



U.S. Department of Justice

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By ECF

Hon. George B. Daniels
United States District Court
Southern District of New York
500 Pearl Street, Room 1310
New York, NY 10007

Re: Request for Entry of Consolidated Briefing Schedule on Plaintiffs' Motion for Preliminary Injunction and Defendants' Motion to Dismiss in *Make the Road New York v. Pompeo*, No. 19-cv-11633

Dear Judge Daniels:

I represent the defendants in the above-captioned case. On January 21, 2020, the plaintiffs filed a motion seeking a preliminary injunction against the three Federal Government actions challenged in this case. Notice of Motion, ECF No. 43. Under Local Civil Rule 6.1(b), the defendants' response is due February 4, 2020. The defendants request that the Court enter an order providing for consolidated briefing of the plaintiffs' motion for preliminary injunction and the defendants' forthcoming motion to dismiss the complaint. As part of the briefing schedule, the defendants request that the Court extend the time for the defendants to respond to the plaintiffs' motion for preliminary injunction and authorize briefs exceeding the usual page limits.

The defendants request that the Court enter a briefing schedule as follows:

- (1) Defendants will file a single brief comprising their memorandum in opposition to the plaintiffs' motion for preliminary injunction and in support of their motion to dismiss by March 2, 2020.
- (2) Plaintiffs will file a single brief comprising their reply in support of their motion for preliminary injunction and their opposition to the defendants' motion to dismiss by March 16, 2020.
- (3) Defendants will file a reply in support of their motion to dismiss by March 30, 2020.

The defendants further request that the Court set a limit of 50 pages for each of the three later briefs. As discussed further below, the principal reasons for the defendants' request are to streamline the briefing of the parties' motions, to permit adequate time for the defendants to respond to the complaint and motion for preliminary injunction, and to adjust page limits so as not to put either side at a disadvantage.

The plaintiffs challenge three Federal Government actions that each pertain to the entry of persons into the United States:

- (1) a January 2018 revision to portions of the Department of State Foreign Affairs Manual, 9 FAM § 302.8-2, pertaining to evaluation of whether a visa applicant is likely to become a "public charge" under the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(4)(A);
- (2) the President's October 2019 Proclamation concerning Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System, in Order to Protect the Availability of Healthcare Benefits for Americans, Proclamation No. 9945, 84 Fed. Reg. 53,991 (Oct. 9, 2019); and
- (3) an October 2019 interim final rule published by the Department of State amending its regulation governing the application of the "public charge" provision, 22 C.F.R. § 40.41, Visas: Ineligibility Based on Public Charge Grounds, 84 Fed. Reg. 54,996 (Oct. 11, 2019).

Complaint for Declaratory and Injunctive Relief, ECF No. 1. The plaintiffs completed service on December 31, 2019, and the defendants' response to the complaint is due March 2, 2020.

The defendants intend to file a motion to dismiss the complaint, and they believe consolidated briefing of the plaintiffs' motion for preliminary injunction and the defendants' motion to dismiss is likely to promote prompt and efficient resolution of both motions by reducing the total number and volume of briefs—the parties would be filing a total of four briefs rather than six.

The defendants' proposed schedule would extend the time for the defendants' response to the plaintiffs' motion for preliminary injunction to March 2, 2020, to align it with the deadline for the defendants' motion to dismiss and to permit the defendants additional time to respond to the plaintiffs' motion. The defendants need additional time in light of the complexity of the issues and the unusual volume of the plaintiffs' motion papers. The Court granted the plaintiffs leave to file a brief of up to 50 pages, and the plaintiffs filed a brief of 51 pages containing numerous dense footnotes and accompanied by more than 1700 pages of exhibits. The defendants have not requested any previous extensions in this action.

There is no impending emergency that would require immediate court action on any of the three challenged actions. At the moment, two of the three challenged actions are not being applied: Enforcement of Proclamation No. 9945 is currently restricted by a preliminary injunction entered in the District of Oregon in *Doe v. Trump*, No. 19-cv-1743 (D. Or.). The Government is contesting that injunction, but it is complying with it while it remains in effect. The Department of State also has not yet implemented its October 2019 rule amending 22 C.F.R.

§ 40.41, and it does not intend to do so until a new form for information collection has been approved by the Office of Management and Budget. The Department of State has not yet completed the steps needed to seek approval. The third challenged action, the January 2018 FAM revision, is currently being applied, but that revision has been in place for more than two years. The timing of the plaintiffs' request for relief suggests that they are not likely to suffer material harm from a short delay in briefing.

Finally, the defendants request that the page limits be set at 50 pages for each of the three later briefs so that neither side is placed at a disadvantage.

The defendants proposed a schedule for consolidated briefing to the plaintiffs' counsel in an email on January 16, 2020, and invited the plaintiffs to discuss the proposal. The plaintiffs did not respond before they filed their motion on January 21, 2020. The defendants contacted the plaintiffs by email again today, January 22, 2020. The plaintiffs indicated that they do not oppose consolidated briefing but believe the defendants' proposed schedule is "too protracted in light of the uncertainty about potential [implementation] of the challenged actions." The plaintiffs proposed a schedule under which the defendants' first brief would be due February 11, 2020; the plaintiffs' second brief would be due February 25, 2020; and the defendants' second brief would be due March 2, 2020. The defendants believe the plaintiffs' proposed schedule would not permit adequate time for the defendants' two briefs.

Accordingly, the defendants respectfully request that the Court enter the defendants' proposed briefing schedule as described above.

Sincerely,

/s/

James C. Luh
Senior Trial Counsel
United States Department of Justice

Cc: All counsel of record via ECF