FILED
2020 Aug-03 PM 05:04
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

STATE OF ALABAMA, et al.,

*Plaintiff*s,

v.

UNITED STATES DEPARTMENT OF COMMERCE; et al.,

Defendants,

and

DIANA MARTINEZ, et. al.

Defendant-Intervenors,

and

JOEY CARDENAS, et. al.,

Cross-Claimants,

v.

BUREAU OF CENSUS, et al.,

Cross-Defendants.

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Civil Action No. 2:18-cv-00772-RDP

PLAINTIFFS' BRIEF IN RESPONSE TO THE COURT'S JULY 23, 2020 BRIEFING ORDER (DOC. # 153)

This brief is in response to the Court's order requesting briefing regarding the effect, if any, that President Trump's recent Memorandum (Doc. 152-1) "may have on the claims asserted in this case." (Doc. 153). While the Memorandum might ultimately cause Defendants to redress Plaintiffs' asserted injuries, Defendants have not yet done so and it is not yet clear whether they will do so. Plaintiffs' claims, therefore, are not moot, and this litigation should proceed.

BACKGROUND

The decennial census is designed to serve "the constitutional goal of equal representation." *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992). To that end, Congress has delegated to the Secretary of Commerce the authority to conduct the census to ensure that congressional representatives and Electoral College votes are "apportioned among the several States according to their respective numbers." U.S. Const. amend. XIV, § 2.

In May 2018, Plaintiffs the State of Alabama and Representative Morris Brooks brought this suit against the Secretary, the Department of Commerce, the Census Bureau, and the Bureau's Acting Director. (*See* Docs. # 1, 112). Plaintiffs contend that both the Constitution and the Administrative Procedure Act prohibit Defendants from including illegal aliens as part of the apportionment base. And Plaintiffs have alleged that if illegal aliens are included in the 2020 census apportionment base, Alabama is substantially likely to lose a congressional seat and Electoral College vote that the State would maintain if the apportionment base included only citizens and lawfully present aliens.

Plaintiffs seek declaratory and injunctive relief that would prevent this representational harm. Plaintiffs request that the Census Bureau's Residence Rule[1] be declared unlawful and be

[1] *See* Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525 (February 8, 2018) (to be codified at 15 C.F.R. Ch. I) ("Residence Rule").

vacated insofar as it permits or requires the Census Bureau to include illegal aliens in the apportionment base used to apportion congressional seats and Electoral College votes among the states. (Doc. # 112, ¶ 144(a), (c)). Plaintiffs further request that the Court declare that an apportionment that "does not use the best available methods to exclude illegal aliens from the apportionment base used to apportion congressional seats and Electoral College votes among the states would be unconstitutional." (*Id.* ¶ 144(b)). Plaintiffs ask for a remand to permit Defendants to issue a new rule that complies with that declaration. (*Id.* ¶ 144(d)). And Plaintiffs request any additional relief, including injunctive relief, that the Court deems appropriate. (*Id.* ¶ 144(e)).

On July 21, 2020, the President issued a Presidential Memorandum entitled "Memorandum on Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census." 85 Fed. Reg. 44,679 (July 23, 2020) (Doc. # 152-1). The Memorandum states that "[t]he Constitution does not specifically define which persons must be included in the apportionment base," that the Constitutional "term 'persons in each State' has been interpreted to mean that only the 'inhabitants' of each State should be included," and that "[d]etermining which persons should be considered 'inhabitants' for the purpose of apportionment requires the exercise of judgment." (Doc. # 152-1 at 2). The Memorandum concludes that Congress has delegated to the executive branch the "discretion … to determine who qualifies as an 'inhabitant,'" which "includes authority to exclude from the apportionment base aliens who are not in a lawful immigration status." (*Id.*).

The Memorandum then declares that "it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. 1101 *et seq.*), to the maximum extent feasible and consistent with the discretion delegated to the executive branch." (*Id.* at 3). The Memorandum orders the Secretary of Commerce to "take all appropriate action, consistent with the Constitution

and other applicable law, to provide information permitting the President, to the extent practicable, to exercise the President's discretion to carry out" that policy. (*Id.* at 4). Finally, the Memorandum makes clear that it does not "create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person." (*Id.*).

