FILED
2020 Oct-30 PM 04:03
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.*, *Plaintiffs*, v. THE UNITED STATES DEPARTMENT OF COMMERCE, *et al.*, *Defendants*, and DIANA MARTINEZ, *et al.*; COUNTY OF SANTA CLARA, CALIFORNIA, *et al.*; and STATE OF NEW YORK, *et al.*, *Intervenor-Defendants.*	Case No. 2:18–cv–00772–RDP

JOINT MOTION TO STAY PROCEEDINGS

With one exception, the parties[1] respectfully move the Court to stay this case pending the Supreme Court's adjudication of the appeal in *New York, et. al. v. Trump, et al.*, No. 20–366 (S. Ct. docketed Sept. 22, 2020)—a case that implicates many of the same issues presented here.[2]

[1] Defendant Intervenor State of California does not join this motion, but Defendant Intervenor State of New York is authorized to represent that California agrees that a stay should be entered.

[2] The Court has already suspended the deadline for completing discovery related to jurisdictional issues. *See* Text Order, ECF No. 170.

BACKGROUND

This case concerns a disagreement over whether persons who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (the "Subject Persons") must be excluded from the apportionment base for seats in the U.S. House of Representatives. *See generally* Amended Complaint ("Am. Compl.") ¶¶ 1–5, ECF No. 112; Martinez Invervenors' Answer and Cross-Claim at 29–31, ¶¶ 1–9, ECF No. 119 (Cross-Claim).

As the Court is aware, the legal landscape of this dispute was altered by the President's issuance of the July 21, 2020, Presidential Memorandum, *Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census*, 85 Fed. Reg. 44,679 (July 21, 2020), which instructed the Secretary of Commerce to transmit to the President information that would enable the President to exclude Subject Persons from the base population number for apportionment "to the maximum extent feasible and consistent with the discretion delegated to the executive branch," *id.* at 44,680. *See generally* Defs.' Br. in Resp. to Court Order, at 2–5, ECF No. 158. Indeed, the implementation of the Memorandum may grant Plaintiffs in this matter all the relief they have sought, or would be entitled to obtain. *See id.*

The Supreme Court may soon decide whether the Memorandum is legal. In September, a three-judge panel of the United States District Court for the Southern District of New York issued a decision finding the Memorandum unlawful, and permanently enjoined certain Defendants in this case from implementing certain of its directives. *New York v. Trump*, -- F. Supp. 3d --, 2020 WL 5422959, at *32, 34–35 (S.D.N.Y. Sept. 10, 2020) (three-judge court), *appeal filed*, No. 20–366 (S. Ct. docketed Sept. 22, 2020). And earlier this month, a three-judge panel of the United States District Court for the Northern District of California came to a similar conclusion and entered a similar injunction. *San*

Jose v. Trump, -- F. Supp. 3d --, 2020 WL 6253433, at *51 (N.D. Cal. Oct. 22, 2020) (three-judge court), *appeal filed*, No. 20–561 (S. Ct. docketed Oct. 29, 2020).[3]

The Government has appealed these judgments to the Supreme Court per 28 U.S.C. § 1253. Given the Secretary of Commerce's December 31, 2020, statutory deadline for reporting population data to the President, *see* 13 U.S.C. § 141(b), the Government had urged the Supreme Court to expedite consideration of the *New York* Jurisdictional Statement. *See* Mot. for Expedited Consideration in *New York v. Trump*, No. 20–366 (S. Ct. Sept. 22, 2020), 2020 WL 5645737. The Supreme Court granted that motion in part, *see Trump v. New York*, -- S. Ct. --, 2020 WL 5807817, at *1 (Sept. 30, 2020), and, after such expedited consideration, established an expedited briefing schedule and set the appeal for argument on November 30, 2020, *see Trump v. New York*, -- S. Ct. --, 2020 WL 6109551, at *1 (Oct. 16, 2020). Considering the Supreme Court's expedited treatment of the *New York* appeal to date, the Supreme Court may decide the Memorandum's legality—and thus the question whether Subject Persons may be excluded from the apportionment base—in short order.

