THE HONORABLE LAUREN KING

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-LK

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR RECONSIDERATION (ECF 640)

NOTE ON MOTION CALENDAR: November 13, 2023

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In its Order of September 7, 2023, the Court ruled, in relevant part, that Defendants had failed to establish a compelling interest in redacting information that "generally indicate[s] whether named Plaintiffs have been subjected to CARRP." Dkt. 626 at 15. Defendants moved for reconsideration, Dkt. 640, and the Court invited Plaintiffs to file a response, Dkt. 648. For the following reasons, Defendants' motion for reconsideration should be denied.

I. LEGAL STANDARD

"Motions for reconsideration are disfavored." Local Civ. R. 7(h)(1); *see also Barton v. LeadPoint Inc.*, No. C21-5372 BHS, 2022 WL 293135, at *1 (W.D. Wash. Feb. 1, 2022) ("Reconsideration is an 'extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.'") (quoting *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)). A party seeking reconsideration must make "a showing of (a) manifest error in the ruling, or (b) facts or legal authority which could not have been brought to the attention of the court earlier, through reasonable diligence." *Barton*, 2022 WL 293135, at *1. A "manifest error" is "an error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record." *Id.* (internal quotation marks omitted).

II. DISCUSSION

A. The Court did not manifestly err in concluding that general information on the Named Plaintiffs' CARRP status may not be redacted.

Defendants seek reconsideration of the Court's order to unseal information that indicates, in general terms, whether the Named Plaintiffs were subject to CARRP (their "CARRP status").[1] To support their motion, Defendants assert that certain Court orders granting Attorneys' Eyes Only (AEO) protection to information exchanged in discovery "implicitly recognize[d]" a compelling reason to seal "any content tending to reveal the CARRP status of class members." Dkt. 640 at 5. Defendants are mistaken.

[1] In the records submitted with their motion for reconsideration, Defendants have applied red highlighting to the text they would redact in public filings if their motion were granted. Most of this red-highlighted text concerns the CARRP status of the Named Plaintiffs, but some of it does not. Plaintiffs briefly address the red-highlighted text that does not concern the CARRP status of the Named Plaintiffs in parts B and C below.

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To begin, the Court has never ruled that the CARRP status of the Named Plaintiffs requires AEO protection. During discovery, the Court issued two key orders imposing AEO restrictions. The first, issued in May 2018, imposed AEO restrictions on "the names, Alien numbers . . . and application filing dates of the *unnamed plaintiff members* of the Naturalization Class."[2] Dkt. 183 at 2 (emphasis added); *see also* Dkt. 126 at 8 (Defendants' motion seeking AEO designation of "the names, A numbers, and application filing dates of the *unnamed* class members") (emphasis added). The second, issued in July 2019, imposed AEO restrictions on any information in the Named Plaintiffs' A-Files revealing "*why* the Named Plaintiffs were subjected to CARRP." Dkt. 274 at 1–2 (quotation marks omitted) (emphasis added); *id.* at 5. Neither order imposed AEO restrictions on information generally indicating *whether* the Named Plaintiffs were subject to CARRP. Thus, the AEO restrictions imposed by the Court during discovery do not encompass the Named Plaintiffs' CARRP status. Defendants' contrary assertion, which forms the backbone of their motion for reconsideration, is flatly wrong.

Significantly, in its July 2019 discovery order, the Court held that "whether or not the Named Plaintiffs were subject to CARRP" was not "information properly withheld under the law enforcement privilege" because "whether [the Named] Plaintiffs' applications were subject to CARRP has already been disclosed either through FOIA requests or disclosures by Defendants." Dkt. 274 at 3. The Court also stated that it had previously "ordered Defendants to produce information showing the reasons why the Named Plaintiffs were subjected to CARRP," *id.* at 1–2 (internal quotation marks and citation omitted), and referred directly to "'why' information in the Named Plaintiffs' A Files," *id.* at 5. These statements are irreconcilable with Defendants' contention that the Court sought to conceal from the public "*any content* tending to reveal the CARRP status of class members." Dkt. 640 at 5 (emphasis added).

[2] Plaintiffs subsequently agreed that if Defendants produced discovery indicating the CARRP status of the Named Plaintiffs, Plaintiffs would treat that information as if it were subject to the AEO protections in Court's May 2018 order. That agreement between the parties, made to facilitate discovery, is hardly equivalent to an order of the Court.

