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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, a federal agency, et al.

Defendants.

NO. 4:19-cv-05210-RMP

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION OF DENIAL OF MOTION TO DISMISS

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I. INTRODUCTION

The Department of Homeland Security (DHS or Defendants) asks this Court to reconsider allowing Plaintiff States' Equal Protection allegations to proceed to discovery. Defendants' request is merely an attempt to relitigate issues that are now better left for summary judgment. Plaintiffs have plausibly stated a viable claim under the Fifth Amendment Due Process clause, but Defendants are urging this Court to accept a factual reality contradicted by Plaintiffs' allegations, discovery documents, and the publicly-available record. Reconsideration is not a vehicle to give Defendants a fourth bite of the apple.

II. BACKGROUND

Count IV of the First Amended Complaint alleges that DHS's public charge Rule violated the equal protection component of the Fifth Amendment Due Process Clause. ECF No. 31 at 176–78. The Court denied Defendants' motion to dismiss this Count (Order). ECF No. 238. In denying Defendants' motion, the Court considered and distinguished the United States Supreme Court decision, *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020). The Court ruled that the statements alleged by Plaintiffs were "made by high-level officials in the Administration contemporaneous with DHS's finalizing the Public Charge Rule" and specifically related to the rule. ECF No. 238 at 42. This contrasted with *Regents*, in which the plurality opinion found the President's alleged statements about Latinos were remote in time from, and unrelated to, the Deferred Action for Childhood Arrivals program. *Id*. at 41.

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Defendants moved to reconsider the denial of their motion to dismiss Count IV. ECF No. 254. Defendants appear to argue that *Ramos v. Wolf*, No. 18-16981, 2020 U.S. App. LEXIS 29050 (9th Cir. Sep. 14, 2020), issued the same day the Court denied their motion to dismiss Count IV, is a "change in controlling law" that is inconsistent with this Court's reasoning. ECF No. 254.

III. ARGUMENT

Defendants argue that this Court should reconsider its order denying the Motion to Dismiss Plaintiffs' Equal Protection claim because the *Ramos* decision undermines this Court's conclusion that statements made by White House officials plausibly demonstrated that discriminatory animus motivated the formulation of the Rule. But *Ramos* constitutes neither a change in controlling law nor a new argument that compels revisiting this Court's prior decision. Because Defendants are merely relitigating arguments that were made and rejected, reconsideration is inappropriate.

A. Legal Standard

District courts have "inherent jurisdiction to modify, alter, or revoke . . . their own orders before they become final . . . ." *United States v. Martin*, 226 F.3d 1042, 1049 (9th Cir. 2000). Reconsideration is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). Thus, "'a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly

discovered evidence, committed clear error, or if there is an intervening change in the controlling law.'" *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (quotation omitted).

B. *Ramos* Does Not Constitute a "Change in Controlling Law"

This Court should not reconsider its Order because *Ramos* does not offer any new insight to plausibly establishing the connection between discriminatory statements and official action at the motion to dismiss stage. First, *Ramos* merely reiterated the analysis from the earlier *Regents* decision and therefore does not constitute a "change" in the law. Second, because the *Ramos* decision addressed a preliminary injunction and not a 12(b)(6) motion to dismiss, *Ramos* does not constitute "controlling" law.

In *Regents*, the Supreme Court considered, in pertinent part, an equal protection challenge under the Fifth Amendment's Due Process Clause to DHS's decision to terminate the immigration relief program known as Deferred Action for Childhood Arrivals (DACA). 140 S. Ct. at 1897. In defending against DHS's motion to dismiss, the plaintiffs argued, in part, that "pre- and post-election statements by President Trump" demonstrated that the Department's decision to rescind DACA was motivated by discriminatory animus. *Id.* at 1915. The plurality of the Court held that these statements were "remote in time and made in unrelated contexts" and therefore "d[id] not qualify as 'contemporary statements' probative of the decision at issue." *Id.* at 1916 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977)). The

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plurality therefore held that the respondents "fail[ed] to raise a plausible inference that the [DACA] rescission was motivated by animus." *Id.*

In *Ramos*, a divided panel of the Ninth Circuit considered a preliminary injunction that was based, in part, on the likelihood of success on a similar equal protection challenge to the Department's decision to terminate Temporary Protected Status (TPS) designations of Sudan, Nicaragua, Haiti, and El Salvador. 2020 U.S. App. LEXIS 29050 at *13. Like *Regents*, the plaintiffs cited to statements made by President Trump as evidence of discriminatory motive. *Id.* at 30–32. The Ninth Circuit held that this evidence "fail[ed] . . . [to] show[] a likelihood of success, or even [raise] serious questions, on the merits of [plaintiffs'] claim that racial animus toward 'non-white, non-European' populations was a motivating factor in the TPS terminations." *Id.* at *65–66. Relying on *Regents*, the divided panel held that "these statements occurred primarily in contexts removed from and unrelated to TPS policy or decisions." *Id.* at *62. Although the district court cited evidence that the White House was pressuring the Department to change TPS policy, *id.* at *28–30, the Court noted that the plaintiffs still failed to provide "evidence that the President's statements played any role in the TPS decision-making process," *id.* at *62.

