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

June 8, 2018

Via CM/ECF
The Honorable Paul W. Grimm
United States District Judge
United States Courthouse
6500 Cherrywood Lane
Greenbelt, Maryland 20770

Re: *NAACP, et al. v. Bureau of the Census, et al.*, No. 8:18-cv-0891 (D. Md.)

Dear Judge Grimm:

Pursuant to the Court's *Letter Order Regarding the Filing of Motions*, *see* ECF No. 3, and the Court's *Order Memorializing the May 8, 2018 Conference Call*, *see* ECF No. 27, Defendants Bureau of the Census; Ron Jarmin, performing the nonexclusive functions and duties of Director, U.S. Census Bureau; Wilbur Ross, Secretary of Commerce; Donald Trump, President of the United States; and the United States (collectively, "Defendants") hereby request that the Court schedule a pre-motion conference in anticipation of Defendants' motion to dismiss. Defendants' motion will argue that, under Federal Rule of Civil Procedure 12(b)(1), the Court lacks jurisdiction to hear this case because (1) Plaintiffs lack standing to bring their claim, (2) Plaintiffs' claim is not ripe for review, and (3) Plaintiffs' claim presents a nonjusticiable political question. Alternatively, Plaintiffs' claim should be dismissed under Rule 12(b)(6) because the Complaint fails to state a claim under the Enumeration Clause of the Constitution.[1]

Factual Background: The Constitution provides that Representatives "shall be apportioned among the Several States . . . according to their respective Numbers," which requires "counting the whole number of persons in each State." U.S. Const. amend. XIV, § 2. To calculate the "number of persons in each State," the Enumeration Clause requires an "actual Enumeration" every 10 years "in such Manner as [Congress] shall by Law direct." *Id.* art. I, § 2, cl. 3. The Census Bureau, under the direction of the Secretary of Commerce, conducts the decennial census to fulfill this constitutional command.

Plaintiffs are organizations and residents associated with Prince George's County, Maryland, as well as the County itself. They advance the novel constitutional argument that, nearly two years before a single person is counted, preparations for the 2020 Census are so deficient as to violate the Enumeration Clause. Specifically, Plaintiffs allege that underfunding, understaffing, and lack of leadership at the Census Bureau, along with design flaws in certain census operations, will result in an undercount of racial and ethnic minorities generally—and County residents specifically—thus imperiling the County's share of political representation and federal funding.

***Plaintiff's Complaint*:** Plaintiffs filed a Complaint on March 28, 2018. *See* ECF No. 1. Plaintiffs assert only one claim: that Defendants' preparations for the 2020 Census violate the Enumeration Clause. In an extraordinary request, Plaintiffs seek, *inter alia*, "an injunction that requires Defendants to propose and implement, subject to this Court's approval and monitoring, a plan to ensure that the hard-to-count populations will be actually enumerated in the decennial census."

[1] Defendants will also be moving to dismiss Donald Trump, President of the United States, and the United States as improper parties.

***Bases for Defendants' Proposed Motion*:** Defendants' proposed motion to dismiss will argue that the Court lacks jurisdiction over this case because (1) Plaintiffs lack standing to bring their claim, (2) Plaintiffs' claim is not ripe for review, and (3) Plaintiffs' claim is barred by the political-question doctrine. Alternatively, Plaintiffs' claim should be dismissed because the Complaint fails to state a claim under the Enumeration Clause.

First, the Court lacks jurisdiction because Plaintiffs do not have standing. Indeed, Plaintiffs fail all three prongs of the Article III standing inquiry because they allege only a highly speculative injury that is not fairly traceable to Defendants' actions and cannot be redressed by the Court. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). With respect to the injury requirement, Plaintiffs' theory of harm—disproportional representation and loss of funding—assumes there will be a differential census undercount, which is unknown (and unknowable) at this juncture. Further, even if there were a differential undercount of racial and ethnic minorities, apportionment of Representatives and allocations of federal aid are based on complex formulas that rely on not only one state's or locality's population count, but also the population counts of other states and localities. Thus, any loss of either representation or funds is far from "certainly impending," *see Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013), because an under- or over-count in one state or locality may be offset by an under- or over-count in another state or locality.

