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11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA

13
14 KAJI DOUSA,

15
16 Plaintiff,

17 v.

18 U.S. DEPARTMENT OF HOMELAND
19 SECURITY (“DHS”); U.S. IMMIGRATION
20 AND CUSTOMS ENFORCEMENT
21 (“ICE”); U.S. CUSTOMS AND BORDER
22 PROTECTION (“CBP”); KEVIN K.
23 MCALEENAN, Acting Secretary of DHS;
24 MATTHEW T. ALBENCE, Acting Director
25 of ICE; MARK A. MORGAN, Acting
26 Commissioner of CBP; AND PETER
27 FLORES, Director of Field Operations for
28 CBP, San Diego,

Defendants.

Case No. 19-cv-01255(LAB)(KSC)

**JOINT MOTION FOR
DETERMINATION OF
DISCOVERY DISPUTE**

[Hon. Karen S. Crawford]

PLAINTIFF’S POSITION

1
2 WHEREAS, Plaintiff Kaji Dousa filed a Complaint for Declaratory and
3 Injunctive Relief on July 8, 2019, asserting Retaliation in Violation of the First
4 Amendment (Count 1), Violation of the First Amendment’s Free Exercise Clause
5 (Count 2), a Hybrid First Amendment Rights Claim (Count 3), and Violation of the
6 Religious Freedom Restoration Act (Count 4), against Defendants U.S. Department
7 of Homeland Security (“DHS”), U.S. Immigration and Customs Enforcement
8 (“ICE”), U.S. Customs and Border Protection (“CBP”), Kevin K. McAleenan,
9 Matthew T. Albence, Mark A. Morgan, and Peter Flores. ECF No. 1.

10 WHEREAS, Plaintiff then filed a motion for a preliminary injunction on July
11 25, 2019, with a hearing date of September 23, 2019. ECF No. 25.

12 WHEREAS, Plaintiff is seeking limited expedited discovery in support of her
13 motion for a preliminary injunction – specifically the following categories of
14 documents:¹

- 15 1. Any and all documents within the possession, custody, or control of DHS,
16 ICE, or CBP relating to the revocation of Kaji Dousa’s Secure Electronic
17 Network of Travelers Rapid Inspection (“SENTRI”) pass.
- 18 2. Any and all files, including but not limited to any “dossiers,” created,
19 kept, or maintained by DHS, ICE, or CBP at any time from January 1,
20 2018 through the present, related to Kaji Dousa.
- 21 3. Any and all documents, dated January 1, 2018 through the present,
22 maintained within a system of records as defined in 5 U.S.C. § 552a(a)(5)
23 and in possession, custody, or control of DHS, USCIS, ICE, or CBP, to
24 which Plaintiff Kaji Dousa is entitled access under the Privacy Act, 5
25 U.S.C. § 552a.

26 ¹ See Exhibit A to the Declaration of R. Stanton Jones, counsel for Plaintiff (“Jones
27 Decl.”).

1 WHEREAS, Plaintiff’s counsel spoke with Defendants’ counsel regarding
2 Plaintiff’s request for expedited discovery by phone on July 25, 2019, and the
3 parties thereafter exchanged a number of email messages.

4 WHEREAS, Defendants have agreed to produce only two heavily redacted
5 pages of documents voluntarily, and the parties have reached an impasse with
6 respect to the vast majority of documents that Plaintiff is seeking to discover in
7 advance of the hearing on her motion for a preliminary injunction.

8 WHEREAS, Plaintiff asserts that there is good cause for expedited discovery
9 and asks that the Court order Defendants to produce all responsive documents
10 (without withholding based on further objection) no later than ten days following an
11 order from this Court, or by September 9, 2019 (one week before Plaintiff’s reply in
12 support of her motion for a preliminary injunction is due), whichever is earlier.

13 WHEREAS, Defendants maintain that expedited discovery is not justified.

14 NOW, THEREFORE, the parties submit their respective positions as
15 follows:

16 **A. Introduction**

17 Plaintiff Kaji Dousa files this motion seeking limited expedited discovery in
18 support of her motion for a preliminary injunction prohibiting the Defendant
19 government agencies from continuing to target her for adverse treatment because
20 she exercises her fundamental rights of free speech, association, and religious
21 exercise in support of immigrant communities.