ARGUMENT

"The discretion to stay a case is 'incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" *Fikes v. Aerofin Corp.*, No. 2:05–cv–1864, 2005 WL 8157977, at *2 (N.D. Ala. Sept. 30, 2005) (Proctor, J.) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). Given that the Supreme Court may soon decide the central question at issue in this case—that is, the legality of excluding

[3] Defendants are also litigating this issue in several other parallel actions in front of three-judge panels that would potentially be directly appealable to the U.S. Supreme Court. *See Common Cause v. Trump*, No. 20-CV-2023 (D.D.C. filed July 23, 2020); *Haitian-Ams. United, Inc. v. Trump*, No. 20-CV-11421 (D. Mass. filed July 27, 2020); *Useche v. Trump*, No. 20-CV-2225 (D. Md. filed July 31, 2020); Second Am. Compl., *La Union Del Pueblo Entero v. Trump*, No. 19-CV-2710 (D. Md. filed Aug. 13, 2020).

Subject Persons from the apportionment base—the Court should exercise its discretion to stay this case at this time to conserve its own and the parties' resources.

This Court's analysis in *McVeigh v. Callan Associates Inc.*, No. 2:09–cv–0685, 2009 WL 10703213 (N.D. Ala. Sept. 14, 2009) (Proctor, J.), is instructuctive. In *McVeigh*, the defendant moved to stay all proceedings "pending the disposition of [the defendant's] petition for writ of mandamus in a parallel case [*Perdue*] by the Supreme Court of Alabama." *Id.* at *1. The Court noted that "[i]t is clear . . . that the central argument over the viability of the motion to stay . . . is the extent to which similarities exist between the *Perdue* and *McVeigh* complaints." *Id.* at *2. "[I]f the actions are sufficiently similar, then interests of efficiency and conservation of resources *dictate* that the stay be granted." *Id.* (emphasis added).

Although the Court acknowledged that the two cases were "not identical," the Court nevertheless found that the Alabama Supreme Court's disposition of the *Perdue* action "would be highly material and informative" to the Court's eventual adjudication of the *McVeigh* action. *Id.* at *3. "These circumstances," the Court held, "dictate that in the interests of efficiency and the conservation of the limited resources of the parties and the court, the proceedings herein are due to be stayed until the Supreme Court of Alabama rules on [the defendant's] petition for writ of mandamus in the *Perdue* case." *Id.* The same analysis applies with even more force here. Whereas *McVeigh* concerned a parallel mandamus *petition*, *see id.* at *1, the Government is presently *appealing* the *New York* decision in the United States Supreme Court.

To be sure, this action and the *New York* action are "not identical." *McVeigh*, 2009 WL 10703213, at *3. The *New York* district court found that the Presidential Memorandum violated statutory provisions, rather than the constitutional provisions that Plaintiffs principally rely on in this action. *See* Am. Compl. ¶¶ 126–134. But as in *McVeigh*, this "dissimilarit[y] [is a] difference[] without distinction for purposes of whether the court should enter a stay." 2009 WL 10703213, at *3. Just

like the Alabama Supreme Court's review in *McVeigh*, United States Supreme Court review of the *New York* action "would be highly material and informative" to this Court's eventual adjudication of this action. *Id.* And, given (i) that the parties in *New York* squarely presented the relevant constitutional questions in their papers, and (ii) the *San Jose* court held that the Memorandum is unconstitutional, *see San Jose*, 2020 WL 6253433, at *25–41, it is entirely possible that the Supreme Court would reach the constitutional questions. Indeed, the constitutional claims: (i) are fairly encompassed within the questions presented in the *New York* appeal, *see* Jurisdictional Statement in *New York v. Trump*, No. 20–366 (S. Ct. Sept. 22, 2020), 2020 WL 5645736, at *I; (ii) have been urged by the *New York* appellees as alternative grounds for affirmance in that appeal, *see* Mot. to Dismiss or Affirm in *New York v. Trump*, No. 20–366 (S. Ct. Oct. 7, 2020), 2020 WL 6121381, at *17–20, 24–25; Mot. to Affirm in *New York v. Trump*, No. 20–366 (S. Ct. Oct. 7, 2020), 2020 WL 6064081, at *26–28, 33–34; (iii) have been briefed by the Government in the *New York* appeal, *see* Reply Br. in *New York v. Trump*, No. 20–366 (S. Ct. Oct. 13, 2020), 2020 WL 6205330, at *8, 10–11; and (iv) in the Government's view at least, rise or fall with the statutory claims presented in *New York*, *see id.* at *6–8, 10–11. *See generally* Jurisdictional Statement in *Trump v. San Jose*, No. 20–561, at 11 (S. Ct. Oct. 29, 2020). Decisions in other parallel litigation may raise similar issues, all directly appealable to the Supreme Court, which may also present a further basis for this stay.

