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

NOTE FOR MOTION CALENDAR:
July 2, 2021

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

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Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

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Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

I. INTRODUCTION

Defendants fail to provide compelling reasons, supported by specific facts, to hide Plaintiffs' Reply in Support of Plaintiffs' Motion for Summary Judgment and Opposition to Defendants' Motion for Summary Judgment, supporting declarations, and supporting exhibits ("Motion") from the public. They simply invoke the specter of "national security" without providing any specific threats, supporting evidence, or declarations from law enforcement or intelligence agencies. Defendants offer only unsupported speculation of grave risk to national security through attorney argument. The public has a presumptive right to access Plaintiffs dispositive motion, arguing that CARRP violates class members' constitutional and statutory rights. Defendants have not offered sufficient evidence to rebut the presumption to open court records and satisfy their burden.

Defendants' remaining arguments likewise fall far short. The mere fact that Defendants chose to label discovery materials "Confidential" or "Attorney's Eyes Only" is meaningless. It is "ultimately up to the Court, not the parties, to decide whether materials that are filed in the record . . . should be shielded from public scrutiny." *Peters v. Aetna, Inc.*, No. 1:15-CV-00109-MR, 2018 WL 1040106, at *1–2 (W.D.N.C. Feb. 23, 2018). Contrary to Defendants' repeated suggestion, the Court has made no such determination under the "compelling reasons" standard. Defendants' attempt to shield Plaintiffs' Motion from the public record should be denied.

II. ARGUMENT

A. Defendants Fail to Provide Compelling Reasons to Seal Plaintiffs' Dispositive Brief and Supporting Documents with Specific Facts

Defendants have the burden to overcome the "strong presumption" in favor of access to judicial records by meeting the "compelling reasons standard." *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178–79 (9th Cir. 2006). "[Defendants] must articulate compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure, such as the public interest in understanding the judicial process." *Id.* (cleaned up). "In turn, the court must conscientiously balance the competing

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

interests of the public and the party who seeks to keep certain judicial records secret." *Id.* (cleaned up). Defendants must "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). Defendants' failure to do so should end the dispute in favor of unsealing the Motion. "[I]f the court decides to seal certain judicial records, it must base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture." *Id.*

"[T]he strong presumption of access to judicial records applies fully to dispositive pleadings, including motions for summary judgment and related attachments," because "resolution of a dispute on the merits . . . is at the heart of the interest in ensuring the public's understanding of the judicial process and of significant public events." *Id.* "The 'compelling reasons' standard is invoked even if the dispositive motion, or its attachments, were previously filed under seal or protective order." *Id.*

Defendants fail to provide "compelling reasons" to seal the Motion. Indeed, they provide no "specific factual findings" necessitating sealing, and instead, continue to rely on vague invocations of "national security". As the Supreme Court has cautioned, "national-security concerns must not become a talisman used to ward off inconvenient claims." *Ziglar v. Abassi*, 137 S.Ct. 1843, 1862 (2017). Here, despite their hefty burden, Defendants make broad claims of national security threats based on nothing but hypothesis and conjecture, without ever explaining what specific information requires sealing and why that information would present a national security threat if revealed. USCIS is not a law enforcement or intelligence agency, and it makes no effort to explain how it is competent to assess threats to national security. Nor is CARRP is a law enforcement program. Defendants offer no declaration from law enforcement or intelligence agency officials—not even its *own* officials—to support its claim of national security risks. Defendants put forward only their counsel's argument to support their claims.

Moreover, Defendants' national security rationale is purely speculative. Dkt. 561at 1 ("harms to national security that *could* arise if the protected information were released

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

publicly."); *id.* at 3 ("*could* compromise national security if publicly disclosed"); and *id.* at 4 ("*could* be used for improper purposes") (emphasis added). Defendants' conjecture is not a compelling reason to keep Plaintiffs' dispositive brief of public view.

