IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ARAB AMERICAN CIVIL RIGHTS LEAGUE, et al.,	
Plaintiffs,	Case No. 2:17-cv-10310-VAR-SDD
v.	Hon. Victoria A. Roberts
DONALD TRUMP, et al.,	Mag. J. Stephanie D. Davis
Defendants.	

JOINT RULE 26(f) DISCOVERY PLAN

Pursuant to the Court's Order of June 9, 2017 (ECF #114), counsel for the parties conducted a Rule 26(f) conference by telephone on June 22, 2017 and have prepared the following Discovery Plan pursuant to Federal Rule of Civil Procedure 26(f)(3) and this Court's standing "Notice of: (1) FRCP 16(b) Status and Scheduling Conference, and (2) Deadline to Exchange FRCP 26(a)(1) Initial Disclosures."

1. Nature and Background of the Case

Plaintiffs' Statement: Plaintiffs, on behalf of themselves and a class of all others similarly situated, allege that Executive Order 13780, 82 Fed. Reg. 13209-19, entitled "Protecting the Nation From Foreign Terrorist Entry Into the United

States" and issued on March 6, 2017 ("the Executive Order"), is unconstitutional under the First Amendment's Establishment Clause, the Fifth Amendment equal protection guarantee, and the First Amendment right to freedom of speech and association. Plaintiffs' allegations and the basis therefor, as well as Plaintiffs' responses to the arguments made in Defendants' Statement below, are set forth in more detail in the numerous filings in this case, including Plaintiffs' Second Amended Complaint, dated March 16, 2017 (ECF #41), and Opposition to Defendants' Motion to Dismiss (ECF #86).

Defendants' Statement: As set forth in Defendants' Motion to Dismiss (ECF #76), Defendants maintain that Plaintiffs' claims are not ripe, that Plaintiffs lack standing to pursue their challenges, and that their Complaint fails to state a claim upon which relief can be granted.

Consistent with the Executive's broad constitutional authority over foreign affairs, national security, and immigration, 8 U.S.C. § 1182(f) expressly authorizes the President to suspend the entry of any class of aliens when in the national interest. Section 1185(a) also authorizes the President to prescribed "reasonable rules, regulations, and orders" governing entry of aliens "subject to such limitations and exceptions as [he] may prescribe." 8 U.S.C. § 1185(a). The President lawfully exercised this authority in the Executive Order that Plaintiffs challenge here: Executive Order No. 13,780, which took effect in March 2017

("the Executive Order"). The Executive Order is neutral with respect to religion, and Plaintiffs cannot demonstrate that it infringes any of the constitutional provisions on which they rely. The Executive Order withstands constitutional scrutiny because it is based on "a facially legitimate and bona fide reason" for the suspension of entry of certain non-resident aliens. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972).

Furthermore, Defendants dispute as a threshold matter the individual and organizational Plaintiffs' Article III or prudential standing to seek to enjoin the Executive Order. For example, the individual and organizational Plaintiffs lack standing because their claims stemming from allegations that they are not able to bring family members or speakers to the United States are not reviewable and, in any event, are speculative or not ripe for decision. The individual and organizational Plaintiffs lack standing to assert an Establishment Clause claim because they have not alleged direct harm to themselves from what they claim is an establishment of religion. And with respect to all claims, the organizational Plaintiffs have failed to allege non-speculative injury that could give rise to direct or associational Article III standing.

2. Matters Contemplated by Fed. R. Civ. P. 26(f)(3)

a. Initial Disclosures: The Parties exchanged their initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1)(a) and this Court's May 11, 2017 Order (ECF

#89) on May 19, 2017. The Parties reserve the right to supplement those disclosures in light of further proceedings in this case and as required by Fed. R. Civ. P. 26(e)(1).

b. Subjects, Timing, and Potential Phasing of Discovery:

The Parties acknowledge that the Court has stated that the outcome of Supreme Court review in the Executive Order challenge in *Trump v. International Refugee Assistance Project*, No. 16-1436[1] may affect the pending motions to dismiss and compel, and the discovery sought or produced by the Parties. *See, e.g.*, ECF # 114, Pg. ID# 2309, at ¶ 6. The Parties agree that the specific timing and schedule for discovery, if appropriate, should be addressed in the "joint statement proposing the schedule for any further proceedings in this case" contemplated by the Court's June 9, 2017, Order. *Id.* at ¶ 5. The Parties nonetheless set forth their current positions as to the subjects, timing, and potential phasing of discovery below.

