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

Response Memorandum in Opposition to ICIRR's Request for Supplemental Discovery

Courts have recognized—since before Congress enacted the Administrative Procedure Act ("APA")—that any inquiry into the legality of agency action is presumptively limited to the administrative record (the "discovery limit"). This rule is based, in part, on the principle that any further judicial inquiry into executive motive is a significant intrusion into workings of a co-equal branch of government and should be avoided absent extraordinary circumstances. To overcome this presumption, a plaintiff must make a *strong showing* of bad faith or improper behavior.

ICIRR, however, makes no serious attempt at making the required strong showing. Instead, it principally argues that the discovery limit applies only to APA claims, and thus ICIRR is entitled to broader discovery because it strategically brought a stand-alone constitutional claim. But that position cannot be squared with either Supreme Court precedent (which applies the discovery limit generally to "the review of agency action") or the discovery limit's underlying policies (to afford federal agencies the presumption of regularity and limit interference with their operations).

ICIRR also argues that relevant materials may exist outside of the administrative record, and thus it is entitled to broader discovery. But no one challenging an agency action is entitled to extra-record discovery simply because it *may* yield relevant evidence. Rather, in these circumstances, a party is *not* entitled to extra-record discovery unless it qualifies for the narrow exception to the discovery limit.

Accordingly, ICIRR must look to the administrative record for evidence relevant to the Department of Homeland Security's motive in issuing the Public Charge Rule.[1] The Court should deny ICIRR's request for supplemental discovery.

I. The discovery limit applies to ICIRR's equal protection claim.

The Supreme Court has made clear that whenever a court "review[s] agency action," it is "ordinarily limited to evaluating the agency's contemporaneous explanation in light of the administrative record." *Dep't of Commerce v. New York*, 139 S.Ct. 2551, 2573 (2019). Courts must usually avoid any "inquiry into the mental processes of administrative decisionmakers," unless the plaintiff makes a "*strong showing* of bad faith or improper behavior." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (emphasis added). Although ICIRR acknowledges this limit on discovery, *see* ICIRR Disc. Br., at 5, 9, it contends that this limit does not apply to independent constitutional claims, or at least to equal protection claims. Neither argument has merit.

A. First, there is no special exception for independent constitutional claims against agency action. To start, the APA allows a party to challenge agency action as "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B); *see also id.* § 706 (providing that the "the reviewing court shall … interpret constitutional and statutory provisions").

[1] *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41292.

ICIRR does not (and could not) dispute that a constitutional claim brought under the APA would be subject to the discovery limit. After all, the APA expressly provides that its statutory limit on discovery—*i.e.*, "the court shall review the whole record or those parts of it cited by a party"—applies to all relevant "determinations," including whether an agency action is "contrary to constitutional right." *Id.* § 706(2).

It would make little to sense to allow a plaintiff broader discovery simply because it discards the APA and instead brings a stand-alone constitutional challenge. *See Chang v. USCIS*, 254 F. Supp. 3d 160, 161-62 (D.D.C. 2017) (collecting cases). Indeed, ICIRR cites to *no* binding precedent indicating that the discovery limit applies only to claims formally brought under the APA. Nor could it: "The principle that judges review administrative action on the basis of the agency's stated rationale and findings, and [courts'] correlative reluctance to supplement the record" has existed in some form since "before passage of the [APA]." *Deukmejian v. Nuclear Regulatory Comm'n*, 751 F.2d 1287, 1325 (D.C. Cir. 1984), *decision aff'd on reh'g en banc*, 789 F.2d 26 (D.C. Cir. 1986); *see also SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.").

Confirming the point, many other courts have applied the discovery limit to stand-alone constitutional challenges to agency action. *See Evans v. Salazar*, No. 8-cv-0372, 2010 WL 11565108, at *2 (W.D. Wash. July 7, 2010) (rejecting plaintiffs' argument that "their constitutional claims are independent from the APA and that discovery" for "those claims is not limited to the administrative record" since the APA "specifically contemplates review of agency actions . . . found to be 'contrary to constitutional right'"); *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1240 (D.N.M. 2014) (finding that plaintiff's First Amendment claim,

which "ar[ose] under the Constitution" was "subject to" the "general rule that . . . review [is limited] to the administrative record" since the claim still pertains to "final agency action"); *Harvard Pilgrim Health Care of New England v. Thompson*, 318 F. Supp. 2d 1, 12 (D.R.I. 2004) ("The fact that [plaintiff] presents a constitutional claim does not alter the conclusion that this Court must confine its review to the administrative record already developed."); *Alabama-Tombigbee Rivers Coal. v. Norton*, 2002 WL 227032, at *6 (N.D. Ala. Jan. 29, 2002) ("the court finds that plaintiffs are not entitled to discovery on their due process claim, and that such claim is limited to the administrative record."). And the cases ICIRR relies upon either conduct only a cursory analysis of the issue,[2] or have since been superseded by later case law.[3]

