

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 20-3142 Caption [use short title]

Motion for: Abeyance

Set forth below precise, complete statement of relief sought: Defendants-appellants respectfully request that this appeal be held in abeyance pending the Supreme Court's resolution of New York v. Trump, No. 20-366, because the Supreme Court's decision could obviate the need for this appeal.

State of New York v. Donald J. Trump

MOVING PARTY: Donald J. Trump et al. OPPOSING PARTY: State of New York et al.

Plaintiff Defendant Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Michael S. Raab OPPOSING ATTORNEY: Judith N. Vale

[name of attorney, with firm, address, phone number and e-mail]

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Court- Judge/ Agency appealed from: Southern District of New York; Judge Furman

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1): Yes No (explain):

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has this request for relief been made below? Has this relief been previously sought in this court? Requested return date and explanation of emergency:

Opposing counsel's position on motion: Unopposed Opposed Don't Know

Does opposing counsel intend to file a response: Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date:

Signature of Moving Attorney:

s/Michael S. Raab Date: October 9, 2020 Service by: CM/ECF Other [Attach proof of service]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

STATE OF NEW YORK, *et al.*,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, *et al.*,

Defendants-Appellants.

No. 20-3142

**DEFENDANTS-APPELLANTS'  
UNOPPOSED MOTION FOR ABEYANCE**

Defendants-appellants Donald J. Trump, Wilbur L. Ross, Steven Dillingham, the United States Department of Commerce, and the United States Census Bureau respectfully request that this appeal be held in abeyance pending the Supreme Court's resolution of *Trump v. New York*, No. 20-366. Plaintiffs do not oppose this motion.

1. The Constitution provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State." U.S. Const. amend. XIV, § 2. That apportionment is enabled by the Constitution's further requirement that a decennial census be conducted "in such Manner as [Congress] shall by Law direct." *Id.* art. I, § 2, cl. 3. Congress has delegated the conducting of the census to the Secretary of Commerce and has required the Secretary to report the total population in each State to the President. 13 U.S.C. § 141. Congress has further directed the President to transmit to Congress

“a statement showing the whole number of persons in each State” as determined by the census, and the number of Representatives to which each State is entitled using a specified mathematical formula. 2 U.S.C. § 2a.

On July 21, 2020, the President issued a Presidential Memorandum, explaining that for the next decade’s apportionment, “it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status.” 85 Fed. Reg. 44,679, 44,680 (July 23, 2020). To implement that policy, the President further directed the Secretary of Commerce to provide him “information permitting the President, to the extent practicable, to exercise the President’s discretion to carry out the policy.” *Id.* Plaintiffs in this case challenge the Presidential Memorandum on a number of grounds, including that it violates the Tenth Amendment, the Apportionment Clause, equal protection principles, separation-of-powers principles, the Census Act, and the APA.

2. Under 28 U.S.C. § 2284, a three-judge district court must be convened “when an action is filed challenging the constitutionality of the apportionment of congressional districts.” After filing these consolidated lawsuits, plaintiffs requested that the district court notify the Chief Judge of this Court of the suits and ask that the Chief Judge designate a three-judge court to hear the suit pursuant to that provision; defendants did not oppose that request. *See* D. Ct. Dkt. No. 58 (plaintiffs’ request); D. Ct. Dkt. No. 65 (defendants’ response). The district court granted plaintiffs’ request and

notified the Chief Judge of this Court, who convened a three-judge court under section 2284. *See* Order, *New York v. Trump*, No. 20-2630 (2d Cir. Aug. 10, 2020).

That three-judge court granted summary judgment in plaintiffs' favor and entered a permanent injunction against defendants, who timely appealed to the Supreme Court under 28 U.S.C. § 1253. *See Trump v. New York*, No. 20-366 (U.S.). At the same time, because it believed the question whether the lawsuits were properly heard by a three-judge court was "not clear-cut," and that issue is jurisdictional, the three-judge court certified that Judge Furman, the district judge to whom the lawsuits were originally assigned, "individually arrived at the same conclusions that [the three-judge court has] reached collectively." D. Ct. Op. 86 n.21; *cf. Swift & Co. v. Wickham*, 382 U.S. 111, 114 n.4 (1965) (approving that "procedure for minimizing prejudice to litigants when the jurisdiction of a three-judge court is unclear").

3. Under 28 U.S.C. § 1253, an appeal from an injunction entered in a civil action required to be heard by a three-judge district court must be taken to the Supreme Court. For that reason, the Supreme Court, and not this Court, is the appropriate forum for appellate review of the district court's order. *See Dothard v. Rawlinson*, 433 U.S. 321, 324 n.5 (1977); *White v. Regester*, 412 U.S. 755, 760-61 (1973). However, to ensure that defendants' ability to obtain appellate review of the district court's decision will not be prejudiced if the Supreme Court were to decline to exercise jurisdiction, defendants have filed this appeal.

This Court should, however, hold this appeal in abeyance pending the Supreme Court's jurisdictional determination. If the Supreme Court holds that the appeal is properly before that Court—as the government urged in its jurisdictional statement and plaintiffs did not dispute in their responses—then this appeal will be obviated. Likewise, if the Supreme Court determines that appeal should have been taken to this Court, but construes the government's jurisdictional statement as a petition for a writ of certiorari before judgment and grants the petition (as the government has urged in the alternative, *see* Juris. Stmt. at 11 n.2, No. 20-366 (U.S. Sept. 22, 2020); *cf.* N.Y. Mot. to Affirm at 3 n.1, No. 20-366 (U.S. Oct. 7, 2020) (suggesting the availability of that alternative)), further proceedings in this appeal likewise will be superfluous. Therefore, to conserve resources for this Court and the litigants, defendants respectfully ask the Court to hold this appeal in abeyance pending the Supreme Court's determination of its own jurisdiction.

6. As noted above, plaintiffs do not oppose this request.

Respectfully submitted,

MARK R. FREEMAN

/s/ Michael S. Raab

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October 9, 2020

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this motion complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Garamond, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 836 words, according to the count of Microsoft Word.

/s/ Michael S. Raab  
Michael S. Raab