THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

JOSEPH R. BIDEN, President of the United States, *et al*.,

Defendants.

No. 2:17-cv-00094-RAJ

PLAINTIFFS' MOTION TO SEAL PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT, AND SUPPORTING DOCUMENTS

NOTE FOR MOTION CALENDAR:
July 2, 2021

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I. INTRODUCTION

Pursuant to Local Rule 5(g), Plaintiffs respectfully move for leave to preliminarily file under seal unredacted versions of Plaintiffs' Reply in Support of Motion for Summary Judgment and Opposition to Defendants' Cross Motion for Summary Judgment (the "Reply"), certain exhibits to the Second Declaration of Jennifer Pasquarella, the exhibits to the Declaration of Heath Hyatt, and the Declaration of Liga Chia and the attached exhibit, which Plaintiffs file contemporaneously with the Reply.[1] Plaintiffs file this motion only to respect Defendants' designations pursuant to the parties' Stipulated Protective Order ("Protective Order"). Dkt. 86.

Plaintiffs believe no "compelling reasons" exist to protect any of these materials from public access. Not only is the "compelling reasons" standard high, but the issues presented in this case and in the parties cross-motions for dispositive relief are matters of great national import. In the Reply, Plaintiffs continue to explain the bases for their challenge to the lawfulness and constitutionality of CARRP, an extra-statutory vetting policy for immigration applications administered by Defendants, that prohibits USCIS field officers from approving an application with an alleged potential national security concern and instead directs officers to deny the application or delay adjudication—often indefinitely. The public has a strong interest in accessing the documents in the judicial record, and the Reply should be unsealed.

II. CERTIFICATION

Pursuant to LCR 5(g)(3)(A), Plaintiffs certify that the parties telephonically met and conferred about this motion on June 9, 2021. Ethan Kanter, Lindsay Murphy, Jesse Busen, and Victoria Braga, participated on behalf of Defendants, and Heath Hyatt participated on behalf of Plaintiffs. Counsel for Defendants informed counsel for Plaintiffs that they do not consent to filing the above documents in any forum that can be accessed by the public or the press.

[1] Pursuant to this Court's General Order No. 03-21 and Defendants' designations, Plaintiffs will not be electronically filing its Reply under seal until the Court determines whether it contains highly sensitive information.

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III. RELIEF

Plaintiffs move to keep preliminarily under seal their Reply and certain supporting documents because they discuss the content of or attach documents designated as "Confidential" or "Attorney's Eyes Only" under the parties' Protective Order. Dkt. 86 at 4 ("nor shall [Confidential Information] be included in any pleading, record, or document that is not filed under seal with the Court or redacted in accordance with applicable law."). Plaintiffs disagree with the designation of these documents because there are not "compelling reasons" to justify keeping the Reply or the supporting documents under seal. But in accordance with LCR 5(g), Plaintiffs move to keep these documents and the Reply preliminarily under seal. Defendants will presumably file a statement explaining why this material should remain under seal as required by the local rule. *See* LCR 5(g)(3). Plaintiffs oppose keeping the Reply and supporting documents under seal and submit that Defendants cannot demonstrate "compelling reasons" to keep the documents under seal.

IV. ARGUMENT

A. Legal Standard

This Court recognizes a "strong presumption in favor of access to courts," *Foltz v. State Farm Mutual Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003), under which documents should remain sealed "[o]nly in rare circumstances." LCR 5(g)(5). The preference for open court records "applies fully to dispositive motions, including motions for summary judgment and related attachments." *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006). This long-standing practice is grounded in "the need for . . . the public to have confidence in the administration of justice." *Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016) (internal quotations omitted). Open court records promote the "interest[s] of citizens in 'keeping a watchful eye on the workings of public agencies.'" *Kamakana*, 447 F.3d at 1178 (quoting *Nixon v. Warner Commc'n., Inc.*, 435 U.S. 589, 597 n.7, 98 S. Ct. 1306 (1978)).

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1. Defendants bear the burden of overcoming the presumption against public access.

Local Rule 5(g)(3)(B) states that when parties have previously entered into a stipulated protective order, the "party wishing to file a confidential document it obtained from another party in a discovery file may file a motion to seal to comply with the protective order." The moving party need not demonstrate the reasons to keep a document under seal. *See* LCR 5(g)(3)(B). Instead, the party who designated the document confidential—in this case, the Defendants—must include the reasons to keep documents under seal in its response. *Id.* Plaintiffs file this motion in accord with the local rule and in anticipation of Defendants' response.

