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

COOK COUNTY, ILLINOIS, an Illinois governmental entity; and **ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS, INC.**,

Plaintiffs,

vs.

CHAD F. WOLF, in his official capacity as Acting Secretary of U.S. Department of Homeland Security; **U.S. DEPARTMENT OF HOMELAND SECURITY,** a federal agency; **KENNETH T. CUCCINELLI II,** in his official capacity as Acting Director of U.S. Citizenship and Immigration Services; and **U.S. CITIZENSHIP AND IMMIGRATION SERVICES,** a federal agency,

Defendants.

Case No. 19-cv-6334

Judge Gary Feinerman

JOINT STATUS REPORT

Pursuant to this Court's order dated May 29, 2020, Dkt. 156, the parties, by and through their respective counsel, hereby submit this Joint Initial Status Report as follows:

A. Nature of the Case

1. Attorneys of record, and lead trial counsel, for each party.

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2. Basis for federal jurisdiction.

This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this action arises under federal law.

3. Nature of the claim(s) and any counterclaim(s), including the amount of damages and other relief sought.

Plaintiffs Cook County and ICIRR bring claims under the Administrative Procedure Act (APA), 5 U.S.C. § 706, et seq., challenging a Department of Homeland Security final rule pertaining to the "public charge" ground of inadmissibility contained in section 212(a)(4) of the

Immigration and Nationality Act, 8 U.S.C. §1182(a)(4) ("INA"). With respect to their APA claims, Plaintiffs claim that the final rule exceeds the agencies' statutory authority, contravenes existing law, and is arbitrary and capricious. Plaintiff ICIRR further claims that the final rule violates the Equal Protection Clause of the Fourteenth Amendment, made applicable to the federal government under the Fifth Amendment. Plaintiffs seek declaratory relief declaring the final rule unlawful and invalid and seek injunctive relief enjoining implementation or enforcement of the final rule in the State of Illinois.

4. Whether the defendant will answer the complaint or, alternatively, whether the defendant will otherwise plead to the complaint.

Defendants answered Plaintiffs' Complaint on July 9, 2020. Dkt. 179.

5. Principal legal and factual issues.

The principal issues in this case are whether Defendants' rule concerning the "public charge" ground of inadmissibility is consistent with the INA; whether Defendants' rule concerning the "public charge" ground of inadmissibility is in accordance with the law; whether Defendants' rule concerning the "public charge" ground of inadmissibility is arbitrary and capricious under the APA; and whether Defendants' rule concerning the "public charge" ground of inadmissibility contravenes the Equal Protection Clause of the Fourteenth Amendment, made applicable to the federal government under the Fifth Amendment.

B. <u>Proceedings to Date</u>

1. Summary of all substantive rulings (including discovery rulings) to date.

On October 14, 2019, this Court entered a preliminary injunction enjoining the implementation of the final rule in the State of Illinois. DHS appealed, *Cook Cnty. V. Wolf*, No. 19-3169 (7th Cir. 2020), and the Supreme Court stayed the preliminary injunction pending appeal, *Wolf v. Cook Cnty.*, 140 S. Ct. 681 (2020) (mem.). On June 10, 2020, the Seventh Circuit affirmed

this Court's entry of a preliminary injunction. *Cook Cnty. V. Wolf*, No. 19-3169 (7th Cir. June 10, 2020).

Meanwhile, on May 19, 2020, this Court denied Defendants' motion to dismiss the suit under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Dkt. 150. This Court found that "[a]lthough ICIRR's strong showing of an incomplete administrative record suffices to justify extra-record discovery, ICIRR also makes a strong showing that DHS's stated reason for promulgating the Final Rule – protecting the fisc – obscures what ICIRR alleges is the real reason – disproportionately suppressing nonwhite immigration." *Id*. at 26. Thus, the Court concluded that "ICIRR is entitled to extra-record discovery on its equal protection claim." *Id*. at 29.

On June 23, 2020, this Court granted in part and denied in part Plaintiff ICIRR's motion for expedited discovery, Dkt. 157, and set a telephonic status hearing for July 14, 2020. Dkt. 170. On July 8, 2020, this Court heard argument on Defendants' motion to certify the Court's May 19 Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and to stay discovery, Dkt. 162.

2. Description of all pending motions, including date of filing and briefing schedule.

Defendants' motion to certify the Court's May 19 Order for interlocutory appeal and to stay discovery, Dkt. 162, is fully briefed and remains pending.

