No. 20-366

In the
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Appellants,

v.

STATE OF NEW YORK, ET AL.,

Appellees.

ON APPEAL FROM THE UNITES STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' OPPOSITION TO MOTION FOR EXPEDITED CONSIDERATION OF THE JURISDICTIONAL STATEMENT AND FOR EXPEDITION OF ANY PLENARY CONSIDERATION OF THIS APPEAL

Appellants fail to demonstrate exigent circumstances warranting expedited consideration of this case, for three reasons.

First, Appellants' request for expedition is flatly contrary to their own repeated and unequivocal representations before the three-judge district court that resolution in this Court can wait, and complete relief for either party can be implemented without difficulty, well beyond this year—*even until 2022*. In their pending motion, Appellants assert that the Court must decide this case before "the December 31 statutory deadline" for the Secretary of Commerce to submit his report to the President on "total population by States" for purposes of apportionment pursuant to 13 U.S.C. § 141(b). Mot. at 6, 3. They further state that revising the

apportionment numbers after the Secretary has submitted them would cause significant harm.

But Appellants repeatedly told the district court the *opposite*. Below, they argued that "[t]here is no extreme time urgency to deciding this matter"; that "there is no need to resolve this lawsuit before the submission of the enumeration numbers to the President"; and that it "would be optimal" for this case "to reach the Supreme Court . . . before the 2022 elections." *New York v. Trump*, 20-CV-5770 (RCW) (PWH) (JMF), Parties' Joint Pre-Conference Letter, ECF No. 37, at 5 (S.D.N.Y. Aug. 3, 2020). That was so, they explained, because it would be "easy" for the Court to "order adequate relief after apportionment," well beyond the end of this year. *New York*, 20-CV-5770 (RCW) (PWH) (JMF), Defs.' Mem., ECF No. 118, at 48. There are no changed factual circumstances that can possibly explain Appellants' 180-degree turn. Appellants' prior representations in this very case preclude their request for expedition here.

Second, the purported exigencies here are of Appellants' own making. Prior to issuance of the Presidential Memorandum at issue in this case, Appellants had stated that they would be unable to meet the December 31 deadline due to the COVID-19 pandemic, and announced that the Commerce Secretary would instead seek to submit his apportionment report by April 30, 2021. *National Urban League v. Ross*, 20-cv-05799-LHK, Order, ECF No. 208 at 7-8 (N.D. Cal. Sept. 24, 2020). Appellants operated under the April 30, 2021 deadline for over four months, while

stating repeatedly, publicly and internally, that the Bureau could not meet the December 31, 2020 statutory deadline. *Id.* at 59-63.

It was only after the Presidential Memorandum was released without warning on July 21, and this litigation was filed on July 24, that Appellants suddenly accelerated their plans and truncated the time for the Secretary's apportionment report, reverting to the December 31 deadline—an apparent bid to lock in their preferred apportionment before judicial review could take place. Having failed in that effort, Appellants cannot now leverage a belated, self-imposed deadline to justify expedited appeal before this Court.

Third, the December 31 deadline—which forms the entire basis for this motion—has been stayed by an order of the District Court for the Northern District of California. *See National Urban League*, 20-cv-05799-LHK, Order, ECF No. 208 at 78. Appellants' arguments for urgency here therefore hinge on a deadline that Appellants may be unable to meet regardless of how this Court rules, and which is now legally inoperative.

Appellants' flip-flopping on positions they took before the district court demonstrates the unsoundness of their position here. They have given no good reason for rushed litigation by the parties, or rushed consideration by the Court—especially in light of the immense significance of the census for the nation. The motion should be denied and this appeal should proceed under the Court's ordinary practices and scheduling rules. In the alternative, if this Court grants Appellants'

motion to expedite consideration of the Jurisdictional Statement and/or appeal on the merits, Appellees respectfully request an alternative schedule, set forth *infra*.

STATEMENT

1. Every census in American history has "included every person residing in the United States at the time of the census, whether citizen or non-citizen and whether living here with legal status or without." App. 3a. And every apportionment has been performed on the basis of such an inclusive census count. On July 21, 2020, however, with the census "still ongoing," "the President announced that this long-standing practice will no longer be the case," and that—for the first time in history—"it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status." App. 3a (quoting Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44,679, 44,680 (July 23, 2020) ("the Presidential Memorandum")).

