UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ARTHENIA JOYNER, *et al.*,

Plaintiffs,

versus

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, *et al.*,

Defendants.
_____/

Case No. 17-22568-CIV-COOKE/Goodman

FEDERAL DEFENDANTS' MOTION FOR PROTECTIVE ORDER TO STAY DISCOVERY AND INCORPORATED MEMORANDUM OF LAW

The federal defendants, Presidential Advisory Commission on Election Integrity ("Commission"), the Vice President, Kris Kobach, in his capacity as Vice Chair of the Commission, the Executive Office of the President of the United States, the Office of the Vice President of the United States, Tim Horne, in his official capacity as Administrator of the General Services Administration, and Mick Mulvaney, in his official capacity as Director, Office of Management and Budget (collectively, the "federal defendants"), by and through undersigned counsel, hereby move pursuant to Federal Rule of Civil Procedure 26(c) for a protective order staying discovery until this Court rules on both the federal defendants' and the state defendant's pending motions to dismiss. The basis for this motion is set forth in the Incorporated Memorandum of Law.

Undersigned counsel has consulted with plaintiffs' counsel, who advised that plaintiffs' oppose a stay of discovery. The state defendant, the Florida Secretary of State, does not oppose this motion.

INTRODUCTION

The federal defendants move pursuant to Rule 26(c) for a protective order to stay discovery pending the outcome of the motions to dismiss filed by both the federal and state defendants. Resolution of these pending motions to dismiss, which raise substantial challenges to the Court's subject-matter jurisdiction over all of plaintiffs' claims, as well as to the plausible validity of plaintiffs' claims, should either obviate the need for any discovery in this case or, at the very least, significantly narrow the issues that remain. Accordingly, it is not in the interest of either judicial economy or minimization of the burdens on the parties to commence burdensome discovery before this Court has resolved these pending motions. This is particularly true here, where the burden would inure to a Presidential commission housed within the Office of the Vice President. *See Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 386 (2004); *see also* Order, *NAACP Legal Def. & Educ. Fund v. Trump,* No. 17-CV-5427 (S.D.N.Y. Nov. 17, 2017) (Ex. A submitted herewith). Moreover, a stay would not prejudice the plaintiffs or affect the trial date, as the discovery period is not scheduled to close until March 9, 2018. That permits ample time for this Court to rule on the motions and for relevant discovery to proceed if any part of the case remains. This Court should therefore exercise its discretion to prevent the unnecessary expenditure of time and energy that would be required to engage in discovery and enter a protective order staying any discovery (with the exception of initial disclosures) until after the Court rules on the motions to dismiss.

BACKGROUND

Plaintiffs, the ACLU of Florida ("ACLU-FL"), Florida Immigrant Coalition, Inc. ("FLIC"), and five individuals who are registered to vote in Florida, seek to prevent the Presidential Advisory Commission on Election Integrity – an entity established by the President solely to advise the President – from collecting voter registration information that states already

make available to the public under their own laws. Plaintiffs filed this suit on July 10, 2017. *See* Compl., ECF No. 1. On July 18, 2017, the Court denied plaintiffs' motion for a temporary restraining order. *See* Paperless Minute Entry, ECF No. 30. The Commission has proceeded to collect voter registration data from the states on a voluntary basis and, as of September 29, 2017, had received data from nineteen states, including Florida, and one county. *See* Ex. B hereto. Pursuant to representations made to this Court, the Florida Secretary of State limited the data it submitted to the information available to the public under Florida law, including under Florida privacy laws. *See* Fla. Sec'y of State Mot. to Dism. at 7, ECF No. 38; Order on Pls.' Mot. for Temp. Restraining Order, ECF No. 31.

Defendant Florida Secretary of State (the "Florida Secretary" or "state defendant") moved to dismiss the complaint on August 14, 2017 (ECF No. 38), and the federal defendants filed their own motion to dismiss on October 20, 2017 (ECF No. 53). Both motions argue that the case should be dismissed because the Court lacks subject-matter jurisdiction and because plaintiffs have failed to state a claim upon which relief can be granted. As of December 1, 2017, both motions to dismiss are fully briefed and ripe for decision.