Three days after the President issued the Memorandum, the Defendants provided responses to interrogatories served by the Martinez Intervenors. *See* Ex. A. In those responses, the Defendants stated that the Census Bureau is "evaluat[ing] whether it is possible to use … data sources, such as administrative records, to determine the number of undocumented immigrants," but that "Defendants have not yet reached a final determination about the full extent of their ability to produce an actual count of undocumented immigrants in the 2020 census." *Id.* at 7.

ANALYSIS

The President's recent Memorandum raises questions of mootness as the Memorandum increases the likelihood that Defendants might ultimately provide Plaintiffs relief that would redress Plaintiffs' claims. But Defendants have not yet provided Plaintiffs that relief. And at this moment, it is far from certain whether Defendants will do so. Plaintiffs' claims thus are not moot.

"Mootness arises when an issue presented in a case is 'no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Keohane v. Fla. Dep't of Corr. Sec'y*, 952 F.3d 1257, 1267 (11th Cir. 2020) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). "But a case 'becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *Knox v. Serv. Empls.*, 132 S. Ct. 2277, 2287 (2012)). Thus, "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.*

Under this framework, Plaintiffs' claims are not moot, for the President's Memorandum has not yet made "it impossible for [the] court to grant any effectual relief whatever to" Plaintiffs. *Id.* While mootness may sometimes arise after a plaintiff has obtained her requested relief from a defendant, Plaintiffs do not yet possess their requested relief. A defendant's stated intent to try to provide a plaintiff relief is not the same as an action that delivers that relief.

For example, in *National Association of Manufacturers v. Department of Defense*, 138 S. Ct. 617 (2018), petitioners challenged the federal defendants' rule defining "waters of the United States" (the "WOTUS Rule"). While litigation was pending, the defendants proposed two rules, one that would rescind the WOTUS Rule and another that would delay the WOTUS Rule's effective date. *Id.* at 627 n.5. Those developments, however, did not render petitioners' challenge moot. Petitioners wanted the WOTUS Rule vacated, and "[b]ecause the WOTUS Rule remains on the books for now, the parties retain a concrete interest in the outcome of this litigation, and it is not impossible for a court to grant any effectual relief ... to the prevailing party." *Id.* (cleaned up). Conversely, in *New York State Rifle & Pistol Association v. City of New York*, 140 S. Ct. 1525 (2020), the government defendant (New York City) did more than show an intent to remedy plaintiffs' harms. The City amended its challenged rule to provide "the precise relief that petitioners requested in the prayer for relief in their complaint." *Id.* at 1526. That action rendered plaintiffs' "claim for declaratory and injunctive relief with respect to the City's old rule … moot." *Id.* In this case, Plaintiffs have not yet received the relief they seek, and an order from this Court could help deliver that relief. Plaintiffs' claims therefore are not moot.

Even if Defendants' intent were relevant to the jurisdictional inquiry, the Memorandum at most suggests that Defendants *might* provide Plaintiffs their requested relief, not that Defendants will do so. Defendants may now be working toward remedying Plaintiffs' harms, but they have

not yet shown that they will be able to provide that relief. *See* Ex. A at 7. In short, there is good reason to think Defendants might not prepare a report for the President that would allow him to exclude illegal aliens from the apportionment count that he will send to Congress. And if Defendants fail to take actions that redress Plaintiffs' harms, this Court could still issue an order that creates "'a substantial likelihood' of redressability." *Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1126-27 (11th Cir. 2019) (quoting *Duke Power Co. v. Carolina Envtl. Study Grp., Inc*., 438 U.S. 59, 79 (1978)). The parties thus retain "a concrete interest … in the outcome of the litigation," *Chafin*, 568 U.S. at 172, and this case should proceed.

