No. 20-72793

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

DONALD J. TRUMP, President of the United States, *et al.*,
Petitioners-Defendants,

v.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent,

RYAN KARNOSKI, *et al.*,
Real Parties in Interest-Plaintiffs,

STATE OF WASHINGTON,
Real Party in Interest-Plaintiff-Intervenor.

REAL PARTIES IN INTEREST-PLAINTIFFS AND PLAINTIFF-INTERVENOR'S ANSWER TO PETITION FOR A WRIT OF *MANDAMUS* TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON [REDACTED]

Peter C. Renn
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010
(213) 382-7600

Tara L. Borelli
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
730 Peachtree Street, NE, Suite 640
Atlanta, GA 30308
(404) 897-1880

James F. Hurst, P.C.
Stephen R. Patton, P.C.
Jordan M. Heinz
Daniel Siegfried
Sam Ikard
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
(312) 862-2000

Counsel for Real Parties in Interest-Plaintiffs

Additional Counsel

Diana Flynn
Sasha Buchert
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
1875 I Street, NW, 5th Floor
Washington, DC 20006
(202) 740-0914

Peter E. Perkowski
OUTSERVE-SLDN, INC.
N/K/A MODERN MILITARY ASSOCIATION OF AMERICA
445 South Figueroa Street, Suite 3100
Los Angeles, CA 90071
(213) 426-2137

Camilla B. Taylor
Kara Ingelhart
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
105 West Adams, 26th Floor
Chicago, IL 60603
(312) 663-4413

Derek A. Newman
Jason B. Sykes
Rachel Horvitz
NEWMAN DU WORS LLP
2101 Fourth Avenue, Suite 1500
Seattle, WA 98121
(206) 274-2800

Paul D. Castillo
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
3500 Oak Lawn Avenue, Suite 500
Dallas, TX 75219
(214) 219-8585

Counsel for Real Parties in Interest-Plaintiffs

Robert W. Ferguson
Attorney General
Chalia Stallings-Ala'ilima
Colleen Melody
Assistant Attorneys General
Alan D. Copsey
Deputy Solicitor General
WASHINGTON STATE ATTORNEY GENERAL'S OFFICE
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7744

Counsel for Real Party in Interest-Plaintiff-Intervenor

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INTRODUCTION

The District Court's denial of Defendants' motions to quash was not erroneous, let alone clearly erroneous as required for the extraordinary relief of mandamus. While each of these witnesses is a current or former senior official, each was directly involved in, and has unique personal knowledge concerning, key issues in dispute, and their depositions are proper under settled law that Defendants cannot dispute. "Courts have time and again allowed the deposition of current and former high-ranking government officials upon a showing that the official has personal involvement or knowledge relevant to the case." *United States v. Sensient Colors, Inc.*, 649 F. Supp. 2d 309, 322 (D.N.J. 2009).

Emails and other evidence establish that each of these witnesses has unique, personal knowledge of the issues on which Plaintiffs seek to depose them. Defendants largely ignore these facts and the District Court's findings. When they do address them, Defendants either mischaracterize the record or make trial-type arguments about the inferences that should be drawn. They only confirm the need for these witnesses' testimony to test whether Defendants' arguments are correct and answer the open questions these witnesses alone can answer.

Defendants' petition is also premature, potentially unnecessary, and therefore not ripe for this Court's consideration. Defendants concede they do not have any basis for "immediate emergency relief." Pet. 4. Yet they assert a stay is nevertheless

necessary because "plaintiffs could at any time demand the depositions proceed." *Id*. at 4-5. This premise relies on a flagrant misrepresentation. When Defendants threatened this petition, Plaintiffs did not merely "informally indicate[]" they do not "plan to notice depositions immediately," *id*., Plaintiffs agreed to *stipulate to a court order* barring them from even noticing the depositions without a further court order and 30-days' advance notice. Dkt. 608-1 at 1; Dkt. 613 at 3. Moreover, Plaintiffs did not merely advise "they no longer plan to notice [the] depositions immediately." Pet. 4. In fact, Plaintiffs long ago told Defendants and the District Court they did not intend to take these—or other—depositions until Defendants' deliberative process privilege ("DPP") claims are resolved and any documents found non-privileged are produced. *E.g.*, Dkt. 546 at 3-5.

Finally, Defendants' motion to terminate all discovery is baseless. Defendants do not cite any authority supporting this request. Nor do they explain how their disagreement about four depositions provides a basis for staying ***all*** discovery, including the entirely separate, *in camera* review of documents withheld for privilege and depositions of other witnesses Defendants do not contest (and which Defendants rely upon in their petition to oppose the four depositions at issue). Instead, they base their request on other, unspecified "intrusive" discovery orders they do not even identify, much less show were "clearly erroneous," as they must for mandamus relief. *See* Pet. 31-32.

Defendants' description of the proceedings below presents an inaccurate caricature of what the District Court has actually ordered. In reality, the Court provided Defendants exactly what they demanded: the most "granular" privilege review possible. Now that such review has revealed Defendants' gross abuse of the DPP, they seek to shut down discovery altogether. Their latest request only demonstrates how far Defendants will go to avoid discovery into the truth of their claim that the "Mattis Policy" was adopted independent from the directives of the President and that "they reasonably determined the policy 'significantly furthers' the government's important interests," which cannot be achieved by "less intrusive means." *Karnoski v. Trump*, 926 F.3d 1180, 1200 (9th Cir. 2019) (citing *Witt v. Dep't of the Air Force*, 527 F.3d 806, 819 (9th Cir. 2008)).

The Court should deny Defendants' petition.

BACKGROUND[1]

A. Proceedings Below on Defendants' Motions to Quash

Plaintiffs subpoenaed each of the four witnesses in mid-May 2020 to ensure their depositions were noticed before the then-existing discovery cutoff. Dkt. 418. Three of the four (Mattis, Selva, and Moran) are former officials who cannot be compelled to appear at trial, and Defendants have made clear they will oppose the

[1] Plaintiffs provided the background of this dispute in Plaintiffs' answer to Defendants' second mandamus petition and supplemental letter briefs. *See* No. 20-70365, Dkts. 10 at 4-17; 29 at 4-10; 30 at SER 001-025.

appearance of the fourth (Wilkie). *See* FED. R. CIV. P. 45(c). These depositions are therefore the only means to obtain their testimony. Before issuing the subpoenas, Defendants' counsel informed Plaintiffs they would move to quash, and the parties agreed to a briefing schedule.