2. Defendants must demonstrate "compelling reasons" to overcome the presumption in favor of open court records.

Because they designated the relevant documents confidential, Defendants bear the burden of demonstrating why this Court should seal the Reply and supporting documents, contrary to the strong presumption in favor of court access. Defendants must meet the "compelling reasons standard" with reference to "specific factual findings", not vague platitudes or speculative fear. *See Kamakana*, 447 F.3d at 1178. The standard requires them to "articulate specific facts to justify sealing, and [to] do so with respect to **each item** sought to be sealed." *MD Helicopters Inc. v. United States*, No. CV-19-02236-PHX-JAT, 2019 WL 2415285, at *2 (D. Ariz. June 7, 2019) (emphasis added). The court, in turn, "may seal records only when it finds a compelling reason and articulates the factual basis for its ruling, without relying on hypothesis or conjecture." *Center for Auto Safety*, 809 F.3d at 1096–97 (internal quotations omitted).

In general, compelling reasons exist where the court files may "become a vehicle for improper purposes, such as the use of the records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets." *Kamakana*, 447 F.3d at 1179 (internal quotations omitted). However, "[t]he mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records." *Id.* This demanding standard applies, "even if the dispositive motion, or its attachments, were previously filed under seal or protective order." *Id.*

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B. No Compelling Reasons Exist for the Court to Seal the Documents Here.

This Court should unseal the Reply and supporting documents. The "compelling reasons" standard is a "stringent" one. *Center for Auto Safety*, 809 F.3d at 1096–97. Defendants will not meet their burden in demonstrating how the standard is met for at least five reasons.

1. The existence of a stipulated protective order is not a compelling reason.

First, the parties' Protective Order has no bearing on whether the Court should find "compelling reasons" to seal documents. *See Kamakana*, 447 F.3d at 1183 (purported reliance on the parties' stipulated protective order was not a "compelling reason" to seal summary judgment motion). Although a protective order is generally "good cause" to seal such documents during discovery, a higher standard is warranted for dispositive motions. *Id.* at 1180. When a dispositive motion becomes part of the judicial record, "the public is entitled to access by default," which "sharply tips the balance in favor of produc[ing]" the document without a seal. *Id.*; *see also Rushford v. The New Yorker Magazine*, 846 F.2d 249, 252 (4th Cir. 1988) ("once the [sealed discovery] documents are made part of a dispositive motion . . . they lose their status of being raw fruits of discovery" and are not protected "without some overriding interests in favor of keeping the discovery documents under seal") (internal quotations omitted). "It is not enough that the documents *could* have been protected from disclosure in the first instance." *Ground Zero Center for Non-Violence Action v. U.S. Dep't of Navy*, 860 F.3d 1244, 1262 (9th Cir. 2017) (emphasis added). Defendants cannot rely on the parties' Protective Order as evidence of "compelling reasons" to keep the Reply under seal.

2. Publicly available documents should not be sealed.

Second, no compelling reasons exist for this Court to seal information that is already in the public domain. *See, e.g.*, *Ibrahim v. Dep't of Homeland Security*, 62 F. Supp. 3d 909, 935 (N.D. Cal. 2014) (plaintiff challenged inclusion on the No-Fly list, and court emphasized that despite "the legitimacy of protecting SSI and law enforcement investigative information," court is less likely to protect information that has been already made publicly available). Sealing such information directly refutes the strong presumption in favor of access to court records. *See, e.g.*,

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Ibrahim, 62 F. Supp. 3d at 936 ("public release of this entire order will reveal very little, if any, information about the workings of our watchlists not already in the public domain").

Here, much of the information Plaintiffs cite in and submit with the Reply was obtained pursuant to the Freedom of Information Act ("FOIA") or is information that would be subject to FOIA. *See, e.g.*, *Muslims Need Not Apply*, ACLU: SOUTHERN CALIFORNIA (Aug. 21, 2013), available at https://www.aclusocal.org/en/publications/muslims-need-not-apply (extensive reporting on CARRP based on information obtained via FOIA request and court order); CARRP FOIA Documents, https://www.aclusocal.org/carrp (USCIS produced dozens of CARRP documents through FOIA, including training guides, workflows, and statistics). Defendants now argue that this publicly available information and similar information is subject to the Protective Order and should remain under seal. But that argument falls flat: it is completely undermined by the fact that much of this information is already in the public eye or readily obtainable by the public. *See, e.g.*, *Al Otro Lado, Inc. v. Wolf*, No. 3:17-cv-2366-BAS-KSC, 2020 WL 3487823, at *4 (S.D. Cal. June 26, 2020) (public could request documents via FOIA, which undermined "[d]efendants' assertion that the information in these records is particularly sensitive and should be protected from disclosure"). If the information were "confidential," as Defendants suggest, it would not be available via FOIA—nor already in Plaintiffs' hands via FOIA, for that matter. And even if Defendants could argue that certain information would be exempt under FOIA, that alone is not a compelling reason for the Court to order that information sealed. *See, e.g.*, *Moussouris v. Microsoft Corp.*, No. 15-cv-1483 JLR, 2018 WL 1159251, at *9 (W.D. Wash. Feb. 16, 2018) ("The fact that the documents are exempt under FOIA is not support for sealing documents on the court docket under a compelling reasons standard."); *Bryan v. U.S.*, No. 2010-0066, 2017 WL 1347681, at *5–7 (D.V.I. Jan. 27, 2017) (unsealing, in part, certain TECS records about Plaintiffs which the Government had disclosed).

