

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

NATIONAL ASSOCIATION FOR THE  
ADVANCEMENT OF COLORED  
PEOPLE, ET AL.

Plaintiffs-Appellants,

v.

BUREAU OF THE CENSUS, ET AL.,

Defendants-Appellees.

No. 19-1863

**GOVERNMENT APPELLEES' OPPOSITION TO  
APPELLANTS' MOTION TO EXPEDITE AND MOTION TO SEAL**

The government respectfully opposes plaintiffs-appellants' motion to expedite this appeal, and motion to file under seal two expert reports never submitted to the district court. On August 1, 2019, the district court granted the government's motion to dismiss plaintiffs' claims that the 2020 Census is underfunded in violation of the Enumeration Clause, and that plans for certain information-gathering methods to conduct the census violate the Administrative Procedure Act (APA). The district court dismissed the underfunding claim as moot, and held that the challenged census implementation plans do not constitute reviewable, final agency action.

This Court has established a briefing schedule under which plaintiffs' opening brief is due on September 23, with the government's response due on October 21.

Plaintiffs have proposed that their opening brief be due on August 30, with the government's response due on September 20.

Plaintiffs have no plausible basis for this schedule. The district court correctly held that plaintiffs had effectively asked it to "take supervisory control over the execution of the 2020 Census," ECF No. 154 (Mem. Op.), at 10, and that their APA claims sought a "sweeping overhaul to the Operational Plan, which exceeds the scope of reviewable 'agency action.'" *Id.* at 21. Plaintiffs have not shown that their appeal should take precedence over other cases pending before this Court. At a minimum, we ask that, if the Court were to move the date of plaintiffs' opening brief to August 30, the government's brief should not be due before September 30. We also oppose plaintiffs' submission of expert reports in support of their motion to expedite, which are not part of the record in this case.

**A.1.** The Constitution's Enumeration Clause requires that an "actual Enumeration" of the population be conducted every 10 years and vests Congress with the authority to conduct that census "in such Manner as they shall by Law direct." U.S. Const. art. I, § 2, cl. 3. Through the Census Act, Congress has delegated to the Secretary of Commerce the responsibility to conduct the decennial census "in such form and content as he may determine." 13 U.S.C. § 141(a). The Bureau of the Census assists the Secretary in the performance of this responsibility. *See id.* §§ 2, 4. As required by the Constitution, a census of the U.S. population has been conducted every 10 years since 1790. U.S. Census Bureau, *Questions Planned for the 2020 Census and*

*American Community Survey*, at 1 (Mar. 2018),

<https://www2.census.gov/library/publications/decennial/2020/operations/planned-questions-2020-ac.pdf>.

2. Plaintiffs brought this action in 2018, alleging that the Bureau's preparations for the 2020 Census violated the Enumeration Clause. U.S. Const. art. I, § 2, cl. 3. Plaintiffs asserted that lack of funding and flaws in certain plans for conducting census operations would result in an undercount of racial and ethnic minorities. *See* ECF. No. 38 (First Amend. Compl.), at 9-12, 17-20. Plaintiffs requested "an injunction that requires Defendants to propose and implement, subject to [the district court's] approval and monitoring, a plan to ensure that the hard-to-count populations will be actually enumerated in the decennial census." *Id.* at 21-22.

In January of 2019, the district court granted in part and denied in part the government's motion to dismiss. The district court dismissed plaintiffs' Enumeration Clause claim relating to the Bureau's census preparations as unripe, and declined "to interject itself into the Bureau's [planning] process." ECF No. 64 (Mem. Op.), at 33. The court did not dismiss plaintiffs' claim that the census is underfunded, citing a possible lapse in appropriations at the end of April 2019. *See id.* at 36. The district court recognized that it was without power to "order Congress to adequately fund the 2020 Census," but allowed the underfunding claim to proceed under the assumption that it "could issue a declaratory judgment that Congress has failed to appropriate sufficient funds." *Id.* at 34, 48. On February 15, 2019, Congress appropriated over

\$3.5 billion to the Bureau for use through 2021. *See* ECF No. 95 (Gov't Second Mot. Dismiss), at 2, 5 & n.4.

3. In April 2019, plaintiffs amended their complaint. Plaintiffs added new claims under the APA, which they styled as challenging six census “design choices” contained in Version 4.0 of the 2020 Census Operational Plan, including the Bureau’s plans for staffing levels and number of field offices. *See* ECF No. 91 (Second Amend. Compl.), at 3, 15, 37-38. Version 4.0 of the Operational Plan reflects the Bureau’s most recent implementation plans for gathering the 2020 Census data, subject to “[a]djustments” that “may be required based on analysis and final tests” carried out through the summer of 2019.<sup>1</sup> *See* United States Census Bureau, *2020 Census Operational Plan 4.0*, at 1, 51, <https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan4.pdf> (Operational Plan). The 2020 Census will be the first to rely extensively on digital methods and automation, and the first census where individuals are encouraged to respond online. *See* Operational Plan at 9.

The government filed its second motion to dismiss urging, *inter alia*, that the underfunding claim was now moot, and that plaintiffs’ challenge to the Operational Plan did not implicate reviewable, final agency action. *See* ECF No. 95.

---

<sup>1</sup> *See generally* United States Census Bureau, *2020 Census Research, Operational Plans, and Oversight*, <https://www.census.gov/programs-surveys/decennial-census/2020-census/planning-management/planning-docs/operational-plan.html> (collecting versions 1.0-4.0 of the Operational Plan, which reflect logistical decisions spanning two Presidential Administrations and at least four separate Census Directors or acting Directors).

