No. 20-72793

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES OF AMERICA; MARK T. ESPER, in his official capacity as Secretary of Defense; U.S. DEPARTMENT OF DEFENSE; U.S. DEPARTMENT OF HOMELAND SECURITY; CHAD F. WOLF, in his official capacity as Acting Secretary of Homeland Security,
Petitioners–Defendants,

v.

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

RYAN KARNOSKI; CATHRINE SCHMID; D.L.; LAURA GARZA; HUMAN RIGHTS CAMPAIGN; GENDER JUSTICE LEAGUE; LINDSEY MULLER; TERECE LEWIS; PHILLIP STEPHENS; MEGAN WINTERS; JANE DOE; CONNER CALLAHAN; AMERICAN MILITARY PARTNER ASSOCIATION,
Real-Parties-in-Interest–Plaintiffs,

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

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INTRODUCTION AND SUMMARY

Plaintiffs' response to our petition underscores the extent to which the district court's orders depart from the uniform understanding of the type of extraordinary circumstances that could justify depositions of the Department of Defense's most senior civilian and military leaders.

More fundamentally, both plaintiffs' and the district court's responses illustrate that discovery in this case has become unmoored from the merits. As this Court explained over a year ago, the question in this case is whether the Secretary of Defense "reasonably determined" that the Mattis policy "'significantly furthers' the government's important interests." *Karnoski v. Trump*, 926 F.3d 1180, 1202 (9th Cir. 2019) (per curiam). Plaintiffs possess all of the information they conceivably need to litigate that question. This Court and the Supreme Court routinely adjudicate equal-protection challenges to government policies on far less robust a factual record than the one here. And it should be clear that there can be no basis for permitting depositions of the Department's highest-ranking officials in a case in which plaintiffs already possess such voluminous documentation of the challenged policy and its justifications.

Despite what is now a mountain of evidence to the contrary, plaintiffs insist that further discovery will prove that the Mattis policy is a "fiction" and was not "developed independent of the President's directives and based on important military interests." Ans.34. And the district court candidly embraces this theory, urging this

Court to allow discovery to continue so that plaintiffs may pursue it unimpeded throughout the Department. D.Ct.Resp.4-6. That sort of fishing expedition would be impermissible in any case; it is altogether unheard of in a case challenging the formulation of military policy.

This Court has made clear that "the reasonableness of the 2018 Policy must be evaluated on the record supporting that decision and with the appropriate deference due to a proffered military decision." *Karnoski*, 926 F.3d at 1207. Before this Court allows plaintiffs and the district court to turn the Department of Defense inside out in search of evidence that the Mattis policy was instead a massive, orchestrated sham—apparently perpetrated by dozens of senior military officials—this Court should at least review the record to determine whether it permits an inference of collective fakery. If the Court concludes, as we submit, that the record contains nothing to support that remarkable assertion after years of discovery based on that premise, then the Court should direct the district court to terminate discovery and render its judgment on the merits. Absent this Court's intervention, the ever-escalating intrusions will continue without limit: the district court has itself declared that, based on its flawed assumptions, discovery will continue until this Court "tell[s] me to stop." Doc.620, at 27:13, 27:19 (Sept. 29, 2020 Hr'g Tr.).

ARGUMENT

I. PLAINTIFFS CANNOT SUPPORT THEIR SUBPOENAS FOR DEPOSITIONS OF CABINET SECRETARIES AND OTHER HIGH-RANKING MILITARY OFFICIALS

A. Plaintiffs do not dispute that the courts of appeals have uniformly held that "absent 'extraordinary circumstances,' high-level agency officials should not 'be called to testify regarding their reasons for taking official action.'" *NEC Corp. v. United States*, 151 F.3d 1361, 1375 (Fed. Cir. 1998) (quoting *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985)); *see* Pet.14-16 (collecting additional authorities). Plaintiffs assert, however, that the district court correctly concluded that "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.'" Ans.16.

