UNITED STATES DISTRICT COURT
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.

Civil Action No. 1:19-cv-06334

Hon. Gary S. Feinerman

REPLY MEMORANDUM IN SUPPORT OF MOTION TO CERTIFY THE COURT'S MAY 19 OPINION & ORDER FOR INTERLOCUTORY APPEAL AND TO STAY DISCOVERY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

INTRODUCTION

ICIRR has asked for, and the Court has granted, expedited discovery on the equal protection claim, which may include document productions from (and depositions of) high-ranking White House officials. The parties are poised to begin an expensive, burdensome, and intrusive discovery process likely to be mired in disputes over scope and applicable privileges. All of these events are predicated on a single conclusion of this Court: that ICIRR stated a plausible equal protection claim.

The Court's conclusion is possible only if ICIRR clears each of three hurdles: establishing that (i) the deferential *Hawaii* standard does not apply here, (ii) generic statements that say nothing of why the Department of Homeland Security ("DHS") instituted the Rule are nonetheless sufficient to sustain an equal protection challenge to a DHS rule, and (iii) ICIRR is a proper plaintiff to bring its equal protection claim. If the Court finds that there is substantial ground for difference of opinion on any one of these three issues, the Court should grant Defendants' Motion to Certify the Court's May 19 Opinion & Order for Interlocutory Appeal and to Stay Discovery.

ARGUMENT

I. The deferential legal standard applicable to admissions cases governs Plaintiff's equal protection claim.

In *Trump v. Hawaii*, the Supreme Court discussed the deferential standard of review that has applied "[f]or more than a century" to cases involving "the admission and exclusion of foreign nationals[.]" 138 S. Ct. 2392, 2418 (2018); *see also Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control"). There is no dispute that the instant case involves a challenge to the executive branch's policy concerning the inadmissibility of certain aliens. *See* Compl. ¶ 19 ("This case concerns changes by"

DHS's Public Charge Rule ("Rule") "to the interpretation and application of the 'public charge' ground for inadmissibility included in section 212(a)(4) of the [INA]"). Nevertheless, ICIRR insists that this deferential standard does not apply here, and that there is not even substantial ground for difference of opinion on that question. ICIRR is wrong, for numerous reasons.

First, ICIRR argues that *Hawaii*'s deferential standard of review does not apply because the Rule impacts immigrants who are "already living in the United States." Resp., at 8. But this does not change the applicable legal standard. Nothing in *Hawaii* suggests a different standard of review for cases involving aliens located inside the United States. On the contrary, the Supreme Court's reasoning indicates that the location of the aliens would not change the applicable standard. The Court explained that there is ordinarily *no* judicial review in admissions cases, and that the Court "has engaged in a circumscribed judicial inquiry" in situations where the government action "allegedly burdens the constitutional rights of a U.S. citizen." 138 S. Ct. at 2419. Likewise, here, the Rule's alleged impacts on ICIRR gives rise to the same circumscribed judicial inquiry, regardless of the location of aliens subject to the Rule.[1]

Additionally, *Hawaii* relied on cases involving aliens inside the United States. For instance, the Court cited *Rajah v. Mukasey*, 544 F.3d 427, 438-39 (2d Cir. 2008), a case involving an equal protection challenge brought by aliens *inside* the country. *Hawaii*, 138 S. Ct. at 2419. The Court also cited *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), where the Court rejected a First Amendment challenge to a law authorizing the deportation of a resident alien because of

[1] ICIRR correctly observes that aliens inside the United States have constitutional rights. *See* Opp'n at 10-11. But no aliens are parties to this case. And even if they were, the fact that a plaintiff has constitutional rights may establish a right to judicial review but does not determine the level of scrutiny that courts should apply.

membership in the Communist Party, explaining that it would deferentially review judgments by the political branches about who may remain in the United States. *Id*. at 591.

