**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

COMMON CAUSE, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*,

Defendants.

No. 1:20–cv–02023–CRC–GGK–DLF

**DEFENDANTS' OPPOSITION TO**
**PLAINTIFFS' MOTION TO EXPEDITE PROCEEDINGS**

On July 21, 2020, the President issued a memorandum entitled Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census (the "Presidential Memorandum" or "Memorandum"), 85 Fed. Reg. 44,679 (July 21, 2020). Plaintiffs filed this action just two days later, *see* Doc. 1. Twenty-nine days after the Presidential Memorandum issued, Plaintiffs filed their motion for partial summary judgment, *see* Doc. 31, and then moved this Court "for expedited briefing, and, if necessary, an expedited trial on the merits." Doc. 32-1 at 7 ("Pl. Mem."). Plaintiffs' motion to expedite, Doc. 32, should be denied.

As a threshold matter, after Plaintiffs filed their motion to expedite, the parties agreed to a briefing schedule, Doc. 35, which the Court so ordered, *see* Minute Order dated Aug. 21, 2020. Accordingly, the portion of Plaintiffs' motion requesting expedited briefing should be denied as moot.

In any event, no expedition is needed because, as Defendants explain in their contemporaneously filed motion to dismiss, the Court lacks subject-matter jurisdiction over this action, and Plaintiffs fail to state a single claim as a matter of law. In particular, Plaintiffs base their motion

to expedite in large part on their unlawful-statistical-sampling claim. *See* Pl. Mem. at 3. Putting aside the fact that, as Defendants explain in their motion to dismiss, this unlawful-statistical-sampling claim is entirely speculative in nature, the Chief Scientist and Associate Director for Research and Methodology at the United States Census Bureau has declared under penalty of perjury "that any methodology or methodologies ultimately used by the Census Bureau to implement the [Presidential Memorandum] will *not* involve the use of statistical sampling for apportionment purposes." Doc. 59-1, Decl. of John M. Abowd, Ph.D (Sept. 1, 2020) ("Abowd Sept. Decl.") ¶ 14 (emphasis added). Plaintiffs' request for expedited proceedings based on their unlawful-statistical-sampling claim is therefore not compelling

Even if Plaintiffs' unlawful-statistical-sampling claim could somehow survive, there is no need to expedite proceedings in the context of this case because Plaintiffs simply challenge the apportionment process, *not* census-enumeration procedures. Congress's concern, as reflected in § 209 of the 1998 Appropriations Act to which Plaintiffs cite, was that "the use of statistical sampling or statistical adjustment in conjunction with an actual enumeration to carry out the census . . . poses the risk of an inaccurate, invalid, and unconstitutional census." Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act, 1998, § 209(a)(7), Pub. L. No. 105-119, 111 Stat. 2440, 2481-82 (1997) (codified at 13 U.S.C. § 141 note) ("1998 Appropriations Act"). No such concern exists here because: (i) the Presidential Memorandum does not affect the conduct of the census, and (ii) the Presidential Memorandum *also* instructs the Secretary to provide the tabulation that follows the methodology set forth in the Residence Criteria. 85 Fed. Reg. at 44,680.

Plaintiffs' citation to *Utah v. Evans*, 182 F. Supp. 2d 1165 (D. Utah 2001) (three-judge court), *aff'd*, 536 U.S. 452 (2002), does not help them. *Evans* only demonstrates that courts *can* and *do* adjudicate apportionment questions *after* apportionment takes place. As the *Evans* district court explained, the challenge in that case came "*after* the 2000 census ha[d] been completed, the President

ha[d] transmitted reapportionment figures to Congress, and the Clerk of the House of Representatives ha[d] issued a certificate to each state indicating the number of representatives to which that state is entitled." *Id.* at 1173 (emphasis added). And the Supreme Court in 2002 made clear that post-apportionment relief would be redressable: "Should the new report contain a different conclusion about the relative populations of North Carolina and Utah, the relevant calculations and consequent apportionment-related steps would be purely mechanical; and several months would remain prior to the first post–2000 census congressional election." *Evans*, 536 U.S. at 463. So, too, here.[1]

*Evans* is no aberration. Even if Plaintiffs' claims could proceed past the Rule 12 stage (and, as explained in Defendants' motion to dismiss, they cannot), apportionment cases generally are decided post-apportionment, when census enumeration procedures are no longer at issue and the actual apportionment figures are known. *See, e.g.*, *Franklin v. Massachusetts*, 505 U.S. 788, 790-91 (1992) (challenging allocation of Department of Defense's overseas employees to particular states following census); *Dep't of Commerce v. Montana*, 503 U.S. 442, 445-46 (1992) (challenging method of equal proportions to determine representatives); *Evans*, 536 U.S. at 458-59 (challenging sampling method known as "hot-deck imputation" used by Census Bureau after analyzing census figures); *Wisconsin v. City of New York*, 517 U.S. 1, 4 (1996) (challenging decision not to use particular statistical adjustment to correct an undercount). Indeed, in *Wisconsin*, it was not until *six years* after the 1990 census that the Court resolved an apportionment dispute based on those results.