In response to Defendants' motions, Plaintiffs made a detailed showing, supported by emails and other exhibits, that each witness was directly involved in, and has unique knowledge concerning, the issues on which Plaintiffs seek to depose them. *See, e.g.*, Dkt. 587 at 18-28 (Mattis); Dkt. 577 at 18-29 (Selva); Dkt. 582, at 18-29 (Wilkie); Dkt. 594 at 17-22 (Moran).

B. The District Court's Order Denying Defendants' Motions to Quash

The District Court denied Defendants' motions on September 2, 2020. Add. 16, as amended Add. 14. Its decision analyzed—and rejected—each of Defendants' three arguments: (1) military deference; (2) privilege; and (3) absence of "exceptional circumstances." Add. 6-13.

Regarding deference, the District Court noted that "Defendants' argument highlights the very reason Plaintiffs are seeking to depose these witnesses": to determine whether the "Mattis Policy" is, in fact, the product of independent military judgment, as required for deference to apply. *Id.* at 7; *see Karnoski*, 926 F.3d at 1202 ("[P]resumption of deference" turns on whether policy is "the product of independent military judgment"; "on remand [Plaintiffs] may present additional

evidence to support this theory . . . that the 2018 Policy was nothing more than an implementation of" the President's directives). Moreover, even where deference applies, "deference does not mean abdication" and Defendants must satisfy their burden of establishing that the policy "'significantly furthers' the government's important interests, and that is not a trivial burden." Add. 7 (quoting *Karnoski*, 926 F.3d at 1202).

As for privilege, the Court concluded that, while privilege might be grounds for objecting to individual questions, it was no basis to bar the depositions entirely. "Defendants cite no authority allowing a court to quash a deposition because some yet-unasked questions may draw a privilege objection." *Id.*

Finally, regarding "exceptional circumstances," the Court applied the standard Defendants urged—that Plaintiffs must demonstrate "the official has unique first-hand knowledge related to the litigated claims or that the necessary information cannot be obtained through other, less burdensome or intrusive means." *Id.* at 8 (quoting *Lederman v. N.Y.C. Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013)). It observed the standard is generally satisfied, and depositions granted, where "the official has been personally involved in the events at issue." *Id.* (citation omitted). The Court then applied this standard to the record facts concerning each witness's "personal[] involve[ment] in the events at issue in this case." *Id.* at 8-13.

General Mattis. Under Defendants' theory, Mattis is not merely a "former high-ranking official," but the eponymous architect of what they call the "Mattis Policy." His testimony about whether he approved that policy independent of his Commander-in-Chief's "directives" is not merely relevant, but potentially dispositive as to Defendants' claims to military deference. *Id.* at 11; *see* Dkt. 587 at 1-3. Defendants have repeatedly represented, including to this Court and the Supreme Court, that the policy is entitled to deference because Mattis ***personally*** approved it based on ***his*** "independent judgment," and there is no substitute for testing those claims with the only witness with direct knowledge of their truth. Add. 11; *see* Dkt. 587 at 21-22.[2]

The Court also found Mattis had unique knowledge concerning "key events in this case," including "his role in drafting the Mattis Memorandum and the DoD Report, the extent to which he obtained input from the Panel, [and] whether he sought information from sources outside the Panel." Add. 11. Furthermore, Mattis alone can speak to whether his decision-making was influenced by inaccurate stereotypes or other animus from sources not considered by the Panel, including evidence about "his interest in contacting anti-transgender rights advocates, and his

[2] Contrary to Defendants' mischaracterization, Pet. 9-10, Plaintiffs' reference below to "an alternative reality" was referring to Defendants' assertion that Mattis—and not the President—originated the policy. *See* Dkt. 587 at 19.

email correspondence with a former colleague, discussing the 'psychological' problems of transgender persons." *Id*.; *see* SA.004. "In a note to himself, Secretary Mattis listed several anti-transgender advocates he was interested in speaking with . . . while acknowledging . . . 'I can't talk to them, but perhaps someone trustworthy can.'" *Id*. 12-13 (quoting SA.025). The Court also cited documents subpoenaed from a third party showing that "Secretary Mattis's special assistant contacted these advocates to solicit their input after the Panel completed its work," and they provided a number of sources not presented to the Panel but ultimately relied on extensively in the DoD Report to justify the Policy. *Id*. at 12 (citing SA.006); *see*, *e.g.*, No. 20-70365, Dkt. 1, Add. 204-05 & nn. 85-86, 88-89, 90-92, Add. 211 & n.120.

Secretary Wilkie. As Under-Secretary of Personnel and Readiness (P&R) and Chair of the Panel, Wilkie was the senior political appointee responsible for ensuring the "Mattis Policy" implemented the President's directives. Among other things, Wilkie reconvened the Panel—presiding over four additional, undocumented meetings—after Vice Chairman of the Joint Chiefs of Staff ("VCJCS") Paul Selva and Deputy Secretary of Defense ("DSD") Patrick Shanahan initially rejected its "Final Report and Recommendations"; sent the January 11, 2018 memo to Mattis reporting the Panel's renewed (and identical) recommendations and then briefed Mattis on those recommendations; and served as a "principal author" of the *post-hoc*

DoD Report. Add. 9-10; Dkt. 582 at 1-2, 18-19. These facts are undisputed. Defendants admit that Wilkie "chaired the remaining six meetings" of the Panel, at which its recommendations were adopted and then re-adopted; was the senior of three officials that "informed Secretary Mattis of the Panel's recommendations"; signed the January 11, 2018 memorandum that "memorialized the Panel's recommendations"; and [redacted] Pet. 7-8; SA.121.

While Defendants argued other witnesses could testify about what occurred *at Panel meetings*, the Court found Wilkie had unique knowledge about what happened "outside the Panel's official documented meetings," particularly during the period between the rejection of the Panel's "Final Recommendations" and Wilkie's memorandum reporting the same recommendations to Mattis. Add. 10. And, as with Mattis, the Court referenced a series of emails showing Wilkie's control over the information the Panel did and did not receive; involvement in meetings and communications in which Defendants' proffered alternative witnesses were not involved, including a discussion with Mattis concerning "the TG Panel recommendations, the ongoing legal challenges, and the court-ordered" preliminary injunction at which Mattis raised undisclosed questions and concerns; and involvement in *post-hoc* efforts to obtain "evidence" supporting the "Mattis Policy." *Id.*; SA.028-29; *see* Dkt. 582 at 20-24; SA.150-54.