Ramos merely reiterated the *Regents* Court's analysis on the need to establish a connection between President Trump's statements and the agency's actions. *Ramos* does not provide any additional context for the *Regents* decision because both cases dealt with an equal protection claim under the Fifth

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Amendment, and both relied exclusively on Trump statements. Indeed, Defendants admit that *Ramos* is merely a continuation of *Regents* by citing to *Regents* numerous times in their brief. ECF No. 256 at 5–9. Thus, *Ramos* does not plow any new ground that would have better informed this Court's Order.

Further, because the legal standard in *Ramos* is different from the legal standard this Court applied on Defendants' motion to dismiss, the *Ramos* analysis is not controlling. In *Ramos*, the plaintiffs had to justify the preliminary injunction by presenting either a "likelihood of success on the merits," or "serious questions going to the merits" of their equal protection claim. *Ramos*, 2020 U.S. App. LEXIS 29050 at *34–35 (quoting *Short v. Brown*, 893 F.3d 671, 675 (9th Cir. 2018)). By contrast, this Court was tasked with determining only whether the "'factual content,' and reasonable inferences from that content, [are] plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. United States Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). Because the plaintiffs' burden to obtain a preliminary injunction in *Ramos* was far more stringent than the Plaintiffs' burden to survive a 12(b)(6) motion to dismiss in this case, the *Ramos* analysis does not govern the outcome here. *Compare Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1122 (9th Cir. 2008), with *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008).

Because *Ramos* merely reiterated the analysis in *Regents* in a legal context that is inapplicable to the current posture of this case, that decision does not constitute a "change in controlling law" that would justify reconsideration.

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C. Defendants' Reliance on *Ramos* Merely Repeats Arguments They Made in Support of Their Original Motion to Dismiss

Defendants claim that *Ramos* compels the conclusion that statements made by Stephen Miller and Kenneth Cuccinelli that evinced discriminatory animus "occurred in 'contexts removed from and unrelated to' the relevant decision[,]" and therefore cannot support Count IV. ECF No. 256 at 5 (quoting *Ramos*, 2020 U.S. App. LEXIS 29050, at *62). This argument, however, merely repeats the arguments Defendants made in support of the original motion to dismiss. In their Motion to Dismiss, Defendants argued that the "alleged public statements in the Complaint do not reference the Rule, and do not otherwise reveal why any particular official supported the Rule." ECF No. 223 at 28. And Defendants specifically cited to the *Regents* decision to argue that "the statements Plaintiffs rely upon cannot support an inference that the decision-makers acted with animus" because "there must still be an allegation tying this animus to the precise policy at issue here (the Rule)." ECF No. 236 at 34–35. This similarity in the arguments militates against reconsideration because reconsideration "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (citation omitted).

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D. *Ramos* Does Not Compel a Different Conclusion on Plaintiffs' Equal Protection Claim

Even if *Ramos* could be construed as a change in controlling law, this Court's analysis in distinguishing *Regents* compels the conclusion that *Ramos* is also distinguishable. Defendants argue that under *Ramos*, "statements by administration officials that allegedly show discriminatory animus . . . d[o] *not* suggest any equal protection violation." ECF No. 256 at 5. But *Ramos* merely requires a plaintiff to provide a link between the statements and the decision-making process. *Ramos*, 2020 U.S. App. LEXIS 29050 at *59–60.[1] To establish this connection, a "plaintiff need provide '*very little such evidence* . . . to raise a genuine issue of fact . . . '" *Pac. Shores Props., LLC v. City of Newport Beach*,

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[1] The Ninth Circuit merely held that a district court cannot use a "cat's paw" theory to artificially create a connection between the views of one government actor and the actions of a separate government actor. *Ramos*, 2020 U.S. App. LEXIS 29050 at *60. This rationale does not apply to statements made by former Acting Director Cuccinelli. Cuccinelli oversaw the implementation of the Rule. ECF No. 31 at ¶ 116. Thus, his thinly veiled discriminatory statements have a more direct and logical impact on the formulation of the Rule. *See Cook County v. Wolf*, No. 19-cv-6334, 2020 U.S. Dist. LEXIS 8768 at *30 (N.D. Ill. May 19, 2020) (Cuccinelli's "statements are unquestionably pertinent in evaluating whether ICIRR has a plausible equal protection claim").

