No. 20-366

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

REPLY IN SUPPORT OF MOTION FOR EXPEDITED CONSIDERATION

Appellees acknowledge that the ordinary briefing schedules of this Court would prevent this case from being considered and decided before the December 31, 2020 deadline established by Congress. See 13 U.S.C. 141(b). And they do not dispute that unless the judgment below is stayed or reversed by December 31, then the Secretary of Commerce and the President will be forced to make reports by the relevant statutory deadlines that do not reflect the President's policy decision. Instead, appellees dismiss those deadlines as insignificant for three reasons, none of which withstands scrutiny.

1. Appellees first emphasize (Opp. 16-17) that the government may alter the apportionment at a later date if it

ultimately prevails before this Court. That is true -- as the government itself recognized, see Mot. 6 -- but beside the point. Even though the apportionment may be corrected later, Congress nevertheless adopted mandatory statutory deadlines for the reports from the Secretary and the President; this serves to provide prompt notice to the Nation about the anticipated apportionment governing the next congressional elections, Mot. 6, just as statutes of limitations serve "important" functions even when they are subject to equitable exceptions, United States v. Kwai Fun Wong, 575 U.S. 402, 410 (2015). Presumably, that is why this Court previously stayed an injunction precluding the government from complying with the December 31 statutory deadline following the 1980 census, Klutznick v. Carey, 449 U.S. 1068, 1068 (1980), even in the face of the dissent's observation that "there is nothing sacrosanct about the December 31 deadline" because reapportionment could occur "well in advance of the 1982 congressional elections," id. at 1071 (Marshall, J.).

Appellees also accuse (Opp. 13-18) the government of taking inconsistent positions on this issue. That is false. Below, the government argued that appellees' alleged apportionment injuries, in addition to being speculative, were not irreparable because they could be remedied after the apportionment. See, e.g., D. Ct. Doc. 118, at 59 (Aug. 19, 2020) ("[T]his Court could order adequate relief after apportionment when any injury to Plaintiffs is known

with certainty, assuming there is any at all."). That is no way inconsistent with the government's separate point that it and the public would be harmed if it was forced to issue a report that did not reflect the President's views in order to satisfy the statutory deadlines. Indeed, the government emphasized that particular harm before the district court. See id. at 64 ("[A]n injunction would impede the Executive's historic discretion in conducting both the census and the apportionment, contrary to Congressional intent."); D. Ct. Doc. 172, at 11 (Sept. 16, 2020) ("Absent timely relief from the Judgment, Congress's statutory deadlines will be undermined, because the Secretary and the President will be forced to make reports by those deadlines that do not reflect the President's policy judgment, and then changes may be necessary afterward if the government subsequently prevails in the Supreme Court."). There is no inconsistency here.

2. Appellees further observe (Opp. 18-20) that in light of the COVID-19 pandemic, the government announced a plan earlier this spring to seek an extension from Congress until April 30, 2021, for the Secretary to comply with the deadline under 13 U.S.C. 141(b). Again, that is a red herring. In adopting that plan, the government "assumed Congressional action" in the form of a 120-day extension of the statutory deadlines. Gov't Mot. for Stay at Add.107, National Urban League v. Ross, No. 20-16868 (9th Cir. Sept. 25, 2020) (20-16868 Gov't C.A. Stay Mot.). By late July,

however, it had become clear that the government could not rely on an amendment from Congress, and so it began to develop a plan to meet the existing statutory deadlines. Ibid. Congress's failure to amend the deadline is not a problem of the Census Bureau's "own making," Opp. 18; if anything, it is further indication that Congress views the December 31 statutory deadline as an important one.

Appellees also fault (Opp. 19) the President for issuing his Memorandum in July 2020; they assert he should have instead issued it before the census field data collection began or after it was over. But in light of the government's consistent position that appellees' challenge will not be ripe until the apportionment occurs -- as the district court itself suggested with respect to their alleged apportionment injuries, see J.S. App. 43a -- it would have made no sense to have issued the Memorandum earlier to facilitate an even less ripe challenge. Indeed, issuing the Memorandum earlier would have only caused appellees more harm under their (erroneous) theory that the Memorandum is deterring census participation. See Opp. 10.

Conversely, waiting until after field data collection had ended would have threatened to hinder the Secretary's ability to provide the President with the necessary information by the December 31 statutory deadline. It also would have prompted accusations that government officials were improperly attempting

"to ram through their preferred apportionment before judicial review could take place." Opp. 19. And by suggesting that they would not have suffered any census-participation injuries had the President waited until field data collection had ended, see Opp. 19, appellees acknowledge that the relief they obtained below will be moot before it ever has any constraining legal effect. See Mot. 3. That only underscores why expedited relief from this Court is warranted.

3. Appellees note (Opp. 20-21) that in separate litigation, a district court recently enjoined the government from complying with the December 31 deadline. See 20-cv-5799 D. Ct. Doc. 208, National Urban League, supra (N.D. Cal. Sept. 24, 2020). But that order is by no means final: The government immediately sought a stay pending appeal and an administrative stay from the court of appeals, see 20-16868 Gov't C.A. Stay Mot., and intends to seek relief in this Court if necessary. Moreover, even if that injunction were to remain in effect, the suspension of the statutory deadline may not last for a significant period, as the district court there gave no indication of how long it planned to keep the "December 31, 2020 deadline * * * stayed." 20-cv-5799 D. Ct. Doc. 208, at 78. Accordingly, expedited relief from the judgment in this case is warranted even if the injunction in that case stands. This Court should not make a decision about whether

this case needs to be expedited based on a moving target in separate litigation that is not yet pending here.

4. Finally, appellees' alternative proposed briefing schedule, see Opp. 21-22, is problematic in multiple respects.

To start, an October 12 deadline to respond to the jurisdictional statement would effectively eliminate the government's right to file, and this Court's ability to consider, a reply before the October 16 conference. It would also unduly compress this Court's time to consider the case before conference. Nor do appellees provide any justification for that delay, other than their desire not to begin briefing their response until this Court decides whether to grant the expedition motion.

In addition, if this Court sets this case for plenary consideration after noting or deferring consideration of probable jurisdiction at the October 16 conference, appellees offer no valid justification for receiving an extra week than the government has for merits briefing. See Opp. 22. That the government may begin preparing a merits brief before this Court decides whether to set this case for plenary consideration, see Opp. 21, is irrelevant: That is true in all appeals, yet Rule 25.1 of this Court still gives the appellant more time to file a merits brief than the appellee. And appellees' extra week would come at the expense of the government, who, under their schedule, would receive a single week for a reply due the day after Thanksgiving. See Opp. 22.

CONCLUSION

The government respectfully requests that the Court expedite consideration of the government's jurisdictional statement based on its 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 its proposed schedule.

Respectfully submitted.

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