Finally, Plaintiffs submitted a series of emails subpoenaed from anti-transgender advocates showing a successful effort, coordinated through the White House, to replace the Panel's original chair, whom they viewed as an [redacted] with Wilkie, a life-long political appointee and "culture warrior," to ensure "President Trump's intent" was implemented. Dkt. 582 at 23-25; SA.030-56, SA.155-58. Wilkie's testimony is thus uniquely relevant to whether the "Mattis Policy" was based solely on military concerns, as opposed to a political and litigation-driven effort to implement the President's directives. Add. 10.

General Selva. The District Court found that Selva "is the only current or former member of the Joint Chiefs that Plaintiffs plan to depose," and that he was "personally involved in" the military's June 30, 2017 decision to delay for six months the Carter Policy on accessions (enlistment) of transgender Service Members; was charged by Mattis with implementing the President's ban and "overseeing the Panel," "which reported directly to [Selva]"; and has personal knowledge concerning "the guidance and boundaries [he] provided to the Panel," including his direction that "all members of the panel be knowledgeable on the President's [transgender] guidance memo." *Id.* at 8-9; Dkt. 577 at 19-25. Selva also "has first-hand knowledge about the reasons" he and Shanahan "initially rejected the Panel's recommendations" and "the subsequent decision to not document the Panel's

reconvened meetings." Add. 9.[3] Selva's declaration in support of Defendants' motion did not dispute his knowledge about any of these matters and was carefully limited to his "direct involvement with the Panel." Add. 116-17.

Admiral Moran. The District Court found that Moran, the second highest uniformed officer in the Navy, was "one of only two voting members of the 17-member Panel that Plaintiffs seek to depose" and "the only voting member who also served on the prior working Group appointed by Secretary Carter, which only a year before had recommended transgender persons be permitted to serve openly." Add. 12; Dkt. 594 at 17-20. He therefore had "unique, first-hand knowledge"

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[3] Defendants repeatedly misrepresent the facts concerning this rejection and the December 15 meeting where it occurred. Pet. 7-8, 24-25. The purpose of that meeting was *not* to "brief" Selva and Shanahan on the Panel's "progress," but to present its "Final Report." Dkt. 577 at 11. Nor was that Report a "draft," as is clear from the Report itself, the Panel's schedule, which called for its final meeting on December 13, 2017, and the absence of any subsequent version. And Selva and Shanahan did *not* simply "indicate[] that the Panel should reconvene for the purpose of collecting more data." Pet. 7-8. They expressly disagreed with the Panel's recommendations:

No. 20-70365, SA. 396.

concerning how and why the two groups reached diametrically opposed conclusions on the same issue just 18 months apart. Add. 13.

Moran also had "unique, first-hand knowledge" of "concerns about the data underlying the Mattis Policy" and whether the Policy was supported by the evidence, including that "'the panel is unanimous in the opinion that the data' presented to it was 'so poor that it is nearly impossible to take a purely analytic approach.'" *Id*. at 12-13.

Finally, the District Court noted that in a December 18, 2017 email, shortly after Selva and Shanahan rejected the Panel's recommendations, Moran proposed several questions seeking data that might show whether the ban on open service was, in fact, "supported by military interests," and that Plaintiffs intend to ask him "whether this data was gathered, and if it was, why it was not cited in the DoD Report." Add. 12; *see* Dkt. 594 at 19; SA.026-27.

Defendants' description of the Court's decision ignores most of these findings and mischaracterizes those it does address. Pet. 11-13. For example, the Court did *not* "rule[] that plaintiffs could depose [Moran] regarding his views on 'the data underlying the Mattis Policy,' without any explanation for why another deponent could not address that question." *Id.* at 12-13. Rather, it found Moran had unique knowledge about *his* "concerns that the ban on transgender persons serving in the military was not supported by evidence" and *his* conclusion that the Panel

unanimously agreed the data was "so poor that it is nearly impossible to take a purely analytic approach." Add. 12.

Likewise, Selva did not simply "hear[] reports from the Panel," and the Court did not merely find "he had 'first-hand knowledge' about the reasons the Panel engaged in further deliberations following December 2017." Pet. 12. Instead, the Court found Selva was charged with developing the "Mattis Policy" and "overseeing the Panel," his testimony was necessary "to understand the guidance and boundaries [he] provided to the Panel"—including his instruction that it must "be knowledgeable on the President's" August 25, 2017 directives—and he had unique knowledge concerning *his* reasons for rejecting the Panel's "Final Recommendations." Add. 9.

And the Court did not "declare" that Mattis could be deposed because he "proceeded in 'bad faith.'" Pet. 11. The quote Defendants mischaracterize concerns their alternative argument that Plaintiffs might "probe Secretary Mattis's mental processes." The Court found that, even if Plaintiffs sought to do so (and they do not), the "bad faith" exception would apply in light of this Court's finding that the Mattis Policy "discriminates on the basis of transgender status on its face" and "evidence that Secretary Mattis's decision-making process may have been influenced by animus." Add. 11-12 (quoting *Karnoski*, 926 F.3d at 1201 n.18).

C. Subsequent Proceedings Relevant to Defendants' Petition

Before Defendants filed their petition, Plaintiffs repeatedly advised them (and the District Court) that they did not intend to take these—or other—depositions until the current dispute over Defendants' DPP claims is resolved and any further documents are produced. *E.g.*, Dkt. 546 at 3-5. Furthermore, after Defendants moved to stay the District Court's order, Plaintiffs advised Defendants (1) they would stipulate to a stay of the depositions pending further order of the District Court; (2) Plaintiffs do not plan to reissue the subpoenas until further discovery is completed, including review of Defendants' DPP claims; and (3) Plaintiffs will give Defendants at least 30-days' notice before noticing any of the witnesses. Dkt. 608-1 at 1. Defendants declined Plaintiffs' stipulation.

