United States District Court
for the
Southern District of Florida

Michael Van Cleve, Plaintiff,	)	
	)	
v.	)	
	)	Civil Action No. 20-23611-Civ-Scola
Wilbur L. Ross, U.S. Secretary of Commerce, and others, Defendants.	)	

Order Denying Renewed Motion for Three Judge Panel

This matter is before the Court upon the Plaintiff Michael Van Cleve's renewed motion for assembly of a three–judge panel pursuant to 28 U.S.C. § 2284. (ECF No. 79.) The Defendants Wilber L. Ross, in his official capacity as United States Secretary of Commerce, Steven Dillingham, in his official capacity as Direct of United States Census Bureau, Russel Thurlow Vought, in his capacity as Director of the Office of Management and Budget, and the three respective agencies have responded to the motion. (ECF No. 81). Van Cleve has submitted a reply. (ECF No. 83). Upon review of the motion, the record, and the relevant legal authorities, the Court **denies** the motion (**ECF No. 79**).

1. Background

This action arises from Michael Van Cleve's claim that "race is a myth based on pseudoscience" such that the Census, which requires respondents to report their race, perpetuates arbitrary data that results in discrimination against groups of people who are not accurately represented by the different race options from which the Census requires them to pick. (Third Am. Compl., ECF No. 32 at ¶¶ 178, 219, 303.)

Van Cleve previously requested an assembly of a three–judge panel pursuant to 28 U.S.C. § 2284. On December 21, 2020, the Court denied Van Cleve's motion, noting that Van Cleve's interpretation of case law was misplaced and that 28 U.S.C. § 2284 did not require a panel because this case does not involve a challenge to the constitutionality of the apportionment of congressional districts. (ECF No. 48.) The Court also entered an order to show cause why the Plaintiff should not be sanctioned with an order to pay the Defendants' costs and fees incurred in responding to a baseless motion.

On February 22, 2021, Van Cleve filed the operative third amended complaint alleging virtually unchanged claims. (Third Am. Compl., ECF No. 72.) In the operative complaint, Van Cleve challenges a set of standards set

forth by the Office of Management and Budget adopted in 1977 that regulate how federal agencies collect information on race and ethnicity. He claims that the standards are unlawful because they do not account for the Middle Eastern and North African population and thus discriminate against these groups. (*Id.* at ¶¶ 7, 146, 209.) He alleges that a failure to include other races in surveys and questionnaires will lead to the dissemination of inaccurate race data. He further claims that such inaccuracies "will make it more difficult to understand which communities need the most help," and affect his ability to effectively represent those persons in his capacity as an attorney. (*Id.* at ¶¶ 219, 257.)

On March 79, 2021, Van Cleve filed the subject renewed motion asking the Court to reconsider its prior denial of his request to convene a three–judge panel. (ECF No. 79.) Although the allegations of the operative complaint are essentially unchanged, Van Cleve argues that a different result is warranted now.

2. Legal Standard

"[I]n the interests of finality and conservation of scarce judicial resources, reconsideration of an order is an extraordinary remedy that is employed sparingly." *Gipson v. Mattox*, 511 F. Supp. 2d 1182, 1185 (S.D. Ala. 2007). A motion to reconsider is "appropriate where, for example, the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension." *Z.K. Marine Inc. v. M/V Archigetis*, 808 F. Supp. 1561, 1563 (S.D. Fla. 1992) (Hoeveler, J.) (citation omitted). "Simply put, a party may move for reconsideration only when one of the following has occurred: an intervening change in controlling law, the availability of new evidence, or the need to correct clear error or prevent manifest injustice." *Longcrier v. HL-A Co.*, 595 F. Supp. 2d 1218, 1247 (S.D. Ala. 2008) (quoting *Vidinliev v. Carey Int'l, Inc.*, No. CIV.A. 107CV762-TWT, 2008 WL 5459335, at *1 (N.D. Ga. Dec. 15, 2008)). However, "[s]uch problems rarely arise and the motion to reconsider should be equally rare." *Z.K. Marine Inc.*, 808 F. Supp. at 1563 (citation omitted). Certainly, if any of these situations arise, a court has broad discretion to reconsider a previously issued order. Absent any of these conditions, however, a motion to reconsider is not ordinarily warranted.

