UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

IRANIAN ALLIANCES ACROSS BORDERS, *et al*., Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al*. Defendants.	Civil Action No.: 17-CV-2921 Judge Chuang
EBLAL ZAKZOK, *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	Civil Action No.: 17-CV-2969 Judge Chuang

MEMORANDUM IN OPPOSITION TO MOTION TO
STAY AND IN SUPPORT OF MOTION FOR ENTRY OF A SCHEDULING ORDER

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INTRODUCTION

The Government urges the Court to stay these cases until the Fourth Circuit and Supreme Court provide guidance on some of the issues that the cases present. The Government claims that a stay could conserve judicial resources because the preliminary-injunction appeals may resolve these cases in their entirety. That will not happen. Plaintiffs have numerous claims that are not even before the appellate courts. Regardless of how the Fourth Circuit and Supreme Court rule on the claims before them, this Court must still decide equal-protection, due-process, free-speech, free-association, and Administrative Procedure Act ("APA") claims. Moreover, the Fourth Circuit and Supreme Court are unlikely to decide the *merits* of Plaintiffs' claims in a preliminary-injunction appeal. And even if the Fourth Circuit or the Supreme Court disagrees with this Court's view that Plaintiffs are likely to succeed on the merits of their Establishment Clause claims based on the *current* record, Plaintiffs will have the opportunity to develop even more evidence that the Proclamation was adopted primarily based on anti-Muslim animus, and not on the national-security concerns that the Government has claimed are demonstrated in undisclosed documents, during merits proceedings.

The prospect of guidance from an appellate court is also not ordinarily a reason to stay merits litigation. If that were required, every preliminary injunction would stall litigation in the trial court while the losing party took an appeal—a most inefficient means of resolving injunction cases, particularly where precious constitutional rights, and even more valuable family relationships, are at stake. Instead, when a preliminary-injunction ruling is appealed, a case continues to proceed towards final judgment just as it would if the plaintiff had not sought a preliminary injunction. If a defendant wants to stay proceedings while it appeals the preliminary-injunction ruling, it bears a heavy burden to show that the equities favor a stay. The Government has not made this showing.

The Government attempts to downplay the effects of the requested stay by noting that it will last only a few months until the Fourth Circuit and Supreme Court rule. But forcing Plaintiffs to wait five more months just to begin briefing on a motion to dismiss will cause significant hardship to Plaintiffs. Plaintiffs suffer each additional day that they remain separated from their loved ones. Indeed, for the elderly Plaintiffs and the Plaintiffs whose relatives suffer from life-threatening illnesses, an additional five months of delay, just to start discovery that will likely also take many months, may mean the difference between being reunited with their families and never seeing their loved ones again. The Government cannot identify any harm that it will suffer by beginning discovery now that even remotely compares to the harm that Plaintiffs face.

The Government also speculates that Plaintiffs will seek unreasonably broad discovery. That concern is unfounded. Plaintiffs will begin discovery by requesting only two limited categories of documents: the reports that underlie the Proclamation and documents concerning the waiver process established by the Proclamation. These documents will be relevant to Plaintiffs' claims no matter how the preliminary-injunction appeals are decided. This initial discovery is critical to determining what, if any, other discovery will be necessary in this case. It will also help advance the case towards a resolution on the merits.

In short, Plaintiffs seek nothing more than to pursue their claims on the schedule provided by the Federal Rules of Civil Procedure, just as any other plaintiff is typically permitted to do. The Government has not offered any compelling reason why Plaintiffs should not be allowed to do so. Given the substantial harm that Plaintiffs would suffer from further delay, and the lack of harm to the Government, the Court should deny the Government's motion for a stay and grant Plaintiffs' cross-motion for entry of a scheduling order.

BACKGROUND

Presidential Proclamation 9645 ("Proclamation")[1] is the third order the President has signed in just over a year to ban millions of citizens from Muslim-majority nations from coming to the United States. *See generally IAAB* ECF No. 46; *Zakzok* ECF No. 36, at 5–21 (district court findings of fact). The bans fulfill the President's many promises to ban Muslims from the United States. *See id.*

The first iteration of the ban, 82 Fed. Reg. 8977 ("EO-1"), was swiftly challenged and enjoined. *See id.* at 8–9. The second iteration of the ban, signed March 6, 2017, reproduced the original in most respects. 82 Fed. Reg. 13209 ("EO-2"). This Court enjoined Section 2(c) of EO-2, and the U.S. Court of Appeals for the Fourth Circuit, sitting en banc, affirmed. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 604–05 (4th Cir. 2017) (en banc), *vacated as moot*, 138 S. Ct. 353 (Oct. 10, 2017). On September 24, 2017, the President signed the Proclamation, which, like the first two bans, would disproportionately ban Muslims, this time for an indefinite period of time.

The individual Plaintiffs in this litigation are U.S. citizens and lawful permanent residents whose relatives—including spouses, parents, and children—are unable to obtain visas while the Proclamation is in effect. *See generally IAAB* ECF No. 46, *Zakzok* ECF No. 36, at 21–35. Not only have many of the Plaintiffs been prevented from reuniting with their family members and loved ones, but they also feel "personally attacked, targeted, and disparaged . . . like an outsider in the country" that they call home. *E.g.*, John Doe #6 Decl. ¶ 9, *IAAB* ECF No. 26-8.

[1] Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. 45161 (Sept. 24, 2017).

The organizational plaintiffs are social-services organizations and associations of young people with similarly situated members and clients that host events and provide services that the Proclamation has disrupted. *See IAAB* ECF No. 46, *Zakzok* ECF No. 36, at 21–35.

Plaintiffs' complaints allege numerous causes of action, and sought a preliminary injunction of the Proclamation based on certain of these claims—specifically that it violated the Establishment Clause of the First Amendment to the United States Constitution, and that the issuance of the travel ban exceeded the President's delegated authority under the Immigration and Nationality Act to suspend the entry into the United States of classes of immigrants and nonimmigrants. *IAAB v. Trump*, No. 17-cv-2921-TDC (D. Md. filed October 2, 2017) ("*IAAB*"); *Zakzok v. Trump*, No. 17-cv-2969-TDC (D. Md. filed October 6, 2017) ("*Zakzok*"). This Court agreed that the Proclamation, like EO-2, likely violates the Establishment Clause, *IAAB* ECF No. 46, *Zakzok* ECF No. 36, at 61–84. This Court also held that the Proclamation's nationality-based ban on the issuance and use of immigrant visas likely violates the INA's anti-discrimination provision, 8 U.S.C. § 1152(a). *Id.* at 42–48. The Court accordingly issued a preliminary injunction prohibiting the Government from enforcing Section 2 of the Proclamation.[2]

The Government appealed the injunction order, and the Fourth Circuit heard oral argument on December 8, 2017. In both the Fourth Circuit and the Ninth Circuit,[3] the

[2] The preliminary injunction does not cover North Korea and the limited group of Venezuelans subject to the ban. *Id.* at 89. The Court also limited the injunction's protection to "those individuals who have a credible claim of a bona fide relationship with a person or entity in the United States." *Id.* at 86.