As in *McVeigh*, "[t]hese circumstances dictate that in the interests of efficiency and the conservation of the limited resources of the parties and the court, the proceedings herein" should be stayed pending the Supreme Court's resolution of the *New York* appeal. *See McVeigh*, 2009 WL 10703213, at *3. Indeed, "[a]bsent a stay, this court would expend valuable judicial resources

supervising pre-trial proceedings and issuing rulings in a case" that may effectively be decided by the Supreme Court. *Fikes*, 2005 WL 8157977, at *2.[4]

CONCLUSION

For these reasons, the movants respectfully request that the Court exercise its discretion to stay this case pending the Supreme Court's adjudication of the *New York* appeal. The movants further propose that the parties submit a joint status report within ten business days after the Supreme Court resolves the *New York* appeal.

[4] To be sure, Defendants previously requested that the Court enter a briefing schedule for the parties to address threshold jurisdictional arguments and the merits of their claims. ECF Nos. 158, 163. But Defendants made that request in part so as to place this action on equal footing with the other actions considering the propriety of excluding Subject Persons from the apportionment base. Since the *New York* action has proceeded to judgment, has been appealed, and will soon be reviewed by the Supreme Court, the calculus has accordingly changed.

Similarly, Plaintiffs' previous requests for the Court to enter a briefing schedule (ECF No. 161, ECF No. 175 at 2) were made when it was far less clear (1) when the Supreme Court would decide the *New York* case, and (2) whether Defendants would be permitted by federal courts to attempt to complete the census by the statutory deadline of December 31, 2020. In Plaintiffs' view, the Supreme Court's order to expedite briefing and oral argument in *New York* makes it likely the Court will decide that case soon, and the Court's order granting a stay in *Ross v. National Urban League*, No. 20A62, 2020 WL 6041178 (U.S. Oct. 13, 2020), makes it likely that census results will be known by or shortly after the statutory deadline of December 31, 2020. Plaintiffs thus now think that a stay of this case tied to the resolution of the *New York* case is appropriate.

Dated: October 30, 2020

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

ALEXANDER K. HAAS
Director, Federal Programs Branch

DIANE KELLEHER
BRAD P. ROSENBERG
Assistant Branch Directors

/s/ Elliott M. Davis
ALEXANDER V. SVERDLOV
ELLIOTT M. DAVIS
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, DC 20005
Tel: (202) 514-4336
elliott.m.davis@usdoj.gov

Counsel for Defendants

Steve Marshall
Alabama Attorney General

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

James W. Davis
Winfield J. Sinclair
Brenton M. Smith
Assistant Attorneys General

OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
Post Office Box 300152
Montgomery, AL 36130-0152
Tel: (334) 242-7300
Fax: (334) 353-8440
Email: elacour@ago.state.al.us
jimdavis@ago.state.al.us
wsinclair@ago.state.al.us
bchynoweth@ago.state.al.us

Counsel for Plaintiff State of Alabama

/s/ Morris J. Brooks, Jr.
Morris J. Brooks, Jr.
Pro se
2101 W. Clinton Avenue
Suite 302
Huntsville, AL 35805
(256) 355-9400
(256) 355-9406—Fax

Counsel for Plaintiff
Morris J. Brooks, Jr.

/s/ Joyce White Vance
Joyce White Vance
101 Paul W. Bryant Drive
Tuscaloosa, AL 35487
jvance@law.ua.edu

LETITIA JAMES
Attorney General of the State of New York

By: */s/ Matthew Colangelo*
Matthew Colangelo
Chief Counsel for Federal Initiatives
Elena Goldstein
Deputy Chief, Civil Rights Bureau

/s/ Barry A. Ragsdale
Barry A. Ragsdale
SIROTE & PERMUTT, PC
2311 Highland Avenue South
Birmingham, AL 35205
Phone: (205) 930-5100
bragsdale@sirote.com

Amanda Meyer, *Assistant Attorney General*
Joseph J. Wardenski, *Senior Trial Counsel*
Office of the New York State Attorney General
28 Liberty Street
New York, NY 10005
Phone: (212) 416-6057
Matthew.Colangelo@ag.ny.gov

