



1 **I. INTRODUCTION**

2 Despite devoting the bulk of their brief to challenging the pace of discovery—an issue the  
 3 Court already has under consideration—Plaintiffs’ actual request sanctions is based on three  
 4 alleged violations of Court orders. In none of those instances, however, have Defendants violated  
 5 the Court’s orders. Even assuming Defendants misunderstood the Court’s intent on an issue,  
 6 there are numerous special circumstances that make award of attorneys’ fees at this juncture  
 7 unjust—including the potential availability of attorneys’ fees under the Equal Access to Justice  
 8 Act (“EAJA”) at the conclusion of the case. Importantly, Plaintiffs have alleged no prejudice,  
 9 and Defendants recently stipulated to vacate deadlines related to expert discovery until  
 10 outstanding discovery issues are resolved. Finally, even if the Court were inclined to impose  
 11 sanctions, the vast majority of the attorney-time claimed by Plaintiffs cannot be awarded because  
 12 it preceded the alleged violations, and thus could not have been “caused by the failure” of  
 13 Defendants to abide by the relevant orders. The motion is meritless and should be denied.

14 **II. BACKGROUND**

15 **A. Court’s October 19, 2017 Order (“Why” Documents and Class List)**

16 In Plaintiffs’ First Requests for Production to Defendants (“First RFPs”), Plaintiffs  
 17 requested documents about why each named Plaintiff’s immigration benefit application was  
 18 subjected to the Controlled Application Review and Resolution Program (“CARRP”) (RFPs No.  
 19 13, 15, 17, 19, 21) (hereinafter “‘why’ documents”), Dkt. 92, Ex. A, and documents sufficient to  
 20 identify each class member (RFPs No. 34, 35) (hereinafter “class list”), *id.* Defendants objected  
 21 to producing both the “why” documents and the class list on the ground that Defendants had a  
 22 law enforcement privilege to “neither confirm nor deny” whether any particular individual’s  
 23 immigration benefit application was subjected to the CARRP.<sup>1</sup> *See id.* Defendants also noted in  
 24 their objections that any particular “why” document, if such existed, might also be privileged.  
 25  
 26

27 \_\_\_\_\_  
 28 <sup>1</sup> With respect to the particular requests for “why” documents related to the named Plaintiffs, Defendants  
 objected, *inter alia*, that they could “neither confirm nor deny that [the named plaintiff’s] naturalization  
 application was subject to CARRP as this information is privileged.” *Id.*

1 Dissatisfied, Plaintiffs moved to compel. Dkt. 91. Plaintiffs acknowledged that  
2 Defendants had not yet made a claim of privilege over the contents of the “why” documents:

3 Because Defendants assert that privilege prevents disclosure of whether Named  
4 Plaintiffs are subject to CARRP, they do not address what privilege, if any, they  
5 believe applies to documents disclosing why Named Plaintiffs are subject to  
CARRP, as requested in RFP Nos. 13, 15, 17, 19 and 21.

6 Dkt. 91 at 4 n.4. In response, Defendants argued only about the privilege claim concerning the  
7 *identity* of the class members, to include named Plaintiffs. Dkt. 94 at 7 (“disclosure of whether a  
8 particular individual application is subject to CARRP could cause substantial harm to law  
9 enforcement investigations and intelligence activities.”). In reply, Plaintiffs again acknowledged  
10 that Defendants had not, at that point, claimed privilege over the “why” information:

11 Defendants also ignore—and thus appear to concede as proper—Plaintiffs’  
12 requests for documents related to the reasons why the five named Plaintiffs have  
13 been subject to CARRP. *See* Perez Decl. Ex. A at RFP Nos. 13, 15, 17, 19, 21; *id.*  
14 Ex. B (raising the issue); Mot. at 3 (arguing Defendants cannot categorically  
15 claim privilege over this information). To the extent Defendants maintain their  
position that these documents, too, are categorically subject to the law  
enforcement privilege, Plaintiffs’ above arguments apply equally here.

16 Dkt. 95 at 4 n.2. The only question before the Court in the motion to compel was whether  
17 Defendants had a law enforcement privilege to “neither confirm nor deny” whether any  
18 particular individual’s immigration benefit application was subjected to the CARRP; Defendants  
19 had not asserted privilege over any particular piece of “why” information, or even identified  
20 whether such information existed. Indeed, asserting privileges over reasons why a named  
21 plaintiff was in CARRP would have required Defendants to admit the individual was in CARRP,  
22 thereby waiving the threshold claim of privilege then being litigated. On the question before the  
23 Court, the Court said:

24 [s]uch a vague, brief explanation that consists of mere speculation and a  
25 hypothetical result is not sufficient to claim privilege over basic spreadsheets  
identifying who is subject to CARRP . . . .

26 [f]inally, Plaintiffs request to know why the Named Plaintiffs were subjected to  
27 CARRP. *For the same reasons stated above*, the Court finds that this information  
28 is relevant to the claims and Plaintiffs’ needs outweigh the Government’s reasons  
for withholding.

1 Dkt. 98 at 3, 4 (emphasis added). The Court acknowledged the importance of protecting  
 2 information identifying applications subjected to CARRP and specific information relating to  
 3 individuals: “The Court notes that there is a protective order in place, Dkt. 86, and Plaintiffs’  
 4 attorneys could supplement the protective order . . . to assuage any remaining concerns on the  
 5 part of the Government.” Dkt. 98 at 4. And, in denying Defendants’ motion for reconsideration,  
 6 the Court invited the parties to agree to an additional protective order. Dkt. 102, at 3.