As for Defendants' request to terminate all discovery, Defendants only recently began complying with the July 15, 2020 Order requiring Defendants to either produce to Plaintiffs or submit *in camera* documents withheld solely on DPP grounds that are outside two presumptive predecisional time periods (when the Carter and Mattis Policies were being deliberated). The Court ordered Defendants to first prioritize two subcategories of documents: (1) documents from the two weeks following President Trump's tweets banning open transgender service, and (2) documents between January 11, 2018 (when the Panel finished its work) and February 22, 2018 (when the DoD issued its anonymous 44-page report). Dkt. 569

at 1-2. Defendants had been withholding approximately 2,380 documents from these two timeframes. But when forced to either submit these documents for *in camera* review or produce them to Plaintiffs, Defendants produced ***80%*** of the documents to Plaintiffs and only ***20%*** for *in camera* review. Dkt. 615 at 1-2.

On September 25, the District Court issued its ruling following *in camera* review of 53 documents dated during the two weeks following the tweets. It found that ***none*** of the documents were privileged because "[t]here was no ongoing process to protect": "prior to the President's Tweet, the transgender working group" Mattis appointed was "busy with actual implementation plans for the Carter Policy"; but "[t]his came to a screeching halt with the President's Tweet," when the focus shifted to developing an implementation plan to carry out the President's direction. Dkt. 614 at 7. "Thus, the documents are not deliberative regarding any policy." *Id.* at 8. The Court also found none of the documents was predecisional, rejecting Defendants' theory that documents are predecisional merely because they predated the February 2018 DoD Report, which would "eviscerate[] the concept of a predecisional requirement." *Id*. at 8. The Court concluded:

> The documents surrounding the President's Tweet go directly to Plaintiffs' theory. They do not deal with a policy process. They are not deliberative; they are not predecisional. None refer to policymaking or processes. . . . The DPP is designed to protect the deliberative process, it is not to be a method for avoiding production of "inconvenient" or embarrassing documents.

Id. at 9.

The District Court recently ordered a production schedule for the remaining documents outside the presumptive predecisional timeframes, which is expected to conclude in mid-November. Dkt. 617.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR BY DENYING DEFENDANTS' MOTIONS TO QUASH, LET ALONE CLEARLY ERR.

The District Court's denial of Defendants' motions to quash was not erroneous, let alone clearly erroneous. The law is settled—and Defendants do not dispute—that "exceptional circumstances" exist where a government official was personally involved or has unique first-hand knowledge of the matter in dispute. Nor do Defendants dispute the facts that show each of these witnesses had such direct involvement and first-hand knowledge. Instead, they make a scattershot attack on the Court's analysis that ignores most of the subjects on which these witnesses have personal knowledge. As to those they do address, Defendants mischaracterize what the record shows or argue the inferences that should be drawn from them. That only highlights the need for these witnesses' testimony to determine whether Defendants' arguments are correct and the significant questions only these witnesses can answer. Indeed, even crediting Defendants' attacks (and the Court should not), each of these depositions would still be warranted based on the many subjects Defendants ignore.

Defendants cite the appropriate legal standard—"extraordinary circumstances"—but they do not address what it requires or show why it was not satisfied here. Pet. 14-17. For good reason. The Court applied the standard *Defendants* urged: that "the official has unique, first-hand knowledge related to the litigated claims or that the necessary information cannot be obtained through other, less burdensome or intrusive means." Add. 8 (quoting *Lederman*, 731 F.3d at 203); *see, e.g.*, Dkt. 585 at 9, 15. As the Court correctly explained, this standard is satisfied, and depositions of senior officials are ordered, "where the official has been personally involved in the events at issue in the case." Add. 8 (quoting *Toussie v. Cty. of Suffolk*, 2006 WL 1982687, at *2 (E.D.N.Y. July 13, 2006)). Defendants do not, and cannot, dispute this settled law. "Courts have time and again allowed the deposition of current and former high-ranking government officials upon a showing that the official has personal involvement or knowledge relevant to the case." *Sensient Colors, Inc.*, 649 F. Supp. 2d at 322.[4]

[4] *Accord Energy Capital Corp. v. United States*, 60 Fed. Cl. 315, 318 (Fed. Cl. 2004) (former Secretary of HUD and former HUD General Counsel); *Am. Broad. Cos. v. U.S. Info. Agency*, 599 F. Supp. 765, 769 (D.D.C. 1984) (agency chief); *Greater Birmingham Ministries v. Merrill*, 321 F.R.D. 406, 413 (N.D. Ala. 2017) (Alabama's Secretary of State); *Fish v. Kobach*, 320 F.R.D. 566, 579 (D. Kan. 2017) (Kansas's Secretary of State); *United States v. City of N.Y.*, 2009 WL 2423307, at *2-3 (E.D.N.Y. Aug. 5, 2009) (Mayor of New York City); *Bagley v. Blagojevich*, 486 F. Supp. 2d 786, 789 (C.D. Ill. 2007) (Governor of Illinois).

This standard is plainly satisfied here. Emails and other evidence Defendants do not dispute show that each of these witnesses was directly involved in, and has personal, unique knowledge about, the issues on which Plaintiffs seek to depose them. *See supra* 6-11. These facts distinguish this case from the cases on which Defendants rely, which involved senior officials who were *not* directly involved in the matter in dispute.[5]

Instead, Defendants focus on the purported underpinnings of the apex doctrine and attempt to elevate it into something it is not—a "reflect[ion] [of] significant 'separation of powers concerns.'" Pet. 16-17. But the cases Defendants cite are inapposite and show that, even where such concerns exist, they are overcome by a

[5] *Compare Lederman*, 731 F.3d at 203 (blocking depositions of former Mayor where plaintiffs did not contend he "had first-hand knowledge about the litigated claims"); *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008) (quashing deposition of Vice President's Chief of Staff where he "ha[d] no apparent involvement in this litigation"); *In re United States*, 197 F.3d 310, 314 (8th Cir. 1999) (disallowing deposition of Attorney General and Deputy AG where they "did not participate in or approve the decision" at issue); *In re FDIC*, 58 F.3d 1055, 1062 (5th Cir. 1995) (disallowing deposition of three officials where the decision "was in fact made by Director Stein . . ., whom [plaintiff] has already deposed"); *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 586–87 (D.C. Cir. 1985) (officials "had no first-hand knowledge of the facts of this case"); *NEC Corp. v. U.S. Dep't of Commerce*, 958 F. Supp. 624, 635 (Ct. Int'l Trade 1997) (limiting deposition to written questions for one official because he "only participated in one of the interagency meetings" and another because he "had no involvement in the activities leading up to" the memorandum at issue).

showing of "exceptional circumstances," namely the official's direct, personal involvement.

