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U.S. DISTRICT COURT
N.D. OF ALABAMA

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.*; COUNTY OF SANTA CLARA, CALIFORNIA, *et al.*; and STATE OF NEW YORK, *et al.*; *Defendant-Intervenors.*	Civil Action No. 2:18-cv-00772-RDP

MARTINEZ INTERVENORS' RESPONSE TO THE PARTIES' BRIEFS REGARDING THE EFFECTS OF THE JULY 21, 2020 PRESIDENTIAL MEMORANDUM

Defendant-Intervenors Diana Martinez, *et al*. ("Martinez Intervenors") file this brief in response to other parties' briefs filed on August 3, 2020, that address the effect of the President's July 21, 2020 Memorandum ("Presidential Memo"). Martinez Intervenors respectfully suggest and request that the Court allow parties to continue discovery and briefing on jurisdictional issues as presently scheduled, contrary to Federal Defendants' request that the Court stay discovery. *See* Federal Defendants' August 3, 2020 Brief ("Federal Defendants' Br.") (Dkt. 158

at 1). Parties should be allowed to conduct discovery on Federal Defendants' newly raised arguments regarding the ripeness of Plaintiffs' claims and Martinez Intervenors' cross-claim. *See id*. at 3-4.

I. Federal Defendants Raise Ripeness and Convening of a Three-Judge Panel Even Though the Presidential Memorandum Did Not Trigger These Issues.

Federal Defendants argue that Plaintiffs State of Alabama and Representative Morris Brooks's ("Plaintiffs") claims and Martinez Intervenors' cross-claim are not ripe; they also request the convening of a three-judge panel. Federal Defendants' Br. at 3, 5 n.1. However, the Court ordered the parties to file briefs "regarding the effect, if any, that the President's June 21, 2020 Memorandum may have on the claims asserted in this case." Order, July 21, 2020 (Dkt. 153) at 1. Federal Defendants do not explain how the Presidential Memo raises any new issue of ripeness that did not exist previously. Any ripeness with respect to the State of Alabama's claims existed and applied prior to the issuance of the Presidential Memo. With respect to the cross-claim, the Presidential Memo, if anything, actually heightens the concreteness and immediacy of the alleged injury. This court already contemplated that jurisdictional issues would have to be resolved in setting the current schedule; nothing with respect to jurisdictional issues has changed, except for the possibility that the Plaintiffs' claims are moot. That change alone does not warrant any schedule change in response to the Presidential Memo.

Federal Defendants hardly state that the Presidential Memo necessitates a three-judge panel, much less offer any rationale for the possible necessity—relegating this to a two-sentence footnote. If Plaintiffs' claim that they are injured by the loss of apportioned congressional seats necessitates a three-judge panel following the Presidential Memo, then that claim equally necessitated such a panel prior to the issuance of the Presidential Memo.

Because any issues of ripeness and three-judge panel applied before the Presidential Memo, Federal Defendants' discussion of those issues is not what this court ordered in the current briefing, and these two issues should trigger no change in the Court's current schedule.

II. The Presidential Memorandum Does Not Preclude Discovery and Briefing on Jurisdiction and Appropriateness of a Three-Judge Panel.

A. Parties should be allowed the opportunity to brief jurisdictional issues following full discovery.

Federal Defendants request that the Court stay discovery and order parties to prepare motions for summary judgment on both jurisdiction and the merits. *See* Federal Defendants' Br. at 6. However, the Court has already provided a schedule for completing discovery and briefing on jurisdictional issues. Federal Defendants have provided only conclusory statements for the proposition that the Presidential Memo necessitates abandonment of the Court's jurisdictional discovery schedule, which concludes in less than two months, and schedule for briefing on jurisdiction, which begins no later than October 21, 2020. *See* Second Amended Scheduling Order (Dkt. 147). Federal Defendants' conclusory argument relies on an entirely new jurisdictional argument in the form of ripeness. *See* Federal Defendants' Br. at 2-3. Federal Defendants should not be able to cut short discovery and briefing on jurisdictional issues based on a newly raised issue, particularly an issue that is not at all affected by the presidential memo that the court directed parties to address.

