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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

DEFENDANTS' MOTION FOR STAY OF ORDER OR, IN THE ALTERNATIVE, FOR EXTENSION OF TIME TO PRODUCE PRIVILEGE LOG

Noted for: June 4, 2020
Without Oral Argument

INTRODUCTION

Plaintiffs have challenged the legality of *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41292 (Aug. 14, 2019) ("Rule"), a final rule issued by the Department of Homeland Security ("DHS") after notice and public comment. The Court has ordered that DHS "provide a privilege log within 30 days for any documents withheld from the administrative record on the basis of privilege" and ordered discovery as to Plaintiffs' equal protection claim. Order Granting Plaintiffs' Motion to Compel, ECF No. 210 (Apr. 17, 2020) ("Order"). Defendants hereby move for a stay of the Court's Order until resolution of Defendant's upcoming motion to dismiss. In the alternative, Defendants respectfully request an extension of time to complete the privilege log, which cannot feasibly be created in the 30 days allotted by the Court. Defendants' counsel conferred with Plaintiffs, who do not consent to the requested relief.

DISCUSSION

I. The Court Should Stay its Order Pending Resolution of Defendants' Motion to Dismiss

A. The Court Should Stay Discovery

"[I]t is well settled that discovery is generally considered inappropriate while a motion that would be thoroughly dispositive of the claims in the Complaint is pending." *Loumiet v. United States*, 225 F. Supp. 3d 79, 82 (D.D.C. 2016); *see also Kolley v. Adult Protective Servs.*, 725 F.3d 581, 587 (6th Cir. 2013); *Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987). As set forth in the parties' May 1, 2020 submission, *see* ECF No. 211, Defendants plan to file a motion to dismiss the entirety of this case, including the equal

protection claim for which the Court has authorized discovery. That motion, if granted, "would be thoroughly dispositive of the claims," *Loumiet*, 225 F. Supp. 3d 82. The Court should stay its Order until the motion has been decided.

As to the equal protection claim, Defendants' motion to dismiss will ripen for decision Defendants' argument that, at most, "a rational basis . . . standard of review will govern" this litigation, a question that the Court ruled did not need to be "resolve[d] . . . at the time" of the Order. Order at 19. Because rational basis scrutiny is satisfied "so long as [an agency's action] can reasonably be understood to result from a justification independent of constitutional grounds," *Hawaii v. Trump*, 138 S. Ct. 2392, 2420 (2018), and the application of this deferential review to this question of immigration policy is clear, Defendants are likely to succeed on their motion to dismiss. Indeed, the Supreme Court considered essentially identical equal protection claims brought by plaintiffs in the Southern District of New York, and granted the government's motion for a stay pending appeal of the injunctions issued in that litigation against the same Rule. *See Dep't of Homeland Sec. v. New York*, No. 19A785, 2020 U.S. LEXIS 813, at *1 (Jan. 27, 2020); *compare* Mem. of Law in Support of P's Mot. for Prelim. Inj. at 33, ECF No. 39, Case No. 1:19-cv-07993-GBD (S.D.N.Y. Sept. 9, 2019) (setting forth S.D.N.Y. equal protection allegations) *with* Order at 19-21 (identifying nearly-identical allegations as the basis for permitting discovery in this action). In doing so, the Supreme Court necessarily determined that the government was likely to prevail against the claims in those cases, including the equal protection claims.

Even if the Court denies the motion to dismiss, however, the determination of what

"standard of review will govern" will significantly impact the scope of discovery that is "proportional to the needs of the case" under Fed. R. Civ. P. 26(b), as the United States District Court for the Northern District of California recently concluded in ordering a stay of discovery in challenges to the public charge rule. *See Calif. v. DHS*, 2020 U.S. Dist. LEXIS 57540, at *71 (N.D. Cal. Apr. 1, 2020); *cf. Keys v. NFL Retirement Plan*, Case No. 8:18-cv-2098-T-36JSS, 2019 U.S. Dist. LEXIS 176218, at *4 (M.D. Fla. Oct. 10, 2019) (scope of discovery under Fed. R. 26(b) is "integrally linked to the standard of review").