2. As its title explains, the Presidential Memorandum directs the Secretary of Commerce, "following the 2020 census," to include two numbers in his apportionment report to the President under 13 U.S.C. § 141(b): the total population in each State, as counted through the 2020 decennial census, which includes undocumented immigrants; and a second number, which excludes undocumented immigrants, and will purportedly form the basis for the apportionment. *See* J.S. 5 (citing 85 Fed. Reg. at 44,680). The Presidential Memorandum "anticipates that excluding illegal aliens from the apportionment

count could reduce the number of representatives in States with large immigrant populations, noting explicitly that in 'one State . . . home to more than 2.2 million illegal aliens'—apparently, California—the inclusion of illegal aliens could 'result in the allocation of two or three more congressional seats than would otherwise be allocated.'" App. 19a (quoting 85 Fed. Reg. at 44,680).

3. On July 24, 2020, Appellees—a group of States and other governmental entities, and a group of immigrants' rights organizations engaged in census outreach—filed complaints alleging that the Presidential Memorandum was undermining census response rates by sowing fear, confusion and distrust about the purposes of the census, and that the policy stated in the Presidential Memorandum would cause Appellees and their constituents to lose political power during the next apportionment, by reallocating seats in the House of Representatives away from states with large immigrant populations. App. 20a. Appellees alleged that the Presidential Memorandum violated several constitutional provisions and federal statutes. *Id.*

4. At the time Appellees filed their complaints, the Census Bureau's planned deadlines for field operations to collect census responses and for the Commerce Secretary to report population totals to the President were October 31, 2020, and April 30, 2021, respectively, under an operational plan adopted by the Bureau in response to the COVID-19 pandemic. App. 16a.

Because of the pandemic, both "the President of the United States and Bureau officials publicly stated that meeting the [statutory] December 31, 2020

deadline [for the Commerce Secretary's apportionment report] would be impossible in any event," and the Commerce Department Chief of Staff reported that, even "under ideal conditions . . . apportionment counts could not be delivered until January 31, 2021, already after the statutory deadline." *National Urban League*, 20-cv-05799-LHK, Order, ECF No. 208 at 7, 9. On April 13, the President publicly stated that, because of the pandemic, the Commerce Secretary's apportionment report would have to be delivered in 2021, regardless of the December 31 statutory deadline: "I don't know that you even have to ask [Congress]. This is called an act of God. This is called a situation that has to be."[1]

Accordingly, on April 13, 2020, through a joint statement from the Commerce Secretary and the Census Bureau Director, the Census Bureau "issued an adjustment to its Operational Plan to account for the impact of COVID-19 (the "COVID-19 Plan")." The plan extended census field operations until October 31, and, given the government's inability to meet the December 31 deadline for the Commerce Secretary's apportionment report, sought to add "120 additional calendar days to deliver final apportionment counts," so that the Commerce Secretary's apportionment report would be delivered to the President on April 30, 2021 rather than December 31, 2020. *National Urban League*, 20-cv-05799-LHK, Order, ECF No. 208 at 7.

[1] White House, Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing," April 13, 2020*, available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-25/.

5. After Appellants issued the Presidential Memorandum, and Appellees filed the complaints in this case, the Census Bureau suddenly changed course and announced a "Replan" on August 3, 2020. The Replan sought to end census field operations on September 30 (instead of October 31), and provided that the Commerce Secretary's apportionment report would be submitted to the President on December 31, 2020 (instead of April 30, 2021). App. 47a; *Nat'l Urban League*, 20-cv-05799-LHK, Order, ECF No. 208 at 11-12. The Department of Commerce Inspector General has concluded that the acceleration of these deadlines "poses a myriad of risks to [the] accuracy and completeness" of the census, and confirmed with Census Bureau officials that "the decision to accelerate the Census Schedule was not the Bureau's decision," but instead "likely came from the White House" or the Commerce Department, and that "the Presidential Memorandum had to have played some role" in that decision.[2]

6. The next day, in a joint letter filed in the district court on August 3, 2020, in response to the district court's question "whether there is a date by which the issues in this case need to be resolved and, if so, what that date is," Appellants wrote that "there is no extreme time urgency to deciding this matter." *New York*, 20-CV-5770, Parties' Joint Pre-Conference Letter, ECF No. 37, at 5.

