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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

NATIONAL URBAN LEAGUE, et al.,

Plaintiffs,

v.

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

Defendants.

CASE NO. 5:20-cv-05799-LHK

PLAINTIFFS' OPPOSITION TO DEFENDANTS' REQUEST FOR A THREE-JUDGE COURT (NO. 413)

Place: Courtroom 8, 4th Floor, San Jose
Judge: Hon. Lucy H. Koh

Defendants' request for a three-judge court is in equal parts surprising and unpersuasive. It is surprising because Defendants base their request on allegations that have been part of this case from the beginning. *See* Compl., ECF No. 1 ¶¶ 104-07, 234-57. It is unpersuasive because Defendants seek to recast Plaintiffs' challenge to *the Replan*—the Census Bureau's decision to curtail 2020 Census Operations—as a challenge to the Bureau's use of *specific statistical methods*. That misrepresents Plaintiffs' claims and provides no basis for convening a three-judge court. Defendants' request should be denied.

BACKGROUND

Defendants invoke two statutes in support of their request for a three-judge court—28 U.S.C. § 2284 and the 1998 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, § 209, 111 Stat. 2440 (1997) (the "1998 Appropriations Act").

In 1976, Congress overhauled the statutory framework for three-judge district courts. The legislation responded to the "mounting volume of three-judge court cases and the increased dissatisfaction with that procedure." 17A Charles Alan Wright et al., Federal Practice and Procedure § 4235, Westlaw (3d ed. database updated Oct. 2020). Congress repealed the main statutes requiring three-judge courts and enacted the current version of § 2284. *See id.*; An Act to Improve Judicial Machinery by Amending the Requirement for a Three–Judge Court in Certain Cases and for Other Purposes, Pub. L. No. 94-381, §§ 1-3, 90 Stat. 1119, 1119 (1979). In doing so, "Congress intended to reduce sharply the class of cases requiring the convening of a three-judge court." *City of Phila. v. Klutznick*, 503 F. Supp. 657, 658 (E.D. Pa. 1980).

In its current form, § 2284 is divided into two parts: Subsection (a) provides two substantive rules for *when* a three-judge court is required, and subsection (b) provides procedural rules for *how* such a court should be convened and operate. For present purposes, subsection (a) is the relevant provision because the question at issue is whether a three-judge court is required, not how such a court should be convened.

Section 2284(a) prescribes a three-judge court under two circumstances: "when otherwise required by Act of Congress" or "when an action is filed challenging the constitutionality of the

apportionment of congressional districts or the apportionment of any statewide legislative body." Defendants do not argue that § 2284(a) has been triggered under the second provision—an apportionment challenge. Instead, they argue that a three-judge court is "otherwise required" by a different "Act of Congress." Thus, for purposes of determining whether a three-judge court is required here, § 2284 is relevant only to the extent that it redirects the Court to *another statute* that independently requires a three-judge court.

That other statute—according to Defendants—is the 1998 Appropriations Act. There, Congress noted its concern that "the use of statistical sampling or statistical adjustment . . . poses the risk of an inaccurate, invalid, and unconstitutional census." § 209(a)(7). It further noted that another statute—13 U.S.C. § 195—prohibits statistical sampling for purposes of apportionment. § 209(a)(4). Congress then created a private right of action to challenge "*the use of any statistical method* in violation of the Constitution or any provision of law (other than this Act) . . . to determine the population for purposes of the apportionment." § 209(b) (emphasis added). The statute defines "statistical method" as an activity related to "the use of representative sampling, or any other statistical procedure, including statistical adjustment, to add or subtract counts to or from the enumeration of the population as a result of statistical inference." § 209(h)(1). A person aggrieved by the use of such a method may "obtain declaratory, injunctive, and any other appropriate relief against the use of such method." § 209(b). Congress provided a series of procedures for actions "brought under this section," including the three-judge court requirement. § 209(e)(1).

Defendants now argue that this Court must convene a three-judge court under the 1998 Appropriations Act because Plaintiffs challenge "statistical methods" in relation to the census. ECF No. 413 at 1. They further claim that this Court has already "recognized that Plaintiffs challenge 'statistical methods'" in its ruling denying Defendants' motion to dismiss, *id.* (quoting ECF No. 401 at 39), and that other courts have convened three-judge courts under similar circumstances, *id.* at 2. None of those arguments withstands scrutiny.

ARGUMENT

Defendants' request for a three-judge court should be denied because the 1998 Appropriations Act does not apply to this case.

