

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

STATE OF ALABAMA, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
COMMERCE, et al.,

Defendants,

DIANA MARTINEZ, et al.,

Defendant-Intervenors,

and

COUNTY OF SANTA CLARA,
CALIFORNIA, et al.,

Defendant-Intervenors,

and

STATE OF NEW YORK, et al.,

Defendant-Intervenors.

Case No.: 2:18-cv-00772-RDP

Reply Brief in Response to the Court's July 21, 2020 Order

INTRODUCTION

The Court should stay this case. No live issue remains for the Court to decide, as the July 21, 2020 Presidential Memorandum titled “Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census” (“Memorandum”), 85 Fed. Reg. 44679 (July 23, 2020), effectively granted the relief Plaintiffs sought. At the same time, a stay, instead of dismissal, best preserves judicial resources: rather than deciding now the justiciability issues raised in the opening briefs, the Court may simply pick up the case if a live case presents itself once again. Thus, Local Government Defendant-Intervenors and State and Other Government Defendant-Intervenors (“Government Defendant-Intervenors”) respectfully request that the Court enter a temporary stay pending the resolution of the litigations challenging the validity of the Memorandum.

ARGUMENT

This Court has the inherent power to issue a stay—and in these circumstances, should exercise that power. First, if the Memorandum is valid, Plaintiffs will not be harmed. Indeed, the Memorandum resolves Plaintiffs’ harms arising from “Defendants’ unconstitutional and arbitrary decision to include illegal aliens in the census numbers utilized for calculating congressional and electoral apportionment,” Dkt. 112 ¶ 4, proclaiming that any apportionment “that does not use the best available methods to exclude illegal aliens from the apportionment base used to apportion congressional seats and Electoral College votes among the states would be unconstitutional.” *Id.* at ¶ 144(b).

Defendants appear to agree, writing, “The Presidential Memorandum makes clear that the Residence Rule does not, as a legal matter, stand in the way of excluding illegal

aliens from the apportionment count transmitted to Congress.” Dkt. 158 at 2. Plaintiffs maintain there is no guarantee that Defendants will ultimately provide relief. But they have not articulated how any relief the Court could provide at this juncture would exceed the relief granted by the Memorandum, which already requires Defendants to “take all appropriate action, consistent with the Constitution and other applicable law,” to allow the President to carry out a “policy . . . to exclude from the apportionment base aliens who are not in a lawful immigration status.” Memorandum at 44680. This is effectively what Plaintiffs sought in their prayer for relief.

Second, a stay conserves judicial resources. It is unnecessary at this juncture for the Court to wade into the jurisdictional and justiciability issues presented by the parties in their opening briefs because their resolution may well prove unnecessary. A stay should be lifted in the event the Memorandum is invalidated in the litigations challenging it, because at that point—and only at that point—Plaintiffs would need an order from this Court to obtain the relief they seek. A temporary stay also avoids the considerable risk that proceeding now, as Plaintiffs have urged, may cause the Court to render an advisory opinion on the merits.

Defendants indicated within a footnote that at some point in the future they “may . . . request” that a three-judge court be convened pursuant to 28 U.S.C. § 2284. Dkt. 158 at 5 n.1. Because no party has requested the appointment of a three-judge court yet, Government Defendant-Intervenors take no position on the application of that statute at this point. Should the Court be inclined to proceed despite the uncertainty of whether Plaintiffs require disposition of their claims to obtain meaningful relief, discovery should

continue. Government Defendant-Intervenors do not understand Defendants' contention that jurisdictional discovery is no longer necessary in light of the Memorandum. The Court has previously permitted discovery, and the Memorandum certainly does not make jurisdiction more apparent.

CONCLUSION

For these reasons and the reasons provided in the opening brief, the Court should stay the action.