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[1] Nor did the *Evans* district court expedite that case based on § 209. In explaining that § 209 did not afford the *Evans* plaintiffs statutory standing, the court noted that the purpose of expedited review was to facilitate a remedy in a potentially defective enumeration procedure. *Evans*, 182 F. Supp. 2d at 1173-74. As explained above, that concern has no relevance to this action. And because the concerns prompting expedition in § 209 did not apply in *Evans* (just as they do not apply here), the district court did not, contrary to Plaintiffs' representations, "expedite[] proceedings" "[o]n [that] basis." Pl. Mem. at 3. The document to which Plaintiffs refer the Court in support of this proposition, which Defendants attach as Exhibit A, is simply a *stipulated* scheduling order that sets out a roughly *two-month* briefing schedule. See Stipulated Scheduling Order in *Utah v. Evans*, No. 2:01-cv-292G, Doc. 15 (D. Utah May 21, 2001) (attached as Ex. A).

Plaintiffs also argue that the three-judge-court statute, 28 U.S.C. § 2284, "calls for expedited proceedings." Pl. Mem. at 2 (capitalization omitted). In truth, § 2284 does not "call[]" for expedited proceedings. Rather, the three-judge-court procedure *is* an expedited proceeding, in that appeals from a three-judge court leapfrog the Court of Appeals and proceed directly to the Supreme Court. Had Congress desired to expedite proceedings in every three-judge-court proceeding, it easily could have provided for such expedition in § 2284. It did not.

This case is no different than *Franklin*, *Montana*, *Evans*, and *Wisconsin*. The Presidential Memorandum does not purport to change the conduct of the census itself. Rather, it concerns the calculation of the apportionment base used to determine the number of representatives that each State will receive. Accordingly, just as the Court noted in *Evans*, this Court could order adequate relief after apportionment when any injury to Plaintiffs is known with certainty—assuming there is any at all. Again, the very fact that the Memorandum calls for the Secretary to report two numbers—one arrived at after the Census Bureau applies its Residency Criteria, and a second that would allow the President to remove some number of illegal aliens that the Secretary is able to identify from the apportionment base—makes clear that a post-apportionment remedy would be easy to craft.

Plaintiffs assert that such cases "routinely proceed on an expedited basis." Pl. Mem. at 5. But they cite only to: the citizenship-question cases, which (unlike this action) concerned the actual *conduct* of the census; two opinions concerning state redistricting plans that have little to do with interstate congressional apportionment; and a parallel challenge to the Presidential Memorandum pending in *State of New York v. Trump*, No. 1:20-cv-05770 (S.D.N.Y. filed July 24, 2020). Plaintiffs argue that the *New York* court entered an "accelerated briefing schedule set to be completed by August 28." Pl. Mem. at 6. Whatever schedule the *New York* court adopted does not automatically control here.

As a practical matter, it is not clear what benefit expedited proceedings would provide, at least as things currently stand. The Census Bureau has not yet concluded its process of determining the

methodologies that it may use to comply with the Presidential Memorandum. *See* Abowd Sept. Decl. ¶ 11. And until the Census Bureau determines and finalizes those methodologies, Plaintiffs' desired expedited proceedings would run headfirst into the government's deliberative process.

There is no reason for the Court to effectively order the parties to hurry up and wait, particularly when Defendants' motion to dismiss remains pending before the Court. Defendants respectfully suggest that the Court first determine whether this action survives Defendants' motion to dismiss. To the extent that the Court determines that it has subject-matter jurisdiction and that Plaintiffs have stated a claim, the Court can then survey the landscape and, if the Census Bureau has finalized its procedures at that point, enter an appropriate schedule on a better-informed basis.

For these reasons, Plaintiffs' motion to expedite should be denied.

DATED: September 2, 2020

Respectfully submitted,

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