C. <u>Discovery and Case Plan</u>

1. Summary of discovery, formal and informal, that has already occurred.

Defendants provided Plaintiffs with the Administrative Record on November 25, 2019. Defendants have agreed to provide to Plaintiffs a copy of the privilege logs that Defendants are producing on a bi-weekly, rolling basis to the plaintiffs in the pending Washington State case. No.

4:19-cv-5210-RMP (E.D. Wash. May 13, 2020).[1] As of this filing, Defendants have made three productions of the privilege log: one on June 12, 2020, one on June 26, 2020, and one on July 10, 2020. According to Defendants, 45,103 documents have been batched for review in the DOJ document review platform. Defendants calculate that roughly 7.8% of the batched documents have been reviewed, and have provided no end date for their production of the complete privilege log.

On June 23, 2020, this Court granted in part and denied in part ICIRR's motion for expedited discovery. Dkt. 170. Pursuant to the Court's order, the parties are in the process of conferring regarding Defendants' responses and objections to ICIRR's requests for production of documents, including Defendants' objections to ICIRR's proposed search terms and custodians. The parties filed a separate joint report regarding the status of that discovery on July 10, 2020.

2. Whether discovery will encompass electronically stored information, and the parties' plan to ensure that such discovery proceeds appropriately.

For its initial expedited discovery, Plaintiff ICIRR is seeking documents and communications relevant to its claim under the Equal Protection Clause, which will encompass electronically stored information. Plaintiffs also allege that the Final Rule is arbitrary and capricious in part because it is a "pretext for discrimination" and "Defendants have failed to consider the racially disparate impact of the Regulation." Compl. ¶¶ 166, 167. Accordingly,

[1] Defendants agreed to provide a copy of the privilege log from the *Washington* case to Plaintiffs as a courtesy, but Defendants maintain that the APA does not require production of a privilege log for an administrative record because such materials are not part of the record to begin with, according to decades of precedent. *See, e.g.*, *Norris & Hirschberg, Inc. v. SEC*, 163 F.2d 689, 693 (D.C. Cir. 1947) ("[I]nternal memoranda made during the decisional process . . . are never included in a record."); *Madison Cty. Bldg. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 622 F.2d 393, 395 n.3 (8th Cir. 1980) ("staff memoranda and recommendations . . . used by an agency in reaching a decision . . . may be excluded from the record"); *Oceana, Inc. v. Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019) ("predecisional and deliberative documents 'are not part of the administrative record to begin with,' so they 'do not need to be logged as withheld from the administrative record'").

Plaintiffs' position is that the expedited discovery requests also bear on Plaintiffs' claims under the Administrative Procedure Act.

Plaintiff ICIRR is also seeking to depose certain Defendants as outlined in its motion for expedited discovery. Dkt. 157. Plaintiffs' position is that, consistent with this Court's order, Dkt. 150, the documents and communications Plaintiff ICIRR seeks related to its equal protection claim may be relevant to Plaintiffs' claims under the APA, and that Plaintiffs may seek to propound additional extrarecord discovery beyond the administrative record for purposes of their APA claims. Such extrarecord discovery would encompass electronically stored information.

Defendants' position is that Plaintiffs are not entitled to extra-record discovery on any of their APA claims since Plaintiffs have not moved for, and the Court has not ordered, extra-record discovery for Plaintiffs' APA claims. *See* Joint Status Report, ECF No. 95 ("For purposes of their APA claims, Plaintiffs seek to discover the final administrative record."); ECF No. 111 ("This case involves two separate and independent claims: an Administrative Procedure Act (APA) challenge to Defendants' Final Rule and a constitutional claim that Defendants' actions . . . violate the Equal Protection Clause. . . . ICIRR seeks discovery in support of its equal protection claim."); ECF No. 150 (concluding only that "ICIRR is entitled to extra-record discovery on its equal protection claim.").

This case is exempt from the Mandatory Initial Discovery Pilot Project because it is "an action for review on an administrative record." Fed. R. Civ. P. 26(a)(1)(B)(i).

3. Proposed scheduling order

i. Deadline for Rule 26(a)(1) disclosures, or why Rule 26(a)(1) disclosures are not appropriate.

