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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

STATE OF WASHINGTON, *et al.*,

Plaintiffs,

v.

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

Defendants

No. 4:19-cv-5210-RMP

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STAY DISCOVERY ON EQUAL PROTECTION CLAIM

Hearing: June 4, 2020
Without Oral Argument

I. The Motion to Dismiss Is Likely to Affect the Scope of Discovery

This Court's resolution of the pending motion to dismiss will likely obviate the need for any discovery on the Equal Protection claim, or at least substantially narrow the scope of any discovery. As discussed in that motion to dismiss, the standard of review applicable to Executive Branch decisions regarding admission entitles the United States to dismissal of that claim at the pleadings stage. The Rule is legitimate so long as it is "facially justified and bona fide," *Trump v. Hawaii*, 138 S. Ct. 2392, 2419 (2018), and Plaintiffs do not identify anything facially discriminatory about the Rule. Similarly, if this Court instead applies a more searching rational basis review, the Rule on its face easily satisfies that test—the Rule is "plausibly related to the Government's stated objective" and "can reasonably be understood to result from a justification independent of unconstitutional grounds." *Id.* at 2420. The Court's resolution of the motion to dismiss will likely thus preclude any need for discovery on the Equal Protection claim.

Indeed, the Supreme Court has already determined that the Government is likely to succeed in its defense of the DHS rule. The Court has already stayed two preliminary injunctions that district courts had entered against the DHS rule. *Wolf v. Cook County, Ill.*, 140 S. Ct. 681 (2020); *Dep't of Homeland Security v. New York*, 140 S. Ct. 599 (2020). To grant those stays, the Court must first have determined that there is "a fair prospect that a majority of the Court will conclude that the decision below was erroneous." *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)).

And although granting a preliminary injunction requires the evaluation of several factors, the record shows that the Supreme Court must have determined, among other things, that the government was likely to prevail on the merits, and could not have based its decision to grant a stay solely on the Court's consideration of irreparable harm or balancing of the equities, as Plaintiffs speculate, *see* Opp'n to Mot. to Stay Discovery on Equal Protection Claim, ECF No. 220, at 8. *See Nken v. Holder*, 556 U.S. 418, 426 (2009) (to obtain a stay, a party must make "a strong showing that [it] is likely to succeed on the merits"). By granting stays in both cases, the Supreme Court thus plainly indicated that the challenges to the DHS rule, including the Equal Protection challenge, are unlikely to prevail. The Supreme Court necessarily considered the claim that the DHS rule violates the Equal Protection Clause, because that claim was one basis on which a district court granted an injunction that was later stayed by the Supreme Court. *See Make the Road New York v. Cuccinelli*, No. 1:19-cv-7993, ECF No. 146 (S.D.N.Y. Oct. 11, 2019), *stayed*, *Dep't of Homeland Security v. New York*, 140 S. Ct. 599 (2020). Because the pending motion to dismiss is defending the same rule on the same grounds as in those cases, the Court should stay discovery while addressing that dispositive motion.

Even if this Court determines that the standard of review applicable to the DHS rule is unsettled or less deferential than Defendants argue, resolving the pending motion to dismiss will still affect the scope of discovery. Because the appropriate standard of review determines not just how the court weighs certain evidence but also whether the court may consider certain purported evidence, the Court's decision is likely to affect what discovery is appropriate. As the Supreme Court itself stated in *Hawaii*, determining

the standard of review affects whether a court "may consider … extrinsic evidence." *Hawaii*, 138 S. Ct. at 2420. If the Court agrees with the Government that the applicable standard of review does not allow the consideration of extrinsic evidence, then any discovery on the Equal Protection claim is not "relevant to any party's claim or defense" and is not "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(2). That question should be resolved before the parties undertake cumbersome discovery that will also further burden this Court's resources in resolving discovery-related disputes.