Pursuant to the Court's October 16, 2017, Order Setting Civil Trial Date and Pretrial Deadlines (ECF No. 52), fact discovery must be completed by March 9, 2018, dispositive motions are due by March 16, 2018, expert discovery must be completed by April 20, 2018, and trial is set for August 20, 2018. On November 13, 2017, plaintiffs served the defendants with extensive discovery requests. *See* Exs. C-E hereto. Specifically, they served the federal defendants with fifteen interrogatories (Ex. C) and 83 requests for production of documents (Ex. D). They also served the state defendant with 49 requests for production of documents (Ex. E).

On November 20, 2017, the federal defendants provided plaintiffs with their initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1), consistent with the deadline set forth in the parties' Corrected Joint Scheduling Report (ECF No. 48). To date, neither the state defendant nor plaintiffs have provided their initial disclosures in compliance with FRCP 26(a)(1).

ARGUMENT

THE COURT SHOULD STAY DISCOVERY PENDING THE RESOLUTION OF THE DEFENDANTS' MOTIONS TO DISMISS

The district court's "power to control its own docket," *Clinton v. Jones*, 520 U.S. 681, 706 (1997), includes "broad discretion over the management of pre-trial activities, including discovery and scheduling." *Johnson v. Bd. of Regents of Univ. of Georgia*, 263 F.3d 1234, 1269 (11th Cir. 2001); *see Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) (Rule 26 "vests the trial judge with broad discretion to . . . dictate the sequence of discovery."). "Matters pertaining to discovery are committed to the sound discretion of the district court." *Patterson v. U.S. Postal Serv.*, 901 F.2d 927, 929 (11th Cir. 1990). Thus, the Court has "broad discretion to stay discovery pending decision on a dispositive motion." *Panola Land Buyers Ass'n v. Shuman*, 762 F.2d 1550, 1560 (11th Cir. 1985).

In general, to obtain a stay of discovery, the moving party must demonstrate reasonableness and good cause. *Chico v. Dunbar Armored, Inc.*, No. 17-22701-CIV, 2017 WL 4476334, at *2 (S.D. Fla. Oct. 6, 2017). In this circuit, "[i]n evaluating whether the moving party has met its burden, a court 'must balance the harm produced by a delay in discovery against the possibility that the [dispositive] motion will be granted and entirely eliminate the need for such discovery.'" *Bocciolone v. Solowsky*, No. 08-20200-CIV, 2008 WL 2906719, at *2 (S.D. Fla. July 24, 2008) (quoting *McCabe v. Foley*, 233 F.R.D. 683, 685 (M.D. Fla. 2006)). This means that courts generally take a "preliminary peek at the merits of the motion to dismiss to see if it appears to be

clearly meritorious and truly case dispositive." *Feldman v. Flood*, 176 F.R.D. 651, 652 (M.D. Fla. 1997). "While overall stays of discovery may be rarely granted, courts have held good cause to stay discovery exists wherein 'resolution of a preliminary motion may dispose of the entire action.'" *Nankivil v. Lockheed Martin Corp.*, 216 F.R.D. 689, 692 (M.D. Fla.) (quoting *Association Fe Y Allegria v. Republic of Ecuador*, No. 98 Civ. 8650, 1999 WL 147716 (S.D.N.Y. Mar. 16, 1999)), *aff'd*, 87 F. App'x 713 (11th Cir. 2003).

A stay of discovery is appropriate in this case because defendants' pending motions are likely to dispose of the entire action and almost certainly will dispose of a large portion of plaintiffs' claims.

A. <u>The Strength of Defendants' Jurisdictional Arguments Strongly Favors a Stay</u>

First, the defendants have moved to dismiss the case in its entirety on jurisdictional grounds, raising substantial issues as to plaintiffs' requisite Article III standing to bring this lawsuit. The federal defendants have argued that the individual plaintiffs lack standing because they have asserted only "concerns regarding, and opposition to the Commission's collection of voter information," which are not cognizable, concrete injuries-in-fact. *See* Fed. Defs.' Dismiss Mem. at 9-10, ECF No. 53. As to the organizational plaintiffs, ACLU-FL and FLIC, neither has pled facts sufficient to establish that they have standing to sue on behalf of their respective members since they have not identified any members who would independently have standing to sue in their own right. *Id.* at 11. The federal defendants have also argued that neither organization has even attempted to plead facts establishing that it has standing to sue on its own behalf. *Id.* at 11-12.