Defendants fail to point to a single example of how Plaintiffs' Motion and attached exhibits reveal sensitive law enforcement techniques or intelligence gathering operations, nor could they. Defendants withheld as law enforcement privileged substantial portions of the submitted policy documents and A-Files. Following discovery litigation, the Court permitted Defendants to withhold all material containing third-party information, third-party communications, and inter-agency coordination as law enforcement privileged. *See* Dkt. 320; Dkt. 451. As a result, there is no unredacted information that reveals any of the information Defendants seek to hide from the public. Plaintiffs did not file any classified information. *See Ground Zero Center for Non-Violent Action v. U.S. Dep't of Navy*, 860 F.3d 1244, 1262 (9th Cir. 2017) ("[T]he fact that the documents are not classified" is relevant to the assessment of whether nondisclosure to the public is justified).

Defendants claim that the Motion must be sealed because it would reveal "how USCIS handles specific types of national security concerns" and how it vets applicants for such concerns. Dkt. 561 at 3. But those categories of information are already the subject of public knowledge. This too is reason enough to deny Defendants' motion. *Ground Zero*, 860 F.3d at 1262 ("the extent to which the information [was] already. . . publicly disclosed" is relevant to whether nondisclosure to the public is justified).

Defendants themselves submitted CARRP policy documents as part of the publicly filed certified administrative record ("CAR") in this case that reveal the very information Defendants claim should be shielded from public view. For example, Defendants complain that unsealing Plaintiffs' Motion would encourage "behavior changes and information concealment" Dkt. 561 at 4, but the indicators that USCIS uses to determine whether someone is a national security concern, including those originating from FBI security checks, are contained in Defendants' own publicly filed CAR. *See* Dkt. 286-3 ECF pages 31-32. But more significantly, dozens of core

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

CARRP documents—the operative policy memoranda and guidance documents, as well as various training modules—have been produced through FOIA requests and litigation, and been the subject of public scrutiny for more than a decade, prompting policy reports, news and law review articles, and litigation around the country.[1] The operative core guidance document listing indicators of a "national security concern" in CARRP, known as "Attachment A," has been public for years. *See* Dkt. 286-3 at 29-37; CARRP Attachment A, shorturl.at/oBIZ9. *See also* CARRP FOIA Documents, https://www.aclusocal.org/carrp (USCIS produced dozens of CARRP documents through FOIA, including training guides, workflows, and statistics). Based on these disclosures, applicants and their attorneys have long been able to determine whether USCIS views them as a "national security concern."

Naturally, USCIS's public disclosure of CARRP information is significantly more widespread than the one-off inadvertent disclosure Defendants' counsel suggest. Under FOIA, it has made hundreds of disclosures to immigration attorneys, news agencies and advocacy organizations. *See, e.g.,* Dkt. 243 ¶¶8-21 (Plaintiffs' expert Jay Gairson describing USCIS disclosures of CARRP information in hundreds of A-Files received); Dkt. 97 ¶¶4-6 (same); CARRP FOIA Documents, https://www.aclusocal.org/carrp (documents obtained through two FOIA requests); *ACLU of Southern California v. USCIS*, 133 F.Supp.3d 234 (D.D.C. 2015) (FOIA litigation); Daniel Burke, "He applied for a green card. Then the FBI came calling," CNN, Oct. 3, 2019 (obtaining CARRP statistics from USCIS); Yesenia Amaro, "Little-known law stops some Muslims from obtaining US citizenship," Las Vegas Review-Journal (Apr. 16, 2016) (obtaining CARRP statistics from USCIS). In other litigation, USCIS filed CARRP policy memoranda on the public record too. *Jafarzadeh v. Nielsen*, 321 F. Supp. 3d 19, 41–44 (D.D.C.