Defendants rely primarily on two Eleventh Circuit cases, *In re United States (Kessler)*, 985 F.2d 510 (11th Cir. 1993), and *In re United States (Jackson)*, 624 F.3d 1368 (11th Cir. 2010). In *Kessler*, separation of powers concerns arose from a different issue—the requirement that a senior official first incur a contempt citation before bringing a mandamus challenge to a subpoena for his testimony. 985 F.2d at 511-12. Citing separation of powers, the court held the official need not "fight the subpoena by placing himself in contempt." *Id*. at 512. On the *merits* of the mandamus claim, however, the court did not cite separation of powers concerns. To the contrary, it applied the "extraordinary circumstances" standard and explained that "[t]he reason for requiring exigency" is senior officials' "greater duties and time constraints than other witnesses." *Id*. ("[T]o protect officials from the constant distraction of testifying in lawsuits, courts have required that [a party] show a special need or situation compelling such testimony."). Unlike here, the FDA Commissioner had no direct knowledge or involvement in the matter and was not even commissioner when the relevant decision was made. *Id*. at 513.

Similarly, in *Jackson*, the issue that implicated separation of powers—"the discretion of the executive branch to designate which high-ranking official should represent the Agency in a judicial proceeding"—is absent here. 624 F.3d at 1369.

Once again, even in that inapposite context, the court found that any concerns were overcome by a showing of "exceptional circumstances." *Id*. at 1372. Applying that standard, the court found no showing the EPA Administrator had direct involvement or unique knowledge. Rather, the Assistant Administrator the government proffered was "the most knowledgeable official" about the determination at issue "because he was responsible for its preparation." *Id*. at 1373.

Finally, *United States v. Morgan*, 313 U.S. 409 (1941), does not reference "separation of powers" or any other *constitutional* basis for its holding that the Secretary of Agriculture should not have been deposed concerning his "mental processes" in adjudicating a rate dispute. *Compare* Pet. 17. Rather, it reached that holding by analogizing the Secretary's role to that of a judge and applying the rule barring examination of judges concerning their "mental processes." 313 U.S. at 422. The *Morgan* ruling was grounded on the principle that, because the two decision-makers were performing a similar, judicial-type function, the same rules should apply. *Id*. This is the antithesis of separation of powers, which is based on respecting the *different* functions among co-equal branches. *E.g.*, *INS v. Chadha*, 462 U.S. 919, 946 (1983).

Yet even if *Morgan* and its progeny *were* based on "separation of powers concerns," they would not help Defendants. The law is clear that any such concerns are overcome where, as here, "exceptional circumstances" exist. In such cases, the

judiciary's truth-seeking function and need to discover relevant facts to fairly adjudicate parties' rights overcomes the presumption against depositions of senior officials, regardless of its source. This is especially true here, where Plaintiffs' claims go to the heart of the Constitution's protections of individual rights, where intent is a central issue, and testimony of the officials who developed and approved the discriminatory policy about their reasons for doing so is critical. *E.g.*, *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998) ("[A]n official's motive is a necessary element" for claims of "gender discrimination in violation of the Equal Protection Clause.").

Thus, the only separation of powers concern here undermines, rather than supports, Defendants' petition. Where, as here, senior officials were directly involved and have unique knowledge, barring their testimony interferes with courts' Article III responsibility to protect individuals' constitutional rights. This interference is exacerbated here by Defendants' selective invocation of the doctrine to permit the depositions of witnesses they rely on affirmatively (Kurta and Hebert), while barring witnesses they apparently fear would be adverse (like Mattis, who did not join in their motion; Selva, who rejected the Panel's recommendations because he did not believe DoD could defend them; and Moran, who believed the "Mattis Policy" was not supported by the data presented to the Panel). Defendants' use of the apex doctrine as not only a shield to protect senior officials, but a sword to limit

the evidence courts hear to what the government deems favorable, does not just interfere with the judicial process; it corrupts it.

Nor is there any support for Defendants' contention that the law is somehow different in military cases. Pet. 17-18. Both *Munaf v. Geren*, 553 U.S. 674 (2008) and *Goldman v. Weinberger*, 475 U.S. 503 (1986) are inapposite on their face. Neither even addressed discovery, let alone adopted some special standard for deposing senior military officials.

Likewise inapposite is *Morgan*'s presumption against probing decision-makers' "mental processes." Pet. 16-17. First, as Plaintiffs made clear below, and the District Court found, they do not seek these witnesses' mental impressions. Add. 11. Rather, they seek testimony on factual issues where the witnesses had direct involvement and personal knowledge.

Second, even where the presumption applies, it is subject to an exception where, as here, there is a showing of "bad faith or improper behavior." *E.g.*, *Singer Sewing Mach. Co. v. NLRB*, 329 F.2d 200, 208 (4th Cir. 1964). As the District Court found, the "Mattis Policy" "discriminates on the basis of transgender status on its face," *Karnoski*, 926 F.3d at 1201 n.18, and there is also evidence it was influenced by inaccurate stereotypes and other animus. Add. 11. In such cases, decision-makers' intent is directly at issue, and probing their "mental process" is proper. *E.g.*, *United States v. Virginia*, 518 U.S. 515, 533 (1996) (intermediate

scrutiny requires the government's justifications to "be genuine, not hypothesized or invented *post hoc* in response to litigation"); *United States v. Hooker Chems. & Plastics Corp.*, 123 F.R.D. 3 (W.D.N.Y. 1998) ("[T]here are literally dozens of litigation contexts wherein courts and litigants routinely examine the mental processes of government officials, most notably in situations requiring revelation of the decisionmakers' motives for their decisions.").

