

FOR PUBLICATION

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UNITED STATES COURT OF APPEALS

OCT 7 2020

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NATIONAL URBAN LEAGUE; LEAGUE OF WOMEN VOTERS; BLACK ALLIANCE FOR JUST IMMIGRATION; HARRIS COUNTY, Texas; KING COUNTY, Washington; CITY OF LOS ANGELES, California; CITY OF SALINAS, California; CITY OF SAN JOSE, California; RODNEY ELLIS; ADRIAN GARCIA; NAVAJO NATION; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; CITY OF CHICAGO, Illinois; COUNTY OF LOS ANGELES, California; GILA RIVER INDIAN COMMUNITY,

Plaintiffs-Appellees,

v.

WILBUR L. ROSS, in his official capacity as Secretary of Commerce; UNITED STATES DEPARTMENT OF COMMERCE; STEVEN DILLINGHAM, in his official capacity as Director of the U.S. Census Bureau; UNITED STATES CENSUS BUREAU,

Defendants-Appellants,

and

STATE OF LOUISIANA; STATE OF MISSISSIPPI,

No. 20-16868

D.C. No. 5:20-cv-05799-LHK
Northern District of California,
San Jose

ORDER

Intervenor-Defendants.

Before: GRABER, W. FLETCHER, and BERZON, Circuit Judges.

Just as the 2020 decennial census was getting underway, the COVID-19 pandemic hit, freezing operations and disrupting a process that had taken nearly a decade to plan. The Census Bureau (“Bureau”) instituted a revised schedule on April 13 (“COVID-19 Plan”), extending its operations to account for this delay. But on August 3, 2020, the Secretary of Commerce (“the Secretary”) announced a new schedule (“the Replan”), under which the Bureau greatly compressed, as compared both to the original schedule and to the COVID-19 Plan, the time allocated to various stages for completing the census. The district court issued a preliminary injunction preventing the Bureau from implementing its proposed Replan schedule for conducting the census. Addressing the government’s emergency motion for a stay of the preliminary injunction pending appeal, we conclude that the government is unlikely to succeed on the merits of the appeal as to the Plaintiffs’ Administrative Procedure Act (“APA”) claims. To the extent that the district court enjoined the Replan and the September 30, 2020, deadline for data collection, the government has not met its burden in showing irreparable harm, and the irreparable harm to the Plaintiffs and the resulting balance of equities justify the denial of a stay. To the extent that the district court enjoined the

government from attempting to meet the December 31, 2020, statutory deadline for completing tabulations by state, the government has, at this juncture, met its burden in seeking a stay pending appeal. We therefore deny the government's motion for a stay in part and grant it in part.

I.

The “Bureau’s mandate in conducting the decennial census is to count everyone living in the United States” and its territories, as Bureau Associate Director Fontenot described in his September 5 declaration. The Bureau spent most of the last decade planning the 15.6 billion dollar 2020 decennial census, an undertaking of extreme complexity.

The four critical interlocking steps of the 2020 census are: (1) soliciting self-response by households, electronically or by mail; (2) non-response follow-up (“NRFU”); (3) data processing; and (4) submission by the Secretary of the two statutorily required reports based on the census data. 13 U.S.C. § 141(b)–(c). The Secretary is required to tabulate the total population by state for congressional apportionment, a task that “shall be completed within 9 months after the census date,” of April 1. *Id.* § 141(b). The Secretary also must tabulate population data used by states for districting, which “shall be completed by him as expeditiously as possible after the decennial census date” and “shall, in any event, be completed,

reported, and transmitted to each respective State within one year after the decennial census date.” *Id.* § 141(c).

Just six days after the self-response period began, in March 2020, COVID-19 stopped the entire census process in its tracks. Following Office of Management and Budget (“OMB”) guidance, the Bureau completely suspended decennial field operations for 47 days between March 18 and May 4, and restarted operations in phases over the next two weeks. During that freeze, the Bureau created a new schedule to accommodate the COVID-19 delays.

On April 13, 2020, the Bureau adopted the COVID-19 Plan, extending the total time for the census from 54 weeks to 71.5 weeks. This extension restored to the schedule the 47 days lost to the complete pandemic shutdown. The Plan also provided additional time for field operations to restart and conclude by October 31, 2020. The Bureau reasoned that the pandemic would make hiring and training the huge temporary staff needed more difficult. Additional time would also be required for the NRFU process, both because of relocations caused by the pandemic and because of the difficulty of in-person canvassing when respondents would be reluctant to interact with enumerators for fear of contracting the illness. The extension also built in more time for data processing, needed to address the complexities of population shifts caused by COVID-19.

The Bureau requested that Congress accordingly extend the statutory deadlines by 120 days. Government officials, from the President to Bureau officers, strenuously maintained that the current statutory deadlines were impossible to meet after the delays and changes caused by the COVID-19 suspension and its aftermath. The House of Representatives passed a bill extending the statutory deadlines for reporting; the Senate Small Business and Entrepreneurship Committee held a hearing on the bill on July 23, 2020. Soon thereafter, the Administration switched gears, requesting, instead of an extension, additional funding to complete a “timely” census. Census Bureau Director Dillingham, when asked about the change at a House hearing, no longer supported an extension.

On July 31, 2020, the Bureau removed the October 31, 2020, deadline for data collection field operations from its website. Over the next four days, Bureau staff and officials prepared a presentation for Secretary Wilbur Ross on the feasibility of moving the end of data collection to September 30, 2020 and completing the data processing necessary for reapportionment by December 31. Despite the Bureau’s months-long position that meeting the statutory deadlines was impossible, Secretary Ross on August 3, 2020, approved the new Replan schedule, which ended field operations by September 30 and the initial data processing stage by December 31, 2020. This plan condensed the total time to

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