Plaintiffs:

Plaintiffs seek discovery regarding the underlying factual basis, intent, issuance, implementation, and effects of the Executive Order, including, but not limited to, the motivations for issuing the Executive Order, the process leading to

[1] The Supreme Court is concurrently reviewing a second challenge to the Executive Order in *Trump v. Hawaii*, No. 16-1540. *See Trump v. Int'l Refugee Assistance Proj.*, 582 U.S. ---, Nos. 16-1436 and 16-1540, 2017 WL 2722580 (U.S. June 26, 2017).

the issuance of the Executive Order, the basis for the Executive Order, the persons involved and/or consulted prior to the issuance of the Executive Order, and the process and effects of implementing the Executive Order. For reasons set forth in Plaintiffs' prior briefing in this case (including, e.g., ECF #104 and ECF #86) and that will be set forth in future briefing as appropriate, Plaintiffs are entitled to discovery into these topics and have standing to assert their claims; Defendants' interest in seeking discovery into Plaintiffs' standing appears to be another tactic to avoid responding to Plaintiffs' discovery requests.

Plaintiffs served four Document Requests and five Interrogatories on Defendants on April 6, 2017. On May 11, 2017, the Court ordered Defendants to respond to Document Request No. 1 by May 19, 2017, and the remaining discovery on June 2, 2017 (ECF #89). On May 19, 2017, Defendants responded to Document Request No. 1, declining to produce the document sought by that request. On May 26, 2017, Plaintiffs moved to compel production of that document (ECF #104). Defendants responded to that motion on June 5, 2017 (ECF #111). That motion to compel, along with Defendants' Motion to Dismiss (ECF #76), are currently pending. Defendants have not responded to the remaining Document Requests or Interrogatories. On May 31, 2017, two days prior to the deadline to respond to that discovery, Defendants moved for a stay of the case pending the Supreme Court's action in *Trump v. Int'l Refugee Assistance*

Project, 582 U.S. ---, Nos. 16-1436 and 16-1540, 2017 WL 2722580 (U.S. June 26, 2017). The Court suspended the remaining discovery deadlines on May 31 (ECF #106), and issued a stay on June 9, 2017 (ECF #114).

Plaintiffs believe that Defendants should respond forthwith to Document Request Nos. 2-4 and Interrogatory Nos. 1-5 upon the Court's decision to lift the stay in this action, and that Defendants should respond to Document Request No. 1 forthwith upon the Court's ruling on Plaintiffs' pending Motion to Compel Production of Documents in response to that request (ECF #104). The timing and schedule for any additional discovery should be addressed in the "joint statement proposing the schedule for any further proceedings in this case" contemplated by the Court's June 9, 2017 Order.

Defendants:

Defendants believe that the discovery Plaintiffs seek—and merits discovery generally—is inappropriate in this case, which involves the Executive's discretionary national security and immigration authority. In the immigration context, courts may not "look behind the exercise of [Executive] discretion" taken "on the basis of a facially legitimate and bona fide reason." *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972); *see also Fiallo v. Bell*, 430 U.S. 787, 796 (1977). As those cases recognize, discovery and trial on the merits would thrust courts into the untenable position of probing the Executive's judgments on foreign affairs and

national security. And it would invite impermissible intrusion on executive branch deliberations, which are constitutionally "privilege[d]" against such inquiry, *United States v. Nixon*, 418 U.S. 583, 708 (1974), as well as litigant-driven discovery that would disrupt the President's ongoing execution of the laws. Defendants further maintain that any merits discovery is in any event premature until the Court rules on their pending Motion to Dismiss, particularly since the Motion to Dismiss raises jurisdictional questions.

