

Appellees' Brief: September 20, 2019

Appellants' Reply: September 30, 2019

Argument: October 2019, or as soon thereafter as the Court's docket permits

In support of this motion, Appellants state:

1. The NAACP, Prince George's County, and other Plaintiffs claim that the Bureau of the Census (the "Bureau"), Steven Dillingham, Wilbur Ross, and the United States ("Defendants" or the "Government") are violating the Enumeration Clause of the United States Constitution¹ and the Administrative Procedure Act² ("APA") by drastically reducing resources for the key operations of the 2020 Census despite clear evidence that such cuts will lead to undercounting of "Hard-to-Count"³ communities, including the racial and ethnic minorities that Plaintiff NAACP represents and in locations such as Prince George's County, Maryland.

2. Because Plaintiffs' claims concern the manner in which the 2020 Census will be conducted, the claims will become moot if this appeal is heard in the

¹ U.S. Const., art. 1, § 2, cl. 3.

² 5 U.S.C. § 701, *et seq.*

³ As this term is used by the Census Bureau, Hard-to-Count communities include racial and ethnic minorities, non-English speakers, low-income people, undocumented immigrants, people with disabilities, and LGBTQ people. *See* Census Bureau, 2020 Census: Counting Everyone Once, Only Once, and in the Right Place at 7 (Nov. 2018), <https://www2.census.gov/cac/nac/meetings/2018-11/chapin-hard-to-count.pdf>.

usual course.⁴ This appeal must be heard in expedited fashion for Plaintiffs to have an opportunity to obtain meaningful and effective relief. As explained in more detail herein, the Census operations which Plaintiffs allege are severely deficient are beginning on or about August 18, and Plaintiffs' window for relief as to those operations spans the next few months.

3. Defendants have cut funding and staff for Census operations that Congress and the Supreme Court have previously recognized as crucial for reaching Hard-to-Count communities, refusing to spend funds appropriated by Congress that are now sitting in agency reserves, in order to meet arbitrary cost constraints. These cutbacks include: (A) cutting by more than fifty percent the number of staff needed to build the Master Address File ("MAF") for the 2020 Census, despite their own testing showing that their approach will lead to serious errors and omit millions of households; (B) reducing the resources for community outreach and advertising to levels well below the 2010 Census, despite a much larger population and increased barriers to community participation; and (C) cutting the numbers of overall field staff and field offices nearly in half, including the complete removal of nearly 30,000 questionnaire assistance centers ("QACs").

⁴ Absent an order to expedite, briefing will not be complete until 91 days after the record is filed, Fed.R.App.P. 31(a), with oral argument and a decision unlikely before the 2020 Census has commenced, let alone any opportunity for a remand to consider appropriate relief.

4. Discovery has revealed that these decisions will lead to a significant undercount of Hard-to-Count communities, and are neither necessary from a cost perspective nor based upon testing or other evidence developed by the Census Bureau showing that they will produce efficiencies without undermining accuracy. To the contrary, the Census Bureau has over \$1.3 billion in already-appropriated funds that it is choosing not to spend on the Census in an effort to satisfy an arbitrary cost constraint for political reasons, despite a wealth of evidence that accuracy will suffer and Hard-to-Count communities will lose political representation and federal funding as a result.

5. These decisions violate the Constitution, which imposes a positive obligation on Defendants to conduct an “actual enumeration” and which requires census-related decisions to bear a reasonable relationship to the goals of the census, including a fair and equal enumeration of the public. They also violate the APA because they are arbitrary and capricious, and made in consideration of factors not directed by Congress.

Procedural History and Decisions Below

6. Plaintiffs filed this case on March 28, 2018, bringing one cause of action under the Enumeration Clause. Plaintiffs filed a first amended complaint on June 14, which Defendants moved to dismiss on July 13, 2018.

7. On January 29, 2019, the District Court granted in part and denied in part the Government's motion to dismiss Plaintiffs' Enumeration Clause claim.⁵ The District Court held that the NAACP, Prince George's County, and other Plaintiffs could not obtain injunctive relief on their Enumeration Clause claim because, at the time, the "beginning of the 2020 Census [was] a year or more away," and judicial intervention would interfere with the final preparations for the 2020 Census.⁶ The Court dismissed that claim for relief without prejudice to being reinstated at a later date.⁷ However, the District Court held that Plaintiffs could proceed on a claim for declaratory relief under the Enumeration Clause.

8. As to both the injunctive and declaratory claims,⁸ the Court rejected all of the Government's other arguments, holding that the Plaintiffs had standing, that their claims did not present an unreviewable political question, and that the Plaintiffs had stated a claim for relief pursuant to the Enumeration Clause.

⁵ See Dkt. No. 64 (the "January Opinion").

⁶ See *id.* at 32. The Court further noted that the Plaintiffs could still obtain a remedy while "waiting until the Secretary has completed the plans for the 2020 Census, or even later, until after the enumeration has taken place." *Id.*

⁷ In early February 2019, Plaintiffs had moved to reinstate their claim for injunctive relief under the Enumeration Clause, see Dkt. No. 68, which the District Court denied, see Dkt. No. 76.

⁸ The District Court made clear that although it was dismissing the claims for injunctive relief, it was analyzing the other arguments against those claims because "they may be reinstated." Dkt. No. 64 at 37 n.16.

