

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,

**REPLY IN SUPPORT OF EMERGENCY MOTION UNDER CIRCUIT
RULE 27-3 FOR AN IMMEDIATE ADMINISTRATIVE STAY PENDING
DISPOSITION OF MOTION FOR STAY PENDING APPEAL**

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

SOPAN JOSHI
*Senior Counsel to the Assistant Attorney
General*

MARK B. STERN
BRAD HINSHELWOOD
*Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530
202-514-7823*

Defendants-appellants respectfully reply to plaintiffs' opposition to our motion for an immediate administrative stay.

1. Plaintiffs urge that the Court should deny an administrative stay because the injury to plaintiffs that will result from granting a stay will outweigh the injury to the Census Bureau's ability to perform its responsibilities if a stay is denied.

This contention requires the Court to accept plaintiffs' position that the Census Bureau is free to disregard the deadline established by the Census Act, and that a district court is empowered to require the Bureau to flout that deadline. Thus plaintiffs declare: "Nor can Defendants articulate what harm (irreparable or otherwise) they would suffer from the Bureau's failure to meet the Census Act's December 31 deadline. That is unsurprising: the district court's order simply restores the status quo ante and allows the Bureau's own previously adopted deadline of April 30, 2021 in the COVID-19 Plan to become operative once again." Opp. 16.

That argument might have some force if the Bureau could simply defy the deadline imposed by Congress and pursue the COVID Schedule that was expressly made contingent on congressional extension of the statutory timetable. But that is not the case. Crucially, plaintiffs do not contest that the absence of a stay will at a minimum threaten to impair the Census Bureau's completion of the census within the statutory timeframe. They similarly disregard the principle that that "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303

(2012) (Roberts, C.J., in chambers)) (quoting *New Motor Vehicle Board v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); see also *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (same). Their argument also disregards the concerns voiced by other states. See Amicus Br. of States of Louisiana and Mississippi, at 1 (noting that “24 states have state statutory or constitutional deadlines tied to the census that are imperiled” by the district court’s injunction).

Whereas the injury to the Census Bureau’s performance of its responsibilities is real and immediate, plaintiffs’ asserted harms involve no similar urgency. In plaintiffs’ view, time is not of the essence because the Bureau can simply “revert” to a schedule under which the Census need not be completed until next April. Opp. 16. Their claims of harm bear no resemblance to the government’s need to comply with the unambiguous statutory command of the Census Act.

2. Plaintiffs’ defense of their legal position offers no basis whatsoever on which the district court’s ruling can be sustained. The “Census Act’s statutory deadline,” they declare, “is no excuse for violating the APA.” Opp. 18. But the APA authorizes courts to set aside final agency action that is “not in accordance with law.” 5 U.S.C. § 706(2)(A). Unsurprisingly, plaintiffs identify no case in which a court has invoked this authority to require an agency to violate an express statutory deadline. Plaintiffs likewise cite no authority for the remarkable proposition that a district court can use its power under the APA to “postpone the effective date of an agency

action,” 5 U.S.C. § 705, to “stay” a statutory deadline set by Congress, much less a case in which a court enjoined an agency from “implementing” such a deadline.

In the absence of relevant authority, plaintiffs rely on the district court’s analysis. Opp. 19-20 (citing Add.64-67). But as discussed in our Motion, none of the cases cited by the district court remotely supports the proposition that it can order the Bureau to disregard the deadline, and plaintiffs make no effort to rehabilitate those cases. None of them involved a requirement to report to Congress itself, much less a reporting requirement of the kind here, established pursuant to Congress’s textually-committed authority to “direct” the “Manner” in which the census will be conducted. U.S. Const. art. I, § 2, cl. 3. Nor did those cases involve a deadline that would trigger submissions from the President to Congress that include the data required for allotment of seats in the House of Representatives and for state-level redistricting. And those cases in any event turned on the interpretation of the statute at issue. Plaintiffs make no attempt to explain how the Census Act can be interpreted to be anything less than mandatory. The only case plaintiffs do cite—*Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020)—simply underscores the absence of any authority for their position. Nothing in that case suggests that an agency can choose to disregard a mandatory statutory deadline, much less that a court can order an agency to defy a deadline.

Plaintiffs urge, however, that “the mere existence of a statutory deadline does not free an agency from considering its *other* statutory—and constitutional—

obligations, such as the duty to conduct ‘a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment.’” Opp. 18-19 (quoting *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2568-69 (2019)). Plaintiffs’ assertion of “constitutional” obligations here and elsewhere, *see* Opp. 18, fails to recognize that the district court explicitly declined to rule on their Enumeration Clause claims, and instead recognized that the statutory deadline “bind[s] Defendants.” Add. 68. And plaintiffs’ reference to other “statutory” obligations mistakenly posits that the Census Act creates an administrable and enforceable standard of accuracy. As discussed in our motion, and as plaintiffs do not dispute, neither *Department of Commerce* nor any other case has ever identified such a standard. That plaintiffs have identified no such standard—and the district court’s unwillingness to attempt to divine one—is a reflection of the Supreme Court’s recognition that the Constitution grants Congress “virtually unlimited discretion” to “conduct[] the decennial” census. *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996). In contrast, the Act *does* impose an explicit and unambiguous statutory deadline that no one has previously thought to be only precatory.

Plaintiffs also fail to recognize that the district court did not independently review the Replan Schedule and did not conclude that its operation would violate any constitutional or statutory standard. Add.44. Instead, it held that Census Bureau had acted arbitrarily in declining to consider a schedule that would extend the census beyond the bounds set by Congress, a conclusion irreconcilable with the terms of the

Census Act. Moreover, given Congress's broad constitutional power over the conduct of the census, the agencies' compliance with the statutory deadline cannot be presumed unconstitutional.

Finally, plaintiffs make the improbable assertion that "this is not a broad programmatic attack on the internal operations of the Bureau," and that "district court merely granted the run-of-mine remedy for an APA violation that stays the unlawful action (the Replan) and, returning to the status quo ante, allows the Bureau's previously adopted COVID-19 Plan to govern in the interim." Opp. 21. Plaintiffs cannot seriously mean that an order to defy a statutory deadline is a "run-of-the-mine remedy," and the district court's order in no way reviews discrete agency action. Instead, the court has ordered the Census Bureau to review the extraordinarily complex workings of the decennial census and to do so while disregarding the express command of Congress. Nor are defendants the ones seeking a departure from the status quo. The district court did that by imposing a temporary restraining order and then a preliminary injunction that altered the Bureau's ongoing operations. And the COVID Schedule, which plaintiffs' complaint seeks to reinstate, is not a viable "status quo ante" because its basic assumption—that Congress would extend the deadline for completing the census—never came to pass.

CONCLUSION

The Court should grant both an immediate administrative stay and a stay pending appeal.

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

SOPAN JOSHI
Senior Counsel to the Assistant Attorney General

MARK B. STERN

 /s/ Brad Hinschelwood
BRAD HINSHELWOOD
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530
202-514-7823

SEPTEMBER 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the requirements of Federal Rule of Appellate Procedure 27(d) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 1,307 words according to the count of Microsoft Word.

/s/ Brad Hinschelwood

BRAD HINSHELWOOD

CERTIFICATE OF SERVICE

I hereby certify that, on September 28, 2020, I electronically filed the foregoing docketing statement with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are CM/ECF users and that service will be accomplished by using the appellate CM/ECF system.

/s/ Brad Hinselwood

BRAD HINSHELWOOD