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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA, *et al.*,	Case No. 6:15-cv-01517-TC
Plaintiffs,	**DEFENDANTS' MOTION TO STAY DISCOVERY PENDING RESOLUTION OF OBJECTIONS**
v.	
UNITED STATES OF AMERICA, *et al.*,	**Expedited Hearing Requested**
Defendants.	

Defendants hereby move the Court for a stay of discovery pending resolution of its objections to this Court's order denying the motion for a protective order and stay of all discovery. May 25, 2018 Order, ECF No. 212. Those objections were filed today. *See* Defs.' Objections to Order Denying Mot. for a Protective Order and Stay of Discovery, ECF No. 215 ("Objections"). As set forth in the accompanying memorandum of law, a stay pending resolution

of those objections is warranted because discovery in this case is impermissible under the Administrative Procedure Act ("APA"), any discovery seeking policy positions of agency officials would violate the separation of powers, and resolution of dispositive motions pending before the Court could remove the need for discovery entirely. Because discovery deadlines are imminent, Defendants request expedited review of this motion. The parties have conferred and Plaintiffs oppose this motion and our request for expedited review. *See* LR 7-1(a).

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STAY DISCOVERY PENDING RESOLUTION OF OBJECTIONS

The Ninth Circuit has stated that it expects the claims and remedies in this case will be "vastly narrowed as litigation proceeds." *United States v. U.S. Dist. Court for Dist. of Or.*, 884 F.3d 830, 836, 838 (9th Cir. 2018). Specifically, that court contemplated that the United States would "seek protective orders," move to "dismiss the President as a party," and seek "summary judgment on the claims." *Id.* at 835-36. It added that Defendants could continue to "raise and litigate any legal objections they have," including by "seeking mandamus in the future" or "asking the district court to certify order for interlocutory appeal of later rulings." *Id.* at 837-38. The government has moved for each of the forms of relief contemplated by the Ninth Circuit, as well as a stay of discovery pending resolution of those motions. *See* Mot. for Judgment on the Pleadings, ECF No. 195; Mot. for Protective Order, ECF No. 196; Mot. for Summary Judgment, ECF No. 207. This Court denied the stay motion on May 25, but Defendants filed timely objections under Fed. R. Civ. P. 72(a), *see* Objections, and good cause exists for staying discovery pending resolution of those objections.

I. This Court should stay discovery to allow the district court to consider the objections to the denial of the motion for a protective order and stay.

This Court should stay discovery pending the District Court's resolution of Defendants' objections to the order denying the motion for a protective order and stay. A court may stay

discovery where there is "good cause" to do so. Fed. R. Civ. P. 26(c). Where "a party moves to stay discovery pending a district judge's resolution of an objection to a discovery order, the movant must show that (1) it is likely it will succeed on the merits of the appeal, (2) it will suffer irreparable injury in the absence of a stay, (3) other parties will not be substantially injured by a stay, and (4) the stay will not harm [the] public interest." *NML Capital, Ltd. v. Republic of Argentina*, No. 2:14-CV-492-RFB-VCF, 2015 WL 3489684, at *4 (D. Nev. June 3, 2015).

A. The objections are meritorious and a stay is warranted.

Defendants are likely to succeed on the merits of their objections because constitutional claims must proceed under the APA, which requires such claims to be directed to discrete and specifically identified agency actions, and requires that judicial review be based on "the administrative record already in existence, not some new record made initially in the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985) (citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973)); *see id* at 743-44 ("The task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court." *Id.* at 743-744 (citation omitted)). It is "black-letter administrative law" that APA plaintiffs are not entitled to discovery, *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) (per curiam), and this principle applies with equal force to cases where plaintiffs assert constitutional claims. *See* ECF No. 196 at 9-14; *see also, e.g.*, *Chiayu Chang v. U.S. Citizenship & Immigration Servs.*, 254 F. Supp. 3d 160, 161-62 (D.D.C. 2017) (denying motion for discovery outside the administrative record on plaintiffs' constitutional claims); *Ketcham v. U.S. Nat'l Park Serv.*, No. 16-CV-00017-SWS, 2016 WL 4268346, at *1 (D. Wyo. Mar. 29, 2016) (reviewing constitutional claims against agency action on administrative record and refusing to "distinguish between a 'stand-alone constitutional

challenge' and an 'APA challenge'" because it "would run afoul of Congress's intent" in enacting the APA); *N. Arapaho Tribe v. Ashe*, 92 F. Supp. 3d 1160, 1174 (D. Wyo. 2015) (finding that court "must limit its constitutional review of Defendants' informal adjudication to the administrative record"); *Harvard Pilgrim Health Care of New England v. Thompson*, 318 F. Supp. 2d 1, 8 (D.R.I. 2004) (affirming magistrate judge's grant of a protective order limiting review of all claims, including constitutional claims, to administrative record); *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1199, 1237 (D.N.M. 2014) (granting motion to preclude discovery outside the administrative record despite constitutional claims); *Evans v. Salazar*, No. C08-0372-JCC, 2010 WL 11565108, at *2 (W.D. Wash. July 7, 2010) (granting protective order barring discovery on constitutional claims and limiting review to administrative record).

