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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

LAS AMERICAS IMMIGRANT ADVOCACY CENTER, et. al.,

Plaintiffs,

v.

JOSEPH R. BIDEN, et. al.,[1]

Defendants.

Case No. 3:19-cv-02051-IM

JOINT STATUS REPORT

[1] Under Federal Rule of Civil Procedure 25(d), President Joseph R. Biden is automatically substituted for the former president as a Defendant in this case. Accordingly, the parties respectfully request that the caption be updated.

Plaintiffs and Defendants, through their undersigned counsel, submit the following Joint Status Report as required by the Court's Case Management Order of December 9, 2020 (ECF 97).

In accordance with the Court's Order, on December 18, 2020, Defendants produced administrative records regarding the immigration judge (IJ) performance metrics policy and the Policy Memorandum (PM) 19-04, Tracking and Expedition of "Family Unit" (FAMU) cases. Former EOIR Director James McHenry certified that each record "contains all non-privileged documents that EOIR considered."

On January 11, 2021, Plaintiffs requested by e-mail that Defendants produce a privilege log describing every document that Defendants withheld pursuant to any privilege, including the deliberative process privilege, along with the date of the document, the author of the document, the individuals with whom it was shared, and the reason it was withheld. On January 13, 2021, Defendants responded that "[n]o documents were withheld based on privilege."

On January 18, 2021, Plaintiffs provided Defendants with their objections to the administrative records. Plaintiffs objected to

> the omission or redaction of all documents and communications that were considered, directly or indirectly, in the adoption of each policy at issue, including (1) documents relating to the factual basis for, decision to implement, or proposed implementation of each policy at issue, (2) documents that are referenced directly in each administrative record, and (3) documents that provide specific data or recommendations that the agency considered when promulgating each policy at issue.

The parties conferred by telephone on February 1, 2021. At that conferral, Defendants' counsel communicated Defendants' position that none of the materials identified in Plaintiffs' objections to the administrative records were considered by the agency and thus none of those materials are part of the administrative records.

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On February 5, 2021, Defendants filed an unopposed Motion for 30-Day Extension of Time for Joint Status Report (ECF 98), which the Court granted on February 8 (ECF 99). On March 15, 2021, the parties submitted a Joint Motion for 30-Day Extension of Time for Joint Status Report (ECF 100), noting that the immigration judge performance metrics and FAMU memorandum were being reviewed by the agency as a result of several executive orders issued by President Biden.[2] The Court granted that extension motion on March 16 and reset the status report deadline for April 14, 2021 (ECF 101).

The parties conferred again by telephone on April 9, 2021. During this call, Defendants' counsel stated that Defendants' review of the immigration judge performance metrics and FAMU memorandum remains ongoing. The parties also discussed how the case should move forward given that the policies noted above remain under review. Counsel for Defendants indicated his clients' intention to seek a 90-day stay of the case in its entirety. The parties also discussed their respective positions on whether discovery should be allowed beyond the administrative record for those policies, and confirmed that the parties remain at odds on that issue.

On April 12, 2021, counsel for the parties conferred further by phone and agreed that Plaintiffs would not oppose Defendants' motion for stay, but notwithstanding the stay, that Plaintiffs would proceed with filing their motion seeking clarification on the scope of discovery

[2] On March 11, 2021, Defendants confirmed via email that "some provisions that may apply" include: "EO 14010 Sec. (4)(c)(i) states that 'within 180 days of the date of this order, conduct a comprehensive examination of current rules, regulations, precedential decisions, and internal guidelines governing the adjudication of asylum claims….'"; "EO 14012 Sec. (1) asks the agencies to ensure that 'immigration processes and other benefits are delivered effectively and efficiently.'"; and "EO 14012 Sec. (3)(a)(i) asks that the AG 'identify barriers that impede access to immigration benefits and fair, efficient adjudications of these benefits….'"

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permitted for Claims 1 and 2 in the Complaint while the case was otherwise stayed, and that the parties would negotiate a proposed briefing schedule for that motion.[3] The parties propose that Plaintiffs file their motion within 21 days of the Court entering an order staying this case, with Defendants' response due 30 days after the motion is filed.[4]

Below, the parties set forth their respective positions on how to best resolve any remaining disputes on the sufficiency of the administrative records and whether discovery beyond the administrative records is appropriate.