3. Analysis

In his motion, Van Cleve argues that reconsideration is appropriate because the Court failed to review whether convening of a three–judge panel was required by Section 209 of Public Law No. 105–119. (Mot., ECF No. 79 at

2–3.) Confusingly, in the operative complaint filed after the Court denied Van Cleve's first motion for a three-judge panel, Van Cleve recognizes that the Court had denied his argument under Section 209. Notwithstanding, the Court addresses the merits of Van Cleve's motion for reconsideration.

Under 28 U.S.C. § 2284(a), "a district court of three judges shall be convened 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." (emphasis added) Moreover, and relevant to the proceedings before the Court, "[a]ny person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law … in connection with the 2000 census or any later decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress, may in a civil action obtain declaratory, injunctive, and any other appropriate relief against the use of such method." § 209(b).(emphasis added) Further, under § 209(e)(1), "[a]ny action brought under this section shall be heard and determined by a district court of three judges in accordance with section 2284."

Section 2284 and Section 209 require a challenge to an action or a statistical method, respectively, affecting the constitutionality of the apportionment ore redistricting of congressional districts. As explained in the Court's earlier order, this case does not challenge the constitutionality of the apportionment of congressional districts or the appointment of a legislative body. On the contrary, the third amended complaint challenges the standards for collecting racial data by federal agencies that may indirectly impact representation of specific populations sometime in the future. At best, his challenge is that inaccurate population data will make it harder for him to represent the Middle Eastern and North African populations in a variety of civil cases. These allegations are insufficient to convene a three–judge panel under either Section 2284 and Section 209 and thus, Van Cleve's motion must be denied. *Compare Alabama v. United States Dep't of Com.*, 493 F. Supp. 3d 1123, 1128 (N.D. Ala. 2020) (Proctor, J.) (denying motion for appointment of three–judge panel because the plaintiff challenge was "not a challenge to the actual division of congressional districts but rather a challenge to a practice that might affect a future division of districts."); *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 577–78 (D.D.C. 1980) (explaining that § 2284 does not apply where the "challenge is to census practices which will produce data on which the apportionment of House of Representative members to states will be based [as opposed] to any state action reapportioning congressional districts."); *Tyree v. Massachusetts*, No. C.A.06-10232-MLW, 2008 WL 427293, at *4 (D. Mass. Feb. 17, 2008) (denying request for three–

judge panel because "[a]lthough the plaintiff's claims regarding the Fourteenth Amendment, the census, and the one-person, one-vote standard may relate to apportionment, the gravamen of plaintiff's complaint is not a challenge to apportionment.") *with Adams v. Clinton*, 26 F. Supp. 2d 156, 161 (D.D.C. 1998) (convening three–judge panel where the plaintiffs "challenge their existing allocation of zero representatives" and contrasting cases "concerned about census practices that might affect a future allocation.") and *Alabama v. United States Dep't of Com.*, No. 3:21-CV-211-RAH-KFP, 2021 WL 1171873, at *2 (M.D. Ala. Mar. 26, 2021) (granting motion to convene three–judge panel where the plaintiffs challenged a "differential privacy method" applied by the Bureau of the Census after collecting population data and alleged that this method was used to add or subtract to or from the population within Alabama for apportionment purposes).

Moreover, the Court has reviewed Van Cleve's various notices filed after the subject motion and finds the information therein nondeterminative for the disposition of this motion. Lastly, to the extent the parties dispute the merits of the Defendants' motion to dismiss, those disputes will be resolved in a forthcoming order.

For these reasons explained above and in the Court's earlier order, Van Cleve's motion for reconsideration is **denied**. **(ECF No. 79.)**

Done and Ordered in chambers, at Miami, Florida, on October 10, 2021.

Robert N. Scola, Jr.
United States District Judge