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.	No. 8:17-cv-02921-TDC
EBLAL ZAKZOK, *et al*., Plaintiffs, v. DONALD TRUMP, in his official capacity as President of the United States, *et al*., Defendants.	No. 1:17-cv-02969-TDC

DEFENDANTS' COMBINED REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO STAY, AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR ENTRY OF A SCHEDULING ORDER

TABLE OF CONTENTS

INTRODUCTION

Plaintiffs' response to the Government's motion to stay does not dispute two key points, each of which independently underscores that a stay of further merits proceedings is justified here. First, Plaintiffs concede that the Supreme Court has now granted certiorari over, and thus will likely decide within a matter of months, many of the critical legal questions governing these cases. *See* Pls.' Br. (*IAAB* ECF No. 65, *Zakzok* ECF No. 53) at 5-7 & nn.4-5. Second, Plaintiffs admit that allowing discovery to proceed would result in significant disputes between the parties, involving "complicated issues" and a process that "could be lengthy[.]" *Id.* at 14. These points thus demonstrate why a stay pending resolution of the ongoing appellate proceedings is the most prudent course here: It simply makes no sense to move forward with motion-to-dismiss briefing (let alone burdensome discovery proceedings) while awaiting forthcoming, binding guidance from the appellate courts. There is a reasonable probability that the ongoing appellate proceedings will entirely resolve these cases, meaning that any merits proceedings conducted in the interim would be entirely for naught. At a minimum, the forthcoming appellate decisions will clarify the legal framework governing Plaintiffs' claims, and therefore any merits issues briefed or decided in the interim would likely need to be re-litigated once the appeals are decided, to ensure consistency between this Court's prior rulings and the framework announced by the appellate courts. Thus, there is little to gain by moving forward now, but there is certainly much to lose—*i.e.*, significant wastes of time and resources, for both the parties and the Court, in litigating and deciding complicated and sensitive issues that may ultimately prove unnecessary.

Plaintiffs try to avoid this logic by instead focusing on the purported harms they will suffer as a result of the Proclamation's ongoing enforcement. *See* Pls.' Br. at 7-10. As the Government explained in its opening memorandum, however, those harms are the exact same ones that the Supreme Court already considered—and rejected—in deciding what the status quo should be while

the ongoing appellate proceedings conclude. *See* Gov't's Br. (*IAAB* ECF No. 63-1, *Zakzok* ECF No. 51-1) at 22. Nothing about the Supreme Court's stay decision requires this Court to structure its proceedings in an inefficient or wasteful manner. Indeed, the Supreme Court's stay decision also underscores that a stay is appropriate here: The governing legal framework remains unsettled, and the Supreme Court itself is moving with great speed to decide key issues; even Plaintiffs predict that the Supreme Court will issue its decision within a few months after briefing on this motion to stay concludes (*i.e.*, by the end of June). *See* Pls.' Br. at 7 n.5.

It is far more sensible to wait those few months before moving forward with any merits proceedings, particularly given that those merits proceedings—*i.e.*, the filing of a motion to dismiss and/or litigating discovery issues—would not themselves redress Plaintiffs' purported harms of family separation. Plaintiffs' argument is thus based on the assumption that beginning merits proceedings now would save time in the long-run, whereas granting a stay would "delay the ultimate resolution of their claims." Pls.' Br. at 7. But that assumption is unfounded for the reasons discussed above: any merits issues briefed or decided prior to the appellate courts' decisions would likely need to be re-litigated to ensure consistency with the subsequent appellate decisions. Thus, it is far from clear that granting a stay would, in fact, "necessarily lengthen the litigation process[.]" *Id.*

Finally, Plaintiffs' filing attempts to justify their requests for discovery by setting forth two particular categories of records and stating that "Plaintiffs are willing to begin with discovery on [those] topics[.]" *Id.* at 23. But those particular categories again only demonstrate the tremendous burdens that Plaintiffs seek to impose on the parties and this Court—*i.e.*, significant motions practice requiring the parties to litigate, and this Court to decide, numerous sensitive legal issues about whether such discovery is appropriate and, even if so, whether the documents are privileged

or afforded other confidentiality protections. Even were the Court not inclined to grant a complete stay of proceedings, therefore, at a minimum the Court should stay Plaintiffs' requests to begin discovery.

In short, and as discussed further below, a stay is amply warranted here because it is the most efficient way to proceed; it would not impose any cognizable prejudice on Plaintiffs; and Plaintiffs' requested discovery only confirms the significant burdens that allowing discovery would impose on both the parties and the Court. This Court should therefore grant the Government's motion to stay proceedings pending resolution of the preliminary-injunction appeals, and should deny Plaintiffs' cross-motion for entry of a scheduling order.

ARGUMENT

I. Plaintiffs Do Not Meaningfully Dispute that the Fourth Circuit and Supreme Court Decisions Will Provide Important Guidance Governing These Cases

As discussed in the Government's opening memorandum, it makes little sense for this Court to conduct further merits proceedings while the Supreme Court and Fourth Circuit directly consider the governing legal framework that will apply in these cases. The forthcoming appellate decisions will soon either (1) resolve these cases entirely, or (2) at least provide significant guidance on critical legal questions governing these cases. *See* Gov't's Br. at 7-14. Plaintiffs do not dispute that the forthcoming appellate decisions will, at a minimum, provide important guidance regarding the legal framework to be applied in their cases.

To the contrary, Plaintiffs expressly acknowledge that the Supreme Court has now granted certiorari and will soon decide four questions governing these lawsuits: (1) whether the challenge to the President's suspension of entry of aliens abroad 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*, No. 17-965, 583 U.S. ___ (U.S. Jan. 19, 2018); Pls.' Br. at 5 n.4. Plaintiffs also do not dispute that these questions are exactly the same ones that this Court would be required to decide if it moved forward with further proceedings in this case. *See* Gov't's Br. at 8-9. In other words, Plaintiffs seek to place this Court in the position of deciding the exact same legal questions that the Supreme Court itself will soon decide.

In order to justify that request, Plaintiffs raise a host of arguments about why a stay of proceedings is not justified here—*e.g.*, assertions that motion-to-dismiss briefing would not be significantly burdensome, and speculation about further proceedings being necessary regardless of how the appellate courts decide the pending appeals. As discussed below, however, Plaintiffs' arguments are unfounded. It would be inefficient, burdensome, and a waste of the parties' and the Court's resources to proceed while the governing legal framework remains in flux, as numerous courts recognized when hearing challenges to prior policies.