7 Ultimately, in a February 2018 Joint Status Report, the parties informed the Court that  
 8 Defendants would produce copies of the named Plaintiffs’ alien files (“A Files”) by February 28,  
 9 2018, and the class list by March 5, 2018. Dkt. 114, at 4. Plaintiffs asserted the A Files should be  
 10 produced un-redacted, while Defendants stated they would produce non-privileged A File  
 11 documents, consistent with their understanding that the Court’s October 19, 2017 order left open  
 12 the possibility of asserting privilege over particular items of information in the A Files.  
 13 Defendants also stated that they reserved the right to seek relief from the Court, as necessary,  
 14 concerning production of the class members list. *Id.*

15 On February 14, 2018, the Court acknowledged that Defendants intended to claim  
 16 privilege over information in the A Files, which includes “why” documents. *See* Dkt. 140, Ex. L,  
 17 at 26:7-13.<sup>2</sup> The Court also acknowledged that Defendants intended to seek further relief related  
 18 to production of the class list. *See id.*, at 27:17-28:2.<sup>3</sup>

19 On February 28, 2018, Defendants produced the A Files, withholding certain information  
 20 under the attorney-client, deliberative process, and law enforcement privileges,<sup>4</sup> Declaration of

21 <sup>2</sup> “MR. WHITE: And our intention would be, as we said earlier, to only redact that which we believe to be  
 22 privileged that needs to be redacted, and provide a privilege log that identifies the privilege being claimed  
 23 and the basis for it.

THE COURT: Okay. All right. Enough said on Item No. 6.” Dkt. 140, Ex. L, at 26:7-13.

24 <sup>3</sup> “MR. WHITE: But what we wanted to be candid with the court about, which is the purpose of the  
 25 subordinate clause [in the status report], was what we’re doing now is consulting with third agencies who --  
 26 that might suffer any risk or harm from the disclosure of the names on the list. And depending on how  
 27 those consultations develop -- and we’re actually working those -- we may potentially come back to the  
 28 court prior to the production deadline to seek further relief. But absent that, our intention is to comply with  
 Your Honor’s orders.

THE COURT: All right.” Dkt. 140, Ex. L., at 27:17-28:2.

<sup>4</sup> Plaintiffs assume, incorrectly, that all redactions from the A Files necessarily concern “why” information,  
 and that all “why” information, to the extent it exists, is in the A Files. Neither assumption is correct. The A

1 Joseph F. Carilli Jr. (Carilli Decl.) Ex. 5, and, on March 16, 2018, produced the corresponding  
 2 privilege logs. Dkt. 140, Ex. Q. On March 1, 2018, in accordance with the Court’s suggestion to  
 3 further supplement the protective order, Defendants moved the court “to supplement the existing  
 4 protective order to limit disclosure of the names, A numbers, and application filing dates of the  
 5 certified class members solely to Plaintiffs’ attorneys of record, any experts retained by  
 6 Plaintiffs, and the Court and court personnel.” Dkt. 126 at 2. On March 5, 2018, Defendants  
 7 produced the class list, but withheld the information at issue in the motion for a supplemental  
 8 protective order pending the Court’s ruling on the motion. Carilli Decl., Ex. 6.

9 **B. Court’s February 14, 2018 Order (“PETT List”)**

10 On February 14, 2018, the Court ordered Defendants to identify to Plaintiffs who among  
 11 the named Custodians had served on the President-Elect Transition Team (“PETT”). Dkt. 140,  
 12 Ex. L, at 21:5-8. On March 9, 2018, Defendants disclosed to Plaintiffs who among the 41  
 13 Custodians thus far identified had served on the President-Elect Transition Team, with the single  
 14 exception of Secretary John F. Kelly. *See* Dkt. 140, Ex. R. Defendants explained that:

15 Given Gen. Kelly’s current position as the President’s Chief of Staff and the  
 16 limits on discovery from the President and his close advisors, *see Cheney v. U.S.*  
 17 *Dist. Ct. for the Dist. of Columbia*, 542 U.S. 367 (2004), [Defendants] have not  
 18 inquired directly with Gen. Kelly whether he was on the President-Elect  
 19 Transition Team, and do not believe it is appropriate or necessary to do so.

18 *Id.*

19 **C. Production Timeline**

20 Defendants agreed to a discovery plan, Dkt. 78, based on certain assumptions about the  
 21 scope of the issues in this case. In hindsight, that plan may have been optimistic. Further, over  
 22 time, the scope of discovery and the number of documents that need to be collected and reviewed  
 23 has considerably expanded. *See, e.g.*, Dkts. 104, 114, 117, 124. In September 2017, at the  
 24 parties’ first meet-and-confer about the First RFPs, Defendants proposed a modification to the  
 25

26 Files contain privileged information that does not have any relationship to the CARRP policy. Emrich  
 27 Decl., ¶ 11. There can be no argument that redacting non-“why” information does not violate the Court’s  
 28 October 19, 2017 order (and the Court should not, therefore, order production of fully *unredacted* A Files).  
 If the Plaintiffs were subject to the CARRP policy, some number of “why” documents would not  
 necessarily be in the Plaintiffs’ A Files. Those documents, to the extent they exist, will be reviewed for  
 privilege; the non-privileged portions will be produced once review is complete.

