No. 21-71312

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: STATE OF ARIZONA, ANDY TOBIN, and PAUL SHANNON

STATE OF ARIZONA, ANDY TOBIN, PAUL SHANNON, Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,
Respondent.

RUSSELL B. TOOMEY, ARIZONA BOARD OF REGENTS D/B/A UNIVERSITY OF ARIZONA, RON SHOOPMAN, LARRY PENLEY, RAM KRISHNA, BILL RIDENOUR, LYNDEL MANSON, KARRIN TAYLOR ROBSON, JAY HEILER, FRED DUVAL, Real Parties In Interest

REPLY SUPPORTING PETITION FOR A WRIT OF MANDAMUS

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I. INTRODUCTION

The Petition for Writ of Mandamus challenges the District Court's Order[1] compelling the disclosure of documents protected by the attorney-client privilege. The Petition demonstrates State Defendants did not affirmatively assert or imply an advice of counsel defense. Plaintiff's Opposition fails to persuasively rebut this position and, instead, relies upon mischaracterizations and exaggerations of State Defendants' discovery responses. The Order is clearly erroneous because it relies upon Plaintiff's inaccurate and incomplete characterizations of the discovery responses. A review of those discovery responses demonstrates that State Defendants did not use the privilege as a sword, assert that they relied on legal advice, disclose what legal advice was given, or state that their understanding of the law was based on legal advice. As a result, State Defendants did not put their privileged communications "at issue." The Order is severely prejudicial and cannot be effectively unwound on appeal from a final judgment.

II. A WRIT OF MANDAMUS SHOULD ISSUE

"Mandamus is appropriate to review discovery orders when particularly important interests are at stake." *Hernandez v. Tanninen*, 604 F.3d 1095, 1099 (9th Cir. 2010) (*citing Perry v. Schwarzenegger*, 591 F.3d 1147, 1156–57 (9th Cir. 2010)); *see also Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111, 130 S. Ct.

[1] Capitalized terms have the same definition as outlined in the Petition.

599, 607, 175 L. Ed. 2d 458 (2009). Plaintiff agrees that the correct standard governing when a writ should issue are the *Bauman* factors. Here, four of the *Bauman* factors weigh in favor of issuing a writ of mandamus.

A. <u>The Order Is Clearly Erroneous</u>.

Addressing the third factor first, Plaintiff alleges that the District Court did not clearly err. (Opp., at 12–23.) Plaintiff asserts: (1) the Order properly finds that State Defendants waived the attorney-client privilege; and (2) State Defendants purportedly misstate the law and factual record. (*Id.*) These arguments are incorrect.

1. State Defendants Did Not Put The Privilege "At-Issue."

Plaintiff contends that State Defendants waived the attorney-client privilege by asserting that they relied on legal advice in their responses to Plaintiff's discovery. (*See id.*, at 14–20.) Plaintiff is correct that a party need not affirmatively plead an "advice of counsel" defense in order to waive the privilege. However, the privilege is waived ***only when*** a party: (1) affirmatively injects the privileged material into the litigation; (2) puts the privileged material at issue; and (3) "application of the privilege would deny the opposing party access to information needed to effectively litigate its rights." *United States v. Amlani*, 169 F.3d 1189, 1195 (9th Cir. 1999); *see also Melendres v. Arpaio*, No. CV-07-2513-PHX-GMS, 2015 WL 12911719, at *2 (D. Ariz. May 14, 2015). Merely "disclosing that legal counsel was consulted, the subject about which advice [was] received, or that action

was taken based on that advice" does not waive the privilege. *Melendres*, 2015 WL 12911719, at *3; *see also In re County of Erie*, 546 F.3d 222, 230 (2d Cir. 2008). Where the basis for the purported waiver is discovery responses, *each* of these factors must be met in the discovery response. *See Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992). Applying these standards, State Defendants' Interrogatory responses did not waive the privilege—expressly or impliedly.