A. Plaintiffs Cannot Escape the Overwhelming Authority from Prior Rounds of Litigation Demonstrating that Stays Are Appropriate

1. Plaintiffs' opposition largely seeks to ignore the most analogous precedents—*i.e.*, the numerous court decisions from prior rounds of litigation holding that stays of further proceedings are appropriate pending the resolution of ongoing appeals. *See* Gov't's Br. at 9-10 & n.*. Plaintiffs offer only two reasons why, notwithstanding those precedents, this Court should take a different approach.

First, Plaintiffs argue that "[t]he courts that granted stays in those cases did so while a nationwide injunction was in place." Pls.' Br. at 17. Of course, those stays remained in place even after the Supreme Court's decision in June 2017 *lifted* the nationwide injunctions in part. *See Trump v. IRAP*, 137 S. Ct. 2080, 2088 (2017) (granting a stay of the injunctions against EO-2 for all foreign nationals except those "who have a credible claim of a bona fide relationship with a

person or entity in the United States"). Thus, the existence of a nationwide injunction was not critical to the ongoing stays entered in those cases. *See, e.g.*, *Pars Equality Center v. Trump*, No. 17-cv-255 (D.D.C.), ECF No. 101 (July 19, 2017 Order) (denying a request from plaintiffs, who lacked credible claims of a bona fide relationship with a person or entity in the United States, for preliminary relief and to lift the stay of proceedings regarding EO-2's refugee provisions). Just as the Supreme Court's stay decision in June 2017 (allowing EO-2 to take partial effect) did not undermine the stays of proceedings entered by numerous courts, the Supreme Court's stay decision in December 2017 (allowing the Proclamation to take effect) likewise does not undermine the appropriateness of a stay here.

Moreover, the premise of Plaintiffs' argument is incorrect. In at least two cases, courts entered stays of proceedings even when the plaintiffs sought to challenge sections of EO-2 that were not subject to any injunction. *See Washington v. Trump*, 2017 WL 4857088, at *6 (W.D. Wash. Oct. 27, 2017) (granting a stay even though plaintiffs sought to challenge sections that were not enjoined, concluding that "[t]he absence of Sections 1(g), 2(d), and 2(f) from the Hawaii federal district court's preliminary injunction does not alter the court's calculus"); *Pars Equality Center v. Trump*, No. 17-cv-255 (D.D.C.), ECF No. 91 (June 20, 2017 Order) (staying merits proceedings in combined cases, even though the plaintiffs in those cases also sought relief against sections 3, 4, and 5 of EO-2).

In any event, Plaintiffs' argument relates, at most, to whether Plaintiffs would "suffer prejudice if a stay of proceedings were granted." Pls.' Br. at 17. But that is a separate element of the stay analysis, discussed in more detail in Part II below. Here, the prior court decisions are relevant because they make it abundantly clear that, when appellate guidance is forthcoming, the most efficient way to proceed is a stay of further merits proceedings. *See* Gov't's Br. at 9-10. On

that point, Plaintiffs offer no basis whatsoever for distinguishing the prior decisions. Thus, all of Plaintiffs' arguments below, *see infra* Parts I.B-C, are directly contrary to the logic of the numerous other court decisions granting stays in prior rounds of litigation. That itself is reason to reject Plaintiffs' arguments below.

Second, Plaintiffs assert that the prior decisions are irrelevant because "EO-2 was a *temporary* ban . . . whereas the Proclamation is indefinite." Pls.' Br. at 17. But Plaintiffs do not explain why the potential duration of the challenged policy has any bearing on the stay analysis. The duration of the Proclamation has no impact on the significant, potentially dispositive, guidance that the Fourth Circuit and the Supreme Court will soon provide regarding Plaintiffs' claims. And in terms of concrete timing, the stay requested here is essentially for the same duration (if not shorter) than the stays granted with respect to the EO-2 challenges. In those cases, most courts granted stays sometime between March and June 2017. *See* Gov't's Br. at 9-10 & n.*. The Supreme Court scheduled oral argument regarding EO-2 for October 10, 2017. Thus, the stays were expected to last, at a minimum, between four and seven months. Here, even Plaintiffs acknowledge that the Supreme Court is likely to decide the Proclamation's legality by the end of June—*i.e.*, within approximately four months after briefing on this motion to stay is complete. *See* Pls.' Br. at 7 n.5. Accordingly, the length of stay requested here is similar to, if not shorter than, what numerous courts granted when hearing challenges to prior policies. Those decisions amply support a stay here.

2. Those decisions are also the answer to Plaintiffs' assertions that they should be permitted to pursue their claims "just as any other plaintiff is typically permitted to do." Pls.' Br. at 2; *see also id.* at 11. These cases are far from typical: Plaintiffs seek to challenge a formal national-security judgment made by the President after receiving the recommendations of several Cabinet

officials, and the cases have been litigated with extraordinary dispatch at every stage. Indeed, the Supreme Court granted certiorari only *three-and-a-half months* after Plaintiffs first moved for preliminary injunctions in this Court. *Compare Trump v. Hawaii*, No. 17-965, 583 U.S. ___ (U.S. Jan. 19, 2018) (granting certiorari), *with IAAB*, ECF No. 26 (filed Oct. 6, 2017); *Zakzok*, ECF No. 2 (filed Oct. 6, 2017). As the decisions from prior rounds of litigation recognize, therefore, the "typical" course in these cases, based on their unique circumstances, is to stay district-court proceedings during the short amount of time necessary for expedited appellate proceedings to conclude. *See Clinton v. Jones*, 520 U.S. 681, 707 (1997) (the power to stay proceedings applies "especially in cases of extraordinary public moment").

As numerous courts in prior rounds of litigation recognized, the most efficient way to proceed is to stay further merits proceedings and await forthcoming appellate guidance, and Plaintiffs offer no reason for this Court to deviate from this common course.