That is not, and plainly could not be, the relevant standard.[1] Cabinet Secretaries and other high-ranking officials are often deeply involved in the development of agency policy. Plaintiffs' rule would make their depositions

[1] Plaintiffs note that the district court purported to rely on *Lederman v. N.Y.C. Dep't of Parks & Recreation*, 731 F.3d 199 (2d Cir. 2013). Ans.5. But the district court's error is encapsulated by its departure from that standard. *Lederman* did not hold that depositions can proceed so long as "the official has been personally involved in the events at issue in the case." Ans.5. It instead held that a plaintiff must demonstrate 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." *Lederman*, 731 F.3d at 203; *see United States v. Sensient Colors, Inc.*, 649 F. Supp. 2d 309, 322 (D.N.J. 2009) (articulating similar standard in rejecting deposition of EPA Administrator).

commonplace. But neither plaintiffs nor the district court have cited a single viable court of appeals decision approving the deposition of a Cabinet Secretary or a high-ranking military official—much less a case in which a court simultaneously approved four such depositions. *See In re Dep't of Commerce*, 139 S. Ct. 16, 16-17 (2018) (staying deposition of Secretary of Commerce following *In re Dep't of Commerce*, No. 18-2856, 2018 WL 6006885 (2d Cir. Oct. 9, 2018)).

Plaintiffs assert that the uniform case law is distinguishable on the ground that "the cases on which Defendants rely . . . involved senior officials who were *not* directly involved in the matter in dispute." Ans.17; *see* Ans.18-19 (attempting, on that basis, to distinguish *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)). That description of the cases is, of course, incorrect. As the Fourth Circuit observed nearly thirty years ago, "federal courts have consistently held that, absent 'extraordinary circumstances,' a government decision-maker will not be compelled to testify about his mental processes in reaching a decision, 'including the manner and extent of his study of the record and his consultations with subordinates.'" *Franklin Sav. Ass'n v. Ryan*, 922 F.2d 209, 211 (4th Cir. 1991) (quoting *United States v. Morgan*, 313 U.S. 409, 421-22 (1941)). There is no doubt that formulating a decision is personal involvement, but the Fourth Circuit found such involvement insufficient to justify a deposition after citing, among other authorities, this Court's decision in *Kyle Engineering Co. v. Kleppe,* 600 F.2d 226 (9th Cir. 1979).

The holdings in these cases derive in substantial part from the Supreme Court's seminal decision in *Morgan*, which involved a challenge to an order establishing maximum rates by certain marketing agencies. The district court in that case permitted the same type of interrogation of a Cabinet Secretary that the district court authorized plaintiffs to pursue here. In *Morgan,* the Secretary of Agriculture "was questioned at length regarding the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates." 313 U.S. at 422. The Supreme Court made clear that this was error: "the short of the business is that the Secretary should never have been subjected to this examination." *Id.* Plaintiffs mistakenly suggest that *Morgan* speaks only to a unique situation in which a Cabinet Secretary is "performing a . . . judicial-type function." Ans.19. The Court in *Morgan* stressed that courts should respect the integrity of the administrative process in the same way that they protect the integrity of the judicial process, explaining that the Executive and Judicial Branches are "collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other." 313 U.S. at 422. The Court did not limit its rationale to any particular type of agency decision, and *Morgan* has not been applied in such a circumscribed manner. This Court and others have instead made clear that "[h]eads of government agencies are not normally subject to deposition," without regard to the function they are performing. *Kyle Eng'g*, 600 F.2d at 231; *see* Pet.15-16.

Plaintiffs similarly dismiss the additional concerns raised by discovery into the deliberations of the military, urging that the Supreme Court's repeated declarations regarding the courts' reluctance "to intrude upon the authority of the Executive in military and national security affairs," *Munaf v. Geren*, 553 U.S. 674, 689 (2008) (quotation omitted), do not "address discovery," Ans.21. In fact, the Supreme Court has cautioned that courts are "ill-equipped" in their factfinding role in challenges to military policies, and it has emphasized that discovery of matters not "in the record" is therefore "quite beside the point." *Goldman v. Weinberger*, 475 U.S. 503, 507, 509 (1986) (quotation omitted). And this Court's prior decision in this case stressed that "the military's interest in full and frank communication about policymaking raises serious—although not insurmountable—national defense interests." *Karnoski*, 926 F.3d at 1206.

Plaintiffs inadvertently underscore the absence of any extraordinary circumstance that would justify the depositions in this case when they urge that they have not yet "decide[d] whether to pursue them." Ans.29. The cynicism of plaintiffs' claim of extraordinary need is highlighted by their explanation that "the upside of obtaining the first-hand knowledge of one or more of these witnesses" may not be "worth the risk of eliciting potentially adverse testimony[.]" Ans.30. In

other words, there are no extraordinary circumstances that justify the depositions, which plaintiffs treat as a function of their evolving cost-benefit calculation.[2]

Given the likelihood that plaintiffs' calculations may evolve again, this Court's intervention is needed now. And at a minimum, plaintiffs' apparent absence of need for the depositions underscores that the subpoenas here should have been quashed, at least until such time as plaintiffs could in fact credibly represent to a court that they have a pressing basis for simultaneous depositions of multiple high-ranking military officials.