Should the Court deny Defendants' Motion to Dismiss, however, and allow discovery to proceed, Defendants reserve the right to seek discovery from the Plaintiffs, including discovery concerning the named Plaintiffs' standing. Although Defendants believe these standing issues can and will be resolved in Defendants' favor based on the pleadings, Defendants reserve the right to raise a factual challenge to standing in the future, if appropriate. Discovery into Plaintiffs' claimed injuries may include topics such as: communications between the individual Plaintiffs and family members seeking entry into the United States, visa application status for and location of those family members, documents relating to visa petitions or applications, membership information of the organizational Plaintiffs, financial information regarding the organizational Plaintiffs, and any information regarding the organizational Plaintiffs' alleged planned conferences or speakers. If merits discovery is allowed to proceed,

Defendants reserve the right to seek a phased approach that would provide for discovery into standing issues before commencing merits discovery.

c. Issues Relating to Disclosure, Discovery, or Preservation of Electronically Stored Information:

Plaintiffs:

With respect to the preservation of documents, Plaintiffs anticipate that the steps taken by Defendants thus far will be insufficient to preserve documents and information "regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case," *see* Fed. R. Civ. P. 26(b)(1). Counsel for Defendants represented during the 26(f) conference that they have issued litigation hold letters to the named agency Defendants describing their broad obligations to preserve documents relevant to the claims and defenses in this case, including pre-Inauguration materials, and the implementation and factual basis of the Executive Order. However, defense counsel also stated that they did not communicate directly about preservation with any individual agency employee (other than agency counsel), including the named Defendants, and declined to identify particular custodians who may have relevant documents. Defense counsel further stated that they have not collected any documents relevant to the litigation, but nonetheless requested Plaintiffs' permission to delete certain backup tapes and video recordings of ports of entry without any assurance that the original copies of

relevant and/or responsive documents have been preserved or collected. Under these circumstances, Plaintiffs are concerned that Defendants have not taken sufficient steps to preserve relevant information, particularly given the potential duration of a stay of this case, and cannot consent to the deletion of such files.

With respect to documents and information purportedly held in Defendants' "personal" capacity, and the Court's instruction in its June 9, 2017 Order that "Defendants must preserve information in their possession, custody, or control — in both their official and personal capacities — that may be relevant to pending litigation, including information that predates January 20, 2017," counsel for Defendants stated that, despite this Court's order and contrary to law that makes information in Defendants' possession, custody, or control subject to discovery, *see, e.g.*, *In re Bankers Trust Co.*, 61 F.3d 465 (6th Cir. 1995), they cannot and will not direct either the individual Defendants or any other federal employees to preserve documents or information that is purportedly held in their personal capacity. Instead, defense counsel has "informed" the *agency* Defendants of the Court's instruction. Counsel for Defendants therefore invited Plaintiffs to send preservation notices to any relevant federal employees. Counsel for Defendants also acknowledged that Plaintiffs may therefore need to issue subpoenas to federal employees in their purportedly personal capacity, but counsel declined to accept service of those subpoenas. Plaintiffs anticipate that they will need to issue such

subpoenas in order to ensure that relevant individuals are effectively notified of their obligations.

As instructed in Plaintiffs' First Set of Document Requests, Plaintiffs request that electronically stored information responsive to Document Request Nos. 1-4 be produced in native form, with all accompanying metadata. Defendants have objected to that request with respect to Document Request No. 1. Counsel for Defendants explained during the 26(f) conference that the principal basis for this objection is that redactions of privileged material would be more complex if native files are produced. Given that Plaintiffs believe that Defendants do not have any valid privilege objection to Document Request No. 1, there similarly appears to be no valid objection to producing native files in response to that request. Counsel for Defendants also referred to difficulties Bates-numbering native files. Again, however, Document Request No. 1 seeks only one document, and the evidentiary value of the metadata contained in the native file exceeds the burden associated with using a "placeholder" page with the document's Bates number in order to produce the native file. Counsel for Defendants indicated that they would assert the same objections with respect to other discovery served by Plaintiffs, including pending Document Request Nos. 2-4. However, Document Request Nos. 2-4 do not implicate any valid privilege concerns, and are unlikely to trigger the burden

that Defendants suggest. With respect to any other discovery that may be served in the future, Plaintiffs are willing to revisit this question.