Additionally, the Supreme Court's recent decision in *Department of Commerce*, 139 S. Ct. 2551, supports Defendants' position. Even though the plaintiffs brought constitutional claims under the enumeration clause and equal protection doctrine alongside their APA claims, the Supreme Court still found that the discovery limit applied. *See id.* at 2573-74. The Supreme Court found that extra-record discovery was ultimately justified only because it concluded that the plaintiffs could satisfy the narrow exception to the discovery limit. *See id.* at 2574. ICIRR notes that in construing the enumeration clause the Supreme Court looked to its history, which could not be gleaned from the administrative record. *See* ICIRR Disc. Br., at 10. But in looking to the history

[2] *See Grill v. Quinn*, 2012 WL 174873, at *2 (E.D. Cal. Jan. 20, 2012) (asserting that the court may "look beyond the administrative record" for a constitutional challenge, without any discussion of relevant Supreme Court precedent or the policies underlying the discovery limit); *PRPHA v. HUD*, 59 F. Supp. 2d 310, 328 (D.P.R. 1999) (summarily stating that plaintiffs are "entitled to discovery in connection with" constitutional claims, but also acknowledging that "[e]ven with constitutional claims . . . wide-ranging discovery is not blindly authorized at a stage in which an administrative record is being reviewed.").

[3] *See Rydeen v. Quigg*, 748 F. Supp. 900, 906 (D.D.C. 1990) (summarily concluding that the court could consider extra-record affidavits for a constitutional claim, while later D.D.C. precedent—including *Chang*—makes clear that the discovery limit applies to constitutional claims).

of the enumeration clause, the Supreme Court was not conducting a *factual inquiry* into the Commerce Department's rulemaking process. It was engaging in standard constitutional interpretation using public sources. ICIRR then suggests that the Supreme Court did not find that the discovery limit applied to the equal protection claim since the district court had already rejected that claim, and thus it was not on appeal. *See id.* But the Supreme Court found that the district court had erred when it initially permitted extra-record discovery—which occurred *before* it rejected the equal protection claim—since, at the time, plaintiffs had failed to establish an exception to the discovery limit. *See id.* at 2574 ("the District Court should not have ordered extra-record discovery when it did"); *New York v. United States Dep't of Commerce*, 345 F. Supp. 3d 444, 446 (S.D.N.Y. 2018) ("on July 3, 2018, the Court authorized discovery beyond the administrative record"); *New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 671 (S.D.N.Y. 2019) (on Jan. 15, 2019, the district court rejected the equal protection claim). The Supreme Court would not have reached this conclusion if it believed that a plaintiff is entitled to broader discovery whenever it asserts an equal protection claim.

ICIRR argues that there must be an exception for constitutional claims since courts owe agencies no deference on these claims. *See* ICIRR Disc. Br., at 9-10. But ICIRR is speaking of deference over substantive *legal* questions; *e.g.*, whether an agency rule is arbitrary and capricious, or violates a constitutional provision. The discovery limit calls for a form of *factual* deference, namely the presumption that a regulation and its accompanying administrative record were properly constructed, and contain the agency's reasons for enacting the regulation. *See infra* at 6. Courts thus can (and do) construe constitutional provisions with no deference to agencies while simultaneously applying the discovery limit. *See Chang*, 254 F. Supp. 3d at 163 (although "[c]onstitutional claims" are "reviewed with no deference to the agency . . . resting [plaintiff's]

discovery request on the level of deference" afforded for its claim "would undermine the general limitations on discovery in APA cases").

B. Second, there is no special exception for equal protection claims. Contrary to ICIRR's assertion, the policy considerations underlying the discovery limit apply to equal protection challenges based on alleged bias. The rule "reflects the recognition that further judicial inquiry into *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 (emphasis added); *see also Deukmejian*, 751 F.2d at 1325 ("judicial reliance on an agency's stated rationale and findings is central to a harmonious relationship between agency and court, one which recognizes that the agency and not the court is the principal decision-maker."). Moreover, the rule is a logical corollary to the principle that the administrative record "is entitled to a strong presumption of regularity," and will generally "delineate[] the path by which [the agency] reached its decision." *Charleston Area Medical Center v. Burwell*, 216 F. Supp. 3d 18, 23 (D.D.C. 2016). Courts therefore generally credit an agency's "contemporaneous explanation" of its decision "in light of the administrative record." *Camp v. Pitts*, 411 U.S. 138, 143 (1973).