1 pre-trial schedule to permit Defendants adequate time to produce the requested discovery and  
2 Plaintiffs adequate time for follow-on discovery. *See* Dkt. 140, Ex. E at 2. Plaintiffs rejected the  
3 proposal. *See* Dkt. 140, Ex. D, at 2; *see also id.*, Ex. F at 2.

4 In response to the First RFPs, in September 2017, Defendants disclosed to Plaintiffs eight  
5 custodians and ten non-custodial sources in their ESI disclosures pursuant to Agreement  
6 Regarding Discovery of Electronically Stored Information and Order, Dkt. 88. *See* Carilli Decl.,  
7 Ex. 1. Subsequently, at Plaintiffs' request, Defendants added two custodians. *See* Carilli Decl.,  
8 Ex. 2. For the search of the custodians' electronic mail, Defendants identified 12 search terms.  
9 *See* Carilli Decl., Ex. 3.

10 On November 14, 2017, Defendants informed Plaintiffs that, given the volume of  
11 documents collected to that point—750,000 in response to the First Requests for Production of  
12 Documents ("First RFPs"), not including RFP Nos. 23 and 24—Defendants would use  
13 technology assisted review ("TAR") to identify responsive documents. *See* Dkt. 140, Ex. I at 2.  
14 Subsequently, Defendants twice provided Plaintiffs with more detailed explanations of the TAR  
15 process and its impact on the production process, and sent Plaintiffs the TAR protocol. Dkt. 140,  
16 Ex. G, H. In addition, at Plaintiffs' request, in December 2017, Defendants added another 20  
17 search terms to be applied to the named custodians. Carilli Decl., Ex. 4.

18 On November 17, 2017, Plaintiffs served their Second RFPs. *See* Dkt. 112, Ex. A  
19 ("Second RFPs"). At Plaintiffs' request, on January 31, 2018, Defendants provided Plaintiffs a  
20 proposed production schedule, contingent on the number of documents collected in the search for  
21 documents potentially responsive to RFP No. 24 and the Second RFPs, and followed up with a  
22 written case schedule proposal that same day. Hennessey Decl., Dkt. 140, Ex. K ("This proposal  
23 is contingent on the number of documents collected during the search for documents *responsive*  
24 to RFP No. 24 and Plaintiffs Second Request for Production to Defendants ('Second RFPs').").

25 On January 19 and 26, 2018, Defendants updated Plaintiffs on the progress of the TAR  
26 process. Carilli Decl., ¶ 4. On February 8, 2018, during the hearing, Defendants provided another  
27 update to Plaintiffs on the TAR process. Carilli Decl., ¶ 5. On February 16, 2018, Defendants  
28 provided Plaintiffs and the Court with their best estimate of the time it would take to complete

1 production for all the documents identified as potentially responsive to the First and Second  
2 RFPs. Dkt. 117 (“To complete the review and production of all currently outstanding discovery  
3 will, Defendants expect, take at least 6 months from present.”). A portion of the TAR process is  
4 complete and has identified more than 82,000 documents. Dkt. 130, ¶ 1.

## 5 **II. ARGUMENT**

### 6 **A. Standard for Imposing Sanctions Under Rule 37(b)(2)(C)**

7 A party commits civil contempt if the party disobeys “a specific and definite court order  
8 by failure to take all reasonable steps within the party’s power to comply.” *Reno Air Racing*  
9 *Ass’n v. McCord*, 452 F.3d 1126, 1130 (9th Cir. 2006). Contempt “need not be willful; however,  
10 a person should not be held in contempt if his action appears to be based on a good faith and  
11 reasonable interpretation of the court’s order.” *Id.* (internal citations and quotation marks  
12 omitted). Substantial compliance is also a defense to civil contempt— “[i]f a violating party has  
13 taken all reasonable steps to comply with the court order, technical or inadvertent violations of  
14 the order will not support a finding of civil contempt.” *Gen. Signal Corp. v. Donallco, Inc.*, 787  
15 F.2d 1376, 1379 (9th Cir. 1986) (internal citation omitted). Thus, the party alleging civil  
16 contempt must demonstrate by clear and convincing evidence that: (1) the alleged contemnor  
17 violated a court order; (2) noncompliance was more than technical or *de minimis*; and (3) the  
18 alleged contemnor’s conduct was not in good faith or reasonable interpretation of the order at  
19 issue. *See Inst. of Cetacean Res. v. Sea Shepherd Conservation Society*, 774 F.3d 935, 945 (9th  
20 Cir. 2014); *United States v. Bright*, 596 F.3d 683, 694 (9th Cir. 2010).

21 The Court has two sources of sanctions authority. First, the Court has “inherent power” to  
22 sanction litigants for a “full range of litigation abuses.” *Evon v. Law Offices of Sidney Mickell*,  
23 688 F.3d 1015, 1035 (9th Cir. 2012) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 55  
24 (1991)). Second, Federal Rule of Civil Procedure 37 authorizes district courts to impose  
25 sanctions for, *inter alia*, failing to obey a discovery order. Here, Plaintiffs seek sanctions only  
26 under Rule 37(b)(2)(C). *See* Dkt. 137 at 13-16.