22 Pastor Dousa is a Christian pastor who ministers to, and advocates for,
23 immigrant communities as part of the exercise of her faith. Compl. at ¶ 4-5 (ECF
24 No. 1). She provides pastoral care to migrants, both in the United States and across
25 the Southern Border in Mexico, officiates migrants’ weddings, and leads prayerful
26 vigils in opposition to U.S. immigration policy. *Id.* 8-9, 31. Because she engages
27 in these activities—all of which are protected by the First Amendment—
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1 Defendants have targeted Pastor Dousa for adverse treatment, including revoking
2 border-crossing privileges they once provided her, and subjecting her to
3 unwarranted surveillance, detention, interrogation, and harassment. *Id.* 10-14. And
4 Defendants have done so as part of a disturbing pattern and practice of targeting
5 scores of faith leaders, journalists, and advocates for adverse treatment in order to
6 stifle opposition to U.S. immigration policy, and to punish those who offer comfort,
7 aid, or ministry to migrants. *Id.*

8 In both her Complaint and motion for a preliminary injunction, Pastor Dousa
9 alleges that Defendants’ conduct violates the First Amendment’s Free Exercise and
10 Free Speech Clauses, as well as the Religious Freedom Restoration Act, 42 U.S.C.
11 §§ 2000bb *et seq.* Pastor Dousa further alleges that Defendants’ actions already
12 have severely harmed her ministry—both in the United States and at the Southern
13 Border—and will continue to inflict further irreparable harm if not enjoined.
14 Accordingly, Pastor Dousa is seeking a preliminary injunction ordering Defendants
15 to comply with the United States Constitution and federal law, to cease their
16 adverse treatment of her, and to restore her status as a “trusted traveler” as part of
17 the Secure Electronic Network for Travelers Rapid Inspection (“SENTRI”)
18 program², and restraining Defendants from taking any future adverse action against
19 her based on her protected expression, association, or religious exercise.

20 _____
21 ² During the course of conferring on this motion, counsel for Defendants initially
22 represented that Pastor Dousa’s SENTRI pass currently is “valid and available for
23 use.” However, they also acknowledged that “it may be that the SENTRI pass was
24 revoked or suspended for a period of time.” *See* Jones Decl. ¶ 8. After Plaintiff
25 sent Defendants her portion of this joint motion, Defendants’ counsel produced the
26 two heavily redacted pages attached to the Declaration of Saro Oliveri, which
27 purport to be records related to Pastor Dousa’s Global Entry card. *Id.* ¶ 11.
28 Neither these documents, nor Mr. Oliveri’s declaration, establish that Pastor Dousa
did not also have a SENTRI pass at one point in time (as the declaration implies, it
is common to have both), nor do they explain the leaked government documents—
effectively authenticated by CBP—indicating that Pastor Dousa did in fact have a

1 In support of that motion, Pastor Dousa seeks limited expedited discovery
2 that is directly relevant to the motion and the imminent harm it seeks to prevent.
3 The discovery Pastor Dousa proposes—three targeted document requests covering a
4 short window of time—is narrowly tailored to seek only limited information in
5 Defendants’ possession, custody, and control that pertains specifically to Pastor
6 Dousa. Defendants should be able to locate and produce the documents readily and
7 with minimal effort. Thus, the burden on Defendants, if any, will be insignificant.
8 At the same time, the documents Pastor Dousa seeks, which are in Defendants’
9 exclusive control, bear directly on the relief she is seeking in her motion for a
10 preliminary injunction. In fact, the Privacy Act, 5 U.S.C. § 552a, requires
11 Defendants to produce most, if not all, of the requested information upon request.³
12 Thus, the benefits of the discovery outweigh any conceivable prejudice to
13 Defendants.

14 In short, there is good cause for the Court to grant Pastor Dousa’s request for
15 limited expedited discovery in connection with her motion for a preliminary
16 injunction.⁴
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20 SENTRI pass and that it was revoked as part of “Operation Secure Line.” *See*
21 Compl. ¶¶ 56-66, 72-73 (ECF No. 1); Jones Decl., Exhibit D.

22 ³ Pastor Dousa submitted a separate Privacy Act request to ICE and CBP on June
23 7, 2019, but has not received any responsive documents or information. *See* Jones
24 Decl. ¶ 4. Defendants’ counsel advised Pastor Dousa’s counsel that “the process
25 has been taking longer than usual,” and was unable to provide even an estimate as
to when the agencies will complete their review, let alone produce responsive
documents. *Id.* ¶ 7.