[3] In addition to the District of Maryland cases, plaintiffs in several other courts have also sought to challenge the Proclamation. *See, e.g.*, *Hawaii v. Trump*, No. 17-cv-50 (D. Haw. 2017). On October 17, 2017, the court in *Hawaii* entered a temporary restraining order against certain sections of the Proclamation, and on October 20, 2017, the Court converted its temporary re-
(continued…)

Government moved to stay enforcement of the preliminary injunctions pending the appeals. The Ninth Circuit stayed the injunction as to persons without bona fide relationships in the United States. Order Granting Stay in Part, *Hawaii v. Trump*, No. 17-17168 (9th Cir. Nov. 13, 2017), ECF No. 39.

After the Government requested that the Supreme Court stay the injunctions issued by both the *Hawaii* district court and this Court, the Supreme Court stayed both injunctions in full pending resolution of the appeals. *Trump v. Hawaii*, 138 S. Ct. 542 (2017); *Trump v. IRAP*, 138 S. Ct. 542 (2017). On December 22, 2017, the Ninth Circuit affirmed, in part, the district court's injunction. *Hawaii v. Trump*, No. 17-17168, 2017 WL 6554184 (9th Cir. Dec. 22, 2017). The Government filed a petition for certiorari, which the Supreme Court granted on January 19, 2018. *Trump v. Hawaii*, 583 U.S. ___ (Jan. 19, 2018).[4]

The Fourth Circuit has not ruled on the appeals in these cases.

ARGUMENT

I. These Cases Should Not Be Stayed Pending Appellate Review Of The Preliminary Injunction Rulings In This Case And The *Hawaii* Case.

"Discovery under the Federal Rules of Civil Procedure is broad in scope and freely permitted." *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 402 (4th Cir. 2003). A party must meet a high burden to obtain a stay of discovery, particularly where the

straining order to a preliminary injunction. *See Hawaii*, ECF Nos. 387, 390. The Government appealed that preliminary injunction as well. *See Hawaii*, ECF No. 391.

[4] The Supreme Court directed the parties to brief and argue the following four questions: 1) whether the challenge to the President's suspension of entry of aliens is justiciable; 2) whether the Proclamation is a lawful exercise of the President's authority to suspend entry of aliens abroad; 3) whether the Proclamation violates the Establishment Clause; and 4) whether the global injunction is impermissibly overbroad. *See Trump v. Hawaii*, 583 U.S. ___ (Jan. 19, 2018).

party seeks a stay because of the pendency of other litigation. Indeed, "the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936). When moving for a stay pursuant to the court's inherent power to manage its docket, the moving party bears the burden of justifying the stay "by clear and convincing circumstances outweighing potential harm to the party against whom it is operative." *Williford v. Armstrong World Indust., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983); *Mullins v. Suburban Hosp. Healthcare Sys., Inc.*, No. 16 Civ. 1113, 2017 WL 3023282, at *1 (D. Md. July 17, 2017) ("A party seeking a stay must demonstrate a pressing need for one and that the need for a stay outweighs any possible harm to the nonmovant." (citations omitted)).

The Government has not met its burden to obtain a stay. Plaintiffs will suffer substantial and irreparable harm from a stay because the delay in resolving their claims will prolong their separation from family members. The Government, in contrast, will not be harmed by advancing with merits proceedings, which the Government will necessarily have to do regardless of the outcome of the appellate proceedings. The Government complains about the burden of engaging in motions practice and discovery, but those are burdens that defendants must always bear in litigation. And contrary to the Government's suggestion, further proceedings will be necessary in this Court no matter how the Fourth Circuit and Supreme Court rule. The appellate courts are unlikely to decide the Establishment Clause and statutory claims on the merits in a preliminary-injunction appeal, but even if they did, this Court would still have to decide Plaintiffs' numerous other claims that are not part of the current appeals.

A. The Government Has Not Met Its High Burden To Obtain A Stay.

1. Plaintiffs suffer each day from this unconstitutional policy.

Plaintiffs seek to be reunited with family members from whom they have been separated for months or years. The Government ignores this ongoing harm and instead contends that "plaintiffs will not suffer any prejudice to their ability to conduct discovery." Def.'s Mot. to Stay at 21, *IAAB* ECF No. 63, *Zakzok* ECF No. 51, at 21. But the issue here is not whether Plaintiffs' ability to conduct discovery will be prejudiced, but whether Plaintiffs will be prejudiced because a stay will delay the ultimate resolution of their claims. Plaintiffs suffer each day that the President's unconstitutional policy remains in place. By postponing discovery until after the preliminary injunction proceedings are resolved, the Government would necessarily lengthen the litigation process and indefinitely postpone Plaintiffs' opportunity to obtain a final determination of their claims on the merits and ultimately to reunite with their family members.

Contrary to the Government's assertions, these delays would be substantial. The Government proposes that these cases be stayed while the Supreme Court decides the *Hawaii* case, as well as the potential proceedings before the Supreme Court in these cases. Resolving these appeals will likely take at least until the end of June—five months from now.[5]

As this Court has recognized, a months-long delay during the pendency of appellate proceedings can inflict substantial harm on litigants who are forced to forego the adjudication of their claims. *Nero v. Mosby*, No. 16 Civ. 1288, 2017 WL 1048259, at *2 (D. Md. Mar. 20, 2017)

[5] The Supreme Court will likely hear oral argument in the *Hawaii* case and issue a decision by the end of June when the current Term ends. *See, e.g.*, Lyle Denniston, "Justices to Rule on Trump Immigration Limits," LYLE DENNISTON LAW NEWS BLOG (Jan. 19, 2018), http://lyldenlawnews.com/2018/01/19/justices-rule-trump-immigration-limits. Because the Fourth Circuit has not yet ruled, the timing for future appellate proceedings in these cases is unclear. But there is no reason to believe that the appeal in these cases would end *before* the Supreme Court decides the *Hawaii* case.