If Defendants believe the Court should seal any information, they must explain why **each individual document** creates a "compelling reason" to be sealed. *See, e.g.*, *Boy v. Admin. Comm. for Zimmer Biomet Holdings, Inc.*, No. 16-CV-197-CAB-BLM, 2017 WL 2868415, at *1 (S.D. Cal. Feb. 21, 2017) (defendants "must explain why any individual document within th[e]

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administrative record should be sealed"). Defendants will be unsuccessful in meeting this burden.

3. Generalized assertions regarding national security are not compelling reasons.

Third, Defendants cannot rely on broad assertions that the documents they seek to seal relate to or would undermine national security interests. A document's relationship to national security alone is not a compelling reason for the court to seal its records. Instead, to restrict access to judicial records relating to national security interests, a party must demonstrate "**specific facts** showing that disclosure of particular documents would **harm** national security." *Ground Zero Ctr. for Non-Violence Action*, 860 F.3d at 1262 (emphasis added). "[V]ague" implications of national security, *see id.*, and reference to "**general investigative procedures**, without implicating specific people or providing substantive details" are insufficient to meet the compelling reasons standard. *United States ex. Rel. Lee v. Horizon W., Inc.*, No. C 00–2921 SBA, 2006 WL 305966, at *2 (N.D. Cal. Feb. 8, 2006) (emphasis added) (the "Government's bare assertion that the disclosure of its extension requests would reveal pieces of the government's investigatory techniques, decision-making processes, research, and reasoning that apply in hundreds of similar cases" was not "a compelling showing" sufficient to prevent the court from lifting seal on the entire record) (internal quotations omitted). And even when the "rare circumstances" involving highly sensitive national security information arise, courts are directed to "minimize the extent of sealed proceedings" to uphold the public's right to access. *Polaris Innovations Ltd. v. Kingston Tech. Co.*, No. SACV 16-00300-CJC(RAOx), 2017 WL 2806897, at *5 (C.D. Cal. Mar. 30, 2017).

Here, the information that Plaintiffs submit with and reference in their Reply is highly generalized in nature or specific as to the named Plaintiffs. For example, several exhibits contain training materials related to CARRP and other policy documents. They discuss USCIS's instructions for officers with respect to broad categories of national security concerns. Other exhibits provide a general overview of the program and discuss how USCIS processes immigration benefits in accordance with the program. None of the information implicates

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specific people, reveals investigative secrets, or provides substantive details such that its disclosure would harm national security. Of course, this is because Defendants have already shielded that type of information from Plaintiffs through upheld claims of privilege. *See, e.g.*, Dkt. 274 (denying, in part, Plaintiffs' motion to compel and allowing Defendants to redact privileged information from certain documents originating from third party agencies). Defendants' now repetitive attempt to assert "national security" as a reason to seal does not satisfy this Court's precedent as meeting the compelling reasons standard.[2] To the contrary, this information is precisely the type of information to which citizens should have access "to keep a watchful eye on the workings of public agencies." *Nixon*, 435 U.S. at 598. Defendants will not meet the compelling reasons standard to seal them.

4. Blanket assertions of privilege are not compelling reasons.

Lastly, while issues of privilege have riddled this litigation for the past several years, those issues are distinct from factors supporting the "compelling reasons" standard.[3] *Kamakana*, 447 F.3d at 1184. To meet the "compelling reasons" standard, a party must do more than simply mention a category of privilege "without any further elaboration or any specific linkage with the documents." *Id.* Moreover, any privileged information in exhibits submitted with or referenced in the Reply has *already been redacted*. The Court should deny Defendants' efforts to shield yet more information from the public eye through sealing.

5. Reliance on prior sealing orders carries no weight as they were considered under the "good cause" standard.

Any purported reliance on prior favorable sealing orders carries no weight here. The Court's only sealing orders to date applied the lower "good cause" standard, not the much higher "compelling reasons" standard that applies here.

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[2] Moreover, as Plaintiffs demonstrate in their Motion to Treat Documents as HSD filed contemporaneously, this is also not a "rare circumstance[]" involving highly sensitive information. *See Polaris Innovations Ltd.*, 2017 WL 2806897, at *5.

[3] The Ninth Circuit recognizes a very narrow exception related to privilege for documents "traditionally kept secret." *Kamakana*, 447 F.3d at 1184–85. But the exception applies only to "grand jury transcripts and warrant materials during the pre-indictment phase of an investigation." *Id.* Documents falling under the privacy, law enforcement, and official information privileges "do not automatically fall within the 'traditionally kept secret exception.'" *Id.*

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V. CONCLUSION

For all the foregoing reasons, the Court should direct the Clerk to unseal Plaintiffs' Reply and the material filed with the accompanying declarations.

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Respectfully submitted,

DATED: June 11, 2021

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