Contrary to Defendants' representation, counsel for Plaintiffs confirmed during the 26(f) conference that they have taken necessary steps to preserve relevant documents and information and were fully prepared to address defense counsel's questions about preservation and the production of electronically stored information. Plaintiffs' counsel simply stated that because they do not yet know what documents Defendants seek, and therefore do not know the format in which those documents are kept by the Plaintiffs (some of whom are individuals and therefore do not have the same record management systems as organizations), Plaintiffs' counsel cannot know in exactly what format those documents can be produced. For example, some of the individual Plaintiffs' documents may be scanned copies of paper documents, and therefore will not be easily producible as a searchable PDF file. Moreover, the discussion of disclosure, discovery, and preservation issues extended well beyond Plaintiffs' current discovery requests.

Defendants: As an initial matter, Defendants understood that the Rule 26(f) Conference was to address "any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced" with respect to all discovery that would potentially be sought by all Parties, and was not just limited to discussion of the discovery already sought by

Plaintiffs. *See* Fed. R. Civ. P. 26(f)(3)(C). During the Parties' conference, Plaintiffs focused primarily on their current discovery requests and frequently did not engage in discussing these issues for the case generally as required by Federal Rule of Civil Procedure 26(f). For example, Plaintiffs were not prepared to discuss preservation efforts they had taken with respect to electronically stored information ("ESI"), nor the format in which Plaintiffs were prepared to produce ESI.

Preservation Efforts and Issues. As an initial matter, Defendants reiterate that merits discovery, including discovery of ESI, is not appropriate in this case. If merits discovery were allowed to proceed, however, Defendants believe that such discovery should be limited to the time period of January 20, 2017 (the date that President Donald Trump took office) forward.

Defendants and counsel have nonetheless taken and continue to take reasonable and proportionate steps to ensure the preservation of any ESI in Defendants' possession, custody, or control that relates to the claims and defenses in this case, including pre-inauguration materials. As explained to Plaintiffs, these efforts include, but are not limited to: notification by the Department of Justice counsel ("DOJ counsel") to the named Defendant agencies of the nature and scope of their ongoing preservation obligations, including distribution of litigation hold letters to the named Defendant agencies and updates to those letters as appropriate; working with the named Defendant agencies to execute their preservation

obligations; and frequent check-ins with the named Defendants to ensure that the Defendants are meeting those obligations. These check-in discussions and communications are designed to ensure, among other things, that Defendants have identified and continue to identify custodians and sources of potentially relevant ESI and other information that should be preserved; that Defendants have investigated retention schedules and practices and ensured that potentially relevant information is not subject to routine destruction or overwriting; and that custodians acknowledge their duties with respect to preservation.

Plaintiffs claim they have concerns with the efficacy of Defendants' efforts, but those stated concerns are not concrete and are based primarily on a misunderstanding of the import of DOJ counsel's statements at the conference. DOJ counsel are engaging in ongoing conversations with those responsible for preservation at the Defendant agencies, including agency counsel, to ensure that the agency has identified and is identifying custodians (of all levels, including the named individual Defendants, in their official capacities, if that individual Defendant is a custodian of potentially relevant information) who may have relevant documents or information, including the sources and types of potentially relevant information. The identification to Plaintiffs of custodians from whom potentially relevant information may be collected is premature at this time given that discovery is stayed and that the ultimate scope of discovery is unknown given

the pending appeals. Further, to the extent Plaintiffs sought privileged information regarding attorney-client communication and attorney work product relating to preservation efforts by the Defendants, that privileged information was not disclosed. *See, e.g.*, *O'Toole v. Perez*, No. 14-cv-2467, 2016 WL 4975203 (N.D. Ill. Sept. 16, 2016).