Moreover, even if the Court determines that the Memorandum has redressed Plaintiffs' claims, the case should continue, for "[t]he doctrine of voluntary cessation provides an important exception to the general rule that a case is mooted by the end of the offending behavior." *Troiano v. Supervisor of Elections in Palm Beach Cty*., 382 F.3d 1276, 1282 (11th Cir. 2004). This exception too has its own exception: A defendant's voluntary actions can moot a case "when there is no reasonable expectation that the voluntarily ceased activity will, in fact, actually recur after the termination of the suit." *Id.* at 1283. "The test for determining that no such reasonable expectation exists is ordinarily a stringent one and, accordingly, the party asserting mootness generally bears a heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs*, 868 F.3d 1248, 1256 (11th Cir. 2017) (cleaned up). But courts grant "governmental entities and officials … considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities." *Id.* Accordingly, "a challenge to a government policy that has been unambiguously terminated will be moot in the absence of some reasonable basis to believe that the policy will be reinstated if the suit is terminated." *Id.*

Here, even if the policy announced in the Memorandum constitutes a voluntary cessation of Defendants' challenged conduct—as opposed to just a stated intent to cease that conduct—there is still "a 'reasonable expectation' … that the government defendant 'will reverse course and reenact' the repealed rule." *Keohane*, 952 F.3d at 1268 (quoting *Flanigan's*, 868 F.3d at 1256). The Eleventh Circuit has highlighted three non-exhaustive factors for courts to consider in making this determination. First, courts "consider whether the termination of the offending conduct was unambiguous." *Rich v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 531 (11th Cir. 2013) (quoting *Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga*., 633 F.3d 1297, 1310 (11th Cir. 2011)). Second, courts consider "whether the change in government policy or conduct appears to be the result of substantial deliberation, or is simply an attempt to manipulate jurisdiction." *Id.* at 532. And, third, courts consider "whether the government has 'consistently applied' a new policy or adhered to a new course of conduct." *Id.* At least two of those factors suggest a substantial likelihood that the Defendants will not redress Plaintiffs' harms absent some action by this Court.

The first factor favors further litigation of Plaintiffs' claims because the termination of Defendants' offending conduct is ambiguous. As discussed above, Defendants have not yet determined whether they will be able to carry out the policy announced in the Memorandum. *See* Ex. A at 7. Thus, there is good reason to think Defendants may resort to their earlier approach "at some point in the future." *Rich*, 716 F.3d at 532. The third factor likewise suggests that Defendants' conduct may recur; Defendants are still attempting to apply the new policy, so it is too soon to say that they have "'consistently maintained' and applied" it. *Keohane*, 952 F.3d at 1270. The second factor (deliberation vs. litigation manipulation) favors a finding of mootness, as there is little indication that issuance of the Memorandum "was an attempt to manipulate

jurisdiction." *Id.* at 1269. But Plaintiffs' claims are not moot, for "the remaining considerations tip the scale decisively in the other direction." *Id.*[2]

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[2] The Martinez Intervenors have also filed a cross-claim seeking declaratory relief and an injunction that would bar Defendants from reporting to the President or Congress "an altered tabulation for the purposes of congressional apportionment that attempts to exclude the undocumented population." (Doc. # 119 at 40). Plaintiffs take no position on the effect, if any, the Memorandum has on the cross-claim.

CERTIFICATE OF COUNSEL

I certify, as an officer of the Court, that I have affirmatively and diligently sought to submit to the Court only those documents, factual allegations, and arguments that are material to the issues to be resolved in the motion, that careful consideration has been given to the contents of Plaintiffs' submission to ensure that it does not include vague language or an overly broad citation of evidence or misstatements of the law, and that the submission is non-frivolous in nature.

s/Edmund G. LaCour Jr.
Edmund G. LaCour Jr.
Solicitor General

CERTIFICATE OF SERVICE

This is to certify that on the 3rd day of August, 2020, a copy of the foregoing has been electronically filed with the Clerk of the Court using the CM/ECF system, which will electronically send a copy of the same to all counsel of record electronically registered with the Clerk.

s/Edmund G. LaCour Jr.
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