Plaintiff's Interrogatory No. 1 requested that State Defendants "[i]dentify and describe all reasons why the [Plan] excludes coverage for 'gender reassignment surgery.'" (Pet., Ex. 3 at Exhibit 4 at pp. 2–3.) In response, State Defendants truthfully identified that one of the[2] reasons that they maintained the Exclusion was that "the State concluded, under the law, that it was not legally required to change its health plan to provide such coverage." (*Id.*) This response does not state where or from whom State Defendants obtained their understanding of the law, and certainly does not state that they relied on the advice of counsel. (*Id.*)

State Defendants' understanding of the law could be based on non-privileged sources, a possibility expressly recognized by the Magistrate Judge. (*See* Pet., Ex. 6 at 5–6.) The documents produced in this case and attached to the briefing clearly

[2] Plaintiff's Opposition quibbles over State Defendants' use of the word "many." (Opp., at 16, n.6.) It is undisputed that State Defendants' response to Interrogatory No. 1 lists at least two reasons for maintaining the Exclusion. (*See id.*; Pet., Ex. 3 at Exhibit 4 at pp. 2–3.) Further context was also provided in response to other Interrogatories and in State Defendants' witnesses' deposition testimony.

demonstrate that State Defendants, in fact, did review and interpret § 1557 themselves, and received interpretations of § 1557 and its impact from insurance vendors, medical consultants, news sources, and public presentations. (*Id.*, Ex. 7.) Each of these documents was produced to Plaintiff and referenced in State Defendants' written discovery responses. Further, many of them were discussed extensively during depositions of State Defendants' witnesses. Quite plainly, State Defendants' response to Interrogatory No. 1 neither affirmatively injects privileged communications into the litigation nor does it put them "at issue."

Interrogatory No. 4 requests an identification of "all persons who participated in formulating, adopting, maintaining, reviewing, approving or deciding to continue" the Exclusion. (*Id.*, Ex. 3 at Exhibit 5 at p. 5.) State Defendants truthfully identified the relevant people, three of whom are attorneys. (*Id.*) The response does not state either that the attorneys listed were acting as attorneys during the subject meetings or that they provided any legal advice, or that State Defendants relied on any legal advice from the listed attorneys. (*Id.*)

Not every communication between an attorney and a client is privileged. The facts communicated from a client to his or her counsel are not covered by the privilege. *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981). Further, the fact that counsel was consulted is not privileged. *See, e.g.*, *Colton v. United States*, 306 F.2d 633, 636 (2d Cir. 1962); *State v. Alexander*, 108 Ariz. 556, 568 (1972)

("the fact that the client has consulted an attorney, the dates and places of his visits, the identity of the client, and similar matters are outside the coverage of the privilege") (citation omitted). State Defendants' identification of the fact that attorneys were present at a meeting and may have reviewed the Exclusion does not reveal any privileged information and does not affirmatively inject any privileged information into this litigation. *See United States v. White*, 887 F.2d 267, 271 (D.C. Cir. 1989) ("An averment that lawyers have looked into a matter does not imply an intent to reveal the substance of the lawyers' advice."). Plaintiff seeks to force State Defendants into an untenable position of either failing to truthfully disclose that attorneys were present at discussions or waiving the privilege by doing so. That is unjust and should not result in a waiver of the important privilege.

Interrogatory No. 7 requests an identification of "all" documents "considered, reviewed, or relied on" by State Defendants "relating to" the Exclusion. (Pet., Ex. 3 at Exhibit 5 at p. 7.) State Defendants' response identified several documents and sources, including both non-privileged documents (such as those authored by insurance vendors, human resource organizations, consultants, and the press) and two communications with legal counsel. (*See id.* at 7–8.) As with the responses to Interrogatory Nos. 1 and 4, again, State Defendants' response to Interrogatory No. 7 did not disclose any legal advice, did not indicate whether there even was a recommendation from legal counsel, and did not state that State Defendants relied

on any advice of legal counsel. It did not put the legal advice at issue.

Moreover, Interrogatory No. 7 is not limited to documents "considered, reviewed, or relied on" in the State Defendants' ***decision-making process***. (*Id.* at 7.) Instead, it seeks all documents "relating to" the Exclusion, whether or not they were germane to State Defendants' decision-making. Plaintiff's Opposition mischaracterizes this fact to suggest that the documents listed were "essential to" the decision to maintain the Exclusion. Plaintiff often repeats that, but State Defendants never said it. Nothing in State Defendants' response to Interrogatory No. 7 suggests that they *relied* on the advice of counsel in any way for their understanding of the law, as asserted by Plaintiff and adopted in the Order. That was clear error.

State Defendants' Interrogatory responses never disclosed: (1) what the legal advice was; (2) whether there was any recommendation from legal counsel; (3) whether State Defendants relied upon any advice from legal counsel; (4) whether actions were based on or justified by legal advice; or (5) what attorneys gave legal advice—whether outside counsel or counsel associated with the State. State Defendants merely acknowledged that counsel was involved in discussions. Under governing case law, that does not waive the privilege. State Defendants' truthful responses to interrogatories did not put legal advice at issue, nor use it as a sword.

