UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 8:17-cv-00361-TDC
DONALD TRUMP, in his official capacity as President of the United States, *et al.*,	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO
PLAINTIFFS' RENEWED MOTION FOR EXPEDITED DISCOVERY

Plaintiffs have filed a renewed motion for expedited discovery, seeking evidence for use in relation to their now-pending motion for a preliminary injunction challenging the President's recently issued Executive Order No. 13,780, titled "Protecting the Nation From Foreign Terrorist Entry Into the United States." But "[e]xpedited discovery is not the norm," and is not permitted absent a showing "of the *need* for the expedited discovery." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. O'Connor*, 194 F.R.D. 618, 623 (N.D. Ill. 2000); *accord Guttenberg v. Emery*, 26 F. Supp. 3d 88, 97 (D.D.C. 2014).

Plaintiffs here have failed to make the requisite showing of a need for the expedited discovery they seek. Contrary to establishing any need, throughout this litigation Plaintiffs have consistently stated they believe they *already* have sufficient evidence to prevail on their motion for a preliminary injunction. These statements alone preclude Plaintiffs from conducting expedited discovery *now* rather than (potentially) at some future point in the litigation.

Moreover, the discovery Plaintiffs seek here is unjustifiably burdensome and should be rejected on its face: the four potential document requests are extremely broad in scope; they seek to intrude into sensitive privileged material; and they would raise significant separation-of-powers concerns given their apparent breadth and applicability to the highest levels of the Executive Branch. *See generally* Defs.' Opp'n to Mot. for Expedited Discovery (ECF No. 81) at 8-15. Rather than respond to these arguments or narrow their discovery requests, Plaintiffs' renewed motion instead demands that Defendants and this Court be required to perform the narrow tailoring for them—*i.e.*, by having Defendants produce responsive documents, objections, and a privilege log within the impossibly short timeframe of seven days, followed by negotiation between the parties and then motions practice in this Court. *See* Pls.' Renewed Mot. (ECF No. 92) at 6-7.

This is not accepted practice. Indeed, Plaintiffs' preferred approach is fundamentally unworkable, and wholly ignores that Plaintiffs bear the burden of demonstrating that expedited discovery is reasonable and appropriate now. Moreover, Plaintiffs' approach is contrary to the Supreme Court's instructions regarding limiting discovery into the highest levels of the Executive Branch. *See Cheney v. U.S. Dist. Court for District of Columbia*, 542 U.S. 367, 388 (2004) (the Executive Branch does not "bear the onus of critiquing the unacceptable discovery requests line by line"). Thus, even apart from Plaintiffs' failure to demonstrate the need for expedited discovery, the burden Plaintiffs seek to impose on Defendants and this Court is an independent reason for denying Plaintiffs' motion.

ARGUMENT

I. Plaintiffs Fail to Demonstrate Exceptional or Unusual Circumstances That Would Justify Expedited Discovery.

As discussed in Defendants' opposition to Plaintiffs' prior expedited discovery motion, *see* ECF No. 81 at 3, Plaintiffs seek an exception to the requirement under Federal Rule of Civil Procedure 26(d) that discovery typically shall not commence until the parties to an action meet and confer as prescribed by Rule 26(f). Expedited discovery is available only in limited, unusual circumstances. *See Dimension Data N. Am., Inc. v. NetStar-1, Inc.*, 226 F.R.D. 528, 530 (E.D.N.C. 2005); *ForceX, Inc. v. Tech. Fusion, LLC*, No. 4:11-cv-88, 2011 WL 2560110, at *4 (E.D. Va. June 27, 2011).

Courts analyze requests for expedited discovery under two separate tests. *See Guttenberg*, 26 F. Supp. 3d at 97. Some courts apply a "reasonableness or good cause" test. *Id.* at 98; *see also Dimension Data*, 226 F.R.D. at 531. "Under that test, a court facing a motion for expedited discovery in connection with a request for preliminary injunction may consider the timing of the motion, whether the party seeking discovery has narrowly tailored its requests to gather information relevant to the preliminary injunction determination, and whether the requesting party has shown a likelihood of irreparable harm without access to expedited discovery." *Lewis v. Alamance Cty. Dep't of Soc. Servs.*, No. 1:15-cv-298, 2015 WL 2124211, at *1 (M.D.N.C. May 6, 2015) (citing *Dimension Data*, 226 F.R.D. at 531-32). Other courts have analyzed requests for expedited discovery "under a similar standard as to the preliminary injunction standard." *ForceX*, 2011 WL 2560110, at *5. Under this test, a party seeking early discovery must make a strong showing of success on the merits as well as likely irreparable harm in the absence of obtaining discovery. *See id.* Plaintiffs' request for expedited discovery fails both tests.