B. A Stay Is Amply Justified Given that Any Merits Proceedings Will Likely Need to Be Re-Evaluated Once the Appellate Decisions Are Issued

1. Plaintiffs' opposition tries to downplay the waste of resources that would be inherent in allowing proceedings to move forward before the preliminary-injunction appeals are decided. Plaintiffs characterize the Government as raising a mere "procedural inconvenience" regarding the filing of a motion to dismiss. Pls.' Br. at 10. And Plaintiffs argue that filing such a motion would not "meaningfully burden the Government" because "significant portions of its motion-to-dismiss brief are already largely written." *Id.* at 12. But these arguments misunderstand the reasons why a stay is warranted here.

The Government's argument for a stay is not premised solely on the burden associated with drafting a motion to dismiss. Rather, the Government's argument is that it is pointless to conduct motion-to-dismiss proceedings now, given that appellate court decisions are imminent and, once

issued, they will either (1) entirely resolve these cases, or (2) significantly clarify the governing legal framework. Even in that latter scenario, moving forward with motion-to-dismiss briefing now still does not make sense: Once the appellate courts clarify the governing legal framework, the parties and the Court will likely need to re-argue the motion-to-dismiss issues to ensure that any prior rulings by this Court are fully consistent with the framework announced by the appellate courts. Thus, further proceedings now are a waste of both the parties' and the Court's resources—they do not move the cases closer to resolution because, at best, another round of briefing will likely need to occur once the appellate courts issue their decisions.

Plaintiffs likewise miss the point in asserting that a stay would not promote judicial economy because "[t]he Court has already addressed justiciability in two lengthy, well-reasoned opinions." Pls.' Br. at 12. Aside from being in considerable tension with Plaintiffs' argument that rulings on preliminary injunctions do not determine how the claims will ultimately be decided on the merits, *see* Pls.' Br. at 18-20; *infra* Part I.C, Plaintiffs' assertion does not address the more important reason for a stay here: It is wasteful for the Court to decide the motion-to-dismiss issues now, only to have to re-consider them later in light of the appellate courts' decisions.

In that respect, the proper question is not whether the Government has identified "any intervening decisions [that] should cause this Court to reconsider its prior rulings." Pls.' Br. at 12. The proper question is whether any such rulings are imminent, and on that question even Plaintiffs do not deny that the answer is "yes"—*i.e.*, that appellate courts will soon decide the exact same legal questions that this Court would have to decide if it proceeded with motion-to-dismiss briefing. *See* Gov't's Br. at 7-9.

Moreover, the Government has, in fact, identified an intervening decision that should prompt this Court to reconsider its prior conclusions—namely, the Supreme Court's stay of this

Court's preliminary injunction. *See Trump v. IRAP*, 138 S. Ct. 542 (2017). The Supreme Court's decision on the Government's stay application was based on essentially the same factors governing issuance of the preliminary injunction in the first instance, and the parties raised the same arguments that they raised before this Court. *See generally* Respondents' Opposition to Application for Stay, *Trump v. IRAP*, No. 17-A-560 (S. Ct. filed Nov. 28, 2017). Thus, there is indeed good reason for this Court to await additional appellate guidance before allowing further merits proceedings.

2. Plaintiffs suggest that the Government could avoid the inefficiencies of motion-to-dismiss proceedings by declining to file such a motion and instead filing an answer to the Complaint. *See* Pls.' Br. at 12-13, 22-23. But the Court should not enter a schedule that makes sense only if the Government declines to exercise a procedural right to which it is entitled. Indeed, given that the Government has already argued—before this Court, the Fourth Circuit, and the Supreme Court—that Plaintiffs' claims are not justiciable, it would be inappropriate for the Government *not* to address those issues in a motion to dismiss and instead allow discovery to proceed.

This Court's obligation to address justiciability first is effectively the lesson of *In re United States*, 138 S. Ct. 443 (2017). There, the Supreme Court held in the context of a mandamus petition that the district court should not have ordered the Government to disclose a number of documents and instead should have "first resolved the Government's threshold arguments" because "those [threshold] arguments, if accepted, likely would eliminate the need for" such disclosure. *Id.* at 445. Plaintiffs relegate this highly analogous decision to a footnote, and seek to distinguish it solely on the basis that "[t]his Court has already considered and decided the Government's reviewability arguments twice." Pls.' Br. at 13 n.7. But again, Plaintiffs' arguments are internally inconsistent—

they cannot simultaneously argue that this Court's legal conclusions from the preliminary-injunction phase are conclusive, but the appellate courts' legal conclusions will be only tentative. *See id.* at 18-20; *infra* Part I.C.

More fundamentally, even if this Court has already rejected the Government's justiciability arguments, the appellate courts have not. Plaintiffs cannot avoid the import of *In re United States* on that basis, therefore, given that the Supreme Court also suggested that it might be prudent for the district court to allow the appellate courts to decide the Government's reviewability arguments. *See In re United States*, 138 S. Ct. at 445 ("The District Court should proceed to rule on the Government's threshold arguments and, in doing so, may consider certifying that ruling for interlocutory appeal under 28 U.S.C. § 1292(b) if appropriate."). Here, the Supreme Court has already agreed to decide the same justiciability (and other legal) questions that this Court would have to confront as part of a motion to dismiss. In these circumstances, it makes eminent sense for this Court to await the Supreme Court's decision on those issues before moving forward with wasteful and burdensome motion-to-dismiss proceedings, and certainly before allowing the type of intrusive discovery contemplated by Plaintiffs. *See id.*; *see also infra* Part III.

C. The Appellate Decisions Will Likely Resolve These Cases Entirely Or, At a Minimum, Will Provide Critical Guidance on Key Legal issues

Plaintiffs try to undermine the value of the forthcoming appellate guidance by asserting that resolution of these cases in their entirety "will not happen" and that "further proceedings will be necessary no matter how the Supreme Court rules[.]" Pls.' Br. at 1, 22; *see also id.* at 19-22. Plaintiffs' arguments are wrong.