[1] *See, e.g.,* Dkt. 27 ¶4; CARRP, Wikipedia, https://en.wikipedia.org/wiki/CARRP; Jennie Pasquarella, *Muslims Need Not Apply: How USCIS Secretly Mandates the Discriminatory Delay and Denial of Citizenship and Immigration Benefits to Aspiring Americans*, ACLU of So. Calif. (Aug. 21, 2013), shorturl.at/nrR89; Katie Traverso, *Practice Advisory: USCIS's CARRP Program*, ACLU of So. Calif., shorturl.at/qtzGS; Nermeen Saba Arastu, *Aspiring Americans Thrown Out in the Cold*, 66 UCLA L. Rev. 1078 (2019); Ming Chen, *Citizenship Denied: Implications of the Naturalization Backlog for Noncitizens in the Military*, 97 Denv. L. Rev. 669 (2020); Diala Shamas, *A Nation of Informants: Reining in Post-9/11 Coercion of Intelligence Informants*, 83 BKNLR 1175 (2018); *Jafarzadeh v. Nielsen*, 321 F.Supp. 3d 19 (D.D.C. 2018); *Ghadami v. United States Dep't of Homeland Sec.*, 2020 WL 1308376 (D.D.C. Mar. 19, 2020); *Siddiqui v. Cissna*, 356 F.Supp.3d 772 (S.D. Ind. 2018); *Al-Saadoon v. Barr*, 973 F.3d 794, 803–04 (8th Cir. 2020).

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

2018) (Dkt. 33-1). Defendants' reliance here on *Ground Zero* is misplaced because the Ninth Circuit did not hold that the inadvertently disclosed document could remain sealed. *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1193-1202 (9th Cir. 2007) is similarly unavailing because that case involved a "Top Secret" classified document where the government invoked the states secret privilege. None of the documents at issue here are classified at any level and Defendants have not invoked the states secret privilege over any of these materials.

The recently filed amicus brief further proves the point. Amici relied exclusively on publicly available information, unrelated to anything produced or disclosed in this case to support their argument. *See* Dkt. 555-1.

Defendants offer no specific evidence to show how these documents are any different or reveal any *additional* sensitive information from those already in the public domain. It is Defendants' burden, not Plaintiffs' burden, to demonstrate to the Court how any of the nonpublic information at issue in Plaintiffs' Motion is any different that the policy and statistical information already in the public domain. Defendants fail to meet this burden.

Defendants cite no precedent that supports their extraordinary request to shield from the public a significant government policy that, as Plaintiffs allege, has denied thousands of people their statutory and constitutional rights, because there is none. The cases Defendants cite only confirm that the government must make a far more specific showing to justify sealing than they have done here. *In Ground Zero*, 860 F.3d at 1262, for example, the Court held it was "not enough that . . . the documents implicate[d] national security in some vague sense." *Id.* (cleaned up). Rather, any restrictions had to be "justified by specific facts showing that disclosure of particular documents would harm national security." *Id.* (emphasis added). Likewise, in *United States v. Ressam*, 221 F. Supp. 2d 1252 (W.D. Wash. 2002), the court rejected the government's argument that continued non-disclosure of protective orders sealed in connection with the Classified Information Procedures Act (CIPA) was required to protect national security. *Id.* at 1263. The court redacted only the name of an individual and nine other words that would immediately implicate the government's ability to gather intelligence. *Id.* at 1264. In *United*

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

States ex rel. Kelly v. Serco, Inc., No. 11CV2975 WQH-RBB, 2014 WL 12675246, at *4 (S.D. Cal. Dec. 22, 2014), the court allowed the sealing of a single exhibit only because it revealed the specific locations of surveillance towers along the border and "a variety of sensitive technical information related to the installed technology and sensor capabilities" of the towers. *Id.*

B. Reliance on the Protective Order and Past Sealing Orders Carries No Weight

Documents that Defendants labeled Confidential or Attorney's Eyes Only do not automatically mean there are compelling reasons to seal those 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); *see e.g.*, *Orthopaedic Hosp. v. DJO Glob., Inc., No. 19-CV-970 JLS (AHG)*, 2020 WL 7129348, at *2 (S.D. Cal. Dec. 4, 2020); *CH2O, Inc. v. Meras Eng'g, Inc.*, No. LACV1308418JAKGJSX, 2016 WL 7645595, at *1 (C.D. Cal. Mar. 3, 2016). While the initial designation of documents as Confidential or Attorney's Eyes Only may have met the "good cause" standard to so designate documents or file them under seal for non-dispositive motions, Defendants must now satisfy the significantly higher "compelling reasons" standard to maintain these documents under seal.