PLAINTIFFS' POSITION[5]

Plaintiffs are aware that Defendants need time to reevaluate their positions in light of the change in Administration. However, Plaintiffs are concerned that progress has now been stalled for several months and that the timeline for resolution of key issues relating to the scope of discovery in this case remains unclear, with nearly half of the fact-discovery period elapsed. During this time, Defendants have neither communicated any substantive policy changes to Plaintiffs—while the challenged policies continue to harm Plaintiffs—nor provided a definitive

[3] Consistent with the Court's comments and instructions during the Rule 16 Conference on December 8, 2020, Plaintiffs understand that they are required to file a Motion to Compel discovery if they wish to seek discovery beyond the administrative records so that the Court may consider and resolve this issue.

[4] Plaintiffs also intend to seek leave of the court to file a reply in support of their motion. At this time, the parties have not reached agreement on whether a reply should be permitted.

[5] Plaintiffs understand that the joint status report should summarize generally the status of the litigation and the parties' discussions for the Court's convenience. To the extent Defendants may argue that any language in the joint report reflects an admission or concession by Plaintiffs regarding issues in dispute or the scope of the litigation, Plaintiffs expressly reject that assertion and respectfully request a conference with the Court to discuss the outstanding disputes.

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timeline for when decisions about these issues may occur.[6] Given this delay and the uncertain timeline moving forward, it is all but certain that the deadline to complete fact discovery, and subsequent deadlines in this Court's Case Management Order (ECF 97), will need to be revised. Therefore, because the parties remain at odds over the scope of discovery on Plaintiffs' non-APA claims notwithstanding Defendants' review of the IJ Performance Metrics[7] and FAMU policies[8], Plaintiffs believe that judicial efficiency would be best served by using any time when the case is further stayed to resolve that issue. Accordingly, Plaintiffs will not oppose Defendants' motion to stay the case if Defendants will agree to fully brief and litigate the scope of discovery during the pendency of the stay.

I. Should the court grant Defendants' request for a stay of another ninety days, Plaintiffs should be permitted to proceed with their Motion to Compel Discovery Beyond the Administrative Record

If the Court finds it appropriate to grant Defendants' Motion for Stay and delay further action on Plaintiffs' APA claims, Plaintiffs should be permitted to file a motion to resolve the scope of permissible discovery on their non-APA claims (Claims 1 and 2), and specifically, the question of whether discovery beyond the administrative records for the IJ Performance Metrics

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[6] Defendants' stated position during the parties' April 9, 2021 conferral, which Defendants' counsel refused to agree to include in the joint portion of this Report, that Defendants' counsel has no information regarding the potential outcome of the new administration's review of the IJ Performance Metrics and FAMU policies or when any decision on those policies will be made.

[7] "IJ Performance Metrics" refers to Defendants' requirements that immigration judges meet certain performance benchmarks, including a Case Completion Quota, Remand Rate, and Speed-Related Adjudication Benchmarks. *See* Complaint (ECF 1) ¶¶ 8-9, 121-126 (challenging the IJ Performance Metrics under the term "Enforcement Metrics"). These requirements were adopted on October 4, 2018, through the Memorandum of Understanding Regarding the Implementation of New Performance Measures for Immigration Judges.

[8] "FAMU" refers to Defendants' family-unit policy, first laid out in PM 19-04, that establishes a rapid-removal family docketing directive. *See* Complaint (ECF 1) ¶¶ 8, 10, 147-153 (challenging FAMU under the term "FAMU Directive").

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and FAMU policies should be allowed for those claims. Discovery on these other claims is appropriate because, as previously noted, their merits are not contingent on the status of either the IJ Performance Metrics or FAMU policies. Rather, Plaintiffs' non-APA claims are fundamentally distinct. For example, whereas Plaintiffs' APA claims challenge specific policies governing aspects of immigration court operations, Claims 1 and 2 seek relief for the "systemic 'gross mismanagement' of the immigration system by Defendants" under wholly different constitutional and statutory provisions. MTD Order at 23; *see also Sierra Club v. Trump*, 929 F.3d 670, 699 (9th Cir. 2019) (holding that Ninth Circuit precedent "clearly contemplate[s] that claims challenging agency actions—particularly constitutional claims—may exist wholly apart from the APA"). In other words, Plaintiffs' first two claims, which arise under the Take Care Clause of the U.S. Constitution and various provisions of the Immigration and Nationality Act, challenge a much broader pattern of Executive Branch actions, and in some instances *inaction,* which have cumulatively resulted in unlawful dysfunction across the immigration court system. *See* Compl. ¶ 197 (alleging Defendants' violation of the Take Care Clause through "the abuse of authority and mismanagement of the immigration courts"); Compl. ¶ 204 (alleging Defendants' violation of the INA's impartial adjudicator requirement by, among other actions, "fostering an adjudicatory system that is permeated by bias against immigrants, including by perpetuating asylum-free zones").[9] Resolving Plaintiffs' challenge to the legality of Defendants' overall management of the immigration court system will require discovery that goes beyond the scope

[9] While Plaintiffs' impartial adjudicator claim does reference the policies at issue, it is much broader than those two policies. *See* Compl. ¶¶ 201-207; MTD Order at 25 (ECF 79) (recognizing that this claim alleges "systemic judicial bias" which "is driven both by policies and also by a general hostility toward immigrants").

