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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.,

*Plaintiff*s,

v.

UNITED STATES DEPARTMENT OF COMMERCE; et al.,

Defendants,

and

DIANA MARTINEZ, et. al.

Defendant-Intervenors,

and

JOEY CARDENAS, et. al.,

Cross-Claimants,

v.

BUREAU OF CENSUS, et al.,

Cross-Defendants.

Civil Action No. 2:18-cv-00772-RDP

PLAINTIFFS' RESPONSE TO THE OTHER PARTIES' INITIAL FILINGS REGARDING THE COURT'S JULY 23, 2020 BRIEFING ORDER (DOC. # 153)

Plaintiffs hereby respond to the filings the other parties submitted in response to the Court's order requesting briefing regarding the effect, if any, that President Trump's recent Memorandum (Doc. 152-1) "may have on the claims asserted in this case." (Doc. 153). Plaintiffs do not oppose Defendants' request to stay discovery and schedule briefing regarding the ripeness, justiciability, and merits of the parties' claims. Plaintiffs, however, contest Defendants' argument that the President's Memorandum deprives Plaintiffs of standing, and Plaintiffs oppose the Government Intervenors' proposal to stay Plaintiffs' case. Plaintiffs have not yet received their relief, it is uncertain that they will receive their relief without an order from this Court, and the Court can consider Plaintiffs' claims alongside the closely related cross-claim raised by the Martinez Intervenors. The Court thus should stay discovery and order summary judgment briefing on the ripeness, justiciability, and merits of the parties' claims.

ANALYSIS

No party contends that the President's Memorandum has rendered Plaintiffs' claims moot, for it is clear that a plaintiff does not lose standing merely because her claims might become moot. As Plaintiffs explained in their initial brief, the Memorandum did not make it "impossible for a court to grant any effectual relief whatever to the" Plaintiffs, *Chafin v. Chafin*, 568 U.S. 165, 172 (2013), and the doctrine of voluntary cessation does not apply because it is not yet clear whether Defendants will cease the conduct Plaintiffs challenged. (*See* Doc. # 156 at 4-8). Defendants nevertheless assert that "Plaintiffs can no longer establish that they stand to suffer harm" because the President's Memorandum proves 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." (Doc. # 158 at 2). But the Rule dictates at least one of the numbers that will be reported to the President, and if that is the only number reported, Plaintiffs still stand to be harmed by the Rule. Moreover,

even if Plaintiffs' challenge of the Residence Rule were mooted or un-ripened by the Memorandum, Plaintiffs' claims turn not only on the Residence Rule, but on the numbers the Secretary of Commerce reports to the President and that the President reports to Congress. The Residence Rule was evidence that Defendants intended to include illegal aliens in the apportionment base reported to the President, and Defendants still maintain that it is uncertain whether illegal aliens will be excluded from the apportionment base. Thus, Plaintiffs should continue to be able to seek a declaration that an apportionment that "does not use the best available methods to exclude illegal aliens from the apportionment base … would be unconstitutional." (Doc. # 112, ¶ 144(b)).

Defendants next assert that Plaintiffs' claims are not justiciable because Defendants *might* voluntarily cease their challenged conduct. This argument, in effect, asks the court to "chang[e] mootness doctrine to signal a lack of jurisdiction not merely when a controversy is moot, but also when it might become moot." *Town of Barnstable v. O'Connor*, 786 F.3d 130, 143 (1st Cir. 2015). The First Circuit rejected that approach and this Court should do the same.

To be sure, courts have held that "ripeness doctrine involves both jurisdictional limitations imposed by Article III's requirement of a case of controversy and prudential considerations arising from problems of prematurity and abstractness that may present insurmountable obstacles to the exercise of the court's jurisdiction, even though jurisdiction is technically present." *Johnson v. Sikes*, 730 F.2d 644, 648 (11th Cir. 1984). And because "ripeness is peculiarly a question of timing, it is the situation now … that must govern." *Id.* But ripeness analysis should still be conducted in light of the principle that "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167

(2014) (quotation marks omitted); *see also id.* (noting the "tension" between this virtually unflagging obligation and "the prudential ripeness doctrine").

