

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

FAIRHOLME FUNDS, INC., THE
FAIRHOLME FUND, ACADIA
INSURANCE COMPANY, ADMIRAL
INDEMNITY COMPANY, ADMIRAL
INSURANCE COMPANY, BERKLEY
INSURANCE COMPANY, BERKLEY
REGIONAL INSURANCE COMPANY,
CAROLINA CASUALTY INSURANCE
COMPANY, CONTINENTAL WESTERN
INSURANCE COMPANY, MIDWEST
EMPLOYERS CASUALTY INSURANCE
COMPANY, NAUTILUS INSURANCE
COMPANY, PREFERRED EMPLOYERS
INSURANCE COMPANY,
Plaintiffs-Appellees,

v.

UNITED STATES,
Defendant-Appellant.

No. 17-1122

[Fed. Cl. No. 13-465C]

**OPPOSITION TO PLAINTIFFS' MOTION TO DISMISS APPEAL OR, IN
THE ALTERNATIVE, FOR SUMMARY AFFIRMANCE**

The United States respectfully opposes plaintiffs' motion to dismiss the government's appeal. This appeal arises from an order compelling disclosure of documents over which the government has asserted the presidential communications privilege, the deliberative process privilege, and the bank examination privilege. The

government filed a petition for a writ of mandamus with respect to that order, which is pending before the Court. Because the Court has in some instances held that orders threatening disclosure of sensitive information are appealable under the collateral order doctrine, the government also filed a notice of appeal. We respectfully urge that the Court consider whether the order at issue is appealable in conjunction with its consideration of the government's mandamus petition rather than as a free-standing matter. We also request that the Court suspend the briefing schedule in this appeal pending resolution of the government's mandamus petition.

1. This is an appeal from the Court of Federal Claims' September 20, 2016, order granting plaintiffs' motion to compel production of documents protected by the presidential communications, deliberative process, and bank examination privileges. On the same day that it filed its notice of appeal, the United States filed a petition for writ of mandamus. *See In re United States*, No. 17-104 (Fed. Cir.), Dkt. No. 1. The government's mandamus petition and its appeal both seek vacatur of the September 20 order. The United States filed the notice of appeal in the event that this Court were to conclude that the September 20 order is appealable under the collateral order doctrine, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), as it has done in other cases involving decisions that threatened to require disclosure of sensitive information. *See, e.g., Kaplan v. Conyers*, 733 F.3d 1148, 1153-54 (Fed. Cir. 2013) (en banc) (review of decision of the Merit Systems Protection Board ordering the government to defend the merits of a national security decision and "potentially

disclose matters concerning national security”); *Apple, Inc. v. Samsung Electronics Co., Ltd.*, 727 F.3d 1214, 1221 (Fed. Cir. 2013) (appeal of district court order requiring the disclosure of confidential information).

2. As plaintiffs note, “[t]he merits of the Government’s appeal . . . rise or fall with the merits of its mandamus petition.” Mot. 13. If this Court exercises its mandamus jurisdiction it will have no occasion to consider the application of the collateral order doctrine here. It is thus appropriate to defer ruling on plaintiffs’ motion to dismiss the appeal, which may be mooted by action on the mandamus petition. The Ninth Circuit followed that course in *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010), in which intervenor-defendants sought review of an order to produce materials that they alleged were privileged under the First Amendment. The intervenor-defendants filed a mandamus petition and also noticed an appeal under the collateral order doctrine. *Id.* at 1153-54. The Ninth Circuit concluded that the question of appealability in that case presented a close question, which it found unnecessary to resolve because the challenge to the district court’s order met the standard for mandamus relief. *Id.* at 1155-56; *see also Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 378-79 (2004) (“Because we vacate the Court of Appeals’ judgment and remand the case for further proceedings for the court to consider whether a writ of mandamus should have issued, we need not decide whether the Vice President also could have appealed the District Court’s orders under *Nixon* and the collateral order doctrine.”).

This Court similarly should defer consideration of plaintiffs' motion to dismiss until its ruling on the pending petition for a writ of mandamus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system:

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