Federal Defendants' request that discovery be stayed would disadvantage Martinez Intervenors in terms of their cross-claim because it would foreclose discovery relevant to that claim and grant Federal Defendants' improper assertion of deliberative process privilege. For examples, Martinez Intervenors already are seeking discovery from the Department of Homeland Security, which the President has tasked with collection of information that Federal Defendants

intend to use for estimates of the undocumented population. Without the opportunity to complete such discovery, Martinez Intervenors would be limited in the ability to respond to Federal Defendants' contention that "[u]ntil Defendants generate and transmit the information required under the Presidential Memorandum, and the President acts on the information, neither Plaintiffs nor Intervenor-Defendants will know whether they have suffered, or stand to suffer, any injury." Federal Defendants' Br. at 3.

Furthermore, Federal Defendants ask the Court to end discovery based on a procedurally improper, blanket assertion of executive/deliberative process privilege. *See* Federal Defendants' Br. at 5; *see also In re Polypropylene Carpet Antitrust Litig.*, 181 F.R.D. 680, 695 (N.D. Ga. 1998) (finding federal government documents not protected under blanket assertion of the deliberative process privilege); *Pac. Gas & Elec. Co. v. United States*, 70 Fed. Cl. 128, 135, *modified on reconsideration*, 71 Fed. Cl. 205 (2006) (citing *Greenpeace v. Nat'l Marine Fisheries Serv.*, 198 F.R.D. 540, 543 (W.D.Wash.2000) ("Blanket assertions of the [executive/deliberative process] privilege are insufficient.") (internal quotation marks omitted). Federal Defendants should receive no protection under a privilege that they have not properly asserted, and such a blanket assertion does not merit a halt of all discovery. *See Sanders v. Alabama State Bar*, 161 F.R.D. 470, 474 (M.D. Ala. 1995) (burden of proof that deliberative process privilege applies is on asserting party, which must also show that requesting party's need for requested information does not outweigh executive's interest in non-disclosure) (internal citations omitted).

Martinez Intervenors should be allowed discovery and full briefing on the ripeness issue. Federal Defendants' briefing is an attempt to circumvent the discovery and briefing schedule that the Court has provided for jurisdictional issues, which includes ripeness. *See Temple B'Nai Zion,*

Inc. v. City of Sunny Isles Beach, Fla., 727 F.3d 1349, 1356 (11th Cir. 2013) ("[r]ipeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies"). Martinez Intervenors' cross-claim is not about an "abstract disagreement over administrative policies," as Defendants argue. Martinez Intervenors' claim is only bolstered by the Presidential Memo because Martinez Intervenors seek relief related to the constitutionality of the Presidential Memo's current mandate that the Secretary of Commerce "shall take all appropriate action, consistent with the Constitution and other applicable law, to provide information permitting the President" to exclude undocumented immigrants from the apportionment base. *See* Presidential Memo § 3; *see also* Martinez Intervenors' Cross-Claim (Dkt. 119) at ¶ 55 ("Defendants' production and report to the President or Congress of an altered dataset using estimations based on statistical probabilities that excludes the undocumented population from the population totals used for congressional apportionment would violate the U.S. Constitution"). Deciding ripeness at this stage, particularly when Federal Defendants did not raise the issue in their answer to Martinez Intervenors' cross-claim or anywhere else, would be unwarranted and premature.

B. Parties should be allowed briefing on whether a 3-judge panel is appropriate following a determination of jurisdiction.