26 ⁴ Prior to submitting their portion of this motion, Defendants had not raised any
27 other or more specific objection to Pastor Dousa’s proposed document requests.
See Jones Decl. ¶ 9.
28

B. The Court Has Discretion to Allow Expedited Discovery

Although the parties generally may not commence discovery until they have conferred as required by Federal Rule of Civil Procedure 26(f), courts may permit earlier, expedited discovery upon a showing of good cause. *Citizens for Quality Education San Diego v. San Diego Unified School Dist.*, 2018 WL 1150836, *2 (S.D. Cal. March 5, 2018); *SemiTool Inc., v. Tokyo Electron America, Inc.*, 208 F.R.D 273, 275-76 (N.D. Cal. 2002). Good cause exists “where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party.” *In re Countrywide Fin. Corp. Derivative Litig.*, 542 F. Supp. 2d 1160, 1179 (C.D. Cal. 2008) (quotations omitted). Such discovery is often permitted where it would “better enable the court to judge the parties’ interests and respective chances for success on the merits at a preliminary injunction hearing.” *Citizens for Quality Education*, 2018 WL 1150836, *2 (citing *Yokohama Tire Corp. v. Dealers Tire Supply, Inc.*, 202 F.R.D. 612, 613 (D. Ariz. 2001) (quotations and citations omitted)); *see also* Fed. R. Civ. P. 26 advisory committee note (1993) (discovery before the Rule 26 conference “will be appropriate in some cases, such as those involving requests for a preliminary injunction or motions challenging personal jurisdiction”); *Ellsworth Assoc., Inc. v. U.S.*, 719 F. Supp. 841, 844 (D.D.C. 1996) (noting that expedited discovery is “particularly appropriate” when a plaintiff seeks injunctive relief and is routinely granted in cases challenging the constitutionality of government action). Courts examine the requested discovery based on the entirety of the record to date and the reasonableness of the request in light of all surrounding circumstances. *Merrill Lynch, Pierce, Fenner & Smith v. O’Connor*, 194 F.R.D. 618, 624 (N.D. Ill. 2000). Factors commonly considered in determining reasonableness include: “(1) whether a preliminary injunction is pending; (2) the breadth of the discovery requests; (3) the purpose for requesting the expedited discovery; (4) the burden on the

1 defendants to comply with the requests; and (5) how far in advance of the typical
2 discovery process the request was made.” *Am. LegalNet, Inc. v. Davis*, 673 F.
3 Supp. 2d 1063, 1067 (C.D. Cal. 2009) (quotations and citations omitted).

4 Pastor Dousa’s request for limited expedited discovery readily satisfies this
5 standard.

6 **C. Pastor Dousa Has Good Cause for Seeking Expedited Discovery**

7 There is good cause for the Court to grant Pastor Dousa’s request for limited
8 expedited discovery. A motion for preliminary injunction is pending, and the
9 discovery sought is designed to facilitate the Court’s full and fair consideration of
10 that motion. Pastor Dousa’s requests are narrow and reasonable, and the benefits of
11 requiring Defendants to produce the documents sought prior to the hearing on
12 Pastor Dousa’s motion for a preliminary injunction significantly outweigh any
13 potential prejudice or burden to Defendants.

14 1. Pastor Dousa’s Requests are Directly Relevant to the Pending Preliminary
15 Injunction Motion

16 The documents Pastor Dousa seeks are directly relevant to the Court’s
17 consideration of her pending motion for preliminary injunction and prevention of
18 irreparable harm. Pastor Dousa has proposed three document requests narrowly
19 targeted to discover Defendants’ motives in revoking her SENTRI pass,⁵ subjecting
20 her to extended secondary detention and interrogation at the border, and surveilling
21 her, including whether Defendants took those actions based on Pastor Dousa’s First
22 Amendment-protected activities. As courts in this District have observed, in the
23 First Amendment context—where evidence regarding the purpose and effect of
24 challenged conduct is essential to assessing both likelihood of success on the merits
25 and irreparable harm—“it is in the interest of the administration of justice . . . to

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27 ⁵ Defendants have not in fact refuted the allegation that they unlawfully revoked
28 Pastor Dousa’s SENTRI pass. *See supra* n.2.

1 more fully develop the factual record on Plaintiffs’ preliminary injunction motion.”
2 *See Citizens for Quality Education*, 2018 WL 1150836, at *4, *6 (granting
3 expedited discovery request) (internal citations and quotations omitted); *see also*
4 *American Beverage Assoc. v. City and County of San Francisco*, 916 F.3d 749,
5 757-58 (9th Cir. 2019) (where plaintiffs have a colorable First Amendment claim,
6 they have demonstrated that they likely will suffer irreparable harm) (citing *Doe v.*
7 *Harris*, 772 F.3d 563, 584 (9th Cir. 2014)). Thus, given that Plaintiff’s motion for
8 a preliminary injunction is already pending (with a hearing date just over a month
9 away), the possibility that Defendants *may* file a motion to dismiss Plaintiff’s
10 Complaint does not change the analysis.

