UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
PAUL W. GRIMM
UNITED STATES DISTRICT JUDGE

6500 CHERRYWOOD LANE
GREENBELT, MARYLAND 20770
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February 28, 2019

RE: *NAACP v. Bureau of the Census*
PWG-18-891

LETTER ORDER

Dear Counsel:

Less than a month ago, I dismissed without prejudice as not yet ripe Plaintiffs' Enumeration Clause[1] claim for injunctive relief with respect to Defendants' planned method and means of conducting the 2020 Census, while denying Defendants' motion to dismiss as to Plaintiffs' claim that there are insufficient funds available for the Bureau to conduct the 2020 Census, which, they allege, also will result in an Enumeration Clause violation.[2] I noted that it was "plausible that this Court could fashion declaratory relief that would make it likely that sufficient funds will be appropriated to enable the final planning and execution of the 2020 Census to take place." *NAACP v. Bureau of Census*, ---F. Supp. 3d ----, 2019 WL 355743, at *3 (D. Md. Jan. 29, 2019). On that basis, I found that Plaintiffs have standing, and I allowed the claim to proceed, with targeted discovery to determine whether an evidentiary basis exists for the declaratory relief they seek.

Just over a week later, on a February 6, 2019 status conference call, Plaintiffs sought leave to amend to add claims under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, and to reinstate their claim for injunctive relief, based on the Bureau's finalization of its operational plans for the 2020 Census ("Final Operational Plan" or "Plan"). The parties fully briefed the issue through informal letters to the Court. ECF Nos. 68, 72, 74. A hearing is not necessary. *See* Loc. R. 105.6. Because amending to introduce APA claims would not be futile but Plaintiffs' Constitutional claims for injunctive relief are not yet ripe, Plaintiffs' letter motion to amend, ECF No. 68, is granted in part and denied in part. Plaintiffs may file a Second Amended Complaint that includes APA claims and factual developments since Plaintiffs last amended their pleading in June 2018, but they may not reintroduce their Enumeration Clause claims for injunctive relief at this time.

[1] U.S. Const. art. I, § 2, cl. 3 ("Enumeration Clause").

[2] Plaintiffs are the National Association for the Advancement of Colored People ("NAACP"); Prince George's County (the "County"); Prince George's County Maryland NAACP Branch (the "County NAACP"); Robert E. Ross, President of the County NAACP; and H. Elizabeth Johnson, County NAACP Executive Committee member. Defendants are the Bureau of the Census (the "Bureau"); Steven Dillingham, Director of the Bureau; Wilbur Ross, Secretary of Commerce; and the United States of America.

Parties' Arguments

Plaintiffs argue that "[t]he Final Operational Plan[ ] constitutes final agency action fit for judicial review pursuant to the APA," and their proposed APA claims would assert that "discrete, final decisions communicated in the Plan are arbitrary and capricious," as well as "'contrary to constitutional right, power, privilege, or immunity.'" Pls.' Ltr. Req. 2 (quoting 5 U.S.C. § 706(2)(B) and citing 5 U.S.C. § 706(2)(A)).

Defendants counter that the Final Operational Plan is not "'agency action' challengeable under the APA" because agency action must be "circumscribed and discrete," yet "Plaintiffs seem to challenge the entire Operational Plan for conducting the 2020 Census, as well as various 'discrete, final decisions . . . .'" Defs.' Ltr. Opp'n 1. Additionally, they argue that agency action must "determine rights and obligations," and insofar as Plaintiffs challenge discrete final decisions, those decisions do not "determine rights and obligations" because they do not have an "immediate and practical impact." *Id.* at 2. And, Defendants again raise the argument that Plaintiffs ask the Court to tread too far into decisions within the Bureau's discretion. *Id.*

In reply, Plaintiffs contend that Defendants' arguments are insufficient to "overcome the lenient standard of review on a motion for leave to amend." Pls.' Reply 1. They insist that they challenge "discrete decisions in Defendants' Final Operational Plan," rather than challenging the Plan more generally, as Defendants suggest. *Id.* at 2. And, in their view, Defendants' challenged actions do determine rights—specifically, "Plaintiffs' rights to be enumerated." *Id.* Additionally, they urge the Court not to allow Defendants to hide behind the shield of "agency discretion." *Id.* Plaintiffs argue that the "time has now come" to reinstate their Constitutional claim for injunctive relief, based on the release of Defendants' Final Operational Plan. *Id.* at 3.

Discussion

A plaintiff may amend his or her complaint once as a matter of course. *See* Fed. R. Civ. P. 15(a)(1). After that, though, amendments are permissible "only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). The Federal Rules of Civil Procedure direct courts to "freely give leave when justice so requires," *id.*, a mandate the Supreme Court has highlighted as one that "is to be heeded," *Foman v. Davis*, 371 U.S. 178, 182 (1962). It is not at all uncommon for courts to grant a plaintiff leave to amend the complaint at this stage of the proceedings, where the court has issued a ruling on the defendant's motion to dismiss and awaits the filing of the defendant's answer. *See Laber v. Harvey*, 438 F.3d 404, 427 (4th Cir. 2006); 6 Charles Alan Wright *et al.*, *Fed. Prac. & Proc.* § 1488 (3d ed. 1998). Indeed, "[t]he Fourth Circuit has stated that leave to amend under Rule 15(a) should be denied only in three situations: when the opposing party would be prejudiced, when the amendment is sought in bad faith, or when the proposed amendment would be futile." *Longue v. Patient First Corp.*, 246 F. Supp. 3d 1124, 1126 (D. Md. 2017) (citing *Laber*, 438 F.3d at 426).

