

JOSEPH H. HUNT
Assistant Attorney General
WILLIAM D. HYSLOP
United States Attorney
ALEXANDER K. HAAS
Branch Director
ERIC J. SOSKIN
Senior Trial Counsel
KERI L. BERMAN
KUNTAL V. CHOLERA
JOSHUA M. KOLSKY, DC Bar No. 993430
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch

Attorneys for Defendants

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT RICHLAND**

STATE OF WASHINGTON, *et al.*,

Plaintiffs,

V.

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY, *et al.*,

Defendants

No. 4:19-cv-5210-RMP

RESPONSE TO NOTICE OF
SUPPLEMENTAL AUTHORITY

RESP. TO NOTICE OF SUPPL. AUTHORITY

U.S. DEPARTMENT OF JUSTICE
1100 L St. NW, Washington, DC, 20003
(202) 353-0533

1 Defendants hereby respond to Plaintiffs' Notice of Supplemental Authority in
 2 Support of Plaintiffs' Motion to Compel, in which Plaintiffs attach the order in *California*
 3 *v. U.S. Department of Homeland Security*, No. 19-4975, and *La Clinica de La Raza v.*
 4 *Donald J. Trump*, No. 19-4980 (N.D. Cal. Apr. 1, 2020). ECF No. 208.

5 First, the plaintiffs in the Northern District of California litigation had sought an
 6 order requiring the government to include in the administrative record, *inter alia*, all
 7 communications related to the public charge rule, and to provide a privilege log of all
 8 documents allegedly "withheld" from the record on the basis of privilege. Notice, Ex. 1,
 9 at 14. The court denied that request in large part, ordering the government to include
 10 only "inter-agency communications submitted to DHS and under DHS's control, relating
 11 to the Rule, and not involving the mental processes of individual agency members." *Id.*
 12 at 20. The court emphasized that, under Ninth Circuit authority, "it would not be
 13 permissible for the court to consider 'the internal deliberative processes of the agency
 14 [or] the mental processes of individual agency members.'" *Id.* And the court clarified
 15 that the types of documents that "would be appropriate for defendants to provide" were
 16 "items such as studies, data, and official memoranda," but not "communications
 17 codifying the internal deliberative processes of individual agency members." *Id.* Also,
 18 the court did not order Defendants to provide a privilege log.
 19

20 Second, Plaintiffs claim that the court "held that plaintiffs are entitled to take
 21 discovery on constitutional claims of the very same nature as the Equal Protection claim
 22

1 Plaintiffs have asserted here.” Notice at 2. The court, however, did not conclusively
2 permit supplemental discovery on the equal protection claim. To the contrary, although
3 the court provisionally allowed for this discovery, it immediately stayed its own ruling,
4 concluding that it would not “permit[] discovery prior to assessing [the] viability of
5 plaintiffs’ claims and directly addressing the appropriate standard of review and the
6 implications of that standard.” *Id.*, Ex. 1, at 31. The court thus clarified that it could
7 ultimately conclude “that discovery may not be appropriate” on that claim. *Id.* at 30. The
8 court cited to the District of Maryland’s decision in the public charge case *Mayor and*
9 *City Council of Baltimore v. Trump*, which found that, under the highly deferential
10 standard of review applicable to equal protection challenges to immigration rules, the
11 plaintiff was “*not* entitled to discovery as to its equal protection claims” and must rely
12 instead on the “administrative record.” 2019 U.S. Dist. LEXIS 219262, at *32 (Dec. 19,
13 2019) (emphasis in original).

15
16 Dated: April 14, 2020

Respectfully submitted,

17
18 JOSEPH H. HUNT
Assistant Attorney General

19
20 WILLIAM D. HYSLOP
United States Attorney

21
22 ALEXANDER K. HAAS
Branch Director

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s/ Joshua Kolsky

1 ERIC J. SOSKIN
2 Senior Trial Counsel
3 KERI L. BERMAN
4 KUNTAL V. CHOLERA
5 JOSHUA M. KOLSKY, DC Bar No. 993430
6 Trial Attorneys
7 United States Department of Justice
8 Civil Division, Federal Programs Branch
9 1100 L Street NW
10 Washington, D.C. 20005
11 Tel: (202) 35-0533
12 Fax: (202) 616-8470
13 eric.soskin@usdoj.gov

14 Attorneys for Defendants
15
16
17
18
19
20
21
22

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all users receiving ECF notices for this case.

/s/ Joshua Kolsky

United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, D.C. 20005

Attorney for Defendants

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