11 2. Pastor Dousa’s Requests are Narrowly Tailored and Reasonable

12 Pastor Dousa proposes three narrow document requests. The first request
13 seeks documents related to revocation of her SENTRI border-crossing privileges, a
14 recent and discrete event. The second request seeks files or “dossiers” Defendants
15 maintain on Pastor Dousa. As a U.S. citizen and faith leader with no criminal
16 record or unusual international travel habits, there is little reason for Defendants to
17 have any, let alone voluminous, documents responsive to this request—and
18 Defendants have not provided any meaningful explanation to the contrary. The
19 third request seeks records to which Pastor Dousa is legally entitled pursuant to the
20 Privacy Act, 5 U.S.C. § 552a, and which, in any event, may overlap entirely with
21 the first and second requests.

22 3. Defendants Will Not Be Prejudiced or Burdened by the Limited
23 Discovery Sought

24 Finally, responding to Pastor Dousa’s proposed discovery requests will not
25 impose any significant burden on Defendants. In light of the specific and narrow
26 scope of Pastor Dousa’s requests—each is limited to records created in the last 20
27 months and each is likely to include only records maintained in files organized and
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1 searchable by Pastor Dousa’s name—Defendants should be able to gather
2 responsive documents with minimal time and effort. Further, Pastor Dousa already
3 has attempted to secure the documents at issue by other means. Over two months
4 ago, Pastor Dousa submitted a Privacy Act request, to which Defendants were
5 legally required to respond **within 20 working days**. *See* 6 C.F.R. § 5.6(c). To
6 date, Pastor Dousa has received no substantive response, and Defendants are unable
7 even to provide an estimate as to when the agencies’ review will be complete, let
8 alone when responsive documents will be produced.⁶ *See* Jones Decl. ¶¶ 4, 7.
9 Expedited discovery is the only way to ensure that Defendants timely produce these
10 documents such that the Court can consider them in adjudicating Pastor Dousa’s
11 preliminary injunction motion. Moreover, expedited discovery need not delay the
12 hearing on Pastor Dousa’s motion for a preliminary injunction, provided
13 Defendants respond in a timely manner. Expedited discovery therefore will not
14 prejudice or burden Defendants in any way.

15 **D. Defendants Have No Immediate Need to Depose Pastor Dousa**

16 Defendants’ suggestion that they should be permitted to take the deposition
17 of Pastor Dousa if she is granted expedited discovery (raised for the first time in
18 their portion of this briefing) misses the point. Defendants have exclusive control
19 of the documents and information that Pastor Dousa is seeking by this motion, and
20 the expedited discovery of those documents will aid the Court in deciding whether a
21 preliminary injunction is merited. Defendants’ desire to depose Pastor Dousa about
22 supposed “inconsistencies” in her declaration does not serve the same purpose—or
23 really any immediate purpose.

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26 _____
27 ⁶ Defendants’ suggestion that the Court should be “wary” of allowing discovery in
28 this case to interfere with the FOIA process is entirely without merit.

1 In any event, Defendants should not be permitted to depose Pastor Dousa
2 more than once. If the Court were to order her deposition on an expedited basis, it
3 should also make clear that Defendants will not be permitted another bite at the
4 apple later in the litigation.

5 **E. Conclusion**

6 For the foregoing reasons, Pastor Dousa respectfully requests that the Court
7 order Defendants to respond to her proposed document requests and produce
8 responsive documents (without withholding based on further objection)⁷, no later
9 than ten days following an order from this Court, or by September 9, 2019,
10 whichever is earlier.

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⁷ Pastor Dousa requests that the Court order Defendants to respond without further
27 objection in order to ensure there is no delay in resolving her motion for a
28 preliminary injunction.

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Dated: August 21, 2019

Respectfully submitted,

By: /s/ Oscar Ramallo

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1 **DEFENDANTS’ POSITION**

2 **I.**

3 **Introduction**

4 “The government is permitted to engage in legitimate law enforcement
5 activities such as surveillance and secondary screening at the border.” Plaintiff’s
6 Mot. for Prelim. Inj., ECF No. 25-1 at 24:20-22. That is exactly what occurred here.

7 On January 2, 2019 – one day after Customs and Border Protection (“CBP”)
8 was forced to use tear gas to deter a large group of migrants attempting to cross the
9 Mexican border illegally – Plaintiff was subjected to secondary screening at the San
10 Ysidro port of entry when she returned to the United States. Plaintiff was released
11 in less than 45 minutes and her Global Entry pass was not revoked or suspended at
12 that (or any) time. In fact, approximately three months later, Plaintiff crossed into
13 Mexico and used the same Global Entry pass at the same port of entry upon her
14 return. Plaintiff’s Global Entry pass remains valid and is not scheduled to expire
15 until 2022.⁸

