

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

NAACP, <i>et al.</i> ,)	
)	
Appellants,)	
)	Case No. 19-1863
vs.)	
)	
BUREAU OF THE CENSUS, <i>et al.</i> ,)	
)	
Appellees.)	

APPELLANTS' MOTION FOR IMMEDIATE ISSUANCE OF MANDATE

Appellants National Association for the Advancement of Colored People, Prince George's County Maryland, Prince George's County Maryland NAACP Branch, Robert E. Ross, and H. Elizabeth Johnson respectfully request that the Court immediately issue the mandate in this appeal and that it shorten the time for a response to the instant motion. The Government-Appellees oppose this motion. In support of this motion, Appellants state:

1. Plaintiffs brought this action asserting that the Government is violating the Enumeration Clause, U.S. Const., art. 1, § 2, cl. 3, and the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*, ("APA") because it has made specific design choices that create an imminent risk of a massive differential undercount of African Americans and other communities of color in the 2020 Census. Plaintiffs also alleged that Defendants failed to dedicate resources sufficient to ensure a fair count.

2. The District Court dismissed all claims, and Plaintiffs appealed. Because the window for relief was rapidly narrowing as to census operations already or imminently taking place, and their appeal would be mooted if heard in the usual course, Plaintiffs moved for expedited consideration. ECF No. 5.

3. This Court ordered an expedited response to the motion, ECF No. 7, and then granted the request for accelerated briefing and argument over the Government's objection. ECF No. 14.

4. On December 19, 2019, this Court affirmed as to the APA claim, reversed the District Court's dismissal of the constitutional claims, and remanded. ECF No. 40. In remanding the Enumeration Clause claims, this Court emphasized that "delayed adjudication would result in hardship to the plaintiffs." *Id.* at 16.

5. Later that same day, the District Court directed the parties to confer and propose a schedule by January 6 for the filing of an amended complaint and renewal of the Government's motion to dismiss. Dist. Ct. ECF No. 163 (Dec. 19, 2019).

6. The urgency underlying Plaintiffs' successful motion to expedite this appeal has only increased. The operations in the Where to Count phase of the 2020 Census are now complete or nearing completion, operations in the outreach phase are well underway, and Census Day, April 1, 2020, is fast approaching.¹

¹ See generally Census Bureau, Final Operational Plan version 4.0 (Dec. 2018), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan4.pdf>; ECF No. 5 at 9–14.

7. Undersigned counsel conferred with Government appellate counsel regarding accelerated issuance of the mandate. By email dated December 23, Counsel for the Government advised that her clients “oppose any motion to expedite issuance of the mandate.”

8. On December 27, 2019, undersigned counsel conferred with Government trial counsel, as directed by the District Court’s December 19 order. Government counsel took the position that the District Court lacks jurisdiction over the matter and that the parties may not proceed with an amended complaint or motion to dismiss until this Court’s mandate issues.

9. Plaintiffs advised the Government during this December 27 conferral that they were prepared to file an amended complaint within 24 hours of the mandate issuing and intended to move for a preliminary injunction soon thereafter.

10. Plaintiffs do not intend to petition for rehearing nor to seek Supreme Court review of the panel’s December 19 decision.

11. Under the circumstances, there is no good reason to delay issuance of the mandate. Absent an order to expedite, the mandate may not issue until February 10, 2020. *See* Fed. R. App. P. 40(a) (parties have 45 days after entry of judgment to petition for rehearing, when United States is a party); Fed. R. App. P. 41(b) (mandate issues 7 days after that time expires or the Government’s motion is denied.).

12. There is good cause for this Court to exercise its discretion to “shorten . . . the time” for issuing the mandate. *See Johnson v. Bechtel Assocs. Prof'l Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986) (*per curiam*) (noting courts of appeals “may order immediate issuance of the mandate” when satisfied that rehearing by panel, rehearing *en banc*, and Supreme Court review are unlikely or inappropriate). Given the timing of the 2020 Census, remand to the District Court for further proceedings is urgent.

For the foregoing reasons, Plaintiffs-Appellants respectfully request that this Court grant the motion for immediate issuance of the mandate and that it shorten the time for the Government-Appellees' response to this motion.

Dated: December 30, 2019

Respectfully submitted,

/s/ Susan J. Kohlmann

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE
REQUIREMENTS**

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

1. The attached motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A). The motion contains 681 words (according to the Microsoft Word 2013 count function), excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 27(a)(2)(B).

2. The attached motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The motion has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman type style.

Date: December 30, 2019

BY: /s/Susan J. Kohlmann
Susan J. Kohlmann

CERTIFICATE OF SERVICE

I, Susan J. Kohlmann, certify that today, December 30, 2019, I have caused a true and correct copy of the foregoing Motion for Expedited Issuance of Mandate to be filed with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit via the appellate CM/ECF, which will send a notice of this filing to all participants in this case, including counsel for appellees.

BY: /s/Susan J. Kohlmann
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