U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, DC 20530

October 5, 2018

By ECF
The Honorable George J. Hazel
United States District Judge
District of Maryland
6500 Cherrywood Lane
Greenbelt, Maryland 20770

Re: Response in Opposition to Plaintiffs' Letter Motion Seeking Leave to Depose Kris Kobach and Steve Bannon in La Unión del Pueblo Entero, et al. v. Ross, et al., No. 18-cv-01570-GJH

Dear Judge Hazel,

In accordance with this Court's September 13, 2018 telephonic scheduling conference and Defendants' September 20, 2018 letter to the Court, ECF No. 73, Defendants submit this letter brief in opposition to Plaintiffs' letter motion to compel seeking authorization from this Court to depose Kansas Secretary of State Kris Kobach and former White House official Steve Bannon, ECF No. 70.

I. Plaintiffs' Conspiracy Cause of Action Should Be Dismissed.

The majority of Plaintiffs' letter motion discusses the necessity of these depositions to support their conspiracy cause of action under 42 U.S.C. § 1985(3). *See* Pls. Mot., ECF No. 70, at 1 (arguing that they should be entitled to discovery beyond what has been allowed in the New York cases because this case "is the only case among the six pending cases . . . that alleges a cause of action for conspiracy" and arguing that "[i]t is precisely those allegations, and the documents supporting them that necessitate the depositions of" Bannon and Kobach). However, for the reasons stated in Defendants' motion to dismiss, ECF No. 54-1 at 22-24, and the reply in support of that motion, ECF No. 68 at 14-17, Plaintiffs have failed to state a plausible claim for relief on their 42 U.S.C. § 1985(3) claim. That cause of action should be dismissed pursuant to Rule 12(b)(6) and Plaintiffs' letter motion should be concomitantly denied.

II. Even if This Court Allows Plaintiffs Conspiracy Claim To Proceed, Plaintiffs Have Failed to Demonstrate That These Depositions Are Necessary.

Furthermore, even if this Court denies Defendants' motion to dismiss as to Plaintiffs' conspiracy claim, Plaintiffs have still failed to demonstrate that depositions of these two individuals are necessary to that claim or that this information cannot be obtained from any other source.

Generally, in keeping with the limited scope of judicial review of such challenges, challenges to agency actions must be decided only upon the administrative record compiled by the agency. 5 U.S.C. § 706; *see also SEC v. Chenery Corp.*, 332 U.S, 194, 196 (1947) (reviewing court in an APA action should consider only the materials that were before the agency when it made its decision). Plaintiffs may not perform an "end around" on this limitation on extra-record discovery by simply adding a statutory or constitutional challenge. *See Charlton Mem'l Hosp. v. Sullivan*, 816 F. Supp. 50, 51 (D. Mass 1993); *see also Harkness v. Sec'y of Navy*, 858 F.3d 437, 451 & n.9 (6th Cir. 2017) (rejecting argument that constitutional claim warranted extra-record discovery and explaining that constitutional claim "is properly reviewed on the administrative record" absent showing of bad faith). This is particularly true where the additional claims fundamentally overlap with the APA claims. *See, e.g., Chang v. U.S. Citizenship & Immigration Servs.*, 254 F. Supp. 3d 160, 162 (D.D.C. 2017); *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 61 F. Supp. 3d 1013, 1238 (D.N.M. 2014) (holding that permitting extra-record discovery for claims that overlapped with APA challenges would "incentivize every unsuccessful party to agency action to allege . . . violations to trade in the APA's restrictive procedures for the more even-handed ones of the Federal Rules of Civil Procedure.").

Plaintiffs do not dispute that the of the extra-record discovery this Court has authorized in this case is the same amount that has been authorized in *Kravitz, et al. v. Department of Commerce, et al.*, No. 18-1041 (D. Md.) ("*Kravitz*"), which "mirrors" what the Southern District of New York has authorized in the New York litigation, unless there is a demonstration "of factual necessity different from the New York cases." Pls. Mot., ECF No. 70, at 1.

In the New York litigation, while Judge Furman granted the plaintiffs' request for some extra-record discovery, the scope of such discovery was limited consistent with the principles of the APA. See Tr. of July 3, 2018 Hearing, ECF No. 71-2, at 85 ("[P]laintiffs argue that they are independently entitled to discovery in connection with their constitutional claims. I'm inclined to disagree given that the APA itself provides for judicial of agency action that is 'contrary to' the Constitution." That court explicitly stated that it is "mindful that discovery in an APA action, when permitted, 'should not transform the litigation into one involving all the liberal discovery available under the federal rules. Rather, the Court must permit only that discovery necessary to effectuate the Court's judicial review; i.e., review the decision of the agency under Section 706.'" *Id*. (quoting *Ali v. Pompeo*, 2018 WL 2058152 at *4 (E.D.N.Y. May 2, 2018)) (emphasis added). On plaintiffs' request for leave to depose third parties, that court refused to authorize such extra-record discovery, noting that it was "not persuaded that discovery from other third parties would be necessary or appropriate; to the extent that third parties may have influenced Secretary Ross's decision, one would assume that the influence would be evidenced in Commerce Department materials and witnesses themselves." *Id*. at 86.