27 Rule 37(b) provides that, if a party fails to obey an order to provide or permit discovery,  
28 “the court must order the disobedient party . . . to pay the reasonable expenses, including

1 attorney's fees, caused by the failure, unless the failure was substantially justified or other  
 2 circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2)(C). No sanctions are  
 3 appropriate here, and certainly not under Rule 37(b). First, Defendants have not violated the  
 4 Court's orders. Second, even if Defendants misconstrued the Court's intent and inadvertently  
 5 violated an order, special circumstances exist as to each category of information at issue that  
 6 substantially justify Defendants' conduct and would make an award manifestly unjust. Third,  
 7 with respect to the amount of attorneys' fees sought, Plaintiffs have wholly disregarded the  
 8 causation element of Rule 37. *See* Fed. R. Civ. P. 37(b)(2)(C) ("caused by the failure"). The  
 9 Ninth Circuit has repeatedly held that an award of attorneys' fees under this provision is limited  
 10 to fees directly attributable to, *i.e.*, "caused" by, the failure to obey the order. A sanctions motion  
 11 cannot be used to shift the cost of litigating discovery matters other than the cost of remedying  
 12 the violation of a court order. Here, even assuming any fees could be properly assessed against  
 13 Defendants, no attorney time prior to February 28, 2018—when the first of the three alleged  
 14 violations took place—is compensable.

### 15 **B. Defendants Have Not Violated Any Court Order**

16 Although Plaintiffs spend the bulk of their brief challenging the pace of discovery, their  
 17 request for sanctions is limited to three items:<sup>5</sup> (1) production of the list of class members with  
 18 identifying information redacted pending the Court's ruling on Defendants' motion for a  
 19 supplemental protective order; (2) production of redacted A Files for the named plaintiffs; and  
 20

21 \_\_\_\_\_  
 22 <sup>5</sup> Although Plaintiffs do not ask for an order relating to the production of documents responsive to RFP  
 23 Nos. 23 and 24, they argue Defendants violated the Court's order to produce those materials on a specific  
 24 timeline. Dkt. 137 at 7, 8. In its January 10, 2018 order, the Court directed the parties to meet and confer  
 25 about search terms and custodians, and directed Defendants to search for and produce responsive  
 26 documents within set timeframes. Following three meet-and-confer sessions (January 26, 29, and 31), the  
 27 parties were at an impasse over search terms and custodians, and Plaintiffs sought the Court's intervention,  
 28 leading to the February 8, 2018 hearing. At that time, Plaintiffs raised the overall discovery schedule, as  
 well as the search terms and custodians issue, and the Court took the matter of the overall case discovery  
 schedule under advisement. Defendants, who had been planning to prioritize production of the non-  
 privileged materials responsive to RFP Nos. 23 and 24 (using their proposed search terms and custodians  
 pending judicial resolution of Plaintiffs' objections) on the court-ordered schedule, then understood the  
 production deadlines in the January 10, 2018 order concerning RFP Nos. 23 and 24 to be subsumed in the  
 larger issue of the overall case discovery schedule that the Court had under active consideration. If  
 Defendants were mistaken, that mistake was made in good faith.

1 (3) Defendants' statement that it would be inappropriate to ask the former Secretary of  
2 Homeland Security and current White House Chief of Staff whether he served on the PETT.

3 1. The Class List

4 On February 14, 2018, at a telephonic hearing, the Court acknowledged that Defendants  
5 intended to seek further relief related to production of the class list. *See* note 4, *supra*; Dkt. 140,  
6 Ex. L, at 27:17-28:2. Then, on March 1, 2018, in accordance with the Court's prior suggestions,  
7 *see* Dkts. 98 at 4, and 102 at 3, Defendants moved for a limited protective order relating to  
8 access, disclosure, and transmittal of sensitive information on the class list. Dkt. 126. On March  
9 5, 2018, Defendants produced the class list, but withheld the names, A numbers, and application  
10 filing dates, pending a ruling on their motion. Carilli Decl., Ex. 6 (Mar. 5, 2018 e-mail). That  
11 motion was pending when Plaintiffs filed their sanctions motion. Defendants await the Court's  
12 ruling on their motion, and will take appropriate steps once the Court rules. Sanctions are not  
13 appropriate because Defendants are not violating any Court order concerning the class list. The  
14 Court itself invited Defendants' effort to obtain tailored protection for the information at issue,  
15 and Defendants have not indicated any intent to withhold the information the Court has ordered  
16 disclosed in defiance of the Court's order; rather, Defendants are simply awaiting a ruling from  
17 the Court on the protective order motion that the Court itself twice suggested.

18 2. The Named Plaintiffs' Information

19 In the February 13, 2018 Joint Status Report, Defendants indicated they would produce  
20 copies of the named Plaintiffs' A Files by February 28, 2018. Dkt. 114 at 4. In that report,  
21 Plaintiffs asserted the A Files should be produced un-redacted; Defendants responded that they  
22 would produce non-privileged documents in the A Files, consistent with their understanding that  
23 the Court's October 19, 2017 order left open their ability to assert privilege over particular pieces  
24 of information in the A Files (as distinct from the earlier *categorical* claim of privilege  
25 concerning the identity of persons subjected to CARRP, which the Court rejected). At a  
26 telephonic hearing on February 14, 2018, the Court acknowledged that Defendants intended to  
27 claim privilege over documents in the A Files, including "why" documents.

