[NOT YET SCHEDULED FOR ORAL ARGUMENT]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELECTRONIC PRIVACY INFORMATION CENTER, Plaintiff-Appellant, v. UNITED STATES DEPARTMENT OF COMMERCE, et al., Defendants-Appellees.	No. 19-5031

RESPONSE TO APPELLANT'S MOTION TO EXPEDITE BRIEFING SCHEDULE

Defendants-appellees, the United States Department of Commerce and the Bureau of the Census, respectfully oppose plaintiff-appellant's motion to expedite the briefing schedule to the extent that it gives the government less than 30 days to prepare its brief. We take no position with regard to the other aspects of plaintiff's proposed schedule.

1. Plaintiff alleges that defendants violated the E-Government Act of 2002 by failing to prepare a "privacy impact assessment" that specifically addressed the Secretary of Commerce's decision to reinstate a citizenship question on the decennial census before March 2018, when the Secretary announced his decision. *See* E-

Government Act of 2002, Pub. L. No. 107-347, § 208(b), 116 Stat. 2899, 2921, *codified at* 44 U.S.C. § 3501 note. The provision on which plaintiff relies states that, before "initiating a new collection of information," an agency must conduct, internally review, and publish (if practicable) a privacy impact assessment that addresses, among other things, "what information is to be collected," "why the information is being collected," and "how the information will be secured." *Id.* § 208(b)(1)(A), (B); (2)(B).

Nearly two months after filing suit, plaintiff filed a motion for preliminary injunction, asking the district court to enjoin defendants from implementing the Secretary's decision to reinstate a citizenship question on the 2020 Census or "otherwise initiating any collection of citizenship status information that would be obtained through the 2020 Census." Dkt. No. 6, at 1.

2. On February 8, 2019, the district court issued a memorandum opinion and order denying plaintiff's motion for a preliminary injunction. The court held that plaintiff's claims were not likely to succeed on the merits. The court reasoned that defendants did not "initiat[e] a new collection of information" under the E-Government Act by merely announcing that a new question would be added to the 2020 Census; instead, "'initiating' the collection of information . . . requires at least one instance of obtaining, soliciting, or requiring the disclosure of information, which . . . will not occur until the Bureau mails its first batch of Census questionnaires to the public." Dkt. No. 17 (Op.), at 6-7. Defendants have made clear that they "have been updating and will continue to update [privacy impact assessments] for the

relevant information technology systems and collections, and fully intend to comply with the [E-Government] Act before soliciting responses to the 2020 Decennial Census questionnaire." Dkt. No. 12, at 1. The district court properly recognized that those actions will satisfy any potential obligation under the E-Government Act.

While recognizing that plaintiff's likely failure on the merits independently barred preliminary relief, the district court also found that plaintiff was unlikely to suffer irreparable harm absent a preliminary injunction. Relying on this Court's decision in *Electronic Privacy Information Center v. Presidential Advisory Commission on Election Integrity*, 878 F.3d 371 (D.C. Cir. 2017) (*EPIC*), the court noted that the relief plaintiff sought—a "negative injunction[] preventing the Bureau from 'implementing' Secretary Ross's 'decision to add a citizenship question to the 2020 Census' and from 'initiating any collection of citizenship status information that would be obtained through the 2020 Census'"—would not redress the informational injury that plaintiff alleged. Op. at 18; *see also EPIC*, 878 F.3d at 380 (noting that "ordering the defendants *not*" to collect information "only *negates* the need (if any) to prepare a[] [privacy impact] assessment") (emphasis in original).

3. Plaintiff's claimed need for expedition is the printing of the Census questionnaires that will commence at the end of June. Plaintiff has no likelihood of prevailing on its claim that defendants are disregarding the statute. It has no likelihood of demonstrating that an appropriate remedy would be an order enjoining inclusion of a citizenship question in the Census. And it has likewise shown no

likelihood of demonstrating that it would even have standing to seek such an injunction.

We note that plaintiffs in *State of New York v. U.S. Department of Commerce*, No. 18-cv-2921 (S.D.N.Y.), obtained a district court order enjoining inclusion of the citizenship question in the 2020 Census. That case involves claims under the Administrative Procedure Act and the Constitution, which the Supreme Court has granted certiorari before judgment to resolve. *See Department of Commerce v. New York*, No. 18-966, 2019 WL 331100 (U.S. Feb. 15, 2019).

4. Plaintiff's request for extraordinary expedition of this appeal is particularly anomalous given its delays in initiating and prosecuting this suit. Plaintiff claims that defendants' obligation to publish its privacy impact assessments specifically addressing the citizenship question arose in March 2018. But plaintiff waited nearly eight months, until November 2018, to file suit. And after plaintiff finally filed this lawsuit, it waited nearly two months to seek preliminary relief from the district court.

While we do not believe that this appeal requires expedition, we take no position on plaintiff's motion except with regard to the 14-day period that it proposes for the preparation of the government's brief. We oppose an expedited schedule that does not afford the government 30 days of briefing time, and such a schedule is not necessary to permit this Court to hear argument in April or May if it chooses to do so. That could be accomplished by making the government's brief due 30 days after plaintiff's proposed March 1 date for filing its own brief.

CONCLUSION

For the foregoing reasons, the Court should deny plaintiff's motion to expedite the briefing schedule to the extent that plaintiff proposes giving the government less than 30 days to prepare its brief.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

MARK B. STERN

s/ *Sarah Carroll*
SARAH CARROLL
Attorneys, Appellate Staff
Civil Division, Room 7511
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-4027

FEBRUARY 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing response 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 response complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 953 words according to the count of Microsoft Word.

s/ *Sarah Carroll*
SARAH CARROLL

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2019, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ *Sarah Carroll*
SARAH CARROLL