For his part, the state defendant has argued that there was never any actual dispute between the Florida Secretary and plaintiffs and has further argued that, even if there was, any such dispute

is now moot as the state has agreed to provide only the data publicly available under state law and in fact has done so. Fla. Sec'y of State Mot. to Dismiss at 9-10, ECF No. 38. The state defendant also argues that plaintiffs have no independent federal cause of action against the Florida Secretary and, finally, that their claims lack redressability. *Id.* at 11-15.

These defects in plaintiffs' jurisdictional allegations identified by the federal defendants and the state defendant present substantial questions as to whether this Court even has subject-matter jurisdiction. Without jurisdiction, the Court cannot take any action, including ordering discovery. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause," other than to "announc[e] the fact and dismiss[] the cause." (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1869))); *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999) ("Simply put, once a federal court determines that it is without subject matter jurisdiction, the court is powerless to continue."). As a result, a court should "limit discovery proceedings at the outset to a determination of jurisdictional matters." *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 79-80 (1988); *see Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997) ("Resolution of a pretrial motion that turns on findings of fact – for example, a motion to dismiss for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2) – may require some limited discovery before a meaningful ruling can be made."). But, here, the discovery plaintiffs seek is not relevant to defendants' pending jurisdictional challenge – discovery *directed to defendants* will not cure *plaintiffs'* failure to allege sufficient injury, which is information entirely within plaintiffs' control. Accordingly, no discovery should be permitted until the Court has ruled on the jurisdictional issues. *See Butler v. Sukhoi Co.*, 579 F.3d 1307, 1314 (11th Cir. 2009) ("Inasmuch as the complaint was insufficient as a matter of law to establish a prima facie case that the district court

had jurisdiction, the district court abused its discretion in allowing the case to proceed and granting discovery on the jurisdictional issue.").

B. The Strength of Defendants' Arguments That Plaintiffs Have Failed to State a Claim Also Strongly Favors a Stay

Defendants' pending motions to dismiss also seek dismissal for failure to state a claim. These parts of the defendants' motions also raise substantial arguments. The federal defendants argue first that plaintiffs lack a valid claim under the Federal Advisory Committee Act ("FACA") or the Paperwork Reduction Act because the Commission is not an "agency" within the meaning of the FACA, the Paperwork Reduction Act, or the Administrative Procedure Act (which would be the source of any cause of action here). *See* Fed. Defs.' Dismiss Mem. at 12-20, ECF No. 53. A district court in the District of Columbia has already agreed with this position. *See Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, No. 17-cv-1320 (CKK), 2017 WL 3141907 (D.D.C. July 24, 2017), *appeal docketed*, No. 17-5171 (D.C. Cir. argued Nov. 21, 2017). The federal defendants have also presented substantial arguments that, even if plaintiffs can proceed under FACA, the Commission has complied with FACA's procedural requirements. Fed. Defs.' Dismiss Mem. at 21-29, ECF No. 53. Finally, plaintiffs' claims that the collection of voter information exceeds the authority granted to the Commission under the Executive Order and violates Article II and separation of power principles border on the frivolous. *See id.* at 29-35. The Executive Order is not enforceable through a private right of action, and neither it nor the Constitution preclude the Commission from studying registration and voting processes used in Federal elections in order to provide advice to the President consistent with his duties to enforce federal law and recommend legislation to Congress.[1] For his part, the state defendant argues that

[1] President Obama similarly established a Presidential Advisory Commission to study election related issues. *See* Presidential Commission on Election Administration, https://obamawhitehouse.archives.gov/the-press-office/2013/03/28/executive-order-establishment-presidential-

plaintiffs have failed to state a claim against the Florida Secretary for violation of any federal law. Fla. Sec'y of State Mot. to Dismiss at 16-27, ECF No. 38.