Here, the issue is whether, as Defendants assert, there has not been any agency action, such that amendment to add APA claims would be futile.

> "The term 'action' as used in the APA is a term of art that does not include all conduct" on the part of the government. Instead, the APA defines "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13).

> This definition limits the scope of judicial review in two important respects. First, each of the terms that comprise the definition of "agency action" is limited to those acts that are "circumscribed" and "discrete." When challenging agency action—whether it be a particular action or a failure to act altogether—the plaintiff must therefore identify specific and discrete governmental conduct, rather than launch a "broad programmatic attack" on the government's operations. . . .
>
> Second, the definition of "agency action" is limited to those governmental acts that "determin[e] rights and obligations." . . . To meet this requirement, a party must demonstrate that the challenged act had "an immediate and practical impact," or "alter[ed] the legal regime" in which it operates.

City of New York v. U.S. Dep't of Defense, 931 F.3d 423, 430–31 (4th Cir. 2019) (internal case citations omitted). It is not so clear that the actions Plaintiffs challenge do not qualify as "agency action" that amendment would be futile. Accordingly, Plaintiffs may amend to add these APA claims. Plaintiffs also may "revise the factual allegations in their Complaint to reflect developments in the plans for the 2020 Census since they filed their First Amended Complaint in June 2018." Pls.' Ltr. Req. 3. They shall comply with this Court's Local Rules' requirement that they file a redlined version along with their Second Amended Complaint.

Defendants have, however, raised a significant challenge to the ultimate viability of Plaintiffs' APA claims. Therefore, Defendants may file a motion to dismiss on the basis that the challenged actions do not qualify as "agency action." The deadline for amending and the timeframe and page limits for briefing the motion to dismiss are set forth below.

Plaintiffs also contend that the previously-dismissed Enumeration Clause claim for injunctive relief now is ripe, as their "claims no longer 'rest[] upon 'contingent future events that may not occur as anticipated . . . .'" Pls.' Ltr. Req. 3. Defendants insist that Plaintiffs' request to reintroduce their claim for injunctive relief is a "not-so-subtle attempt at reconsideration." Defs.' Ltr. Opp'n 3. Notably, three days before the Defendants filed their letter opposition on February 18, 2019, Congress appropriated to the Bureau more than $3 billion for the 2020 Census, *see* H.J. Res. 31, 116th Cong. (2019). Defendants urge that, in light of that recent appropriation, "the Court should also reconsider its holding that Plaintiffs' funding claim is both justiciable and ripe." Defs.' Ltr. Opp'n 3; *see also* Defs.' Pre-Mot. Ltr., ECF No. 75 (seeking to file motion to dismiss funding claim). Additionally, they argue that it is still true, as I ruled on January 29, 2019, that

> [f]irst, . . . "the immediacy of Defendants' actions is not tantamount to a certainty of injury or hardship to Plaintiffs in the absence of Court intervention at this time," and Plaintiffs "have not shown that delayed resolution of the issues would foreclose any relief from their alleged injury." Second, . . . "if the Court were to interject itself into the Bureau's process during the critical final preparations, requiring—as Plaintiffs request—its monitoring and approval of the plans along the way, it is hard to imagine that this oversight would not hinder the process as opposed to facilitate it." And third, . . . "the more-than-a-year remaining before the start of the 2020 Census will put to the test the new procedures the Secretary has planned to adopt," and "the conduct of the Census itself will result in a preliminary population count that will determine whether the differential undercount that the Plaintiffs fear will adversely affect their federal and local representation and future federal funding."

Defs.' Ltr. Opp'n 3 (quoting *NAACP*, 2019 WL 355743, at *14, *15). I agree and will deny Plaintiffs' request to reintroduce their Enumeration Clause claims for injunctive relief at this time, for the reasons stated in *NAACP*, 2019 WL 355743, at *14, *15. As for the funding claim, although the appropriations bill has passed, Plaintiffs still sufficiently question the adequacy of the funding for their claim to move forward to targeted discovery. Nonetheless, Defendants may address the justiciability of this claim, also, in their proposed motion to dismiss.

Accordingly, it is hereby ORDERED that

1. Plaintiffs' letter motion to amend, ECF No. 68, IS GRANTED IN PART AND DENIED IN PART as follows:
    a. Plaintiffs may file a Second Amended Complaint that includes APA claims and factual developments since Plaintiffs last amended their pleading in June 2018;
    b. Plaintiffs may not reintroduce their Enumeration Clause claims for injunctive relief at this time; and
    c. Plaintiffs' Second Amended Complaint must be filed, along with a redlined version, by April 1, 2019; and
2. Defendants may file a motion to dismiss the APA claims in the Second Amended Complaint for lack of agency action and to dismiss the funding claim as moot by April 15, 2019; if they do so, Plaintiffs' opposition will be due April 29, 2019, and Defendants' reply will be due May 13, 2019; the opening brief and opposition will be limited to 25 pages each, and the reply will be limited to 15 pages.

Although informal, this is an Order of the Court and shall be docketed as such.

Sincerely,

/S/
Paul W. Grimm
United States District Judge