1 MR. WHITE: And our intention would be, as we said earlier, to only redact that which  
2 we believe to be privileged that needs to be redacted, and provide a privilege log that  
3 identifies the privilege being claimed and the basis for it.

4 THE COURT: Okay. All right. Enough said on Item No. 6.

5 Dkt. 140, Ex. L, at 26:7-13.

6 On February 28, 2018, Defendants produced the A Files, protecting certain information  
7 under the attorney-client, deliberative process, and law enforcement privileges, Carilli Decl., Ex.  
8 5 (Feb. 28, 2018 Ltr), and, on March 16, 2018, produced the corresponding privilege logs, Dkt.  
9 140, Ex. Q. Defendants have complied with all Court orders and the production schedule agreed  
10 to by the parties (which is not a Court order). Further, Defendants and non-party government  
11 agencies have not yet fully formally asserted, explained or briefed the privileges applicable to the  
12 redactions taken from the named Plaintiffs' A files, because Plaintiffs have never filed a direct  
13 challenge to those redactions. Nevertheless, in an abundance of caution, Defendants have filed  
14 as exhibits to this opposition declarations formally asserting privileges applicable to the redacted  
15 A File information.<sup>6</sup> See Declarations of Douglas Blair, Matthew D. Emrich, Carl Ghattas,  
16 Tatum King, Corey A. Price, and John P. Wagner. Defendants are contemporaneously filing a  
17 motion for leave to submit additional declarations *ex parte* containing law enforcement sensitive  
18 information for the Court's *in camera* review. To the extent the content of any declaration does  
19 not require *ex parte, in camera* protection, Defendants are filing the declaration on the public  
20 docket. Nevertheless, despite the filing of these declarations, Defendants respectfully submit that  
21 the importance and sensitive nature of the information at issue requires thorough briefing before  
22 the Court rules on the claims of privilege asserted in these declarations.

23 <sup>6</sup> Defendants, and other government agencies, reserve the right to assert the state secrets privileged over information  
24 otherwise discoverable in this case. Consistent with judicial guidance, Defendants will invoke that privilege only as  
25 a last resort, as the privilege "is not to be lightly invoked." *United States v. Reynolds*, 345 U.S. 1, 7 (1953).  
26 Department of Justice policy also imposes strict procedures on the privilege's assertion, and we must comply with  
27 those procedures as well. See [https://www.justice.gov/opa/pr/attorney-general-establishes-new-state-secrets-](https://www.justice.gov/opa/pr/attorney-general-establishes-new-state-secrets-policies-and-procedures)  
28 policies-and-procedures (Last visited Apr. 5, 2018). In addition, Defendants withheld certain visa related  
information under 8 U.S.C. § 1202(f). "Under 8 U.S.C. § 1202(f) the Secretary of State has no authority to disclose  
material to the public." *Medina-Hincapie v. Dep't of State*, 700 F.2d 737, 741-42 (D.C. Cir. 1983) (footnotes and  
citations omitted). Accordingly, it is sufficient that the records "pertain[ ]to the issuance or refusal of visas or permits  
to enter the United States" in order to sustain those withholdings. 8 U.S.C. § 1202(f). Similarly Sensitive Security  
Information ("SSI") is protected from disclosure by statute and regulation, and the decision to withhold such  
information from disclosure is reviewable only in the United States Courts of Appeals, pursuant to 49 U.S.C. §  
46110. 49 U.S.C. § 114; 49 C.F.R. Part 1520. See Declaration of Douglas Blair, ¶ 4.

1           3. Secretary Kelly

2           The Court has previously explained “that intruding on the Executive in this context is a  
3 matter of last resort, *Cheney v. U.S. Dist. Ct. for the Dist. Of Columbia*, 542 U.S. 367 (2004).”  
4 Dkt. 98 at 5. On February 14, 2018, the Court ordered Defendants to identify to Plaintiffs who  
5 among the named custodians had served on the PETT. Dkt. 140, Ex. L., at 21:5-8 (“Of the  
6 Custodians in this litigation, who among them were on the transition team?”).

7           On March 9, 2018, Defendants identified to Plaintiffs whether 40 of the 41 named  
8 Custodians had served on the President-Elect Transition Team, with the single exception of  
9 Secretary Kelly. Dkt. 140, Ex. R. Defendants explained that:

10           [g]iven Gen. Kelly’s current position as the President’s Chief of Staff and the  
11 limits on discovery from the President and his close advisors, *see Cheney v. U.S.*  
12 *Dist. Ct. for the Dist. of Columbia*, 542 U.S. 367 (2004), [Defendants] have not  
13 inquired directly with Gen. Kelly whether he was on the President-Elect  
14 Transition Team, and do not believe it is appropriate or necessary to do so.

15 *Id.*

16           Given that the Court’s February 14, 2018 oral order did not directly address Secretary  
17 Kelly, Defendants understood the Court’s order in the context of its prior order refusing to permit  
18 discovery from the President and his close advisors because of the serious concerns it would  
19 raise about Executive privilege, intruding on a co-equal branch of government, and the  
20 distraction it would cause to a senior government official to attend to a tangential issue in this  
21 litigation. Dkt. 98 at 5; *see also In re United States*, 985 F.2d 510, 512 (11th Cir. 1993).  
22 Moreover, it is unclear, what benefit further inquiry would have as Secretary Kelly has already  
23 been identified as a custodian, his Department of Homeland Security emails are already  
24 undergoing review for responsiveness and privilege and, under long-standing Supreme Court  
25 precedent, he is protected from being deposed. *United States v. Morgan*, 313 U.S. 409, 422  
26 (1941) (noting “[T]he Secretary should never have been subjected to . . . examination” and “it  
27 was not the function of the court to probe the mental processes of the Secretary”) (internal  
28 quotation marks omitted); *see also Cheney*, 542 U.S. 367; *PBGC v. LTV Corp.*, 496 U.S. 633  
(1990); *United States v. Nixon*, 418 U.S. 683 (1974).