Federal Defendants request that a three-judge panel under 28 U.S.C. § 2284 be convened in this case if the Court concludes that the federal court has jurisdiction over this case. *See* Federal Defendants' Br. at 5 n.1. Martinez Intervenors do not contest the assertion that this single-judge Court may decide jurisdiction prior to referring the case to the chief circuit judge under 28 U.S.C. § 2284. *See id*. (citing *Shapiro v. McManus*, 136 S. Ct. 450, 455 (2015)). If the

Court concludes that it has jurisdiction, the parties should then be directed to provide briefing on the issue of whether a three-judge panel is warranted in this case. *Shapiro*, 136 S. Ct. at 455 (single-judge district court "must determin[e][...]whether the request for three judges is made in a case covered by § 2284(a)") (internal quotation marks and citation omitted). Briefing and deciding the applicability of the three-judge court statute is premature until this court decides jurisdiction.

III. Discovery Should Proceed as Scheduled with Some Modifications.

A. In order to complete discovery in a timely manner, conference requirements should be suspended for remainder of discovery.

The Court set discovery to close on September 23, 2020. Second Amended Scheduling Order (Dkt. 147). The court order requires parties to meet and confer when "new" discovery is propounded, and if the parties cannot agree, to file a joint status report to the court outlining a dispute. Given the short amount of time that remains in the discovery schedule and the need to ensure parties have adequate time to move forward requests with respect to the ripeness issues newly raised by Defendants, this Court should now allow unfettered discovery on jurisdictional issues, without any requirements to meet and confer. As Defendants' note in their brief, Plaintiffs and Martinez Intervenors' claims are in part dependent on what is "feasible," in addition to the President's stated course of action. This highlights the needs for continued discovery, not for a premature stay. The Defendants' conflation of (1) standing and whether or not Plaintiffs' or Martinez Intervenors will suffer injury with (2) the separate question of whether or not the case is ripe, in order to escape proper discovery in this case, is unavailing.

Martinez Intervenors have unresolved discovery requests that are necessary in order to sufficiently address the jurisdictional issues in this case, including to address Defendants'

ripeness arguments. These discovery requests include unresolved discovery of the Department of Homeland Security, including a document subpoena and a 30(b)(6) deposition of DHS, which is necessary to understanding the veracity of the data that the Census Bureau is acquiring in order to create an estimate of undocumented immigrants for each state. This discovery is relevant to understand the basis of data that Defendants were directed to collect under Executive Order 13880, and which the President has now linked to the creation of state-by-state estimates of undocumented immigrants. *See* Presidential Memo § 1. Whether the Census Bureau can derive an estimate of undocumented immigrants, and how it might possibly derive those numbers, were critical components of the jurisdictional issues on which discovery was ordered, and are relevant to the ripeness issues Defendants now raise. In order to better understand the "feasibility" of the Census Bureau's ability to create such estimates, continued discovery is necessary to understand the origin of the data cited in Executive Order 13880 and any flaws in accuracy or completeness in the data.

In addition, Federal Defendants submitted an expert report by Dr. Enrique Lamas, the Deputy Director and Chief Operating Office of the U.S. Census Bureau. Dr. Lamas's expert declaration speaks to the unreliability of Alabama's proffered expert's opinions, and the unreliability of estimates for the purpose of establishing whether Alabama would suffer an injury here. In light of the Presidential Memo, Martinez Intervenors believe that discovery of Dr. Lamas's opinion and its bases is even more critical. Martinez Intervenors and Defendants were engaged in unresolved discussions regarding Dr. Lamas's expert opinion prior to the issuance of the Presidential Memo. At this juncture, the Presidential Memo bolsters Martinez Intervenors' claim, and thus, it is important that Martinez Intervenors fully understand the extent of Dr.

Lamas's expert opinion in the main case and how it may overlap with issues relevant to Martinez Intervenors' cross-claim.

CONCLUSION

Martinez Intervenors have unresolved discovery issues and may seek additional discovery to address relevant jurisdictional issues, including Defendants' new ripeness arguments. Martinez Intervenors thus urge this court to allow continued discovery, but without the obligation to meet and confer prior to new discovery, in order to efficiently utilize the time that remains in the discovery period.

Dated: August 10, 2020

Respectfully Submitted,

/s/ Andrea Senteno

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2020, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of the filing to all CM/ECF registrants.

Date: August 10, 2020

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