1. Plaintiffs first contend that it is "speculative" whether the Supreme Court will decide the merits of Plaintiffs' claims in the context of an appeal of a preliminary injunction. Pls.' Br. at 18-19. Obviously nobody can predict with certainty how the Supreme Court will rule. But

reasonable predictions can be made, and all signs here point to the Supreme Court resolving Plaintiffs' claims on the merits. For one thing, the questions that the Supreme Court agreed to decide all relate to the underlying merits of Plaintiffs' claims, not the four-factor test governing preliminary injunctions. For example, the Supreme Court agreed to decide "whether the Proclamation is a lawful exercise of the President's authority to suspend entry of aliens abroad," not whether there is a likelihood of success on such a claim. *Id.* at 5 n.4; *see Trump v. Hawaii*, No. 17-965, 583 U.S. ___ (U.S. Jan. 19, 2018). Moreover, Plaintiffs do not dispute that, when litigating EO-2 before the Supreme Court, all of the parties (including the *IRAP* plaintiffs) briefed the ultimate merits, not just the preliminary-injunction factors. *See* Gov't's Br. at 11-12. Thus, there is at least a reasonable likelihood that the Supreme Court will decide the claims on their merits rather than in a preliminary posture.

2. Plaintiffs also argue that "[e]ven 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." Pls.' Br. at 21 (mentioning free speech, equal protection, due process, free association, and APA statutory claims).

As an initial matter, Plaintiffs mischaracterize the governing legal standard: a stay is still warranted even when the ongoing appellate proceedings may not "settle every question of . . . law." *Landis v. N. Am. Co.*, 299 U.S. 248, 256 (1936). It is sufficient that the ongoing appeal is likely to "settle many" issues and "simplify" others, *id*., such that a stay will facilitate the orderly course of justice and conserve resources for both the Court and the parties. Here, even if the issues on appeal are not identical, it cannot be seriously disputed that the Supreme Court and Fourth Circuit decisions will "settle many" issues and "simplify" others, as past courts have recognized

in similar circumstances. *See, e.g.*, *Washington v. Trump*, 2017 WL 2172020, at *3 (W.D. Wash. May 17, 2017); *Hawai'i v. Trump*, 233 F. Supp. 3d 850, 855 (D. Haw. 2017); *see also, e.g.*, *Fairview Hosp. v. Leavitt*, 2007 WL 1521233, at *3 n.7 (D.D.C. May 22, 2007); *In re Literary Works in Elec. Databases Copyright Litig.*, 2001 WL 204212, at *3 (S.D.N.Y. Mar. 1, 2001).

Moreover, even if not all of Plaintiffs' claims are presently before the Fourth Circuit or the Supreme Court, the appellate decisions may still effectively dispose of such claims. For example, the Government has raised threshold arguments as to the justiciability of Plaintiffs' constitutional and statutory claims. A ruling in the Government's favor on those arguments would resolve Plaintiffs' claims entirely.

Additionally, the Government's position is that the *Mandel* standard applies to all of Plaintiffs' constitutional claims. Although Plaintiffs assert in a footnote that "the *Mandel* framework would not govern all of Plaintiffs' claims," Pls.' Br. at 21 n.8, that contention is wholly unexplained and is contrary to prior cases applying the *Mandel* standard to various types of claims. *See, e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753, 760 (1972) (First Amendment right to "hear[] and meet[]" with alien); *Fiallo v. Bell*, 430 U.S. 787, 791 (1977) (applying *Mandel* to claims that statute discriminated based on sex and illegitimacy in violation of the Equal Protection and Due Process Clauses); *Rajah v. Mukasey*, 544 F.3d 427, 438 (2d Cir. 2008) (applying *Mandel* to equal protection claim alleging discrimination based on "religion, ethnicity, gender, and race"). Although Plaintiffs are free to dispute the applicability of *Mandel*, "the salient point for purposes of Defendants' stay motion is that resolution of the . . . appeal is likely to provide guidance to this court" on how broadly the *Mandel* standard should apply. *Washington*, 2017 WL 2172020, at *2.

3. Finally, Plaintiffs also argue that the appeals will not definitively resolve their claims because their claims "turn on questions of fact." Pls.' Br. at 20. But the relevance of Plaintiffs'

purported "factual record" is itself a disputed issue that the appellate courts are likely to shed light on. *See* Gov't's Br. at 12-13; *see also infra* Part III. Notably, this Court previously described Plaintiffs' claims as "center[ing] on legal issues arising from the Proclamation[.]" Prelim. Inj. Op. (*IAAB* ECF No. 46, *Zakzok* ECF No. 36) at 36.

Accordingly, there is good reason for this Court to await appellate guidance before conducting further proceedings. The appellate decisions may entirely resolve, or at least provide significant guidance on, key legal issues governing Plaintiffs' claims. Consistent with the overwhelming weight of authority, therefore, a stay of additional proceedings is warranted here.

II. Plaintiffs' Arguments Regarding Harms Do Not Support Moving Forward with Merits Proceedings Now

Throughout their filing, Plaintiffs argue that they are suffering ongoing harms from the Proclamation and that a stay should be denied for that reason. *See* Pls.' Br. at 7-10, 17. There are two problems with this theory: first, the alleged harms stem from the Supreme Court's decision to stay this Court's preliminary injunction, and that decision actually confirms that a stay of further proceedings is appropriate here; and second, Plaintiffs are wrong that staying these proceedings would "necessarily lengthen the litigation process" and "delay the ultimate resolution of their claims." Pls.' Br. at 7. Thus, Plaintiffs' purported harms do not provide a basis for denying the Government's requested stay.

A. The Supreme Court's Stay Decision Does Not Warrant Moving Forward In a Wasteful or Inefficient Manner

Plaintiffs argue that they are suffering "ongoing harm" which justifies denying the Government's stay motion and instead moving forward with additional merits proceedings. Pls.' Br. at 10. But Plaintiffs are suffering these purported harms because the Supreme Court determined that, while the preliminary-injunction appeals are ongoing, the Proclamation should be allowed to go into effect. *See Trump v. IRAP*, 138 S. Ct. 542 (2017). In reaching that conclusion,

the Supreme Court rejected the very same alleged harms that Plaintiffs now rely on here. *Compare, e.g.*, Pls.' Br. at 8-9 (discussing alleged injuries of family separation), *with* Respondents' Opposition to Application for Stay, *Trump v. IRAP*, No. 17-A-560, at 16-18 (S. Ct. filed Nov. 28, 2017) (arguing against a stay of the preliminary injunction, due to the "indefinite and potentially permanent ban" that will prolong the separation of family members). Given that Plaintiffs' purported harms were insufficient to overcome a stay of this Court's preliminary injunction, those harms should likewise be insufficient to justify further merits proceedings during that same time period. The Supreme Court decided what the status quo should be over the next several months, and Plaintiffs' dissatisfaction with that determination is not itself a reason to move forward with merits proceedings here.