(refusing to stay discovery during an interlocutory appeal because plaintiffs would "suffer substantial harm" from the "unnecessary delay in their gathering evidence," regardless of whether that delay would have been for "several months or in excess of a year"); *see also Dynport Vaccine Co. v. Lonza Biologics, Inc.*, No. 14 Civ. 2921, 2015 WL 5768707, at *2 (D. Md. Jan. 10, 2015) (denying a motion to stay while an appeal was resolved in another proceeding because a stay "surely prejudice[s] [the nonmoving party's] efforts to achieve prompt resolution of the instant case"). While five or six months may not be "an inordinate amount of time" for the Government, Mot. at 22, it would be devastating for many Plaintiffs. Their most intimate and family relationships are threatened with irreparable and fundamental damage by the delay that the Government seeks.

Zakzok Plaintiff Sumaya Hamadmad's father-in-law, who is in Syria, is eighty-one years old, and has been diagnosed with skin and prostate cancer. Hamadmad Decl. ¶¶ 11–12, *Zakzok* ECF No. 6-3. Every day that the travel ban remains in effect, Ms. Hamadmad's children are at increasing risk of never knowing their grandfather. *IAAB* Plaintiff Jane Doe #5 and her husband are separated from their son, who lives in Iran. Jane Doe #5 Decl. ¶¶ 2, 6, *IAAB* ECF No. 26-7. Ms. Doe is seventy-nine years old and wheelchair-bound; her husband is ninety. *Id.* ¶ 6. A matter of months could mean that Ms. Doe and her husband will never again see their son, a fear that causes Ms. Doe great pain every day. *Id.* ¶ 7.

The Proclamation has torn apart spouses and fiancés, threatening the future of those deeply personal and intimate relationships. *Zakzok* Plaintiff John Doe #1 is living in the United States alone without his wife, whom he married just weeks before the Proclamation went into effect. Doe #1 Decl. ¶¶ 3, 5, 9, *Zakzok* ECF No. 6-4. Because of the Proclamation, Mr. Doe and his wife cannot have children, as they planned, and the uncertainty over the future of his

marriage has caused him to feel stressed, anxious, helpless, and depressed. *Id.* ¶¶ 9–10. *Zakzok* Plaintiff Jane Doe #3's fiancé, a Somali native, cannot join her in the United States because of the Proclamation. Jane Doe #3 Decl. ¶¶ 3, 6, *Zakzok* ECF No. 6-6. Their separation, and the uncertainty about whether they will ever be able to live together, has placed a strain on their relationship, and she fears that she will never be able to marry or start a family. *Id.* ¶¶ 4, 7, 8. *IAAB* Plaintiff Jane Doe #2 feels that she is being forced to choose between the only country she has ever known and the love of her life. Jane Doe #2 Decl. ¶¶ 7–8, *IAAB* ECF No. 26-5. Other Plaintiffs are suffering similar harms. *See, e.g.*, Jane Doe #1 Decl. ¶¶ 9–10, 13, *IAAB* ECF No. 26-4.

Numerous Plaintiffs also fear that their family members, who are refugees in other countries, could at any moment be sent back to countries where they would be subject to persecution, torture, or worse, instead of joining their family members safely in the United States. Plaintiff Eblal Zakzok's daughter, who is currently living in Turkey but has no path to citizenship there, is at risk of being returned to Syria, where her father was persecuted and tortured. Zakzok Decl. ¶ 16, *Zakzok* ECF No. 6-2. *Zakzok* Plaintiff Jane Doe #2's father-in-law is living in Kuwait, but his immigration status depends on his employment, and, as he nears retirement age, he is at risk of being sent back to Syria, where he could be persecuted because of Jane Doe #2 and her husband's political advocacy for the freedom of the Syrian people. Jane Doe #2 Decl. ¶¶ 19–20, *Zakzok* ECF No. 6-5. IAAB Plaintiff Jane Doe #1's husband lives in the United Arab Emirates, where his status is temporary and his residency requires periodic renewal. Jane Doe #1 Decl. ¶¶ 2, 9, *IAAB* ECF No. 26-4. She fears for his safety should he be deported to Iran, where he would face persecution. *Id.* ¶ 10.

The individual plaintiffs also suffer each day from the stigma and disparagement they feel as a result of the Proclamation, which only worsen each day the Proclamation is in effect. They feel that the Proclamation is an attack on their religion and national origins. *E.g.*, Zakzok Decl. ¶ 18, *Zakzok* ECF No. 6-2. They feel that the United States no longer welcomes them because of their Islamic faith and nationality. *E.g.*, Hamadmad Decl. ¶ 18, *Zakzok* ECF No. 6-3. They see a rising anti-Muslim sentiment as a result of the Proclamation, and fear for their safety and the safety of their families within the United States. *E.g.*, John Doe # 6 Decl. ¶ 10, *IAAB* ECF No. 26-8. Indeed, at its summer camps for high-school students, IAAB has had to spend considerable time addressing their campers' feelings of fear and self-hate. Kharrazi Decl. ¶¶ 9, 12, *IAAB* ECF No. 26-3.

The Fourth Circuit has emphasized "human aspects of needs" as especially significant harms, and has refused to issue a stay that "would work manifest injustice" against, for example, parties "in declining health," even where proceeding with the litigation would be inefficient in a number of ways. *Williford*, 715 F.2d at 127–28. The harms to Plaintiffs here are examples of such manifest injustice. The harm suffered by Plaintiffs is grave and ongoing, and additional harm occurs each day the Proclamation is in effect because of the potential for ill family members to pass away, for important relationships to founder, and for family members stranded abroad to be sent back to dangerous and war-torn countries. Each day the Proclamation is in effect, United States citizens and lawful permanent residents feel unwelcome and unsafe in their homes, cities, and country. The procedural inconvenience that the Government claims it will experience in the absence of a stay pales in comparison to the ongoing harms suffered by Plaintiffs from the operation of a Proclamation that multiple courts have determined is likely unlawful.

2. The Government does not present a strong case of hardship.

The Government contends that Plaintiffs have not "carried their burden of demonstrating why they should be entitled to discovery at this stage." Mot. at 19. But Plaintiffs have no burden to carry. Like the plaintiff in any other case, Plaintiffs have a right to litigate their claims unless the Government demonstrates that a stay is appropriate. *Landis*, 299 U.S. at 256. Indeed, the burden of "making out the justice and wisdom of a departure from the beaten track" of continuing proceedings "lay[s] *heavily*" on the Government. *Id.* (emphasis added); *see also Nken v. Holder*, 556 U.S. 418, 433 (2009) (explaining that as "an intrusion into the ordinary processes of administration and judicial review," a stay "is not a matter of right, even if irreparable injury might otherwise result to the appellant"). An interlocutory appeal of a preliminary injunction "does not defeat the power of the trial court to proceed further with the case." 16 Charles A. Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure* § 3921.2 (3d ed. 1999); *see also id.* ("Interlocutory injunction appeals would come at high cost if the trial court were required to suspend proceedings pending disposition of the appeal. The delay and disruption alone would be costly. As importantly, cases involving injunctive relief are apt to present an urgent need for action."). The Government has not made this showing here.

a) Alleged burden and inefficiency of briefing a motion to dismiss

The Government attempts to satisfy its heavy burden by focusing on the adversity it would face by having to prematurely brief issues on which the Fourth Circuit or Supreme Court may later offer "dispositive guidance." *See, e.g.*, Mot. at 8. As a threshold matter, there is little reason to think that the Fourth Circuit or Supreme Court will decide this entire case. *See infra* Section I.B. That is particularly true here given that many of Plaintiffs' claims are not part of the preliminary-injunction appeals.