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of the administrative record provided for two specific policies. *See* ECF 90; *see also State v. U.S. Dep't of Homeland Sec.*, 2020 WL 1557424, at *15–16 (N.D. Cal. Apr. 1, 2020) (granting extra-record discovery where plaintiffs alleged "different factual allegations between the APA claims and the constitutional claims" and "the claims do not fundamentally overlap"); *Manker v. Spencer*, 2019 WL 5846828, at *19 (D. Conn. Nov. 7, 2019) (finding extra-record discovery warranted "[w]here a plaintiff challenges an agency's general course of conduct rather than a discrete adjudication").

Defendants have given no indication that any of the policy changes being considered by the new Administration would moot Plaintiffs' broader statutory and constitutional claims. Accordingly, because these claims are distinct and require discovery that goes beyond the administrative record specific to the IJ Performance Metrics and FAMU policies, Plaintiffs respectfully submit that any question as to the scope of discovery for these non-APA claims should be promptly resolved, irrespective of Defendants' ongoing policy review and the grant of a further stay of this case. *See, e.g.*, *Vidal v. Duke*, 2017 WL 8773110, at *2 (E.D.N.Y. Oct. 17, 2017) (permitting discovery to proceed on equitable and constitutional claims brought alongside APA claims); *Jordan v. Wiley*, 2008 WL 4861923, at *1–2 (D. Colo. Nov. 10, 2008) (declining to stay discovery of Plaintiffs' constitutional claims while APA claims remain pending). Plaintiffs therefore intend to file a Motion to Compel Discovery Beyond the Administrative Record on their non-APA claims, unless the Court is already of the opinion that such discovery may proceed.

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II. Administrative Records for APA Claims: Notwithstanding the delay, Plaintiffs preserve their right to file motions to complete the administrative records and/or for discovery beyond the administrative records for those policies

Although Plaintiffs do not oppose Defendants' Motion for Stay, Plaintiffs maintain their position, as articulated in their objections shared with Defendants on January 18, 2021, that Defendants must complete the administrative records for the IJ Performance Metrics and FAMU policies by correcting the omission and/or redaction of any documents that were considered, directly or indirectly, in the adoption of each policy at issue. In elaborating on these omissions and redactions, Plaintiffs cited in their written objections to specific documents that they had identified in each category, including documents referenced in the administrative records and/or available in the public domain. Plaintiffs also objected to "the lack of a privilege log for either administrative record, to the extent that one should have been produced for a complete administrative record."[10]

[10] Defendants also refused to agree to include in the joint portion of this Report the following statements Defendants' counsel made during the parties' February 1, 2021 conferral regarding Plaintiffs' objections to the administrative records: In response to Plaintiffs' request for a privilege log, Defendants' counsel stated during the February 1, 2021 conferral that no documents that the agency considered to be part of the administrative records were withheld or redacted based on privilege and confirmed Defendants' position that additional discovery beyond the administrative records was not warranted in this case.

Defendants also refused to agree to include in the joint portion of this Report various statements made by Defendants' counsel during the parties' April 9, 2021 conferral. During that conferral, Plaintiffs' counsel requested clarification as to whether any privileged materials were considered indirectly in developing the IJ Performance Metrics and/or FAMU policies. Plaintiffs' counsel also requested clarification as to why certain pages in the IJ Performance Metrics record appeared to have been redacted. Counsel for Defendants confirmed that no materials were considered, either directly or indirectly, that were not included in the administrative records for those policies and that the noted redactions were applied prior to Defendants' consideration of those materials for reasons Defendants were not privy to, and that Defendants were not claiming privilege over the redacted material.