At the July 3, 2018 hearing in the New York litigation, Judge Furman explicitly held that he would not give plaintiffs leave to depose Mr. Bannon at that time. ECF No. 71-2 at 64. In doing so, Judge Furman indicated that allowing plaintiffs in the New York litigation to pursue discovery of the Department of Commerce and the Department of Justice should be sufficient, as "the relevance of whatever input [Mr. Bannon and Mr. Kobach] gave is what impact it had on the decision-makers at Commerce and that can be answered by discovery through Commerce alone." *Id*. Judge Furman also noted "Mr. Bannon is a former White House adviser and that implicates a

whole set of separate and rather more significant issues, namely separation of powers issues, and executive privilege issues, and so forth." *Id.*

Plaintiffs in the New York litigation later moved for leave to depose Mr. Kobach, giving that court an occasion to rule on a virtually identical motion to the one before this Court. On August 30, 2018, plaintiffs in the New York litigation filed a motion seeking leave to depose Kris Kobach. *See New York, et al. v. U.S. Dep't of Commerce, et al.*, S.D.N.Y. No. 18-2921 ECF No. 286. In that motion, plaintiffs argued that leave to conduct such extra-record discovery was warranted because Mr. Kobach "may have relevant information related to his role in influencing Secretary Ross's decision." *Id.* at 2. Plaintiffs in that case further argued that such discovery was warranted because their claim for relief under the Equal Protection Clause directly concerned Secretary Ross's reason for his decision to reinstate a citizenship question on the 2020 Census, and that "Mr. Kobach is a critical witness to whether the decision to add the question was the result of political pressure." *Id.* at 3. On September 6, 2018, the court rejected plaintiffs' argument and denied the motion for leave to depose Mr. Kobach. *New York, et al. v. U.S. Dep't of Commerce, et al.*, S.D.N.Y. No. 18-2921 ECF No. 303. The court held that deposing Mr. Kobach was neither necessary nor appropriate for plaintiffs' claims, given that Mr. Kobach was just "one of many people from outside the Department of Commerce who communicated with Secretary Ross about the citizenship question" and that "the substance of Mr. Kobach's views is already reflected in the record," citing the same emails from Mr. Kobach to Secretary Ross that Plaintiffs here cite in their letter motion. *Id.*

This court should follow the reasoning of Judge Furman and deny Plaintiffs' motion for leave to depose Mr. Kobach and Mr. Bannon. Plaintiffs' basis for seeking leave to depose Mr. Kobach and Mr. Bannon arises almost entirely from an email exchange appearing in the administrative record that Plaintiffs reference and selectively quote in their amended complaint at paragraphs 174-77. The emails were sent between July 14, 2017 and July 24, 2017. In a July 14, 2017 email to Secretary Ross, Mr. Kobach stated that he believed it was "essential" that a citizenship question be on the 2020 Census. Am. Compl. ¶ 174. On July 21, 2017, Mr. Kobach emailed Secretary Ross's chief of staff, Wendy Teramoto, to follow up on his previous email. Mr. Kobach mentioned that he and Secretary Ross had "spoken briefly on the phone" about the citizenship question "a few months earlier," and sought to schedule a call with Secretary Ross, to which Ms. Teramoto responded on July 24, 2017, setting up a call for the following day, July 25, 2017. *Id.* ¶ 175. There is no indication in the administrative record that Mr. Kobach spoke to Secretary Ross about a citizenship question after that call. Mr. Kobach later re-stated his views in a letter dated February 12, 2018. *Id.* ¶ 177.

As Judge Furman recognized, discovery in an APA action is generally disfavored, and, when allowed, should be narrowly tailored to the specific issue of allowing the court sufficient information to review the actual decision of the agency. Here, the decision of the agency occurred on March 26, 2018, when Secretary Ross issued the memorandum reinstating the citizenship question for the 2020 Census and explaining the basis for the decision. While the court in the New York litigation held that the plaintiffs in that case have made a *prima facie* allegation that the stated basis for the decision "was pretextual," Tr. at 83, and even though the plaintiffs in that case brought an equal protection challenge predicated on the notion that limited extra-record discovery authorized by the Court should be targeted towards whether Secretary Ross's decision to reinstate a citizenship question was arbitrary and capricious, Judge Furman limited extra-record discovery

to Department of Commerce and Department of Justice, and refused to authorize the exact third-party discovery Plaintiffs seek here.

Plaintiffs have not explained how deposing Mr. Kobach would reveal any material information about the basis for Secretary Ross's decision. Mr. Kobach's views on the citizenship question are not in doubt, and in fact are clearly articulated in the correspondences with Secretary Ross Plaintiffs already have and reference in their amended complaint. There is no reason to conclude that, apart from conveying his views on reinstating a citizenship question, Mr. Kobach would have any information relevant to the issue of whether the basis for the decision provided by Secretary Ross was rational. *Cf. Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 462 (D.C. Cir. 2014) (Agency decision-makers "should be judged by what they decided, not for matters they considered before making up their minds."). As is apparent from the Administrative Record, and as recognized by the court in the New York litigation, Mr. Kobach is just one of many interested parties who conveyed their views or comments to Secretary Ross, none of whom participated in the decision itself. In short, the fact that Mr. Kobach, a high-ranking elected official in the State of Kansas, participated in a brief email exchange, one or (possibly) two conversations, and later sent an official letter, falls well short of establishing that Mr. Kobach would have "necessary or appropriate" information regarding the basis for Secretary Ross's decision to reinstate a citizenship question on the 2020 Census.