In any event, "[t]t is a well established fact that an applicant for adjustment of status under Section 245 of the Act is in the same posture as though he were an applicant before an American consular officer abroad seeking issuance of an immigrant visa for the purpose of gaining admission to the United States as a lawfully permanent resident." *Matter of Harutunian*, 14 I. & N. Dec. 583, 589 (Reg'l Comm'r Feb. 28, 1974). In other words, regardless of the location of the alien, DHS's determinations under the INA's public charge provision are indisputably determinations about *admissibility*, which are required for applicants seeking adjustment of status under 8 U.S.C. § 1255. Moreover, limiting the deferential standard to situations where aliens are outside the country would be inconsistent with the Supreme Court's explanation that the "power to *expel* or exclude aliens" is "largely immune from judicial control." *Fiallo*, 430 U.S. at 792 (emphasis added).[2]

Further, ICIRR misstates *Hawaii* when it claims that "the *Hawaii* Court repeatedly noted the targeted focus of its ruling: on Presidential regulation of entry of immigrants in the pursuit of *national security*." Opp'n at 7 (emphasis in original). *Hawaii* expressly stated that the deferential standard applies "across different contexts and constitutional claims." 138 S. Ct. at 2419. For authority, the Court cited *Fiallo*, a paternity/legitimacy case in which the Court had rejected the same type of reasoning advanced by Plaintiff here. *See Fiallo*, 430 U.S. at 796 (rejecting characterization of "prior immigration cases as involving foreign policy matters and congressional choices to exclude or expel groups of aliens that were specifically and clearly perceived to pose a

[2] Conceding, as it must, that this case implicates admissions, ICIRR suggests there is some relevant distinction between "admissions" and "entry," but it fails to explain how that distinction might be relevant here. Opp'n at 8 n.2. Notably, the Rule implicates physical border crossings because its coverage extends to determinations made at the border. Opp'n at 8 n.3.

grave threat to the national security . . . or to the general welfare of this country"). And the Supreme Court quoted its prior ruling that "*any* policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power." *Id*. (quoting *Harisiades*, 342 U. S. at 588-89) (emphasis added). Defendants raised these points in their opening brief, and ICIRR failed to address them. At minimum, these (unrefuted) points establish that there is substantial ground for difference of opinion on this issue.

Second, ICIRR attempts to distinguish *Hawaii* on the grounds that the underlying statute at issue in *Hawaii* arguably gives the executive branch broader authority than the public charge inadmissibility statute. Resp., at 6-7. But *Hawaii*'s application of a deferential standard did not hinge on the scope of authority conferred by the statute at issue. Rather, the Court reasoned that a deferential standard is appropriate because "the admission or exclusion of foreign nationals" is an area "largely immune from judicial control." *Hawaii*, 138 S. Ct. at 2418. Moreover, to the extent ICIRR is suggesting that DHS lacks significant discretion over public charge inadmissibility determinations, two Circuit Courts of Appeals, including the Seventh Circuit, have disagreed with that position. *See Cook Cty. v. Wolf*, No. 19-3169, 2020 WL 3072046, at *10 (7th Cir. June 10, 2020) ("[I]n 1952 Congress amended the Act in a way that uses the language of discretion[.]"); *id*. at *11 ("What has been consistent is the delegation from Congress to the Executive Branch of discretion, within bounds, to make public-charge determinations."); *City and Cty. of San Francisco v. USCIS*, 944 F.3d 773, 791 (9th Cir. 2019) (INA uses "the language of discretion, and the officials are given broad leeway").

As Defendants noted in their Motion, another district court has ruled that the *Hawaii* standard governs an equal protection challenge to the State Department's interpretation of 8 U.S.C. § 1182(a)(4)—the same statute at issue here. *See Mayor of Balt. v. Trump*, 2019 U.S. Dist. LEXIS

219262, at *27-33 (D. Md. Dec. 19, 2019). Plaintiff tries to distinguish that case on the grounds that the agency interpretation there "is directed exclusively to immigrants residing outside the United States" who are seeking visas to come to the United States. Resp., at 10. But again, the "an applicant for adjustment of status . . . is in the same posture as though he were an applicant . . . seeking issuance of an immigrant visa[.]" *Harutunian*, 14 I. & N. Dec. at 589. As the Rule explains, "[t]hree different agencies are responsible for applying the public charge ground of inadmissibility, each in a different context or contexts." 84 Fed. Reg. 41292, 41294 n.3. "DHS primarily applies the public charge ground of inadmissibility at ports of entry and when adjudicating certain applications for adjustment of status." *Id*. "[Department of State] Consular officers are responsible for applying the public charge ground of inadmissibility as part of the visa application process." *Id*. It would be anomalous if DHS's interpretation of the public charge inadmissibility statute in this case is subject to strict scrutiny while the State Department's interpretation of precisely the same statute is subject to the deferential *Hawaii* standard.

