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

REPLY IN SUPPORT OF MOTION FOR ENTRY OF A SCHEDULING ORDER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

In opposing Plaintiffs' request to begin discovery, the Government focuses on reasons why it thinks that waiting for the Fourth Circuit and Supreme Court to rule in the preliminary-injunction appeals would be the most efficient way to proceed. The Fourth Circuit has now ruled, and it affirmed this Court's preliminary-injunction ruling. *See Int'l Refugee Assistance Project v. Trump*, No. 17-2231, 2018 WL 894413 (4th Cir. Feb. 15, 2018) ("*IRAP*"). Nothing in the Fourth Circuit's decision suggests that these cases will end without Plaintiffs being permitted to take discovery.

The Government contends that Plaintiffs should not be permitted to begin discovery because they have not shown that discovery is warranted. But a plaintiff bears no burden to prove that discovery should begin. It is the Government's burden to show that discovery should not proceed, and to do so, the Government must demonstrate that it would suffer more hardship from discovery beginning than Plaintiffs would suffer if discovery were stayed. The Government cannot make that showing.

The Government's sole alleged harm—a speculative concern that the scope of discovery may be narrowed by the Supreme Court's decision on the preliminary-injunction appeal—pales in comparison to the harm that Plaintiffs will suffer if discovery is further delayed. In affirming this Court's preliminary-injunction ruling, the Fourth Circuit acknowledged the harm that the Proclamation causes:

> On a human level, the Proclamation's invisible yet impenetrable barrier denies the possibility of a complete, intact family to tens of thousands of Americans. On an economic level, the Proclamation inhibits the normal flow of information, ideas, resources, and talent between the Designated Countries and our schools, hospitals, and businesses. On a fundamental level, the Proclamation second-guesses our nation's dedication to religious freedom and tolerance. . . . When we compromise our values as to some, we shake the foundation as to all.

IRAP, 2018 WL 894413, at *18.

The Government also contends that Plaintiffs' planned discovery is irrelevant to these cases and would be too burdensome. These arguments lack merit. Plaintiffs seek discovery that is plainly relevant to their claims, as evidenced by the fact that the Government has relied on both the reports underlying the Proclamation and the implementation of the waiver provisions to argue that that the Proclamation does not violate the Establishment Clause. Nor are these requests burdensome. The two reports (and four attachments) are a total of only 45 pages. On the waiver implementation, Plaintiffs seek only the types of documents routinely included in an administrative record. In any event, the Government's arguments as to burden and relevance are the kinds of disputes regularly resolved during discovery; they are not valid reasons for delaying the start of discovery.

Plaintiffs filed their lawsuits four months ago, and it has now been more than two months since the Government missed its deadlines for filing answers or motions to dismiss. For more than two months, the Proclamation has been in effect and Plaintiffs have been unable to litigate their claims. Given the substantial harm that the Proclamation is inflicting on them and their loved ones, Plaintiffs should be permitted to begin discovery on their claims.

ARGUMENT

I. Discovery Should Begin Because The Government Has Not Shown That Discovery Will Impose A Hardship On It.

The Government urges the Court to reject Plaintiffs' request to proceed with discovery in the interest of efficiency. Reply Br. at 16. The Government has inverted the importance of the considerations that a court must weigh when deciding whether discovery should begin. The Government also fails to respond to Plaintiffs' showing that waiting for the Supreme Court's decision is unlikely to achieve the efficiencies imagined by the Government.

Discovery is not stayed simply because an argument can be made that it would be more efficient to do so. Rather, the Court must weigh the harm to the plaintiff against any efficiencies to be gained through a stay. Where, as here, a plaintiff would be harmed by a stay, the defendant must show that the hardship it would suffer if discovery proceeds outweighs the harm that a stay would cause the plaintiff. The Government does not and cannot make that showing.

A. The Government Bears The Burden Of Demonstrating That Discovery Should Not Proceed.

Contrary to the Government's assertion, Reply Br. at 23, it is the Government that bears the heavy burden to delay the start of discovery. The Government implicitly concedes this point by acknowledging that *Landis v. North American Co.*, 299 U.S. 248, 256 (1936), provides the "governing legal standard" here. Reply Br. at 11.