Similarly, Plaintiffs have failed to give any plausible explanation of how deposing Mr. Bannon would reveal any material information about the basis for Secretary Ross's decision. Plaintiffs spend scant time in their letter motion on Mr. Bannon, and for good reason: the only interaction implied by the administrative record is that Mr. Bannon wanted Secretary Ross to speak with another individual about the Census (AR 2561). There is no indication from the record that Mr. Bannon had any substantive conversation with Secretary Ross about the possibility of reinstating a citizenship question on the decennial census.[1] While Plaintiffs make the claim that "Mr. Bannon and Mr. Kobach were the instruments, and arguably the sources of the invidious intent to conspire to deprive Plaintiffs of their constitutional rights," Pls. Mot. at 4, this is nothing more than self-serving speculation unsupported by the administrative record. This Court should not sanction such a fishing expedition targeted at a former high-ranking White House official, particularly in a case challenging an agency action subject to the discovery limitations of the APA.

Plaintiffs' attempt to explain why there is a "factual necessity" for this information particular to this case is unconvincing. Plaintiffs essentially argue that they need this information because their conspiracy claim under 42 U.S.C. § 1985(3), as well as their claim for violation of the Due Process Clause of the Fifth Amendment, "require proof of discriminatory purpose to deprive Plaintiffs of their constitutional right to equal protection." Pls. Mot., ECF No. 70, at 4. In their second letter, Plaintiffs explicitly state that this is a special element of their claim(s), which makes this case distinct from the other ongoing litigation challenging Secretary Ross' decision. Pls. Supp. Letter, ECF No. 71, at 1. However, this assertion—that this challenge to Secretary Ross's motivation in making his decision differs from the other ongoing cases—is flatly untrue. In the New York litigation, Plaintiffs also assert an equal protection claim that alleges that

[1] Furthermore, even if Mr. Bannon was involved in any high-level discussions regarding the possible reinstatement of a citizenship question on the decennial census, the content of such communications would almost certainly be protected by the presidential communications privilege and/or the deliberative process privilege.

Secretary Ross's stated reason for reinstating a citizenship question was motivated by discriminatory animus. See *New York Immigration Coalition, et al. v. U.S. Dep't of Commerce, et al.*, S.D.N.Y. No. 18-5025, Compl., ECF No. 1, at ¶¶ 193-200 (alleging violation of Equal Protection Clause based upon allegation that "Defendants acted with discriminatory intent toward Latinos, Asian-Americans, Arab-Americans, and immigrant communities of color generally in adding the citizenship question to the Decennial Census.") (emphasis added); *see also* Tr. of July 3, 2018 Hearing in *State of New York et al. v. U.S. Dep't of Commerce, et al.*, ECF No. 71-2, at 69 (plaintiffs' attorney arguing that a broader scope of extra-record review is appropriate "because we have additional elements on our intentional discrimination claim") (emphasis added). Simply put, the New York plaintiffs' need for extra-record discovery from Mr. Bannon and Mr. Kobach was precisely the same as Plaintiffs' alleged need here, and yet Judge Furman properly recognized that such extraordinary discovery outside the record and outside the agency in question was inappropriate.

Finally, Plaintiffs offer nothing more than a self-serving explanation for why the information they seek is unavailable from the discovery in which they have actively participated. Pursuant to a stipulation entered into in this litigation, Plaintiffs have been able to participate fully in the multiple depositions of Commerce and Census Bureau personnel. ECF No. 67 at 2. Plaintiffs make the sweeping statement that "[none] of the [Commerce and Census Bureau deponents] were able to provide any relevant information whatsoever concerning Mr. Kobach's conversations with Secretary Ross." Pls. Mot. at 6. This provides no detail about what they mean by a lack of "relevant information," and reveals a more salient point: there is no other information about Mr. Kobach supporting a claim of discrimination because no other contact occurred. More importantly, Plaintiffs do not even attempt to explain what efforts they have taken to obtain relevant information from Commerce. To satisfy this Court's articulated standard of a material factual difference, Plaintiffs must provide much more than a conclusory statement that there is no other available source for such information. They have not done so here. Accordingly, Plaintiffs have failed to provide any plausible explanation for why they have a need for this information different from the New York cases, and have therefore failed to show entitlement to this third-party extra-record discovery under the standard this Court articulated at its September 13, 2018 teleconference.

Conclusion

For the foregoing reasons, Defendants request that this Court deny Plaintiffs' letter motion requesting leave to depose Kansas Secretary of State Kris Kobach and former White House official Steve Bannon.

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