ICIRR misreads the plurality opinion in *Department of Homeland Security v. Regents of the University of California* when it argues that that decision indicates that "traditional equal protection analysis under *Arlington Heights* does apply when reviewing agency action affecting immigrants in the United States."[3] Resp., at 10 (citing 2020 WL 3271746 (June 18, 2020)). In *Regents*, the government did not argue that the *Hawaii* standard applied. Instead, it relied on *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999), which holds that "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." *See* 2020 WL 3271746 at *16. The plaintiffs "counter[ed] that their claim

[3] Only Justice Sotomayor disagreed with this part of the *Regents* opinion. The other eight Justices agreed that the plaintiffs' equal protection claim should be dismissed.

falls outside the scope of that precedent" but the Supreme Court did "not resolve this debate[.]" *Id*. Instead, it explained that "even if" the plaintiffs' equal protection claim were "cognizable," the allegations would be "insufficient" under *Arlington Heights*. *Id.*

Lastly, ICIRR cites cases declining to apply the *Hawaii* standard to claims challenging the termination of certain Temporary Protected Status ("TPS") designations. Resp., at 9. Defendants respectfully submit that those decisions were incorrectly decided and, in any event, are distinguishable. "The TPS statute 'does not create an admissions program.'" *Celaya-Martinez v. Holder*, 493 F. App'x 934, 940 (10th Cir. 2012). The Rule, however, clearly pertains to admissions and therefore should be subject to the deferential standard governing admissions cases. Thus, at minimum, there is substantial ground for disagreement over the legal standard applicable to Plaintiff's equal protection claim. That controlling issue should be resolved on appeal.

II. ICIRR exclusively or largely relies upon statements reflecting the views of non-decisionmakers of the Rule. These statements do not give rise to a plausible equal protection claim.

ICIRR does not deny that comments reflecting only the views of non-decisionmakers are irrelevant to an equal protection challenge to an agency rule. Instead, ICIRR argues only that it relies largely (or entirely) on statements from decisionmakers. Thus, the question here is whether persons that did not make the ultimate decision on the structure or enactment of DHS's Rule are still the Rule's "decisionmakers." The answer to that question should be a straightforward "No." At the very least, there is substantial ground for disagreeing that the answer is "Yes." That substantial ground for disagreement warrants Seventh Circuit review.

The meaning of "decisionmaker," in the equal protection context, is the person or entity that ultimately made the decision at issue (here, the decision to issue the Rule).[4] *See, e.g.*, *Regents*, 2020 WL 3271746, at *11, 16 (for the equal protection claim, "[t]he relevant actors were most directly Acting Secretary Duke and the Attorney General," since Duke took the action and, under the relevant statute, "she was bound by the Attorney General's legal determination."); *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (noting that the "decisionmaker, in this case [is the] *state legislature*" where plaintiffs challenged state legislation); *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (looking to whether "discriminatory intent is inherent in the *prosecutor's* explanation" in suit involving *Batson* claim). Here, there is no dispute that the Acting Secretary of Homeland Security had ultimate authority over the Rule's enactment. DHS organized the notice-and-comment process and eventually implemented the Rule (with the Acting Secretary's signature). Thus, the vast majority of quotations ICIRR relies on are irrelevant; they say nothing of why the Acting Secretary (the decisionmaker) promulgated the Rule.[5]

Several courts have rejected equal protection claims that similarly relied on the alleged animus of those who did not ultimately make the decision at issue, even if they had some connection to the decision. In *Jennings v. City of Stillwater*, the plaintiff brought an equal protection challenge to a city's failure to prosecute the alleged perpetrators of her assault. 383 F.3d 1199, 1200 (10th Cir. 2004). The plaintiff claimed that this failure stemmed from the bias of the officer who investigated her allegations. The Tenth Circuit rejected this claim, noting:

[4] This is not a formalistic interpretation, as ICIRR claims. The key inquiry is not whether an entity is simply labeled a "decisionmaker," but whether it has the final authority over the challenged decision. Here, there is no dispute that the Acting Secretary of Homeland Security had ultimate authority to approve or disapprove the Rule.

