

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

IN RE DONALD J. TRUMP, in his official capacity as  
President of the United States, *et al.*,

*Petitioners.*

DONALD J. TRUMP, in his official capacity as  
President of the United States, *et al.*,

*Petitioners,*

v.

No. 20-72793

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-Intervenor-Plaintiff.*

**GOVERNMENT'S OPPOSITION TO PLAINTIFFS' MOTION FOR  
EXTENSION TO FILE RESPONSE TO MOTION TO STAY**

The federal government respectfully opposes plaintiffs' motion for an indefinite extension of time to respond to the government's motion for a stay pending disposition of its petition for a writ of mandamus in No. 20-72793 and its petition and supplemental filings in No. 20-70365. Plaintiffs do not identify a date on which they

would file their stay response, but request an extension until 10 days after the district court acts on our motion for a stay in that court. Because the district court has not indicated a date by which it intends to rule on our motion, plaintiffs seek an extension of indefinite length.

Plaintiffs' response in this Court is currently due on September 28, 2020, and they offer no reason why they cannot respond by that date. We have informed plaintiffs that we would not object to a short extension if required, but we ask that any extension require plaintiffs to respond to the government's stay motion no later than Friday, October 2, so that this Court may consider that motion in connection with the ongoing mandamus proceedings set for argument on October 14.

1. This Court has scheduled oral argument on October 14 to consider the government's mandamus petition in No. 20-70365 and the ongoing discovery issues as to which the Court requested supplemental briefing. As this Court is aware, after the filing of the supplemental brief requested by this Court, the district court ordered the depositions of current and former Cabinet Secretaries and two other high-ranking military officials, upon whom plaintiffs had served subpoenas for depositions set for between May 25 and 28, 2020. *See* 20-70365 Gov't Suppl. Br. 7 (supplemental brief addressing depositions); 20-70365 Gov't Suppl. Resp. 4-5 (supplemental response addressing depositions); *see also* Add. 139, 145, 151, 157 (subpoenas). The government then petitioned this Court to review the deposition orders and to consider those orders together with other discovery issues at the October 14 oral

argument. *See* Pet. 4-5. The government also asked the Court to stay the deposition orders pending its consideration of the petition.

Plaintiffs now seek an extension of uncertain duration to respond to our request for a stay. Plaintiffs offer no ground for such an extension, and, in fact, they do not explain why they require any significant amount of time to state their objections to a stay.

2. Plaintiffs' apparent purpose in seeking an extension is to avoid having this Court consider this stay and accompanying mandamus petition together with other discovery issues at the October 14 argument, and, indeed, plaintiffs' motion explicitly urges (at 2 n.1) the Court not to consider the district court's latest discovery order in that context. Plaintiffs offer no reason why the Court should not, in its discretion, consider all the related discovery issues together. And, in any event, they cannot properly use a request for an extension as a means to achieve that end.

Plaintiffs' various assertions have no bearing on their ability to respond to our stay request within the allotted time. Instead, to discourage the Court from considering the propriety of the depositions, plaintiffs now declare (at 3) that "to be clear, they may elect not to" depose these four high-ranking officials "at all." This is in every way a remarkable tactic. Plaintiffs served subpoenas upon two Cabinet Secretaries and other senior military officials for depositions on set dates in May 2020. They forced the government to litigate these issues for months, requiring the government to contest substantive and procedural issues in multiple district courts.

*See Karnoski v. Trump (Mattis)*, No. 20-mc-10 (E.D. Va. July 15, 2020) (Doc. 41), transferred to No. 20-mc-61 (W.D. Wash.); *Karnoski v. Trump (Wilkie)*, No. 20-mc-16 (E.D. Va. July 15, 2020) (Doc. 35), transferred to No. 20-mc-56 (W.D. Wash.); *Karnoski v. Trump (Selva)*, No. 20-mc-15 (E.D. Va. July 7, 2020) (Doc. 35), transferred to No. 20-mc-55 (W.D. Wash.); *Karnoski v. Trump (Moran)*, No. 20-mc-13 (M.D.N.C. Aug. 10, 2020) (Doc. 23), transferred to No. 20-mc-69 (W.D. Wash.). And they strenuously urged the district court in this case to provide judicial authorization for those depositions based on the premise that there were “extraordinary circumstances” necessitating those depositions. *NEC Corp. v. United States*, 151 F.3d 1361, 1375-1376 (Fed. Cir. 1998) (quoting *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985)). The district court accepted these representations in its deposition orders of September 2 and 14, 2020, *see* Add. 1, 14, 16, and the government’s mandamus petition and motion for a stay explained why it was wrong to do so.

Plaintiffs offer no reason for the abrupt change in their view of the compelling necessity for the depositions ordered by the district court at their behest. And they understandably do not wish to explain to the Court how the depositions might be both completely unnecessary but at the same time justified by “extraordinary circumstances.” Instead, they reserve the option to take the depositions at a point they believe to be tactically more advantageous. They urge that this proposal makes good sense because (at 3-4) they would consent to “immediate entry of an order” in

district court that provides the government “at least 30-days advance notice” before a deposition. Plaintiffs’ offer to provide the government with the opportunity to seek emergency relief in this Court from the same depositions that were already authorized and at issue here transparently advances their goal of ensuring that the Court does not consider the deposition orders in reviewing the course of discovery. In any case, plaintiffs cannot properly seek an extension of time to respond to a stay request to accomplish that purpose.

3. Plaintiffs’ assertion (at 2) that the government has failed to comply with Federal Rule of Appellate Procedure 8 likewise has no bearing on their request for an extension. Plaintiffs are, of course, free to make that argument in an opposition to a stay. At which time it will properly be rejected. The government filed a stay motion in district court on September 10, 2020, requesting relief no later than 12 p.m. EST on September 18, pursuant to Rule 8(a)(1)(A). *See* Doc. 601. The district court did not act on that motion, but instead reissued its prior order with minor corrections on September 14. *See* Add. 1, 16. The court thus “failed to afford the relief requested.” Fed. R. App. P. 8(a)(2)(ii). While Rule 8 requires a litigant to seek relief in the district court in the first instance, it does not preclude a filing in the court of appeals until the district court acts on its motion. And plaintiffs’ own unwillingness (at 2) to respond in district court within the government’s requested timeframe for relief or to respond in this Court are not reasons to consider the current petition and stay motion in connection with the argument already set for October 14.

In sum, plaintiffs have identified no basis for their requested extension of time. If the Court grants an extension at all, we respectfully request that it extend no farther than October 2.

Respectfully submitted,

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*Deputy Assistant Attorney General*<sup>1</sup>

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SEPTEMBER 2020

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<sup>1</sup> The Acting Assistant Attorney General is recused from this matter.

## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing response complies with the type-volume limitation of Ninth Circuit Rules 27-1 and 32-3 because it contains 1183 words. This response complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 27 because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Garamond typeface.

*s/ Dennis Fan*  
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DENNIS FAN

### **CERTIFICATE OF SERVICE**

I hereby certify that on September 22, 2020, I electronically filed the foregoing opposition with the Clerk of the Court by using the appellate CM/ECF system. Service has been accomplished via e-mail to the following counsel. The district court has been provided with a copy of this notice pursuant Federal Rule of Appellate Procedure 21(a).

*s/ Dennis Fan*  
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DENNIS FAN