Accordingly, to permit extra-record discovery simply because a plaintiff seeks to question an agency's explanation would turn the discovery limit on its head. Unsurprisingly, courts have thus applied the discovery limit to equal protection claims. As discussed in Defendants' opening brief, Judge Bates of the D.C. District Court concluded that the discovery limit applies even if a plaintiff asserts an equal protection claim "brought under the court's 'equitable power' and the Constitution rather than the APA." *Chang*, 254 F. Supp. 3d at 161; *see* Defs.' Disc. Br., at 5. The D.C. District Court reached the same conclusion in a case where the plaintiff—like ICIRR here—alleged improper bias behind an agency action. In *Muwekmna Ohlone Trive v. Norton*, the

Department of Interior ("DOI") "refused to grant federal recognition to the plaintiff as a native American Tribe." 2005 WL 8168909, at *1 (D.D.C. June 13, 2005). The plaintiff brought a number of claims, including an equal protection claim based on alleged "animus" and "hostile behavior" toward the plaintiff. *Id.* at *3. The court still applied the discovery limit, noting that "mere allegations of improper conduct or bias [are] insufficient to permit a party to conduct discovery outside of the administrative record." *Id.* at *2.

ICIRR relies on *Saget v. Trump*, which is inapplicable. There, the court did not permit extra-record discovery simply because the plaintiff asserted an equal protection claim. Rather, the court had already concluded that it would consider extra-record discovery since it found that the plaintiffs had "proferred significant evidence," including documents and testimony, sufficient to quality for an exception to the discovery limit. *Id.* at 343. In the segments quoted by ICIRR, the court was merely stating that it would also consider this evidence for the equal protection claim, in addition to the plaintiffs' other claims. *Id.* at 368. The remaining cases cited by ICIRR do not support its position. For example, ICIRR cites to two orders in which the District of Maryland set a schedule that includes discovery deadlines, but in neither order did the court provide any substantive analysis for why the plaintiff was entitled to extra-record discovery.[4] And in one of those cases—challenging public charge amendments to a State Department manual—the Court has since denied plaintiffs' request for supplemental discovery on their equal protection claim in light of the level of deference afforded to the government on immigration matters. *See Mayor and City Council of Baltimore v. Trump*, 18-cv-3636, ECF No. 88 (D. Md. Dec. 19, 2019), at 19. The court noted that it must "uphold the [manual] so long as it can reasonably be understood to result

[4] *See* Casa de Maryland, Inc. v. Trump, 18-cv-845-GJH (D. Md. Feb. 8, 2019), ECF No. 57; Mayor & City of Baltimore v. Trump, 18-cv-3636-ELH (D. Md. Sept. 20, 2019), ECF No. 69.

from a justification independent of unconstitutional grounds," and "this assessment can be made on the basis of the administrative record."[5] *Id.* at 22. ICIRR also cites to a number of employment cases involving two cities and a municipality.[6] These cases, however, say nothing of the propriety of extra-record discovery against federal agencies.

ICIRR also argues that evidence outside of the administrative record may be relevant to its improper bias allegation. *See* ICIRR Disc. Br., at 2-4 (discussing *Arlington Heights* factors concerning discriminatory intent). But ICIRR is not entitled to extra-record discovery concerning motive simply because it *may* uncover relevant evidence. Again, one basis for the discovery limit is the presumption that the agency's contemporaneous explanation, along with its administrative record, will reflect the agency's actual reasons for issuing a regulation. *See supra* at 6. Further, in *Arlington Heights v. MHDC* itself, the Supreme Court noted that "testimony concerning the purpose of [an] official action" should be allowed only in "extraordinary instances" since "judicial inquiries into . . . executive motivation represent a substantial intrusion into the workings of [another branch] of government," and is "therefore usually to be avoided." 429 U.S. 252, 268 & n.18 (1977). Thus, unless ICIRR can make a "strong showing of bad faith or improper behavior," it may only seek the administrative record for evidence relevant to its equal protection claim.