730 F.3d 1142, 1159 (9th Cir. 2013) (emphasis added) (quoting *Schnidrig v. Columbia Mach., Inc*., 80 F.3d 1406, 1409 (9th Cir. 1996)).

Here, this Court properly noted that Plaintiffs established the connection that was lacking in *Regents* and *Ramos* because Plaintiffs alleged that White House senior advisor Stephen Miller was a key architect of the Rule. ECF No. 31 at ¶¶ 96, 112–13. For example, Plaintiffs have alleged that Miller attempted to force the resignation of then-USCIS Director L. Francis Cissna because Miller viewed Cissna as a roadblock to implementing the Rule in the way Miller wanted. ECF No. 31 at ¶ 113. In fact, Plaintiffs have received documents that support Miller's involvement in and direct influence on the formulation of the Rule. ECF No. 256-4 at 16 ("The [Rule] is widely attributed to Stephen Miller, Trump's hardline anti-immigration advisor."). Other documents reveal Miller's "'singular obsession' with the public charge rule," Declaration of Ryan S. Hardy (Hardy Decl.) ¶ 2, Ex. A, and active involvement in the rulemaking process, Hardy Decl. ¶ 3, Ex. B; ¶ 4, Ex. C.

These allegations and documents go beyond merely exerting pressure on agency decisions. *Ramos*, 2020 U.S. App. LEXIS 29050 at *61. When Miller copied the Office of Management and Budget Director Mick Mulvaney on an email criticizing Cissna, it was clear who answered to whom. Hardy Decl. ¶ 3, Ex. B at 1. And when the USCIS chief counsel promised to "do what we can to quickly move [the Rule] back up to the Department and then OMB," *id.* at 3, it became clear that Miller spoke to Cissna as a superior in an executive decision-

making hierarchy and not as a co-equal colleague reminding Cissna of a deadline. *See Free Enter. Fund v. PCAOB*, 561 U.S. 477, 501 (2010) ("The President has been given the power to oversee executive officers; he is not limited . . . to 'persuad[ing]' his unelected subordinates 'to do what they ought to do without persuasion.' In its pursuit of a 'workable government,' Congress cannot reduce the Chief Magistrate to a cajoler-in-chief.") (citation omitted) (alterations in original). Thus, Miller's statements made during the formulation of the Rule have a logical connection to Plaintiffs' allegation that the Rule violates the equal protection clause of the Fifth Amendment. *See City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 196–97 (2003) ("[S]tatements made by decisionmakers or referendum sponsors during deliberation over a referendum may constitute relevant evidence of discriminatory intent in a challenge to an ultimately enacted initiative.").

Defendants' argument that *Ramos* rejects mere temporal proximity between discriminatory statements and agency policy also falls short because neither this Court nor the Plaintiffs relied solely upon the timing of the statements from federal officials and the promulgation of the Rule to plausibly establish the connection between the two. Specifically, this Court noted that DHS's acknowledgement at the time the Rule was published that the Rule would have a likely discriminatory effect itself was evidence that DHS knew of the discriminatory impact of the Rule. ECF No. 248 at 42. This acknowledgement from DHS, which was not present in *Regents* and *Ramos*, helped establish the

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connection that *Regents* and *Ramos* require.[2] In other words, the temporal proximity augmented the connection between Miller's statements and Rule, it did not create that connection.

IV. CONCLUSION

Plaintiffs' equal protection claim survived a motion to dismiss, and now Defendants must respond to the mounting evidence that Stephen Miller allowed his racist, white nationalist views to infect the decision-making process that led to the formulation of the Rule rather than pretend this evidence does not exist.

For the foregoing reasons, Defendants' motion for reconsideration should be denied.

RESPECTFULLY SUBMITTED this 21st day of October 2020.

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[2] Other documents in Plaintiffs' possession reveal that Miller's views on public assistance to immigrants prior to working at the White House were incorporated into the Rule itself. Hardy Decl. ¶ 5, Ex. D; ¶ 6, Ex. E; ¶ 7, Ex. F; ¶ 8, Ex. G. The logical inference from Miller's involvement in the Rule and the consistency between his views and the Rule's regulatory changes is "that racial animus was at least 'a motivating factor' in" formulating the Rule. *Ramos*, 2020 U.S. App. LEXIS 29050 at *58 (quoting *Arlington Heights*, 429 U.S. at 265–66).

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will serve a copy of this document upon all counsel of record.

DATED this 21st day of October 2020, at Seattle, Washington.

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