Defendants' reliance on prior Court orders granting motions to seal or other discovery motions is similarly unavailing. Each citation that Defendants offer was based on the lower "good cause" standard, not the much higher "compelling reasons" standard that applies here.

Finally, Defendants argue that Plaintiffs belatedly seek to overturn Defendants' confidentiality designations. Dkt. 561 at 5. But Defendants' argument confuses the issues and is irrelevant. *Defendants*, not Plaintiffs, have the burden to show compelling reasons exist to keep the Motion under seal. Plaintiffs are under no obligation to challenge protective order designations, let alone before challenging whether such information should remain under seal on a dispositive motion. Defendants' attempt to alleviate their own burden should be rejected.

III. CONCLUSION

For all the foregoing reasons, the Court should order Plaintiffs' Motion unsealed.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Respectfully submitted,

DATED: July 2, 2021

s/ Jennifer Pasquarella
s/ Liga Chia
Jennifer Pasquarella (admitted pro hac vice)
Liga Chia (admitted pro hac vice)
ACLU Foundation of Southern California
1313 W. 8th Street
Los Angeles, CA 90017
Telephone: (213) 977-5236
jpasquarella@aclusocal.org
lchia@aclusocal.org

s/ Matt Adams
Matt Adams #28287
Northwest Immigrant Rights Project
615 Second Ave., Ste. 400
Seattle, WA 98122
Telephone: (206) 957-8611
matt@nwirp.org

s/ Stacy Tolchin
Stacy Tolchin (admitted pro hac vice)
Law Offices of Stacy Tolchin
634 S. Spring St. Suite 500A
Los Angeles, CA 90014
Telephone: (213) 622-7450
Stacy@tolchinimmigration.com

s/ Hugh Handeyside
s/ Lee Gelernt
s/ Hina Shamsi
s/ Charles Hogle
Hugh Handeyside #39792
Lee Gelernt (admitted pro hac vice)
Hina Shamsi (admitted pro hac vice)
Charles Hogle (admitted pro hac vice)
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
Telephone: (212) 549-2616
hhandeyside@aclu.org
lgelernt@aclu.org
hshamsi@aclu.org
chogle@aclu.org

s/ Harry H. Schneider, Jr.
s/ Nicholas P. Gellert
s/ David A. Perez
s/ Heath L. Hyatt
s/ Paige L. Whidbee
Harry H. Schneider, Jr. #9404
Nicholas P. Gellert #18041
David A. Perez #43959
Heath L. Hyatt #54141
Paige L. Whidbee #55072
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
HSchneider@perkinscoie.com
Ngellert@perkinscoie.com
Dperez@perkinscoie.com
Hhyatt@perkinscoie.com
Pwhidbee@perkinscoie.com

s/ John Midgley
John Midgley #6511
ACLU of Washington
P.O. Box 2728
Seattle, WA 98111
Telephone: (206) 624-2184
jmidgley@aclu-wa.org

s/ Sameer Ahmed
s/ Sabrineh Ardalan
Sameer Ahmed (admitted pro hac vice)
Sabrineh Ardalan (admitted pro hac vice)
Harvard Immigration and Refugee Clinical Program
Harvard Law School
6 Everett Street; Suite 3105
Cambridge, MA 02138
Telephone: (617) 495-0638
sahmed@law.harvard.edu
sardalan@law.harvard.edu

Counsel for Plaintiffs