16
17 ⁸ Plaintiff appears to confuse Global Entry with SENTRI, which are both
18 components of CBP’s Trusted Traveler Program. Both Global Entry and SENTRI
19 allow members of those programs expedited entry into the United States from
20 Mexico and Canada via land ports. Global Entry also links to a member’s passport
21 and allows expedited entry when flying into the United States. With respect to a
22 person returning to the United States from Mexico on foot or in an automobile,
23 Global Entry and SENTRI provide the same expedited clearance benefits. Plaintiff’s
24 Global Entry pass has never been suspended or revoked. *See* Declaration of Saro
25 Oliveri (“Oliveri Decl.”), ¶¶ 3-4. Mr. Oliveri’s search also turned up no evidence
26 that Plaintiff ever had a SENTRI pass, and Plaintiff has produced no SENTRI
27 application or SENTRI card to refute this fact. The only document Plaintiff has
28 produced as evidence of her alleged enrollment in the SENTRI program is one that
contains an image of her photograph with a statement indicating her SENTRI status
has been revoked. But, as Plaintiff concedes, that document was published by a local
news station which claims the image was leaked by an undisclosed internal CBP
source. Because the source of the document is unknown at this time, and discovery
into its origin has not yet begun, the government does not concede that the document
is authentic. Nor does Plaintiff produce any evidence that anyone at CBP has
confirmed its authenticity.

1 Given these facts, Plaintiff does not come close to meeting the standard for a
2 preliminary injunction, let alone expedited discovery. Specifically, no good cause
3 exists for expedited discovery because: (1) there is no immediate threat or
4 emergency that justifies a deviation from the normal discovery rules; (2) Plaintiff's
5 complaint is likely subject to a motion to dismiss; (3) Plaintiff's request that the
6 Court order the government to produce documents "without further objection" and
7 within 10 days creates a significant burden; (4) some of the information called for in
8 Plaintiff's requests implicates governmental and law enforcement privileges; and (5)
9 the government has already voluntarily produced information demonstrating that
10 Plaintiff's Global Entry pass has never been revoked.

11 In short, Plaintiff has not suffered any harm, let alone an unconstitutional
12 deprivation of rights. Plaintiff remains free to travel to Mexico, practice her religion,
13 and voice her opposition to U.S. immigration policy. This lawsuit should therefore
14 be subject to the normal discovery rules. In the unlikely event the Court permits
15 expedited discovery, however, the government should be allowed to depose Plaintiff
16 regarding the contents of the declaration she filed in support of her motion for a
17 preliminary injunction.

18 **A. There Is No Immediate Threat Or Emergency Justifying Expedited**
19 **Discovery**

20 Among the factors the Court must consider in determining whether good
21 cause for expedited discovery exists is whether the requesting party will suffer harm
22 absent a deviation from the normal discovery rules. *See Megaupload, Ltd. v.*
23 *Universal Music Grp., Inc.*, No. 11-CV-6216 CW (JSC), 2012 WL 243687, at *3
24 (N.D. Cal. Jan. 25, 2012) (noting courts generally permit early discovery when
25 "there is ongoing harm or the evidence sought is in danger of destruction or loss").
26 Here, no imminent threat exists.

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1 The core allegation at the heart of Plaintiff’s suit – that she was “singled out”
2 for secondary screening on January 2, 2019 – occurred more than eight months ago.
3 Approximately three months following that event, Plaintiff crossed into Mexico and
4 returned through the same port of entry using the same Global Entry pass without
5 incident. Oliveri Decl., ¶¶ 5-6. Plaintiff then waited almost four additional months
6 before filing this suit. Plaintiff has never been prevented from crossing the border,
7 nor does she allege any intent to travel to Mexico in the near future. And even if she
8 did, there is no evidence her ability to travel would be impacted. In other words, no
9 emergency exists to justify a deviation from the normal discovery rules. *See Al Otro*
10 *Lado, Inc. v. Nielsen*, No. 17-CV-2366-BAS (KSC), 2019 WL 1057387, at *3 (S.D.
11 Cal. Mar. 6, 2019) (denying motion for expedited discovery on similar facts because
12 immigrant rights group failed to articulate “any imminent irreparable harm that
13 could be prevented by the Court allowing expedited discovery, as opposed to
14 discovery conducted under the typical timing requirements of the Federal Rules of
15 Civil Procedure”); *see also Fuhu, Inc. v. Toys “R” Us, Inc.*, No. 12-CV-2308-WQH
16 (WVG), 2012 WL 12870313, at *3 (S.D. Cal. Oct. 4, 2012) (noting that “if Plaintiffs
17 were acting under exigent circumstances as they claim,” Plaintiff’s motion for
18 expedited discovery should “have been filed earlier, rather than two weeks after
19 discovering the alleged wrongdoing that created the emergency”).⁹

