

No. 20-72793

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

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

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

v.

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

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

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

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**REAL PARTIES IN INTEREST-PLAINTIFFS' AND PLAINTIFF-  
INTERVENOR'S OPPOSITION TO DEFENDANTS' MOTION FOR STAY**

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Defendants’ request for a stay of the four depositions they challenge—and indeed their entire mandamus Petition—is premature and potentially unnecessary. Defendants concede they do not have any basis for “immediate emergency relief.” Pet. 4. But they say a stay is nevertheless necessary because “plaintiffs could at any time demand the depositions proceed.” *Id.* 4-5.

Not so. In response to Defendants’ threatened petition, Plaintiffs did not merely confirm they do not “plan to take the depositions immediately,” they agreed to *stipulate to a court order* barring them from even noticing the depositions without first providing at least 30 days advance notice—precisely to provide Defendants with an opportunity to seek whatever relief they deem appropriate if and when the need actually arises. Specifically, Plaintiffs advised that: (1) they do not plan to take these depositions until further discovery, including the District Court’s *in camera* review of documents withheld on privilege grounds, is completed; (2) depending on the results of that further discovery, they may not take some or all of the depositions at all; and (3) to avoid a premature and potentially unnecessary fight over mandamus and a stay, Plaintiffs would stipulate to immediate entry of an order that would bar them from even noticing the depositions without first providing at least 30 days notice. Defendants currently face no harm whatsoever—much less irreparable harm—and there is no basis nor need for a stay.

Defendants’ motion to stay all discovery, meanwhile, is as meritless as it is revealing. Defendants do not cite any case or other authority supporting their request. Nor do they explain how their disagreement with the denial of their motions to quash four depositions provides a basis for staying *all* discovery, including unrelated document productions and depositions of other witnesses Defendants have never opposed—two of which Defendants *rely on* as a supposed basis to quash the four depositions at issue in their Petition.

Defendants instead base their request on other, unspecified “intrusive” discovery orders they do not even identify. *See* Pet. 31-32. Defendants’ sweeping, overreaching request—for this Court to shut down all ongoing discovery below—shows Defendants will resort to any means, no matter how extreme and unsupported, to avoid discovery that will reveal the truth as to their claims that (1) the “Mattis Policy” was adopted by the military completely independent from the President’s directives, and (2) “they reasonably determined the policy ‘significantly furthers’ the government’s important interests” that cannot be achieved by “less intrusive means.” *Karnoski v. Trump*, 926 F.3d 1180, 1200, 1202 (9th Cir. 2019).

Defendants have not met their burden of showing a stay is warranted, and this Court should deny their motion.

## RELEVANT PROCEDURAL BACKGROUND<sup>1</sup>

Plaintiffs subpoenaed each of the four witnesses at issue in Defendants' Petition—all of whom played a central role in the discriminatory decision Plaintiffs challenge in this case—in mid-May 2020 to ensure their depositions were noticed before the then-existing discovery cutoff. Defendants moved to quash, and Plaintiffs opposed each motion with a detailed evidentiary showing that each witness was directly involved in, and has unique knowledge concerning, issues central to this case. ECF No. 15-4 at 4-12.

The District Court denied Defendants' motions on September 2, 2020, carefully analyzing and rejecting each of the Defendants' arguments. Add. 1-3. Most important, the District Court found the evidentiary record established that each of the four deponents “has unique first-hand knowledge related to the litigated claims” and was “personally involved in the events at issue.” *Id.* at 8-13. The evidence showed, among other things:

**General Mattis** has unique knowledge concerning “key events in this case,” including “his role in drafting the Mattis Memorandum and the DoD Report, the

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<sup>1</sup> The complete factual and procedural background for this discovery dispute is set forth in Plaintiffs' Answer to Defendants' Petition for Writ of Mandamus. ECF No. 15-4. Because the same panel will hear Defendants' petition and motion to stay, Plaintiffs incorporate by reference the background section of its Answer to avoid repetition.

extent to which he obtained input from the Panel, [and] whether he sought information from sources outside the Panel.” *Id.* at 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. *E.g., id.* at 11-12 (“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.’”). Separately, Defendants have repeatedly represented, including to this Court and the Supreme Court, that the challenged policy is entitled to deference because Mattis *personally* approved it based on *his* “independent judgment”; he is thus the only witness with direct knowledge of a central issue for trial. *Id.* at 11.

