

No. 20-_____

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.

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

MOTION FOR EXPEDITED CONSIDERATION OF THE JURISDICTIONAL
STATEMENT AND FOR EXPEDITION OF ANY PLENARY CONSIDERATION
OF THIS APPEAL IF APPELLANTS' FORTHCOMING MOTION
TO STAY THE JUDGMENT IS NOT GRANTED

The Acting Solicitor General, on behalf of Donald J. Trump, President of the United States, et al., hereby moves, pursuant to Supreme Court Rule 21, for expedited consideration of the jurisdictional statement, filed today, on appeal from the judgment of the United States District Court for the Southern District of New York entered on September 10, 2020 (J.S. App. 105a-107a). That judgment bars the Secretary from including information requested by the President about the immigration status of individuals in a report concerning the enumeration for purposes of apportionment of Representatives; the report has a statutory deadline of December 31, 2020. See id. at 106a; 13 U.S.C. 141(b). The President, in

turn, has a statutory deadline of January 10, 2021, to provide a statement to Congress with the apportionment. See J.S. App. 8a-9a; 2 U.S.C. 2a(a). Absent some form of relief from the judgment, the Secretary and the President will be forced to make reports by the statutory deadlines that do not reflect the President's important policy decision concerning the apportionment.

Expedited consideration of the jurisdictional statement is needed to enable the Court to be in a position to resolve the appeal, if necessary, before the statutory deadlines. The government respectfully requests that appellees be directed to file a motion to dismiss or to affirm by October 2. The government would waive the 14-day waiting period for reply briefs under Rule 18.7 of this Court, so that this Court could consider the case on an expedited basis at its October 9 Conference or October 16 Conference.

The government also intends to file in this Court a motion to stay the district court's judgment if that court does not stay the judgment itself. On September 16, 2020, the government sought a stay from the district court, which called for a response from appellees by September 23. See J.S. 11. Staying the judgment would be an especially appropriate and efficient way to ensure that the Secretary and the President can meet the statutory deadlines because, among other things, that judgment constraining the contents of the Secretary's December 31 report will not and

cannot redress appellees' alleged injuries related to the present collection of census field data. Indeed, because field data collection will end on September 30 (or potentially October 31, depending on ongoing litigation elsewhere), the district court's relief will become moot before it ever has any constraining legal effect. If the district court or this Court stays the judgment, there will be no need to expedite any plenary consideration of this appeal. But if no stay is granted, the government respectfully requests such expedition.

In particular, if the Court notes or defers consideration of probable jurisdiction on or before October 16, and sets this case for plenary consideration, the government requests that appellants' opening brief be due on October 30; that appellees' brief be due on November 13; that appellants' reply brief be due on November 20; and that oral argument be heard during the December 2020 sitting. Amicus briefs supporting the parties should be due on the dates the parties' briefs are due.

STATEMENT

Following completion of the 2020 census, by December 31, 2020, the Secretary must submit to the President "[t]he tabulation of total population by States * * * as required for the apportionment of Representatives in Congress among the several States." 13 U.S.C. 141(b). By January 10, 2021, the President must "transmit to the Congress a statement showing the whole number of

persons in each State * * * and the number of Representatives to which each State would be entitled * * * by the method known as the method of equal proportions." 2 U.S.C. 2a(a).

On July 21, 2020, the President issued a Memorandum to the Secretary providing that "it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended, to the maximum extent feasible and consistent with the discretion delegated to the executive branch," and directing the Secretary, in preparing his Section 141(b) report, "to provide information permitting the President, to the extent practicable," to carry out that policy. 85 Fed. Reg. 44,679, 44,680 (July 23, 2020) (citation omitted).

Appellees brought suits alleging, among other things, that the Memorandum violates the statutory requirements in 13 U.S.C. 141 and 2 U.S.C. 2a on the ground that the Memorandum contemplates an apportionment calculation based on a tabulation in the Secretary's report that (1) will not be "ascertained under * * * [the] decennial census," 2 U.S.C. 2a(a), and (2) will not count "the whole number of persons in each State," ibid. See J.S. App. 4a, 20a-21a.

On September 10, 2020, a three-judge district court that was convened pursuant to 28 U.S.C. 2284(b) granted appellees' motion for summary judgment. J.S. App. 105a-107a. The court entered a

declaratory judgment that the Memorandum is an unlawful exercise of the President's statutory authority and permanently enjoined appellants (other than the President) "from including in the Secretary's report to the President pursuant to Section 141(b) any information" that would allow the President to carry out the policy in the Memorandum. Id. at 106a.

Pursuant to 28 U.S.C. 1253, the government has filed a notice of appeal to this Court, J.S. App. 108a-109a, and has separately today filed a jurisdictional statement.

ARGUMENT

Congress has delegated to the President the authority to ascertain each State's apportionment base "under the * * * decennial census of the population," 2 U.S.C. 2a(a), and has delegated to the Secretary the authority, subject to the President's direction and supervision, to take the "decennial census of population * * * in such form and content as he may determine," 13 U.S.C. 141(a). Although the President has broad substantive discretion in determining each State's apportionment base, see Franklin v. Massachusetts, 505 U.S. 788, 797-801, 803-806 (1992), Congress has enacted procedural deadlines for the Secretary to report the results of the census to the President (December 31, 2020), and for the President to report the results of the apportionment to Congress (January 10, 2021), see 2 U.S.C. 2a(a); 13 U.S.C. 141(b).

Expedited consideration of the government's jurisdictional statement 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. If that judgment is not stayed or expeditiously reversed, then both the Secretary and the President will be forced to make reports by the relevant statutory deadlines that do not reflect the President's policy decision. And if the government then later prevails before this Court, it may be necessary to alter the apportionment at that time. Cf. Utah v. Evans, 536 U.S. 452, 462 (2002); Franklin, 505 U.S. at 803. Such a post-apportionment remedy, while available, 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.

The ordinary briefing schedules prescribed by Rules 18 and 25 of this Court would not allow the case to be considered and decided before the December 31 statutory deadline. Accordingly, this Court should adopt an expedited briefing schedule on the jurisdictional statement, and if this Court declines to stay or summarily reverse the district court's judgment, it should also adopt an expedited briefing schedule on any plenary consideration of the appeal, allowing this Court to resolve the important questions presented

in the government's jurisdictional statement before the December 31 deadline passes.

The government respectfully proposes that appellees' motion to dismiss or to affirm be due on October 2. That schedule would allow the Court to consider this case on an expedited basis at its October 9 Conference or October 16 Conference.

If the district court's judgment is neither stayed nor summarily reversed, and this Court sets this case for plenary consideration after noting or deferring consideration of probable jurisdiction on or before October 16, the government respectfully proposes the following schedule for briefing and argument:

October 30, 2020	Appellants' opening brief
November 13, 2020	Appellees' brief
November 20, 2020	Appellants' reply brief
December 2020 Sitting	Oral argument

Amicus briefs supporting the parties should be due on the dates the parties' briefs are due.

CONCLUSION

The government respectfully requests that the Court expedite consideration of the government's jurisdictional statement based on the proposed schedule and, if the Court neither stays nor summarily reverses the judgment below and sets the case for plenary consideration, that the Court expedite briefing and oral argument based on the proposed schedule.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

SEPTEMBER 2020