The Government notes that, under *Landis*, a district court has the power to stay discovery *if* an "ongoing appeal is *likely* to 'settle many' issues and 'simplify others.'" Reply Br. at 11 (quoting *Landis*, 299 U.S. at 256 (emphasis added)). But the Government ignores *Landis*'s guidance on how a district court should decide whether to exercise that authority. The Supreme Court explained that determining whether to permit discovery "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." 299 U.S. at 254–55. When "there is even a fair possibility that the stay" will "work damage to" the party opposing it, the moving party "must make out a *clear case of hardship or inequity* in being required to go forward." *Id*. at 255 (emphasis added). The Supreme Court explained, "[T]he burden of making out the justice and wisdom of a departure from the beaten track lay[s] heavily" on the moving party. *Id*. at 256.

The Government attempts to invert this standard by misconstruing the holding in *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367 (2004). In *Cheney*, the Su-

preme Court held that the district court should have narrowed overly broad discovery requests before forcing the Vice President to invoke executive privilege. *Id*. at 390 ("In recognition of these concerns, there is sound precedent in the District of Columbia itself for district courts to explore other avenues, short of forcing the Executive to invoke privilege, when they are asked to enforce against the Executive Branch unnecessarily broad subpoenas.") But *Cheney* does not suggest that a district court is barred from allowing discovery to proceed at all simply because questions of executive privilege may arise. *See Nero v. Mosby*, No. CV MJG-16-1288, 2017 WL 1048259, at *2 (D. Md. Mar. 20, 2017) (rejecting argument that discovery against public official should have been stayed in light of potential immunity defense and explaining that "a right to immunity is not a right to be free from litigation in general" (internal quotation marks and citations omitted)).

B. The Government Has Not Carried Its Heavy Burden Of Showing That Plaintiffs Should Be Prevented From Beginning Discovery.

The Fourth Circuit recognizes that the primary concern when considering whether to permit discovery is the potential harm to plaintiffs, and has applied *Landis* to hold that plaintiffs should be allowed to litigate their claims *even where* the court has acknowledged that proceeding with discovery would create inefficiency. *See Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124 (4th Cir. 1983). This Court should reach the same result here, both because the harm to Plaintiffs is so high and because the Government's argument as to efficiencies that would be achieved through a stay is speculative and overstated.

In *Williford*, the Fourth Circuit held that "the party seeking a stay must justify it by clear and convincing circumstances outweighing potential harm to the party against whom it is operative." *Id*. at 127. In determining that the standard to justify a stay of discovery had not been met, the Fourth Circuit explained: "Of particular significance in balancing the competing interests of

the parties in the case at bar are the human aspects of the needs of a plaintiff in declining health as opposed to the practical problems imposed by the" parallel litigation. *Id*. at 127–28. The court of appeals recognized that allowing the plaintiff to pursue his claim could require re-litigating the claim, but the mere inefficiency of re-litigation was insufficient to support a stay that "would work manifest injustice" to the plaintiff. *Id*. at 128.

This case presents even more compelling circumstances than *Williford*. The narrow discovery Plaintiffs seek while awaiting the Supreme Court's ruling is unlikely to require reconsideration later because the Supreme Court is unlikely to address discovery-related issues. *See infra* at 6. And there is "more than a fair possibility" that delaying discovery will "work damage" to Plaintiffs. Plaintiffs suffer each day that they are precluded by the challenged Executive Order from reuniting with their loved ones. This ongoing injury is particularly acute for Plaintiffs who are separated from sick and elderly loved ones, such as *Zakzok* Plaintiff Sumaya Hamadmad, whose father-in-law in Syria is 81 years old and has been diagnosed with cancer. Hamadmad Decl. ¶¶ 11–12, *Zakzok* ECF No. 6-3. Some Plaintiffs are themselves in need of assistance from their family members, such as *IAAB* Plaintiff Jane Doe #5, who is 79 years old, confined to a wheelchair, and indefinitely separated from her son in Iran. Jane Doe #5 Decl. ¶ 6, *IAAB* ECF No. 26-7. And all Plaintiffs whose lives and intimate relationships have been put on hold by the Proclamation and related litigation have also been harmed and will continue to suffer such harm. *See, e.g.*, Jane Doe #3 Decl. ¶¶ 3, 6, *Zakzok* ECF No. 6-6 (Plaintiff is separated from her fiancé).