[2] U.S. Dep't of Commerce, Office of the Inspector General, *The Acceleration of the Census Schedule Increases the Risks to a Complete and Accurate 2020 Census*, Final Management Alert No. OIG-20-050-M, at 10, 5, 6-7 (Sept. 18, 2020) ("OIG Report"), *available at* https://www.oig.doc.gov/OIGPublications/OIG-20-050-M.pdf.

"More specifically," Appellants continued, "there is no need to resolve this lawsuit before the submission of the enumeration numbers to the President." *Id.* Appellants asserted that a decision from the district court "would be optimal with sufficient time to reach the Supreme Court . . . before the 2022 elections." Appellants added that if the district court "decided the case soon *after* the President sent the enumeration and apportionment to Congress in January 2021 (or later, if Congress responds to the Census Bureau's request for an extension to complete the 2020 Census), that should provide more than enough time for any relief the Court ordered to be effectuated." *Id.* (emphasis added). Appellants asserted that, after final resolution of this case, "relief could simply involve apportionment based on" a total population count different from the one included in the Secretary's initial apportionment report under 13 U.S.C. § 141(b). *Id.*

Thus, after accelerating the timelines for the census and apportionment, Appellants sought to delay resolution of this case until after both would be finished. That would have ensured that judicial review would not occur until *after* the Secretary had already submitted Appellants' preferred apportionment number—based on Appellants' unequivocal assertions that review by this Court can wait, and complete relief for either party can be afforded, after the fact.

7. On August 7, Appellees filed a motion for summary judgment (or, in the alternative, for a preliminary injunction), only on claims that the Presidential Memorandum violates the Enumeration Clause, as modified by the Fourteenth Amendment; and violates 2 U.S.C. § 2a and 13 U.S.C. § 141. App. 22a.

8. On August 10, the Chief Judge of the Second Circuit appointed a three-judge panel to hear this case, consisting of Second Circuit Judges Wesley and Hall, and Southern District of New York Judge Furman, pursuant to 28 U.S.C. § 2284(b). App. 21a.

9. On August 19, Appellants filed their opposition, once again asserting that there was no urgency to resolving this case and that Supreme Court review was unnecessary prior to the Commerce Secretary's December 31 statutory deadline for reporting the "total population by States" under 13 U.S.C § 141(b). Appellants told the three-judge panel:

> any purported apportionment injury that Plaintiffs could suffer is, as a legal matter, not irreparable. The Supreme Court has regularly decided census cases that, like this one, contest the relative apportionment of representatives post-apportionment, because an erroneous or invalid apportionment number can be remedied after the fact. . . . This case is not different.

New York, 20-CV-5770 (RCW) (PWH) (JMF), Defs.' Mem., ECF No. 118, at 48 (citing *Utah v. Evans*, 536 U.S. 452, 462 (2002); *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992); *Dep't of Commerce v. Montana*, 503 U.S. 442, 445-46 (1992); *Wisconsin v. City of New York*, 517 U.S. 1 (1996)). Appellants further stated that the court "could order adequate relief after apportionment . . . a post-apportionment remedy would be easy to craft." *Id.*

10. On September 10, the three-judge district court issued a per curiam opinion and order granting Appellees' motion for summary judgment on their statutory claims. The court declared the Presidential Memorandum's policy of excluding undocumented immigrants from the apportionment base unlawful, and

enjoined the Commerce Secretary from including information in the Section 141(b) report that would allow the President to implement the policy.

First, the district court held that there was "undisputed evidence that the Presidential Memorandum is affecting the census count in the present," App. 44a, by causing "widespread confusion among illegal aliens and others as to whether they should participate in the census, a confusion which has obvious deleterious effects on their participation rate." App. 35a. "These deterrent effects have far-reaching ramifications, including increasing costs for census outreach programs run by NGOs and governments," such as the Plaintiff-Appellees. App. 35a. The court further found that "the undisputed facts in the record also reflect that judicial relief invalidating the Presidential Memorandum would likely reduce the confusion felt by immigrant communities," thereby enabling the Plaintiffs-Appellees to "conduct more efficient and effective census outreach," and ultimately "alleviate some of the injuries being felt by Plaintiffs." App. 42a. The district court thus concluded that Appellees had standing to bring their claims based on their injuries arising from the Presidential Memorandum's chilling effect on census participation, and redressable by declaratory and injunctive relief. App. 43a-68a. The district court declined to address Appellees' apportionment-related injuries, based in part on Appellants' argument that "an illegal apportionment can be remedied even after the apportionment process has taken place." App. 43a.