1 **C. Assuming, *Arguendo*, Defendants Inadvertently Violated an Order,**  
2 **Defendants Were Substantially Justified and Other Circumstances Exist As**  
3 **to Each Category of Discovery that Would Make Sanctions Unjust**

4 As outlined above, Defendants have not violated any of the Court's orders. However, to  
5 the extent Defendants might have misunderstood an order, and therefore not complied with the  
6 Court's intent, Defendants' actions are substantially justified and, in any event, other  
7 circumstances would make an award unjust. *See* Fed. R. Civ. P. 37(b)(2)(C).

8 1. Defendants' Position Is Substantially Justified

9 Substantial justification "does not mean 'justified to a high degree', but is satisfied if  
10 there is a 'genuine dispute' or 'if reasonable people could differ' as to the appropriateness of the  
11 contested action." *Guam Indus. Servs., Inc. v. Zurich Am. Ins. Co.*, Nos. 11-00014 & 11-0031,  
12 2011 WL 4525228, \*2 (D. Guam Aug. 26, 2013) (applying *Pierce v. Underwood*, 487 U.S. 552  
13 (1988) to substantial justification under Rule 37(b)(2)). Here, Defendants' positions were all  
14 substantially justified. Defendants produced a redacted class list while awaiting the Court's  
15 decision on a motion for a limited protective order that the Court twice suggested the parties file.  
16 Defendants produced redacted A Files because privilege assertions over particular pieces of  
17 information in the A Files were not—indeed, could not have been—litigated earlier without  
18 waiving other privileges that logically had to be adjudicated first. Defendants identified all of the  
19 custodians who served on the PETT with the single exception of Secretary Kelly because of his  
20 unique position as White House Chief of Staff, the constitutional and prudential limits on  
21 discovery from close advisors to the President, and longstanding precedent limiting discovery  
22 from Cabinet Secretaries. Because a reasonable person could conclude Defendants acted in  
23 accordance with the Court's directives, sanctions under Rule 37(b)(2)(C) cannot be granted.

24 2. Other Circumstances Make an Award of Attorneys' Fees Unjust

25 In addition to Defendants' actions being substantially justified, other circumstances also  
26 make an award of attorneys' fees unjust. A number of these apply equally to all three of the  
27 asserted violations: uncertainty regarding the Court's oral directives; the need to litigate  
28 privileges one after another to avoid waiving privileges; concerns of national security and public  
policy; and the lack of prejudice to Plaintiffs, including the potential for attorneys' fees at the

1 conclusion of the case, all weigh against an award of attorneys' fees in the midst of discovery.  
2 Additional considerations specific to each alleged violation are also present. As a result—even if  
3 Defendants inadvertently violated an order, and even if it was not substantially justified—an  
4 award of attorneys' fees would still be improper.

5 *a. Circumstances that Apply to All Issues*

6 There are a number of circumstances that apply equally to the three alleged violations.  
7 *First*, the Court's responses at the February 14, 2018 hearing to Defendants' intended actions  
8 counsel against imposition of sanctions. An oral statement may be an "order" for purposes of  
9 Rule 37, but only if it provides *unequivocal* notice that specific documents must be produced.  
10 *See Henry v. Sneiders*, 490 F.2d 315, 318 (9th Cir. 1974) (emphasis added). Here, the Court  
11 responded to Defendants' stated intentions with regard to the class list and the "why" documents  
12 in a way that appeared to indicate agreement. *See* Dkt. 140, Ex. L, at 26:7-13; 27:17-28:2.  
13 Likewise, the Court's statements concerning its reluctance to intrude on the Executive provide  
14 reasonable grounds for Defendants to have understood the February 14, 2018 order concerning  
15 the PETT issue generally as not applying in the same way to Secretary Kelly as to the other  
16 custodians. If Defendants have misinterpreted the Court's intentions, the appropriate course of  
17 action is clarification, not sanctions.

18 *Second*, there are layered privileges at issue that must be litigated in succession.  
19 Defendants could not have asserted, in the Fall of 2017, privileges over particular pieces of  
20 information concerning *why* the named plaintiffs were allegedly subject to CARRP without  
21 waiving their assertion of privilege over *whether* they were subject to CARRP and *who* is in the  
22 class. It would be unjust to punish Defendants for seeking to withhold privileged information  
23 over which particular claims of privilege have not been previously litigated, and that Defendants  
24 reasonably believe were not before the Court when the Court issued its October 19, 2017 order.

25 *Third*, "[p]ublic policy concerns must also be weighed." *Halaco Eng'g Co. v. Costle*, 843  
26 F.2d 376, 382 (9th Cir. 1988). Here, Plaintiffs are seeking thousands of names of individuals  
27 who have an articulable link to a national-security related ground of inadmissibility; the reasons  
28 why the five named Plaintiffs are allegedly within that group; and information directly

1 concerning one of the senior-most individuals in the federal government. Defendants are  
2 understandably reticent to give the Court's directives a more expansive reading than may be  
3 required. Indeed, public policy demands that national security information be protected to the  
4 fullest extent possible. Defendants would be remiss in this duty to disclose more than is required.