[5] Even assuming Miller was in frequent contact with the actual decisionmaker, *see* Resp., at 13, that does not make him a decisionmaker, and it certainly says nothing of whether the actual decisionmaker harbored any improper motive when enacting the Rule.

> The ultimate decisions not to prosecute the [alleged perpetrators] . . . were made not by [the officer], but by [the] District Attorney. . . . Plaintiff's allegations of discrimination are directed not at the decisions by the ultimate decisionmaker, but at various actions of [an officer.] . . . The problem is that these actions by [the officer], even assuming they are every bit as improper, arbitrary, and discriminatory as Plaintiff alleges, were not final decisions; they were only steps in a process leading toward a final decision.

Id. at 1212. Likewise, in *Morrissey v. United States*, a homosexual man asserted an equal protection challenge to the IRS's decision not to allow him to claim a certain tax deduction for money he "paid to father children through in vitro fertilization." 871 F.3d 1260, 1262 (11th Cir. 2017). "[A]s evidence of . . . anti-homosexual bias," plaintiff relied on "a remark in the initial audit report of" an "IRS agent." *Id.* at 1271. But the Eleventh Circuit rejected this claim, noting: "[the IRS agent's] report wasn't the IRS's final or official word on [plaintiff's] claimed deduction. In the IRS's formal claim-disallowance letter, the Supervisory Revenue Agent explained, simply and without any trace of bias [that the deduction did not apply for reasons unrelated to sexual orientation]. . . . Because there is no evidence that the IRS's actual decisionmakers engaged in any intentional discrimination, [the] equal protection claim fails." *Id.* at 1272; *see also* Defs.' Br., at 15 (citing other cases).

In response, ICIRR quotes from *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, and states that the decisionmaker includes "the decisionmaking body . . . the group of individuals who made the challenged decision." Resp., at 12. But this raises the same legal question: who *made* the challenged decision? As noted above, the person or entity that "made" the decision is just that—the person or entity that had the authority to make, and ultimately made, the decision at issue. This is consistent with *Arlington Heights*, where the Court and plaintiffs looked to the statements from the Village's Board of Trustees and Plan Commission, the entities which made the contested decision on the plaintiff's rezoning petition. *See* 429 U.S. 252, 270 (1977).

ICIRR seems to suggest that a "decisionmaker" is anyone whose alleged animus had some "connection" to the decision at issue. Resp., at 12. But ICIRR cites to no case where a court has sustained an equal protection claim based on such a broad understanding of "decisionmaker," and in any event ICIRR's position is inconsistent with *Regents*, which held that statements made by President Trump—who certainly had some "connection" to the challenged policy—were "unilluminating." 2020 WL 3271746, at *16. ICIRR's position would also produce absurd results. For example, a private party that submits a racially-motivated comment during a notice-and-comment period would be considered a "decisionmaker," since it bore the requisite animus, and its comment was "connected" to the decision at issue. ICIRR offers no practical defense of its interpretation, but instead relies on carefully trimmed quotations from Defendants' cases (devoid of their context). For example, ICIRR states that in *Clearwater v. Independent School District*, the Eighth Circuit found that "what matters is whether animus is '[]related to the decisional process.'" Resp., at 12 (quoting 231 F.3d 1122, 1126 (8th Cir. 2000)). This is incorrect. The court stated that "[e]vidence demonstrating discriminatory animus in the decisional process" excludes "statements by nondecisionmakers, or statements by *decisionmakers* unrelated to the decisional process." *Clearwater*, 231 F.3d at 1126 (emphasis added). The court thus found that only statements by *decisionmakers* relating to the decisional process are relevant. Other cases cited by ICIRR likewise support Defendants' position. *See, e.g.*, *Simmons v. Chicago Bd. of Educ.*, 289 F.3d 488, 492 (7th Cir. 2002) (plaintiff claimed that the Board demoted him based on his race, and court refused to consider statements from a non-Board member since "statements by nondecisionmakers cannot satisfy a plaintiff's burden of proving discrimination."). Accordingly, Defendants' construction of "decisionmaker" is correct; at minimum, there is substantial ground for difference of opinion on this issue.