In contrast, the sole hardship asserted by the Government is that the parties will engage in discovery and motions practice, and there is a *possibility* that subsequent appellate decisions *might* limit their scope. That risk is always present when a party seeks emergency or preliminary

relief, and yet as a general rule cases are not stayed pending appeal of an interlocutory order. *See* 16 Charles A. Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure* § 3921.2 (3d ed. 1999) (an interlocutory appeal of a preliminary injunction "does not defeat the power of the trial court to proceed further with the case").

The Government also significantly overstates the likelihood that the Supreme Court will limit the scope of discovery and related motions, and it is incorrect that the Supreme Court could render discovery unnecessary. The complaints assert many claims—both constitutional and statutory—that are not part of the preliminary injunction proceedings. And there are many grounds on which the Supreme Court could base its decisions—for example, by agreeing or disagreeing with lower courts that the plaintiffs are likely to prevail on the merits—that would have no effect on the ultimate merits outcome. Further, the Government speculates that all of Plaintiffs' constitutional claims might be decided in the preliminary-injunction appeal because the Government will argue that *Kleindienst v. Mandel*, 408 U.S. 753 (1972), applies to all constitutional claims. Reply Br. at 12. But, as explained in Plaintiffs opening brief, even if the Supreme Court agrees with the Government's interpretation of *Mandel*, Plaintiffs may take discovery and prove their constitutional claims under the Government's proposed standard. Pls. Br. at 20–21. The Government does not respond to this point, nor to Plaintiffs' argument that their APA claims are not governed by *Mandel*.

In short, the equities favor permitting discovery to begin now. Plaintiffs would suffer substantial harm from further delay in resolving their claims. Those harms vastly outweigh any burden imposed on the Government to defend against those claims. That is especially true given that discovery will be necessary in the future because the Supreme Court is unlikely to conclusively decide all of Plaintiffs' claims—many of which are not even before that Court.

C. Permitting Discovery Will Allow The Cases To Progress More Quickly Toward Final Judgment.

The Government attempts to downplay the clear benefits of beginning discovery now by arguing that it "is unlikely to bring these cases closer to final judgment." Reply Br. at 14. This too is incorrect. Discovery delays will inevitably delay final resolution of Plaintiffs' claims. Plaintiffs should be allowed to begin discovery now to ensure that their claims can be resolved as soon as practicable.

The Government's argument that a months-long stay will not affect the timing of a final judgment in this case is based on its speculation that the Supreme Court will provide guidance on discovery-related issues. *Id*. at 15. That is a remote possibility at best.

Should discovery proceed, the Government asserts that it intends to invoke the presidential-communications and deliberative-process privileges to refuse production of the discovery sought by Plaintiffs. *Id*. at 22–23. There is no reason to think that the Supreme Court will enter a ruling on those privilege issues. They have been neither briefed in the preliminary-injunction proceedings nor addressed in any of the prior rulings in the travel-ban litigation in this matter or in *Trump v. Hawaii*, No. 17-965 (U.S.), which is now before the Supreme Court. Without a record on which to rule, the Supreme Court is unlikely, in a case it is reviewing on a preliminary injunction, to provide guidance on privileges not yet even invoked by the Government regarding discovery on the merits in the trial court.

Allowing discovery to begin now will help the cases progress more quickly toward final judgment because the parties can address and resolve the Government's privilege assertions while the Supreme Court proceedings are pending. If Plaintiffs are allowed to serve discovery requests now, the Government would have 30 days to respond. *See* Fed. R. Civ. P. 34(b)(2)(A). If the Government objects to the discovery requests—by claiming privilege or on any other

ground—Plaintiffs can evaluate the objections and determine whether to challenge the Government's response through a motion to compel. This determination, and any necessary briefing, can occur during the next few months, while the preliminary-injunction ruling is subject to further review.