Prudential ripeness turns on an assessment of "both the fitness of the issues for judicial decision and the hardship to the parties of withholding judicial review." *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1291 (11th Cir. 2010). The fitness analysis "is typically concerned with questions of finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed." *Id.* (quotation marks omitted). "The 'fitness' issue raised by the existence of future contingencies, which goes to ripeness, is related to but distinct from the 'imminence' requirement of a cognizable injury-in-fact, which goes to standing." *Id.* at 1291 n.11. While standing turns on "how likely the challenged conduct is to cause the plaintiff an injury," ripeness turns on "whether the defendant's *engagement* in the challenged conduct is contingent on future events whose non-occurrence might deprive the plaintiff of an injury-in-fact." *Id*. "The hardship prong asks about the costs to the complaining party of delaying review until conditions for deciding the controversy are ideal." *Id.* at 1291.

Applying the fitness prong here, the President's Memorandum appears to make it more likely that Defendants will take actions that remedy Plaintiffs' harms. But "to determine whether a future contingency creates fitness (and ultimately ripeness) concerns, a court must assess the *likelihood* that a contingent event will deprive the plaintiff of an injury." *Id.* at 1291-92. And several factors suggest that Defendants are not likely to remedy Plaintiffs' harms. First, Defendants have professed uncertainty over their ability to produce a count of illegal aliens in time to report a number to the President. (Doc. # 156-1 at 7). Second, the Memorandum requires the Secretary of Commerce, in effect, to report two numbers to the President, while leaving the President discretion to pick one or the other. (Doc. # 152-1 at 3-4). Third, the Government

Intervenors and numerous other individuals and groups have challenged the Memorandum in courts across the country. (*See* Docs. # 154, 155). If a preliminary injunction is entered in even one of these cases, Defendants might have to cease working to implement the Memorandum. Thus, while the Memorandum makes it more likely that Plaintiffs' harms will be redressed, there is still sufficient likelihood of harm to warrant moving forward with this case.

Moreover, even if delaying resolution of this case could resolve some uncertainty, that delay would come at a significant cost to Plaintiffs and Intervenors alike. To be sure, as Defendants recently argued in the Southern District of New York, litigation over the apportionment base can continue post-apportionment. *See* Parties' Joint Letter at 5, *New York v. Trump*, No. 1:20-cv-5770-JMF (S.D.N.Y. Aug. 3, 2020), ECF No. 37. But States require time to redistrict and would face significant costs if forced to redistrict based on an order that leads to a new apportionment base.

As to Defendants' proposal to close discovery and brief the remaining issues, Plaintiffs agree. The parties' experts have been deposed, and the Census Bureau's Rule 30(b) witness has been deposed twice. The Court can now turn to the ripeness, justiciability, and merits of the parties' claims.

And if the Court determines that ripeness requires a delay in ruling on these claims, there is still good reason to brief them, for any ripeness obstacles would be short-lived. Any ripeness concerns regarding Plaintiffs' claims would disappear if Defendants stop trying to implement the Memorandum or fail to do so—whether due to feasibility issues, an injunction from another court, or another cause. Meanwhile, the Martinez Intervenors' cross-claim would undoubtedly be ripe if the President were to report an apportionment number to Congress that excludes illegal aliens.

Thus, any prudential reasons for delaying a decision in this case would still support briefing the issues now so the case can be resolved as promptly as prudence allows.

Plaintiffs thus oppose the Government Intervenors' proposal to stay Plaintiffs' action until the Government Intervenors' other lawsuits have run their course. (Doc. # 157 at 2). Indeed, many of these Intervenors argued elsewhere that "[t]o redress" their feared "apportionment harms," their challenges to the President's Memorandum "must be finally resolved by the end of 2020." Parties' Joint Letter at 4, *New York v. Trump*, No. 1:20-cv-5770-JMF (S.D.N.Y. Aug. 3, 2020), ECF No. 37. Plaintiffs' alleged apportionment harms also require prompt adjudication. A stay is not warranted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify, as an officer of the Court, that I have affirmatively and diligently sought to submit to the Court only those documents, factual allegations, and arguments that are material to the issues to be resolved in the motion, that careful consideration has been given to the contents of Plaintiffs' submission to ensure that it does not include vague language or an overly broad citation of evidence or misstatements of the law, and that the submission is non-frivolous in nature.

s/Edmund G. LaCour Jr.
Edmund G. LaCour Jr.
Solicitor General

CERTIFICATE OF SERVICE

This is to certify that on the 10th day of August, 2020, a copy of the foregoing has been electronically filed with the Clerk of the Court using the CM/ECF system, which will electronically send a copy of the same to all counsel of record electronically registered with the Clerk.

s/Edmund G. LaCour Jr.
Edmund G. LaCour Jr.
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