And while this Court has correctly noted that Plaintiffs do not invoke the APA, the APA nonetheless provides the right of action for challenging action or alleged inaction by a federal agency, including on constitutional grounds, *see* 5 U.S.C. § 706, and it requires plaintiffs to direct their challenge to specifically identified and discrete agency actions. Plaintiffs cannot avoid the APA by choosing not to invoke it in their Complaint. Just as a plaintiff asserting a damages claim under the Constitution against a state actor cannot circumvent the requirements of 42 U.S.C. § 1983 by failing to invoke that statute in their complaint, *see Johnson v. City of Shelby*, 135 S. Ct. 346, 347 (2014), and a prisoner challenging the fact of their imprisonment under the Constitution cannot avoid the exhaustion requirements of the habeas statute by failing to invoke it, *see Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973), so too, are Plaintiffs bound by the statutory requirements governing constitutional claims against agency action and inaction. The APA expressly contemplates judicial review of constitutional challenges to agency action.

See 5 U.S.C. § 706(2)(B) (directing a reviewing court to hold unlawful agency action that is "contrary to constitutional right, power, privilege, or immunity"). Thus, as with regard to habeas petitions, "[i]t would wholly frustrate explicit congressional intent to hold that [Plaintiffs] in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings." *Preiser*, 411 U.S. at 490.

The issue of whether Plaintiffs must invoke the private right of action in the APA has not previously been addressed by this Court, although it was squarely presented in Defendants' motion for a protective order and stay. In addressing justiciability, the District Court has held that there are adequate legal standards by which to adjudicate the merits of Plaintiffs' constitutional claims. *See* ECF No. 83 at 13. But whether the Constitution provides a judicially enforceable right to a climate system of a particular composition is a separate question from whether Plaintiffs have identified a private right of action to enforce any such right. The former turns on whether the asserted constitutional right exists. The latter issue—and the only relevant one here—turns on whether the APA provides the exclusive right of action for constitutional challenges to an agency's action or alleged failure to act with respect to regulatory measures, and other administrative measures, and if so, whether Plaintiffs' claims comply with the judicial review standards imposed by the APA. On this latter issue, the law is clear that Plaintiffs must invoke the APA's private right of action and abide by the APA's judicial review standards.

Defendants are also likely to succeed on the merits of their objections because any discovery requiring agencies to take policy positions and make factual judgments in discovery conflicts with the APA's "comprehensive regulation of procedures" for agency decision-making. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 36 modified, 339 U.S. 908 (1950), including notice-and-comment procedures to ensure an opportunity for broad public input before an agency

reaches particular conclusions and adopts measures within its authority for making adjudicatory decisions. "Time and again," the Supreme Court has explained that the APA provides the exclusive procedural requirements for agency decision-making, and the courts are not free to alter those requirements. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015) (internal quotation marks and citation omitted); *see Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 546 (1978). To require agencies to comply with discovery seeking official positions on matters of factual assessment and questions of policy, would impermissibly conflict with the procedures prescribed by the APA and deprive the public of the ability to provide input, where the APA's rulemaking provisions or agency procedures require. *See, e.g., In re SEC ex rel. Glotzer*, 374 F.3d 184, 188-192 (2d Cir. 2004) (refusing to authorize discovery request directed at federal agency that violated APA requirements); *cf. Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011) (AEP) (noting, in rejecting climate-change-related claim, that courts "may not … issue rules under notice-and-comment procedures"). Indeed, so too would any trial and ultimate rulings by this Court outside the statutory framework for agency decision-making and judicial review.

Defendants' objections are also likely to succeed because the separation of powers bars discovery under the circumstances presented by this case. Specifically, the Constitution provides that the "executive Power shall be vested in a President of the United States." U.S. CONST. art. II, § 1, cl. 1. As part of the executive power, the "President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *United States v. Nixon*, 418 U.S. 683, 708 (1974). Plaintiffs' attempts to probe the views of federal agencies concerning questions of national environmental and energy policy and to require them to make factual and predictive

judgments outside the scope of governing procedures usurps the role of the President in supervising and seeking the opinions of Executive Branch agencies and is fundamentally contrary to the constitutional structure and the judicial power under Article III.