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In any event, as the Court has explained, the entry of a protective order—even one imposing AEO restrictions—does not establish a basis for sealing. Dkt. 626 at 14 n.6; Dkt. 587 at 5–6; *see also Thrive Nat. Care, Inc. v. Thrive Causemetics, Inc.*, No. CV 20-9091 PA (ASX), 2021 WL 5279575, at *1 (C.D. Cal. Sept. 21, 2021) (denying motion to seal discovery designated "Attorneys' Eyes Only"). Defendants identify no contrary authority—and none exists. Instead, they cite a pair of irrelevant cases holding that the public's presumptive right of access to judicial records did not extend to documents submitted *in camera* to resolve a discovery dispute. *See* Dkt. 640 at 5 (citing *United States v. Ressam*, 221 F. Supp. 2d 1252, 1258 (W.D. Wash. 2002) (holding presumptive right of access inapplicable to judicial records submitted by government during discovery proceeding under Classified Information Procedures Act); *United States v. Wolfson*, 55 F.3d 58, 60 (2d Cir. 1995) (holding presumptive right of access not applicable to documents reviewed *in camera* pursuant to discovery dispute and held to be non-discoverable)). Those cases have no bearing here, where the public's strong right of access to the records in question is settled.

Relatedly, Defendants fault the Court for purportedly failing to consider several "classified and privileged declarations" submitted for *ex parte, in camera* review during discovery. Dkt. 640 at 3. These declarations, say Defendants, provided "the underlying justification for the AEO protection" granted by the Court's discovery orders. *Id.* But Defendants waived reliance on their *ex parte* discovery declarations by failing to cite them in the parties' joint submission on sealing, Dkt. 609 at 8–19, or Defendants' attached declaration, Dkt. 609-2 at 1–6. Defendants now claim that their "error was attributable, at least in part, to an inclination to refrain from referencing classified material as a first resort." Dkt. 640 at 5. This explanation does not excuse the error—indeed, it does not make sense. Defendants have already relied upon the same *ex parte* discovery declarations at earlier points in this litigation; doing so again would hardly have been a "first resort." *Id.*

Setting aside Defendants' waiver, the *ex parte* discovery declarations would not have altered the sealing analysis. Those declarations were submitted in support of privilege claims, and thus do not support sealing, regardless of whether AEO protection was attached to certain

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information produced in discovery. Moreover, even if the *ex parte* declarations might have provided testimony relevant to sealing at the time they were prepared, Defendants offer no basis on which to conclude that they are relevant now. Years have passed. The Named Plaintiffs' circumstances have changed. So have global politics and the leadership of the Executive Branch; indeed, since the *ex parte* declarations were submitted, the Executive has run through a series of changing public positions on whether, and for how long, it will continue to operate CARRP at all. Given all that has happened since the submission of the *ex parte* declarations, neither law nor logic suggests that they are relevant to the present sealing dispute, and the Court would not have been required to consider them even if they had been properly cited.

B. The Court did not manifestly err in concluding that general information on a small number of unnamed Plaintiffs' CARRP status may not be redacted.

Nearly all the red-highlighted text as to which Defendants seek reconsideration involves the Named Plaintiffs' CARRP status. To the best of Plaintiffs' knowledge, there is only one excerpt that relates to the CARRP status of a small group of unnamed class members: the red-highlighted text on page 2, lines 21–22 of Document 14. Most of the foregoing analysis applies to this text, just as it applies to the Named Plaintiffs' CARRP status. A discovery order—even one imposing an AEO restriction—does not establish a compelling reason to overcome the public's presumptive right of access to judicial records, and Defendants' years-old *ex parte* declarations would not have carried their burden even if Defendants had not waived reliance on them.

C. Defendants offer no explanation of how the Court may have erred as to some of the text they challenge.

There are several instances of red-highlighted text for which Defendants offer no explanation how the Court may have erred. For instance, in Documents 18–23, they seek reconsideration of a footer that does not disclose CARRP status. And, on several documents, they seek reconsideration of dates and other similar objective information that does not disclose CARRP status. The Court should not grant reconsideration of this red-highlighted material.

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III. CONCLUSION

Defendants fail to identify any "manifest error" in the Court's Order of September 7, 2023, Dkt. 626. Local Civ. R. 7(h)(1). Defendants also fail—indeed, do not attempt—to identify "new facts or legal authority which could not have been brought to [the Court's] attention earlier with reasonable diligence." *Id.* Accordingly, and for the reasons stated above, the Court should deny the motion.

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We certify that this memorandum contains 1,575 words, in compliance with the Local Civil Rules and the Court's November 20, 2023 Order.

Respectfully submitted,

DATED: November 28, 2023

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