A. Plaintiffs Cannot Demonstrate a Compelling Need or Irreparable Harm That Would Justify Expedited Discovery.

Fundamentally, expedited discovery is designed for the unusual circumstance in which a party would suffer irreparable harm if discovery were postponed until after the parties' Rule 26(f) conference. Thus, regardless of which test is applied, Plaintiffs "must show a likelihood of irreparable harm without access to early discovery." *Lewis*, 2015 WL 2124211, at *2. Plaintiffs have failed to demonstrate why their requested discovery is necessary now, particularly because they have expressed the contrary throughout this litigation.

Plaintiffs argue their requested discovery would provide "additional evidence bearing on the central question of the March 6 [Executive] Order's discriminatory intent." Pls.' Renewed Mot. at 2. But Plaintiffs have not established that their requested evidence is even *relevant* to the Court's consideration of the Executive Order's alleged discriminatory purpose. Plaintiffs' four discovery requests here seek purely internal Government documents related to Executive Order Nos. 13,769 and 13,780. As discussed in detail in the Government's forthcoming opposition to Plaintiffs' motion for a preliminary injunction, however, the purpose of a Government policy must be determined in this context by reference to *official public acts*, not by scrutinizing internal Government documents. The Government hereby incorporates those arguments by reference. *See also, e.g.*, *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 863 (2005) (in deciding whether "a religious objective permeated the government's action," courts consult "openly available data"). By definition, therefore, Plaintiffs cannot establish an urgent, present need for discovery because the evidence they are seeking is not relevant to the issues confronting the Court in connection with Plaintiffs' motion for a preliminary injunction.[*]

[*] Plaintiffs' renewed motion cites two cases purportedly addressing what courts may review when analyzing the purpose of government action. *See* Pls.' Renewed Mot. at 4 (citing *Hunter v. Underwood*, 471 U.S. 222, 227-28 (1985); *Vill. of Arlington Heights v. Metro. Hous.*

Moreover, even assuming Plaintiffs' requested evidence were relevant, Plaintiffs fail to demonstrate a *need* for the discovery. Indeed, Plaintiffs have repeatedly stated throughout this litigation that they do *not* need any additional discovery to prove a likelihood of success on their claim. In their prior motion for expedited discovery, Plaintiffs asserted that the evidence they already have "is more than sufficient to show that they are likely to succeed in their claim that the . . . successor [order] violates the Constitution." ECF No. 62 at 8-9. And in Plaintiffs' latest motion for a preliminary injunction, Plaintiffs again assert that they already have "[v]oluminous" and "overwhelming" evidence as to the new Executive Order's purported illegality. ECF No. 91 at 2, 5. Given that Plaintiffs themselves do not view discovery as necessary to prove their claims, there is accordingly no basis for permitting expedited discovery here.

Plaintiffs' renewed motion argues generally that expedited discovery would "facilitate a prompt and well-informed preliminary injunction ruling." Pls.' Renewed Mot. at 5. But that is not the standard governing their request for expedited discovery. Plaintiffs must show not only that they would suffer irreparable harm in the absence of a preliminary injunction—which they cannot do for the reasons explained in Defendants' forthcoming opposition to that motion—but also that they would suffer irreparable harm without the opportunity to conduct expedited discovery. *See Lewis*, 2015 WL 2124211, at *2 (denying a motion for expedited discovery because "Plaintiff's instant filings otherwise fail to address the issue of irreparable harm as it concerns access to expedited discovery"). Similarly here, Plaintiffs do not even attempt to make this showing of irreparable harm in the absence of expedited discovery, and therefore their renewed motion must be denied.

Dev. Corp., 429 U.S. 252, 266-68 (1977)). But those cases arose against state and local actors in the race-discrimination context—not in the immigration context, and not about assessing the alleged motive of the President of the United States.

B. Plaintiffs' Requested Discovery Is Not Narrowly Tailored.

Plaintiffs' motion for expedited discovery should also be denied because their discovery requests are not narrowly tailored. *See Guttenberg*, 26 F. Supp. 3d at 98 (denying motion for expedited discovery where, *inter alia*, plaintiffs sought "relatively broad discovery on issues going to the merits" rather than "narrowly tailored [requests] to reveal information related to the preliminary injunction as opposed to the case as a whole"). Despite a lengthy discussion of this flaw in Defendants' opposition to Plaintiffs' prior discovery motion—which Defendants incorporate by reference here for this opposition, *see* ECF No. 81 at 8-11—Plaintiffs nonetheless fail to defend the scope of their discovery requests.