The parties would need to go through the same process later if this Court stays discovery until after the Supreme Court rules. Waiting to begin this process will undoubtedly prolong resolution of Plaintiffs' claims—and the harm to the Plaintiffs—unnecessarily. Under the most favorable potential timeline, the Supreme Court will decide the preliminary injunction appeal in the *Hawaii* matter by the end of June. Pls. Br. at 7. If discovery is stayed, the Plaintiffs will not be able to issue their initial discovery requests until July. The Government would have 30 days to respond. And Plaintiffs would need to evaluate whether to challenge the Government's objections. There is every reason to believe that the stay thus would result in at least a four-month delay in these proceedings.

Finally, the Government contends that allowing discovery to proceed in the trial court in the normal course now will not lead to a quicker resolution because the parties would have to re-brief the Government's motion to dismiss after the Supreme Court's ruling "to ensure this Court's prior rulings are consistent with the articulated framework." Reply Br. at 15. But briefing on a motion to dismiss does not determine the timing of discovery. Pls. Br. at 22–23. Even if the Government had grounds to file a Rule 12(c) or other motion based on the Supreme Court's decision, the parties would still be moving the case closer to final resolution by having begun discovery and having briefed any necessary discovery-related issues.[1]

[1] In Plaintiffs' view, the Government is in no different position here than any other defendant that believes that it is unlikely to prevail on a pre-answer motion to dismiss under current law and precedent. The Government should move or answer the complaint in a timely fashion as re-
(continued…)

II. The Government's Challenges To The Discovery Requests Lack Merit And Are Premature In Any Event.

The Government opposes discovery on the two narrow categories of documents that Plaintiffs seek: (1) the July 2017 and September 2017 reports (with attachments) on which the Proclamation is based ("Reports"), and (2) documents related to implementation of the waiver process under the Proclamation. Contrary to the Government's assertions, these initial discovery requests are relevant to Plaintiffs' claims, as well as to the Government's defenses, and are not burdensome. The Government provides no persuasive reason for further delaying discovery on these topics.

A. Plaintiffs Should Be Allowed Discovery Of The Reports Without Further Delay.

1. The Reports Are Relevant To Plaintiffs' Claims And The Governments' Defenses.

The Government opposes Plaintiffs' planned discovery of the Reports on the ground that they are irrelevant to the case, Reply Br. at 21, but it ignores virtually every argument that Plaintiffs have made concerning the relevance of the documents. By failing to address the bulk of Plaintiffs' arguments, the Government effectively concedes that the Reports are relevant.

First, Plaintiffs argued that they are entitled to this discovery because the Reports are the cornerstone of the Government's defense to this action. Pls. Br. at 24. As Plaintiffs explained, the Reports are critical to the Government's defense to the Establishment Clause claims—and therefore are central to the case—because, in the Government's view, they demonstrate that the

---

quired by the Federal Rules of Civil Procedure. The Rules do not connect the time for discovery to a motion to dismiss, and they provide opportunities for a party to challenge the sufficiency of a complaint after an answer is filed. *See* Pls. Br. at 22. However, if the Court is not inclined to hear a motion to dismiss or require an answer from the Government before the Supreme Court rules, Plaintiffs are willing to confer regarding a scheduling order that permits discovery to go forward now while delaying the Government's obligation to answer or move until a later date.

Proclamation's purpose is wholly separate from EO-2's unconstitutional religious purpose. *Id*. The Government has no response to this point.

Second, Plaintiffs argued that they are entitled to this discovery because the Reports are relevant to claims that are not part of the preliminary-injunction appeal. *Id*. at 26. Discovery of the Reports is clearly relevant to Plaintiffs' equal-protection claims, which depend on issues of "discriminatory intent or purpose" and therefore require the factfinder to consider the "administrative history" and "the specific sequence of events leading up [to] the challenged decision." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–68 (1977). Again, the Government has no response.

Third, Plaintiffs argued that they are entitled to this discovery because the Reports are relevant to Establishment Clause grounds for relief that were not decided in the preliminary-injunction proceedings. Pls. Br. at 26. The reasonable-objective-observer test—the test that this Court applied—is but one of many applicable Establishment Clause tests. *See, e.g.*, *Mellen v. Bunting*, 327 F.3d 355, 370–75 (4th Cir. 2003). The Reports are relevant to Plaintiffs' claim of denominational preference, for example, which requires a fact-finder to determine whether the Proclamation "is closely fitted to further [a compelling governmental] interest." *Larson v. Valente*, 456 U.S. 228, 247 (1982). Yet again, no response.

