UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Cook County, Illinois, et al.,

Plaintiffs,

v.

Chad F. Wolf, in his official capacity as Acting Secretary of U.S. Department of Homeland Security, et. al.,

Defendants.

Case No. 19-cv-6334

Judge Gary Feinerman

Memorandum in Opposition to ICIRR's Request for Supplemental Discovery and in Support of Motion for Stay of Proceedings

Discovery is generally limited to the administrative record in lawsuits challenging agency actions. Plaintiff Illinois Coalition for Immigrant and Refugee Rights, Inc. ("ICIRR") now takes the "unusual step" of asking "the court to authorize discovery outside the administrative record" for its equal protection claim. *Dep't of Commerce v. New York*, 139 S.Ct. 2551 (2019). ICIRR cannot make the requisite showing necessary to warrant additional discovery. The Court should thus deny ICIRR's request for supplemental discovery.

Additionally, Defendants now move the Court to stay proceedings in this case until the Seventh Circuit has resolved Defendants' appeal of the Court's preliminary injunction order. A decision on Defendants' appeal may limit, or obviate, any need for Plaintiffs' requested supplemental discovery, and will impact any subsequent briefing in this case. Because Plaintiffs will suffer no harm from the Rule's operation while the preliminary injunctions imposed by this Court, and three others, are in effect, the Court ought to issue the requested stay.

I. Background.

Plaintiffs ICIRR and Cook County, Illinois brought suit challenging the Department of Homeland Security ("DHS") final rule *Inadmissibility on Public Charge Grounds* ("Rule"). *See* 84 Fed. Reg. 41292. In their Complaint, Plaintiffs jointly assert a number of Administrative Procedure Act ("APA") claims, primarily arguing that the Rule is arbitrary and capricious, and contravenes the Immigration and Nationality Act ("INA"). ICIRR independently asserts an equal protection claim under the Fifth Amendment. On September 25, 2019, Plaintiffs moved for a temporary restraining order and/or preliminary injunction based on their joint claims. *See* ECF No. 23-1. The Court granted Plaintiffs' motion on October 14, 2019, issuing a preliminary injunction against implementation of the Rule in the State of Illinois. *See* ECF No. 87. Defendants have appealed the Court's preliminary injunction order, *see* ECF No. 96, and are currently scheduled to file their opening appellate brief on December 10, 2019. Defendants filed a motion to stay the preliminary injunction pending the appeal, *see* ECF No. 90, which the Court denied on November 14, 2019, *see* ECF No. 105. Defendants have sought a stay of the preliminary injunction before the Seventh Circuit.

Meanwhile, although Plaintiffs seek only the administrative record for their joint claims, ICIRR seeks additional discovery for its equal protection claim, including "internal agency communications" and possibly "depos[itions] [of] certain Defendants." *See* Joint Status Report, ECF No. 95, at 5. ICIRR concedes that the Rule is "facially neutral," Compl. ¶ 183, but claims that the Rule violates the equal protection clause because its alleged purpose is to disproportionately affect particular groups, *see* Compl. ¶ 182. ICIRR bases its theory on alleged public statements by government officials concerning immigration in general. For example, ICIRR refers to various generic statements from the "administration," and unnamed "senior officials

within . . . DHS." Compl. ¶ 174. ICIRR also refers to statements from the Acting Directors of the U.S. Citizenship and Immigration Services ("USCIS") and U.S. Immigration and Customs Enforcement ("ICE"), even though the Rule was promulgated by the DHS Secretary. *See* Compl. ¶ 174-76. ICIRR never explains how these statements—none of which reference the Rule in particular—influenced the Rule's design. DHS explained its justifications for the Rule, in painstaking detail, in both the Rule's Notice of Proposed Rulemaking and the Rule. Indeed, ICIRR refers to other alleged statements from "administration" personnel that are consistent with DHS's justifications, including the need to incentivize self-sufficiency. *See* Compl. ¶ 178 (President states that we need "new immigration rules which say those seeking admission into our country must be able to support themselves financially"); Compl. ¶ 180 (senior policy advisor expresses concern that aliens come "from all the countries of the world" regardless of "whether they can pay their own way"). ICIRR's equal protection allegations are unlikely to survive a motion to dismiss, much less satisfy the heightened standard for discovery beyond the administrative record.

II. Discovery Scope.

"[I]n reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record." *Dep't of Commerce*, 139 S.Ct. at 2573; *see also Little Co. of Mary Hosp. v. Sebelius*, 587 F.3d 849, 856 (7th Cir. 2009) (The "general rule" is "that discovery outside of the administrative record is inappropriate . . . review of an administrative decision should be confined to the administrative record."); *USA Grp. Loan Servs., Inc. v. Riley*, 82 F.3d 708, 715 (7th Cir. 1996) ("Discovery is rarely proper in the judicial review of administrative action.").[1] An "inquiry into the mental processes of administrative decisionmakers is usually to be avoided." *Citizens to Pres. Overton*

[1] Internal quotation marks are omitted from citations throughout this brief.

Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971). There "must be a *strong showing* of bad faith or improper behavior before such inquiry may be made." *Id.* (emphasis added). This "principle reflects the recognition that further judicial inquiry in executive motivation represents a substantial intrusion into the workings of another branch of Government and should normally be avoided." *Dep't of Commerce*, 139 S.Ct. at 2573. Additionally, discovery into matters implicating "the foreign affairs power of the Executive," including its authority over immigration policy, is especially disfavored given the "substantial deference that is and must be accorded to the Executive" in this area. *Trump v. Hawaii*, 138 S. Ct. 2392, 2424 (2018) (Kennedy, J. concurring).

Discovery is presumptively limited to the administrative record even though ICCIR is not asserting its equal protection claim under the APA. The Supreme Court has made clear that the discovery limitation applies generally to the "review[] [of] agency action," not just claims formally brought under the APA. *Dep't of Commerce*, 139 S.Ct. at 2573; *see also* Complaint, *New York Immigration Coalition v. Dep't of Commerce*, 18-cv-5025, ECF No. 1 (S.D.N.Y. June 6, 2018) (plaintiffs assert a free-standing equal protection claim). If this rule applied only to APA claims, plaintiffs could easily circumvent it, as this case illustrates. ICIRR could have brought its equal protection claim under the APA, which allows a court to set aside "agency action" if it is "contrary to constitutional right." 5 U.S.C. § 706(2)(B). ICIRR should not be permitted to instead assert a free-standing equal protection claim, and "trade in the APA's restrictive procedures for the more evenhanded ones of the Federal Rules of Civil Procedure." *Chang v. USCIS*, 254 F. Supp. 3d 160, 161-62 (D.D.C. 2017); *cf. Smith v. Robinson*, 468 U.S. 992, 1005, 1009-13, 1019 (1984) (rejecting plaintiffs' attempt to "circumvent the requirements" of a detailed statutory scheme by asserting an equal protection claim that arose out of the same "nucleus of operative fact" as their statutory claim); *Eastern Bridge, LLC v. Chao*, 320 F.3d 84, 91 (1st Cir. 2003) (rejecting argument

that plaintiffs need not exhaust administrative remedies because they were alleging a Fourth Amendment violation and noting that "invocation of constitutional authority, without more, cannot breathe life into a theory already pronounced dead by the Supreme Court in binding precedent"). In *Chang*, Judge Bates thus applied the discovery limitation to a free-standing equal protection claim. There, plaintiffs challenged the denial of their visa petitions, asserting a number of constitutional claims, including an equal-protection one. *See* 254 F. Supp. 3d at 161. Judge Bates concluded that "discovery on plaintiffs' equal protection" claim was "not appropriate." *Id.* at 162. He noted that "[j]udicial review of agency action, is generally limited to the administrative record," even for "constitutional or 'non-APA'" claims. *Id.* at 161. And he explained that "[t]o hold otherwise . . . would incentivize" parties to simply allege free-standing constitutional claims to secure broader discovery. *Id.* at 161-62. Accordingly, ICIRR's equal protection claim is subject to the discovery limitation placed on challenges to agency actions.

ICIRR cannot establish that the "narrow exception to the general rule against inquiring into the mental processes of administrative decisionmakers" applies here. *Dep't of Commerce*, 139 S. Ct. at 2573. "[S]uch an inquiry may be warranted and may justify extra-record discovery" on "a *strong showing* of bad faith or improper behavior." *Id.* at 2573-74 (emphasis added); *see also id.* at 2574 ("[T]he District Court should not have ordered extra-record discovery when it did. At that time, the most that was warranted was the order to complete the administrative record."). ICIRR made its request for supplemental discovery *before* it received the administrative record, and so it currently does not base its request on the scope or adequacy of the administrative record. ICIRR presumably relies on the facts set forth in the Complaint. ICIRR, however, alleges only generic statements by various Government officials, none of which specifically reference the Rule. And the few statements that *arguably* relate to the Rule reflect no discriminatory intent. *See*

Compl. ¶ 178 ("new immigration rules" must ensure that "those seeking admission into our country must be able to support themselves financially"); Compl. ¶ 180 (aliens may come "*from all the countries of the world*" regardless of "whether they can pay their own way" (emphasis added)).