It is well within a district court's power to limit discovery until after resolving a potentially dispositive motion that would, if granted, render such discovery unnecessary. Any assertion by Plaintiffs that this is an "out-of-Circuit" practice is erroneous. In fact, the Ninth Circuit has expressly blessed the practice of staying discovery while considering a potentially dispositive motion. *Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988) (upholding a stay of discovery until after resolving a claim of immunity). Such a stay "furthers the goal of efficiency for the court and litigants." *Id.* And it is common practice for district courts within this circuit to stay or otherwise limit discovery while considering a motion that may resolve the issue on which discovery is sought. *See, e.g.*, *Ahern Rentals, Inc. v. EquipmentShare.com, Inc.*, No. 2:10-cv-1788, 2020 WL 2216944, at *2–3 (E.D. Cal. May 7, 2020); *Quezambra v. United Domestic Workers of Am. AFSCME Local 3930*, No. 8:19-CV-927, 2019 WL 8108745, at *2 (C.D. Cal. Nov. 14, 2019); *Driscoll's, Inc. v. California Berry Cultivars, LLC*, No. 2:19-CV-493, 2019 WL 4822413, at *1 (E.D. Cal. Oct. 1, 2019); *Commerce & Indus. Ins. Co. v. Durofix, Inc.*, No. CV 16-00111, 2018 WL 8332535, at *2 (D. Haw. May 30, 2018); *United States*

v. Center for Diagnostic Imaging, Inc., No. C05-0058, 2010 WL 11682231, at *2 (W.D. Wash. Dec. 16, 2010). The ability of this Court to stay discovery while handling a dispositive motion is thus will settled.

Staying discovery is especially appropriate here, where the contemplated discovery is invasive and likely to raise serious constitutional and privilege arguments. Plaintiffs do not and cannot dispute that they seek discovery in the very heart of Executive Branch decisionmaking—top officials' and advisors' communications and deliberations regarding some of the Executive Branch's most sensitive prerogatives. That is a core of Plaintiffs' hidden-discrimination theory for their Equal Protection claim. Far from being "speculative," privilege and other objections for such an intrusive foray into the Executive Branch are inevitable. This Court is likely to be forced to spend substantial time and effort resolving those disputes and the attendant thorny legal questions, even though resolving the motion to dismiss may make that work unnecessary. The judicial system and the parties would therefore be best served by a temporary stay of discovery on the Equal Protection claim while the Court considers the pending motion to dismiss. Moreover, Plaintiffs do not even contend that they would be harmed by a stay of discovery.

II. Defendants Have Not Changed Position on Discovery

Contrary to Plaintiffs' insinuations, Defendants have been consistent in their position regarding discovery. Defendants have consistently stated that discovery on the Equal Protection claim is improper. Parties' Joint Status Report, ECF No. 193 (Dec. 16, 2019). Although Defendants agreed to schedule dispositive motions to occur after this

Court decided whether discovery was appropriate, Defendants never agreed that discovery itself should take place before a decision was made on those dispositive motions. And with good reason—as discussed above, the resolution of the motion to dismiss will affect the scope of any discovery.

It was sensible to brief discovery before dispositive motions as a means of preserving the resources of the Court and the parties. Had this Court held that no discovery was appropriate, then the parties could have submitted a single round of dispositive briefing instead of two, which would have saved time and energy for all involved. But now that the Court has ordered discovery, temporarily staying that discovery will likewise aid judicial efficiency as discussed above, because resolving the motion to dismiss will clarify the scope of permissible discovery.

This is the same approach taken by the District Court for the Northern District of California in another case challenging the DHS rule, *California v. Dep't of Homeland Security*, No. 4:19-cv-4975, -- F. Supp. 3d --, 2020 WL 1557424 (N.D. Cal. Apr. 1, 2020). There, the parties likewise agreed to brief the discovery issue before dispositive motions. But when the court granted discovery, it also granted Defendants' request for a stay of discovery until resolution of the motions to dismiss. That court held 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." *Id.* at *16. Likewise, the District of Maryland took the same approach in two others cases challenging the same DHS rule. On March 13, 2020, the court in *Casa de Maryland v. Trump*, No. 19-2715 (D. Md.) and *City of Gaithersburg v. DHS*, No. 19-2851 (D. Md.)

stayed "[a]ll proceedings related to discovery" and denied the plaintiffs' request for leave to file motions to compel "pending resolution of the Motion to Dismiss." *Casa*, No. 19-2715, ECF. No. 105 (D. Md. Mar. 13, 2020), attached hereto as Exhibit A. The Southern District of New York, too, recently entered a similar order in two other cases challenging the same rule. The plaintiffs in those cases had filed a motion for a pre-motion discovery conference in which they argued that they were entitled to discovery on their equal protection claims. *See, e.g.*, *New York v. DHS*, No. 19-7777, ECF No. 125 (Dec. 6, 2019). The court denied that motion "without prejudice to renew, if applicable, after this Court renders a decision on Defendants' pending motions to dismiss." *New York*, No. 19-7777, ECF No. 182 (May 14, 2020), attached hereto as Exhibit B. This Court should follow the same approach as these other courts and allow resolution of the motion to dismiss to inform the scope of permissible discovery. Indeed, none of the other several courts handling litigation regarding the Rule have permitted discovery prior to a ruling on the government's motion to dismiss.