B. Plaintiffs' efforts to justify the depositions ordered here demonstrate the absence of any extraordinary circumstances that would allow them to go forward. More generally, plaintiffs' arguments make clear that the only purpose of the remaining discovery in this case is to fish for evidence somewhere, from some source, to substantiate their speculation that the Panel process was a "fiction." Ans.34.

[2] Plaintiffs state that they "long ago" declared that they might not take the depositions. Ans.2, 13 (citing Add.97-99). Yet plaintiffs subpoenaed these officials for depositions on definite dates in May 2020, *see* Add.139, 145, 151, 157, and litigated their claimed need for the depositions in multiple district courts. If plaintiffs "long ago" had second thoughts about these depositions, it would demonstrate only that they recognized that there were no extraordinary circumstances that would properly permit the depositions. In any event, plaintiffs' cited status report—from July 2020—makes no reference to dispensing with the four depositions here, instead discussing potentially deferring some unspecified depositions until more unwarranted disclosures of deliberative documents occur. Add.97; *see* Ans.2, 13 (similar). Nor did plaintiffs disclose that they might not take such depositions in their August 2020 clarification motion or reply addressing depositions in this Court.

1. Plaintiffs state that they want to depose Secretary Mattis to learn what information he used "in approving the panel's recommendations" and whether the President's "directives" played a role in his decisionmaking. Ans.22-23. Remarkably, plaintiffs insist that these inquiries do not probe "mental processes," Ans.23, despite *Morgan*'s clear statement that questioning a Cabinet Secretary "regarding the process by which he reached the conclusions of his order, including the manner and extent of his study of the record" is precisely the sort of inquiry into "the mental processes of the Secretary" that is impermissible. 313 U.S. at 409. Plaintiffs do not advance their argument by speculating that Secretary Mattis must have manipulated the Panel process to effectuate an outcome ordained by the President. *See* Ans.22-23. In fact, as this Court recognized, Secretary Mattis ultimately concluded that "a change to [the President's] policy is warranted." *Karnoski*, 926 F.3d at 1202 (quotation omitted). And plaintiffs point to nothing in the voluminous materials they have received that permits the inference that the Secretary was party to an extended deception.

In authorizing the deposition of Secretary Mattis, the district court stated that plaintiffs had "made the prerequisite showing of bad faith." Add.11. Plaintiffs are now unwilling to defend that conclusion, instead declaring that it is a "mischaracteriz[ation]" to state that the district court found "that Mattis could be deposed because he proceeded in 'bad faith.'" Ans.12 (quoting Pet.11). Plaintiffs' description is inaccurate, but they are certainly correct in making no attempt to defend the accusation of bad faith.

From the thousands of pages of documents that they have received, plaintiffs identify as evidence of animus certain emails indicating Secretary Mattis's interest in hearing from a law professor and psychiatry professor whose viewpoints plaintiffs do not share. Ans.22-23. Plaintiffs note that Secretary Mattis's assistant reached out to these sources after the Panel had completed its process. *Id.* at 23. And they intimate that these contacts formed part of a hidden conspiracy yet to be uncovered. But to the extent the Department relied on articles shared by these sources, it expressly disclosed that reliance by citing the articles in its final Report and including them in the administrative record. *Compare, e.g.*, Add.190 n.85, 191 n.93 (articles in *PLoS One* and *Clinical Endocrinology*), *with, e.g.*, Doc.588-5, at 4 (Administrative Record at AR498 and AR1178). Whatever arguments plaintiffs wish to make about these sources and the role they played in the Department's reasoning have long been available on the basis of the existing record. And, as plaintiffs do not dispute, the Secretary adopted the Panel's recommendations in full.

2. Plaintiffs attempt to minimize the extraordinary nature of their attempt to depose Secretary Wilkie, a sitting Cabinet Secretary, by arguing that "[a]ll senior officials have busy schedules" and that there is no "special rule" preventing the deposition of a Cabinet Secretary. Ans.26. But as this Court (and many other courts of appeals) recognized, "[h]eads of government agencies are not normally subject to deposition." *Kyle Eng'g*, 600 F.2d at 231.