Regardless, ICIRR has no basis for suspecting that any of these statements materially influenced the Rule's design, or otherwise reveal that DHS harbored an improper motive in implementing the Rule. The rulemaking process here was extensive. It involved a number of DHS officials and an exhaustive notice-and-comment procedure. DHS thoroughly explained its rationale in both the Notice of Proposed Rulemaking and the Rule itself, and the final draft included a number of changes in light of the submitted comments. *See* 83 Fed. Reg. 51114 (Notice of Proposed Rulemaking); 84 Fed. Reg. 41292 (Final Rule). The administrative record contains a detailed account of DHS's analysis and conclusions in support of the Rule. If ICIRR's sparse allegations of improper motive constituted a "strong showing" of "bad faith or improper behavior," despite the developed, non-discriminatory justifications in the administrative record, the presumptive discovery limitation for lawsuits against agency actions would be a nullity.

III. Motion to Stay Proceedings.

The Court should stay these proceedings pending the Seventh Circuit's resolution of Defendants' appeal of the Court's preliminary injunction order. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). "In deciding whether to grant a stay, courts will balance the competing interests of the parties and the interest of the judicial system." *In re Groupon Derivative Litigation*, 882 F.Supp.2d 1043, 1045 (N.D. Ill. 2012). A stay is especially appropriate "in cases of extraordinarily public moment," *Landis*, 299 U.S. at 256, and

when "cases [are] in the initial stages of litigation" when "there has been little discovery," *GoodCat, LLC v. Cook*, 2016 WL 10490470, at *1 (S.D. Ind. Nov. 21, 2016) (quoting *Finjan, Inc. v. Symantec Corp.*, 139 F.Supp.3d 1032 (N.D. Cal. 2015)). "Given the increasing demands on the time and resources of district courts, district courts are given considerable leeway in managing their dockets." *Alabama Tissue Center v. Sullivan*, 1992 WL 86086, at *2 (N.D. Ill. Apr. 21, 1992).

"Courts generally consider three factors when determining whether to grant a stay: (1) whether a stay will simplify the issues in question and streamline the trial; (2) whether a stay will reduce the burden of litigation on the parties and on the court; and (3) whether a stay will unduly prejudice or tactically disadvantage the non-moving party." *Groupon*, 882 F.Supp.2d 104 at 1045. Each factor counsels in favor of staying the proceedings here.

First, resolution of Defendants' appeal may simplify the issues in question. For example, if the Seventh Circuit holds that ICIRR is not the appropriate party to challenge the Rule as contravening the INA, this conclusion could obviate the need to consider ICIRR's equal protection claim altogether. Further, the Seventh Circuit's resolution of Defendants' appeal may also impact the merits of ICIRR's equal protection claim. ICIRR's equal protection claim relies on allegations concerning Defendants' motivation for implementing the Rule. *See* Compl. ¶ 172. ICIRR alleges, for example, that Defendants relied on "pre-textual concerns" in supporting the Rule. Compl. ¶ 183. To be clear, such bare assertions plainly cannot qualify for the "narrow exception to the general rule against inquiring into the mental processes of administrative decisionmakers." *Dep't of Commerce*, 139 S. Ct. at 2573; *see also supra* at 5-6. But even if this Court thinks this question is debatable, there can be no dispute that Defendants' appeal may simplify (if not eliminate) this issue. For example, if the Seventh Circuit agrees with Defendants that the Rule's formulation of "public charge" is consistent with the historical meaning of the term,

along with Congress' clear intent in adopting and sustaining the public charge ground of inadmissibility, that conclusion would undermine ICIRR's allegations of improper motive and pretext. *Cf. City of Chicago v. Shalala*, 189 F.3d 598, 608 (7th Cir. 1999) ("In light of the various rationales" proferred by the government "we cannot say that the Welfare Reform Act is inexplicable by anything but animus toward" noncitizens). Additionally, and obviously, a Seventh Circuit decision concerning the merits of Plaintiffs' joint APA claims will impact any further briefing on these claims.

Second, a stay would reduce the burden of litigation on the parties and the Court. The discovery process will consume a significant amount of resources from all parties. ICIRR is broadly requesting impermissible discovery into "internal agency communications," and depositions of "certain Defendants." Status Report, ECF No. 95 at 5. Even if the Court allowed only limited supplemental discovery, the requisite steps for *any* additional discovery—*e.g.*, negotiations over custodians, search terms, etc.—are costly and burdensome. Additional discovery disputes may arise throughout the process, requiring judicial intervention. A stay could ensure that the parties and the Court do not expend resources on discovery that may ultimately be rendered irrelevant by a decision from the Seventh Circuit. *See Alabama Tissue*, 1992 WL 86086, at *2 n.2 ("[P]roceeding with discovery in this case could result in a waste of time and resources" given the Court of Appeals' review of relevant issues.).