Finally, even if the presumption applied (and it does not), it would not justify barring these depositions entirely, but only those specific questions seeking "mental impressions." *E.g.*, *Franklin Savings Ass'n v. Ryan*, 922 F.2d 209, 211 (4th Cir. 1991); *Libertarian Party of Ohio v. Husted*, 33 F. Supp. 3d 914, 924-25 (S.D. Ohio 2014).

Defendants also do not dispute, and largely ignore, the contemporaneous emails and other *facts* concerning these witnesses' direct involvement and personal knowledge. *See supra* 6-11. Plaintiffs' targeted, documented showing is the antithesis of what Defendants' describe in their petition—a "fishing expedition" and "wholly unsupported speculation [] without a trace in the evidentiary record." Pet. 18, 20.

Mattis. Defendants have no response to the District Court's finding that only Mattis can address the role of the President's directives on his decision to recommend the "Mattis Policy." *See* Pet. 20-21. As to animus, Defendants ignore

most of the emails Plaintiffs and the District Court cited, including an exchange with a retired colleague concerning transgender individuals' purported medical needs and "psychological issues," which rely on inaccurate stereotypes rejected by current medical and scientific consensus. Dkt. 587 at 27; SA.001-24. Defendants also mischaracterize the emails they do address and ignore the questions they raise. If, as they speculate, Mattis reached out to anti-transgender advocates simply to obtain alternative "perspectives," Pet. 21, then why did he write himself a note that "you can't talk to them, but perhaps someone trustworthy can," and why did his "special assistant" subsequently contact these advocates outside the Panel process—indeed, *after* the Panel disbanded? And, why were the sources and information they provided, which were not presented to the Panel and have been rejected by leading medical groups and even the government's own surgeons general, nevertheless relied on extensively to justify the Panel's recommendations?

All of this is in addition to the other questions raised in the Court's Order, which Defendants simply ignore, such as what role did Mattis play in drafting the Memorandum and DoD Report? What information did he obtain and rely upon in approving the Panel's recommendations? Add. 11-12; Dkt. 587 at 24. Did he seek or consider information from outside the Panel in approving those recommendations, and if so, what and from whom? These issues bear directly on Plaintiffs' claims of

unconstitutional discrimination, and are not foreclosed "mental processes." *Supra* 19-21.

Wilkie. Defendants *concede* Wilkie "chaired the final six meetings of the Panel," "informed Secretary Mattis . . . of the Panel's recommendations," and was the senior of three officials who "were charged with coordinating the preparation of the [DoD] Report." Pet. 23. This direct, personal involvement alone warrants his deposition under settled law. But Plaintiffs also submitted documents showing, among other things, Wilkie's control over the information the Panel did and did not receive; role in "reconvening" the Panel and supervising its undocumented deliberations after its "Final Recommendations" were rejected; [redacted]; and involvement in senior meetings where Defendants' proffered alternative witnesses were not involved, including a meeting with Mattis in late January 2018, referenced in a highly-redacted email from Wilkie to senior military officials, concerning "the TG Panel recommendations [and] the ongoing legal challenges," at which Mattis asked questions (redacted) and expressed a concern (also redacted). *See* Dkt. 582 at 21-23; SA.150-53, SA.028-29.

Defendants ignore this evidence. Instead, they attack an argument neither Plaintiffs nor the District Court made—that "military judgment" does not include

civilian DoD officials, like Wilkie. Pet. 23-24. What Plaintiffs actually argued is that one of the things that made Wilkie unique is that, based on emails with the White House subpoenaed from a third party, he was appointed at the urging of anti-transgender advocates midway through the Panel process to ensure the DoD implemented the President's ban, and thereafter he was "the senior political appointee" who led both the effort to develop the "Mattis Policy" and Defendants' *post-hoc* effort to create the DoD Report that Defendants cite in support of the policy. Dkt. 582 at 19-25. [redacted]. SA.115-21.

The District Court's reference to Wilkie's involvement in efforts to "collect evidence" after the Panel was disbanded was *not* limited to "a public news article" Pet. 24, and even for that example, the evidence was not the article itself but the [redacted] it reported. *See* Dkt. 583 at 23; SA.154. Nor do Defendants dispute Wilkie's unique knowledge concerning the period between December 15, 2017, when the Panel's recommendations were rejected, and January 11, 2018, when Wilkie forwarded the exact same recommendations to Mattis, during which the Panel held four undocumented meetings. Instead, Defendants simply assert "[t]his was not a 'critical time period' in any relevant sense." Pet. 24. But they do not purport to explain why the Panel and Wilkie made, and Mattis accepted, the

"identical" recommendations Selva and Shanahan rejected three weeks and four undocumented meetings earlier. *Id*. at 25.

Defendants further argue Wilkie's deposition is unnecessary because they allegedly produced 14,000 documents dated during this period, but none of these documents answer Plaintiffs' questions and, even if they did, none would be a substitute for Wilkie's testimony. *Shoen v. Shoen*, 5 F.3d 1289, 1297 (9th Cir. 1993) ("[P]ointed questions at deposition are the only effective way to discover facts bottled up in a witness' recollection."). Finally, Defendants cite no case recognizing a special rule for cabinet secretaries—because there is none. Pet. 23. All senior officials have busy schedules, which is the basis for, and captured by, the "exceptional circumstances" requirement, which is amply satisfied here. *See*, *e.g.*, *Lederman*, 731 F.3d at 203.

Selva. Mattis did not merely charge Selva "with receiving periodic reports from the Panel." Pet. 26. He "directed" Selva, along with Shanahan, "to lead the Department of Defense (DoD) in developing an Implementation Plan on military service by transgender individuals to effect the policy and directives" in the President's August 25, 2017 Memorandum. SA.057-58. Nor did the Court find Selva's deposition justified because "he might have provided undisclosed 'guidance and boundaries' to the Panel" and thereby played a "covert role in superseding Secretary Mattis's own instructions." Pet. 26. Rather, the Court found that *one* of

several reasons Selva's deposition was warranted was "to understand the guidance and boundaries [he] provided to the Panel, which reported directly to him," citing as an example his going-in instruction that "all members of the panel [should] be knowledgeable on" the President's August 25, 2017 Memorandum, which he referred to as "the President's TG guidance memo." Add. 9 (quoting SA.108). There was nothing "covert" about this guidance, which did not "supersede," but was completely consistent with, Mattis's direction that Selva, Shanahan, and the Panel "develop[] an Implementation Plan . . . to effect the policy and directives" in the President's Memorandum. SA.057-58.