Indeed, the Supreme Court's stay order reinforces the appropriateness of a stay here, as the governing legal framework remains uncertain. If this Court were to proceed, it would be required to attempt to discern meaning from that stay order in order to ensure that its legal rulings are consistent with the Supreme Court's judgments. But it makes little sense for this Court to move forward in such a manner given that the Supreme Court itself is acting with great speed—*i.e.*, certiorari was granted in mid-January, oral argument will presumably be scheduled for April, and even Plaintiffs predict a decision by the end of June. *See* Pls.' Br. at 7 n.5. Plaintiffs' purported harms are thus an inadequate basis for moving forward with merits proceedings, given the Supreme Court's rejection of those harms in the context of its stay decision and the fact that even Plaintiffs predict that the Supreme Court will resolve these appeals within the next few months.

B. Allowing Merits Proceedings Now is Unlikely to Bring These Cases Closer to Final Resolution

Plaintiffs' argument regarding their harms also depends on an unsupported assumption. Even if Plaintiffs are suffering harms from enforcement of the Proclamation, allowing merits

proceedings to move forward—*i.e.*, briefing a motion to dismiss and/or conducting discovery—would not itself remedy Plaintiffs' purported harms of family separation. Plaintiffs' argument depends, therefore, on their assumption that "a stay will delay the ultimate resolution of their claims" and "would necessarily lengthen the litigation process[.]" *Id.* at 7.

For reasons similar to those discussed above in Part I.B, however, Plaintiffs' assumption is unfounded. Allowing merits proceedings to move forward now will not necessarily bring these cases closer to final judgment, but would instead likely result in duplicative motions practice—*i.e.*, with one round occurring now (when the legal framework is uncertain), and a second round occurring later (once the appellate courts clarify the governing framework, to ensure this Court's prior rulings are consistent with the articulated framework). That is equally true with respect to discovery. As Plaintiffs acknowledge, the initial stages of discovery will likely be consumed by motions practice regarding whether discovery is appropriate, and if so the permissible scope of such discovery. *See* Pls.' Br. at 13-15; Gov't's Br. at 12-14. Once the appellate decisions are issued, therefore, any discovery-related decisions will also likely need to be re-considered to ensure consistency with the legal framework articulated by the appellate courts.

Thus, even assuming the appeals do not entirely resolve these cases, *but see supra* Part I.C, Plaintiffs are wrong to assume that conducting merits proceedings now would necessarily save time later. Certainly it is far more efficient—and it will not necessarily take any additional time—to conduct only one round of briefing after the appeals, rather than two rounds of briefing both before and after the appeals. *See Washington v. Trump*, 2017 WL 1050354, at *5 (W.D. Wash. Mar. 17, 2017) ("'Where significant litigation is likely to take place during the pendency of an appeal,' granting a stay is a 'means of conserving judicial resources.' Considerable judicial resources may be wasted 'if the appellate court's controlling decision changes the applicable law

or the relevant landscape of facts that need to be developed.'" (quoting *Hawaii v. Trump*, 233 F. Supp. 3d 850, 856 (D. Haw. 2017) (modifications and citations omitted))).

III. At A Minimum, the Court Should Reject Plaintiffs' Request to Begin Discovery, Which Plaintiffs Have Now Confirmed Will Be Extremely Burdensome

Plaintiffs do not dispute that the forthcoming appellate decisions, to the extent they do not entirely resolve these cases, will provide important guidance regarding the availability and scope of discovery—issues that are currently disputed between the parties. *See* Gov't's Br. at 12-15. Plaintiffs' concession on this point independently justifies the Government's requested stay of discovery until after resolution of the appellate proceedings.

Rather than dispute the logic of waiting to proceed with discovery until after the appellate courts provide such guidance, Plaintiffs instead respond to a different argument—*i.e.*, they argue that they should be permitted to proceed with discovery regardless of whether the Government would respond to their Complaints with a motion to dismiss. *See* Pls.' Br. at 22-23. But the Government's intent to file a dispositive motion to dismiss, including based on justiciability, provides an *additional* reason (beyond just the ongoing appeals) why discovery should not be permitted now.

Plaintiffs also try to downplay the burdens of their requested discovery, particularly with respect to two sets of document requests that they "are willing to begin with[.]" *Id.* at 23. But Plaintiffs' filing actually confirms that their requested discovery would be tremendously burdensome and intrusive, and would require a significant expenditure of resources from both the parties and this Court. In these circumstances, there is ample reason to, at a minimum, stay all discovery pending resolution of the appellate proceedings, or at least until after resolution of the Government's motion to dismiss.

A. The Pendency of a Dispositive Motion to Dismiss Would Independently Justify a Stay of Discovery

As noted above, the Government's primary argument regarding discovery is that, because appellate proceedings would inform the appropriate scope of discovery (if any), discovery should be stayed pending resolution of those proceedings. *See* Gov't's Br. at 12-14; *see also Washington*, 2017 WL 2172020, at *2 ("Although the Ninth Circuit is not considering discovery issues on appeal, it is likely to decide legal issues that will impact the court's resolution of the parties' discovery disputes here by clarifying 'the applicable law or relevant landscape of facts that need to be developed.'" (quoting *Hawaii*, 233 F. Supp. 3d at 856)). Plaintiffs do not dispute the logic of that primary argument. Instead, Plaintiffs respond to a different argument—that the Government's intent to file a motion to dismiss as the next step in these proceedings should not prevent them from beginning discovery. *See* Pls.' Br. at 22-23 ("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[.]").

Of course, the filing of a dispositive motion to dismiss would be an *additional* reason why discovery should not proceed here. It is true that the mere filing of a motion to dismiss does not automatically stay discovery. But courts have routinely granted stays in such circumstances, recognizing that "[a] stay of discovery pending the determination of a dispositive motion is an eminently logical means to prevent wasting the time and effort of all concerned, and to make the most efficient use of judicial resources." *Chavous v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 201 F.R.D. 1, 2 (D.D.C. 2001); *see also, e.g.*, *Chaudhry v. Mobil Oil Corp.*, 186 F.3d 502, 505 (4th Cir. 1999) ("The only way [the plaintiff] could possibly have been entitled to discovery" given the filing of a motion to dismiss "was if [the defendant] had attacked the factual basis for jurisdiction."); *Thigpen v. United States*, 800 F.2d 393, 396 (4th Cir. 1986) ("Nor did the court err

by granting the government's motion . . . to stay discovery pending disposition of the 12(b)(1) motion."), *overruled on other grounds by Sheridan v. United States*, 487 U.S. 392 (1988); *Tilley v. United States*, 270 F. Supp. 2d 731, 734 (M.D.N.C. 2003) ("A protective order . . . to stay discovery pending determination of a dispositive motion is an appropriate exercise of the court's discretion."); *cf. Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987). These principles have particular force when the defendant raises a challenge to the justiciability or reviewability of Plaintiffs' claims; as discussed above, that was effectively the Supreme Court's holding in the recent decision of *In re United States*, 138 S. Ct. at 445; *supra* Part I.B.