But even if the statements ICIRR relies upon were by "decisionmakers," none reveals any animus in connection with the Rule. The Supreme Court has recently clarified that "statements . . . remote in time and made in unrelated contexts . . . do not qualify as 'contemporary statements' probative of the decision at issue," and thus "fail to raise a plausible inference that the [the decision] was motivated by animus." *Regents*, 2020 WL 3271746, at *16. Here, ICIRR largely relies on (i) quotes from Stephen Miller suggesting that he pushed for the Rule, and (i) statements from Miller—"remote in time and made in unrelated contexts"—which ICIRR believes reveal that he harbored animus. But ICIRR references no statement connecting the two: that he pushed for the rule *because* of any animus. Under *Regents*, this is insufficient for an equal protection claim.

That leaves ICIRR with a single quote from Kenneth Cuccinelli. It would be imprudent to allow ICIRR to move forward on its equal protection claim, and pursue burdensome and invasive discovery requests, based solely on a single, grossly mischaracterized quote. Indeed, Defendants described the actual quote and its context, *see* Defs.' Br., at 16, and ICIRR responds only with bluster, asserting with no support that the full quote and relevant context somehow "strain[] credulity." Resp., at 13. Again: in response to an abstract question concerning the Emma Lazarus poem, Cuccinelli stated only that the poem uses certain terms such as "wretched refuse" which, when the poem was written, was often used to describe persons considered to be of a lower class in Europe. *See id.* Cuccinelli never stated that the poem's principles applied only to persons from Europe. And neither the question nor the answer had anything to do with why he supported the Rule. ICIRR incorrectly states that the parties should litigate this issue on summary judgment. When a plaintiff cites to an external source in the complaint, a court may consider the whole source for context in assessing whether the plaintiff's pleadings are sufficient. *See Minch v. City of Chicago*, 486 F.3d 294, 300 (7th Cir. 2007). Accordingly, there is at the very least substantial

ground for disagreement on whether the statements ICIRR relies upon may give rise to a plausible equal protection claim, especially in light of the Supreme Court's recent *Regents* decision.

III. ICIRR is not a proper plaintiff for its equal protection claim.

The Seventh Circuit effectively concluded that there is substantial ground for disagreement as to whether ICIRR falls within the zone-of-interests of the INA's public charge inadmissibility provision. *Cook Cty.*, 2020 WL 3072046, at *6. This reasoning applies equally to ICIRR's equal protection claim; if the "link between [the alleged economic and mission-related] injuries" to ICIRR "and the purpose of the public-charge part of the [INA]" are "attenuated," the same is true of ICIRR's alleged injuries and the purpose of the equal protection clause (to protect persons against impermissible discrimination). *See* Defs.' Br., at 18.

ICIRR responds that the zone-of-interests test applies only to statutory claims. But in *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*—the seminal zone-of- interests decision—the Supreme Court framed the inquiry as "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute *or constitutional guarantee in question.*" 397 U.S. 150, 153 (1970) (emphasis added). And both the Supreme Court and Seventh Circuit have applied the zone-of-interests test to constitutional claims. *See Bos. Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 321 n.3 (1977) (Commerce Clause); *Calvin v. Conlisk*, 534 F.2d 1251, 1253 (7th Cir. 1976) (Fourteenth Amendment). The Supreme Court has never retreated from that position. ICIRR cites to *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, but that decision did not state that the test applies only to statutory claims. 572 U.S. 118 (2014). To the contrary, it reaffirmed that "[t]he modern 'zone of interests' formulation originated in *Association of Data Processing*," and called it a "requirement of general