In any event, plaintiffs have provided no basis for Secretary Wilkie's deposition. Plaintiffs assert that they seek to ask Secretary Wilkie about his "control over the information the Panel did and did not receive." Ans.24. For this, they cite an email from former Deputy Assistant Secretary Anthony Kurta—who chaired Panel meetings before Secretary Wilkie's confirmation as Under Secretary—to then-Under Secretary Wilkie (among others) about whether to disseminate "a draft memo" to the Deputy Secretary that would not "usually" be shared (SA.151) and an email from Panel member Thomas Dee attaching a memorandum memorializing his dissent from the Panel's recommendations (SA.150). It is unclear how an email about the dissemination of a draft memorandum has any bearing on the case (and plaintiffs were long ago offered the chance to depose Kurta, the author of the email, which they did not take); and Dee's dissent has long been available to plaintiffs. *See* 20-70365 SA.391 (entire Dee dissenting opinion). Even apart from the presumption of regularity that attaches to these interactions—a presumption that is underscored by the fact that Panel members had leeway to dissent, *see USPS v. Gregory*, 534 U.S. 1, 10 (2001)—these assertions provide no basis for a deposition.

Plaintiffs are on no firmer ground in urging that they seek to depose Secretary Wilkie about a meeting with Secretary Mattis concerning the "Panel recommendations [and] the ongoing legal challenges." Ans.24 (quoting SA.28). Plaintiffs cite an email from Secretary Wilkie indicating that Secretary Mattis had "asked questions" and "expressed a concern," noting that some information has been redacted. *Id.* (citing

SA.28-29). On no theory can the fact that a Cabinet Secretary and his Under Secretary discussed concerns about a major policy initiative justify their depositions. Moreover, those discussions have no bearing on the merits inasmuch as Secretary Mattis accepted the Panel's recommendations.

Equally baseless is plaintiffs' assertion that then-Under Secretary Wilkie was appointed "midway through the Panel process" "at the urging of anti-transgender advocates." Ans.25. Secretary Wilkie was nominated as Under Secretary of Defense in July 2017—months before the Panel was even established. After his confirmation, he replaced Kurta, who was the Acting Under Secretary of Defense. Add.111-12; *see* Pet.7.

3. Plaintiffs offer no basis for the proposed deposition of General Selva. Plaintiffs have every single deliberative and non-deliberative communication to the Panel, and they concede that General Selva offered no further "guidance" that was "covert" and that his communications were "completely consistent" with all other guidance. Ans.27. Yet plaintiffs rely on the unremarkable proposition that General Selva wanted the Panel members to be "knowledgeable" about prior guidance. Ans.20, 27 (quoting SA.108). That is no ground for taking his deposition.

Plaintiffs alternatively argue that they need to depose General Selva "regarding the military's June 2017 decision to delay the Carter Policy on accessions" and that it "verges on the absurd" to suggest that a deposition is not warranted on this ground. Ans.27. But plaintiffs do not explain what extraordinary need they might have for

testimony about events months before the Department initiated the Panel process that culminated in Secretary Mattis's adoption of the Panel's recommendations.

4. Plaintiffs' stated need for the deposition of Admiral Moran is equally without basis. Plaintiffs provide two justifications. First, they say that Admiral Moran had concerns that "were *shared with and by others*" on the Panel, meaning any number of other Panel members could be deposed on the same topics. Ans.28. Second, plaintiffs recognize that, like Admiral Moran, Kurta also has "knowledge" of matters related to the Carter policy (matters that are already of tangential relevance to this litigation), but—inverting the usual premises—state that functions attaching to Admiral Moran's high rank is why there is "no substitute" for him. Ans.28.

C. Plaintiffs' insistence that they should be able to take the depositions at issue rests on feigning ignorance of the vast discovery they already have received. And plaintiffs' demands are particularly anomalous because they never accepted the government's offer in 2018 to allow the deposition of former Deputy Assistant Secretary Kurta, who served as Acting Under Secretary and chair of the Panel until the confirmation of then-Under Secretary Wilkie, or the government's offer to allow plaintiffs to depose current Deputy Assistant Secretary Hebert, who facilitated the Panel meetings after Wilkie's arrival. *See* Ans.20; Add.112.

It cannot be the case that plaintiffs' fear that Kurta and Hebert may testify "affirmatively" under oath that the Panel process was not a sham is what permits

them to instead target the Nation's most senior civil and military leaders. Ans.20.