**Secretary Wilkie** was the senior political appointee responsible for ensuring the “Mattis Policy” implemented the President’s directives. He reconvened the Panel—presiding over four additional, undocumented meetings—after Vice Chairman of the Joint Chiefs of Staff Paul Selva and Deputy Secretary of Defense Patrick Shanahan initially rejected the Panel’s “Final Report and Recommendations.” *Id.* at 9. Wilkie then sent the January 11, 2018 memo to Mattis reporting the Panel’s renewed (and identical) recommendations, briefed Mattis on those recommendations, and served as a “principal author” of the *post-hoc* DoD Report. *Id.* at 9-10. Wilkie’s testimony is uniquely relevant to whether the “Mattis

Policy” was based solely on military concerns and not infected by animus or external pressure. *Id.* at 10.

**General Selva** 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. *Id.* at 8. Mattis charged him with implementing the President’s directives and “overseeing the Panel,” “which reported directly to [Selva].” *Id.* at 8-9. He therefore has personal knowledge of “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 9. 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.” *Id.*

**Admiral Moran** was “one of only two voting members of that 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.” *Id.* at 12. He thus has “unique, first-hand knowledge” about how and why the two groups reached opposite conclusions on the same issue just 18 months apart. *Id.* at 13. Moran also has “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.

On September 10, 2020, Defendants moved in the District Court to stay the order. W.D. Wash. Dkt. 601. Then, on September 18, 2020, before Plaintiffs responded to the motion (which was not fully briefed until October 1), Plaintiffs moved in this Court not only to stay the four depositions—which Plaintiffs had not even sought dates for—but also to stay *all* discovery in the District Court. *Compare* FED. R. APP. P. 8(a)(1)(C).

### ARGUMENT

A stay pending appeal is an exceptional remedy; it is “not a matter of right, even if irreparable injury might otherwise result.” *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017). When assessing a stay request, this Court considers (1) whether Defendants have “made a strong showing that [it] is likely to succeed on the merits; (2) whether [Defendants] will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Id.* A stay should be denied where the movant fails to satisfy either of the first two factors, which are the “most critical.” *Id.* (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). The latter two factors “merge when the Government is the opposing party.” *Nken*, 556 U.S. at 435.

Defendants' Petition does not even purport to explain why they satisfy any of these factors, much less all four. They have not demonstrated likelihood of success on the merits (let alone made a "strong showing"), and they do not and cannot claim any threat of irreparable harm. Each independently requires this Court to deny Defendants' stay request. *Washington*, 847 F.3d at 1164 (denying stay where government "failed to clear each of the first two critical steps"). Nor do the equities weigh in Defendants' favor. Defendants do not remotely satisfy the strict standard for the extraordinary relief they seek, and their request for a stay should be denied.

**I. There Is No Basis To Stay The Four Depositions**

**A. Defendants Have Not Made Any Showing Of Likelihood Of Success On The Merits, Let Alone A "Strong Showing."**

Defendants' burden on the first stay factor is a heavy one. Mandamus is a "drastic and extraordinary remedy" that will only be granted in "exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (internal quotation marks and citations omitted). Defendants must prove their "right to the writ is clear and indisputable." *Karnoski*, 926 F.3d at 1203.

At a minimum, this requires showing that "the district court's order is clearly erroneous as a matter of law." *Id.* (citing *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654–55 (9th Cir. 1977)). And this heavy burden is amplified in the discovery context, where the district court "has wide latitude" because "decisions governing

discovery are highly fact-intensive.” *In re Anonymous Online Speakers*, 661 F.3d 1168, 1176 (9th Cir. 2011).

As set forth more fully in Plaintiffs’ Answer to Defendants’ Petition for Writ of Mandamus, Defendants do not meet that heavy burden.<sup>2</sup> *See* ECF No. 15-4.

*First*, 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, and a deposition is therefore appropriate, where a government official “has unique, first-hand knowledge related to the litigated claims.” *Lederman v. N.Y.C. Dep’t of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013). Accordingly, “[c]ourts 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). As set forth in Plaintiffs’ Answer to the Petition, that standard is amply satisfied here for each of the four witnesses.