Further, the Government effectively concedes in its motion that the motion-to-dismiss briefing would not be burdensome: it states that it would "raise . . . the *same* arguments" it has already twice presented to this and other courts. Mot. at 8 (emphasis added). Proceeding before the Supreme Court issues its decision would not meaningfully burden the Government if significant portions of its motion-to-dismiss brief are already largely written. *See Hawaii*, 233 F. Supp. 3d 850, 854 (D. Haw. 2017) (considering the government's motion to stay and declaring: "Why the United States Department of Justice, what some describe as the largest law firm in the world, is not able to litigate similar claims on a mere two fronts without claiming burden is beyond this Court.").

Nor does a stay meaningfully promote "judicial economy," as the Government argues, by relieving this Court of the obligation to rule once again on the justiciability issues. The Court has already addressed justiciability in two lengthy, well-reasoned opinions. Mem. Op. 23–40 (Oct. 17, 2017), *IAAB* ECF No. 46; *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 549–53 (D. Md. 2017). The Government does not claim that it will raise new arguments, nor does it suggest that any intervening decisions should cause this Court to reconsider its prior rulings.[6] Given the extensive prior litigation of these questions, the Court should not need to expend significant resources to decide what it previously considered.

The Government's argument boils down to a preference not to file a motion to dismiss when the Court has already concluded that Plaintiffs are likely to succeed on the merits of their claims. But the Government, of course, can answer the complaint, rather than file a motion that has little chance of success. The arguments the Government might make on a motion to dismiss

[6] If anything, the justiciability issues are simpler now because, as the Government concedes, its ripeness argument is no longer relevant given that a relative of *IAAB* Plaintiff John Doe #6 was denied a waiver under the Proclamation. Mot. at 15.

could be made later, in a motion for judgment on the pleadings under Rule 12(c), or in a motion for summary judgment, after the preliminary injunction appeals are resolved. *See* Fed. R. Civ. P. 12(h).[7] And the burden on the Government to answer the complaint is not comparable to the substantial harms that the Plaintiffs suffer each day as a result of the delay in deciding their claims.

b) Alleged burden of participating in discovery

The Government also objects to the "burden" of participating in discovery. The Government warns that Plaintiffs' request for discovery could "threaten . . . a collision course" with privileges, Mot. at 18; "lead to significant motions practice regarding the availability and scope of discovery," *id.* at 14; "consume significant time and resources," *id.* at 14; and be "highly burdensome and intrusive," *id.* at 17. In essence, the Government claims that without a stay it would be burdened by having to participate in the normal discovery disputes that arise during the course of litigation. But that hardly justifies a stay.

As a preliminary matter, the local rules specifically reject this argument in the ordinary course: "Unless otherwise ordered by the Court, the existence of a discovery dispute as to one (1) matter does not justify delay in taking any other discovery." D. Md. Local Rule 104.3. Further, "being required to defend a suit, without more, does not constitute a clear case of hardship or inequity within the meaning of *Landis*." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005) (quotation marks omitted); *see also, e.g.*, Order Denying Motion for Reconsideration, *Lam v. City & Cty. of San Francisco*, No. 10 Civ. 4641 (N.D. Cal. July 22,

[7] The government's reliance on *In re United States*, 138 S. Ct. 443 (2017), is unavailing. There, the Supreme Court instructed the district court to consider the government's reviewability and jurisdictional arguments before ordering it to complete the administrative record. *Id.* at 445. This Court has already considered and decided the Government's reviewability arguments twice.

2015), ECF No. 130 ("The only 'injury' that would result from denial of a stay would be the requirement of plaintiffs' participation in the discovery process."); *see also Nero v. Mosby*, No. CV 16-1304, 2017 WL 1048259, at *2 (D. Md. Mar. 20, 2017) (rejecting the argument that discovery against a public official should have been stayed because a potential immunity defense would have rendered the discovery "unnecessary" or injurious and explaining that "a right to immunity is not a right to be free from litigation in general" (internal quotation marks and citations omitted)); *Geiser v. Simplicity, Inc.*, No. 10 Civ. 21, 2011 WL 128776, at *4 (N.D. W. Va. Jan. 14, 2011) ("Discovery should only be stayed . . . where there are no factual issues in need of further immediate exploration and the issues before the court are purely questions of law." (internal quotation marks and citation omitted)). Indeed, the fact that this process could be lengthy and involve complicated issues is a reason for discovery to proceed now, so that the parties can get started on the process, their time and resources are not drained by dragging out the litigation, and Plaintiffs are spared the additional harm that will come with each day of delay.

The Government also suggests that if the Court were to permit discovery to proceed in the normal course, the Government would be powerless to protect itself from overreaching, abusive, or harassing discovery requests. But the discovery process is designed to offer an opportunity for parties to develop their claims while preserving the rights of opposing parties to object. *See, e.g.*, Fed. R. Civ. P. 34(b)(2) (objections); Fed. R. Civ. P. 26(c) ("The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including by prohibiting or limiting the discovery); D. Md. Local Rules 104.1 (limitation on requests), 104.8(a) (minimizing briefing on motions to compel), 104.13 (regarding confidentiality orders). That disputes may arise is not a reason to

deny Plaintiffs the opportunity to request discovery materials to develop evidence in support of their claims.

