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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

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

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

14 Indeed, the Supreme Court has already determined that the Government is likely
 15 to succeed in its defense of the DHS rule. The Court has already stayed two preliminary
 16 injunctions that district courts had entered against the DHS rule. *Wolf v. Cook County*,
 17 Ill., 140 S. Ct. 681 (2020); *Dep’t of Homeland Security v. New York*, 140 S. Ct. 599
 18 (2020). To grant those stays, the Court must first have determined that there is “a fair
 19 prospect that a majority of the Court will conclude that the decision below was
 20 erroneous.” *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in
 21 chambers) (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in
 22 chambers)).

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

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

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

8 It is well within a district court’s power to limit discovery until after resolving a
 9 potentially dispositive motion that would, if granted, render such discovery unnecessary.
 10 Any assertion by Plaintiffs that this is an “out-of-Circuit” practice is erroneous. In fact,
 11 the Ninth Circuit has expressly blessed the practice of staying discovery while
 12 considering a potentially dispositive motion. *Little v. City of Seattle*, 863 F.2d 681, 685
 13 (9th Cir. 1988) (upholding a stay of discovery until after resolving a claim of immunity).
 14 Such a stay “furthers the goal of efficiency for the court and litigants.” *Id.* And it is
 15 common practice for district courts within this circuit to stay or otherwise limit discovery
 16 while considering a motion that may resolve the issue on which discovery is sought. *See*,
 17 *e.g.*, *Ahern Rentals, Inc. v. EquipmentShare.com, Inc.*, No. 2:10-cv-1788, 2020 WL
 18 2216944, at *2–3 (E.D. Cal. May 7, 2020); *Quetzambra v. United Domestic Workers of*
 19 *Am. AFSCME Local 3930*, No. 8:19-CV-927, 2019 WL 8108745, at *2 (C.D. Cal. Nov.
 20 14, 2019); *Driscoll’s, Inc. v. California Berry Cultivars, LLC*, No. 2:19-CV-493, 2019
 21 WL 4822413, at *1 (E.D. Cal. Oct. 1, 2019); *Commerce & Indus. Ins. Co. v. Durofix,*
 22 *Inc.*, No. CV 16-00111, 2018 WL 8332535, at *2 (D. Haw. May 30, 2018); *United States*

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

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

18 **II. Defendants Have Not Changed Position on Discovery**

19 Contrary to Plaintiffs’ insinuations, Defendants have been consistent in their
 20 position regarding discovery. Defendants have consistently stated that discovery on the
 21 Equal Protection claim is improper. Parties’ Joint Status Report, ECF No. 193 (Dec. 16,
 22 2019). Although Defendants agreed to schedule dispositive motions to occur after this

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

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

12 This is the same approach taken by the District Court for the Northern District of
 13 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).
 15 There, the parties likewise agreed to brief the discovery issue before dispositive motions.
 16 But when the court granted discovery, it also granted Defendants’ request for a stay of
 17 discovery until resolution of the motions to dismiss. That court held that “permitting
 18 discovery prior to assessing viability of plaintiffs’ claims and directly addressing the
 19 appropriate standard of review and the implications of that standard would be premature.”
 20 *Id.* at *16. Likewise, the District of Maryland took the same approach in two others cases
 21 challenging the same DHS rule. On March 13, 2020, the court in *Casa de Maryland v.*
 22 *Trump*, No. 19-2715 (D. Md.) and *City of Gaithersburg v. DHS*, No. 19-2851 (D. Md.)

1 stayed “[a]ll proceedings related to discovery” and denied the plaintiffs’ request for leave
2 to file motions to compel “pending resolution of the Motion to Dismiss.” *Casa*, No. 19-
3 2715, ECF. No. 105 (D. Md. Mar. 13, 2020), attached hereto as Exhibit A. The Southern
4 District of New York, too, recently entered a similar order in two other cases challenging
5 the same rule. The plaintiffs in those cases had filed a motion for a pre-motion discovery
6 conference in which they argued that they were entitled to discovery on their equal
7 protection claims. *See, e.g., New York v. DHS*, No. 19-7777, ECF No. 125 (Dec. 6, 2019).
8 The court denied that motion “without prejudice to renew, if applicable, after this Court
9 renders a decision on Defendants’ pending motions to dismiss.” *New York*, No. 19-7777,
10 ECF No. 182 (May 14, 2020), attached hereto as Exhibit B. This Court should follow the
11 same approach as these other courts and allow resolution of the motion to dismiss to
12 inform the scope of permissible discovery. Indeed, none of the other several courts
13 handling litigation regarding the Rule have permitted discovery prior to a ruling on the
14 government’s motion to dismiss.

* * *

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

18 || Dated: May 26, 2020

Respectfully submitted,

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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.

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UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
PAUL W. GRIMM
UNITED STATES DISTRICT JUDGE

6500 CHERRYWOOD LANE
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(301) 344-0670
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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).

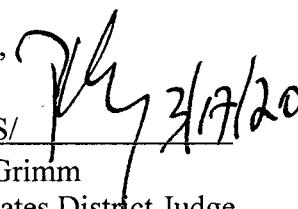
For the reasons discussed on the telephone conference, the Government's motion to stay the cases pending appeal is GRANTED IN PART and DENIED IN PART as follows:

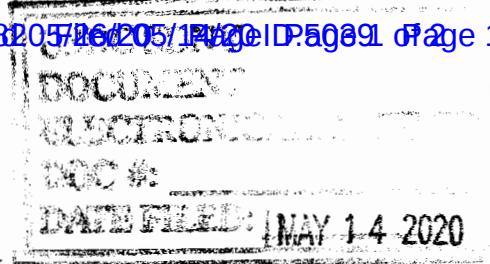
- All proceedings related to discovery and completion of the administrative record are STAYED;
- The parties will proceed with the Motion to Dismiss briefing;
- The parties will submit a joint status report by Wednesday, March 18, 2020 confirming that the Motion to Dismiss briefing schedule currently 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/
Paul W. Grimm
United States District Judge



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, : ORDER

-against- : 19 Civ. 7777 (GBD)

UNITED STATES DEPARTMENT OF :
HOMELAND SECURITY; KEVIN K. :
MCALLENAN, *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. :

-X-

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

Plaintiffs, : ORDER

-against- : 19 Civ. 7993 (GBD)

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

Defendants. :

-X-

GEORGE B. DANIELS, United States District Judge:

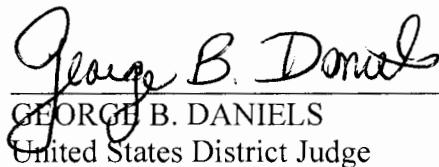
Plaintiffs' letter motion for a pre-motion discovery conference (19-cv-7777, ECF No. 125; 19-cv-7993, ECF No. 162) is DENIED, without prejudice to renew, if applicable, after this Court renders a decision on Defendants' pending motions to dismiss (19-cv-7777, ECF No. 140; 19-cv-7993, ECF No. 176).

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
United States District Judge