First, Plaintiffs brought this action under the Administrative Procedure Act (APA) and the Constitution, not § 209 of the 1998 Appropriations Act. Contrary to Defendants' suggestion, § 209 does not provide that all lawsuits challenging "statistical methods" must be heard by a three-judge court. Instead, § 209(b) creates a private right of action for any person injured by the government's use of statistical methods in the census in violation of another source of law,[1] and § 209(e)(1) provides that suits *brought under § 209(b)* must be heard by three-judge district courts.[2]

Principally, Congress sought through § 209 to provide a mechanism for enforcing the rule codified in 13 U.S.C. § 195, which prohibits "the use of the statistical method known as 'sampling'" for purposes of apportionment. *See* § 209(a)(4); *see also, e.g.*, *New York v. Trump*, No. 1:20-cv-05770 (S.D.N.Y. Aug. 7, 2020), ECF No. 68 at 3 ("Congress has provided a private right of action [through § 209] to enforce that provision [of § 195]."). Defendants have repeatedly acknowledged as much in other cases, explaining that "Congress's concern, as reflected in § 209 of the 1998 Appropriations Act . . . was that 'the use of *statistical sampling* or *statistical adjustment* in conjunction with an actual enumeration to carry out the census . . . poses

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[1] In that sense, the 1998 Appropriations Act is like 42 U.S.C. § 1983, which is "not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979); *see also Chapman v. Hous. Welfare Rights Org.*, 441 U.S. 600, 617 (1979) (holding that § 1983 does not establish any substantive rights but merely "authorizes a cause of action based on the deprivation of civil rights").

[2] Other parts of the 1998 Appropriations Act reinforce that the statute did not establish a general rule that all lawsuits challenging "statistical methods" must be heard by a three-judge court. *See, e.g.*, § 209(e)(1) ("The chief judge of the United States court of appeals for each circuit shall . . . consolidate . . . all *actions* pending in that circuit *under this section*. Any party to *an action under this section* shall be precluded from seeking any consolidation of that action . . . . Any final order or injunction of a United States district court that is issued pursuant to an *action brought under this section* shall be reviewable by appeal directly to the Supreme Court of the United States . . . . No stay of an order issued pursuant to *an action brought under this section* may be issued by a single Justice of the Supreme Court." (emphases added)); § 209(e)(2) ("It shall be the duty of a United States district court hearing *an action brought under this section* and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any such matter." (emphasis added)).

the risk of an inaccurate, invalid, and unconstitutional census.'" Defs.' Opp. to Pls.' Mot. to Expedite Proceedings, *Common Cause v. Trump*, No. 1:20-cv-02023 (D.D.C. Sept. 2, 2020), ECF No. 61 at 2 (second alteration in original) (citation omitted) (emphases added).[3] Notably, Defendants do not identify a single three-judge court convened under the 1998 Appropriations Act that did not involve a § 195 claim.

Plaintiffs' suit does not belong before a three-judge district court because it is not an "action brought under [§ 209]" of the 1998 Appropriations Act—it is an action brought under the APA and the Constitution. *See* Sec. Am. Compl. ¶¶ 460-84 (SAC), ECF No. 352. That fact is dispositive. *See The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) (Holmes, J.) ("Of course, the party who brings a suit is master to decide what law he will rely upon . . . ."); *see also*, *Hawaii ex rel. Louie v. HSBC Bank Nev., N.A.*, 761 F.3d 1027, 1040 (9th Cir. 2014).

Second, this case is substantively different from cases brought under the 1998 Appropriations Act because Plaintiffs do not challenge the use of any "statistical method." The Act defines that phrase as "representative sampling," "statistical adjustment," or any other procedure to add or subtract to the population through "statistical inference." § 209(h)(1).[4] Plaintiffs do not challenge the use of any of those methods. Unlike *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 320 (1999), Plaintiffs are not suing over the use of "statistical sampling." Instead, Plaintiffs challenge Defendants' *decisions* to truncate and curtail 2020 Census operations at the expense of a fair and accurate enumeration. *See* SAC ¶¶ 460-84.

Defendants argue to the contrary by pointing to Plaintiffs' allegations that the Replan "departed from federal government statistical standards," may require more extensive use of "statistical imputation," and will cause inaccuracies in the enumeration. ECF No. 413 at 1

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[3] *See also, e.g.*, Joint Case Mgmt. Statement, *San Jose v. Trump*, Nos. 5:20-cv-05167, -05169 (N.D. Cal. Aug. 17, 2020), ECF No. 44 at 3 ("The parties . . . agree that Congress has provided a right of action [under the 1998 Appropriations Act] to enforce this provision [§ 195] . . . ."); Revised Hr'g Tr., *San Jose*, Nos. 5:20-cv-05167, -05169 (N.D. Cal. Oct. 8, 2020), ECF No. 97 at 11:9-11 (Defendants: "Congress had passed a special statute [the 1998 Appropriations Act] just to review that sampling that was in the operational plan for the 2000 Census.").

[4] The complete definition states: "(1) the term 'statistical method' means an activity related to the design, planning, testing, or implementation of the use of representative sampling, or any other statistical procedure, including statistical adjustment, to add or subtract counts to or from the enumeration of the population as a result of statistical inference." § 209(h)(1).

(quoting SAC ¶¶ 144-46, 279-88, 301-03, 317). But those same allegations have been in this case from the beginning, and Defendants never suggested that such allegations require a three-judge court. *See* Compl., ECF No. 1 ¶¶ 104-07, 234-57. That is because the parties have all understood that the object of Plaintiffs' challenge is the Bureau's truncation of census timetables and operations, not its adoption of any particular statistical sampling or other method.