application."[6] *Id.* at 129. Although *Lexmark* noted that the zone-of-interests inquiry "us[es] traditional tools of statutory interpretation" to determine "whether a legislatively conferred cause of action encompasses [a] particular plaintiff's claim," it was because *that case* dealt with a statutory claim. *See id.* at 125, 127 (the Court "granted certiorari to decide the appropriate analytical framework for determining a party's standing to maintain an action . . . under the Lanham Act."). Even *Data Processing* framed the question as one of "statutory interpretation"—because that case, like *Lexmark*, involved a statutory claim—yet the Court made clear there that the zone-of-interests test could apply to constitutional claims as well. *See id.* at 126 (noting that *Data Processing* "sought to 'ascertain,' as a matter of statutory interpretation . . . the 'class of persons who [could]" sue under the Clayton Act). To the extent the Court still finds *Lexmark* ambiguous on this point, the proper course would be to certify the issue for Seventh Circuit review, not overrule the Supreme Court. *Cf. Agostini v. Felton*, 521 U.S. 203, 237 (1997) (lower courts must "leav[e] to [the Supreme] Court the prerogative of overruling its own decisions").[7]

ICIRR also argues that it comes within the zone of interests of the equal protection clause because it devotes resources to assisting those allegedly subject to discrimination under the Rule. But the fact that ICIRR chooses to use its resources in that way does not show that ICIRR's *own alleged injuries* come within the relevant zone of interests, or that ICIRR's own constitutional rights have been violated. At best, ICIRR's allegations show only that ICIRR assisted *others* whose injuries come within the relevant zone of interests. In order to assert the equal protection rights of those individuals in litigation, however, ICIRR would need to establish that it is a proper litigant

[6] *Lexmark* quoted this language from *Bennett v. Spear*, where the Court reiterated that a party must come "within the zone of interests to be protected or regulated by the . . . constitutional guarantee in question." 520 U.S. 154, 163 (1997).

[7] ICIRR also notes that other cases Defendants rely upon involved statutory claims. But none of those cases held that the zone-of-interests test applies *only* to statutory claims.

under the Supreme Court's third-party standing precedents. *See id.* at 127 n.3 ("[T]hird-party standing is closely related to the question whether a person in the litigant's position will have a right of action on the claim."); Defs.' Mem., at 18 & n.2 (discussing third-party standing). Doing so generally requires a litigant to establish that it has a close relationship with the absent rights-holders and that significant hindrances prevent those rights-holders from asserting their rights on their own behalf. *See, e.g.*, *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). ICIRR has not even *attempted* to argue that it can satisfy those third-party standing requirements.

ICIRR itself was not subject to any discrimination; its interests are "attenuated" from the interests protected and rights conferred by the equal protection clause. Thus, there is substantial room for disagreement as to whether ICIRR is a proper plaintiff for its equal protection claim.

IV. Certifying the Court's May 19, 2020 Order for interlocutory review, and staying discovery over the equal protection claim, will materially advance this litigation and avoid critical separation of powers concerns.

Given the unique posture of this case, interlocutory review of the equal protection claim will materially advance this litigation. ICIRR does not deny that Plaintiffs' remaining claims can be resolved in this Court, and in appellate tribunals, without the need for further discovery. Additional discovery for, and resolution of, the equal protection claim will draw out the proceedings in this Court. Therefore, a Seventh Circuit determination that ICIRR has failed to state a claim will necessarily materially advance the termination of this litigation.

Further, if discovery commences here, the "coequal branches of the Government [will be] set on a collision course" and the Court will be placed "in the awkward position of evaluating the Executive's claims of confidentiality and autonomy" which "pushes to the fore difficult questions of separation of powers and checks and balances." *Cheney v. U.S. Dist. Court for Dist. Of Columbia*, 542 U.S. 367, 389 (2004). Additionally, "courts should be mindful of the burdens

imposed on the Executive Branch." *Id.* at 391. Interlocutory review of the equal protection claim, accompanied by a stay of discovery, is necessary to ensure that the Court avoids this "collision course" based on a claim which may ultimately prove implausible on its face.