2. The Facts And Law Support State Defendants' Position.

First, Plaintiff argues that a party need not "formally plead" an advice of

counsel defense. (Opp., at 17–18.) However, the privilege is waived ***only when*** a party: (1) affirmatively injects the privileged material into the litigation; (2) puts the privileged material at issue; and (3) "the privilege would deny the opposing party access to information needed to effectively litigate its rights." *Amlani*, 169 F.3d at 1195; *see also Melendres*, 2015 WL 12911719, at *2. This standard has not been met. Plaintiff put the privileged communications at issue, but it is not Plaintiff's prerogative to do so. Only State Defendants can do so and they have not.

Second, Plaintiff argues that State Defendants implicitly waived the privilege by apparently "allud[ing] to" privileged communications. (Opp., at 18.) "The doctrine of implied waiver is invoked when a party makes the content of his attorney's advice relevant to some claim or defense in the case." *Wi-LAN, Inc. v. Kilpatrick Townsend & Stockton LLP*, 684 F.3d 1364, 1370 (Fed. Cir. 2012) (applying Ninth Circuit precedent); *see also Chevron*, 974 F.2d at 1162–63 (privilege was implicitly waived where a party "claims that its [] position is reasonable because it was based on advice of counsel"). As outlined above, State Defendants did not assert or imply that they relied on legal advice in making the decision to maintain the Exclusion. Instead, State Defendants merely acknowledge that attorneys were consulted. Identification of the attorneys consulted was required in order to provide a complete and truthful response to the Interrogatories; not identifying that counsel was consulted would have been sanctionable conduct.

However, this information is insufficient to imply a privilege waiver.

Third, Plaintiff speculates that State Defendants did not rely on non-privileged sources in coming to their understanding of Affordable Care Act § 1557. (Opp., at 20.) It is unclear how Plaintiff can say what State Defendants reviewed or relied upon in making their decision. Plaintiff provided no evidence suggesting that State Defendants did not rely upon non-privileged sources of information during the decision-making process. (*See generally id.*) Contrary to Plaintiff's assertion, State Defendants expressly stated that they relied on non-privileged information in interpretating § 1557. (Pet., Ex. 3 at Exhibit 3 at pp. 7–8 ("Defendants also gathered information and data from insurers and other entities regarding their experience providing transgender benefits[.]").) Quite plainly, Plaintiff's argument is directly contradicted by the language of State Defendants' Interrogatory responses.

Fourth, Plaintiff attempts to rebut the argument that State Defendants' identification of meetings with attorneys is insufficient to waive the privilege by asserting that the Order does not implicate non-privileged communications with attorneys. (Opp., at 20–21.) Plaintiff's position is perplexing. Obviously, the Order does not implicate non-privileged documents. Indeed, there would be no basis for such a motion to compel because State Defendants produced all non-privileged communications with counsel (including communications discussing and approving the language of the Exclusion) and stated non-privileged information in their

discovery responses (such as the fact that counsel was consulted). However, this only emphasizes the prejudice that will result if the Order is upheld.

Fifth, Plaintiff argues that State Defendants also waived the privilege via deposition testimony. (*See* Opp., at 2, 8, 19.) Deposition testimony is not relevant to the instant Petition because the Order does not adopt this rationale as a reason for granting the Motion and does not find that deposition testimony was a waiver. (*See generally* Pet., Ex. 1.) For this reason, deposition testimony is not part of the Petition. (*Id.* at 19, n.5.) The Court should disregard any references to deposition testimony.

B. State Defendants Have No Other Adequate Means of Relief.

Plaintiff does not refute that State Defendants exhausted all available remedies and admits that the Order is not independently appealable. (Opp., at 24–25.) Plaintiff instead argues that State Defendants can obtain relief by either: (1) deliberately disobeying the Order and appealing the resulting sanctions; or (2) producing the documents, accepting any resulting prejudice, and appealing the Order after a final judgment is entered. (*Id.*) This Hobson's choice is contrary to both *Mohawk* and this Court's post-*Mohawk* decisions. First, as Plaintiff recognizes, *Mohawk* expressly left open the possibility that a party may seek (and obtain) a writ of mandamus in this situation. *See Mohawk*, 558 U.S. at 111; *see also In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (stating that the *Mohawk* court "repeatedly and expressly reaffirmed that *mandamus* . . . remains a 'useful

safety valve' in some cases of clear error to correct 'some of the more consequential attorney-client privilege rulings'") (emphasis in original). Further, a party is not required to risk sanctions for failing to comply with a discovery order in order to obtain review. *In re Perez*, 749 F3d 849, 955 (9th Cir. 2014).[3]

