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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

NATIONAL URBAN LEAGUE, et al.,

Plaintiffs,

v.

WILBUR L. ROSS, JR., et al.,

Defendants.

CASE NO. 5:20-cv-05799-LHK

PLAINTIFFS' STATEMENT RE: UNITED STATES SUPREME COURT'S STAY PENDING APPEAL

Date: TBD
Time: TBD
Place: Courtroom 8
Judge: Hon. Lucy H. Koh

In response to the Court's Order Re: United States Supreme Court's Stay and Case Management Conference (Dkt. 339), Plaintiffs respectfully note the following:

1. On October 13, 2020, the Supreme Court stayed this Court's September 24, 2020 Order Granting Plaintiffs' Motion for Stay and Preliminary Injunction ("PI Order") (Dkt. 208) until disposition of the appeal in the Court of Appeals for the Ninth Circuit and disposition of the petition for a writ of certiorari, if such writ is timely sought ("Supreme Court Order"). Because of the timing, the Supreme Court Order effectively resolves the question of preliminary relief regarding Plaintiffs' Administrative Procedure Act ("APA") claim. *See Nat'l Urban League v. Ross*, No. 20-16868, Dkt. 20 (setting a deadline of November 20 for the answering brief, and an optional reply brief deadline of within 21 days after service of the answering brief). The stay will remain in place until the Ninth Circuit resolves the pending appeal and the Supreme Court either denies a petition for a writ of certiorari or, after granting such a petition, resolves the case on its merits. Given the briefing schedule on appeal, and the time it takes to file and rule on a petition for a writ of certiorari, there is no likelihood that the stay will be lifted before the 2020 Census timelines or before a final judgment in this case. And although no court has yet addressed the Enumeration Clause claim, Plaintiffs do not currently intend to seek preliminary relief with respect to that claim (or any new claims). In short, Plaintiffs believe the focus of this case going forward should be on permanent relief.

2. As to permanent relief, the Supreme Court Order provides no meaningful guidance. The unexplained order does not reject any decision made by this Court or the Ninth Circuit on the threshold issues or on the merits.

As for the threshold issues, this Court rejected Defendants' arguments regarding the political question doctrine, standing, final agency action, and commitment to agency discretion by law. *See* PI Order 21-44. Defendants pursued only their final agency action argument when seeking a stay from the Ninth Circuit. And the Ninth Circuit soundly rejected that argument too. When seeking a stay from the Supreme Court, Defendants again abandoned their political question and standing arguments—and focused only on final agency action and (to a lesser extent) whether the questions presented had been committed to agency discretion by law. The unexplained decision granting the stay does not suggest any disagreement with this Court or the Ninth Circuit's disposition of those

issues. There are accordingly no grounds for Defendants to renew their already rejected threshold arguments.

As for the merits of the APA argument, the Supreme Court Order again says nothing. This Court found multiple APA violations and two separate panels of the Ninth Circuit agreed. Because the Supreme Court stay decision is silent, there is no reason to think that the Court disagreed with this Court or the Ninth Circuit's determination that the APA had been violated (or at least that Plaintiffs were likely to prevail on that argument).

The one issue on which the Ninth Circuit departed from this Court's reasoning, and a key focus of the Supreme Court briefing, was the issue of irreparable harm and a balance of the hardships. Specifically, the Ninth Circuit stayed the December 31 portion of this Court's preliminary injunction because it believed the balance of harms weighed in favor of Defendants for two primary reasons: (1) because the December 31 date was still three months away, and (2) because of separation of powers issues given the statutory nature of the reporting deadline. Accordingly, the only portion of the preliminary injunction still in effect when Defendants filed their application for a stay in the Supreme Court was the October 31 deadline for data collection. And as to that date, the primary focus of Defendants' briefing was on the completion rate. According to Defendants, the preliminary injunction should have been administratively stayed because it was essentially no longer necessary as the Census Bureau had already reached 99.9% of households. That is, there was allegedly no longer any irreparable harm. Given that focus, and history, Plaintiffs believe the Supreme Court Order may well have turned on a determination that the balance of harms had shifted between the time this Court granted the PI (on September 24) and when the Court ruled on the stay application (on October 13).

3. Although the Ninth Circuit appeal remains pending, that too should have no impact on further proceedings in this Court. As noted above, the PI Order has been superseded. As Plaintiffs argued to the Ninth Circuit and the Supreme Court, a decision granting Defendants' request for a stay would "effectively moot" the appeal. *Nat'l Urban League v. Ross*, No. 20-16868, Dkt. 40-1 at 1. The Ninth Circuit panel ruling on the administrative stay said the same. *See Nat'l Urban League v. Ross*, No. 20-16868, Dkt. 45 at 17. Accordingly, Plaintiffs' position is that the appeal

should be held in abeyance pending resolution of the merits and a decision on permanent relief before this Court. The parties met and conferred via email on the issue. A few hours ago, Defendants informed Plaintiffs they do not agree—and, shortly thereafter, filed their opening brief in the Ninth Circuit. Plaintiffs will, of course, respond in the Ninth Circuit as appropriate. But this case should proceed in the meantime to final judgment, as per the norm. Any Ninth Circuit decision on the Court's PI Order will come too late to be of any significance and, in any event, will be limited to the closed preliminary injunction record and will not speak to new developments in this case.

4. Plaintiffs' view is that the matter before this Court should move toward an expedited and final judgment. To that end, Plaintiffs propose the following schedule with deadlines noted below, focused on seeking an order from the Court on a motion for summary judgment (or, if necessary, after a bench trial) before the Secretary provides any state population counts to the President. Defendants previously and repeatedly took the position that this *has* to happen before the December 31 statutory deadline. But Defendants' most recent statements suggest that they have shifted, once again, from their previous statements to the courts, and that they may no longer view that date as binding.