Finally, Defendants asked Plaintiffs to agree to exclude from the scope of preservation in this case those categories of information set forth in Principle 2.04(d) of the Eastern District of Michigan's Model Order relating to the Discovery of Electronically Stored Information that "generally are not discoverable in most cases," including "backup data that is substantially duplicative of data that is more accessible elsewhere." Defendants specifically noted this as applicable to backup and disaster recovery tapes. Defendants also raised with Plaintiffs the possibility of exempting ongoing operational video footage from cameras located at Ports of Entry to the United States from preservation, due to the expense and burden of maintaining terabytes of video data with unlikely relevance to this case, and as a form of ESI "whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business." *See id.; see also* Fed. R. Civ. Proc. 26(b)(1) (requiring proportionality in discovery). While Plaintiffs could not agree to these reasonable requests at this time, Defendants expect that the parties will continue to meet and confer on these issues as necessary

depending on further proceedings in this case and the continued costs of preservation.

Personal-Capacity Preservation. In its June 9, 2017, Order, this Court directed that the current named individual Defendants sued in their official capacity[2] preserve information "created, received or maintained in their personal capacities." ECF #114, at p. 6. DOJ counsel has notified relevant agency counsel and asked them to provide a copy of the Court's Order to the current named individual Defendants and inform them of this aspect of the Court's Order. However, the individual Defendants are sued in their official capacities, and are not parties to this suit in their personal capacity. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (official capacity suits are not suits against the official personally; the real party in interest is the entity). Instead, a lawsuit against an official-capacity defendant "is not a suit against the official but rather is a suit against the official's office." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). Indeed, when officials sued in their official capacity in federal court die or leave office, their successors automatically assume their roles in the litigation. *See* Fed. R. Civ. P. 25(d)(1); Fed. R. App. P. 43(c)(1); S. Ct. Rule 35.3. In general, preservation obligations do not extend to the preservation of documents held by

[2] Defendants interpret the Court's direction to pertain to those individuals who held the office sued at the time of the Court's Order. *See* Fed. R. Civ. P. 25(d) (providing for automatic substitution of official-capacity defendants).

third parties that are outside a party's possession, custody, or control. *E.g.*, *Coach, Inc. v. Dequindre Plaza, L.L.C.*, No. 11-cv-14032, 2013 WL 2152038, at *7 (E.D. Mich. May 16, 2013). "Control" is defined as the "the legal right to obtain the documents on demand." *In re Bankers Trust Co.*, 61 F.3d 465, 469 (6th Cir. 1995); *see also Frye v. CSX Transp., Inc.*, No. 14-cv-11996, 2016 WL 2758268, at * 4 (E.D. Mich. May 12, 2016).

The Department of Justice does not represent any executive branch official in his or her personal capacity absent a formal representation decision under 28 C.F.R. § 50.15. DOJ counsel does not, therefore, represent the official-capacity Defendants in their third-party, personal capacity and does not have the authority to represent those individuals with respect to any personal-capacity preservation obligations. Nor does the undersigned have the authority to require any action by those individuals, to the extent relevant information is held by named individual Defendants *purely* in their third-party, personal capacities (that is, to the extent the information is not government information and is not otherwise in the named Defendants' possession, custody, or control). To the extent that the individual named Defendants are the custodians of potentially relevant information that is in their agency or office's possession, custody, or control, Defendants are, as stated, taking and continuing to take reasonable and proportionate steps to preserve that information.

DOJ counsel has nonetheless taken appropriate steps under the circumstances to seek compliance with the personal-capacity preservation language in the Court's Order. DOJ counsel has informed the relevant agencies of this aspect of the Court's June 9, 2017, Order, with the request to provide a copy of the Order to the current named individual Defendants and inform them of the Order's instructions regarding personal-capacity preservation. Plaintiffs also remain free to send third-party preservation letters to such individuals in their personal capacity. Defendants believe that the service of subpoenas on third parties is an unnecessary disruption of the stay of proceedings in this case, unless and until Plaintiffs have legitimate concerns with the responses to such third-party preservation letters. If Plaintiffs were to obtain a modification of the stay to serve subpoenas on these third parties under Paragraph 3 of the June 9, 2017, Order (at p.7), Defendants expect that Plaintiffs would provide advance notice as required under Federal Rule of Civil Procedure 45(a)(4). As indicated above, DOJ counsel does not represent the individual named Defendants in their third-party, personal capacity and thus cannot agree at this time to accept service of subpoenas on such individuals in their personal capacity.