C. State Defendants Will Be Prejudiced By Production Of The Documents.

Plaintiff does not dispute that State Defendants will be prejudiced by production of the privileged documents. (*See* Opp., at 25–30.) Instead, Plaintiff argues that any prejudice is minimal and can be corrected on appeal.[4] (*Id.*)

Plaintiff's argument that the Order does not affect all State Defendants' privileged documents does nothing to remedy the potential prejudice to State Defendants. The attorney-client privilege provides clients with a right not to disclose privileged information in the course of litigation. *See Mohawk*, 558 U.S. at 109 ("an order to disclose privileged information intrudes on the confidentiality of attorney-client communications"). An order compelling disclosure of privileged documents will prejudice the disclosing party, whether it affects one or one-thousand communications. This prejudice is magnified where, as here, the disclosure order

[3] Even if Plaintiff's suggestions were an effective or realistic option, that would only result in this Court addressing the same issues on a later appeal.

[4] Plaintiff also asserts that this Court should consider "fairness and [the] policy-based reasoning behind the 'at-issue' waiver" doctrine in determining whether State Defendants will be prejudiced. (Opp., at 26.) Plaintiff cites no authority for this position, which contradicts the second *Bauman* factor and cases interpreting it.

compels production of documents that were not subject to a waiver of the privilege. *See Hernandez*, 604 F.3d at 1101 ("a blanket waiver of both privileges could result in matters far beyond the scope of the waiver being disclosed").

Plaintiff is correct that, in *Mohawk*, the Supreme Court found that post-judgment remedies "generally suffice" to protect the rights of litigants who are compelled to produce privileged materials. 558 U.S. at 110–11 (cited at Opp., at 27). However, Plaintiff largely ignores *Mohawk*'s statement that post-judgment appeals may not be sufficient for "correcting serious errors," such as a "particularly injurious or novel privilege ruling." 558 U.S. at 110–11. As outlined in the Petition, compelling a government entity to produce attorney-client privileged documents is "particularly injurious." *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 166 (2011); *In re City of Houston*, 772 Fed. App'x 143, 144 (5th Cir. 2019). Plaintiff attempts to distinguish *Jicarilla* by asserting that it "is not novel" because of the application of the attorney-client privilege, but rather because of the interplay between the federal government and indigenous nations. (*See* Opp., at 29.) In *Jicarilla*, the Supreme Court reviewed the Federal Circuit's denial of a petition for writ of mandamus in order to analyze the application of a common law exception to the attorney-client privilege. 564 U.S. at 165. While the relationship between the federal government and indigenous nations was discussed, the thrust of the decision focuses on the application of the attorney-client privilege asserted by the United

States and the exception raised by the Tribes. *See generally* 564 U.S. 162. Similarly, the Fifth Circuit in *In re City of Houston*, 772 Fed. App'x 143, 144 (5th Cir. 2019), granted a writ of mandamus to vacate an order compelling production of attorney-client privileged documents in the possession of the City. Plaintiff does not even attempt to distinguish *In re City of Houston*. (*See generally* Opp., at 25–30.)

Courts find disclosure of a government's privileged documents "particularly injurious" because the attorney-client privilege applies with a "special" force with a government client. *See Modesto Irrigation Dist. v. Gutierrez*, 1:06-CV00453 OWWDLB, 2007 WL 763370, at *13 (E. D. Cal. Mar. 9, 2007). Government entities are tasked with reviewing, considering, and creating policies for the benefit of the public. These decisions may affect millions of people and, moreover, often involve weighing competing interests about which constituents may feel very strongly and which may be challenged after-the-fact. For these reasons, government officials formulating policies in the public interest are encouraged to (and often do) take advantage of the privilege and consult with counsel. *Modesto Irrigation*, 2007 WL 763370, at *13. Governmental entities should be permitted to seek legal advice without fear of disclosure. As the Second Circuit explained, government entities consulting attorneys is "a normal, desirable, and ***even indispensable*** part of conducting public business." *Am. C.L. Union v. Nat'l Sec. Agency*, 925 F.3d 576, 589 (2d Cir. 2019) (internal quotations omitted) (emphasis added). Disrupting this

process "undermines that culture and thereby ***impairs the public interest***." *Id.* Plaintiff's argument puts State Defendants—and other government entities—in a no-win situation. Either State Defendants ignore changes in the legal landscape and do not consult counsel in making decisions that affect millions of Arizona citizens or they acknowledge that they want to follow the law, consult counsel, and make a decision, knowing that they will be deemed to have waived the privilege. The first route is not only bad for the public interest, but would likely expose State Defendants to litigation. The second route deprives them of the benefit of the privilege.