20
21 ⁹ Plaintiff contends she is afraid to cross the U.S.-Mexico border due to the alleged
22 conduct of CBP. But this assertion is not credible. In fact, Plaintiff recently boasted
23 on her Twitter feed @KajiDousa that “Because I have a voice and won’t be
24 intimidated – even by the most powerful government in the world – I am suing #DHS
25 #ICE #CBP.” *See* Declaration of Ernest Cordero, Jr. (“Cordero Decl.”), Exhibit 1,
26 p. 1. Plaintiff also does not shy away from controversy or engagement. Rather, as
27 evident from her Twitter postings, she is an experienced activist who regularly
28 networks with organizations seeking to bring about political and social change in
various areas, especially with respect to U.S. immigration policy. *Id.* The Court may
take judicial notice of the Twitter feed pursuant to Federal Rule of Evidence 201(b).
Dzinesquare, Inc. v. Armano Luxury Allowys, Inc., No. 14-CV-01918-JVS (JCGTx),
2014 WL 12597154, at *3 (C.D. Cal. Dec. 22, 2014).

1 The fact that Plaintiff has filed a motion for a preliminary injunction does not
2 change this result. *Am. LegalNet, Inc. v. Davis*, 673 F. Supp. 2d 1063, 1066 (C.D.
3 Cal. 2009) (“[E]xpedited discovery is not automatically granted merely because a
4 party seeks a preliminary injunction.”). In fact, a review of Plaintiff’s pending
5 motion reveals no missing piece of evidence that Plaintiff believes is necessary to
6 prove her entitlement to injunctive relief. *See* ECF No. 25-1. For this additional
7 reason, expedited discovery should be denied. *See Palermo v. Underground*
8 *Solutions, Inc.*, No. 12-CV-1223-WQH (BLM), 2012 WL 2106228, at *2 (S.D. Cal.
9 June 11, 2012) (denying motion for expedited discovery in part because “the Court
10 has reviewed [plaintiff’s] motion for preliminary injunction and . . . it does not
11 identify any missing facts or need for discovery”); *Fuhu*, 2012 WL 12870313, at *3
12 (“With Plaintiffs’ concessions that they have all of the information that they need
13 for the upcoming TRO hearing, the Court is at a loss to understand why expedited
14 discovery is necessary.”).

15 **B. Plaintiff’s Complaint Is Likely Subject To A Motion To Dismiss**

16 Expedited discovery is also unwarranted because Plaintiff’s complaint is
17 likely subject to a motion to dismiss. Although no response to the complaint is due
18 for some time, a preliminary review of Plaintiff’s allegations indicates that Plaintiff
19 suffered no actual harm, let alone an unconstitutional deprivation of rights.¹⁰
20 Moreover, even if Plaintiff could articulate some cognizable injury, Plaintiff’s
21 requested relief is so vague that it is legally infirm. *See Van Dyke v. Regents of*
22 *University of California*, 815 F. Supp. 1341, 1345-46 (C.D. Cal. 1993) (granting
23 motion to dismiss complaint seeking injunction preventing defendants from
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25 ¹⁰ Notably, the government’s right to conduct searches at an international border is
26 broad and requires no probable cause. *See United States v. Cotterman*, 709 F.3d
27 952, 960 (9th Cir. 2013) (noting that “border searches are generally deemed
28 ‘reasonable simply by virtue of the fact that they occur at the border’”) (citing *United States v. Ramsey*, 431 U.S. 606, 616 (1977)).

1 interfering with plaintiffs’ religion as vague, overbroad and impossible to enforce).
2 Given that Plaintiff’s complaint is likely subject to legal challenge, early discovery
3 is particularly unjustified. *See Lycurgan, Inc. v. Griffith*, No. 14-CV-548-JLS
4 (BGS), 2017 WL 2709740, at *5 (S.D. Cal. June 22, 2017) (finding no good cause
5 for expedited discovery in part because “the Court should first be given an
6 opportunity to decide defendants’ pending Motions to Dismiss, which appear to raise
7 potentially valid legal challenges”); *Profil Institut Fur Stoffwechselforschung GmbH*
8 *v. Profil Institute For Clinical Research*, No. 16-CV-2762-LAB (BLM), 2016 WL
9 7325466, at *4 (S.D. Cal. Dec. 16, 2016) (“The Court’s resolution of the pending
10 motion to dismiss will significantly impact the scope and permissibility of any
11 discovery.”). At the very least, discovery should not commence until the
12 government answers Plaintiff’s complaint, which will give the Court an opportunity
13 to evaluate Plaintiff’s requests in the context of what is ultimately at issue. *See Pofil*
14 *Institut*, 2016 WL 7325466 at *4 (denying expedited discovery in part because
15 “Defendant’s answer, when and if filed, will further define the proper scope of
16 discovery”).