Rather, Kurta, Hebert, or both would have been aware of:

- then-Under Secretary Wilkie's alleged "control over information," Ans.24, for which plaintiffs refer to an email from Kurta about whether to share certain information, SA.151;
- events at a meeting with Secretary Mattis in January 2018, which Kurta and Hebert attended along with then-Under Secretary Wilkie, Ans.24; *see* Add.113 (Hebert declaration explaining that he and Kurta also attended this meeting);[3]
- events at the final Panel meetings between December 15, 2017 and January 11, 2018, Ans.25;
- what "instruction" or "guidance" the Panel received from General Selva (which plaintiffs admit was not "covert" and was "completely consistent" with other guidance, thus providing no incremental value), Ans.27; and
- the "concerns" that Admiral Moran "shared with" other members of the Panel, Ans.28 (emphasis omitted).

In addition, Kurta was involved (as plaintiffs concede, Ans.28) with the formation of the Carter policy. Thus, even assuming the Carter policy process has any marginal relevance to this case, *see* 20-70365 Pet.27-28; Reply 15-16, that policy process is no basis to authorize any of the depositions at issue here.

[3] The Hebert declaration indicates that this meeting took place on Wednesday, January 17, 2017. However, documents previously disclosed to plaintiffs (though not filed on the docket) indicate that the meeting originally scheduled for January 17 was rescheduled to Friday, January 19. *See* SA.28.

II. PLAINTIFFS' AND THE DISTRICT COURT'S RESPONSES SHOW THAT NO FURTHER DISCOVERY IS WARRANTED AND THAT THIS COURT SHOULD INSTRUCT THE DISTRICT COURT TO DECIDE THE MERITS

The responses of both plaintiffs and the district court make clear that the ongoing discovery is not directed at examining whether the Mattis "policy 'significantly furthers' the government's important interests," *Karnoski*, 926 F.3d at 1202, but has devolved into a search for some elusive piece of evidence that the policy is a "fiction," Ans.34. In its previous decision, this Court observed that, "[o]n the current record, a presumption of deference is owed, because the 2018 Policy appears to have been the product of independent military judgment." *Karnoski*, 926 F.3d at 1202. The massive disclosures since that decision confirm that this is indeed the case.

Nevertheless, plaintiffs and the district court insist that it is necessary to pursue an open-ended inquiry into a conjectural sham that allegedly included dozens of military officials, from former Secretary Mattis to current Secretary Wilkie to the former second-highest uniformed officer General Selva. Plaintiffs' and the court's responses make clear that this is the sole continuing basis for the years-long discovery proceedings. The court frankly acknowledged that the purpose of discovery is to determine whether the Mattis policy was "'hypothesized or invented post hoc in response to litigation,'" asserting that the Panel process was "closely correlated with milestones in this litigation." D.Ct.Resp.4 (quoting *Karnoski*, 926 F.3d at 1200).

This is now discovery for discovery's sake, unmoored from this Court's instructions that the Mattis policy "must be evaluated on the record supporting that

decision and with the appropriate deference due to a proffered military decision." *Karnoski*, 926 F.3d at 1207. Since that decision, plaintiffs have obtained every document received by, sent to, or generated by the Panel. In addition, the government has made approximately 100 document productions from over 150 custodians across all levels of the military during a five-year period that have provided plaintiffs with more than 60,000 documents totaling over 400,000 pages. This was not a matter of "pushing a haystack of documents" at plaintiffs. D.Ct.Resp.9. Plaintiffs have requested a "haystack of documents" in pursuit of a needle, the district court has facilitated that enterprise, and plaintiffs having found nothing demand ever more haystacks.

Plaintiffs' statement that they still have "questions" about the Panel process, Ans.1, underscores that their continued failure to grapple with their possession of every single deliberative or non-deliberative document of the Panel during that process. And plaintiffs and the district court make quite clear that there will be no limit or end point to their search. Plaintiffs have frankly acknowledged to this Court that they do not know "how much, or which, evidence is 'needed to resolve this litigation.'" 20-70365 Pls.' Suppl. Resp. 3. Accepting that proposition, the district court has made clear that discovery in this case will not end absent this Court's intervention. As the district court has confirmed, it intends to continue to order intrusive discovery until this Court "tell[s] me to stop." Doc.620, at 27:13, 27:19 (Sept. 29, 2020 Hr'g Tr.). This Court's intervention is plainly needed.

Plaintiffs and the district court find it unremarkable that the court has not sustained the government's withholding of a single privileged document under the deliberative process privilege. Since the filing of the government's mandamus petition in February 2020, the district court has issued more than a dozen rulings requiring disclosure of sensitive and confidential documents. *See* Ans.31; *see also* 20-70365 Gov't Suppl. Br. 2-7 (describing orders); 20-70365 Gov't Suppl. Resp. 4-5 (same).[4] Plaintiffs hail the relentless disclosure of deliberative materials. But plaintiffs do not explain how the torrent of production has informed the resolution of the relevant issues; nor do they explain how the multiple disclosures have brought the discovery process closer to an end.