Were the Court to allow merits proceedings to begin, therefore, the next step would be for the Government to file a motion to dismiss, raising both justiciability arguments and other reasons why Plaintiffs' Complaints fail to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(1), 12(b)(6). Such a motion would itself be a reason to stay discovery, independent from the ongoing appellate proceedings. Here, then, there are two reasons not to allow Plaintiffs to begin discovery immediately—because there are ongoing appeals that will inform the proper scope of any such discovery, and also because the Government would raise a dispositive motion to dismiss that should be decided prior to allowing any such discovery to begin.

B. Plaintiffs' Filing Confirms that Discovery Would Be Highly Burdensome

In addition to the inefficiencies of going through discovery when it may turn out to be entirely unnecessary, Plaintiffs' filing now makes clear that allowing them to conduct discovery would be burdensome for both the parties and the Court. That is an independent reason why discovery should be stayed.

As discussed in the Government's opening brief, allowing discovery to begin now would result in significant motions practice regarding the appropriate scope, if any, of discovery regarding Plaintiffs' claims. *See* Gov't's Br. at 13-14, 16-21. Plaintiffs do not shy away from that prospect,

but instead run directly into it. *See, e.g.*, Pls.' Br. at 15 ("Plaintiffs do not deny that there may be disputes about discovery requiring the time and attention of the parties."); *id.* at 14 (noting that "this process could be lengthy and involve complicated issues"); *id.* at 27 (arguing that this Court should "resolve any questions of privilege while appellate proceedings on the preliminary injunction are pending"). Plaintiffs have thus conceded that allowing them to begin discovery will necessarily result in significant motions practice, requiring this Court to decide "complicated issues" including, among other things, sensitive privilege claims.

Plaintiffs argue they have minimized these burdens by focusing on two categories of documents. *See* Pls.' Br. at 23-29. Even those categories, however, would impose significant burdens on the parties and the Court. *See infra* Part III.C. Moreover, Plaintiffs expressly say that those categories are only how their discovery will *begin*. *See* Pls.' Br. at 23. Thus, Plaintiffs' eventual discovery will presumably be much broader, leading to even more disputes and imposing even more significant burdens on the parties and the Court.

Plaintiffs also argue that it is "premature" to criticize Plaintiffs' discovery requests as overly broad. *See* Pls.' Br. at 15-16. During the pre-motion conference call with the parties, however, this Court expressly directed Plaintiffs to identify the subjects on which they seek discovery. By failing to specify those subjects—and instead providing only a list of topics on which their discovery will "begin"—it is Plaintiffs who have put the Government, and the Court, in the position of assuming that the full scope of their discovery will be quite expansive.

Indeed, the record here already *confirms* that Plaintiffs' discovery will be overly broad and intrusive. Not only are the *IAAB* and *Zakzok* plaintiffs seeking discovery, but the *IRAP* plaintiffs are also seeking permission to begin discovery if the *IAAB* and *Zakzok* plaintiffs are permitted to do so. *See* Pls.' Notice Regarding Pending Stay Motions in Related Cases, *IRAP v. Trump*, No. 17-

cv-361-TDC (D. Md.), ECF No. 244 (Feb. 1, 2018). And the *IRAP* plaintiffs have already made clear their intent to seek broad, intrusive discovery. *See* Gov't's Br. at 16-19. Granting Plaintiffs' requested relief would therefore allow discovery to begin for three separate sets of plaintiffs—one of which has already confirmed that they will seek broad discovery, and the other two seeking at least an initial round of intrusive discovery as well.

In that respect, it is notable that Plaintiffs offer no defense of their refusal to consent to consolidation of these cases. They say that "[t]here is no basis to assert that Plaintiffs will begin to abuse the litigation process now." Pls.' Br. at 16-17. In order to demonstrate the burdens of discovery, however, the Government need not accuse Plaintiffs of any abuse. The obvious reality is that discovery by three separate sets of plaintiffs, in three separate cases, is inherently more burdensome than discovery by a single consolidated group of plaintiffs. By refusing to consent to consolidation of the cases, Plaintiffs are again effectively confirming that allowing discovery here will impose significant burdens on both the Government and this Court.

C. The Particular Discovery Proposed by Plaintiffs Would Be Significantly Burdensome and Require this Court to Confront Sensitive Issues

Plaintiffs argue that their requested discovery will not be burdensome, because they are "willing to begin with" discovery on two topics: (1) the reports underlying the Proclamation; and (2) documents regarding implementation of the waiver process under the Proclamation. Pls.' Br. at 23. Neither of these categories supports Plaintiffs' requests to proceed with discovery now.

1. The Underlying Reports Are Irrelevant, Classified, and Privileged

For the first category, Plaintiffs would request the following:

> (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.

Pls.' Br. at 23. There are numerous problems with this request: the reports are irrelevant as Plaintiffs themselves have previously argued; the reports contain classified information; and the reports are also privileged in their entirety. Thus, allowing Plaintiffs to pursue discovery over these documents would lead to significant motions practice regarding sensitive Government privileges.

a. As this Court has previously recognized, the reports underlying the Proclamation are irrelevant to Plaintiffs' claims. *See* Prelim. Inj. Op. at 81 (noting that even if the September Report had been submitted to the Court, "its value . . . would be limited" because "in Establishment Clause cases, it is the opinion of the reasonable observer that controls"). Indeed, Plaintiffs themselves previously made this very argument: "[W]e're not suggesting that there's a need for this Court to look at the report because the question is what the reasonable observer would perceive and understand from the facts that are readily available to the public." Prelim. Inj. Hr'g Tr. at 22.