Plaintiffs do not deny that there may be disputes about discovery requiring the time and attention of the parties. But to the extent that there will be privilege and other disputes, it would be more efficient for the parties to begin the process of serving requests and negotiating the scope of discovery now. "Any decision in the Court of Appeals on the preliminary injunction will by definition be preliminary so far as the merits are concerned. It is an appropriate use of judicial resources (and those of the parties) to proceed with the actual merits so as to obtain a final resolution." *Pharm. Care Mgmt. Ass'n v. Maine Attorney Gen.*, 332 F. Supp. 2d 258, 260 (D. Me. 2004) (declining the government's motion to stay pending appeal of a preliminary injunction); *see also Cognate BioServices, Inc. v. Smith*, No. 13 Civ. 1797, 2015 WL 5673067, at *5 (D. Md. Sept. 23, 2015) (expressing concern that granting a stay of discovery would "hinder [the plaintiff's] ability to bring its claims against [the defendants] to a disposition" and granting a stay of discovery only on the "limited basis" that "much of the discovery already conducted by the parties would likely be conducted again"); *Fed. Ins. Co. v. S. Lithoplate, Inc.*, No. 12 Civ. 793, 2013 WL 4045924, at *1 (E.D.N.C. Aug. 8, 2013) (concluding that granting motions to stay discovery "are generally disfavored because delaying discovery may cause case management problems as the case progresses"). For example, Plaintiffs understand that it will be necessary to negotiate a protective order in this case before the production of documents or other discovery; this process alone will likely take time and should begin immediately.

c) Alleged burden as to anticipated scope of discovery

Finally, as part of its strained effort to make out a claim of hardship, the Government urges the Court to assume that Plaintiffs "will seek extremely broad discovery on a variety of topics." Mot. at 16. That argument is speculative and premature, and as explained below,

incorrect. *See, e.g.*, *DKS Inc. v. Corp. Bus. Sols., Inc.*, No. 15 Civ. 132, 2015 WL 6951281, at *2 (E.D. Cal. Nov. 10, 2015) (denying the defendant's motion to stay pending an appeal and finding that the defendant's "conclusory contention that Plaintiff has made 'crippling demands for voluminous discovery' is not enough to make a strong showing of irreparable harm"); *Wise v. Pine Tree Villa, LLC*, No. 14 Civ. 517, 2015 WL 1109006, at *2 (W.D. Ky. Mar. 11, 2015) (denying a motion to stay discovery, in part, because the "[d]efendant's concerns about voluminous discovery [were] speculative at th[at] early stage of the litigation"); *Chamber of Commerce v. Servin*, No. 09 Civ. 2014, 2011 WL 871735, at *1 (D.D.C. Mar. 11, 2011) (denying a motion to stay discovery as "premature" in part because the parties had not yet "conferred about the discovery that is necessary"); *Actividentity Corp. v. Intercede Grp. PLC*, No. 08 Civ. 4577, 2009 WL 10691373, at *2 (N.D. Cal. Dec. 30, 2009) (describing as "premature" the defendant's "judicial economy" arguments and stating that a "concern for the burden of . . . discovery, while perhaps practical, cannot alone form the basis for a decision to stay discovery"); *cf. Citifinancial, Inc. v. Lightner*, No. 06 Civ. 145, 2007 WL 3088087, at *2 (N.D. W. Va. Oct. 22, 2007) (considering defendant's argument that denying a motion to stay a remand pending an appeal would cause financial outlay and inconvenient strategy changes and ultimately characterizing it as "too remote and speculative" and "hypothetical and attenuated" to establish that participating in discovery would cause harm).

The Government's arguments are also unfounded. Plaintiffs have prosecuted their cases efficiently in all stages of the proceedings so far, including by coordinating among the various plaintiff groups to submit consolidated briefs in order to minimize the burden on the Government and the Court. There is no basis to assert that Plaintiffs will begin to abuse the litigation process

now. In any event, Plaintiffs' initial discovery requests, *see infra* Section II.B., are narrowly tailored.

3. The Court's stay of proceedings for EO-2 does not support a stay of proceedings here.

The Government's reliance on stays granted during the litigation involving EO-1 and EO-2 is misplaced. The courts that granted stays in those cases did so while a nationwide injunction was in place. Most of those courts explicitly acknowledged the injunction in their decisions and reasoned that, unlike here, the plaintiffs would not suffer prejudice if a stay of proceedings were granted. *See, e.g.*, *Washington v. Trump*, No. 17 Civ. 0141, 2017 WL 2172020, at *1 (W.D. Wash. May 17, 2017) ("[T]he court entered a stay . . . in part because the federal district court in Hawaii entered a nationwide injunction that provided Plaintiffs with the relief they sought."); *Hawaii*, 233 F. Supp. 3d at 853 ("[T]he Western District of Washington's nationwide injunction already provides the State with the comprehensive relief it seeks in this lawsuit."); *Arab Am. Civil Rights League v. Trump*, No. 17 Civ. 10310, 2017 WL 2501060, at *2 (E.D. Mich.) (June 9, 2017) ("Regardless of the length of stay, because the Fourth Circuit upheld the nationwide injunction of the Executive Order, Plaintiffs' interests are protected."). Here, the Proclamation has gone into effect; Plaintiffs are suffering; and a stay would cause irreparable injury.

The Government's reliance on the previous stays with respect to EO-2 is also misplaced because EO-2 was a *temporary* ban, *see* EO-2 § 2(c), whereas the Proclamation is indefinite. Until the Fourth Circuit and Supreme Court issue decisions, the Proclamation will continue to separate family members from their loved ones. The indefinite nature of the Proclamation and lack of a nationwide injunction counsel in favor of denying the Government's requested stay.

B. The Preliminary Injunction Appeal Will Not Conclusively Decide This Case**.**

The Government contends that the entire case should be stayed because "[t]here is at least a significant possibility . . . that no further proceedings will be necessary after the preliminary-injunction appeals are resolved." Mot. at 11. That is incorrect. The issue before the Supreme Court is the appropriateness of the preliminary injunction, not a review of the merits with a fully developed factual record. For a preliminary injunction, plaintiffs must "establish that [they are] *likely* to succeed on the merits." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (emphasis added). A preliminary injunction is designed "merely to preserve the relative positions of the parties *until a trial on the merits can be held*." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (emphasis added); *see also Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 671-72 (2004) (upholding a preliminary injunction and remanding for trial, noting that the Court would not "usurp the District Court's factfinding role" where there were "substantial factual disputes remaining in the case"). A preliminary injunction is not designed to obviate discovery and adjudication on the merits. Since a final decision on the merits was not made in the district court, the Supreme Court is unlikely to decide the issues before it in a way that precludes litigation of Plaintiffs' Establishment Clause and statutory claims on the merits. But even if it did, this Court would still need to decide the claims that are not part of the preliminary injunction appeal.