Allowing discovery to proceed while the important legal questions such as the standard of review remain unresolved would impose a heavy burden on both Defendants and the Court, given the topics on which the Court has authorized discovery and the likelihood that Plaintiffs' discovery requests will lead to motions practice before this Court. At a minimum, as the Court recognized, discovery into Plaintiffs' claim will be seeking information related to development of the policy in the public charge rule—information that would clearly qualify as pre-decisional and deliberative and thus likely subject to the Government's deliberative process privilege. Moreover, the Order identified allegations about the views of the President, a "high-ranking White House official," and other senior U.S. Government officials as the basis for discovery in this action, *see* Order at 19-21, which is likely to place discovery on a collision course with the presidential communications privilege and/or the President's more general Executive Privilege. *See Karnoski v. Trump*, 926 F.3d 1180, 1203 (9th Cir. 2019) (granting mandamus relief and explaining that the presidential communications privilege is "a

presumptive privilege" that protects, *inter alia*, "communications directly involving" the President and his "immediate White House advisers") (internal quotations omitted). In order to avoid the potential waste of resources associated with litigating discovery and privilege disputes now when resolution of Defendants' motion to dismiss may obviate those disputes, discovery should be stayed. *See Cheney v. United States Dist. Court*, 542 U.S. 367, 385 (2004) ("This Court has held, on more than one occasion, that '[t]he high respect that is owed to the office of the Chief Executive . . . is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery'").

As noted above, a stay of discovery would also be consistent with the recent order issued in similar circumstances by the United States District Court for the Northern District of California, an order already submitted by Plaintiffs to this Court as relevant supplemental authority regarding discovery here. *See* ECF No. 208 (citing "order in related litigation, *California v. U.S. Department of Homeland Security* and *La Clinica de La Raza v. Donald J. Trump*, No. 19-cv-04975-PJH and No. 19-cv-04980-PJH, 2020 WL 1557424 (N.D. Cal. Apr. 1, 2020"). In their submission, Plaintiffs explained that these cases "challenge the same Final Rule—*Inadmissibility on Public Charge Grounds*—that Plaintiffs challenge in this action," and contended that the submitted "analysis weighs in favor" of granting their motion to compel. ECF No. 208 at 1. After finding that the plaintiffs in *California* had established an entitlement to discovery, however, the district court concluded that "permitting discovery prior to assessing viability of plaintiffs' claims and directly addressing the appropriate standard of review and the implications of that standard would be premature." 2020 U.S. Dist. LEXIS 57540, at *72. For that

reason, the Court stayed "discovery until resolution of defendants' forthcoming motion to dismiss," and this Court should do the same.

B. The Court Should Stay its Order Requiring Defendants to Provide a Privilege Log

The Court should also stay its Order to the extent it requires Defendants to provide a privilege log, until the motion to dismiss has been decided. The motion will likely result in the dismissal of, at minimum, Plaintiffs' claims under the Administrative Procedure Act because the Ninth Circuit has already ruled, in a published opinion, that "DHS is likely to succeed on the merits" of those claims. *See City & County of San Francisco v. USCIS*, 944 F.3d 773, 805 (9th Cir. 2019). And the Ninth Circuit's reasoning in that decision rejects any conceivable argument that Plaintiffs' could raise in opposition to Defendants' motion to dismiss those claims.

Under these circumstances, it would be particularly inequitable to force Defendants to undertake the burdensome process of preparing a privilege log (which has no relevance at the pleading stage). As Defendants explained in their brief in opposition to Plaintiffs' motion to compel, Defendants' view is that "privileged materials . . . are not part of the administrative record in the first instance." ECF No. 198 at 9 (quoting *ASSE Int'l v. Kerry*, Case No. 14-534, 2018 WL 3326687 at *2 (C.D. Cal. Jan. 3, 2018)). Consistent with that position (which has been overruled by the Court in its Order), Defendants did not assemble such materials when compiling the administrative record. Accordingly, to prepare a privilege log, Defendants must now search the records of numerous custodians across multiple components of DHS for materials to be included on the privilege log. For

any documents that implicate White House equities, Defendants may have to confer with the White House to assess whether to invoke any executive privilege. It makes little sense to force the government to follow this burdensome process at this point in the litigation, given that the Ninth Circuit's ruling necessarily forecloses Plaintiffs' APA claims. Instead, the appropriate next step is for the parties to brief Defendants' motion to dismiss, which will allow the Court to assess the sufficiency of Plaintiffs' complaint.