*Second*, 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. Crucial threshold questions, including

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<sup>2</sup> To avoid unnecessary repetition, Plaintiffs incorporate those arguments by reference here.

whether, when, and which of the depositions will proceed, depend on uncertain future events and could render Defendants' petition moot in whole or in part. Under settled law, Defendants' mandamus petition is therefore premature. *See, 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).

Plaintiffs' Answer to the mandamus petition fully details these and other reasons why Defendants are unlikely to succeed on the merits. The Court should deny Defendants' motion to stay based on failure to satisfy this factor alone. *See Anonymous Online Speakers*, 661 F.3d at 1177 (holding failure to identify any clear error of law "is dispositive" on mandamus petition).

**B. Defendants Will Not Suffer Irreparable Harm Without A Stay.**

Defendants never even try to show irreparable harm in their Petition. Nor could they.

Plaintiffs subpoenaed these witnesses in May 2020 to ensure that Defendants' motions to quash were resolved, and any depositions completed, by the then-existing fact discovery cutoff. Since that time, the District Court has lifted that cut-off and commenced *in camera* review of documents withheld on grounds of privilege, and

Plaintiffs have made clear that they do not intend to notice these depositions until that review is complete. Indeed, depending on the results of that further discovery, Plaintiffs may not notice some or all of the depositions. As a result, none of the depositions are currently even noticed, and Plaintiffs have further committed—and offered to enter into a binding stipulation providing—that Plaintiffs cannot do so without further order of the District Court and without first providing at least 30 days advance notice, to give Defendants ample time to seek relief at that time. *See* W.D. Wash. Dkt. 608.

Under these circumstances, and without any risk of an imminent deposition, Defendants cannot show *any* harm, and certainly not the *immediate, irreparable* harm required for a stay. *See, e.g., Summers v. Earth Island Inst.*, 555 U.S. 488, 493, 499–500 (2009) (declining to “replace the requirement of ‘imminent’ harm . . . with the requirement of ‘a realistic threat’ . . . [of] harm ‘in the reasonably near future’”); *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011) (“[S]tays must be denied to all petitioners who did not meet the applicable irreparable harm threshold, regardless of their showing on the other stay factors.”). Defendants’ failure even to try to meet this burden is fatal to their motion.

**C. The Balance Of Hardships And Public Interest Favor Plaintiffs.**

In stark contrast to Defendants’ inability to show any harm, much less the irreparable harm required for a stay, Plaintiffs are significantly harmed each day by

Defendants' policy, and a stay would only further delay the resolution of this suit. This Court has repeatedly confirmed that the deprivation of constitutional rights constitutes irreparable injury and that "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citation omitted).

## **II. There Is No Basis To Stay All Discovery**

Finally, there is no basis for a stay of all discovery, and Defendants do not provide one. In recent months, the District Court has given Defendants exactly what they repeatedly demanded and *twice* sought mandamus to request: the most "granular" review possible through *in camera* review of documents withheld on the basis of the deliberative process privilege (which Defendants evidently thought was impossible given the volume of documents they withheld). Now that this granular review they requested has revealed Defendants' massive over-designation, Defendants change course and ask this Court to completely halt further discovery.

Defendants do not cite a single case that ever ordered this relief. Indeed, Defendants tacitly recognize that an order declining to quash four depositions provides no basis for preventing *all other* discovery, purporting to bolster their request with a vague claim 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 is clearly erroneous.

Defendants' request to terminate all discovery is nothing but their 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 deliberative process privilege 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.

But Defendants do not attempt to show likelihood of the success on the merits, and there is no conceivable irreparable harm from participating in discovery in a case where their motion to dismiss was denied. Complying with the Federal Rules of Civil Procedure does not irreparably harm litigants. The Court should deny Defendants' unprecedented and unsupported stay request.

### **CONCLUSION**

For all of these reasons, the Court should deny Defendants' request for a stay of the four depositions as premature and unnecessary and deny Defendants'

meritless request to stay all proceedings below based on an order permitting Plaintiffs to take four depositions at some indeterminate time in the future. There are no extraordinary circumstances here warranting a stay.

Dated: October 12, 2020

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### **CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the length limits permitted by Ninth Circuit Rule 27(d)(2), because it does not exceed 5,200 words, excluding the parts exempted by FED. R. APP. P. 32(f). The brief's type size and type face comply with FED. R. APP. P. 32(a)(5) and (6).

/s/ Stephen R. Patton, P.C.  
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### **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 12, 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.

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