Fourth, Plaintiffs argued that they are entitled to this discovery because the Reports are relevant to the Plaintiffs' claims on the merits under the Establishment Clause's reasonable-objective-observer test, a test that has been addressed only as a preliminary matter under a likelihood analysis. Pls. Br. at 26. As Plaintiffs explained, application of this test does not preclude discovery into the Government's purpose. *Id*. To the contrary, 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 Cty.*, 607 F.3d 439, 443–44 (6th Cir. 2010) (emphasis added).

The Government does not dispute that discovery is typically permissible in Establishment Clause cases, even when a claim invokes the reasonable-objective-observer test. Instead, the Government contends that Plaintiffs waived their right to seek discovery based on statements made during the preliminary-injunction hearing. Reply Br. at 21. The statements of counsel cannot reasonably be interpreted as waiving Plaintiffs' right to seek discovery during litigation of the merits of their claims. Moreover, the statements related to the issue before the Court during the preliminary-injunction hearing: whether the Court could enter an injunction without reviewing the Report. The Court did not inquire about the permissible scope of discovery for Plaintiffs' claims on the merits, and counsel's statement did not address that issue. Regardless, the statement applied only to the objective-observer test, and even the Government's misinterpretation of that statement does not negate the other points discussed above.

In short, the Reports are plainly relevant to the claims and defenses in this case. Having put the Reports at the center of its defense of the Proclamation, the Government cannot now contend that they are irrelevant and beyond the scope of discovery.

2. Plaintiffs' Request For The Reports Is Not Too Burdensome.

The Government opposes Plaintiffs' plan to request the Reports on the ground that this discovery would be "tremendously burdensome." Reply Br. at 16. But the supposed burden arises entirely from the effort required by the Government's own plan to resist producing the Reports. The Government should not be permitted to prevent Plaintiffs from seeking the Reports simply because it wants neither to produce them nor to justify withholding them.

The Government does not—and cannot—contend that the discovery requests themselves are burdensome. The Government does not argue that it would be burdensome to search for responsive documents. And indeed, the Government has already identified the six responsive documents—two reports and four attachments. *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 *1 (S.D.N.Y. Jan. 10, 2018). Nor can the Government argue that it would be burdensome to review the documents for privilege. The documents total only 45 pages and have already been reviewed for privilege. *See* Decl. of Mark Mosier, Ex. A (Feb. 9, 2018 FOIA Response).

Instead, the Government contends that it would be too burdensome for the Government to defend whatever privilege determinations it makes regarding requested discovery. The Government again bases its argument on *Cheney*, 542 U.S. 367, but once again that decision does not support the Government's position. In *Cheney*, the Supreme Court addressed the problem created by "overly broad discovery requests," and held that the Vice President could raise separation-of-powers arguments in mandamus proceedings without first "critiquing the unacceptable discovery requests line by line" to assert privilege. *Id*. at 388–89.

Plaintiffs do not plan to seek discovery directly from the President. They intend to seek discovery from the State Department, which has the Reports and attachments. *See Brennan Ctr.*, 2018 WL 369783, at *1. Far from "ask[ing] for everything under the sky," as in *Cheney*, 542 U.S. at 387, Plaintiffs seek only the 45 pages that the Government has already identified as the relevant Reports and attachments. The D.C. Circuit has refused to extend *Cheney* to circumstances like those present here, where document requests are narrowly tailored and directed to a federal agency. In such cases, discovery requests will not "require the President, Vice President, or their staffs to sort through mountains of files for responsive documents while 'critiquing the

unacceptable discovery requests line by line.'" *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Homeland Security*, 532 F.3d 860, 867 (D.C. Cir. 2008) (quoting *Cheney*, 542 U.S. at 386). This Court should do the same.