Consistent with this, the complaint's allegations that touch on statistics—whether the allegations about Defendants' departure from general federal statistical standards or the likely increase in imputation—merely provided support for Plaintiffs' claims that Defendants' adoption of the Replan is unconstitutional and arbitrary and capricious, that their justification for that decision is a pretext, and that the decision would irreparably harm Plaintiffs. The truncation of the census—not the subsequent use of any particular statistical method to make up for the resulting flaws—is the focus of Plaintiffs' suit.

Defendants also argue that this Court "has now recognized" that Plaintiffs challenge the use of "statistical methods in connection with the census." *See* ECF No. 413 at 1 (citing ECF No. 401 at 39). But context makes clear that this Court said no such thing. Defendants cite the prudential ripeness analysis in the Court's recent ruling denying Defendants' motion to dismiss. There, the Court rejected Defendants' "meritless" argument that "[e]valuating Plaintiffs' claims of inaccuracy and disproportionate undercount at this juncture is not an inquiry fit for judicial decision." ECF No. 401 (citation omitted). In doing so, the Court cited two examples in which the Supreme Court found cases fit for judicial decision under similar circumstances: *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019), where "the Supreme Court adjudicated Enumeration Clause and APA claims without waiting for undercount-related harms to materialize;" and *U.S. House of Reps.*, 525 U.S. 316, where the Supreme Court relied on the 1998 Appropriations Act, which "creates a cause of action for 'any person aggrieved by the use of any statistical method . . . in connection with the [] census.'" ECF No. 401 at 39 (alterations in original) (citation omitted). After discussing *U.S. House of Representatives*, the Court cited Plaintiffs' allegations about how the Replan departed from Federal Statistical Guidelines, and it

noted that "Plaintiffs also challenge statistical methods in connection with the census." *Id.* (citing SAC ¶¶ 279-88).

The Court's comment and citation to *U.S. House of Representatives* and the 1998 Appropriations Act—like its citation to *New York* and the APA—supported its prudential ripeness conclusion. It did not somehow transform Plaintiffs' challenge into a claim under § 195. Nor did it change the object of Plaintiffs' challenge or mark a "recognition" by the Court that Plaintiffs had really been challenging the use of a particular "statistical method" all along. The Court's comment simply reflected arguments that Plaintiffs have made from the beginning of the case: Defendants' abandonment of longstanding federal statistical guidelines is one piece of the overwhelming body of evidence that Defendants' Replan decision was arbitrary and capricious, the justification for that decision was a pretext, and the result of that decision will be an unconstitutionally inaccurate enumeration.

Third, and notably, Defendants do not cite a single case that has invoked a three-judge court in remotely comparable circumstances. Defendants claim that the recently convened three-judge courts adjudicating the Presidential Memorandum on apportionment are analogous to this case. *See* ECF No. 413 at 2. They are wrong. In all four cases Defendants cite, it was undisputed that a three-judge court was required. In *San Jose*, for example, the plaintiffs argued that the Presidential Memorandum excluding undocumented immigrants from the apportionment was unconstitutional, and they also brought a claim under § 195, arguing that the only way to implement the Memorandum would be through the use of statistical sampling. *See* Am. Compl., *San Jose v. Trump*, Nos. 5:20-cv-05167, -5167, (N.D. Cal. Aug. 18, 2020), ECF No. 46 at 30-40. There, as this Court noted, the "parties agree[d]" both that (1) the plaintiffs' claim triggered § 2284(a) because it was an apportionment challenge; and (2) the plaintiffs' "statutory claims under 13 U.S.C. § 195" require a three-judge court per the 1998 Appropriations Act. ECF No. 49 at 2 (N.D. Cal. Aug. 18, 2020). The three other cases cited by Defendants relied on the same two reasons for invoking a three-judge court.[5] Neither applies here: Defendants do not argue

[5] *See* Req. to Chief Judge, *New York v. Trump*, No. 1:20-cv-05770 (S.D.N.Y. Aug. 7, 2020), ECF No. 68 at 2-3 (listing same two reasons for three-judge court), *final judgment vacated*, *Trump v. New York*, --- S. Ct. ---, 2020 WL 7408998 (U.S. Dec. 18, 2020); Order,

that this is an apportionment case under § 2284(a), and Plaintiffs have not brought a statutory claim under § 195.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Request For A Three-Judge Court.

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Common Cause, No. 1:20-cv-02023 (D.D.C. Aug. 20, 2020), ECF No. 33 at 1-2 (same); Letter, *Useche v. Trump*, No. 8:20-cv-02225 (D. Md. Aug. 17, 2020), ECF No. at 2 (same).

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ATTESTATION

I, Sadik Huseny, am the ECF user whose user ID and password authorized the filing of this document. Under Civil L.R. 5-1(i)(3), I attest that all signatories to this document have concurred in this filing.

Dated: January 12, 2021

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