Second, the district court ruled that the Presidential Memorandum violated 2 U.S.C. § 2a and 13 U.S.C. § 141, statutes requiring that congressional

apportionment be based on the results of the decennial census alone, and that the census must include all persons whose usual residence is in the United States, regardless of immigration status. App. 74a. The panel noted that "[t]he merits of the parties' dispute are not particularly close or complicated." App. 6a. The Court further noted that, "[i]n light of that conclusion, we need not and do not reach Plaintiffs' constitutional claims, let alone the Plaintiffs' claims that did not form the basis for their motion." App. 94a.

Third, the district court issued a permanent injunction against all defendants except the President, barring them from including in the Commerce Secretary's Section 141(b) report "any information concerning the number of aliens in each State 'who are not in a lawful immigration status under the Immigration and Nationality Act.'" App. 99a-100a. The district court ordered that the Secretary's Section 141(b) report shall include only the results of the 2020 decennial census. App. 99a. The district court clarified that its limited injunction did *not* block Appellants "from continuing to study whether and how it would be feasible to calculate the number of illegal aliens in each State." App. 100a.

Finally, the district court also issued "an unambiguous judicial declaration that the Presidential Memorandum is unlawful," which the district court determined "would help ensure that the chilling effects on participation in the census are mitigated to the maximum extent possible." App. 102a.

11. Appellants filed a notice of appeal from the three-judge district court's final judgment and subsequently filed a jurisdictional statement in this Court.

Together with their jurisdictional statement, Appellants moved to expedite this Court's consideration of the jurisdictional statement and, if the Court notes probable jurisdiction, to expedite its merits review. The motion argues that "[e]xpedited consideration . . . is needed to enable the Court to be in a position to resolve the appeal, if necessary, before the statutory deadlines," *i.e.*, the December 31 deadline for the Secretary of Commerce to report the census results to the President, because otherwise Appellants "will be forced to make reports by the statutory deadlines that do not reflect the President's important policy decision concerning the apportionment." Mot. at 2.

12. In separate litigation, on September 24, 2020, the U.S. District Court for the Northern District of California granted a stay and preliminary injunction concerning the August 3, 2020 "Replan," which accelerated and curtailed the census. *National Urban League*, 20-cv-05799-LHK, Order, ECF No. 208 (Sept. 24, 2020). The Court's order (1) stays the "September 30, 2020 deadline for the completion of data collection and December 31, 2020 deadline for reporting the tabulation of the total population to the President . . . pursuant to 5 U.S.C. § 705"; and (2) enjoins the Secretary of Commerce, Department of Commerce, Director of the Census Bureau, and the Census Bureau from implementing the Replan deadlines. *Id.* at 78. The effect of the order is to revert to the Bureau's own April 30, 2021 deadline for delivery of the Secretary's apportionment report to the President.

ARGUMENT

A. The Court Should Deny the Motion to Expedite

Appellants' motion should be denied for three reasons.

1. First, Appellants repeatedly and unequivocally stated in the district court that review by this Court can wait, and complete relief in this case can be afforded, well after the December 31 statutory deadline for the Commerce Secretary's apportionment report. Their request for expedition directly contradicts those previous assertions.

Appellants base their motion on the assertion that "[e]xpedited consideration . . . is warranted because the district court's judgment interferes with the Secretary's ability to meet the December 31 statutory deadline while complying with the President's expressed policy." Mot. at 6. But until they received an adverse ruling from the district court, Appellants not only argued that urgent resolution of this case was unnecessary, but that review by the Supreme Court would be "optimal" *after* the December 31 deadline, and that an incorrect Section 141(b) report or apportionment could be easily and fully redressed with complete relief long after December 31—so long as the case was resolved prior to the *2022 elections cycle*. *New York*, 20-CV-5770, Parties' Joint Pre-Conference Letter, ECF No. 37, at 5.

For example, Appellants stated:

- "There is no extreme time urgency to deciding this matter. More specifically, **there is no need to resolve this lawsuit before the submission of the enumeration numbers to the President**." *Id.* (emphasis added).

