



U.S. Department of Justice
Civil Division
Federal Programs Branch

October 2, 2020

Via CM/ECF

The Honorable Pamela A. Harris

U.S. Circuit Judge

The Honorable Ellen L. Hollander

U.S. District Judge

The Honorable Paula Xinis

U.S. District Judge

Re: *La Unión Del Pueblo Entero, et al. v. Trump, et al.*, No. 8:19-cv-2710 (D. Md.)

Dear Judges Harris, Hollander, and Xinis:

On October 1, 2020, this Court ordered Defendants to provide further information on (1) the effect of the U.S. District Court for the Northern District of California's September 24 preliminary injunction; (2) the effect of the October 5 "target date" for completing the data collection phase of the 2020 Census; and (3) "if the Bureau still intends to meet the December 31 statutory deadline, how it plans to accomplish an accurate final enumeration given that the post-data processing phase has been shortened further." ECF No. 125. Early this morning (Eastern Time), the California District Court clarified its September 24 injunction, explaining that Defendants cannot cease data collection operations before October 31, 2020. *See Nat'l Urban League v. Ross*, No. 20-cv-0577, ECF No. 288 at 10 (N.D. Cal. October 2, 2020) (noting that the September 24 order requires "immediate reinstatement of the COVID-19 Plan's deadlines of October 31, 2020 for data collection and April 30, 2021 for reporting the tabulation of total population to the President"). That court also ordered certain compliance measures, like "a new text message to all Census Bureau employees . . . stating that the October 5, 2020 'target date' is not operative," and a declaration by Census Bureau Director Steven Dillingham that "details the steps Defendants have taken to prevent future violations of the Injunction Order." *Id.*

The attached declaration from Associate Director Fontenot briefly explains how the Census Bureau had previously intended to meet the December 31 statutory deadline using an October 5 "target date" for conclusion of field operations. But as a result of the California District Court's orders, that "target date" is no longer operative, and the Census Bureau is reevaluating all operations to comply with those orders. *See Fontenot Decl.*

¶¶ 6–8. This ongoing reevaluation, as well as the uncertainty of emergency appeals,¹ means that this Court’s requested information is already outdated. *See id.* If the California injunction remains in place, the Census Bureau likely cannot meet the December 31 statutory deadline. *Id.* ¶ 8. If, on the other hand, the California injunction is stayed by the Ninth Circuit or the Supreme Court, and the Census Bureau is able to complete field operations by October 5, then the Census Bureau anticipates achieving a complete and accurate census by the statutory deadline. *Id.* (also explaining the timing of data production to implement the Presidential Memorandum). Defendants appreciate this Court’s careful consideration of the issues here and plan to update this Court with the status of census operations and any appeals by 5:00 p.m. on October 7, 2020, or at any other time preferred by the Court.²

There is, however, relevant information that Defendants can provide today. As of October 1, the Census Bureau has enumerated 99.1% of the country’s households. That is comparable to the completion rate for prior censuses, and “above the completion rate required for a complete and accurate enumeration by any standard.” Fontenot Decl. ¶¶ 10–11. So even if this Court had jurisdiction, Plaintiffs cannot overcome the “substantial deference” owed to the Secretary to establish a violation of whatever standard applies under the Enumeration Clause. *See* Defs.’ Opp’n at 24–35, 29–30, ECF No. 117.

But this Court does not have jurisdiction, and there is no standard to apply here. *See id.* at 5–18. “Determining what level of [census] accuracy is sufficient” — as Plaintiffs advocate — “is simply not something that the judicial branch is equipped to do.” *Nat’l Urban League v. Ross*, --- F.3d ---, 2020 WL 5815054, at *9 (9th Cir. Sept. 30, 2020) (Bumatay, J., dissenting).³ Put simply, “[d]eciding whether the census meets a free-floating concept

¹ Defendants’ motion for a stay pending appeal will be fully briefed in the Ninth Circuit by October 3, 2020.

² Defendants conferred with Plaintiffs about a possible postponement of the filings required by the Court’s October 1 Order. But despite obtaining their requested relief by way of the California orders, Plaintiffs did not agree to postpone the parties’ submissions until further clarity is gained next week, and Defendants submit this letter in accordance with the Court’s Order.

³ In the Ninth Circuit’s decision, only one judge grappled with the arguments Defendants advance in this case, and he found that the issue presented here “is exactly the type of political question that courts are powerless to adjudicate.” *Nat’l Urban League*, 2020 WL 5815054, at *7 (Bumatay, J., dissenting). The remaining judges focused almost exclusively on “the need to preserve the status quo.” *Id.* at *3; *id.* at *4 (noting that the

of ‘accuracy’ is exactly the type of political question that courts are powerless to adjudicate.” *Id.* at *7. “Even under ordinary circumstances, the Secretary and Bureau must juggle many important considerations when designing the census plan.” *Id.* at *8. But “[b]y requiring the Bureau to prioritize an elusive standard of accuracy over and above the interest in completing the census in a timely manner, as prescribed by Congress, [a] court substitutes its own policy determination for those set by Congress and delegated to the Secretary.” *Id.*

This is all the more important because Plaintiffs may seek relief *after* the census is timely completed, *see Utah v. Evans*, 536 U.S. 452, 464 (2002), but “[a]ny time a [government] is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury,” *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (citation omitted). Plaintiffs do not even allege that the statutory deadline *itself* is unconstitutional, which is all this Court needs to know. “Congress makes laws, the Executive enforces them, and [courts] interpret them in the course of adjudicating disputes.” *Nat’l Urban League*, 2020 WL 5815054, at *10. So where, as here, “Congress by [] statute sets a specific deadline for agency action, neither the agency nor any court has discretion. The agency must act by the deadline.” *South Carolina v. United States*, 907 F.3d 742, 758 (4th Cir. 2018) (quoting *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999)).

The Court should deny Plaintiffs’ preliminary-injunction motion, and Plaintiffs should petition Congress, not this Court, for appropriate relief.

majority does not reach the jurisdictional issues). But the majority disregarded a declaration from Associate Director Fontenot—similar to the declaration submitted in this case—because that declaration was not “in the administrative record but was instead prepared for litigation.” *Id.* at *3. No such “administrative record” even arguably exists here, and the Court should take Associate Director Fontenot’s unrebutted declaration at its word.

DATED: October 2, 2020

Respectfully submitted,

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