

**In the
Supreme Court of the United States**

DONALD J. TRUMP,
President of the United States, et al.,

Appellants,

v.

NEW YORK, et al.,

Appellees.

APPELLEES' MOTION TO DIVIDE AND ENLARGE ORAL ARGUMENT TIME

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
DALE E. HO*
125 Broad Street
New York, New York 10004
(212) 549-2693
dho@aclu.org

LETITIA JAMES
Attorney General
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
28 Liberty Street
New York, New York 10005
(212) 416-8016
barbara.underwood@ag.ny.gov

**Counsel of Record for Appellees*
New York Immigration Coalition, et al.

**Counsel of Record for Appellees*
State of New York, et al.

Dated: November 12, 2020

INTRODUCTION

In accordance with Supreme Court Rules 21, 28.3, and 28.4, Appellees jointly move to enlarge the total time for oral argument, and to divide oral argument time between the two groups of Appellees. Appellees ask the Court to extend the total time for oral argument to eighty minutes, and to divide the forty minutes for Appellees evenly between the Government Appellees and the Private Appellees. This enlargement of time is necessary to provide Appellees adequate time to address the numerous issues presented in this appeal. The division of argument time will ensure that each group of Appellees—first, a collection of States and other governmental entities; and second, a collection of private advocacy organizations—can adequately present its own distinct perspective and represent its own interests. Appellants do not oppose Appellees’ motion.

STATEMENT

Appellees brought two separate lawsuits challenging a Presidential Memorandum announcing an unprecedented policy of excluding undocumented immigrants from the apportionment base used to allocate seats in the House of Representatives among the States. Each lawsuit alleged that the Memorandum’s policy violated, among other things, the Census Act, Article I of the Constitution, and the Fourteenth Amendment.

In August 2020, the cases were consolidated, and a three-judge court was appointed under 28 U.S.C. § 2284. In September 2020, the court granted summary judgment to Appellees and entered final judgment. The court held that each group of

Appellees had standing based on the Memorandum's likely effect in deterring responses to the census, which in turn is likely to injure appellees in various ways including but not limited to causing one or more States to lose federal funds and rely on degraded census data needed for redistricting and many other important government functions. On the merits, the court determined that the Memorandum's policy violates the Census Act. The court found it unnecessary to resolve whether Appellees had standing based on the Memorandum's express exclusion of persons from the apportionment base, or whether the Memorandum's policy violated the Constitution. In October 2020, this Court agreed to hear the case on the merits, while postponing consideration of jurisdiction.

On October 22, in a different lawsuit in the Northern District of California, a three-judge court entered final judgment declaring the Memorandum unlawful. *City of San Jose v. Trump*, ___ F. Supp. 3d ___, 2020 WL 6253433, at *49-51 (N.D. Cal. Oct. 22, 2020). That court found that the plaintiffs there had standing because the Memorandum will cause them to suffer imminent and likely apportionment harm and loss of federal funds. *Id.* at *14-25. The court further concluded that the Memorandum's policy violated both the Constitution and the Census Act. *Id.* at *26-49.

On November 6, in a third lawsuit, a three-judge court in the District of Maryland entered final judgment invalidating the Memorandum. *Useche v. Trump*, No. 20-cv-2225, 2020 WL 6545886, at *1 (D. Md. Nov. 6, 2020) (per curiam). The Maryland district court determined that the plaintiffs there had standing because

ongoing implementation of the Memorandum was substantially likely to cause them to suffer apportionment injury. *Id.* at *4-9. On the merits, the court concluded that the Memorandum violated the Census Act. *Id.* at *9-14.

ARGUMENT

1. Each group of Appellees has distinct interests that warrant divided argument. States and their political subdivisions, as sovereign or quasi-sovereign entities, have unique interests that private parties do not adequately represent. This Court has thus routinely divided argument when, as here, both a government entity and a private party were on the same side. *See, e.g., Fulton v. City of Philadelphia*, No. 19-123, 2020 WL 5882196 (U.S. Oct. 5, 2020) (mem.) (City of Philadelphia and private respondent); *Department of Commerce v. New York*, No. 18-966, 139 S. Ct. 1543 (2019) (mem.) (governmental respondents and private respondents); *American Legion v. American Humanist Ass'n*, No. 17-1717, 139 S. Ct. 951 (2019) (mem.) (Maryland-National Capital Park and Planning Commission and private petitioners); *Tennessee Wine & Spirits Ass'n v. Blair*, No. 18-96, 139 S. Ct. 783 (2019) (mem.) (State of Illinois for amici curiae and private petitioner); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, No. 16-111, 138 S. Ct. 466 (2017) (mem.) (State of Colorado and private respondents).