- **"[A] decision would be optimal with sufficient time to reach the Supreme Court—and, if necessary, for relief to be effectuated—before the 2022 elections**. Therefore, if the Court decided the case soon after the President sent the enumeration and apportionment to Congress in January 2021 (or later, if Congress responds to the Census Bureau's request for an extension to complete the 2020 Census), that should provide more than enough time for any relief the Court ordered to be effectuated." *Id.* (emphasis added).

- After judicial resolution of this dispute, "relief could simply involve apportionment based on" a different population total. *Id.*

- "[A]ny purported apportionment injury that Plaintiffs could suffer is, as a legal matter, not irreparable. The Supreme Court has regularly decided census cases that, like this one, contest the relative apportionment of representatives post-apportionment, because **an erroneous or invalid apportionment number can be remedied after the fact** . . . . This case is not different." *New York*, 20-CV-5770 (RCW) (PWH) (JMF), Defs.' Mem., ECF No. 118, at 48.

- "[T]his Court **could order adequate relief after apportionment . . . a post-apportionment remedy would be easy to** craft." *Id.* (emphasis added).

- "[T]he Court's evaluation of any claim . . . would benefit from allowing the Census Bureau, the Secretary, and the President to complete the enumeration and apportionment process." *New York*, 20-CV-5770 (RCW) (PWH) (JMF), Defs.' Reply, ECF No. 154, at 2.

The Court should deny the motion to expedite, because Appellants repeatedly represented to the lower court that there is no need to expedite. Indeed, based on their earlier position, Appellants should be estopped from even seeking expedition. The doctrine of judicial estoppel "protect[s] the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). Judicial estoppel applies where: (1) the party's position is "clearly inconsistent with its earlier position"; (2) "the party has succeeded in persuading a court to accept that party's

earlier position"; and (3) "the party seeking to assert an inconsistent position would derive an unfair advantage . . . if not estopped." *Id.* at 750–51 (2001) (internal quotation marks omitted).

All three factors are met here. First, Appellants have repeatedly asserted that appellate review by this Court would be "optimal" *after* December 31, so long as it took place before the 2022 elections, *New York*, 20-CV-5770, Parties' Joint Pre-Conference Letter, ECF No. 37, at 5; that "an erroneous or invalid apportionment number can be remedied after the fact"; and that such a remedy would be "easy to craft." *New York*, 20-CV-5770 (RCW) (PWH) (JMF), Defs.' Mem., ECF No. 118, at 48. And the district court carefully tailored its injunction to ensure that, if Appellants ultimately prevail on appeal, they may immediately implement their preferred apportionment: "To be clear, as an exercise of discretion, this Court does not enjoin Defendants from continuing to study whether and how it would be feasible to calculate the number of illegal aliens in each State." App. 99a-100a. The White House has since acknowledged that the injunction does not impede Appellants from preparing to implement the policy in the Presidential Memorandum:

> [T]he district court's order does not prevent the Department of Commerce from continuing preparations to execute the President's policy not to include illegal aliens in the apportionment base. Nor does it affect . . . the Department of Commerce's efforts to compile citizenship and immigration status data to achieve an accurate count of the number of illegal aliens in the country. Accordingly, **the Federal Government's work . . . continues unabated**.[3]

[3] Statement from the White House Press Secretary, Sept. 18, 2020 (emphasis added). *Available at* https://www.whitehouse.gov/briefings-statements/statement-

Appellants' new position—that "[e]xpedited consideration . . . is needed to enable the Court to be in a position to resolve the appeal" before the Secretary submits his population report under Section 141(b), Mot. at 2, and that relief awarded after that deadline would "undermine the point of deadlines established by Congress," Mot. at 6—directly contradicts their previous representations to the district court. *See supra.* And, while Appellants asserted below that this case was not urgent because the Presidential Memorandum's effect on the apportionment was inchoate and "entirely speculative," *New York*, 20-CV-5770 (RCW) (PWH) (JMF), Defs.' Mem., ECF No. 118, at 48, Appellants now warn this Court that expedited proceedings are necessary because reversing the injunction "may [make it] necessary to alter the apportionment" in the future. Mot. at 6. Defendants have, in multiple respects, "deliberately chang[ed] positions according to the exigencies of the moment." *New Hampshire*, 532 U.S. at 749-50.

