

No. 20-16868

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL URBAN LEAGUE, et al.,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California
Case No. 5:20-cv-05799-LHK

**APPELLEES' MOTION TO HOLD APPEAL IN ABEYANCE
OR, IN THE ALTERNATIVE,
FOR A 30-DAY EXTENSION OF TIME TO FILE RESPONSE BRIEF**

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Pursuant to Federal Rules of Appellate Procedure 26 and 27 and Ninth Circuit Rule 27-1, Plaintiffs-Appellees respectfully move the Court to hold this appeal in abeyance until April 30, 2021. Because the district court's preliminary injunction order (PI Order) that is the subject of this appeal has been stayed by the Supreme Court, and because the PI Order will soon be entirely moot—as will this appeal—there is no reason for further expenditure of judicial and party resources in this appeal.

Alternatively, the Court should hold this appeal in abeyance until at least December 31, or until the Secretary of Commerce delivers 2020 Census population numbers to the President as mandated by 13 U.S.C. § 141(b), whichever is later. Defendants have repeatedly stated that they intend to deliver the Secretary's report as close as possible to the statutory deadline of December 31, and the report and its timing may impact the appropriate resolution of this appeal. Accordingly, when the Secretary ultimately transmits the report, further briefing from the parties would likely be required. A short and non-prejudicial delay would obviate the need for such supplemental briefing, allowing Plaintiffs to address the impact of the Secretary's report in their response brief if necessary, and Defendants to do so in their reply. Once the population numbers are reported, the parties can advise this Court and propose a revised briefing schedule or other resolution.

Plaintiffs' response brief in this appeal is currently due on December 21, 2020. If the Court is unable to rule on this motion before that date, Plaintiffs respectfully request an additional 30 days to file their response brief. Counsel for Defendants-Appellants have indicated that they oppose Plaintiffs' motion to hold this case in abeyance, including for the reasons set forth in Doc. 55 (Nov. 16, 2020), but do not intend to file a written opposition unless the Court wishes.

BACKGROUND

This appeal concerns a challenge to Defendants' decision to radically truncate the time to complete the 2020 Census. The Census Bureau spent most of the last decade planning, developing, testing, and re-testing the operational plan for the 2020 Census (the "2018 Operational Plan"). ER 2-4. Then in March, just as census season began, the COVID-19 pandemic hit and the Bureau was forced to reevaluate its plan. *Id.* at 4-6. Over the course of the next month, the Bureau developed a revised plan, which it announced on April 13 (the "COVID-19 Plan"). *Id.* at 6-7. The COVID-19 Plan retained the key design choices of the 2018 Operational Plan; it simply adjusted the timeline for operations, ensuring that each was given the same amount of time or more. *Id.*

Over the next four months, Defendants implemented the COVID-19 Plan, partnering with Plaintiffs to advertise its deadlines to the public. *Id.* at 6-9. All of that changed when President Trump issued a memorandum on July 21 declaring that

it was the United States' policy to exclude undocumented immigrants from the congressional apportionment base. *Id.* at 9. After receiving a sudden request from Secretary Ross, the Bureau devised a new plan (the "Replan") over the course of just four or five days, which drastically cut the timelines for the 2020 Census. *Id.* at 9-12, 58, 80, 176 (¶ 81). The Replan required that all data collection conclude on September 30 (rather than October 31), and advanced the deadline for completing data processing and reporting to the President from April 30, 2021 to December 31, 2020. *Id.* at 12.

Plaintiffs brought suit and, on September 24, 2020, the district court issued its PI Order. *Id.* at 1-78. The PI Order enjoined Defendants from implementing the new, truncated deadlines for conducting the 2020 Census. *Id.* at 78. On October 1, 2020, the district court clarified that the injunction reinstated "the rule previously in force: the COVID-19 Plan deadlines of October 31, 2020 for the completion of data collection and April 30, 2021 for reporting the tabulation of total population to the President." *Id.* at 92.

In the meantime, on September 30, 2020, a panel of this Court denied Defendants' application for an administrative stay of the PI Order. *See Nat'l Urban League v. Ross*, 977 F.3d 698 (9th Cir. 2020). On October 7, another panel of this Court granted in part and denied in part a motion to stay the PI Order pending appeal. *See Nat'l Urban League v. Ross*, 977 F.3d 770 (9th Cir. 2020). And on October 13,

2020, the Supreme Court issued an order staying the entirety of the PI Order, which will remain in effect until this Court's ultimate disposition of this appeal and the Supreme Court's disposition of any petition for a writ of certiorari. *See Ross v. Nat'l Urban League*, No. 20A62, 2020 WL 6041178 (U.S. Oct. 13, 2020).

Defendants filed their opening brief on appeal of the now-stayed PI Order on October 23, 2020. Plaintiffs' response brief was originally due on November 20, 2020. After this Court granted a 30-day extension of time, Plaintiffs' brief is now due on December 21, 2020.

DISCUSSION

This appeal is already effectively moot. The Supreme Court's stay of the PI Order will last until at least July 2021, and the PI Order—and thus this appeal—will be moot as of April 30, 2021. The Court should hold this appeal in abeyance for the short time remaining until it becomes entirely moot.

1. As Plaintiffs explained in seeking an extension of the briefing schedule, this appeal is already essentially moot. The Supreme Court has stayed the district court's PI Order until the disposition of any petition for a writ of certiorari. Under the Supreme Court's COVID-19 guidance, a petition for a writ of certiorari would be due 150 days from the date of this Court's decision. *See Supreme Court of the United States Office of the Clerk, Guidance Concerning Clerk's Office Operations*

2 (Nov. 13, 2020).¹ On the current schedule, briefing of this appeal would not be complete until January 2021. Thus, even if this Court were to decide this appeal as soon as briefing is concluded and an argument held under the current schedule, and even if a petition for a writ of certiorari and opposition thereto were filed on an extremely expedited basis, the Supreme Court’s stay of the PI Order would last until at least July of 2021.

