UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

No. 6:21-cv-00191

State of Texas et al.,
Plaintiffs,
v.
Chiquita Brooks-LaSure et al.,
Defendants.

ORDER

The parties have conferred and filed a discovery-planning report under Federal Rule of Civil Procedure 26(f). The case is now ready for a scheduling order. Pursuant to Federal Rule of Civil Procedure 16(b), the court orders the following deadlines:

- **September 24, 2021:** Deadline for defendants to certify and file the administrative record.
- **November 11, 2021:** Deadline for plaintiffs to move to supplement the administrative record.
- **November 12, 2021:** Deadline to join parties with leave of court and amend the pleadings with leave of court.
- **January 7, 2022:** Deadline for a party with the burden of proof on an issue to file a written designation of the name and address of any expert witness who will testify on that issue and otherwise comply with Federal Rule of Civil Procedure 26(a)(2) and Local Rule CV-26(b). Within 45 days of any such disclosure, the party intending to rebut any such expert testimony must make disclosures for any such rebuttal expert testimony or evidence.
- **February 4, 2022:** Deadline for a party without the burden of proof on an issue to file a written designation of the name and address of any expert witness who will testify for that party and otherwise comply with Federal Rule of Civil Procedure 26(a)(2) and Local Rule CV-26(b). Within 45

days of any such disclosure, the party intending to rebut any such expert testimony must make disclosures for any such rebuttal expert testimony or evidence.

- **May 10, 2022:** Deadline for the completion of all discovery.
- **June 21, 2022:** Deadline for all dispositive motions and any other motions that may require a hearing, including *Daubert* motions.

A bench trial will be scheduled, if necessary, upon ruling on any dispositive motions. The presently anticipated date for any bench trial is September 19, 2022.

Discovery is open pursuant to Rule 26(d)(1) because the parties have conferred as required by Rule 26(f). However, defendants dispute the propriety of discovery into agency decision-making. As such, discovery on that matter should not proceed until the court receives further briefing and issues a ruling clarifying the permissibility of that discovery. Discovery on other matters, such as plaintiffs' standing and the equitable requirements for the permanent injunction sought by plaintiffs, remains available.

To assist in resolving the parties' dispute regarding discovery into agency decision-making, the parties are ordered to file briefing to supplement their Rule 26(f) report. Each side must file a single, separate supplemental brief. Each brief must address and cite relevant authority on the following issues:

- Is a claim pursuant to 5 U.S.C. § 706(1) that agency action was unlawfully withheld or delayed "an action for review on an administrative record" within the meaning of Federal Rule of Civil Procedure 26(a)(1)(B)(i)? If defendants contend that this claim is for review on an administrative record, what administrative record needs to be produced for a claim that an agency's *failure* to act constitutes unreasonable delay? Are facts outside a record produced by the agency admissible to show that a delay in agency action is unreasonable? *See generally Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989) (noting that extra-record materials are

appropriate, among other things, "in cases where agencies are sued for a failure to take action").

- Is plaintiffs' estoppel claim "an action for review on an administrative record" within the meaning of Federal Rule of Civil Procedure 26(a)(1)(B)(i)? If defendants argue that it is, what type of materials relevant to that claim would be in an administrative record produced by the agency?
- Is plaintiffs' Spending Clause claim "an action for review on an administrative record" within the meaning of Federal Rule of Civil Procedure 26(a)(1)(B)(i)? Can an affirmative answer to that question be squared with the proposition that, "[w]hen reviewing constitutional challenges to agency decisionmaking, courts make an independent assessment of the facts"? *Rydeen v. Quigg*, 748 F. Supp. 900, 906 (D.D.C. 1990) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 578–79 n.2 (1968)); *accord Porter v. Califano*, 592 F.2d 770, 780 (5th Cir. 1979) ("The intent of Congress in 5 U.S.C. s 706(2)(B) was that courts should make an independent assessment of a citizen's claim of constitutional right when reviewing agency decision-making.").
- Does the Spending Clause claim, however, require plaintiffs to make any showing of intent? Or are there any other reasons why plaintiffs' Spending Clause claim would require discovery into agency decision-making, as opposed to discovery into the coercive effect on Texas of federal spending decisions?
- Is a waiver of sovereign immunity necessary to seek an injunction against the United States to prevent it from enforcing a statute or agency action in violation of the Spending Clause? If so, is the waiver in the Administrative Procedure Act sufficient here?
- What threshold showing is necessary to authorize discovery into agency decision-making for plaintiffs to establish their claim of arbitrary and capricious agency action? *See generally Tech Sys., Inc. v. United States*, 97 Fed. Cl. 262,

> 265 (Ct. Fed. Cl. 2011) ("A plaintiff seeking to supplement the record need not, for that purpose, meet the same burden of proof that it ultimately must carry on the merits, and '[t]he test for supplementation is whether there are sufficient well-grounded allegations of bias to support' supplementation.").

As the parties resisting discovery obligations on these matters, defendants' supplemental brief is due first, on September 20, 2021. Plaintiffs' supplemental brief is due on September 27, 2021. Each brief is limited to 25 pages.

So ordered by the court on September 13, 2021.

J. CAMPBELL BARKER
United States District Judge