* * *

Accordingly, this Court should stay its Order until the Court has resolved Defendants' pending motion to dismiss.

Dated: May 26, 2020

Respectfully submitted,

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Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 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/ Jordan L. Von Bokern
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Attorney for Defendants

 Ex. A

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
PAUL W. GRIMM
UNITED STATES DISTRICT JUDGE

6500 CHERRYWOOD LANE
GREENBELT, MARYLAND 20770
(301) 344-0670
(301) 344-3910 FAX

March 13, 2020

RE: Public Charge Cases
Casa de Maryland, Inc. et al. v. Trump et al., PWG-19-2715
City of Gaithersburg et al. v. DHS et al., PWG-19-2851

LETTER ORDER

Dear Counsel:

This Letter Order memorializes today's telephone conference with the parties in the *Casa de Maryland* and *City of Gaithersburg* cases regarding the Government's motion to stay the cases pending appeal (*Casa*, ECF No. 84), and Plaintiffs' requests for the Government to complete the administrative record or for leave to file motions to compel (*Casa*, ECF No.100; *Gaithersburg*, ECF No. 48).

For the reasons discussed on the telephone conference, the Government's motion to stay the cases pending appeal is GRANTED IN PART and DENIED IN PART as follows:

- All proceedings related to discovery and completion of the administrative record are STAYED;
- The parties will proceed with the Motion to Dismiss briefing;
- The parties will submit a joint status report by Wednesday, March 18, 2020 confirming that the Motion to Dismiss briefing schedule currently in place (*see Casa*, ECF No. 91) is still feasible or proposing an alternate schedule for the Court's approval.

The Plaintiffs' requests for the Government to complete the administrative record or for leave to file motions to compel are DENIED WITHOUT PREJUDICE, pending resolution of the Motion to Dismiss.

Although informal, this is an Order of the Court and shall be docketed as such.

Sincerely,

/S/ 3/17/20
Paul W. Grimm
United States District Judge

Ex. B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, CITY OF NEW YORK, STATE OF CONNECTICUT, and STATE OF VERMONT,

Plaintiffs,

-against-

UNITED STATES DEPARTMENT OF HOMELAND SECURITY; KEVIN K. MCALEENAN, *in his official capacity as Acting Secretary of the United States Department of Homeland Security*; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; KENNETH T. CUCCINELLI II, *in his official capacity as Acting Director of United States Citizenship and Immigration Services*; and UNITED STATES OF AMERICA.,

Defendants.

ORDER

19 Civ. 7777 (GBD)

MAKE THE ROAD NEW YORK, AFRICAN SERVICES COMMITTEE, ASIAN AMERICAN FEDERATION, CATHOLIC CHARITIES COMMUNITY SERVICES, and CATHOLIC LEGAL IMMIGRATION NETWORK, INC.,

Plaintiffs,

-against-

KEN CUCCINELLI, *in his official capacity as Acting Director of United States Citizenship and Immigration Services;* UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES; KEVIN K. MCALEENAN, *in his official capacity as Acting Secretary of Homeland Security*; and UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendants.

ORDER

19 Civ. 7993 (GBD)

GEORGE B. DANIELS, United States District Judge:

Plaintiffs' letter motion for a pre-motion discovery conference (19-cv-7777, ECF No. 125; 19-cv-7993, ECF No. 162) is DENIED, without prejudice to renew, if applicable, after this Court renders a decision on Defendants' pending motions to dismiss (19-cv-7777, ECF No. 140; 19-cv-7993, ECF No. 176).

Plaintiffs' request that the Court restructure the order of presentation of oral argument scheduled for May 18, 2020 (19-cv-7777, ECF No. 179; 19-cv-7993, ECF No. 208) is DENIED.

Members of the public who wish to listen to the oral argument scheduled for May 18, 2020 at 10:00 am may call (888) 363-4749 and use Access Code 4523890.

Dated: New York, New York
May 14, 2020

SO ORDERED.

George B. Daniels

GEORGE B. DANIELS
United States District Judge