In treating discovery as an end unto itself, plaintiffs contend that the very fact that documents are protected as "*deliberative*" means that the privilege should be set aside. Ans.34. That view is apparently shared by the district court. *See* D.Ct.Resp.9 (suggesting that remaining deliberative documents are superior in "quality or relevance"). After engaging in *in camera* review of a subset of documents, the court issued an order on July 15 that required effectively all remaining deliberative documents in the case to be "produced." Add.81. Plaintiffs suggest that this is a

[4] The district court asserts that "the Government's attorneys have admitted that they did not review these documents before production." D.Ct.Resp.9. The court appears to mean that litigation counsel did not personally review every single document, instead enlisting the support of numerous Department of Defense attorneys. *See, e.g.*, Doc.371-1, at 7. That was entirely proper.

"misrepresentation" of that order, Ans.31, but the order speaks for itself. Plaintiffs apparently mean to say that the court retracted its production order of over ten thousand documents once the government sought a stay. Add.74.

Although the only purpose of discovery at this point is the search for evidence of a widespread sham, the district court at every turn has held that this is sufficient justification to outweigh the military's interest in protecting privileged materials. In effectively rendering the deliberative process privilege unavailable, the court has also *ex ante* held it inapplicable to all documents except for those that were generated immediately prior to the Carter and Mattis policies. All other documents, the court has declared, are post-decisional. And on that basis, the court has declared deliberative drafts from the highest levels of the Department of Defense—including drafts of the Department's final Report and Secretary Mattis's personal notes—to be "post-decisional," on the anomalous theory that the Panel's recommendation was the final decision. Add.87-88.

The district court's orders have continued to spiral outward to more remote topics. The court recently ordered disclosure of military deliberations surrounding the President's 2017 statement on Twitter, declaring that the military's recommendations and deliberations—including communications between the Secretary of Defense and the Chairman of the Joint Chiefs of Staff (the Nation's highest uniformed officer)—are "post-decisional" and thus could not be privileged. Doc.614; *see* Gov't 28(j) Letter (Oct. 5, 2020). As if to underscore its disregard for the military's confidentiality

interests, the court unilaterally disclosed privileged deliberations by including in its order block-quotes from documents that the government had marked confidential in submitting them for *in camera* review pursuant to a protective order. *See* Doc.614, at 7-8. Asked to refrain from doing so again, the court denied that disclosing sealed privileged materials on the public docket is "problematic," Doc.620, at 28:23, and has also unambiguously expressed its intention to continue ordering disclosure of an "enormous number of relevant documents" that are privileged, Add.78. *See* D.Ct.Resp.6, 10 (finding it "imperative" that discovery continues until there is "a complete record")

The government has abided by numerous erroneous discovery rulings, all of which target sensitive, privileged, and confidential military matters. We have sought this Court's review only for the most egregious errors. Plaintiffs have received extensive information through the discovery process, far beyond anything to which they have any legal entitlement. Plaintiffs have made clear, however, that they intend to pursue an open-ended search for evidence that—despite Secretary Mattis's statement that the Mattis policy represents both the best professional judgment of the military and his own professional judgment, *see* Add.212—the entire Panel process was a charade. Ans.34. And the district court has made clear that it intends to allow them to do so.

The government has been prepared for over two years to defend the military's decisionmaking process based solely on the record—the entirety of which (and tens

of thousands of documents more) has been disclosed to the plaintiffs—as that record comprises the government's defense. No aspect of discovery has altered that basic premise. We respectfully request that the Court direct the district court to terminate discovery and adjudicate the merits.

CONCLUSION

This Court should grant the petition for a writ of mandamus.

Respectfully submitted,

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OCTOBER 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that this reply complies with the limit of Ninth Circuit Rule 21-2(c) and 32-3(2) because it totals 4,193 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this reply complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using Microsoft Word 2016 in a proportionally spaced typeface, 14-point Garamond font.

s/ Dennis Fan
DENNIS FAN

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2020, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service has been accomplished via the CM/ECF system. The district court has been provided with a copy of this reply in support of the petition for writ of mandamus pursuant to Federal Rule of Appellate Procedure 21(a).

s/ Dennis Fan
DENNIS FAN