Finally, Defendants argue that Selva's testimony regarding the military's June 2017 decision to delay the Carter Policy on accessions is "wholly irrelevant." Pet. 27. But that verges on the absurd. *Defendants* put this decision at issue, arguing the delay was supposedly due to the military's pre-Tweet concerns about the Carter Policy, which supposedly prompted a pre-Tweet review that Selva and Shanahan merely continued—which they say supports their argument that the "Mattis Policy" was created independent from the President's intervening Tweets. *E.g.*, No. 18-35347, Dkt. 30 at 1, 7, 17, 46. Contemporaneous documents, however, show this prior "review" was limited to an assessment of "the Department's readiness to begin accessing transgender applicants"—***not*** to revisit whether transgender persons should be allowed to access or remain in the military. Dkt. 577 at 20; SA.59-106.

Defendants do not dispute that as VCJCS, Selva has unique knowledge about the reasons for this delay and the scope of the prior review. *Id*.

Moran. Defendants say Plaintiffs "offered no reason why" Moran's testimony "is required with regard to any issue," Pet. 27, but that ignores the Court's findings about Moran's direct involvement and unique knowledge on several key issues. *See supra* 10-11; Dkt. 594 at 17-19; SA.159, SA.026-27. Nor did the Court "simply *declare*[] that Admiral Moran, had *his* own 'concerns' and 'questions' during the Panel process." Pet. 27 (emphasis added). The Court actually pointed to ***emails*** showing that his concerns—including that "the Panel [was] unanimous in the opinion that the data" presented to it was "so poor that it is nearly impossible to take a purely analytic approach"—were ***shared with and by others***. Add. 12. Finally, Defendants do not dispute Moran is the only person who served as a voting member of both the Panel and the Carter Working Group. Kurta's knowledge as one of the officials staffing both groups, Pet. 28, is clearly not co-extensive with and no substitute for Moran's, who was the second-highest officer in the Navy and a *voting* member of both groups.

In short, Defendants' incomplete and inaccurate challenges to the District Court's order show no error, and certainly not the clear error required for mandamus.

II. DEFENDANTS' PETITION IS PREMATURE, POTENTIALLY UNNECESSARY, AND NOT RIPE FOR THIS COURT'S CONSIDERATION.

Defendants' petition—which requests this Court's immediate intervention to quash subpoenas for four depositions that may or may not occur at some uncertain future date—is premature.

This Court routinely denies mandamus petitions seeking premature relief. *E.g.*, *In re Freeman*, 489 F.3d 966, 968 (9th Cir. 2007) (holding mandamus relief was premature because petitioner could seek relief through an administrative hearing that had not yet occurred); *Plata v. Schwarzenegger*, 560 F.3d 976, 983 (9th Cir. 2009) (finding mandamus premature because further development of the factual record was needed for review of government's claim). Indeed, *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 661 (9th Cir. 1977), which established this Court's mandamus standard, denied relief because of the risk of "unnecessarily and prematurely" deciding the issues raised. The same is true here.

First, threshold questions—including whether, when, and which of the depositions will proceed—depend upon uncertain future events and could render Defendants' petition moot in whole or in part. While Plaintiffs are entitled to take the depositions under settled law, Plaintiffs have made clear they plan to decide whether to pursue them only *after* further discovery is completed, as litigants often do with senior decision-makers. For example, discovery may persuade Plaintiffs

that the upside of obtaining the first-hand knowledge of one or more of these witnesses is not worth the risk of eliciting potentially adverse testimony that, given these witnesses' unavailability, will be admissible at trial. FED. R. EVID. 804; FED. R. CIV. P. 45(c). Defendants' claim that Plaintiffs would not have opposed their motions unless they were going to take these depositions conflates Plaintiffs' preservation of their right to take these depositions with their separate and future decision whether to exercise that right.

Second, since Plaintiffs do not intend to take these depositions now, permitting further factual development would promote more fulsome mandamus review by this Court should it ultimately be required. To be clear, the information sought from these witnesses cannot be obtained from alternate sources of discovery. But further factual development, such as the District Court's ongoing *in camera* review of documents, will enable this Court to fully test that assertion.

Third, Defendants will suffer no hardship whatsoever if this Court denies their petition as premature. None of the depositions are scheduled, and Plaintiffs have agreed to provide at least 30-days' advance notice, affording Defendants ample opportunity to seek mandamus relief if this dispute ever ripens into a controversy appropriate for this Court's review.

III. THERE IS NO BASIS TO TERMINATE ALL DISCOVERY.

Finally, there is no basis for this Court to terminate all discovery. Defendants do not cite any case that ordered such relief. Indeed, Defendants tacitly recognize that an order declining to quash four depositions provides no basis for preventing *all other* discovery, buttressing their request with the assertion that the District Court has issued more than "a dozen intrusive and erroneous discovery orders since" their last mandamus petition. Pet. 31. But they do not even identify the supposed orders, let alone purport to show any are clearly erroneous. All they cite on this point is their supplemental brief, which describes orders that *Plaintiffs* rely on, where the District Court found Defendants' privilege assertions are baseless after conducting document-by-document review. *Id.*

The only order that Defendants do identify is the July 15 order, but they merely repeat their prior misrepresentations about its contents. That order did not "set aside the deliberative process privilege as to effectively all remaining documents." Pet. 32. Rather, as Plaintiffs explained in prior briefing, it established *presumptive* predecisional time periods when undisputed facts show neither the Carter nor Mattis policies were being deliberated. No. 20-70365, Dkt. 29 at 8. Remarkably, Defendants never mention that, under that order, Defendants are expressly permitted to submit for *in camera* review any documents within those time periods they maintain are privileged. *See id.* at 10.

As for the presumptive time periods themselves, Defendants do not dispute their factual accuracy or their necessity as a discovery management tool. And although Defendants *assert* the timeframes are "based on [an] erroneous understanding of the privilege," they never explain why. Pet. 32. That assertion appears to be based on Defendants' mistaken view that the order requires disclosure of documents subject to the privilege in relation to *other* policies that Defendants somehow determined were responsive to requests targeting the development of the Carter and Mattis policies. It does not. As explained, if Defendants believe that a document is privileged, they may submit it for *in camera* review, regardless of the decision to which it relates. Finally, Defendants' sole example for why the presumptive time periods are "manifest error" in fact proves the opposite. *Id.* The District Court has *not* ordered production of Secretary Mattis's handwritten notes. Defendants submitted that document for *in camera* review, and the District Court will decide, based on an individualized review, whether the document is predecisional and deliberative. Dkt. 533-1 at 53.