C. The Balance of Factors Weighs Heavily in Favor of a Stay, Particularly Given the Burdensome Nature of Plaintiffs' Propounded Discovery and the Special Considerations That Must Inform Discovery Against the Executive

In sum, all of the above significant challenges to the viability of plaintiffs' claims should be resolved before the burdensome process of discovery begins. *See Chudasama*, 123 F.3d at 1367 ("Facial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should . . . be resolved before discovery begins."). The numerous and wide-ranging grounds for dismissal raised by defendants, both for lack of jurisdiction or for failure to state a claim upon which relief can be granted, heighten the probability that the Court's decision on the pending motions will dispose of the entire case or a large portion of it. Given the substantial nature of defendants' motions, the parties and the Court should not be put to the burden of discovery until the Court rules on the pending motions. *See Butler*, 579 F.3d at 1315 (reversing district court order "requiring Russia and its instrumentalities to engage in the burdens and costs of responding to discovery" where "the jurisdictional question in this case may be resolved simply by reference to the undisputed allegations in the complaint"); *Chudasama*. 123 F.3d at 1368 (discussing burdens of discovery and finding district court abused its discretion in allowing discovery before ruling on motion to dismiss fraud claim that was "novel and of questionable validity"); *see also Patterson*, 901 F.2d at 927 (holding district court did not abuse its discretion by staying discovery where pending dispositive motions gave court enough information to ascertain further discovery not likely to produce a genuine issue of material fact); *Zinn v. SCI Funeral Servs. of Florida, Inc.*, No. 12-80788-CIV, 2013 WL 12080175, at *2 (S.D.

commission-election-administr (last visited Dec. 4, 2017).

Fla. Mar. 4, 2013) (citing cases where this Court "has granted stays of discovery until the Court has ruled on motions to dismiss for failure to state a claim upon which relief can be granted");.

As the Eleventh Circuit has explained,

> as the burdens of allowing a dubious claim to remain in the lawsuit increase, so too does the duty of the district court finally to determine the validity of the claim. Thus, when faced with a motion to dismiss a claim for relief that significantly enlarges the scope of discovery, the district court should rule on the motion before entering discovery orders, if possible. The court's duty in this regard becomes all the more imperative when the contested claim is especially dubious.

Chudasama, 123 F.3d at 1368; *see also Gibbons v. Nationstar Mortg. LLC*, No. 3:14-CV-1315, 2015 WL 12840959, at *1 (M.D. Fla. May 18, 2015) ("Overall, stays of discovery are seldom granted, but courts have held that good cause to stay discovery exists when resolution of a dispositive motion may dispose of the entire action."); *Safeco Ins. Co. of Am. v. Amerisure Ins. Co.*, No. 8:14-CV-774, 2014 WL 12621558, at *1 (M.D. Fla. Sept. 9, 2014) ("Where a preliminary motion may dispose of the entire action, a court has good cause to stay the case pending resolution of the dispositive motion.") (citations omitted). *But see Bocciolone*, 2008 WL 2906719, at *1-*2 (noting that *Chudasama* did not create a "per se requirement to stay discovery pending resolution of a dispositive motion" and distinguishing "the bizarre situation in *Chudasama*"); *Feldman*, 176 F.R.D. at 652-53 (holding that a stay of discovery was not appropriate where pending motion to dismiss was not case dispositive).

A stay of discovery would save the parties and the Court from expending unnecessary time and energy resolving the proper contours of discovery before the Court has even determined that it can proceed to the merits of plaintiffs' claims. Continuing with discovery at this stage, before the issues are better defined, will almost certainly lead to objections, particularly given the breadth of the requests already served by plaintiffs. As examples of the burdensome nature and

questionable relevance of what plaintiffs have requested, defendants note that plaintiffs have requested the following documents[2]:

- All documents referenced in the Document Index filed at Docket Entry 33-3 in the case styled Lawyers' Committee for Civil Rights Under Law v. Presidential Advisory Commission on Election Integrity, Case No. 1:17-cv-1354 (CKK) in the United States District Court for the District of Columbia – this document index contains 803 entries, some entries encompassing multiple documents (Ex. D, Request No. 1);
- Documents that appear related to another case (Ex. D, Request Nos. 2 & 4);
- All communications between certain individuals without reference to the content of the communications (Ex. D, Request Nos. 5-18);
- All documents relating to Vice-Chair Kris Kobach's schedule as it pertains to certain work he may have undertaken as the Secretary of State of Kansas (Ex. D, Request No. 26).