While the government's motion was pending, plaintiffs sought emergency relief from the district court, including "a preliminary injunction directing the Bureau to allocate and spend immediately money the Bureau acknowledges it can spend at any time." ECF No. 146 (Pls. Letter 3).

4. The district court granted the government's second motion to dismiss. The district court concluded that the 2019 Appropriations Act rendered plaintiffs' underfunding claim moot, and that any other alleged injury based on future appropriations was speculative. *See* ECF No. 154, at 7-8. The district court also declined to entertain plaintiffs' challenge to "the Bureau's ability to carry out the 2020 Census with all the funding that it requested," a challenge that "would take the Court into the area reserved for Congress and the Executive Branch." *Id.* at 13, 14. The court denied plaintiffs' requested emergency relief, which "in effect" asked the court to "take supervisory control over the execution of the 2020 Census." *Id.* at 10. And the district court held that the Bureau's planned operations "do not qualify as 'agency action' because they do not 'determin[e] rights and obligations,'" and dismissed plaintiffs' APA claims as seeking "sweeping overhaul to [Version 4.0 of the] Operational Plan, which exceeds the scope of reviewable 'agency action.'" *Id.* at 21, 23-25 (citing *City of New York v. United States Dep't of Def.*, 913 F.3d 423, 431-32 (4th Cir. 2019)).

**B.** Plaintiffs have provided no basis for advancing the schedule already established by this Court. They have provided no basis whatsoever for questioning

the district court's conclusion that plaintiffs' underfunding claim is unreviewable.

ECF No. 154, at 7.<sup>2</sup>

The district court correctly held that it has no authority to accept plaintiffs' invitation to oversee the details of census procedures, explaining that the APA does not permit "broad programmatic attack[s]' on the government's operations." ECF No. 154, at 16 (citing *City of New York*, 913 F.3d at 431). As the court explained, *see id.* at 23-25, review under the APA is limited to "governmental acts that determin[e] rights and obligations," and courts "are woefully ill-suited . . . to adjudicate generalized grievances asking us to improve an agency's performance or operation." *City of New York*, 913 F.3d at 431 (quotation marks omitted). The precise methods used by the Bureau are squarely within the province of the agency in any event. *See* 13 U.S.C. § 141(a) (delegating to the Secretary of Commerce the responsibility to conduct the decennial census "in such form and content as he may determine"); *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). To the extent plaintiffs "indirectly" challenge the Bureau's failure to act, as the district court recognized, "[p]laintiffs can point to no legal requirement that the Census Bureau conduct certain field tests, hire a

---

<sup>2</sup> Plaintiffs appear to newly take issue with the Bureau's alleged "refusal to spend already appropriated funds." Pls. Mot. 13. But plaintiffs should not be permitted to advance—for the first time—a new APA claim based on the Bureau's funding decisions, which they did not assert in their second amended complaint. *See* ECF No. 91, at 15, 37-38 (describing APA claims as based on "irrational design choices in the final operational plan" "described in paragraphs 66 through 175 of this complaint," none of which relate to funding decisions). That new claim would be meritless in any event. *See Weyerbaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (explaining that "allocation of funds from a lump-sum appropriation" is the type of "agency decision[] that courts have traditionally regarded as unreviewable").

specific number of enumerators, open a specific number of Census Bureau field offices, or take any other action Plaintiffs would prefer.” ECF No. 154, at 20-22.

In short, plaintiffs have shown no good cause for advancing their appeal ahead of those of other parties. At a minimum, the government asks that if the Court makes plaintiffs’ brief due on August 30, the government’s brief be due no earlier than September 30, briefing time that is particularly necessary because lead counsel will be on leave during the week of September 8.

**C.** The government opposes plaintiffs’ filing in this Court of two expert reports under seal in support of their motion to expedite. *See* Pls. Mot. Seal. On August 12, 2019, the Court construed plaintiffs’ motion to seal as a certificate of confidentiality and placed the reports under seal. But the reports were never filed with the district court and are not properly a part of the record below. *See* Fed. R. App. P. 10 (record on appeal constitutes the original papers and exhibits filed in district court); Pls. Mot. Seal 3 (explaining that plaintiffs “*produced* two expert reports”) (emphasis added). The reports therefore are not appropriately before this Court.

## CONCLUSION

For the foregoing reasons, plaintiffs' motions to expedite and submit expert reports under seal should be denied.

Respectfully submitted,

JOSEPH H. HUNT

*Assistant Attorney General*

ROBERT K. HUR

*United States Attorney*

MARK B. STERN

*/s/ Thais-Lyn Trayer*

---

THAIS-LYN TRAYER

*Attorneys, Appellate Staff*

*Civil Division, Room 7712*

*U.S. Department of Justice*

*950 Pennsylvania Avenue NW Rm. 7712*

*Washington, DC 20530*

*(202) 514-5091*

*Thais-Lyn.Trayer@usdoj.gov*

August 2019



**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing response complies with the requirements of Federal Rule of Appellate Procedure 27(d) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this response complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 1,692 words according to the count of Microsoft Word.

*/s/ Thais-Lyn Trayer*  
\_\_\_\_\_  
THAIS-LYN TRAYER

**CERTIFICATE OF SERVICE**

I hereby certify that on August 15, 2019, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Thais-Lyn Trayer  
THAIS-LYN TRAYER