1. The argument that the Supreme Court will decide the preliminary-injunction appeal on the merits is speculative.

The Government contends that further proceedings in this Court may become unnecessary because the Supreme Court may decide the merits of Plaintiffs' claims. Mot. at 11. Tellingly, in the majority of the cases on which the Government relies, a court stayed proceedings where the anticipated decision in the other litigation is *on the merits*, not an

interlocutory appeal of preliminary relief or a similar situation. *See* Mot. at 7–8 (*Amdur v. Lizars*, 372 F.2d 103, 106 (4th Cir. 1967) (state court case on same issues with same parties); *Hickey v. Baxter*, 833 F.2d 1005 (4th Cir. 1987) (table) (parallel case on same issue); *Preston v. United States*, No. 14 Civ. 1920, 2015 WL 221633, at *9 (D. Md. Jan. 15, 2015) (same); *In re Mut. Funds Inv. Litig.*, No. 04 MD 15863, 2011 WL 1540134, at *2 (D. Md. Apr. 20, 2011) (stayed pending decision on liability of parties in securities fraud actions).

The Government relies on two cases that it claims demonstrate the Supreme Court's willingness to "resolve the merits of the legal claims with little attention paid to the preliminary nature of the case." Mot. at 11 (citing *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Arizona v. United States*, 567 U.S. 387 (2012)). While *Burwell* and *Arizona* were decided on the merits at the preliminary injunction stage, that is not the Supreme Court's usual practice. *See, e.g., Ashcroft*, 542 U.S. at 673 ("This opinion does not foreclose the District Court from concluding, upon a proper showing by the Government that meets the Government's constitutional burden as defined in this opinion, that COPA is the least restrictive alternative available to accomplish Congress' goal."); *Camenisch*, 451 U.S. at 395 (finding that although the preliminary injunction had been mooted, the district court still needed to decide merits of the case); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 934 (1975) ("[W]e cannot conclude that the District Court abused its discretion by granting preliminary injunctive relief. This is the extent of our appellate inquiry, and we therefore intimate no view as to the ultimate merits of (respondents) contentions." (internal citations omitted)); *Brown v. Chote*, 411 U.S. 452, 457 (1973) (affirming a preliminary injunction but adding that "we intimate no view as to the ultimate merits of appellee's contentions.").

Burwell and *Arizona* were decided based solely on statutory interpretations, whereas the issues here also turn on questions of fact. In particular, as this Court's analysis demonstrates, Plaintiffs' Establishment Clause claims depend, among other things, on evidence that the Proclamation was adopted based on anti-Muslim animus and that the purported national-security interests were pretextual or secondary. Op. at 74–84, *IAAB* ECF No. 46, *Zakzok* ECF No. 36. Even if the Supreme Court holds that the Hawaii plaintiffs did not sufficiently show that the Proclamation's primary purpose was anti-Muslim animus, it would not necessarily mean that Plaintiffs here could not make this showing on a full record. Nor would it preclude Plaintiffs from offering additional evidence of anti-Muslim animus and pretext when the claim is adjudicated on the merits. Likewise, Plaintiffs' statutory claims also depend on the factual record—for example, whether the President made the requisite "findings" under Section 1182(f). *See, e.g.*, *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 606 (4th Cir. 2017) (Keenan, J., concurring) (finding that injunctive relief was appropriate because "the INA nevertheless is supported by the failure of Section 2(c) to satisfy the threshold requirement of Section 1182(f) for the President's lawful exercise of authority").

The Government's arguments regarding *Kleindienst v. Mandel*, 408 U.S. 753 (1972), do not change the analysis. This Court properly relied on the concurring opinion in *Kerry v. Din*, 135 S. Ct. 2128 (2015), to hold that Plaintiffs' evidence that the Proclamation was adopted in bad faith was sufficient to satisfy *Mandel*. Op. at 63, *IAAB* ECF No. 46, *Zakzok* ECF No. 36. The Government disagrees that the *Mandel* test permits a court to consider evidence of bad faith, arguing instead that it mandates "rational-basis review." Opp. to Prelim. Inj. Mot at 36, *IAAB* ECF No. 36, *Zakzok* ECF No. 20 (citing *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1693 (2017)). But even if the Government is correct on this point, Plaintiffs could still litigate their

constitutional claims under rational basis review. *See, e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448–50 (1985) (striking down law on rational-basis review where "the record does not reveal any rational basis" for the law, which instead "appear[ed] to rest on an irrational prejudice").[8] Plaintiffs can demonstrate that the Proclamation is not rationally related to its stated goal of national security, and that it fails other constitutional tests. Indeed, Plaintiffs already have evidence to support this allegation—*see, e.g.,* Brief of Former National Security Officials as Amici Curiae in Support of Plaintiffs, *IRAP* ECF No. 123-1—and discovery will likely produce more such evidence.

2. Plaintiffs have claims that are not before appellate courts.

Even if the Supreme Court decided the merits of the claims before it, further proceedings in this Court will still be necessary because some of Plaintiffs' claims are not before either the Supreme Court or the Fourth Circuit as part of the preliminary injunction appeal. *See IAAB* First Am. Compl. ¶¶ 91–94 (free-speech claim); *Id.* ¶¶ 95–101 (equal-protection claim); *Id.* ¶¶ 102–07 (due-process claim); *Id.* ¶¶ 113–16 (free-association claim). Nor will the Supreme Court decide all of Plaintiffs' APA claims. *See, e.g.*, *Zakzok* Compl. ¶¶ 128–34 (procedural violation of APA); *IAAB* First Am. Compl. ¶¶ 108–12 (same). Because the appellate courts will not decide these claims, there is no reason to delay litigating them.

In short, these cases should not be stayed pending resolution of the preliminary-injunction appeals because neither the Fourth Circuit's nor the Supreme Court's decision will conclusively decide this case. The Supreme Court is unlikely to decide the claims before it on

[8] The Government broadly asserts that "no discovery is appropriate" until the Supreme Court has had the opportunity to consider *Mandel*'s application here. Mot. at 12–13. But even if the Supreme Court were to agree with the Government, the *Mandel* framework would not govern all of Plaintiffs' claims, which overlap in terms of scope of discovery; therefore the pending appeal on this issue does not justify a stay.

the merits, and it certainly will not decide claims that are not before it. Because further proceedings will be necessary no matter how the Supreme Court rules, those proceedings should begin now.

II. The Parties Should Immediately Begin The Discovery That Will Be Necessary Regardless Of The Supreme Court's and Fourth Circuit's Rulings.

A. The Government's Desire To Wait Before Filing A Motion To Dismiss Ignores That Discovery Need Not Wait Until The Court Rules On The Government's Motion.