Plaintiffs now try to distance themselves from that statement, noting that it was "a statement by IRAP's counsel[.]" Pls.' Br. at 25. Plaintiffs do not dispute, however, that *IRAP* counsel was arguing on behalf of all plaintiffs (including the *IAAB* and *Zakzok* plaintiffs) when making that statement. *See* Prelim. Inj. Hr'g Tr. at 6. Plaintiffs also try to characterize the statement to be merely that the Court need not look at the report "to rule for Plaintiffs." Pls.' Br. at 25. But that characterization ignores the latter half of the sentence—that the Court need not look at the report because the *relevant legal question* "is what the reasonable observer would perceive and understand from the facts that are readily available to the public." Prelim. Inj. Hr'g Tr. at 22. Plaintiffs may not be bound by this statement for the entire case, but they should, at a minimum, not be permitted to change their position now—before the preliminary-injunction appeals have even concluded—simply because a different position is more conducive to their

current requests for discovery.

b. As Plaintiffs surmise, the underlying reports they seek are privileged and contain classified information. *See* Pls.' Br. at 27. Accordingly, they cannot be discussed publicly or provided to opposing counsel as part of discovery.

First, at least some portions of the reports and their attachments contain classified information. *Cf. Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988) (the President has "authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to . . . give that person access to such information").

Second, the reports and their attachments are privileged in their entirety. The documents are protected in full by the presidential-communications privilege because they involve confidential, indeed classified, communications to the President of the United States. *See Cheney v. United States District Court*, 542 U.S. 367, 389-90 (2004); *United States v. Nixon*, 418 U.S. 683, 706 (1974); *In re Sealed Case*, 121 F.3d 729, 744-53 (D.C. Cir. 1997). Portions of the reports are also subject to additional confidentiality protections and privileges, such as the deliberative-process privilege. *See* Procl. § 1(h) (describing the September report as "recommending entry restrictions and limitations on certain nationals"); *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) ("[D]eliberative process covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated."). Accordingly, the reports and their attachments are not subject to disclosure due to their privileged content.

c. By seeking discovery into these reports, Plaintiffs are creating exactly the "collision course" that the Supreme Court has warned against. *Cheney*, 542 U.S. at 389. Specifically, Plaintiffs are seeking to prompt the President to assert his Executive privileges over those reports,

and thereby force this Court "into the difficult task of balancing the need for information in a judicial proceeding and the Executive's Article II prerogatives." *Id.* That is not how the Supreme Court has directed discovery to proceed:

> This Court has held, on more than one occasion, that the high respect that is owed to the office of the Chief Executive is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery, and that the Executive's constitutional responsibilities and status are factors counseling judicial deference and restraint in the conduct of litigation against it.

Id. at 385 (modifications, internal citations omitted); *see also United States v. McGraw-Hill Cos., Inc.*, No. 13-cv-0779-DOC (JCGx), 2014 WL 8662657, at *8 (C.D. Cal. Sept. 25, 2014).

In that respect, Plaintiffs are incorrect that they "have no burden to carry" with respect to their attempts to obtain discovery. Pls.' Br. at 11. The Supreme Court has held otherwise. *See Cheney*, 542 U.S. at 388 (discovery intruding on the Chief Executive is permissible "only after the party requesting the information . . . ha[s] satisfied his burden of showing the propriety of the requests," because the Executive Branch does not "bear the onus of critiquing the unacceptable discovery requests line by line"). In the present posture, Plaintiffs are unable to demonstrate the propriety of their requests because the legal framework governing Plaintiffs' claims remains uncertain, and until those legal issues are resolved by the appellate courts, Plaintiffs cannot show that they are entitled to intrusive discovery against the Chief Executive. Allowing such discovery to proceed while the appellate proceedings are ongoing—proceedings that may ultimately obviate the need for any discovery—would be improper. *See In re United States*, 138 S. Ct. at 445; *Cheney*, 542 U.S. at 386-90. The mere process of litigating these sensitive privilege issues, moreover, underscores why a stay of discovery is appropriate until after the appellate proceedings have concluded and have clarified the governing legal framework.

d. Plaintiffs argue that "[p]roducing the reports will not be burdensome because the

Government must produce them soon in FOIA litigation," citing *Brennan Ctr. for Justice at N.Y. Univ. Sch. Of Law v. Dep't of State*, No. 17-cv-7520, 2018 WL 369783, at *8 (S.D.N.Y. Jan. 10, 2018). Pls.' Br. at 24. Plaintiffs, however, mischaracterize the status of that case: the Government has not been ordered to produce the reports, but instead has been directed only to produce those portions of the reports that are not exempt under FOIA, and to produce a *Vaughn* index identifying the exemptions that apply to any portions of the reports that are withheld. *See Brennan Ctr.*, 2018 WL 369783 at *8. Because the Government has determined that the reports are properly withheld in full pursuant to FOIA Exemption 5, *see* 5 U.S.C. § 552(b)(5), and in part pursuant to several other exemptions, it has not produced the reports in that case.

Moreover, it is worth noting that the plaintiff in that case is represented by virtually all of the same counsel representing the *IAAB* and *Zakzok* plaintiffs here. Indeed, the named plaintiff—the Brennan Center for Justice—is itself counsel for the *Zakzok* plaintiffs. *Cf.* Pls.' Br. at 31. Plaintiffs' argument thus cuts both ways: to the extent Plaintiffs (or at least their counsel) already have a forum available in which to seek the underlying reports, there is no need for this Court to permit discovery (at least at this stage) for Plaintiffs to pursue the exact same documents.

Plaintiffs also argue that this discovery request will not be burdensome because it pertains to an "exceedingly small set of documents[.]" Pls.' Br. at 23. As another court recently noted, however, the burden of litigating discovery disputes is not tied to the volume of documents at issue. *See Arab Am. Civil Rights League v. Trump*, No. 17-10310, 2017 WL 2501060, at *2-3 (E.D. Mich. June 9, 2017) (noting that the discovery dispute "pertains only to one document request seeking a single document," but there have nonetheless been "voluminous filings and issues raised," and therefore "it is clear that resolution of disputes related to Plaintiffs' 'limited' discovery requests will require significant resources on behalf of the parties and the Court," and "devot[ing] time and

resources to resolve these matters during the appeal in *IRAP* would not be economical, because the Supreme Court's decision will be significantly relevant to, and possibly control, the Court's consideration of issues raised in this suit"). The same considerations likewise warrant a stay here, particularly because the documents in question are classified and privileged.

