

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

STATE OF ALABAMA, et al.,

Plaintiffs,

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.

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

JOINT STATUS REPORT

In response to the Court's second amended scheduling order (doc. 147), the parties have conferred and now submit this joint report stating their respective positions regarding the briefing schedule for potentially dispositive motions and any hearing(s) that should be set.

Plaintiffs' Position

Plaintiffs the State of Alabama and Representative Morris Brooks take the position that the Court should maintain the current date of October 21, 2020, as the due date for potentially dispositive motions. Responses to any briefs would be due 22 days later (to account for Veteran's Day), with reply briefs due 13 days after responses (the day before Thanksgiving).

Plaintiffs also propose scheduling an evidentiary hearing for December 14 in the event there are factual disputes regarding genuine issues of material fact, including whether it is substantially likely that a ruling for Plaintiffs would redress their harm. When the evidentiary hearing concludes, the Court can then hold a hearing on pending dispositive motions and take the case under submission.

Plaintiffs' Proposed Deadlines for Motions and Hearings

Event	Plaintiffs' Proposed Date
Potentially Dispositive Motions	October 21, 2020
Responses to Motions	November 12, 2020
Replies in support of Motions	November 25, 2020
Evidentiary Hearing on Justiciability	December 14-16, 2020
Hearing on Dispositive Motions	December 17, 2020

Defendants' Position

On June 16, 2020, the Court entered its Second Amended Scheduling Order, which stated in relevant part that: (i) “[a]ll potentially dispositive motions, including those motions related to jurisdictional issues and motions for judgment on the pleadings, should be filed by October 21, 2020”; and (ii) “[o]n or before September 30, 2020, the parties and Intervenors shall submit a joint report regarding the briefing schedule and any hearing(s) that should be set.” Doc. 147 (emphases omitted).¹

On September 23, 2020, Plaintiffs filed their Motion for the Appointment of a Three-Judge Court. Doc. 171. The Federal Defendants have consented to Plaintiffs’ motion. The State and Other Government Defendant-Intervenors and the Local Government Defendant-Intervenors oppose Plaintiffs’ motion. Doc. 173. Any other responses are due on September 30, 2020. Text Order, Doc. 172.

The Federal Defendants submit that the Court should defer entry of a briefing schedule until Plaintiffs’ pending motion has been resolved and, to the extent that motion is granted, until a three-judge court is appointed. The Federal Defendants propose the following: Within seven days after either the denial of Plaintiffs’ pending motion or the appointment of a three-judge court, the parties shall meet and confer about a proposed briefing schedule and shall submit a joint report regarding a briefing schedule. If a three-judge court is appointed, Defendants’ proposal would ensure that the full court could consider the appropriate schedule and further steps in this case.

¹ As the Court’s Second Amended Scheduling Order did not address discovery, Defendants do not address it here. Defendants will be prepared to discuss the status of discovery at the Court’s upcoming status conference.

Defendants further note that an evidentiary hearing is not necessary to resolve the justiciability issues in this case. Should the Court enter a scheduling order at this time, the Federal Defendants propose that the Court schedule a hearing on the parties' dispositive motions, and defer scheduling an evidentiary hearing unless, following that argument, the Court determines that an evidentiary hearing is necessary to resolve the parties' motions.

The Federal Defendants disagree with Intervenors' position that discovery is necessary before a briefing schedule is established. *See* Def. Resp., Doc. 169, at 1 ("Defendants do not believe that the completion of discovery is necessary for resolution of those [justiciability] issues."). But to the extent that the Court determines further discovery is in order, the Federal Defendants suggest that the parties meet and confer about a circumscribed and appropriate period for essential discovery; setting a discovery trigger date and a 21-day countdown period for completion now is not appropriate given the differences between the parties on the necessity of further discovery and the possible appointment of a three-judge court.

Intervenors' Joint Position

The State and Other Government Defendant-Intervenors, the Local Government Defendant-Intervenors, and the Martinez Defendant-Intervenors (collectively, "Intervenors") respectfully request that the Court permit them to conclude discovery before this case proceeds to briefing.

By way of background, the Court's Second Amended Scheduling Order set September 23, 2020, as the deadline for completing discovery related to jurisdictional issues. Dkt. 147, ¶1. The Court subsequently suspended that deadline and stated that the Court would consider modifying the Second Amended Scheduling Order at the October 5 teleconference. Dkt. 170. There is no deadline for discovery on merits issues, which has not yet opened. Defendants have not taken any

discovery in this case. Thus, only discovery that Intervenor take will be used to defend this case.