Under the Federal Rules of Civil Procedure, a party can serve discovery requests beginning 21 days after the summons and complaint are served, or at a Rule 16(b) conference if later than 21 days after the summons and complaint are served. *See* Fed. R. Civ. P. 26(d). "The purpose of discovery is to provide a mechanism for making relevant information available to the litigants." Fed. R. Civ. P. 26 advisory committee's note to 1983 amendment. Further, the Fourth Circuit has declared that "[d]iscovery under the Federal Rules of Civil Procedure is broad in scope and freely permitted." *Carefirst of Md., Inc.*, 334 F.3d at 402. The filing of a motion to dismiss has no effect on the period for requesting discovery. *See* Fed. R. Civ. P. 12(a)(4) (addressing effect of filing a motion to dismiss without suspending discovery rules).

As discussed above, a significant portion of the Government's motion focuses on the burden of having to brief a motion to dismiss before the Supreme Court and Fourth Circuit decide the appeals of the preliminary injunction. The Government argues that "moving forward with merits proceedings at this stage would be highly inefficient and burdensome. If the cases were to move forward, the next step would be for the Government to move to dismiss the complaints." Mot. at 1. But the request that Plaintiffs made to the Court that prompted this motion was for the entry of a scheduling order so that the parties can begin *discovery*. *See IAAB* ECF No. 58; *Zakzok* ECF No. 46. Although courts sometimes stay discovery during the

pendency of a motion to dismiss, this is not the default rule under the Federal Rules of Civil Procedure, and the Rules do not link the briefing of a motion to dismiss with the period for discovery. Nor, as noted above, is the Government required to file a motion to dismiss at this juncture; it would be a simple matter for the Government to answer the complaint, if it does not want to file such a motion.

B. Plaintiffs' Initial Requests Will Not Be Burdensome And Will Seek Discovery That Will Be Necessary Regardless Of The Appellate Rulings.

The Government contends that discovery should wait until after the Supreme Court has ruled on the preliminary injunction because the Supreme Court's ruling could provide guidance that could affect discovery. Mot. at 7-12. This Court would be well within its discretion to permit discovery to proceed in the ordinary course. But given that the Supreme Court is likely to rule before discovery could be completed in this case, Plaintiffs are willing to begin with discovery on topics that would pose little burden on the Government and will be necessary no matter how the Supreme Court rules. As discussed below, Plaintiffs have identified three such areas: (1) reports underlying the Proclamation; (2) implementation of the waiver process under the Proclamation; and (3) the Government's discovery regarding Plaintiffs' injuries.

1. Reports (with attachments)

Plaintiffs would request (1) the report, identified in Section 1(c) of the Proclamation, that the Secretary of Homeland Security submitted to the President on July 9, 2017 (the "July Report"); (2) the report, identified in Section 1(h) of the Proclamation, that the Acting Secretary of Homeland Security submitted to the President on September 15, 2017 (the "September Report"); and (3) any attachments or appendices associated with either of those reports. This exceedingly small set of documents is indisputably relevant, as the Government

has made clear by its repeated reliance on them in these proceedings. Hence, they are a crucial starting point for litigating this action and determining what other discovery is needed.

Plaintiffs will seek discovery of the reports because they are the cornerstone of the Government's defense to this action. Most obviously, the Government relies upon the September Report as a defense to Plaintiffs' Establishment Clause claims. It argues that the Proclamation's purpose is wholly separate from EO-2's unconstitutional religious purpose because "the Proclamation was based on recommendations of the Acting Secretary of DHS"—*i.e.*, the September Report. *IAAB* ECF No. 36, at 42. The Government also uses the reports to defend against Plaintiffs' claim under the INA that the President failed to make adequate findings that banning nationals of the designated majority-Muslim countries is in the national interest, *see, e.g.*, *IRAP* ECF No. 205, at 17–18, asserting that the President provided plenty of "detail and explanation for his findings"—"[s]pecifically, [that] the President imposed the entry restrictions after reviewing the recommendations of the Acting Secretary of DHS" in the September Report, and that those "recommendations were created following a worldwide review that evaluated every country according to neutral criteria" set forth in the July Report, *IAAB* ECF No. 36, at 22. And the Government contends that the "recommendations of the Acting Secretary of DHS" (*i.e.*, the September Report) provide a "bona fide basis" for the ban such that the Proclamation should be unreviewable under *Mandel*. *See id*. at 36. None of these arguments can be resolved in the Government's favor by the mere existence of the reports; it is the actual content—and whether that content supports the Proclamation—that matters.

Producing the reports will not be burdensome because the Government must produce them soon in FOIA litigation. *See Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep't of State*, No. 17 Civ. 7520, 2018 WL 369783, at *8 (S.D.N.Y. Jan. 10, 2018). In that case,

the district court ordered the Government to produce the reports, four accompanying attachments, and a *Vaughn* index for anything not produced, by February 9, 2018. *Id.* The Government can hardly object to making the same production in this case that it must make in another case.

The Government contends, however, that Plaintiffs may not seek discovery of the reports because they have already conceded that the reports are irrelevant to their claims. Mot. at 16–17. The Government bases this argument on a statement by IRAP's counsel during the preliminary injunction hearing that the Court did not "need . . . to look at the report" to rule for Plaintiffs. *Id.* But the assertion that the record was already sufficient to grant Plaintiffs' preliminary injunction does not negate the report's overall relevance to the merits of this case.

Indeed, in Establishment Clause cases, evidence of impermissible purpose is not limited solely to the public record. What matters is the Government's *actual* purpose. *See, e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987). The Supreme Court was warned against "judicial psychoanalysis of a drafter's heart of hearts," *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005), but discovering and reviewing concrete, objective evidence of governmental purpose is not judicial psychoanalysis. It is the ordinary and prescribed form of judicial inquiry. Indeed, in *McCreary* itself, "[a]fter the Supreme Court issued its opinion, the case returned to the district court for further proceedings," in which the plaintiffs took "discovery as to the factual details and *motivation* for the sequence of the [challenged] displays." *ACLU of Ky. v. McCreary County*, 607 F.3d 439, 443–44 (6th Cir. 2010) (emphasis added); *see also Bauchman ex rel. Bauchman v. W. High Sch.*, 132 F.3d 542, 560 (10th Cir. 1997) (although "examination must stop short of an attempt to discern a defendant's psychological *motives vis à vis* his past conduct, underlying belief system or religious character," it is entirely proper to "focus . . . on objectively

discernible conduct or communication that is temporally connected to the challenged activity and manifests a subjective intent by the defendant to favor . . . a particular religious belief").

In any event, Plaintiffs would be able to seek discovery of the reports even if they could not be considered under the reasonable-objective-observer test. That test is but one of many that Plaintiffs can use to demonstrate that the Proclamation violates the Establishment Clause. *See, e.g.*, *Mellen v. Bunting*, 327 F.3d 355, 370–75 (4th Cir. 2003) (reviewing governmental action under several Establishment Clause tests). For example, Plaintiffs' allegation of official disfavor toward Muslims, *see IAAB* First Am. Compl. ¶¶ 84–89, is a claim of denominational preference, which receives "strict scrutiny" under *Larson v. Valente*, 456 U.S. 228, 246 (1982). Discovery of the July and September Reports will thus be relevant in determining, under *Larson*, whether the Proclamation "is closely fitted to further [a compelling governmental] interest." *Id.* at 247.