ESI Production Format. Plaintiffs have not indicated the forms in which they intend to produce documents.

As communicated to Plaintiffs at the conference, Defendants are prepared to produce ESI in searchable PDF format. Defendants do not intend to produce electronic documents in native format, except for Excel (spreadsheet), PowerPoint (slideshow), or other documents which are not amenable to PDF production. The reasons Defendants object to production in native format is because of the inability to Bates label such documents on a page-by-page basis, and the inability to readily redact such documents, which renders privilege review and redactions unnecessarily burdensome and costly. Nonetheless, Defendants communicated to Plaintiffs that they are amenable to production in other reasonably usable formats that would include metadata fields. Defendants have invited Plaintiffs to identify those metadata fields that they wish to have produced so that the Parties can engage in that discussion. Defendants expect that the Plaintiffs will engage in such discussions if further proceedings require. Defendants further expect that any agreed protocol with respect to production format would generally apply equally to both Parties and to all discovery produced in the case. As noted, Plaintiffs have not yet specified the format in which they wish to produce documents

Reasonable Limitations on ESI Discovery. As set forth below, if this case proceeds to merits discovery, Defendants request that Plaintiffs agree to negotiate limits on ESI searches and production similar to those contemplated by the Model Order Relating to the Discovery of Electronically Stored Information § 2.04(f).

d. Privilege Issues, Including Orders under Federal Rule of Evidence 502:

Plaintiffs: Defendants have asserted various privileges or suggested that they or third parties will do so in the future. Specifically, counsel for Defendants disclosed during the 26(f) conference that they expect to assert attorney-client privilege, attorney work product protection, deliberative process privilege, presidential communications privilege, law enforcement privilege, and/or additional protections from discovery for the President or the Executive Office of the President. Plaintiffs carefully drafted their discovery requests to avoid implicating such privileges, and anticipate that Defendants' assertion of such privileges will lack merit and will be the subject of future motions.

Should Defendants seek discovery from Plaintiffs, Plaintiffs will assert all applicable privileges.

Defendants: As noted, Defendants do not believe that merits discovery is appropriate in this case. If discovery proceeds, however, Defendants intend to assert all applicable privileges with respect to documents sought by Plaintiffs'

current or future discovery requests (including those documents sought from third parties), potentially including the attorney-client privilege, attorney work-product protection, the deliberative process privilege, the presidential communications privilege, and the law enforcement or investigatory files privilege. It is also possible that third parties may have their own privileges to assert with respect to the discovery sought by Plaintiffs.

If the case proceeds to discovery, Defendants anticipate the need for a Federal Rule of Evidence 502(d) Order (Clawback agreement).

e. Proposed Limitations on Discovery: The Parties do not, at this time, stipulate to or seek any changes to the limits on the number of interrogatories or depositions allowed by the Federal Rules of Civil Procedure, but will seek such relief if warranted by future proceedings in this case. The Parties expect that, if discovery proceeds, they will meet and confer to discuss suitable limitations on the scope of collection, search, and production of ESI.

Plaintiffs: Plaintiffs believe that Defendants are unlikely to be able to establish good cause for their requests to exceed the limitations on discovery allowed by the Federal Rules of Civil Procedure contemplated in Defendants' statements below, but that it is premature to address this request in detail.

Defendants: As set forth below, if the case is not resolved on Defendants' Motion to Dismiss, Defendants reserve the right to depose the named Plaintiffs,

including Rule 30(b)(6) representatives of the organizational Plaintiffs. As there are currently more than ten Plaintiffs, Defendants thus may in the future seek leave from Plaintiffs or the Court to depose more than ten individuals/organizations under Federal Rule of Civil Procedure 30(a)(2).