DATED: August 10, 2020

Respectfully submitted,

/s/ Robert S. Vance
THE BLOOMSTON FIRM
Robert S. Vance
2151 Highland Avenue South, Suite 310
Birmingham, AL 35205
(205) 212-9700
Robert@thebloomstonfirm.com

DAGNEY JOHNSON LAW GROUP
Anil A. Mujumdar (ASB-2004-L65M)
2170 Highland Avenue South, Suite 205
Birmingham, Alabama 35205
Telephone: (205) 649-7502
Facsimile: (205) 809-7899
Email: anil@dagneylaw.com

LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW
Ezra D. Rosenberg
Dorian L. Spence
1401 New York Avenue NW, Suite 400
Washington, DC 20005
Telephone: (202) 662-8600
Facsimile: (202) 783-9857
Email: erosenburg@lawyerscommittee.org
dspence@lawyerscommittee.org

DEMOCRACY FORWARD

Robin F. Thurston

John T. Lewis

Democracy Forward Foundation

P.O. Box 34553

Washington, DC 20043

Telephone: (202) 448-9090

Email: rthurston@democracyforward.org

jlewis@democracyforward.org

Attorneys for Defendant-Intervenors City of
Atlanta, Georgia; City of San José, California;
Arlington County, Virginia;
and King County, Washington

DEBEVOISE & PLIMPTON LLP

Jyotin Hamid

Lauren M. Dolecki

Ming Ming Yang

919 Third Ave

New York, NY 10022

(212) 909-6000

Facsimile: (212) 909-6836

Email: jhamid@debevoise.com

lmdolecki@debevoise.com

mmyang@debevoise.com

CITY OF SAN JOSÉ

Richard Doyle, City Attorney

Nora Frimann, Assistant City Attorney

Office of the City Attorney

200 East Santa Clara Street, 16th Floor

San José, CA 95113-1905

Telephone: (408) 535-1900

Facsimile: (408) 998-3131

Email: cao.main@sanjoseca.gov

Attorneys for Defendant-Intervenor
City of San José

COPELAND FRANCO
SCREWS & GILL, P.A.

Robert D. Segall (SEG003)
Post Office Box 347
Montgomery, AL 36101-0347
Phone: (334) 834-1180
Facsimile: (334) 834-3172
Email: segall@copelandfranco.com

OFFICE OF THE COUNTY COUNSEL
COUNTY OF SANTA CLARA
James R. Williams, County Counsel
Greta S. Hansen
Raphael N. Rajendra
Marcelo Quiñones
Laura S. Trice
Office of the County Counsel
County of Santa Clara
70 West Hedding Street
East Wing, 9th Floor
San José, CA 95110
Email: raphael.rajendra@cco.sccgov.org
marcelo.quinones@cco.sccgov.org

LAW OFFICE OF
JONATHAN WEISSGLASS
Jonathan Weissglass
410 12th Street, Suite 250-B
Oakland, CA 94607
Telephone: (510) 836-4200
Email: jonathan@weissglass.com

Attorneys for Defendant-Intervenor
County of Santa Clara, California

LETITIA JAMES
Attorney General of the State of New York

/s/ Joyce White Vance
Joyce White Vance
101 Paul W. Bryant Drive
Tuscaloosa, AL 35487
jvance@law.ua.edu

/s/ Barry A. Ragsdale
Barry A. Ragsdale
SIROTE & PERMUTT, PC
2311 Highland Avenue South
Birmingham, AL 35205
Phone: (205) 930-5100
Fax: (205) 930-5101
bragsdale@sirote.com

By: /s/ Matthew Colangelo
Matthew Colangelo
Chief Counsel for Federal Initiatives
Elena Goldstein
Deputy Chief, Civil Rights Bureau
Joseph J. Wardenski, *Senior Trial Counsel*
Office of the New York State Attorney
General
28 Liberty Street
New York, NY 10005
Phone: (212) 416-6057
Matthew.Colangelo@ag.ny.gov

Attorneys for the State and Other Government
Defendant-Intervenors

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2020, a true and correct copy of the foregoing was served electronically to counsel of record agreed to by the parties.

/s/ Robert S. Vance

Dated: August 10, 2020