Second, the district court accepted Appellants' previous representations, and relied on them in declining to address plaintiffs' second theory of standing, which was based on how the Presidential Memorandum will affect the final state-by-state apportionment numbers. While Appellees disagreed in the court below with Appellants' view that it would be unproblematic to revise the apportionment numbers after-the-fact,[4] Appellants won on this issue below and Appellees lost: The

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[4] In the district court, Appellees also sought a prompt ruling because Appellants' actions were actively interfering with the ongoing census count and had committed Appellants to an unlawful apportionment. It was necessary for the district court to

district court ruled that there would not "be any harm in waiting until January 2021" to address Plaintiffs' apportionment-related injuries because "an illegal apportionment can be remedied even after the apportionment process has taken place." App. 43a (citing *Utah*, 536 U.S. at 462-63).

That reliance suffices for estoppel purposes. Judicial estoppel requires only that "the party's former position has been adopted in some way by the court in the earlier proceeding." *In re Adelphia Recovery Tr.*, 634 F.3d 678, 695-96 (2d Cir. 2011) (internal quotation marks omitted); *see also Montrose Med. Grp. Participating Sav. Plan v. Bulger*, 243 F.3d 773, 783 (3d Cir. 2001) ("so long as the initial claim was in some way accepted or adopted, no further showing is necessary that the party 'benefitted' in any particular way"); *In re Coastal Plains, Inc.*, 179 F.3d 197, 206 (5th Cir. 1999) ("the 'judicial acceptance' requirement 'does not mean that the party against whom the judicial estoppel doctrine is to be invoked must have prevailed on the merits . . . only that the first court has adopted the position urged by the party, either as a preliminary matter or as part of a final disposition'") (quoting *Reynolds v. Commissioner of Internal Revenue*, 861 F.2d 469, 473 (6th Cir. 1988)).

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act quickly to allow the census count to proceed unimpeded, by requiring Appellants to adhere to the same total-population-based apportionment policy that has been followed since the Founding. But now, the appeal from the status quo established by the decision below does not require further expedition, because no party claims that the decision impairs an accurate census count or requires an apportionment base that would be unlawful.

Third, Appellants now seek an unfair advantage, repudiating their prior positions in order to obtain expedited consideration of an adverse judgment. Despite previously arguing to the district court that "a post-apportionment remedy would be easy to craft" and would be fully "adequate" to address "an erroneous or invalid apportionment," *New York*, 20-CV-5770 (RCW) (PWH) (JMF), Defs.' Mem., ECF No. 118, at 48, Appellants now seek expedited appeal by asserting to this Court that "[s]uch a post-apportionment remedy . . . would undermine the point of the deadlines established by Congress, which is to provide prompt notice to the Nation about the new apportionment that will govern the next congressional elections." Mot. at 6.

The Court should reject Appellants' gamesmanship. Just as the "the Government should turn square corners in dealing with the people," *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020) (internal quotation marks omitted), the government must turn square corners in dealing with the federal judiciary. A private litigant would be held to account for reversing its factual representations in this manner. The Appellants should be too.

2. The motion should be denied for a second reason: Appellants' purported concern about meeting their deadlines is a problem of their own making. Prior to this litigation, Appellants had publicly stated their expectation that they would be unable to comply with the December 31 deadline at all because of COVID-19 pandemic, and announced that the Commerce Secretary would instead seek to submit his apportionment report by April 30, 2021. *National Urban League*, 20-cv-05799-LHK, Order, ECF No. 208 at 7-8. The President disclaimed that a statutory change was

needed to permit submission of the apportionment report at that time, and Appellants then operated under the April 30, 2021 deadlines for over four months. *Id.* at 59-63. It was only after the Presidential Memorandum was issued and this litigation was brought that Appellants accelerated plans to meet a December 31 deadline, and then argued that this case can and should be heard by this Court well after the end of this year. Appellants' alleged exigencies now are thus the product of their own failed effort to ram through their preferred apportionment before judicial review could take place.

In fact, any time sensitivities of this dispute were caused by Appellants' odd choice of timing in issuing the Presidential Memorandum—more than a year after a related Executive Order regarding the collection of citizenship data in July 2019, and with only a few months left before the end of census outreach efforts. As the district court observed: "The President could have issued his Presidential Memorandum well before the census began, in which case Plaintiffs would have had ample time to obtain a definitive ruling on their claims" or "waited until census operations were over, in which case there would have been no risk of the census-related harms that Plaintiffs seek to remedy." App. 67a; *see also* App. 46a.