Finally, Defendants' objections concerning this Court's denial of their stay motion are likely to succeed because there are two dispositive motions pending before the Court. Those motions should be decided before allowing for discovery, consistent with the Ninth Circuit's instruction that Defendants "have ample opportunity to raise and litigate any legal objections they have" in the District Court. *United States v. U.S. Dist. Court for Dist. of Or.*, 884 F.3d at 837. The Defendants' motion for judgment on the pleadings is currently set for hearing on July 18, and under the Court's local rules, the Defendants' motion for summary judgment will be fully briefed and ripe for hearing on the same date. A favorable ruling on either of those motions would either terminate the litigation or substantially narrow it, thus eliminating any need for discovery or substantially affecting its scope. The arguments set forth in those motions are compelling, meritorious, and if successful, will eliminate the need for discovery and any further proceedings in this case. Where, as here, pending motions have the potential to alter the scope of the case, a stay of discovery is the appropriate course. *See Ciuffitelli v. Deloitte & Touche LLP*, No. 3:16-cv-0580-AC, 2016 WL 6963039, at *9 (D. Or. Nov. 28, 2016) ("Delaying discovery . . . will promote the efficient and 'inexpensive determination' of this case by clarifying the appropriate scope of Plaintiffs' claims and, thus, establishing the appropriate scope of discovery."); *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("It is sounder practice to determine whether there is any reasonable likelihood that plaintiffs can construct a claim before forcing the parties to undergo the expense of discovery."); *Wood v. McEwen*, 644 F.2d 797, 801-02 (9th Cir. 1981) (upholding protective order suspending discovery

where the legal sufficiency of plaintiff's complaint was challenged); *Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987) (no abuse of discretion in staying discovery pending resolution of a motion to dismiss when the motion did not raise factual issues).

Indeed, in similar circumstances, the Supreme Court recently held that the Ninth Circuit erred in another case challenging Executive Branch policy by denying the government's petition for a writ of mandamus against orders to produce certain materials before the district court had resolved the government's dispositive motion. *See In re United States*, 138 S. Ct. 443 (2017) (per curiam). In that case, the district court refused to stay all discovery until it resolved the government's motion to dismiss on justiciability grounds, among others, and ordered the expansion of the administrative record that the government had produced. *Id.* at 444. After the Ninth Circuit denied the government's mandamus petition challenging those orders, the government renewed its arguments in the Supreme Court in a petition for mandamus or, in the alternative, certiorari, and further sought a stay of all discovery and the administrative-record order pending consideration of its petition. *Id.* The Supreme Court granted the stay. *Id.* And it unanimously vacated the Ninth Circuit's denial of mandamus, remanding with instructions that the district court rule on the government's threshold arguments, which "if accepted, likely would eliminate [any] need" for expanding the record before the district court, and then "consider certifying that ruling for interlocutory appeal under 28 U.S.C. § 1292(b) if appropriate." *Id.* at 445. On remand, the district court maintained the stay of all discovery and, although it ultimately rejected the government's motion to dismiss, it *sua sponte* certified its order for interlocutory appeal, which the Ninth Circuit subsequently accepted. *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1050 (N.D. Cal. 2018).

The Supreme Court's guidance in *In re United States* is equally applicable here; the District Court should rule on the pending dispositive motions prior to allowing discovery to proceed. Accordingly, Defendants are likely to succeed on the merits of their objections.

B. Granting the requested stay will not prejudice Plaintiffs, whereas denying it will harm the public interest and significantly prejudice Defendants.

A stay of discovery pending this Court's resolution of the dispositive motions will not prejudice Plaintiffs. Only modest discovery has occurred to date, so a stay would not cause any serious disruption. *See Matera v. Google Inc.*, No. 15-cv-04062-LHK, 2016 WL 454130, at *4 (N.D. Cal. Feb. 5, 2016). At most, Plaintiffs may complain of a short-term delay. But it was Plaintiffs who waited years to bring this suit, and even more years to serve their current discovery requests. Thus, any argument of harm arising from a stay would be exceedingly strained, at best.

The balance of harms tips strongly in Defendants' favor. Absent a stay, Defendants and the public will be significantly prejudiced because Plaintiffs' discovery requests undermine the public process that the APA and the legislative process provide for citizens to petition their government to institute their preferred policies. And requiring Defendants to participate in discovery, and by necessity forcing the Executive branch to formulate national policies on behalf of these Plaintiffs and no one else, will violate the Constitution's separation of powers. Moreover, responding to the unlawful discovery Plaintiffs seek in this case will waste public resources.

II. A stay is warranted even if the district court is inclined to agree with this Court's resolution of the previous motion for a stay or protective order.

A stay pending resolution of the objections is warranted, even if the District Court is inclined to agree with the resolution of Defendants' prior motion for a protective order or stay, because the District Court should certify its order "for interlocutory appeal … pursuant to 28

U.S.C. § 1292(b)" as the Ninth Circuit expressly contemplated. *United States v. U.S. Dist. Court for Dist. of Or.*, 884 F.3d at 838.

Conclusion

For the foregoing reasons, the Court should grant this motion to stay discovery pending resolution of Defendants' objections to this Court's order denying the motion for a protective order and stay.

Dated: June 1, 2018

Respectfully submitted,

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Certificate of Service

I hereby certify that on June 1, 2018, I filed the foregoing with the Clerk of Court via the CM/ECF system, which will provide service to all attorneys of record.

/s/ Sean C. Duffy
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