Lacking any legal or factual basis for terminating discovery, Defendants resort to grossly mischaracterizing this Court's prior opinion and the discovery process below.

First, this Court did ***not*** find the Mattis policy is the "product of independent military judgment" as a matter of law, much less suggest the record be limited to the

documents Defendants selectively choose to disclose. Pet. 29-30. Just the opposite, this Court found that "Plaintiffs raise non-frivolous arguments that the 2018 Policy did not independently analyze the impact of transgender individuals serving in the armed services," and "the litigation may require the district court to consider the basis of the President's initial decision, as well as the 2018 Policy." *Karnoski*, 926 F.3d at 1204. Any initial deference finding was based "[*o*]*n the current record*," which had not yet been developed by discovery. *Id.* at 1202 (emphasis added). The Court expressly clarified that whether deference applies—and the extent of any deference—is a factual question, and "Plaintiffs on remand may present additional evidence to support" their theory. *Id.* Defendants' representation that the District Court "disregarded" this Court's decision by proceeding with the very discovery process outlined in that decision, strains credulity.

In fact, Defendants repeatedly mischaracterize this Court's decision, which did not find that, "if there was to be discovery," the standard was "what 'was sufficient to allow for judicial review.'" Pet. 3, 29 (*quoting Karnoski*, 926 F.3d at 1206 n.22). Nor did it find that "discovery 'involving the most senior executive branch officials . . . may require greater deference.'" *Id.* at 4. This quote was in reference to application of the *Warner* test for overcoming the DPP, not the scope of discovery, and was immediately followed by the statement that such witnesses "may, of course, also be the most relevant." *Karnoski*, 926 F.3d at 1206.

Second, Defendants' dismissal of Plaintiffs' right to discovery as a "fishing expedition" is especially incredible, given that the documents at issue are documents Defendants themselves determined were not only relevant to the development of the challenged policy, but supposedly *deliberative* as to the challenged decision-making process. There is no serious question they are relevant to Defendants' claim that the Mattis policy was developed unconstrained by the President's Tweets and free from stereotypes and prejudice.

Moreover, Defendants' argument that discovery should be terminated because—in their view—"plaintiffs have located nothing that refutes" Defendants' defenses, Pet. 30, turns the discovery process on its head and is based on the same unsupported argument, which this Court impliedly rejected, that discovery is limited in cases involving the military. *See Karnoski*, 926 F.3d at 1201, 1206. Defendants are also flat wrong on the facts. The documents Plaintiffs have obtained since this Court's 2019 decision further refute Defendants' fiction of a policy developed independent of the President's directives and based on important military interests. *See* No. 20-70365, Dkt. 10 at 7, 9 (evidence Panel and its working groups understood their charge was to implement President's Tweets and Memorandum); *id.* at 7-8 (evidence Mattis Policy not supported by evidence or data presented to the Panel on military effectiveness, cohesion, or budget constraints); *id.* at 6 (evidence Defendants distorted minutes of Panel "deliberations" and stopped taking any

minutes once their recommendations were rejected); *id.* at 10 (evidence DoD Report not prepared by Panel and based on sources not provided to Panel); *id.* at 10-11 (evidence DoD Report is a *post-hoc*, lawyer-invented rationale); *id.* at 11 (evidence Mattis Policy influenced by advocates with animus toward transgender individuals).

Equally disingenuous is Defendants' argument that delays in completing discovery warrant ending discovery, as if those delays had nothing to do with their actions. Pet. 30, 33-34. It is *Defendants* who have treated this Court as a court of first resort, with seriatim mandamus petitions over interlocutory discovery disputes; abused the routine appellate administrative stay to block unrelated discovery; defied District Court orders, and slow-walked and sought to stay almost every production deadline; and continue to withhold tens of thousands of relevant documents—nearly all of which, it is becoming clear, were not remotely privileged in the first place. Any delay is of Defendants' making, and their abuse of the discovery process should not be rewarded by terminating discovery altogether.

At bottom, Defendants' request to terminate all discovery is the latest in a series of increasingly desperate attempts to avoid discovery that would reveal the truth concerning Defendants' post-litigation development of the "Mattis Policy." This includes Defendants' attempt to limit discovery to an "administrative record" their own lawyers created; an unprecedented invocation of the DPP over 50,000 documents and asserting that those claims could only be tested by a "granular"

review they deemed impossible given the volume of their claims; and now that they are receiving the "granular" review they demanded and it has exposed their massive withholding of documents not remotely privileged, termination of discovery. The Court should deny that unprecedented and unsupported request.

CONCLUSION

Defendants' petition should be denied.

Dated: October 7, 2020

Respectfully submitted,

By: /s/ *Stephen R. Patton*
James F. Hurst, P.C.
Stephen R. Patton, P.C.
Jordan M. Heinz
Daniel Siegfried
Sam Ikard
KIRKLAND & ELLIS LLP

Diana Flynn
Camilla B. Taylor
Peter C. Renn
Tara L. Borelli
Paul D. Castillo
Sasha Buchert
Kara Ingelhart
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

Peter E. Perkowski
OUTSERVE-SLDN, INC.
N/K/A MODERN MILITARY ASSOCIATION OF AMERICA

Derek A. Newman
Jason B. Sykes
NEWMAN DU WORS LLP

Counsel for Real Parties in Interest-Plaintiffs

By: /s/ *Chalia Stallnigs-Ala'ilima*
Robert W. Ferguson
Attorney General
Chalia Stallings-Ala'ilima

Colleen Melody
Assistant Attorneys General
Alan D. Copsey
Deputy Solicitor General
WASHINGTON STATE ATTORNEY GENERAL'S OFFICE

Counsel for Real Party in Interest-Plaintiff-Intervenor

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 8,230 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).

By: /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 October 7, 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.

By: /s/ *Stephen R. Patton*
Stephen R. Patton