In sum, it "would make little sense" if expedited briefing "were available when a litigant [is] responsible for its own delay." *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750, 756 (2016). Appellants should not receive the benefit of an expedited appeal due to their artful timing of the Presidential Memorandum and the shifting deadline for the Commerce Secretary's apportionment report.

Appellants' choices are "a bed of their own making." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 468 (2000) (citation and internal quotation marks omitted).

3. Finally, the motion should be denied because the December 31 deadline is not currently operative as either a practical or legal matter. As noted, *supra*, Appellants have repeatedly represented that they cannot even meet the December 31 deadline underlying their request. And that deadline has now been stayed by order of the United States District Court for the Northern District of California. *See National Urban League*, 20-cv-05799-LHK, Order, ECF No. 208 at 78. The reporting deadline is now April 30, 2021.[5]

Appellants thus have no basis for seeking expedited consideration of this case. If the Court chooses not to dismiss the Jurisdictional Statement or to summarily affirm, the Court could set a merits argument for March, which would give the parties

[5] Moreover, bipartisan-sponsored legislation was introduced just last week on September 24, which would officially extend the statutory deadline for the Commerce Secretary's apportionment report to April 30, 2021. See Census Deadline Extension Act, *available at* https://www.murkowski.senate.gov/imo/media/doc/09.15.20%202020%20Census%20Deadline%20Extensions%20Act.pdf. And, in any event, this Court and lower courts have frequently approved agency actions that miss statutory deadlines. *See, e.g.*, *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 157, 171–72 (2003) (upholding the Social Security Commissioner's late assignment of beneficiaries to coal companies despite the fact that it "represent[ed] a default on a statutory duty, though it may well be a wholly blameless one"); *Newton Cty. Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110, 112 (8th Cir. 1997) ("Absent specific statutory direction, an agency's failure to meet a mandatory time limit does not void subsequent agency action"); *Linemaster Switch Corp. v. EPA*, 938 F.3d 1299, 1304 (D.C. Cir. 1991) (explaining that the Court did not want to restrict the agency's powers "when Congress . . . has crafted less drastic remedies for the agency's failure to act").

a reasonable period of time in which to brief the statutory and constitutional questions at issue in this appeal.

B. If the Court Does Expedite this Matter, it Should Reject Appellants' Proposed Schedule

If, however, this Court were to grant Appellants' motion to expedite consideration of this case, Appellees respectfully request a schedule that is somewhat different from the one proposed by Appellants, both with respect to responding to the Jurisdictional Statement and with respect to merits briefing.

First, if the Court decides to expedite consideration of the Jurisdictional Statement, the Court should set an October 12 deadline for Appellees' response. Even if the Court grants the motion for expedition at the earliest opportunity, on Monday, September 28, the October 2 deadline that Appellants propose would give Appellees at most four days to prepare a response to the jurisdictional statement. That is not sufficient time. October 12 would be a more reasonable deadline for Appellees' response to the Jurisdictional Statement.

Second, if the Court notes probable jurisdiction after expediting, the Court should not adopt Appellants' proposed merits schedule. That schedule provides Appellants with over seven weeks between the date of the lower court's judgment and the deadline for their opening brief, but affords Appellees only two weeks to respond. Appellees' alternative proposed schedule will afford all parties adequate time to respond and allow for the completion of briefing in time for the Court's December 2020 sitting.

Specifically, if the Court grants the motion, Appellees respectfully propose the following schedule for briefing and argument:

October 30, 2020	Appellants' opening brief (7 weeks from the decision below)
November 20, 2020	Appellees' brief (3 weeks from the opening brief)
November 27, 2020	Appellants' reply brief (1 week from Appellees' brief)
December Sitting	Oral argument

Appellees also do not object to Appellants' proposal that amicus briefs in support of each party be due on the dates that the parties' briefs are due.

CONCLUSION

For these reasons, the Court should deny Appellants' motion to expedite consideration of the Jurisdictional Statement and to expedite plenary consideration of the appeal.

However, in the event that the Court grants Appellants' motion with respect to consideration of the Jurisdictional Statement, the Court should order that Appellants' response to the jurisdictional statement be due on October 12, 2020. And, if the Court notes probable jurisdiction and grants Appellants' motion with respect to merits review, the Court should order that Appellants' opening brief be due on October 30, 2020 as proposed in Appellants' motion, and that Appellees' opposition and Appellants' reply briefs be due respectively on November 20, 2020 and November 27, 2020.

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