When Intervenor deposed the Census Bureau on March 2, 2020, a primary area of inquiry was the methodology for ascertaining and assigning citizenship and immigration status. This methodology plainly bears on the number of undocumented immigrants that Plaintiffs seek not to count and, accordingly, on Alabama's standing. Although the Court previously ruled for standing purposes that Plaintiffs had plausibly *alleged* they would lose a congressional representation if undocumented immigrants are included in the 2020 apportionment base, the Court also required that Plaintiffs present *evidence* at the summary judgment stage. *Alabama v. United States Dep't of Commerce*, 396 F. Supp. 3d 1044, 1054 (N.D. Ala. 2019). The methodology developed by the Census Bureau is the evidence that bears directly on that question. The methodology also would be required for Plaintiffs to obtain a remedy. At the deposition, Defendants' counsel objected to questions in this area on deliberative process grounds because the relevant methodology for the Census Bureau's plans to create a citizenship redistricting file was not completed. The deponent stated that it was the Census Bureau's goal to have the methodology completed by Spring 2020. Rather than engage in litigation over the propriety of the privilege, and given that no final answer could be obtained in any event until the methodology was complete, Intervenor agreed to wait for completion of the methodology to reopen the deposition. It is now Fall 2020, and despite repeated inquiries to counsel for Defendants, there is no update as to when the methodology will be finalized.² To date, the Census Bureau has not provided any information about whether it can, or

² Indeed, on September 22, 2020, Defendants in this action, acting as appellants in *Trump v. State of New York*, No. 20-366 (Supreme Court filed Sept. 22, 2020), represented to the United States Supreme Court that "[t]he Census Bureau . . . is currently formulating a methodology for potentially accomplishing" the purpose of excluding undocumented persons from the apportionment population count. *Trump v. State of New York*, No. 20-366 (Supreme Court Appellants' Jurisdictional Statement filed Sept. 22, 2020).

how it would, develop such a dataset.

Further, Defendants agree that they “still have an obligation to finalize their production of outstanding documents, complete their privilege review, provide a privilege log for any documents withheld, and complete negotiations with the Martinez intervenors concerning third-party document and testimonial subpoenas that the Martinez intervenors served on the Department of Homeland Security.” Dkt. 169 at 2.

Under these circumstances, it is premature to brief this case. Rather, jurisdictional discovery should remain open until Defendants have fulfilled the obligations they identified and Intervenor has the opportunity to obtain answers to questions about the Census Bureau’s methodology that they first asked more than six months ago. Accordingly, Intervenor proposes that the deadline to complete jurisdictional discovery be extended to 21 days after Defendants provide notice that the methodology for calculating citizens and non-citizens is complete to allow time to schedule and take a deposition, as well as conclude jurisdictional discovery.

Intervenor disagrees with Plaintiffs and Defendants that it is proper to commence briefing without the completion of discovery that goes to the Court’s jurisdiction to hear this case. If the Court nevertheless wants briefing to start, Intervenor suggests that dispositive motions related to jurisdictional issues be briefed on the following schedule: Opening briefs due October 21, 2020; opposition briefs due November 12, 2020; reply briefs due November 24, 2020. Intervenor suggests that the Court set a hearing in early December. It is, however, premature to set an evidentiary hearing now. If there are disputed issues of material fact that prevent the Court from resolving Plaintiffs’ claims, the Court can set an evidentiary hearing at that point.

Intervenor does not believe that the Court should change how this case has been proceeding and now combine jurisdictional and merits briefing. Rather, the Court should set a briefing

schedule on the merits after deciding the jurisdictional issues – if the case remains live at that point. If the Court nonetheless wants full briefing now, there needs to be sufficient time to address the important questions this case presents and the schedule discussed above with respect to jurisdictional issues would need to be extended by a few weeks.

State and Local Government Intervenors’ Further Position

Plaintiffs have recently requested a three-judge court, which State and Local Government Intervenors address in a separate filing. As explained in that filing, to the extent a party to the Martinez Intervenors’ cross-claim has presented to this Court the question whether to appoint a three-judge court, the Court should make that decision only if the Court first decides that Plaintiffs are entitled to relief on their claims. Meanwhile, discovery should proceed on the cross-claim so that in the event it becomes necessary to reach that claim, it can be promptly resolved.

September 30, 2020

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