

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

COMMON CAUSE, et al.

Plaintiffs,

v.

DONALD J. TRUMP, et al.

Defendants.

No. 1:20-cv-02023-CRC

Motion to Expedite Proceedings

MOTION TO EXPEDITE PROCEEDINGS

In this action, Plaintiffs challenge a July 21, 2020 Memorandum issued by President Donald J. Trump, titled “Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census” (the “Memorandum”). By separate motion, Plaintiffs move for summary judgment that the Memorandum and its implementation violate the constitutional and statutory frameworks governing the apportionment of Congressional representatives.¹ Plaintiffs hereby move to expedite proceedings so that a final judgment and appeal to the U.S. Supreme Court can be completed before January 10, 2021, when the President is scheduled to transmit his unlawful apportionment numbers to Congress.

Congress has made clear that challenges to apportionment are to be decided on an expedited basis. Expedition is especially appropriate here, because the unlawful policy set forth in the Memorandum is due to be carried out on a very short timeframe and the reason for that short timeframe is entirely due to the President’s decision to wait until the very end of the multi-year census process to issue the Memorandum. The Memorandum invokes the President’s duty under 2 U.S.C. §2a to transmit the relevant apportionment numbers to Congress “within one

¹ The Memorandum in support of that motion will be cited here as “SJ Mot.”

week” of the first regular session of Congress, that is, no later than January 10, 2021. Unless final judgment in this action and a subsequent appeal to the Supreme Court are resolved by that date, President Trump will implement the Memorandum without a final judicial determination of its legality, throwing the apportionment process into disorder and doubt.

Meanwhile, as set forth in the accompanying motion for summary judgment, Plaintiffs’ claims present legal issues that are suitable for speedy resolution. Indeed, a related case in the Southern District of New York involving overlapping but non-identical claims is already being heard on an expedited schedule, with briefing to be completed by August 28, 2020. Here, the parties have agreed on a proposed briefing schedule under which briefing on Plaintiffs’ summary judgment motion will be complete by mid to late September. Plaintiffs respectfully request that the Court order an expedited hearing on their motion, and, if the motion is denied, an expedited trial on the merits of Plaintiffs’ claims.²

ARGUMENT

I. CONGRESS HAS PROVIDED FOR CHALLENGES TO APPORTIONMENT TO BE HEARD ON AN EXPEDITED BASIS

A. 28 U.S.C. § 2284(a) Calls for Expedited Proceedings

Because apportionment decisions impact a cascade of time-delimited political processes, Congress has provided for challenges to apportionment to be resolved expeditiously. Under 28 U.S.C. § 2284(a), which Defendants have acknowledged applies here (ECF No. 30), challenges to the constitutionality of apportionment are heard by a three-judge court whose decision may be directly appealed to the Supreme Court. As the legislative history indicates, the purpose of this procedure is to ensure that “every reasonable means should be provided for speeding the litigation.” 36 Cong. Rec. 1679 (1903) (statement of Sen. Fairbanks); *see also Swift*

² Defendants have indicated that they oppose this relief.

and Co. v. Wickham, 382 U.S. 111, 124 (1965) (observing that “[t]he purpose of the three-judge scheme was in major part to expedite important litigation”); *Graham v. Minter*, 437 F.2d 427, 429 (1st Cir. 1971) (three-judge court procedure was “designed to be expeditious”). The same policy that calls for convening a three-judge court calls for expediting proceedings so that the legality of the Memorandum can be timely adjudicated.