Plaintiff's attempts to distinguish *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010), and *Hernandez v. Tanninen*, 604 F.3d 1095 (9th Cir. 2010), are unpersuasive. First, Plaintiff argues that the *Perry* court's statement that "[a] post-judgment appeal would not provide an effective remedy" for compelled production of privileged materials because "no such review could prevent the damage that [Petitioners] allege they will suffer or afford effective relief" is not applicable here because *Perry* analyzed the application of the First Amendment, not the attorney-client privilege. (Opp., at 28–29.) However, the portions of *Perry* cited by Plaintiff come from the Court's discussion regarding the collateral order doctrine, not availability of a writ of mandamus. (*See id.* (*citing* 591 F.3d at 1155–56).) Plaintiff's argument also ignores the several other courts that also state that the prejudice stemming from disclosure of privileged documents comes from the disclosure itself.

See Mohawk, 558 U.S. at 109; *see also Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Arizona*, 881 F.2d 1486, 1491 (9th Cir. 1989) ("if Admiral is forced to produce a privileged statement, it will be injured in a way not correctable on appeal"). Second, Plaintiff attempts to distinguish *Hernandez* by pointing out that the disclosure order in that case found a "blanket" waiver, affecting all of the petitioner's attorney-client privileged communications. (Opp., at 29.) The *Hernandez* court found the waiver to be clearly erroneous not because of its title but because it "result[ed] in matters far beyond the scope of the waiver being disclosed." 604 F.3d at 1101. This concern is equally applicable here because State Defendants did not waive the privilege and, therefore, the Order necessarily goes beyond the scope of the waiver.

D. <u>The Order Disregards The Well-Established Attorney-Client Privilege</u>.

Contrary to Plaintiff's assertions (Opp., at 30–31), State Defendants do complain that the District Court repeatedly erred by ordering disclosure of the attorney-client privileged documents. First, the Magistrate Judge granted the Motion (Pet., Ex. 6) over State Defendants' opposition (*id.*, Ex. 5). Then, the District Court rejected State Defendants' objection and affirmed the Magistrate Judge's order. (*Id.*, Exs. 1 & 7.) The fourth *Bauman* factor can be satisfied when a district court rejects a party's request to reconsider. *See In re Canter*, 299 F.3d 1150, 1154–55 (9th Cir. 2002); *see also Cole v. U.S. Dist. Court For Dist. of Idaho*, 366 F.3d 813, 823 (9th Cir. 2004) (fourth factor not satisfied where court did not "repeatedly refuse[] to

reconsider" order).

Moreover, the Order disregards the federally-established attorney-client privilege. The Order mentions the importance of the privilege in a single sentence, but then fails to accommodate the importance of the privilege or the potentially grave consequences of the Order. (Pet., Ex. 1.) Obtaining privileged communications will always assist a party in litigation, but such communications are nevertheless expressly excluded from the scope of discovery under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 26(b)(1). This is especially important when the client is a government entity. (*See supra*, § II.C.) The Order, however, finds that State Defendants' mere acknowledgement that they researched the law and consulted legal counsel *waived* the attorney-client privilege. It cannot be so. If the attorney-client privilege can be waived so easily, government officials who consult counsel in any context can ***never*** assume their communications are privileged. They will, therefore, be discouraged from seeking legal counsel when making important public policy decisions. The fourth *Bauman* factor weighs in favor of granting the Petition.[5]

III. CONCLUSION

State Defendants respectfully request that the Court grant the Petition and issue a Writ of Mandamus directing the District Court to vacate the Order.

[5] Moreover, all five *Bauman* factors need not be established for a writ of mandamus to properly issue. *In re U.S.*, 791 F.3d 945, 955 (9th Cir. 2015); *Hernandez*, 604 F.3d at 1101.

DATED this 20th day of December, 2021.

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I hereby certify that I electronically filed the foregoing Reply Supporting Petition for Writ of Mandamus with the Clerk of the Court for the United States Court of Appels for the Ninth Circuit by using the appellate CM/ECF system on December 20, 2021. The undersigned further certifies that on December 20, 2021, the Reply Supporting Petition for Writ of Mandamus was served by mail on all participants listed below:

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