Defendants believe that, depending on further proceedings, other types of limitations on discovery may be appropriate, in accordance with their objections set forth in Sections 2(f) and 8, below (such as limitations on merits discovery, on the relevant time period for merits discovery, or on discovery sought from the President).

f. Need for Additional Orders Under Rule 26(c) or Rule 16(b) and (c):

Plaintiffs: Although Plaintiffs believe that many of the documents they seek do not implicate privacy concerns, Plaintiffs provided a draft protective order to Defendants on April 6, 2017, in order to forestall any objections to production on that basis. Plaintiffs remain prepared to negotiate an appropriate protective order, but do not believe that Defendants should be allowed to use delays or disagreement with respect to a protective order as a basis for withholding documents. Plaintiffs expect, however, that the parties will be able to come to agreement on the terms of a protective order prior to expiration of the stay. With respect to Defendants' statement that they may seek a protective order "to protect privileged documents from disclosure as well as to protect the Executive Office of

the President from inappropriate discovery under *Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*," Plaintiffs do not believe that Defendants are entitled to a protective order to relieve themselves of the obligation to assert and provide the basis of any applicable privileges.

Defendants: If the case is not resolved on Defendants' Motion to Dismiss, Defendants anticipate the need for a confidentiality protective order under Federal Rule of Procedure 26(c) to protect from dissemination or improper use information protected from disclosure under the Privacy Act, 5 U.S.C. § 552a, other statutes and regulations, or other legitimate reasons to limit disclosure. Entry of an appropriate confidentiality protective order is necessary before Defendants could produce any document or provide any discovery response containing confidential information without redaction of such information. Defendants remain willing to work with Plaintiffs to finalize the terms of a stipulated confidentiality protective order during the pendency of the stay.

Defendants also reserve the right to move for any Rule 26(c) protective order necessary to protect privileged documents from disclosure as well as to protect the Executive Office of the President from inappropriate discovery under *Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 542 U.S. 367 (2004), and related doctrines.

3. **Proposed Amendments to Pleadings**:

Plaintiffs: Plaintiffs do not anticipate further amendments to the Complaint at this time, but reserve the right to seek further amendments in light of future proceedings in this case and other cases challenging the Executive Order.

Defendants: Defendants have not yet answered the Second Amended Complaint.

4. Admissions of Facts and Stipulations to Authenticity of Certain Documents: The Parties agree that it is premature at this time to agree to admissions and stipulations, but will discuss that matter as appropriate in the future.

5. Depositions:

Plaintiffs: Plaintiffs are not pursuing depositions at this stage of the case and do not currently seek to exceed the limits on depositions imposed by the Federal Rules of Civil Procedure, but reserve the right to revisit these issues after appropriate witnesses are identified in written discovery or further proceedings occur in this case.

Defendants: Defendants have filed a Motion to Dismiss that should be dispositive of all claims in Plaintiffs' Second Amended Complaint. If this case is not resolved on Defendants' Motion to Dismiss (or any future motion to dismiss) and discovery is allowed to proceed, however, Defendants reserve the right to seek

leave to exceed the presumptive deposition limit under Federal Rule of Civil Procedure 30 as appropriate.

6. **Interrogatories:** The Parties do not currently stipulate to or intend to seek leave to exceed the limits on interrogatories imposed by Federal Rule of Civil Procedure 33, but reserve the right to revisit this issue after further proceedings.

7. Expert Testimony:

Plaintiffs: Plaintiffs do not currently expect to rely on expert testimony, but reserve the right to revisit this issue after further proceedings occur in this case and provide such disclosures within the time limit set forth in Fed. R. Civ. P. 26(a)(2)(D).

Defendants: At this time, Defendants do not anticipate relying on expert testimony. If this case is not resolved on Defendants' Motion to Dismiss (or any future motion to dismiss) and discovery is allowed to proceed, however, Defendants reserve the right to propose a schedule for the disclosure of expert testimony.

8. Current or Anticipated Discovery Disputes.

Plaintiffs: Plaintiffs anticipate that there will be several disputes related to discovery. The Parties' disputes regarding Plaintiffs' Document Request No. 1, including Defendants' objections pertaining to issues of disclosing information and asserting privilege, are set forth in the briefing on Plaintiffs' pending Motion to

Compel Production of Documents in response to that request (ECF #104). Plaintiffs anticipate further disputes regarding the objections identified by Defendants below. Plaintiffs also anticipate that there may be disputes related to Defendants' compliance with their obligations to preserve documents and produce documents that Defendants contend are held in their "personal" capacity.