Finally, the Government contends that this Court should not permit Plaintiffs to seek discovery of the Reports because Plaintiffs' counsel are involved in the FOIA litigation over the Reports. Reply Br. at 24. Plaintiffs' right to conduct discovery should not be limited based on their counsel's involvement in another case on behalf of other clients. The Government cites no authority to support this position. Limiting Plaintiffs' discovery based on their counsel's involvement in other cases would be particularly problematic here, given that the FOIA court will not decide the same privilege issue that will be before this Court. In the FOIA litigation, the court will decide the Government's claim of privilege vis-à-vis the general public's right of access to the Reports. *See Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220–21 (1978). In contrast, because the Government indicates that it intends to invoke qualified privileges, this Court will consider factors such as the importance of the documents to Plaintiffs' claims and Plaintiffs' inability to get the same information from other sources. *See FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) (recognizing that deliberative process privilege can be overcome by factors demonstrating the necessity of discovery); *In re Sealed Case*, 121 F.3d 729, 754–55 (D.C. Cir. 1997) (same for presidential communication privilege).

This Court should not prevent Plaintiffs from seeking discovery on the ground that the Government has indicated that it intends to assert privilege over the Reports and would consider it burdensome to defend that choice. Agencies withholding documents based on privilege are routinely required to defend their privilege determinations, *see, e.g.*, *Citizens for Responsibility & Ethics in Washington*, 532 F.3d at 868, and the Government should be required to do so here.

B. Plaintiffs Should Be Allowed Discovery Without Further Delay Of Documents Relating To Implementation Of The Process For Obtaining A Waiver From The Travel Ban.

1. Documents Regarding Implementation Of The Process For Obtaining A Waiver Are Relevant To Plaintiffs' Claims And The Government's Defenses.

The Government also opposes Plaintiffs' planned requests for documents related to implementation of the Proclamation's waiver provisions on the ground that these documents are irrelevant to this case. Those arguments fail.

The Government expressly relied on the process that it asserts allows an individual to obtain a waiver of the travel ban to argue that the Proclamation's primary purpose was not anti-Muslim animus. Opp. to Prelim. Inj. 40. And in opposing Plaintiffs' motion for a preliminary injunction, the Government argued that the availability of "case-by-case waivers" demonstrates that "[n]either the Proclamation's text nor its operation evidence an intent to exclude Muslims." *Id*.

The Government does not dispute that it relied on the availability of the waiver process to argue that the Proclamation complies with the Establishment Clause. Instead, the Government attempts to dismiss its own prior argument by contending that it "was made as an alternative argument." Reply Br. at 26. But the Government cites no authority to suggest that this distinction makes any difference for purposes of discovery. Plaintiffs are entitled to conduct discovery relevant to all of the Government's defense theories, not just the ones that the Government declares to be its main arguments.

The Government also contends that discovery should not be permitted because Plaintiffs have not yet established a "concrete foundation" to demonstrate that the waiver process operates differently from what is set forth in the Proclamation. *Id*. This argument is based on a fundamental misunderstanding of how discovery operates. Plaintiffs need not present evidence of how

the Government's claimed waiver process is working to obtain evidence about how it is working. That sort of rule would create obvious circularity problems that would defeat the purposes of discovery. Instead, Plaintiffs may seek discovery "that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). That test is satisfied for evidence related to the Government's process of implementing the waiver because, as the Government concedes, it relies on waiver implementation in defending against Plaintiffs' Establishment Clause claims.

2. Plaintiffs' Request For Waiver-Implementation Documents Is Not Too Burdensome.

The Government also opposes discovery of documents related to implementation of the waiver process on the ground that it would be too burdensome. But the Government does not contend that producing the requested documents would be burdensome. Nor could it: The requests seek the 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). Instead, the Government contends that it may withhold production of these documents, which could lead to motions practice, and that motions practice could be burdensome. Reply Br. at 28.

The Government is vague about what privilege it might invoke, describing it only as a privilege protecting "law-enforcement sensitive information." *Id*. Whatever privilege the Government may have in mind, it cannot justify the Government's apparent refusal to disclose its interpretation of the Proclamation's waiver provisions. The Proclamation requires 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." Proclamation § 3(c). The Government's adoption of guidance for the waiver process does not mean that an agency is "permitted to develop a body of 'secret law,' used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a

veil of privilege." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980); *see also Brennan Ctr. v. Dep't of Justice*, 697 F.3d 184, 195 (2d Cir. 2012) (government cannot claim privilege over "an 'opinion[] [or] interpretation[] which embod[ies] the agency's effective law and policy,' in other words, its 'working law'" (quoting *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co*, 421 U.S. 132, 153 (1975))); *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 360 (2d Cir. 2005) (recognizing that government cannot "adopt a legal position while shielding from public view the analysis that yielded that position").