Attorneys for the State and Other Government Defendant-Intervenors

Respectfully submitted,

/s/ Robert S. Vance
THE BLOOMSTON FIRM
Robert S. Vance
2151 Highland Avenue South, Suite 310
Birmingham, AL 35205
(205) 212-9700
Robert@thebloomstonfirm.com

DAGNEY JOHNSON LAW GROUP
Anil A. Mujumdar (ASB-2004-L65M)
2170 Highland Avenue South, Suite 205
Birmingham, Alabama 35205
Telephone: (205) 649-7502
Facsimile: (205) 809-7899
Email: anil@dagneylaw.com

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
Ezra D. Rosenberg
Dorian L. Spence
1401 New York Avenue NW, Suite 400
Washington, DC 20005
Telephone: (202) 662-8600
Facsimile: (202) 783-9857
Email: erosenberg@lawyerscommittee.org
dspence@lawyerscommittee.org

DEMOCRACY FORWARD
Robin F. Thurston
John T. Lewis
Democracy Forward Foundation
P.O. Box 34553
Washington, DC 20043

Telephone: (202) 448-9090
Email: rthurston@democracyforward.org
jlewis@democracyforward.org

Attorneys for Defendant-Intervenors City of Atlanta; City of San José; Arlington County; and King County

DEBEVOISE & PLIMPTON LLP
Jyotin Hamid
Lauren M. Dolecki
Ming Ming Yang
919 Third Ave
New York, NY 10022
(212) 909-6000
Facsimile: (212) 909-6836
Email: jhamid@debevoise.com
lmdolecki@debevoise.com
mmyang@debevoise.com

Robert Kaplan*
801 Pennsylvania Avenue NW, Suite 500
Washington, DC 20001
Telephone: (202) 383-8000
Facsimile: (202 383-8188
Email: rbkaplan@debevoise.com

CITY OF SAN JOSÉ
Richard Doyle, City Attorney
Nora Frimann, Assistant City Attorney
Office of the City Attorney
200 East Santa Clara Street, 16th Floor
San José, CA 95113-1905
Telephone: (408) 535-1900
Facsimile: (408) 998-3131
Email: cao.main@sanjoseca.gov

Attorneys for Defendant-Intervenor City of San José

COPELAND FRANCO
SCREWS & GILL, P.A.
Robert D. Segall (SEG003)
Post Office Box 347
Montgomery, AL 36101-0347
Phone: (334) 834-1180

* Application for Pro Hac Vice Admission Pursuant to ALND L.R. 83.1(b) Forthcoming.

Facsimile: (334) 834-3172
Email: segall@copelandfranco.com

OFFICE OF THE COUNTY COUNSEL
COUNTY OF SANTA CLARA
James R. Williams, County Counsel
Greta S. Hansen
Raphael N. Rajendra
Marcelo Quiñones
Laura S. Trice
Office of the County Counsel
County of Santa Clara
70 West Hedding Street
East Wing, 9th Floor
San José, CA 95110
Email: raphael.rajendra@cco.sccgov.org
marcelo.quinones@cco.sccgov.org

LAW OFFICE OF
JONATHAN WEISSGLASS
Jonathan Weissglass
1939 Harrison Street, Suite 150-B
Oakland, CA 94612
Telephone: (510) 836-4200
Email: jonathan@weissglass.com

Attorneys for the Local Government Defendant-Intervenors

Respectfully submitted,

/s/ Edward Still

MEXICAN AMERICAN LEGAL
DEFENSE AND EDUCATIONAL FUND
Thomas A. Saenz
Andrea Senteno
Ernest Herrera
634 S. Spring St., Ste. 1100
Los Angeles, CA 90014
Telephone: (213) 629-2512
Facsimile: (213) 629-0266
Email: tsaenz@maldef.org
asenteno@maldef.org
eherrera@maldef.org

Edward Still
Bar. No. ASB-i47w-4786

still@votelaw.com
429 Green Springs Hwy STE 161-304
Birmingham, AL 35209
Telephone: (205) 320-2882
Facsimile: (205) 320-2882

James U. Blacksher
(AL Bar: ASB-2381-S82J)
825 Linwood Road
Birmingham, AL 35222
Telephone: (205) 612-3752
jublacksher@gmail.com

Attorneys for Martinez Intervenors