This appeal will be moot long before that date for two reasons. *First*, the data-collection portion of the injunction is already moot, and the data-processing portion will be moot as of April 30, 2021. In accordance with the Bureau’s own COVID-19 Plan, the injunction ordered Defendants to continue data collection until October 31, 2020—a date which has come and gone. In fact, Defendants ceased data collection on October 15, shortly after the Supreme Court’s Stay Order. As for data processing, the injunction ordered Defendants to continue data processing until April 30, 2021 (again, under the Bureau’s own COVID-19 Plan). No matter what happens, then, the preliminary injunction will expire on its own terms by the end of April 2021.

Second, district court proceedings in this case remain ongoing, and the district court has set any trial on the merits of this case for March 19, 2021. The PI Order will become moot upon the district court’s issuance of a judgment on any permanent

¹ Available at https://www.supremecourt.gov/announcements/COVID-19_Guidance_November_2020.pdf.

relief. *See Planned Parenthood Arizona Inc. v. Betlach*, 727 F.3d 960, 963 (9th Cir. 2013). The current trial schedule ensures that this will happen long before the Supreme Court’s stay expires. Indeed, in response to Plaintiffs’ request to this Court for an extension of time, Defendants did not deny that this appeal already “is ‘effectively moot’ in light of the Supreme Court’s grant of a stay [of the PI Order] and the district court’s plan for future proceedings.” *Opp. to Mot. for Extension of Time* at 4, ECF No. 55 (quoting *Mot. for Extension of Time* at 3, ECF No. 54).²

There is no reason for this Court to expend its resources—or for the parties to expend theirs—to resolve an appeal of a PI Order that is already stayed and will be moot in just a few months, well before the stay is lifted.

2. For the same reasons, holding this appeal in abeyance will not prejudice Defendants. While appeals of preliminary injunctions are generally expedited, that is because the preliminary injunction ordinarily remains in place while the appeal is pending. Because the PI Order in this case has been stayed by the Supreme Court, and Defendants are not currently enjoined in any way, they will suffer no harm from the Court’s grant of this motion.

² Defendants argued that this Court should nonetheless proceed to decide this appeal so that it can provide “guidance to the district court on any final judgment.” *Opp. to Mot. to Extend Time* at 4. Rushing an appeal on a stayed preliminary injunction is not the proper mechanism to give “guidance” to the district court, and this Court is not in the business of issuing advisory opinions.

3. Alternatively, this Court should hold the appeal in abeyance until the Secretary has reported total population numbers to the President. Defendants continue to state that they will report state population numbers “as close” to December 31, 2020 “as possible.” *See Update on 2020 Census Data Processing*, U.S. Census Bureau (Dec. 2, 2020).³ But recent news reports suggest that several processing anomalies have been uncovered that will delay reporting further. *See, e.g., Hansi Lo Wang, Millions of Census Records May Be Flawed, Jeopardizing Trump’s Bid to Alter Count*, NPR (Dec. 5, 2020)⁴; Michael Wines & Emily Bazelon, *Flaws in Census Count Imperil Trump Plan to Exclude Undocumented Immigrants*, New York Times (Dec. 4, 2020)⁵; Hansi Lo Wang, *Census ‘Anomalies’ Could Thwart Trump’s Bid To Alter Next Electoral College*, NPR (Nov. 19, 2020).⁶ Defendants have yet to acknowledge those reports in this litigation and, as recently as November 30, told the Supreme Court that “it remains possible” they will get relevant “data to the President in January.” Transcript of Oral Argument at 6-7, *Trump v. New York* (Nov. 30, 2020) (No. 20-366).

³ <https://www.census.gov/newsroom/press-releases/2020/update-2020-data-processing.html>.

⁴ <https://www.npr.org/2020/12/05/943416487/millions-of-census-records-may-be-flawed-jeopardizing-trumps-bid-to-alter-count>.

⁵ <https://www.nytimes.com/2020/12/04/us/census-trump.html>.

⁶ <https://www.npr.org/2020/11/19/936561664/anomalies-found-in-census-could-thwart-trumps-bid-to-alter-electoral-college>.

The Secretary's report and its timing may impact the proper resolution of this appeal and would likely require further briefing from the parties. On the current schedule, Plaintiffs' brief is due on December 21, and Defendants' reply brief is due on January 11. A short, non-prejudicial delay in the briefing schedule should avoid the need for supplemental briefing. Plaintiffs will promptly inform the Court of any material developments in this case, and notify the Court once the Secretary has reported population numbers to the President. At that time, the parties can further advise this Court of the appropriate disposition of the appeal and, if necessary, propose a revised briefing schedule. Accordingly, if the Court is not inclined to hold the appeal in abeyance until April 30, 2021 (which, Plaintiffs respectfully submit, is the most prudent and efficient course), it should at least hold the appeal and suspend the briefing schedule until the Secretary submits his report to the President—and order the parties to file short letter briefs proposing next steps within 14 days of the report's submission.

4. In the event that this Court is unable to rule on Plaintiffs' motion to hold this appeal in abeyance before December 21, 2020, Plaintiffs respectfully request an extension of 30 days, until January 20, 2021, to file their response brief.

Respectfully submitted,

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