5 *Fourth*, "[a] final consideration is the existence and degree of prejudice to the wronged  
6 party." *Halaco Eng'g Co.*, 843 F.2d at 382; *see also Montano v. Solomon*, No. 07-cv-0800, 2010  
7 WL 1947041, \*1 (E.D. Cal. May 13, 2010) (finding extension to discovery deadline rendering  
8 prejudice *de minimis* constituted substantial justification for failure to comply with production  
9 deadline). Here, Plaintiffs have not identified any prejudice from any alleged violation of any  
10 specific order. Instead, Plaintiffs suggest that "delays have dramatically driven up the costs of  
11 litigation" that "make it very difficult for Plaintiffs to move forward with this case." Dkt. 137 at  
12 14. It is not clear what this means, or how delay alone results in costs to Plaintiffs. Plaintiffs also  
13 suggest that delays "allow unconstitutional programs to persist." Dkt. 137 at 14. But this is  
14 nothing more than a conclusory assertion of what Plaintiffs allege in their Complaint. An  
15 unproven claim set in a time frame remains an unproven claim. It is not prejudice. In any event,  
16 this motion for sanctions is not Plaintiffs' only opportunity to shift the cost of the litigation onto  
17 Defendants. If Plaintiffs prevail in this case, they may seek to recover reasonable attorneys' fees  
18 under EAJA. Finally, *before* Plaintiffs filed their sanctions motion, Defendants stipulated to  
19 vacate expert discovery deadlines, to ensure discovery would be available to Plaintiffs' expert,  
20 should they decide to retain one. Dkt. 136.

21 *b. Circumstances Specific to Individual Issues*

22 *i. The Class List Is Subject to a Pending Motion*

23 Plaintiffs' sanctions motion, with respect to the class list, is frivolous. Defendants have  
24 not refused to comply with the Court's order to produce the class list. Rather, at the Court's  
25 urging, Defendants properly and timely moved for a supplemental protective order concerning  
26 how the highly sensitive information the list contains is to be accessed and maintained, and have  
27 only retained identifying information pending the Court's ruling on their motion. Defendants will  
28 take appropriate action once the Court rules on that motion. Plaintiffs' effort to have Defendants

1 sanctioned *while Defendants' motion is pending before the Court* is both inappropriate and  
2 disrespectful of the Court's crowded docket. This is especially true given that Defendants  
3 stipulated to vacate expert discovery deadlines *before* Plaintiffs filed their sanctions motion. To  
4 the extent Plaintiffs intend to use information on the class list in an expert report they remain  
5 able to do so.

6 *ii. Secretary Kelly's Involvement in This Litigation Presents Unique*  
7 *Separation-of-Powers Issues*

8 Defendants answered Plaintiffs' question about which custodians worked on the PETT,  
9 as ordered by the Court, for every custodian except Secretary Kelly. Secretary Kelly's situation,  
10 however, presents a unique situation. He cannot be deposed with respect to his time as Secretary  
11 under the *Morgan* doctrine (though Defendants have collected documents (including emails)  
12 responsive to the RFPs from Secretary Kelly's time as Secretary of Homeland Security). Carilli  
13 Dec., ¶ 6. Nor can he be deposed with respect to his time as White House Chief of Staff, because  
14 he is shielded by Executive Privilege. Further, given the publicly available facts concerning  
15 Secretary Kelly's pre-inauguration activities and his current position as Chief of Staff to the  
16 President, it would be an unnecessary and unjustified intrusion into the functioning of the White  
17 House to involve Secretary Kelly in discovery in this case, as this Court previously recognized.  
18 *See* Dkt. 98 at 5 ("Court does not find that the record before it justifies [] an intrusion [on the  
19 Executive]"). Defendants, therefore, in light of the language concerning Executive Privilege and  
20 White House discovery in the Court's October 19, 2017 order, understand the Court's February  
21 14, 2018 oral order, concerning the PETT, not to require Defendants to inquire with Secretary  
22 Kelly concerning whether he previously worked for the PETT. Consequently, Defendants  
23 maintain they have not violated the Court's February 14, 2018 order; if they misunderstood the  
24 Court's command, the misunderstanding was in good faith. Further, Plaintiffs utterly fail to  
25 identify any prejudice from Defendants not having directly asked Secretary Kelly whether he  
26 worked for the PETT.

27 **D. Plaintiffs Are Not Entitled to Attorneys' Fees**

28 Plaintiffs are not entitled to attorneys' fees, first and foremost, because Defendants have  
not violated any Court order. Further, even if the Court concludes some aspect of Defendants'

1 conduct is not what the Court intended with respect to a particular order, any such conduct was  
 2 not intended to violate a Court order, and a variety of special circumstances make a fee award  
 3 unjust. Finally, even assuming, *arguendo*, that some fees could properly be assessed, Plaintiffs  
 4 are not entitled to payment for the vast majority of their claimed time because the expenditure of  
 5 that time was not “caused by the failure” to obey an order. *See* Fed. R. Civ. P. 37(b)(2)(C).  
 6 Additionally, the claims themselves are excessive and improperly documented.