II. ICIRR cannot establish that the narrow exception to the discovery limit applies here.

ICIRR does not put forth evidence constituting a "strong showing" of bad faith or improper behavior. As Defendants noted in their opening brief, the public statements referenced in the

[5] Defendants, however, disagree with the District of Maryland's conclusions with respect to *Dep't of Commerce v. New York*, and the applicability of the discovery limit to constitutional claims, for the reasons set forth throughout this brief.

[6] *See Durgins v. City of East St. Louis*, 272 F.3d 841 (7th Cir. 2001); *Garcia v. Village of Mount Prospect*, 360 F.3d 630 (7th Cir. 2004); *Rodriguez v. City of Chicago*, 370 F. Supp. 3d 848 (N.D. Ill. 2019).

Complaint are not specific to the Rule, and cannot demonstrate bad faith or improper behavior in light of the exhaustive, and non-discriminatory justifications laid out in the Rule's preamble—which spans roughly 200 pages—and the accompanying administrative record—which spans over 380,000 pages. *See* Defs.' Disc. Br., at 5-6. Additionally, the Rule's implementation followed an extensive notice-and-comment process, with a notice of proposed rulemaking that was just under 200 pages long. *See* 83 Fed. Reg. 51114 (Oct. 10, 2018). The Rule included a number of changes from the proposed rule in response to public comments. *See*, *e.g.*, Rule, at 41297 ("Following receipt of public comments . . . DHS has excluded consideration of the receipt of Medicaid by aliens under the age of 21 and pregnant women during pregnancy and during the 60-day period after pregnancy."). The Rule's procedural history undermines ICIRR's conclusory assertion that the Rule's design may somehow be attributed to any alleged improper bias.

To show otherwise, ICIRR now relies on various alleged statements from a single White House advisor. *See* ICIRR Disc. Br., at 4-5. None are relevant. First, ICIRR identifies a number of alleged statements where the advisor "pressure[d] DHS officials to move faster to complete the Final Rule." ICIRR Disc. Br., at 4-5. But these alleged statements do not indicate that the advisor pushed for the Rule due to any discriminatory motive. Second, ICIRR also identifies certain messages where the advisor "cited to materials from websites" which contained particular viewpoints on immigration. *Id.* But again, these messages do not indicate that the advisor himself harbors these viewpoints, or that these viewpoints had any bearing on his support for the Rule.

In all events, even if the Court were to credit these allegations, there is no indication that a single, non-DHS official's viewpoints materially influenced the Rule's design. *Muwekma Ohlone Tribe* is instructive. There, the plaintiff tribe sought to make a "strong showing" that would justify extra-record discovery on its claim that the DOI was motivated by bias when it denied the plaintiff

federal recognition. *See Muwekma Ohlone Tribe*, 2005 WL 8168909, at *3-4. The plaintiff submitted an affidavit indicating that an anthropologist assisting the DOI with the plaintiff's petition for recognition displayed "hostile behavior" toward the plaintiff. *Id.* at *3. The court found this evidence insufficient, since it did "not describe any bad faith or improper conduct on the part of the DOI, but rather expresse[d] one individual's viewpoint." *Id.* The same reasoning applies here.

* * * * *

The discovery limit applies to ICIRR's equal protection claim. The Supreme Court has applied the discovery limit to constitutional claims (including an equal protection claim), and ICIRR's request for supplemental discovery into DHS's motive for promulgating the Rule implicates the precise separation-of-powers concern underlying the discovery limit. The evidence submitted by ICIRR does not constitute the type of "strong showing" necessary to overcome the discovery limit and warrant the "unusual step" of "discovery outside the administrative record." *Dep't of Commerce*, 139 S.Ct. at 2564. The Court should deny ICIRR's request for supplemental discovery.[7]

Dated: December 19, 2019

[7] The Court denied Defendants' Motion to Stay Proceedings as premature, since the court "has not yet . . . decided whether discovery will be permitted on the equal protection claim." *See* ECF No. 117. Thus, Defendants currently do not address ICIRR's arguments in opposition to staying discovery. It is Defendants' position that that if the Court were to allow supplemental discovery, discovery should be stayed, at least until the Court has decided whether ICIRR has plead a viable equal protection claim. *See DSM Desotech Inc. v. 3D Sys. Corp.*, No. 8-cv-1531, 2008 WL 4812440, at *2 (N.D. Ill. Oct. 28, 2008) ("stays are granted with some frequency," and courts "may limit discovery in myriad situations, including when a defendant files a motion to dismiss" and "discovery may be especially burdensome and costly"). If necessary, Defendants will file a renewed motion to stay, and will address ICIRR's arguments in opposition to staying discovery.

Respectfully submitted,

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