The reports are also relevant to Plaintiffs' other claims and therefore the proper subject of discovery. As discussed above, the reports are relevant to the Government's assertion that the President made a proper finding under Section 1182(f) in order to justify the Proclamation. The Government's equivocation at oral argument regarding the consistency between the report and the Proclamation casts doubt on that defense. *See* Prelim. Inj. Hr'g Tr. at 48–52. Moreover, the report is relevant to Plaintiffs' claims that are not the subject of the preliminary-injunction proceedings. Discovery of governmental records such as the July and September Reports will clearly be relevant to Plaintiffs' Equal Protection claims, which require the Court to decide questions of "discriminatory intent or purpose" by reviewing the "administrative history" and "the specific sequence of events leading up [to] the challenged decision." *Vil. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–68 (1977).

Plaintiffs anticipate that the Government will assert that portions of these documents are classified or privileged. *See, e.g.*, Prelim. Inj. Hr'g Tr. at 48 ("[T]he [September] report actually contains a lot of classified information."). But the Government has implicitly conceded that not *all* the contents are classified. *See, e.g.*, *id.*; Proclamation § 2(h)(i) (describing contents of September Report). As discussed above, the Government has already been ordered in FOIA litigation to produce these documents and to identify which portions cannot be produced. *See Brennan Ctr*, 2018 WL 369783, at *8. The Government should be able to identify and assert any claims of privilege here with little or no additional effort. Plaintiffs would then get the benefit of the reports to the extent that they can be produced immediately, and this Court will then be able to resolve any questions of privilege while appellate proceedings on the preliminary injunction are pending, thus allowing the parties to proceed with this litigation without unnecessary delay once those proceedings have concluded.

2. Implementation of the waiver

The Proclamation created a waiver process that promises to provide a determination "on a case-by-case basis" of whether a person subject to the travel ban should nevertheless be allowed to enter the United States. Proclamation § 3(c). A waiver may be granted only where (1) "denying entry would cause the foreign national undue hardship;" (2) "entry would not pose a threat to the national security or public safety of the United States;" and (3) "entry would be in the national interest." *Id.* The Proclamation instructs the Secretary of State and the Secretary of Homeland Security "to adopt guidance addressing the circumstances in which waivers may be appropriate for foreign nationals seeking entry as immigrants or nonimmigrants." *Id.*

Plaintiffs seek discovery regarding the implementation of this waiver process. The Government has asserted that "[t]he Proclamation also provides for case-by-case waivers" as evidence that "[n]either the Proclamation's text nor its operation evidence an intent to exclude

Muslims." Opp. to Prelim. Inj. at 40. But Plaintiffs have reason to believe that the waiver process is not operating as set forth in the Proclamation, which is inconsistent with the Government's asserted defense. Despite the Proclamation's instructions, no guidance has been publicly released, which means that visa applicants and their U.S. relatives have no way to know how applicants may apply for a waiver, how determinations regarding waiver eligibility are made and by whom, and whether there is any recourse for persons denied a waiver.

IAAB Plaintiff John Doe #6 provides a good example. In December 2017, his mother-in-law received a form letter from the U.S. Consulate signed by the "Nonimmigrant Visa Unit," informing her that "a consular official found [her] ineligible for a visa under Section 212(f) of Immigration and Nationality Act, pursuant to Presidential Proclamation 9645" and that "[t]aking into account the provisions of the Proclamation, a waiver will not be granted in [her] case." *See* Decl. of Sirine Shebaya, Ex. A. But John Doe #6's mother was never given an opportunity to apply for a waiver or demonstrate that she meets the criteria set forth in the waiver provision of the Proclamation before receiving this blanket denial of both her visa application and a waiver.

Plaintiffs' initial discovery requests will seek records created on or after September 24, 2017—the date the Proclamation was issued—of practices, policies, guidance, and procedures addressing how consular officers should evaluate visa applications from nationals of the affected countries and how they are to determine whether waiver requests will be granted, including how to determine whether an individual's entry "would cause . . . undue hardship," "would not pose a threat to the national security or public safety of the United States," and "would be in the national interest." Proclamation § 3(c).

These requests are relevant to Plaintiffs' claims and not burdensome. The documents are relevant because the Government has relied on the waiver provisions to argue that the

Proclamation is not based on anti-Muslim animus. Evidence about the Government's waiver process policies could therefore undermine the Government's asserted defense to Plaintiffs' Establishment Clause and Equal Protection claims. And the requests are not burdensome because the relevant time period is narrow and Plaintiffs seek the same types of documents that government agencies must include in the administrative record in virtually all APA litigation. *See* 5 U.S.C. § 557(c)(3)(A); *Doolin Sec. Sav. Bank, F.S.B. v. F.D.I.C.*, 53 F.3d 1395, 1409 (4th Cir. 1995).

C. The Parties Will Need Time To Negotiate A Protective Order If The Government Takes Discovery.

Finally, to the extent that the Government intends to take discovery from Plaintiffs, that process too should begin immediately so that there is time to negotiate a protective order related to the use and production of such information. In litigation involving EO-2, the Government argued that the previous version of the travel ban should be upheld without any discovery on any issue. *See, e.g.*, Joint Rule 26(f) Discovery Plan at 6, *Arab Am. Civil Rights League v. Trump*, No. 17-10310 (E.D. Mich.) (July 6, 2017), ECF No. 115. But the Government also sought to "reserve the right" to seek discovery of the plaintiffs' injuries if discovery were permitted. *Id.* at 7. The Government stated that:

> Discovery into Plaintiffs' claimed injuries may include topics such as: communications between the individual Plaintiffs and family members seeking entry into the United States, visa application status for and location of those family members, documents relating to visa petitions or applications, membership information of the organizational Plaintiffs, financial information regarding the organizational Plaintiffs, and any information regarding the organizational Plaintiffs' alleged planned conferences or speakers.

Id.

Unless the Government agrees to forgo such discovery in these cases, a protective order will be necessary for several reasons related to the sensitivity of such information, including that

some Plaintiffs have been granted leave to proceed under pseudonym. Plaintiffs will of course cooperate in reasonable requests for discovery by the Government.

CONCLUSION

Plaintiffs' motion for entry of a scheduling order should be granted, and the Government's motion to stay should be denied.

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Respectfully submitted,

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