B. 13 U.S.C. § 195 Calls for Expedited Proceedings

Similarly, 13 U.S.C. § 195, the statute governing Plaintiffs’ claim that the Memorandum calls for the illegal use of statistical sampling to apportion representatives (*see* SJ Mot. at 32-41), expressly requires expedition. Congress has provided that “[i]t shall be the duty of a United States district court hearing an action” challenging the use of a “statistical method” in the apportionment of congressional districts to “***advance on the docket and to expedite to the greatest possible extent*** the disposition of . . . such matter.” Pub. L. 105-119, Title II, § 209(b) & (e)(2) (emphasis added). As courts have noted, this “language evidences congressional intent to facilitate a prospective remedy for any constitutional or statutory infirmity in a procedure Defendants propose to use in a decennial census before the procedure is actually used.” *Utah v. Evans*, 182 F. Supp. 2d 1165, 1173–74 (D. Utah 2001), *aff’d*, 536 U.S. 452 (2002). The *Utah* court further observed that “Congress clearly intended section 209 to provide a vehicle for expedited review of the methods chosen by Defendants for use in the . . . census prior to the actual undertaking and completion of the census.” *Id.* On this basis, the court in *Utah* expedited proceedings. *See Utah v. Evans*, Index No. 01-CV-00292, ECF No. 15 (D. Utah May 21, 2001). The Court should do the same here.

II. EXPEDITION IS NECESSARY TO ENSURE TIMELY RESOLUTION OF PLAINTIFFS' CLAIMS

Expedited proceedings are particularly necessary here because the President issued the Memorandum in the waning months of the Census process, leaving little time to adjudicate its legality before implementation. Amended Compl. ¶¶ 59, 92, 159. Under the statutory framework, the reapportionment process is “virtually self-executing,” *Franklin v. Massachusetts*, 505 U.S. 788, 791–92 (1992), with the number of Representatives allotted to each State determined by the President and certified to the States on a rapid timeline culminating in January 2021. Within nine months after the April 1, 2020 “decennial census date,” i.e., by December 31, 2020, the Secretary of Commerce must report to the President “[t]he tabulation of total population by States” that is “required for the apportionment of Representatives in Congress among the several States.” 13 U.S.C. § 141(b).³ The President then transmits the apportionment calculation to Congress “on the first day, or within one week thereafter, of the first regular session” after the census, 2 U.S.C. § 2a(a), that is, between January 3 and January 10, 2021. The Clerk of the House must certify the apportionment to each State within 15 days thereafter, that is, by January 25, 2021. 2 U.S.C. § 2a(b).

Importantly, Congress has not provided any procedure for correcting inaccurate or incomplete counts once they are reported to the President and he transmits them to Congress as required by statute. Accordingly, unless this legal challenge is resolved *prior* to January 2021, there will be no statutory guidance regarding how to proceed with apportionment if the President’s counts are subsequently ruled illegal. Because a ruling that the Memorandum is

³ The Government has determined that the deadline for tabulation is December 31, 2020. *See* Frequently Asked Questions (FAQs), U.S. Census Bureau (March 30, 2020); <https://www.census.gov/topics/public-sector/congressional-apportionment/about/faqs.html#Q13>.

illegal would require calculating a new apportionment base for all 50 states, delay in adjudicating this challenge could cause serious disruption to the political process.

In order to avoid such disruptions, cases concerning apportionment and the census routinely proceed on an expedited basis. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) (ordering expedited briefing in action concerning inclusion of citizenship question in census questionnaire); *Veith v. Pennsylvania*, 67 F. App'x 95, 96–97 (3d Cir. 2003) (expedited discovery schedule and evidentiary hearing in action contesting constitutionality of redistricting plan); *New York v. United States Dep't of Commerce*, 339 F. Supp. 3d 144, 148–49 (S.D.N.Y. 2018) (expedited discovery schedule in case challenging the Commerce Department's decision to include a citizenship question on the census questionnaire); *New York v. Trump*, 20-CV-05770 (S.D.N.Y. Aug. 14, 2020) ECF No. 95 (expedited briefing in action contesting constitutionality of excluding undocumented immigrants from the apportionment count); *Rybicki v. State Bd. of Elections of State of Ill.*, 574 F. Supp. 1082, 1085 (N.D. Ill. 1982) (expedited trial in action contesting constitutionality of state redistricting plan). Given the short statutory timetables at issue, the need for expedition is even more pronounced in this case.