Plaintiffs have also sought answers to, *e.g.*, the following overbroad and burdensome interrogatories, seeking a detailed listing of:

- all evidence or information within the federal defendants' custody, possession, or control that supports President Donald Trump's statement that he won the popular vote (Ex. C, Interrogatory No. 11);
- all evidence or information within the federal defendants' custody, possession, or control that supports Vice-Chair Kris Kobach's statement on Brietbart News

[2] These examples are illustrative only and are not intended to limit the federal defendants' rights to assert any applicable objections in responding to any or all of the requests.

that the Commission did not request the last four digits of voters' Social Security numbers (Ex. C, Interrogatory No. 12).

A stay of discovery would obviate the need for the Court and the parties to adjudicate the reasonableness of these and plaintiffs' other requests and defendants' inevitable objections.

In addition, a stay of discovery is particularly warranted here because plaintiffs seek discovery from and about a presidential advisory commission created by the President, chaired by the Vice President, and staffed by individuals employed by the Office of the Vice President. The Supreme Court has cautioned that, where "discovery requests are directed to the Vice President and other senior Government officials who serve on a [committee] to give advice and make recommendations to the President, "special considerations control" regarding "the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications." *Cheney*, 542 U.S. at 385. In such circumstances, "[t]he high respect that is owed to the Office of the Chief Executive . . . is a matter that should inform . . . the timing and scope of discovery, . . . and . . . the Executive's constitutional responsibilities and status [are] factors counseling judicial deference and restraint[.]" *Id.* (internal citations and quotation marks omitted).

Many of plaintiffs' requests seek information that directly implicates Presidential and Vice Presidential communications. *See, e.g.*, Ex. C, Request No. 6 (requesting "[a]ll documents concerning or relating to communications (e.g., text messages, emails, or any other type of communication) between Kris Kobach and now-President Donald J. Trump prior to the date of the Commission's first public meeting"); *id.*, Request No. 10 (requesting "[a]ll documents concerning or relating to communications (e.g., text messages, emails, or any other type of communication) between now-President Donald J. Trump and any other member or potential member of the

Commission prior to the date of the Commission's first public meeting"). Consistent with the Supreme Court's admonishment, this Court should rule on defendants' motions to dismiss before determining whether it is appropriate to burden the Offices of the President and the Vice President with document production requests at this stage of the litigation. Adhering to this admonishment, the court in a related case brought in the Southern District of New York stayed discovery pending resolution of the federal defendants' motion to dismiss. *See* Order, *NAACP Legal Defense & Educ. Fund* (Ex. A). In *NAACP*, the court concluded that "[t]he potential burdens" of the plaintiffs' proposed document discovery directed to the Commission and Vice Chair Kobach, "although perhaps speculative, are still too weighty when considered through the lens of *Cheney*." *Id.* at 13; *see also Butler*, 579 F.3d at 1314 (considering "the principles of comity underlying" the Foreign Sovereign Immunities Act in deciding whether or not to allow jurisdictional discovery from a foreign sovereign).

Finally, a short stay of discovery will not meaningfully prejudice plaintiffs. A stay of discovery while the Court determines the exact contours of which of plaintiffs' claims, if any, will be allowed to proceed will save plaintiffs and their counsel (as well as defendants and their counsel) unnecessary expense and burden in attempting to pursue discovery on issues fated for dismissal anyway. Nor will any of the pretrial deadlines need to be adjusted. Given the March 2018 deadline for the completion of discovery, there is ample time for the Court to rule on the motion to dismiss, and, if any part of the case remains, for the parties to complete any necessary discovery in advance of the deadline.

In sum, deferring discovery until after this Court decides whether it has jurisdiction to hear plaintiffs' claims and whether any of those claims have facial plausibility would prevent unnecessary expenditure of all parties' resources and would cause minimal prejudice to plaintiffs,

if any. Considered together with the strength of defendants' motions to dismiss, along with the special factors counseling against wide-ranging discovery against the President and Vice President, the balance of harms weighs heavily here in favor of granting a stay of discovery until after the Court rules on the pending motions to dismiss.

CONCLUSION

For the foregoing reasons, the federal defendants' Motion for Protective Order to Stay Discovery should be granted.

Dated: December 4, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 4, 2017, the foregoing Motion for Protective Order to Stay Discovery and Incorporated Memorandum of Law were electronically filed with the Cour using the ECF System, which will provide electronic notice to all counsel of record.

s/Carol Federighi
CAROL FEDERIGHI