17 **C. Plaintiff’s Requests Present A Significant Burden**

18 Contrary to Plaintiff’s suggestion, Plaintiff’s discovery requests will also
19 create a significant burden at this early stage. Essentially, Plaintiff’s requests require
20 the Department of Homeland Security (“DHS”) to produce all documents in its
21 “possession, custody, or control” that might refer or relate to Plaintiff. Given the
22 size and number of different components contained within DHS, complying with
23 this request is not a simple matter that can be carried out “readily and with minimal
24 effort.” Moreover, the conditions under which Plaintiff seeks to force DHS to
25 respond are extreme. Specifically, Plaintiff asks the Court to enter an order requiring
26 the government to comply “without further objection” and within 10 days. There is
27 no justification for an order forcing the government to waive all of its objections,
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1 and compelling DHS to respond within 10 days creates a colossal burden. *See*
2 *Palermo*, 2012 WL 2106228 at *3 (finding requests unduly burdensome because
3 they appear “to be a vehicle to conduct the entirety of [plaintiff’s] discovery prior to
4 the Rule 26(f) conference”). Again, Plaintiff fails to demonstrate how she will be
5 irreparably harmed if forced to make these document requests under the normal
6 rules. *See Am. LegalNet*, 673 F. Supp. 2d at 1071 (finding no evidence the plaintiff
7 “will be irreparably harmed by delaying the broad-based discovery it now requests
8 until after the initial conference between the parties under Rule 26(f)”).

9 **D. Plaintiff’s Requests Implicate Governmental And Law Enforcement**
10 **Privileges**

11 Plaintiff’s requests raise additional and significant burdens in the context of
12 this case. Specifically, Plaintiff’s requests implicate a number of privileges
13 applicable to CBP’s law enforcement mission. *See Paco v. United States Customs*
14 *and Border Protection*, Civ. No. 14-5017 (MLC), 2016 WL 344522, at *5-6 (D. N.J.
15 Jan. 27, 2016) (finding CBP properly withheld information related to the revocation
16 of plaintiff’s Global Entry membership on a number of grounds, including FOIA
17 exemptions applicable to privacy interests and law enforcement records). This is
18 precisely why Plaintiff has yet to receive documents in response to her FOIA
19 request.¹¹ As a result, if discovery is permitted at this early stage, the government
20 will be forced to assert a number of privileges, creating an additional burden and
21 most likely leading to additional motion practice. *See Al Otro Lado*, 2019 WL
22 1057387 at *3 (denying expedited discovery in part because the proposed discovery
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24 ¹¹ The Court should be particularly wary of permitting expedited discovery to the
25 extent it might conflict with, undermine or circumvent the FOIA process that is
26 currently underway. *See Hines v. United States*, 736 F. Supp. 2d 51, 53 (D. D.C.
27 2010) (noting that exhaustion of FOIA administrative remedies is generally required
28 before seeking judicial review to prevent premature interference with agency
processes, provide the agency an opportunity to correct errors, and enable an
adequate record for review).

1 requests “may implicate qualified privileges that are available to governmental and
2 law enforcement agencies” and therefore “place an additional burden on defendants
3 in responding”).

4 **E. The Government Has Already Voluntarily Produced Information That**
5 **Negates Plaintiff’s Core Allegation**

6 Setting the lack of good cause aside, Plaintiff’s request for expedited
7 discovery should be denied because the government has already voluntarily
8 produced information negating the central allegation in Plaintiff’s complaint.
9 Specifically, the government voluntarily produced a record of all of Plaintiff’s
10 crossings from Mexico into the United States within last 18 months, including
11 evidence that Plaintiff’s Global Entry pass is valid and not scheduled to expire until
12 2022. Oliveri Decl. at ¶ 4. This information refutes Plaintiff’s allegation that her
13 expedited access has been revoked and provides yet another reason to follow the
14 normal discovery rules. *See Am. LegalNet*, 673 F. Supp. 2d at 1070 (finding no good
15 cause for expedited discovery in part because evidence proffered by the defense lies
16 “in stark contrast to the inference [plaintiff] asks the Court to draw”).