To summarize the defects, all four of Plaintiffs' discovery requests are exceedingly broad and intrusive. Two of those requests seek tremendous amounts of information related to the implementation of both Executive Order Nos. 13,769 and 13,780, as well as related court orders. *See* ECF No. 63-1 at 6 (Requests for Production of Documents Nos. 2 and 4). Those requests could very well encompass every U.S. Customs and Border Protection officer's decision to grant or deny entry, for every national of the seven countries, occurring from January 27, 2017, to the present. Those requests could also extend to privileged internal Justice Department documents providing advice about the meaning and implementation of court orders entered in pending cases—including court orders entered in cases not under this Court's jurisdiction, and thus lacking in relevance to this particular lawsuit.

Plaintiffs' two other requests extend to all data, memoranda, and other documents "relating to the development" of the two Executive Orders. *See* ECF No. 63-1 at 6 (Requests for Production of Documents Nos. 1 and 3). These requests could extend to countless documents that are highly sensitive, such as: data relating to decisions on visa applications and entry of foreign nationals; intelligence reports regarding potential future terrorist attacks; summaries of

prior terrorism investigations and prosecutions; and numerous other sensitive documents related to our Nation's foreign relations, national security, and immigration activities. Indeed, these requests on their face seek a tremendous amount of privileged material, as discussed further below.

Under no circumstances could these requests be described as narrowly tailored, which requires the denial of Plaintiffs' renewed motion for expedited discovery. *See ForceX*, 2011 WL 2560110, at *5 n.3 (denying motion because "[t]hese requests are not narrowly tailored to obtain relevant information necessary for expedited discovery purposes"); *see also ELargo Holdings, LLC v. Doe–68.105.146.38*, 318 F.R.D. 58, 61 (M.D. La. 2016) ("The party seeking expedited discovery has the burden of establishing good cause and the scope of the requests must be narrowly tailored to the necessary information they seek."); *Philadelphia Newspapers, Inc. v. Gannett Satellite Info. Network, Inc.*, No. 98-CV-2782, 1998 WL 404820, at *2 (E.D. Pa. July 15, 1998) (collecting cases for the proposition that "courts generally deny motions for expedited discovery when the movant's discovery requests are overly broad"). Because Plaintiffs have not carried their burden of demonstrating that their discovery requests are sufficiently narrowly tailored, Plaintiffs' motion should be denied.

C. Plaintiffs Have Not Demonstrated a Likelihood of Success on the Merits Sufficient to Justify Expedited Discovery.

The above discussion demonstrates why Plaintiffs cannot satisfy the "good cause" or "reasonableness" standards for expedited discovery. *See Lewis*, 2015 WL 2124211, at *1-2. Should this Court instead apply the preliminary injunction standard to Plaintiffs' motion for expedited discovery, Plaintiffs' request would fail for an additional reason: Plaintiffs cannot make a strong showing of success on the merits. *See ForceX*, 2011 WL 2560110, at *5. As discussed in the Government's forthcoming opposition to Plaintiffs' pending motion for a

preliminary injunction, there are numerous obstacles precluding Plaintiffs' success: Plaintiffs lack standing, and they challenge a lawful exercise by the President of broad discretionary authority granted to him by statute. For these reasons, too, Plaintiffs' renewed motion should be denied.

II. The Discovery Requests Here Implicate Significant Privilege Concerns, and Plaintiffs' Proposed Approach Is Wholly Unworkable.

Plaintiffs' requested discovery should also be rejected because it would raise significant privilege issues, including potentially intruding into the highest levels of the Executive Branch. Plaintiffs offer no justification for this intrusion into core Executive Branch privileges, and their proposal for Defendants to assert privileges in response to their discovery requests—and for further motions practice before this Court to resolve these issues—is not only unworkable but veers into the impossible.

A. Plaintiffs' Requested Discovery Implicates Core Governmental Privileges.

As discussed in the Government's opposition to Plaintiffs' prior motion, Plaintiffs' discovery requests, on their face, seek a significant amount of undoubtedly privileged material. *See* ECF No. 81 at 12-15. Specifically, Plaintiffs' requests seek a significant number of documents that would certainly qualify as pre-decisional and deliberative and thus be subject to the Government's deliberative process privilege. Furthermore, by requesting all documents relating to the development of the two Executive Orders, Plaintiffs' requested discovery is clearly directed at least in part at the Executive Office of the President and implicates the presidential communications privilege.

Plaintiffs' renewed motion again says remarkably little about this clash with executive privileges. In terms of the deliberative process privilege, for example, Plaintiffs respond that "the privilege does not protect any documents that are 'peripheral to actual policy formation[.]'"

Pls.' Renewed Mot. at 7. But even taking that limitation at face value, it is inapplicable to Plaintiffs' discovery requests which are expressly tied to policy formation—*i.e.*, seeking documents "relating to the development" of the two Executive Orders. The Supreme Court has made clear that the deliberative process privilege is broad in scope and protects the type of documents Plaintiffs seek here:

> Our emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.

NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 n.18 (1975). Thus, Plaintiffs' attempt to downplay concerns associated with their intrusive discovery is unpersuasive; their discovery requests plainly encompass expansive swaths of privileged material.

B. Plaintiffs' Proposal for Resolving Privilege Issues Is Inappropriate and Wholly Unworkable.

Instead of narrowing their requested discovery or even acknowledging the legitimacy of Defendants' privilege concerns, Plaintiffs' renewed motion seeks to further increase the burden on Defendants and the Court—by requiring Defendants to fully respond to the discovery requests within seven days, followed by negotiation between the parties and then motions practice before the Court. This proposal is clearly unfeasible, and further underscores why Plaintiffs' motion should be denied.

As an initial matter, the premise of Plaintiffs' argument is that "[t]here is no reason to diverge from th[e] typical discovery dispute resolution process here[.]" Pls.' Renewed Mot. at 6. But it is Plaintiffs who advocate departing from typical discovery practices, by seeking expedited discovery, and moreover by framing broad and intrusive requests that sweep in highly privileged

material. In any event, Plaintiffs' premise is directly contrary to the Supreme Court's express statement that district courts must account for separation-of-powers and privilege concerns when setting the timing and scope of civil discovery implicating the Executive Office of the President. *See Cheney*, 542 U.S. at 385 ("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."). Plaintiffs' suggestion that Defendants should raise their privilege objections "in *responding to* Plaintiffs' discovery requests," Pls.' Renewed Mot. at 6, is likewise contrary to the Supreme Court's instructions. *See Cheney*, 542 U.S. at 388 (discovery 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"); *United States v. McGraw-Hill Cos.*, No. 13-cv-0779-DOC (JCGx), 2014 WL 8662657, at *8 (C.D. Cal. Sept. 25, 2014) ("The Supreme Court has been crystal clear: courts must ensure that the invocation of executive privilege is the last resort." (citing *Cheney*, 542 U.S. at 384-90)).

Plaintiffs' failure to reconcile (or even acknowledge) *Cheney*'s holdings makes their proposed future proceedings all the more remarkable. In Plaintiffs' view, the appropriate course here is for Defendants to respond to their discovery requests (including production of documents and a privilege log) within just seven days. *See* Pls.' Renewed Mot. at 6-7. After that, the parties can negotiate about withheld documents, followed by motions practice. *See id.* at 6 ("If the parties are unable to reach an agreement about certain categories of documents, the parties can make any appropriate motions to the Court for resolution.").

This proposed discovery schedule is unworkable. For one thing, it would be impossible for the Government to comprehensively respond to Plaintiffs' four expansive discovery requests

within a mere seven days—less than 25% of the time typically provided for a party to respond with *objections* to a request for production of documents, *see* Fed. R. Civ. P. 34(b)(2)(A). Complying with Plaintiffs' requested deadline would require collection, review, and production of voluminous material within an extremely short timespan. Even in the unlikely event it were possible for the Government to comply with that timeline, it would at a minimum be incredibly burdensome. *Cf. In re Fannie Mae Derivative Litig.*, 227 F.R.D. 142, 143 (D.D.C. 2005) (relevant factors regarding whether to grant expedited discovery include "the burden on the defendants to comply with the requests" (citing *Entertainment Tech. Corp. v. Walt Disney Imagineering*, No. 03-3546, 2003 WL 22519440, at *3-5 (E.D. Pa. Oct. 2, 2003)).

This proposed schedule highlights why it is unreasonable for Plaintiffs to demand such expansive discovery prior to a hearing on their motion for a preliminary injunction, *see* Pls.' Renewed Mot. at 3 n.2, which they have previously requested to be scheduled for March 28. It is wholly unrealistic to expect the discovery process to be completed prior to that date (or any similar date). The Government would have to respond to Plaintiffs' expansive requests; the parties would then need time to negotiate; the parties would then need time to brief any discovery-related motions; and finally the Court would need time to review and rule upon those motions. Because Plaintiffs' discovery requests are expansive, implicate the Executive Office of the President, and seek highly privileged material, it is simply not possible to conclude the necessary discovery process prior to any hearing on Plaintiffs' motion for a preliminary injunction.

Ultimately, Plaintiffs had the burden to submit discovery requests that were narrowly tailored and did not unjustifiably intrude upon core Executive Branch privileges. Plaintiffs cannot rely on Defendants and this Court to perform that narrow tailoring for them, through a

highly burdensome and time-consuming process of discovery motions practice. Because Plaintiffs' renewed motion for expedited discovery is not only practically unworkable but also legally unjustified, Plaintiffs' renewed motion should be denied.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the Court deny Plaintiffs' motion for expedited discovery.

Dated: March 13, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2017, I electronically filed the foregoing Defendants' Opposition to Plaintiffs' Motion for Expedited Discovery using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

/s/ Arjun Garg
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