

September 3, 2020

Hon. Ona T. Wang
United States Magistrate Judge
United States District Court
Southern District of New York
500 Pearl St., Courtroom 20D
New York, NY 10007

Re: *Make the Road New York, et al. v. Cuccinelli, et al., No. 19 Civ. 7993 (GBD)* (“MRNY”);
State of New York, et al. v. U.S. Dep’t of Homeland Security, et al., No. 19 Civ. 7777
(GBD) (“*State of New York*”)

Dear Judge Wang:

Plaintiffs in these consolidated cases submit this letter to reply to the letter submitted by defendants on August 27, 2020. MRNY ECF No. 232; *State of New York* ECF No. 206 (“Defs.’ Ltr.”). Defendants request that the Court bypass the standard pre-motion discovery conference and “instead proceed to formal briefing on the question of equal protection discovery.” Defs.’ Ltr. at 4. The Court should reject that request.

Defendants’ request will unduly delay discovery. Plaintiffs filed their complaints more than one year ago. MRNY ECF No. 1 (Aug. 27, 2019); *State of New York* ECF No. 1 (Aug. 20, 2019). The Court granted a preliminary injunction on October 11, 2019, concluding that plaintiffs were likely to prevail on their claims that the Rule¹ violates the equal protection guarantee of the Fifth Amendment. MRNY ECF No. 147 at 20–21. The Second Circuit affirmed that injunction without reaching the equal protection issue, *New York v. U.S. Dep’t of Homeland Sec.*, 969 F.3d 42 (2d Cir. 2020), although the injunction has been stayed by the Supreme Court, *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 155 (2020) (mem.). Subsequently, after full briefing and oral argument, the Court substantially denied defendants’ motion to dismiss and held that the Complaints state a claim under the Fifth Amendment as well as the Administrative Procedure Act. MRNY ECF No. 221 at 8–10, 13–15; *State of New York* ECF No. 195 at 8–10, 13–15. In that time, plaintiffs have had no opportunity to take discovery. We respectfully request that this case should move forward and discovery should commence expeditiously.

There is also no need for additional briefing on the issue of whether plaintiffs are entitled to take discovery on their equal protection claims. The parties have filed multiple letters and supplemental authorities with the Court addressing the issue of equal protection discovery. Defendants accuse plaintiffs of submitting supplement authority “based on out-of-circuit law” that are “of limited persuasive value.” Defs.’ Ltr. at 1. But these “out-of-circuit” decisions were issued by courts considering the same discovery dispute in cases concerning challenges to the same Rule.² Defendants do not dispute that *every court* to consider the issue has ruled in favor

¹ Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019).

² And defendants themselves rely largely on out of circuit precedent. See Defs.’ Ltr. at 2–3 (citing five out-of-circuit cases).

of plaintiffs seeking discovery based on allegations that the Rule violates the equal protection clause. *See MRNY ECF Nos. 207 & 231; State of New York ECF Nos. 178 & 205.* Plaintiffs' initial letter requesting a discovery conference also discussed in detail the leading cases from within the Second Circuit, which support plaintiffs' right to take discovery on constitutional claims in cases that also include claims under the Administrative Procedure Act. *See MRNY ECF No. 162 at 3–4; State of New York ECF No. 125 at 3–4.* These issues have already been fully aired; further briefing would serve only to delay adjudication.

Defendants also repeat their argument that plaintiffs are not entitled to discovery because their equal protection claims are subject to the “highly deferential” standard articulated in *Trump v. Hawai’i*, 138 S. Ct. 2393 (2018). *See* Defs.’ Ltr. at 3. Defendants’ position is inaccurate and irrelevant. It is inaccurate because, as plaintiffs have explained and other courts have found, the Supreme Court’s use of rational basis review in *Hawai’i* “was based on two considerations not at issue here: first, the limited due process rights afforded to foreign nationals seeking entry into the United States, and the particular deference accorded to the executive in making national security determinations.” *Centro Presente v. U.S. Dep’t of Homeland Sec.*, 332 F. Supp. 3d 393, 411 (D. Mass. 2018); *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1105–06 (N.D. Cal. 2018); *MRNY ECF No. 181 at 57–58; State of New York ECF No. 145 at 57–58.* It is irrelevant because, even if “highly deferential” rational basis scrutiny applied to plaintiffs’ equal protection claims, “the level of deference impacts only how the Court will eventually consider the evidence, not whether the [plaintiffs] are entitled to the discovery they seek.” *State of Washington v. U.S. Dep’t of Homeland Sec.*, No. 19-cv-5210-RMP (Apr. 17, 2020), *ECF No. 210 at 19* (rejecting identical argument and permitting plaintiffs to take equal protection discovery in parallel case challenging the Rule); *see MRNY ECF No. 162 at 2–3; State of New York ECF No. 125 at 2–3* (arguing that discovery into the animus motivating the Rule is necessary and appropriate even if plaintiffs’ constitutional claims were subject to rational basis review). Indeed, the Court in these cases has held that plaintiffs state a claim and are likely to succeed on the merits of their equal protection claims *even if* rational basis scrutiny applies. *MRNY ECF No. 147 at 20; MRNY ECF No. 221 at 13; State of New York ECF No. 195 at 13.* Plaintiffs are entitled to pursue discovery under any arguably applicable standard.

Accordingly, plaintiffs respectfully submit that there is no need for additional briefing on their right to take discovery on their equal protection claims. Plaintiffs request that the Court schedule a conference at its earliest convenience to discuss these matters. Alternatively, if the Court orders the parties to proceed to formal briefing, plaintiffs respectfully request an expedited briefing schedule. This should pose no burden to defendants who have already briefed this issue (and lost) in three other cases challenging the Rule.

Respectfully submitted,

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cc: All Counsel of Record via ECF