This situation is very similar to *In re United States*, 138 S. Ct. 443 (2017). There, a district court had ordered the government to expand the administrative record and produce a privilege log. The government sought review in the Ninth Circuit and then in the Supreme Court. The Supreme Court ruled that "the District Court should have granted respondents' motion on November 19 to stay implementation of the challenged October 17 order and first resolved the Government's threshold arguments" in its motion to dismiss. *Id*. at 445. That was because "[e]ither of those arguments, if accepted, likely would eliminate the need for the District Court to examine a complete administrative record." *Id*.

That reasoning applies equally here. The arguments that Defendants will raise in their motion to dismiss, if accepted, will eliminate the need for the Court to examine an administrative record. Plaintiffs cannot dispute that issues relating to the adequacy of the administrative record, including the assertions of privilege, have no relevance to whether Plaintiffs' complaint adequately pleads a claim.

For these reasons, the Court should stay its Order pending a ruling on Defendants' upcoming motion to dismiss.

II. In the Alternative, An Extension of Time is Needed to Assemble the Privilege Log Ordered by the Court

If the Court does not stay its Order, it should extend the time for Defendants to create a privilege log. As discussed above, in order to prepare a privilege log, Defendants must search the records of numerous custodians across multiple components of DHS for materials to be included on the log. There is an extremely large volume of emails and other documents pertaining to the Rule, through which Defendants must search in order to locate relevant privileged materials for inclusion on the log. Even in ordinary times, that process would require well beyond the thirty days allotted by the Court. This process, however, is further complicated by multiple factors.

First, as the Court is aware, the ongoing public health emergency related to COVID-19 requires that most DHS employees carry out their responsibilities remotely. The technical stresses on DHS systems required by the unprecedented surge in the number of teleworkers limits that capacity of those systems to be used in searching for and retrieving documents, limits the availability of technical support personnel to assist with searching for and retrieving documents, and slows the ability of DHS personnel to review the materials retrieved for privilege and to create the privilege log. DHS is also evaluating whether any relevant materials are located in paper records, which cannot be reviewed remotely and therefore cannot be assembled until DHS personnel return to their ordinary work stations.

Second, due to changes in DHS information technology systems over time, relevant documents are stored in different systems. The need to search DHS's older

system adds technical complexity and difficulty, and thus delay, to the process of retrieving records and reviewing those materials for privilege.

In light of these factors, if the Court denies Defendants' request to stay the requirement to provide a privilege log, Defendants respectfully request an extension of time to provide the privilege log so that it will be due 90 days from the date of the Court's order on this motion.

CONCLUSION

For the foregoing reasons, the Court should stay its Order until the Court has resolved Defendants' motion to dismiss. In the alternative, Defendants should be granted an extension of time to complete the privilege log.

Dated: May 5, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 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

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STATE OF WASHINGTON, *et al.*,

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Defendants

No. 4:19-cv-5210-RMP

[PROPOSED] ORDER STAYING APRIL 17, 2020 ORDER

U.S. DEPARTMENT OF JUSTICE
1100 L St. NW, Washington, DC, 20003
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The Court, having considered Defendants' Motion for Stay of Order or, in the Alternative, for Extension of Time to Produce Privilege Log and the entire record, hereby **ORDERS** as follows:

(1) Defendants' Motion is **GRANTED**.

(2) The Court's April 17, 2020 Order Granting Plaintiffs' Motion to Compel is hereby **STAYED** until further Order of the Court.

IT IS SO ORDERED.

Dated:

_____
United States District Judge