Third, a stay of proceedings will not prejudice Plaintiffs. Their alleged interests are currently protected by the Court's preliminary injunction against the Rule's enforcement in Illinois. If the Seventh Circuit reverses the Court's preliminary injunction order, it will by necessity have determined that Plaintiffs are not entitled to preliminary relief because they are unlikely to either prevail on the merits or suffer irreparable harm. Thus, when the proceedings resume,

Plaintiffs will be in the same position they would have been in had the improper preliminary injunction never issued. If the Seventh Circuit rules in favor of Plaintiffs, the preliminary injunction will continue in place through the Court's decision on the merits. Thus, in either scenario, Plaintiffs will suffer no meaningful harm from a stay of proceedings pending the Seventh Circuit's decision on Defendants' appeal of the preliminary injunction order. Additionally, three other courts have issued injunctions that prevent enforcement of the Rule in Illinois. *See CASA de Maryland, Inc. v. Trump*, 19-cv-2715, ECF No. 65 (D. Md. Oct. 14, 2019); *State of New York v. DHS*, 19-cv-7777, ECF No. 109 (S.D.N.Y. Oct. 11, 2019); *State of Washington v. DHS*, 19-cv-5210, ECF No. 162 (E.D. Wa. Oct. 11, 2019).

District courts often "stay[] proceedings for reasons of judicial economy" when "the validity of a preliminary injunction [is] before the circuit court or the Supreme Court." *IRAP v. Trump*, 323 F. Supp. 3d 726, 731 (D. Md. 2018) (collecting cases). For example, in *Goodcat, LLC v. Cook*, the district court issued a preliminary injunction against an Indiana statute pertaining to e-liquids, and subsequently stayed discovery pending defendants' appeal of the injunction to the Seventh Circuit. 2016 WL 10490470, at *1 (S.D. Ind. Nov. 21, 2016). The court stayed discovery despite the plaintiff's objection since the plaintiff had "obtained the relief it sought," namely "an injunction of the application of [the challenged statute]." *Id.* The court found that a stay was especially appropriate since, like the case here, the litigation was "at a very early stage." *Id.* Any risk of prejudice to plaintiffs—*e.g.*, potential harm stemming from delayed discovery if the "Seventh Circuit . . . vacates [the] court's preliminary injunction order"—was outweighed by the other factors counseling in favor of a stay. *Id.* at *1-2.

Likewise, in *Ozinga v. U.S. Department of Health and Human Services*, plaintiffs challenged certain provisions of the Affordable Care Act, and their implementing regulations,

concerning contraceptive coverage. 2013 WL 12212731, at *1 (N.D. Ill. Aug. 14, 2013). This Court "entered a preliminary injunction enjoining Defendants from enforcing the relevant ACA provisions and regulations," and the defendants moved for a stay of proceedings pending a Seventh Circuit decision in two other cases "which involve[d] similar issues." *Id.* at *1-2. This Court stayed all proceedings, concluding, in part, that plaintiffs would suffer no material "prejudice or hardship" since the Court had "already entered a preliminary injunction." *Id.* at *2.

The fact that Defendants are seeking a stay of the preliminary injunction from the Seventh Circuit (as well as stays of the related injunctions in the Second, Fourth, and Ninth Circuits) does not change the analysis. If Defendants succeed in obtaining stays of every injunction that prevents enforcement of the Rule in Illinois, then Plaintiffs may move the Court to lift the stay of proceedings and the parties may brief the issue of whether the stay of proceedings remains appropriate. *Cf. Garvey v. American Bankser Insurance*, 2017 WL 6016307, at *1 (N.D. Ill. Dec. 4, 2017) (if circumstances change, the court would "reconsider whether conintuing the stay would yield[] the same benefits against the potential prejudice to plaintiff"). At this time, however, any *potential* injuries that Plaintiffs might suffer from stays of the four relevant injunctions cannot outweigh the *certain* burdens on the parties and the Court if proceedings here are allowed to continue. And even if all four preliminary injunctions were stayed pending appeal, the factors counseling in favor of staying proceedings here would outweigh any arguable harms to Plaintiffs stemming from the stays of the injunctions. Again, if the relevant appellate courts were to stay the preliminary injunctions, they would necessarily have concluded that Plaintiffs and their fellow challengers were unlikely to either prevail on the merits or suffer irreparable harm.

Accordingly, a stay of proceedings is warranted here because the likelihood of a significant waste of the Court's and parties' resources outweighs any arguable harm to Plaintiffs.

Dated: December 5, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ALEXANDER K. HAAS
Director, Federal Programs Branch

/s/ *Kuntal Cholera*
ERIC J. SOSKIN
KERI L. BERMAN
KUNTAL V. CHOLERA
JOSHUA M. KOLSKY
U.S. Dept. of Justice, Civil Division,
Federal Programs Branch
1100 L Street, N.W., Rm. 12306
Washington, DC 20005
Phone: (202) 305-4357
Fax: (202) 616-8470
Email: kuntal.cholera@usdoj.gov