Even if Plaintiffs' allegations were not inherently speculative, Plaintiffs also fail to establish the second and third prongs of standing: traceability and redressability. Plaintiffs' tenuous theory of harm, based on some persons not responding to the census, is not attributable to Defendants' significant census preparations, but rather to independent actions of third parties: individuals who disobey a legal duty to respond to the census. And perhaps most problematically, the Court cannot redress Plaintiffs' alleged harm because it has no power to order Congress's appropriation of more funds, the President's appointment of a Census Director (and the Senate's confirmation of the same), or a reallocation of agency staff. All of these programmatic decisions are beyond the judiciary's power, *see Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990), and, due to the speculative nature of Plaintiffs' alleged harm, may have no impact on Plaintiffs' ultimate representation in Congress or receipt of federal funds.

Second, the Court lacks jurisdiction because Plaintiffs' claim is not ripe for review. A case is only ripe for judicial decision "when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties." *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006). Here, Plaintiffs' claim rests solely on unknowable future events. Indeed, even if Plaintiffs' allegations of census "deficiencies" were plausible—and a wealth of publically-available census information demonstrates that they are not—the issues Plaintiffs identify could be remedied far in advance of Census Day in April 2020. For example, even if the Secretary were to spend all the money appropriated for the 2020 Census as well as the contingency fund that Congress has provided, the Census Bureau could request and Congress could appropriate additional funds as the census draws closer. These events would alleviate many, if not all, of Plaintiffs' complaints about funding, staffing, and operational deficiencies. Further, the President could nominate, and the Senate could confirm, a new Census Director at any time before April 2020, thereby alleviating any complaints about Census Bureau leadership. In other words, Plaintiffs' allegations hinge on future uncertainties regarding funding, leadership, staffing, and operations that are far from determined, demonstrating that this case is not ripe for judicial review. Moreover, Plaintiffs will not suffer hardship if this case is dismissed: all individuals have a legal obligation to respond to the census, 13 U.S.C. § 221, regardless of the scope or extent of pre-census planning.

Third, the Court lacks jurisdiction because Plaintiffs' claim is barred by the political-question doctrine. This doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the

confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). This case implicates not one, but three constitutional powers that are committed to the Political Branches by the Constitution's text: Congress's plenary power over the "[m]anner" of the Census, Congress's power to "make all Laws which shall be necessary and proper," and the President's power to "nominate, and by and with the Advice and Consent of the Senate, [ ] appoint . . . all [ ] Officers of the United States." U.S. Cons. art. I, § 2, cl. 3; art. I, § 8; art. II, § 2. Beyond the plain text, however, decisions regarding the information-gathering procedures for the census are fully committed to the discretion of Congress—and, by delegation, the Secretary of Commerce—for a reason: each procedure requires a careful balancing of considerations such as cost, testing, training, effectiveness, timing, informational need, and accuracy. These considerations are quintessentially policy choices outside the province of the judiciary, and therefore this case is barred by the political-question doctrine.

Even if this case were justiciable, the Complaint should be dismissed because it fails to state a claim under the Enumeration Clause. The Constitution's reference to "actual Enumeration" is simple: population is to be determined through a person-by-person headcount, rather than through estimates or conjecture. Plaintiffs do not and cannot allege that the Secretary will be estimating rather than counting the population, and he has in fact established procedures for doing so that are more wide-ranging and more advanced than any previous decennial census. Furthermore, while the possibility of an undercount exists in every census, the Constitution does not require perfection. *See Wisconsin v. City of N.Y.*, 517 U.S. 1, 6 (1996). As long as the Secretary has established procedures for counting every resident of the United States, any undercount is the constitutionally permissible result of attempting to enumerate upwards of 325 million people across 3.8 million square miles.

For these reasons, Defendants respectfully request the Court's permission to file a dispositive motion.

Very truly yours,

CHAD A. READLER
Acting Assistant Attorney General

CARLOTTA P. WELLS
Assistant Director, Federal Programs Branch

/s/ Stephen Ehrlich
KATE BAILEY
STEPHEN EHRLICH
CAROL FEDERIGHI
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20530
Tel.: (202) 305-9803
Fax: (202) 616-8470
Email: stephen.ehrlich@usdoj.gov

Attorneys for Defendants

cc: Counsel of Record (via CM/ECF)