The Proclamation requires the Departments of State and Homeland Security to provide guidance on how the Proclamation's waiver provisions operate. Plaintiffs and the rest of the world—including the 150 million Muslims who categorically will be denied entry into the United States unless they satisfy the waiver criteria—are entitled to know the law governing visa applications under the Proclamation. The Government should not be permitted to oppose discovery of that guidance on the ground that it would be too burdensome to defend its decision to keep this law secret.

CONCLUSION

Plaintiffs' motion for entry of a scheduling order that requires the Government to answer or otherwise respond to the complaints within 14 days and permits discovery to begin immediately should be granted.

Dated: February 16, 2018

Respectfully submitted,

_____/s/_____

Johnathan Smith*
Sirine Shebaya (Bar # 07191)
MUSLIM ADVOCATES
P.O. Box 66408
Washington, D.C. 20035

Mark H. Lynch (Bar # 12560)
Mark W. Mosier*
José E. Arvelo*
John W. Sorrenti*
Marianne F. Kies (Bar # 18606)

Tel: (202) 897-2622
Fax: (415) 765-1774
johnathan@muslimadvocates.org
sirine@muslimadvocates.org

Richard B. Katskee (Bar # 27636)
Eric Rothschild*
Andrew Nellis*^
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1310 L St. NW, Ste. 200
Washington, D.C. 20005
Tel: (202) 466-3234
Fax: (202) 466-3353
katskee@au.org
rothschild@au.org
nellis@au.org

COVINGTON & BURLING LLP
One City Center
850 10th Street, NW
Washington, D.C. 20001
Tel: (202) 662-6000
Fax: (202) 662-6302
mlynch@cov.com
mmosier@cov.com
jarvelo@cov.com
jsorrenti@cov.com
mkies@cov.com

Kathryn E. Cahoy*
COVINGTON & BURLING LLP
333 Twin Dolphin Dr., Suite 700
Redwood Shores, CA 94065
Tel: (650) 632-4735
Fax: (650) 632-4800
kcahoy@cov.com

Rebecca G. Van Tassell*
COVINGTON & BURLING LLP
1999 Avenue of the Stars
Los Angeles, California 90067
Tel: (424) 332 4800
Fax: (424) 332-4749
RVanTassell@cov.com

Counsel for IAAB Plaintiffs

_____/s/_____
Charles E. Davidow (Bar # 06516)
Paul, Weiss, Rifkind, Wharton & Garrison LLP
2001 K Street NW
Washington, DC 20006-1047
Tel.: (202) 223-7300
Fax: (202) 223-7420
cdavidow@paulweiss.com

Robert A. Atkins*
Liza Velazquez *
Andrew J. Ehrlich*
Steven C. Herzog*
Paul, Weiss, Rifkind, Wharton & Garrison LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Tel.: (212) 373-3000
Fax: (212) 757-3990
ratkins@paulweiss.com
lvelazquez@paulweiss.com
aehrlich@paulweiss.com
sherzog@paulweiss.com

Faiza Patel*
Michael Price*
Brennan Center for Justice at NYU School of Law
120 Broadway, Suite 1750
New York, NY 10271
Tel.: (646) 292-8335
Fax: (212) 463-7308
faiza.patel@nyu.com
michael.price@nyu.com

Jethro Eisenstein*
Profeta & Eisenstein
45 Broadway, Suite 2200
New York, New York 10006
Tel.: (212) 577-6500
Fax: (212) 577-6702
jethro19@gmail.com

Lena F. Masri*
Gadeir Abbas*
Council on American-Islamic Relations (CAIR)
453 New Jersey Avenue SE
Washington, D.C. 20003
Tel.: (202) 488-8787
Fax: (202) 488-0833
lmasri@cair.com
gabbas@cair.com

Counsel for Zakzok Plaintiffs

* *Pro hac vice.*
^ Admitted only in New York; supervised by Richard B. Katskee, a member of the D.C. Bar.