EVENT	DEADLINE
Amended Complaint	October 27, 2020
Focused Discovery Period	October 27, 2020-November 20, 2020
Answer[1]	November 10, 2020
Cross-Motions for Summary Judgment	November 25, 2020
Cross-Oppositions to Motions for Summary Judgment	December 7, 2020
Cross-Replies	December 14, 2020
Hearing on Motions for Summary Judgment	December 17, 2020
Trial	December 21-24, 2020

[1] At the last Case Management Conference, Defendants stated that they were still considering whether to file an answer or motion to dismiss. Plaintiffs believe that Defendants' motion to dismiss/pleadings-based arguments have already been raised and resolved through extensive briefing in various courts, and that Defendants should now file their Answer. To the extent Defendants want to raise any further legal arguments, without fear of waiver, an expeditious schedule for motions for summary judgment would allow them to do so.

5. Plaintiffs plan to file an amended complaint on Tuesday, October 27, 2020. The amended complaint will, in large part, be identical to Plaintiffs' original complaint, but will include additional allegations on issues that have become increasingly important in recent weeks. Two are worth briefly flagging here.

First, through their rush to justify finishing the count for the 2020 Census, Defendants have introduced a new issue in the case regarding the completion rate metrics and processes for data collection. Defendants have repeatedly and expressly utilized increased completion rates with regard to data collection to attack Plaintiffs' claims and the Court's PI Order, and to obtain a stay. Ironically, of course, it was the Court's PI Order that extended the data collection period that allowed Defendants to even make these arguments regarding increased data completion. Nonetheless, Defendants continue to tout, in their opening brief in the Ninth Circuit filed just today, how they were able to reach a 99% completion rate by October 15—which they claim somehow shows this Court should never have issued its PI Order on September 24. The argument is logically unsound and remarkably disingenuous. Defendants told this Court via sworn testimony that they would reach a 99% completion rate in every state by September 30, argued vociferously that data collection should therefore not go a single day past September 30, and insisted that they should be allowed to start winding up Census operations, regardless of completion rates, as early as September 11. If the Court had taken Defendants at their word, the result would have been a disastrous census count—completion rates as of September 30 were under 99% (in some cases dramatically so) *in over a third of the states in the nation*. *See* U.S. Census Bureau, 2020 Census Housing Unit Enumeration Progress by State (Sept. 30, 2020), https://2020census.gov/content/dam/2020census/news/daily-nrfu-rates/nrfu-rates-report-09-30.pdf. And even those numbers were inflated, since at a minimum the wind-down would have started weeks prior. Defendants were forced to count millions more Americans only as a result of this Court's orders.

Defendants' assertions that the overall final completion count is proof that the Court's orders should never have issued in the first place raise a number of serious questions—and especially as to the claimed completion rates themselves. In making these arguments, while admitting that some unknown amount of changes have been made to the Bureau's NRFU processes that coincided with

the increase in completion rates, Defendants have squarely put at issue whether the completion rates, metrics, and processes the Census Bureau has employed are accurate and are being correctly portrayed. *See* Appl. for a Stay 7-8 n.3, *Ross v. Nat'l Urban League*, No. 20A62 (U.S. Oct. 7, 2020) (conceding that "operations under the Replan Schedule used fewer follow-up visits from some addresses" and made other "changes" to supplying POP counts and fewer random reinterviews "as a quality check"). Indeed, Justice Sotomayor's dissent from the Supreme Court Order, the only written opinion from the Supreme Court on this case, flagged this issue—and as the Court knows, dozens of Census field employees have written to the Court to draw attention to questionable practices.

Second, Defendants' Supreme Court filings and changed position make clear that the data processing aspect of the census has become even more critical, and Defendants' truncation of that process has become even more extreme. Defendants' ever-changing positions regarding the time required for data processing demonstrates that Defendants have not provided this Court with accurate information regarding data processing timelines. *Compare* Dkt. 131-7 at 10 ("Post-processing must start by October 1, 2020"), *and* Dkt. 131-8 ¶ 107 ("[W]e wish to be crystal clear that if the Court were to extend the data collection period past September 30, 2020, the Census Bureau would be unable to meet its statutory deadlines to produce apportionment counts prior to December 31, 2020 and redistricting data prior to April 1, 2021."), *with* Dkt. 233 at 147-48 ("The latest date to begin post data collection processing that allows Census Bureau to deliver state counts for apportionment to the Secretary of Commerce by December 31, 2020 is October 6, 2020."). Current statements by Defendants indicate that the Census Bureau has now abandoned the December 31, 2020 statutory deadline—the principal argument raised by Defendants throughout all court proceedings in this case. *See* U.S. Census Bureau, Transcription of News Briefing by U.S. Census Bureau to Provide Updates on 2020 Census Operations at 19 (Oct. 21, 2020), https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/20201021-transcript-2020-census-op-brief.pdf (Associate Director Fontenot acknowledging that the Census Bureau "did not say we were going to be able to meet the December 31 deadline. We said we're working to come as close as possible to the December 31 deadline"). Defendants' shifting arguments, and inability to complete adequate data

processing procedure before December 31, establish without question Plaintiffs' APA and Enumeration Clause claims in this case.

Dated: October 23, 2020

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ATTESTATION

I, Sadik Huseny, am the ECF user whose user ID and password authorized the filing of this document. Under Civil L.R. 5-1(i)(3), I attest that all signatories to this document have concurred in this filing.

Dated: October 23, 2020

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