III. EXPEDITION IS FEASIBLE AND WILL NOT PREJUDICE DEFENDANTS

As a practical matter, Plaintiffs' claims here can comfortably be resolved on an expedited schedule. Plaintiffs' primary claims, that the Memorandum violates the Constitutional and statutory requirements that apportionment be based on the "the whole number of persons in each state," U.S. Const., amend. XIV, cl. 2; 2 U.S.C. §2a(a), present a straightforward legal issue that is suitably for resolution on the pleadings.⁴ SJ Mot. at 19-26. Furthermore, this issue is already being presented to the United States District Court for the Southern District of New

⁴ Plaintiffs have submitted expert declarations establishing that they have standing to challenge the Memorandum, but they do not rely on any record evidence on the merits of this claim.

York, on an accelerated briefing schedule set to be completed by August 28. *New York v. Trump*, 20-CV-05770, ECF No. 95 (S.D.N.Y. Aug. 14, 2020). It will be straightforward for Defendants to respond to Plaintiffs' motion on an expedited schedule, given that they will already have completed briefing on the similar claim in the New York litigation.

Although the second set of claims on which Plaintiffs move for summary judgment – their claims under 13 U.S.C. § 195 and the “actual Enumeration” clause of the Constitution – are not presented in the pending motions in New York, they are also feasible to resolve on an expedited schedule. As Plaintiffs show in their motion for summary judgment and accompanying declarations, it is impossible for the Census Bureau to determine the population of undocumented immigrants on the statutory timetable without running afoul of Article I, Section 2's “actual Enumeration” requirement and Section 195's prohibition on the use of statistical sampling, because no actual enumeration of undocumented immigrants exists or will possibly exist by the close of the census process. SJ Motion at 37–39. Because there is no basis for a reasonable factfinder to find otherwise, Plaintiffs' claim is suitable for resolution as a matter of law, without the need for discovery or further proceedings. *Id.* There is no reason that this question of law cannot be addressed on an expedited schedule.

Even if the Court were to conclude that there are disputed issues of fact, the speed at which the relevant statutes require Defendants to proceed makes it feasible to hold an expedited trial. As noted, the statutory framework requires the Secretary of Commerce to *complete* its calculation of the apportionment base by December 31, 2020. 13 U.S.C. § 141(b). In order to meet this deadline, Defendants will need to finalize their methods for estimating the population of undocumented immigrants well before that time. Analyzing whether these methods comply with Constitutional and statutory requirements presents a targeted issue for expert discovery,

without any need for extensive fact discovery or other proceedings. An expedited trial addressing the narrow question as to whether Defendants have conducted an “actual Enumeration” or, instead, have engaged in prohibited statistical sampling, would not be burdensome for the Court or the parties. To ensure timely resolution of Plaintiffs’ claims without disruption to the political process, Plaintiffs respectfully request that the Court order expedited proceedings.

CONCLUSION

For the foregoing reasons, Plaintiffs’ motion for expedited briefing, and, if necessary, an expedited trial on the merits, should be granted.

DATED: August 19, 2020

/s/ Daniel S. Ruzumna

Daniel S. Ruzumna (D.C. Bar No. 450040)

BONDURANT MIXSON & ELMORE LLP

EMMET J. BONDURANT*
1201 West Peachtree Street NW
Suite 3900
Atlanta, GA 30309
Telephone: (404) 881-4100
Fax: (404) 881-4111
bondurant@bmelaw.com

PATTERSON BELKNAP WEBB & TYLER LLP

GREGORY L. DISKANT*
DANIEL S. RUZUMNA (D.C. Bar No. 450040)
ARON FISCHER*
JONAH M. KNOBLER*
PETER A. NELSON*
J. JAY CHO*
DEVON HERCHER*
ABIGAIL E. MARION*
ETHAN KISCH*
1133 Avenue of the Americas

New York, NY 10036
Telephone: (212) 336-2000
Fax: (212) 336-2222
gldiskant@pbwt.com

Attorneys for Plaintiffs
* admitted *pro hac vice*

McDERMOTT WILL & EMERY
MICHAEL B. KIMBERLY (D.C. Bar No. 991549)
500 North Capitol Street, NW
Washington, D.C. 20001
Telephone: (202) 756-8000
Fax: (202) 756-8087
mkimberly@mwe.com

*Attorney for the Individual and
Organizational Plaintiffs*