Defendants: At this time, Defendants anticipate raising the following objections to merits discovery, but reserve the right to raise additional objections as necessary. As noted, Defendants do not believe merits discovery is appropriate in this case. Further, Defendants maintain that any discovery is premature prior to the Court's ruling on Defendants' Motion to Dismiss. If merits discovery were to proceed, however, Defendants object to discovery into pre-inauguration materials as irrelevant to official decision-making; to materials relating to the subjective intent of decision-makers (or non-decision-makers); to discovery that looks behind the facial reasons for the Executive Order; and to discovery into private campaign and transition materials that are more easily sought from third parties. Defendants further object to discovery from the Executive Office of the President absent a showing of heightened need under *Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 542 U.S. 367 (2004), as well as the President's general immunity from civil process related to official acts as set forth in *Nixon v. Fitzgerald*, 457 U.S. 731, 748-55 (1982) and *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866).

9. Resolution of the Matter:

Plaintiffs: For this case to be resolved, Plaintiffs would require that Defendants rescind the Executive Order and agree not to take any similar action in the future. Defendants have stated that they would not agree to such a resolution at this time.

Defendants: The nature of Plaintiffs' challenges to the Executive Order and their settlement demand makes the case unamenable to settlement or other informal resolution at this time.

10. Management Plan: Pursuant to the Court's June 9, 2017 Order (ECF #114), the Parties will "file a joint statement proposing the schedule for any further proceedings in this case within seven days after the 'final action' by the Supreme Court in *IRAP*."

11. Anticipated Motions:

Plaintiffs: Plaintiffs may seek relief from the Court to ensure the adequate preservation of documents and information relevant to this litigation, including a motion, as contemplated by the Court's June 9, 2017 order, for a "limited modification of [the] stay to allow [Plaintiffs] to issue subpoenas to third parties." Plaintiffs may also seek relief from the Court "if circumstances change prior to the 'final action' by the Supreme Court in *IRAP*," as also contemplated by the Court's June 9, 2017 order. Plaintiffs will consider what additional motions may be

appropriate after the stay in this action is lifted and/or after any relevant decisions by the Supreme Court in other cases challenging the Executive Order.

Defendants: In light of the stay of proceedings, Defendants do not anticipate filing any motions in the near future.

Dated: July 6, 2017 Respectfully submitted,

/s/ Nabih H. Ayad
Nabih H. Ayad (P59518)
AYAD LAW, P.L.L.C.
645 Griswold St., Ste. 2202
Detroit, MI 48226
(313) 983-4600
nayad@ayadlaw.com

Counsel for Plaintiffs Arab American Civil Rights League, American Arab Chamber of Commerce, Hend Alshawish, Salim Alshawish, Yousef Abdullah, Fahmi Jahaf, and Mohamed Alshega

/s/ Miriam Aukerman
Miriam Aukerman (P63165)
American Civil Liberties Union Fund of Michigan
1514 Wealthy SE, Suite 242
Grand Rapids, MI 49506
(616) 301-0930
maukerman@aclumich.org

/s/ Jason C. Raofield
Jason C. Raofield (DC Bar #463877)
Nishchay Maskay (DC Bar #998983)
Covington & Burling LLP
850 10th Street, NW
Washington, DC 20001
(202) 662-5072
jraofield@cov.com

Counsel for Plaintiffs American Civil Liberties Union of Michigan, Arab American and Chaldean Council, Arab American Studies Association, Adeeb Saleh, Sofana Bella, Hilal Alkatteeb and S.A., a minor through her Parent and Next Friend, Hilal Alkatteeb

AUGUST FLENTJE
Special Counsel

WILLIAM C. PEACHEY
Director

GISELA A. WESTWATER
Assistant Director

EREZ REUVENI
Senior Litigation Counsel

By:
/s/ Katherine J. Shinners
KATHERINE J. SHINNERS
Trial Attorney
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Phone: (202) 598-8259
katherine.j.shinners@usdoj.gov

JOSHUA S. PRESS
Trial Attorney

BRIANA YUH
Trial Attorney

Attorneys for Defendants