Rule 26(a)(1) is inapplicable to Plaintiffs' APA claims under Rule 26(a)(1)(B)(i). ICIRR proposes that Rule 26(a)(1) disclosures related to Plaintiff ICIRR's equal protection claim be made

by ICIRR and Defendants within thirty (30) days of the filing of Defendants' answer. ICIRR contends that Defendants be required to provide mandatory Rule 26(a)(1) disclosures within a reasonable time, which is *consistent* with expedited discovery, as opposed to permitting Defendants to delay any discovery *beyond* what is standard (which is what Defendants propose below).

Defendants maintain that all discovery should be stayed pending interlocutory review of the Court's order on ICIRR's equal protection claim, especially in light of the Supreme Court's decision in *Department of Homeland Security v. Regents of the University of California*, 2020 WL 3271746 (June 18, 2020). If the Court does not stay all discovery, Defendants propose that any further discovery—including the exchange of initial disclosures—should be conducted following the completion of document productions made during the expedited discovery schedule. Defendants contend that the parties should not pursue both expedited and standard discovery simultaneously.

ii. Deadline for issuing written discovery requests.

Plaintiffs propose that written discovery requests be made within thirty (30) days of the filing of Defendants' answer. As noted above, Defendants should not be permitted to use an order expediting discovery as a justification to delay discovery.

As noted above, Defendants request that all discovery be stayed pending interlocutory review of the Court's equal protection claim, or, at minimum, further discovery should commence only after expedited discovery is complete.

iii. Deadline for completing fact discovery.

Plaintiffs propose that fact discovery be complete by Friday, November 13, 2020. Plaintiffs assert that Defendants' proposal to delay fact discovery until more than a year from now,

and more than two years after the filing of this suit, demonstrates another attempt at delay in a case in which this Court already has found urgency by (1) granting a preliminary injunction; and (2) granting expedited discovery.

Defendants propose that, to the extent the Court orders further discovery, fact discovery be complete by October 1, 2021, which is the fact discovery deadline set by the Court in the Washington matter. *See* Scheduling Order, *Washington v. DHS*, 19-cv-5210, ECF No. 212 (May 4, 2020). Adopting the same fact discovery deadline as the Washington matter will allow Defendants to better coordinate discovery across the cases. Contrary to Plaintiffs' assertion, Defendants do not seek to delay *all* fact discovery until October 1, 2021. Expedited discovery on the equal protection claim will continue; Defendants propose only that the discovery process as a whole—including potential discovery on other claims, if the Court allows it—need not be complete on the same expedited time-table.

iv. Whether discovery should proceed in phases.

Plaintiffs' position is that discovery should not proceed in phases.

Defendants' position is that the full scope of potential discovery is currently unknown, thus it cannot take a position at the moment on whether discovery should proceed in phases.

v. Whether expert discovery is contemplated and, if so, deadlines for Rule 26(a)(2) disclosures and expert depositions.

Plaintiff ICIRR anticipates expert discovery related to its equal protection claim. Plaintiffs also reserve the right to call an expert witness in connection with their APA claims. Expert discovery shall conclude sixty (60) days after the conclusion of fact discovery.

vi. Deadline for amending the pleadings and bringing in other parties.

Within 45 days of Defendants' answer, unless good cause is shown.

vii. Deadline for filing dispositive motions.

For Plaintiffs' APA claims, the deadline for filing dispositive motions shall be Friday, December 18, 2020. This is premised on the acceptance of Plaintiffs' proposed discovery deadlines above, and Plaintiffs also reserve the right to file a dispositive motion or motions earlier than this date.

For Plaintiff ICIRR's equal protection claim, the deadline for filing dispositive motions shall be 45 days after the end of expert discovery.

4. Whether there has been a jury demand.

Plaintiff ICIRR filed a jury demand with respect to its equal protection claim.

5. Estimated length of trial.

The Parties estimate that a trial could take 8-10 days.

D. Settlement

1. Describe settlement discussions to date and whether those discussions remain ongoing.

There have been no settlement discussions to date.

2. Whether the parties request a settlement conference.

The parties do not request a settlement conference.

E. Magistrate Judge

1. Whether the parties consent to proceed before a magistrate judge for all purposes.

The parties do not consent to proceed before a magistrate judge.

2. Any particular matters that have already been referred to the magistrate judge, and the status of those proceedings.

Not applicable.

Dated: July 13, 2020

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