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The APA requires courts to "review the whole record" underlying an agency's decision, 5 U.S.C. § 706, and judicial review must be "based on the full administrative record that was before the [agency] at the time [it] made [its] decision," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). The "whole record" includes "all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position." *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (internal quotation marks omitted). Here, Plaintiffs have identified—with specificity—missing documents and categories of documents that provide reasonable, non-speculative grounds to conclude that Defendants' current administrative records are incomplete. *See Audubon Soc'y of Portland v. Zinke*, 2017 WL 6376464, at *4 (D. Or. Dec. 12, 2017) (internal citations and quotations omitted); *see also Pub. Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982) (recognizing the court's power to compel completion of the administrative record "when it appears the agency has relied on documents or materials not included in the record"). Accordingly, Plaintiffs maintain that Defendants should be required to produce missing documents and communications relating to the factual basis for, decision to implement, and proposed implementation of the IJ Performance Metrics and FAMU policies.

Furthermore, Plaintiffs may move for discovery beyond the administrative records on their APA claims based on established APA caselaw permitting such discovery, for example, upon a showing of bad faith or impropriety, or on the basis that the administrative records are so bare as to prevent effective judicial review. *Theodore Roosevelt Conservation Partnership v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010). Thus, notwithstanding any grant of a further stay on the basis that those policies remain under review, Plaintiffs reserve the right to address these

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deficiencies in the future by filing motions to complete the existing administrative records and/or for discovery outside the administrative records for those policies after any stay is lifted.[11]

DEFENDANTS' POSITION

As set out in greater detail in Defendants' motion to stay this case, new leadership at Defendant agencies is currently reviewing the policies and practices at issue in this case. As noted in that motion, it is common and appropriate to stay litigation related to agency policies and practices to give a new administration time to evaluate those policies and practices. Staying litigation will conserve the Court's resources by preventing the parties from litigating issues that may become moot should the new administration alter or eliminate the challenged policies and practices.

As noted above, the parties have conferred on two issues that may affect how this case proceeds if the agency does not make changes that render the case moot in its entirety: (1) whether any of the materials Plaintiffs have identified should be included in the administrative records, and (2) whether this case should be resolved based on those records or whether discovery beyond the records should be permitted.

With respect to the completeness of the records, Plaintiffs do not dispute that an administrative record is limited to the materials that were before the agency and that the agency considered, either directly or indirectly, at the time it made the relevant decision. Plaintiffs have

[11] Examples of materials apparently missing from the existing administrative record include, but are not limited to: documents considered when adopting the criteria and numerical benchmarks outlined in the IJ Performance Metrics policy; documents considered when renewing prioritization of "family unit" cases, adopting specific timelines, and selecting initial "pilot" courts for the FAMU policy; and documents considered when discussing policy alternatives, assessing costs and benefits, and requesting or providing feedback on either policy.

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provided a list of documents they believe should be included in the record. However, the Executive Office for Immigration Review, the defendant agency in this case, has confirmed that none of the documents Plaintiffs have identified were considered when setting the immigration judge performance metrics or issuing PM 19-04, and therefore these documents are not properly part of the record. Accordingly, what Plaintiffs seek is to supplement, rather than complete the record, an issue that should be resolved through a motion to supplement the record where the parties can fully address the standard for supplementing an administrative record. However, this and all other issues related to the agency records for the challenged practices will be moot if the agency alters or changes those practices, so it makes sense to defer resolution of this issue to allow the agency to review its policies and practices.

With respect to discovery beyond the administrative record, Defendants believe that Plaintiffs' claims, all of which challenge agency action, should be resolved based on administrative records for those actions. *See, e.g.*, *Hall v. Norton*, 266 F.3d 969, 977 (9th Cir. 2001) (noting that a "fundamental principle[ ] of judicial review of agency action" is that "judicial review" should be based on "the administrative record already in existence" and denying "discovery outside the administrative record"). Nonetheless, Plaintiffs have indicated that they intend to file a motion seeking discovery beyond the administrative records. Defendants do not oppose moving forward with that briefing while the case is otherwise stayed, on the briefing schedule the parties propose above, to allow the Court to resolve this issue with the benefit of briefing from the parties.

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REQUEST FOR STATUS CONFERENCE

To aid the Court in establishing a process for resolving the conflicts presented by the parties' positions described herein, Plaintiffs request that the Court set a status conference at its earliest convenience to confirm a briefing schedule for the motion practice identified above and clarify which local rules apply to Plaintiffs' motion regarding the scope of discovery for Plaintiffs' non-APA claims. Defendants do not oppose Plaintiffs' request for a status conference if the Court believes it would assist the Court.

Pursuant to LR 11-1(b)(2), the parties consent to the e-signing and e-filing of this document.

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DATED: April 14, 2021

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DATED: April 14, 2021

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