7 *a. Rule 37(b)(2)(C) Only Authorizes Award of Fees “Caused by the Failure”*  
 8 *to Obey an Order*

9 Citing Federal Rule of Civil Procedure 37(b)(2)(C), Plaintiffs request the Court award  
 10 them attorneys’ fees “starting with the September Motion to Compel.” Dkt. 137 at 13-14. Ninth  
 11 Circuit precedent, however, clearly establishes that the fees Plaintiffs seek are orders of  
 12 magnitude greater than what that rule authorizes. Rule 37(b)(2) “provides for the award of  
 13 reasonable expenses and attorney’s fees ‘caused by the failure’ to obey a court order to provide  
 14 or permit discovery. Expenses incurred outside of this particular context are not provided for in  
 15 Rule 37(b)(2).” *Toth v. Trans World Airlines, Inc.*, 862 F.2d 1381, 1385-86 (1988); *see also*  
 16 *Unigard Sec. Ins. Co. v. Lakewood Eng’g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992)  
 17 (“Rule 37(b)(2) has never been read to authorize sanctions for more general discovery abuse.”).  
 18 In addition, Rule 37(b)(2) “‘must be distinguished from Rule 37(a), which provides for the award  
 19 of expenses resulting from efforts to secure an order compelling discovery.’” *Toth*, 862 F.2d at  
 20 1386 n.2 (quoting *Liew v. Breen*, 640 F.2d 1046, 1051 (9th Cir. 1981)). “Thus, ‘attorney-time  
 21 before and during’ a hearing in which a court order is imposed is ‘not attorney-time incurred *on*  
 22 *account of failure to obey an order.*” *Id.* (quoting *Liew*, 640 F.2d at 1051) (emphasis added);  
 23 *United States v. Nat’l Medical Enters. Inc.*, 792 F.2d 906, 910 (9th Cir. 1986) (quoting *Shuffer v.*  
 24 *Heritage Bank*, 720 F.2d 1141, 1148 (9th Cir. 1983) (“a compensatory award is limited to the  
 25 ‘actual losses sustained as a result of the contumacy.’”); *see also Wm. T. Thompson Co. v. Gen.*  
 26 *Nutrition Corp.*, 104 F.R.D. 119, 121-22 n.1 (C.D. Cal. 1985) (no entitlement to expenses for  
 27 motion to compel where no relief pursuant to Rule 37(a) was sought).

28 Here, although Plaintiffs seek fees starting with their September 2017 motion to compel,  
 Defendants’ first alleged failure to obey a discovery order did not occur (even allegedly) before

1 February 28, 2018, the date on which Defendants produced redacted A Files, allegedly violating  
 2 the Court's October 19, 2017 order. Consequently, the earliest possible date on which Plaintiffs  
 3 can reasonably contend Defendants failed to obey any order of this Court is February 28, 2018,  
 4 and all the time they have claimed prior to that date cannot possibly have been *caused by*  
 5 Defendants' alleged violation of a court order. The award of attorneys' fees for time spent by  
 6 Plaintiffs' counsel working on this case prior to February 28, 2018, would require the Court to  
 7 disregard binding Ninth Circuit precedent that the dollar amount of fees sought as a sanction  
 8 must be specifically tailored to the disobedient conduct that is challenged. *See Toth*, 862 F.2d at  
 9 1386 (remanding for adjustment of sanctions award "[b]ecause the costs and fees awarded were  
 10 not properly segregated to those expenses caused by the failure to obey court orders, as  
 11 circumscribed by [Rule] 37(b)(2)."). Any fees Plaintiffs seek for work performed before  
 12 February 28, 2018, are not compensable because it is impossible that any such expenses were  
 13 "caused by the failure to obey court orders."

14 *b. The Claimed Amounts Are Improper*

15 Of the ten attorneys for whose work Plaintiffs seek fees, only six performed work on the  
 16 case on or after February 28, 2018.<sup>7</sup> Dkt. 139-45. Assuming *arguendo* that all post-February 28,  
 17 2018, work of the those six attorneys was *specifically related to the allegedly disobedient*  
 18 *conduct*, the maximum possible amount this Court could award Plaintiffs based on those records  
 19 would be \$14,532.00, rather than the \$219,974.02 that Plaintiffs claim.<sup>8</sup>

20 **III. CONCLUSION**

21 For the foregoing reasons, Plaintiffs' Motion for Sanctions should be denied.  
 22  
 23

24 <sup>7</sup> Attorneys Pasquarella, Realmuto, Schneider, and Tolchin do not claim fees for work performed on or  
 25 after February 28, 2018. Dkt. 139 at 5; 142 at 8-27; 143 at 7-9; 144 at 6; 145 at 6. Attorneys Adams,  
 26 Ahmed, Gellert, Handeyside, Hennessey, and Perez claim fees for work occurring on or after February 28,  
 2018. Dkt. 141 at 6; Dkt. 142 at 26-27; Dkt. 143 at 12.

27 <sup>8</sup> Defendants respectfully request the opportunity to provide the Court both a line-item analysis and an  
 28 evaluation of the hourly rates claimed by Plaintiffs' counsel, should the Court conclude Plaintiffs are  
 entitled to fees for work prior to February 28, 2018. Similarly, Defendants reserve the right to challenge  
 any fees the records for which were not appended to the motion for sanctions.

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Dated: April 9, 2018  
  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on April 9, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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