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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

STATE OF ALABAMA, *et al.*, *Plaintiffs*, v. THE UNITED STATES DEPARTMENT OF COMMERCE, *et al.*, *Defendants*, and DIANA MARTINEZ, *et al.*; COUNTY OF SANTA CLARA, CALIFORNIA, *et al.*; and STATE OF NEW YORK, *et al.*, *Intervenor-Defendants.*	Case No. 2:18-cv-00772-RDP

DEFENDANTS' REPLY TO THE PARTIES' BRIEFS CONCERNING THE EFFECT OF THE JULY 21, 2020 PRESIDENTIAL MEMORANDUM

Defendants, the United States Department of Commerce, Wilbur Ross, in his official capacity as Secretary of Commerce, the United States Census Bureau, and Steven Dillingham, in his official capacity as Director of the Census Bureau (Defendants), submit this brief in reply to the other parties' submissions regarding the effect of the July 21, 2020 Presidential Memorandum, *Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census*, 85 Fed. Reg. 44,679 (July 21, 2020). For the reasons below, and those previously articulated in Defendants' August 3, 2020 brief, Defendants request that the Court stay all ongoing discovery and enter a scheduling order to resolve threshold jurisdictional issues and allow the parties to brief the merits of the parties' claims.

ARGUMENT

The parties' briefs in response to the Court's July 21, 2020 Order demonstrate why this case cannot continue in its current posture.

None of the parties claim that they are currently injured by the Presidential Memorandum. *See generally* Pls. Resp. Br., ECF No. 156 (Pls. Br.); Martinez Intervenor Br., ECF No. 159; State and Local Intervenor Br., ECF No. 157 (States Br.). Nor can they. Work to comply with the Presidential Memorandum remains ongoing, and Defendants do not presently know what numbers they may ultimately transmit to the President pursuant to the Memorandum's requirements. *See, e.g.*, Pls. Br. at 4 (citing Defendants' interrogatory responses which state that "Defendants have not yet reached a final determination about the full extent of their ability to produce an actual count of undocumented immigrants in the 2020 census"). Indeed, Plaintiffs explicitly acknowledge that the Presidential Memorandum "*might* ultimately cause Defendants to redress Plaintiffs' asserted injuries," and that it is "*not yet* clear whether [it] will do so." Pls. Br. at 2 (emphasis added).

This is the very definition of a ripeness problem: Plaintiffs do not know whether they will be injured by any action or inaction by Defendants. *See Texas v. United States*, 523 U.S. 296, 300 (1998) (a "claim is not ripe for adjudication" and thus not justiciable "if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all" (internal quotes and citations omitted)); *see also Nat'l Advert. Co. v. City of Miami*, 402 F.3d 1335, 1339 (11th Cir. 2005) ("When a plaintiff is challenging a governmental act, the issues are ripe for judicial review if a plaintiff . . . show[s] he has sustained, or is in immediate danger of sustaining, a direct injury as the result of that act." (internal quotes and citations omitted)). And though the cross-claiming Defendant-Intervenors, Diana Martinez, *et al.* (Martinez Intervenors), do not address the issue, the same uncertainty taints their claims. At best, both sets of parties can speculate that they *might* be injured sometime in the future. But that is not enough. As we explained in our opening brief, the Court has an obligation to

assess whether it has jurisdiction over the parties' claims, and may not proceed until it has satisfied itself that such jurisdiction is present. *See, e.g.*, *Johnson v. Sikes*, 730 F.2d 644, 647–48 (11th Cir. 1984) (because the "question of ripeness affects [] subject matter jurisdiction," the Court must consider it independently even if the parties fail to address it or ask the Court to render a decision notwithstanding the issue (citing cases)).

The state and local government intervenors propose that the Court postpone any such adjudication until later, and stay the case in the meantime. *See* States Br. at 2–3. But that is not an appropriate course either. A stay is an exercise of judicial discretion incident to the Court's authority to manage the case before it. *Clinton v. Jones*, 520 U.S. 681, 706 (1997). That exercise of discretion, however, can only be appropriate where a case is properly before the Court in the first instance.

Moreover, the state and local government intervenors' request is inconsistent with the position they have taken elsewhere. As the Court is aware, many of those intervenors have recently brought separate challenges to the Presidential Memorandum in other district courts around the country. In those cases, those parties do not take the position that resolution of their legal claims be stayed. To the contrary, in the case it brought in the District Court for the Southern District of New York (the S.D.N.Y. litigation), the state of New York has pressed for an extraordinarily expedited briefing schedule, seeking partial judgment on the merits and a preliminary injunction on August 7, 2020. *See generally* Order, ECF No. 53, *New York et al. v. Trump et al.*, 20-CV-5770 (S.D.N.Y Aug. 5, 2020) (scheduling order); Mot. Prelim. Inj., ECF No. 74, *New York*, 20-CV-5770 (S.D.N.Y Aug. 7, 2020) (motion for a preliminary injunction or partial summary judgment). New York does not offer any reason why that case should proceed expeditiously to judgment while this one is stayed, and there is none. To the extent this case is to implicate the Presidential Memorandum, as the Martinez

Intervenors seem to suggest, Martinez Intervenors Br. at 3, it should similarly be adjudicated without delay.[1]

The S.D.N.Y. litigation also raises another issue that needs to be addressed in this matter. Shortly after New York filed its Constitutional and other challenges to the Presidential Memorandum, the state requested that a three-judge court be convened pursuant to 28 U.S.C. § 2284, which requires convening such a court "when an action is filed challenging the constitutionality of the apportionment of congressional districts." 28 U.S.C. § 2284(a). In response to that request, which the Government did not oppose, a three-judge court has now been designated. *See* Designation of Three-Judge Panel, ECF No. 83, *New York*, 20-CV-5770 (S.D.N.Y Aug. 10, 2020). To the extent that the Martinez Intervenors seek to challenge the Presidential Memorandum on the same bases as New York has done, or to the extent that Alabama's claims survive Defendants' jurisdictional defenses, a three-judge court may likewise need to be convened here pursuant to § 2284's provisions.

Notably, however, the request to convene a three-judge court in the *New York* case has not delayed the briefing schedule in that matter. And it should not delay the Court's action here. For all the reasons above, and those articulated in our prior brief, the Court should stay all ongoing discovery and enter a scheduling order directing the parties to submit briefing addressing whether this Court has jurisdiction to hear the parties' claims. In the interests of judicial economy, this briefing should also allow the parties to address the merits of their Constitutional claims, so that this Court—or one convened under 28 U.S.C. § 2284—can decide those issues if it determines that doing so is appropriate.

[1] To be clear, the Defendants' interests in proceeding with briefing is not a concession that a pre-apportionment challenge to the Presidential Memorandum is appropriate. To the contrary, as noted above, Defendants intend to argue that such a challenge is not ripe.

Dated: August 10, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of August, 2020, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing.

/s/ Alexander V. Sverdlov
ALEXANDER V. SVERDLOV