In response, ICIRR tries to distinguish *Cheney*, largely relying on immaterial factual differences. First, ICIRR notes that the claim in *Cheney* was "meritless," whereas here the Court found that ICIRR has made a "substantial showing" on their animus allegation. But the whole point of this motion is that this Court's equal protection holding raises close legal questions that merit further review. ICIRR also claims that in *Cheney*, the plaintiffs "ask[ed] for everything under the sky." Resp., at 17. But that is no basis for distinguishing this case; indeed, plaintiffs' requests here are comparable to the ones in *Cheney*. The plaintiffs there did not ask for all documents in defendants' possession, but rather for virtually all documents relating to the Task Force at issue in that litigation. *Cheney*, 542 U.S. at 387. Here, similarly, ICIRR asks for "everything under the sky" concerning any potential impact of the Rule on any racial, ethnic, or national subset of aliens. *See* ECF No. 157-2. ICIRR goes even further, asking for communications involving five separate agencies (beyond the defendant agencies), and any communication involving three separate Immigration advocacy groups. *See id.* And ICIRR seeks discovery of privileged White House communications, on an expedited basis, which will require the White House to review documents and invoke executive privilege. *See id.* ICIRR also seeks to depose senior White House and agency officials, which is extremely intrusive and burdensome discovery that is almost never permitted. ICIRR's discovery thus raises precisely the same concerns as described in *Cheney*.

ICIRR also notes that *Cheney* involved the Vice President. *See* Resp., at 18. But the Court's decision in *Cheney* was based on its more general concern that "enforcement" of discovery orders "might interfere with [Executive Branch] officials in the discharge of their duties." 542 U.S. at

372. An important consideration there was that the "discovery requests [were] directed" to "other senior Government officials" in addition to the Vice President. *Id.* at 382. ICIRR's discovery requests expressly target a senior Presidential advisor, the former White House Chief of Staff, and other White House officials.

Finally, ICIRR asserts that any "constitutional confrontation" concerns are premature. *See* Resp., at 18. But *Cheney*'s ultimate conclusion was that courts ought to avoid initiating a discovery process involving the Executive to prevent even the "*occasion* for constitutional confrontation between the two branches."[8] 542 U.S. at 389-90 (emphasis added). Interlocutory review, accompanied by a stay of discovery, is necessary to minimize the risk of intrusion into the Executive Branch, and the need for the Court to assess and resolve sensitive questions of Executive privilege. In short, interlocutory review is precisely the type of "other avenue[], short of forcing the Executive to invoke privilege" that district courts are supposed to explore in these circumstances.[9] *Id.* at 390.

CONCLUSION

For the foregoing reasons, the Court should the Court should grant Defendants' Motion.

[8] ICIRR claims that *Cheney* involved a damages claim, *see* Resp., at 17, but *Cheney*'s holding hinged on the nature of the discovery requested, not the relief sought. ICIRR also claims that, according to *Cheney*, the "calculus changes" when the claim has "constitutional dimensions." Resp., at 17. But ICIRR misquotes *Cheney*. The Court actually said: there is a "'fundamental' and 'comprehensive' need for" certain evidence "in the criminal justice system" but "the right to . . . relevant evidence in civil proceedings does not have the same 'constitutional dimensions.'" 542 U.S. at 384.

[9] ICIRR claims that the "Court held that ICIRR was entitled to discovery not only because of its equal protection claim, but also because it" satisfies the "strong showing" standard for APA discovery. Resp., at 18. But the Court only held that ICIRR was entitled to additional discovery *for the equal protection claim* even under the "strong showing" standard. ECF No. 150, at 27. ICIRR did not move for additional discovery on any other claim, and the Court certainly did not grant it. *See id.* at 29 ("ICIRR is entitled to extra-record discovery on its equal protection claim.").

Dated: July 2, 2020

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ALEXANDER K. HAAS
Director, Federal Programs Branch

/s/ Kuntal Cholera
ERIC J. SOSKIN
Senior Trial Counsel
KERI L. BERMAN
KUNTAL V. CHOLERA
JOSHUA M. KOLSKY, DC Bar No. 993430
Trial Attorneys
U.S. Dept. of Justice, Civil Division,
Federal Programs Branch
1100 L Street, N.W., Rm. 12002
Washington, DC 20001
Phone: (202) 305-8645
Fax: (202) 616-8470
Email: kuntal.cholera@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2020, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Kuntal Cholera
Kuntal Cholera