17 **F. If The Court Permits Plaintiff to Conduct Expedited Discovery, the**
18 **Government will Request an Order Permitting it to Depose Plaintiff**

19 Finally, in the event the Court permits Plaintiff to conduct expedited
20 discovery, the government will seek an order allowing it to depose Plaintiff on the
21 topics contained in her declaration filed in support of her motion for a preliminary
22 injunction. A review of that declaration reveals a number of inconsistencies with
23 the allegations contained in Plaintiff’s complaint. For example, Plaintiff’s complaint
24 states unequivocally that Plaintiff “no longer has access to the expedited screening
25 she enjoyed as a SENTRI holder,” yet Plaintiff’s declaration makes no mention of
26 ever possessing a SENTRI card and seems to admit that her Global Entry card has
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1 never been revoked. *Compare* Compl., ECF No. 1 at ¶ 82 with Plaintiff’s Decl.,
2 ECF No. 25-1 at ¶ 27. Plaintiff’s alleged possession and use of a SENTRI card
3 purportedly suspended or revoked by CBP is a key assertion underlying her request
4 for expedited discovery and a preliminary injunction. For this reason, counsel for the
5 government sent Plaintiff’s attorneys an email on August 19, 2019 requesting
6 Plaintiff’s production of a copy of her alleged SENTRI card. As set forth in the
7 email:

8 If Pastor Dousa was issued a SENTRI card as she contends, the best evidence
9 of this would be the card itself. The documents submitted as part of the joint
10 motion do not state whether she still has the card or, if not, what happened to
11 it. Since the alleged SENTRI card is key to the ongoing dispute, I believe the
12 Court would be interested in knowing the physical card’s status and the last
13 time Pastor Dousa used the card to enter the U.S. Our information is that even
14 if she did have a SENTRI card, she has not used it for at least the past 18
15 months. Hopefully, the Court is not being requested to resolve a dispute that
involves, in part, an alleged SENTRI membership that is of no consequence
because Pastor Dousa uses only her Global Entry card/membership when she
enters the U.S.

16 *See* Cordero Decl., ¶ 4 and Exhibit 2. The following day, Plaintiff’s attorneys
17 responded that they did not agree with the government’s position and did not
18 produce a copy of the card. It therefore appears that the only way to obtain
19 information from Plaintiff on the status of her SENTRI card is to take her deposition.

20 Similarly, Plaintiff’s declaration claims that she “fear[s] travelling across the
21 border to Mexico,” yet says nothing about her trip to Mexico in April 2019 or her
22 use of her Global Entry pass upon her return. *See* Plaintiff’s Decl., ECF No. 25-1 at
23 ¶ 42. The ability to cross examine Plaintiff regarding her alleged fear serves an
24 immediate purpose because that alleged fear forms the basis of her claim that she is
25 entitled to a preliminary injunction. Plaintiff’s declaration is also replete with vague
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1 claims of harm and alleged “targeting” of individuals that seem to have little or no
2 connection to this case. *Id.* at ¶¶ 46-52.

3 If the Court denies Plaintiff’s request for expedited discovery, the government
4 will not need to take Plaintiff’s deposition in advance of the due date for its
5 opposition brief (currently September 9, 2019). But, if Plaintiff is granted expedited
6 discovery, the government will request, and should be permitted, to depose Plaintiff
7 in order to cross examine her on the assertions made in her declaration. *See United*
8 *States v. Zerjav*, No. 08-CV-00207 ERW, 2008 WL 2486032, at *2 (E.D. Mo. June
9 18, 2008) (recognizing defendants’ need to conduct early discovery and permitting
10 defendants to “depose nine of the eighteen affiants identified in Plaintiff’s motion
11 for a preliminary injunction”). Because this deposition will be limited to the issues
12 raised in Plaintiff’s declaration, the Court should also permit the government to
13 depose Plaintiff more broadly in course of normal discovery, should Plaintiff’s
14 complaint survive the pleading stage.

15 II.

16 Conclusion

17 Plaintiff seeks expedited discovery in this case. But the evidence submitted in
18 support of her request, and in opposition, does not support any violation of
19 constitutional rights. That charge is supported solely by Plaintiff’s speculative
20 allegations – not evidence. In fact, this entire lawsuit appears based on a media
21 report regarding an alleged SENTRI pass that Plaintiff never says she had and likely
22 never existed. Moreover, even if Plaintiff did possess a SENTRI pass at some point
23 long ago, Plaintiff does not meet her burden to show good cause for expedited
24 discovery, in part, because she is able to enter the United States with her Global
25 Entry card. Contrary to Plaintiff’s belief, her expedited entry right has not been
26 suspended or revoked.

1 In sum, there is no reason why discovery cannot proceed in the normal course
2 in this action. That said, in the event the Court permits expedited discovery, the
3 government will request, and should be allowed, to take Plaintiff’s deposition on the
4 topics raised by her declaration prior to its September 9, 2019 deadline to respond
5 to the motion for preliminary injunction. This deposition should not preclude the
6 government from further deposing Plaintiff once it obtains additional information
7 and documents through regular discovery.

8
9 DATED: August 21, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2019, I electronically filed the foregoing with the Court by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Respectfully,

ARNOLD & PORTER KAYE SCHOLER LLP

/s/ Oscar Ramallo

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