In sum, Plaintiffs' argument—that they should be allowed to seek classified, privileged advice provided to the President, and that this Court should "resolve any questions of privilege while appellate proceedings on the preliminary injunction are pending," Pls.' Br. at 27—only serves to confirm the burdensome, intrusive nature of the discovery they seek, and the resulting motions practice that will be necessary. This Court should not invite such motions practice—over sensitive issues such as Plaintiffs' access information covered by the presidential communications privilege—before the appellate proceedings are resolved, *i.e.*, when it is unclear whether any such discovery will even be necessary.

2. Plaintiffs Have No Basis for Seeking Information Related to Implementation of the Proclamation's Waiver System

For their second request, Plaintiffs argue they should be allowed to seek:

> [R]ecords 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."

Pls.' Br. at 28 (quoting Procl. § 3(c)). But again, Plaintiffs have no basis for requesting this information, and litigation over it would be quite burdensome for the parties and the Court.

a. As discussed in the Government's opening brief, implementation of the Proclamation's waiver provision has no bearing on the merits of Plaintiffs' claims. *See* Gov't's Br. at 15. Plaintiffs assert that the Government relied on the waiver provision as "evidence that '[n]either the

Proclamation's text nor its operation evidence an intent to exclude Muslims,'" Pls.' Br. at 27-28 (quoting Gov't's Prelim. Inj. Opp. at 40), and Plaintiffs now "have reason to believe that the waiver process is not operating as set forth in the Proclamation[.]" *Id.* at 28.

As an initial matter, the quoted statement from the Government's brief was made as an alternative argument if the Court were to apply domestic Establishment Clause precedents rather than the *Mandel* standard. Thus, the quoted statement cannot be construed as a concession that information related to implementation of the waiver provision would actually be relevant to Plaintiffs' claims. In the Government's view, no such discovery is appropriate. *See* Gov't's Br. at 12-14. Plaintiffs' request for information regarding the waiver process would therefore require the same motions practice discussed above—*i.e.*, litigating whether any discovery is appropriate, and if so, the permissible scope of that discovery.

More fundamentally, Plaintiffs cannot obtain discovery based on a vague, non-specific statement that they "have reason to believe that the waiver process is not operating as set forth in the Proclamation[.]" Pls.' Br. at 28. "The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926); *see also Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004). Absent some sort of concrete foundation for Plaintiffs' speculation regarding how the waiver system is being implemented, there is no basis for permitting discovery on such a topic now, before the appellate proceedings have concluded.

b. The only specific issue Plaintiffs mention is that "[d]espite 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[.]" Pls.' Br. at 28. To

illustrate the point, Plaintiffs discuss how John Doe #6's mother-in-law was denied a waiver even though she 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[.]" *Id.*

This alleged inconsistency does not justify Plaintiffs' demands for discovery. For one thing, the Proclamation did not require that any guidance be issued publicly. *See* Procl. § 3(c). And in any event, Plaintiffs are also wrong about the absence of public guidance. Since December 2017, the State Department's website has included a "Frequently Asked Questions" page containing the following guidance regarding waivers:

> **Will you process waivers for those affected by the Proclamation? How do I qualify for a waiver to be issued a visa?**
>
> As specified in the Proclamation, consular officers may issue a visa based on a listed waiver category to nationals of countries identified in the [Proclamation] on a case-by-case basis, when they determine: that issuance is in the national interest, the applicant poses no national security or public safety threat to the United States, and denial of the visa would cause undue hardship. There is no separate application for a waiver. An individual who seeks to travel to the United States should apply for a visa and disclose during the visa interview any information that might demonstrate that he or she is eligible for a waiver.

New Court Orders, State Dep't (Dec. 4, 2017), available at https://travel.state.gov/content/travel/en/News/visas-news/new_court_orders_on_presidential_proclamation.html.

Accordingly, Plaintiffs' purported inconsistency involving John Doe #6's mother-in-law is based on their own misunderstanding: There is no opportunity to "apply" for a waiver beyond the general visa application and interview process, and an applicant's opportunity to demonstrate that he or she meets the criteria for a waiver likewise occurs during the visa application and interview process. As properly understood, then, there is no inconsistency between the Proclamation and the events described by Plaintiffs pertaining to John Doe #6's mother-in-law. Accordingly, discovery should not be permitted on the basis of those allegations.

c. As discussed above, this document request would not avoid motions practice based on the documents' purported relevance. Similarly, this request also would not avoid motions practice based on the sensitive or privileged nature of the requested documents. Some of the internal guidance that has been issued contains classified information, and may also contain other privileged information such as law-enforcement sensitive information.

The connection between Plaintiffs' requests and these sensitive privileges is obvious. For example, the Proclamation directed the Secretaries of State and Homeland Security to issue guidance addressing "the standards, policies, and procedures" for "determining whether the entry of a foreign national would not pose a threat to the national security or public safety of the United States[.]" Procl. § 3(c)(ii)(A). The public disclosure of that information—*i.e.*, the standards and processes by which the United States determines whether a foreign national poses a threat—could easily undermine the United States' national security and/or law-enforcement interests.

Allowing this discovery request to go forward, therefore, would also be significantly burdensome for the parties and the Court—again leading to extensive motions practice touching on sensitive issues. This burdensome motions practice amply justifies a stay of discovery until after the appellate proceedings have been resolved—*i.e.*, to ensure that any such discovery is actually necessary, and to have the benefit of the appellate courts' rulings in deciding what is relevant and necessary for adjudication of Plaintiffs' claims.

* * * *

The most prudent course is for the Court to stay all proceedings pending resolution of the appeals. Given that critical legal issues are currently pending before the Supreme Court, and given that the Supreme Court itself is moving expeditiously towards resolution of those issues, there is no reason for this Court to move forward with additional merits proceedings. Accordingly, this

Court should stay all further merits proceedings, or at a minimum stay discovery pending resolution of the ongoing appellate proceedings.

CONCLUSION

The Court should stay all proceedings in *IAAB* and *Zakzok* pending final resolution of the preliminary-injunction proceedings before the Fourth Circuit and/or the Supreme Court.

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Respectfully submitted,

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