Each group of Appellees has distinct perspectives and arguments on the questions presented. For instance, while all appellees support their standing with allegations that the Memorandum's policy will cause some States to lose representation in Congress, the Government Appellees and Private Appellees each

identified additional distinct injuries to support their standing: the Government Appellees established that the Presidential Memorandum will cause them the unique harm of degrading the accuracy of census data that they rely on for numerous important government functions (J.S.A. 48a-59a), while the Private Appellees established that the Presidential Memorandum will force them to divert resources needed to run their organizations (J.S.A. 35a-37a). The Court should therefore divide Appellees' argument time.

2. Appellees also request enlargement of argument time, from sixty to eighty minutes, in light of the distinct interests of the two Appellee groups; the number of issues raised in the jurisdictional statement and Appellants' opening brief, and the national importance of the apportionment of the House of Representatives. Appellants have advanced at least five distinct arguments regarding jurisdiction: (1) the harm to the census count has become moot on appeal, (2) the case does not fall with the exception to mootness, (3) the allegations of census-count harm were too speculative, (4) there is a "mismatch" between the relief awarded and the census-count injury, and (5) Appellees' apportionment injury is too speculative. *See* J.S. 12-18; Br. for Appellants 15-21. Appellants have also advanced numerous arguments regarding the merits of Appellees' statutory and constitutional claims. Moreover, Appellees will need to address, as possible alternative grounds for affirmance, the additional grounds for standing and for invalidating the Memorandum ruled on by the California and Maryland district courts. In particular, those rulings further demonstrate that Appellants here have standing given the Memorandum's imminent

and likely harm to the apportionment of House seats and federal funds distributed based on the decennial census's total-population counts. And the ruling from the California district court further confirms that the Memorandum's exclusion of undocumented immigrants who usually live here from the apportionment base flagrantly violates not only the Census Act but also the Constitution.

In addition, all parties agree that the issue underlying the legal dispute—the propriety of excluding undocumented immigrants from the census count used for apportionment of the House of Representatives—has national importance. *See, e.g.*, Appellants' Mot. to Expedite 6-7; Government Appellees' Mot. to Affirm 11, 16-17; Private Appellees' Mot. to Dismiss or Affirm 29, 32-35. This Court has previously enlarged argument time in cases addressing matters of extraordinary public importance. *See, e.g., United States v. Texas*, No. 15-674, 136 S. Ct. 1539 (2016) (mem.); *Michigan v. EPA*, No. 14-46, 575 U.S. 902 (2015); *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015) (mem.); *National Fed'n of Indep. Bus. v. Sebelius*, No. 11-393, 565 U.S. 1193 (2012) (mem.); *League of United Latin Am. Citizens v. Perry*, No. 05-204, 546 U.S. 1149 (2006); *McConnell v. Federal Election Comm'n*, No. 02-1674, 539 U.S. 911 (2003) (mem.).

Appellees therefore request that the Court enlarge the time for argument to allow Appellants and Appellees forty minutes each, with Appellees' time to be evenly divided and with counsel for the Government Appellees to present first.

If the Court enlarges argument time but grants fewer than forty minutes to each side, or if it declines to enlarge argument time, Appellees request that they be

given an opportunity to consult each other and inform the Clerk's Office of their joint proposal for dividing time. See Stephen M. Shapiro et al., *Supreme Court Practice*, § 14.6, at 781 (10th ed. 2013).

CONCLUSION

For these reasons, Appellees jointly request that the Court enlarge the total argument time to eighty minutes, with the forty minutes for appellees to be divided equally between the Government Appellees and the Private Appellees, with counsel for the Government Appellees presenting first.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
DALE E. HO*
ADRIEL I. CEPEDA DERIEUX
DAVID D. COLE
CECILLIA WANG
DAVIN ROSBOROUGH
SOPHIA LIN LAKIN
THERESA LEE
MY KHANH NGO
SARAH BRANNON
CERIDWEN CHERRY
dho@aclu.org

LETITIA JAMES
Attorney General
State of New York


BARBARA D. UNDERWOOD*

Solicitor General
STEVEN C. WU
Deputy Solicitor General
JUDITH N. VALE
Senior Assistant Solicitor General
ERIC R. HAREN
Special Counsel
barbara.underwood@ag.ny.gov

ARNOLD & PORTER KAYE
SCHOLER LLP
JOHN A. FREEDMAN
R. STANTON JONES
ELISABETH S. THEODORE
DANIEL F. JACOBSON

MATTHEW COLANGELO
Chief Counsel for Federal Initiatives
ELENA GOLDSTEIN
Deputy Chief Civil Rights Bureau
FIONA J. KAYE
Assistant Attorney General

NEW YORK CIVIL LIBERTIES FOUNDATION
PERRY GROSSMAN
CHRISTOPHER DUNN

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF TEXAS
ANDRE I. SEGURA
EDGAR SALDIVAR
THOMAS BUSER-CLANCY

ACLU FOUNDATION OF SOUTHERN
CALIFORNIA
JULIA A. GOMEZ
PETER ELIASBERG

* *Counsel of Record for Appellees*
New York Immigration Coalition, et al.

* *Counsel of Record for Appellees*
State of New York, et al.

Dated: November 2020