9. After the January Opinion, the District Court granted expedited discovery on Plaintiffs' Enumeration Clause claim, which was ongoing while the Government's motion to dismiss the second amended complaint ("SAC") was pending.⁹ During this time, it became clear that the Government was woefully unprepared for the 2020 Census, and was committed to a Census design that would undercount communities of color.

10. Days after the District Court issued its January 2019 opinion, the Census Bureau completed its operational planning for the 2020 Census and published what it terms its "Final Operational Plan."¹⁰ Plaintiffs promptly requested leave to add APA claims challenging discrete aspects of the Final Operational Plan and to reinstate their constitutional claims for injunctive relief.¹¹

11. The District Court allowed Plaintiffs to add their APA claims but not to reinstate their constitutional claims, and permitted the Government to file a motion to dismiss the new APA claims.¹² The parties completed briefing on the Government's second motion to dismiss on May 13, 2019. The District Court declined to schedule oral argument on the motion.

⁹ See Dkt. No. 85.

¹⁰ See generally Census Bureau, Final Operational Plan version 4.0 at 8 (Dec. 2018), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan4.pdf> ("Final Operational Plan").

¹¹ See Dkt. No. 68.

¹² See Dkt. No. 76.

12. On June 27, 2019, the Supreme Court decided *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), in which the Court held that the plaintiffs in that case had standing to challenge the addition of the citizenship question to the 2020 Census, that the decision was reviewable under the APA, and that the decision was impermissibly pretextual. The parties submitted notices of supplemental authority to the District Court regarding the Supreme Court's opinion.¹³

13. On July 25, 2019, after the Plaintiffs partially completed the discovery ordered by the District Court, including two depositions of Census Bureau personnel and two expert reports regarding the deficiencies in the Census Bureau's plans and the effects on Hard-to-Count Communities, Plaintiffs filed a pre-motion letter with the District Court regarding their intent to seek emergency relief on their claims.¹⁴ Plaintiffs explained that proceeding with the 2020 Census as currently constituted would cause them irreparable harm by resulting in a significant undercount of Plaintiffs' communities, that waiting any longer would prevent Plaintiffs from obtaining meaningful relief on their claims, and that discovery and publicly available information revealed that the Census Bureau was holding in reserve over \$1.3 billion

¹³ See Dkt. Nos. 131 & 132.

¹⁴ See Dkt. No. 146.

in appropriated funds, instead of spending it on key operations that could reach Hard-to-Count Communities.

14. Over the Government's objection, the District Court issued an order on July 29 permitting Plaintiffs to file their emergency motion, and directed the parties to confer regarding a briefing schedule and advise the Court of their proposal by July 31, 2019.¹⁵ The parties negotiated a schedule that began with submission of Plaintiffs' emergency motion on August 5, 2019, and as directed, advised the Court of the agreed-upon schedule on July 31.¹⁶

15. On August 1, 2019, the District Court granted the motion to dismiss the SAC in its entirety.¹⁷ The District Court held that the Plaintiffs' Enumeration Clause claim had become moot in February 2019 (*prior* to the District Court ordering discovery on this same claim) when Congress passed the appropriations bill that ended the government shutdown.¹⁸ The District Court also reversed its decisions from the January Opinion, holding that Plaintiffs no longer had standing in part because an Order directing the Census Bureau to expend appropriated funds is "not a remedy that a court has the authority, expertise, or time to provide."¹⁹

¹⁵ See Dkt. No. 150.

¹⁶ See Dkt. Nos. 152 & 153.

¹⁷ See Dkt. No. 154 (the "August Opinion").

¹⁸ See *id.* at 7.

¹⁹ See *id.* at 10.

16. In the August Opinion, the District Court also dismissed APA claims brought by Plaintiffs in the SAC. These claims challenged the Bureau's so-called "Final Operational Plan" for the 2020 Census, released in February 2019, which describes the final design of the Census. The District Court held that, despite their publicly self-proclaimed "final" status, the Census Bureau's decisions announced in the Final Operational Plan are not final agency actions and accordingly dismissed Plaintiffs' APA claims.²⁰

17. On August 5, 2019, Plaintiffs filed their Notice of Appeal of the District Court's decisions.

The Need for Expedited Relief

18. Expedited review is necessary because the first stage of the Census is about to begin, on or about August 18. In order to be most effective, relief is needed before this stage ends in November 2019.

19. As relevant to this appeal, there are three phases of the Census²¹:

- a. Where to Count. First, the Bureau canvasses all of the addresses in the nation, to identify all of the places where people could live. The addresses are compiled into the Master Address File ("MAF"), which is the foundation for all subsequent stages of the Census. Residents at addresses overlooked in this stage will almost certainly not be counted.
- b. Outreach. Next, the Bureau engages in outreach campaigns to increase the self-response rate. Every housing unit in the MAF is contacted initially by mail and asked to "self-respond." This outreach further

²⁰ See *id.* at 15-21.

²¹ See generally Final Operational Plan.

includes hiring partnership staff from Hard-to-Count communities to encourage those groups to respond to the Census and advertising campaigns about the Census targeted at Hard-to-Count communities.

- c. Conducting the Count. Last, the Bureau enumerates the population. First, self-responses are received and tallied, then the Bureau targets nonresponding housing units in the MAF with follow-up visits by its field staff, who operate out of field offices across the country.

20. The Where to Count phase begins on August 18, 2019,²² hiring for Outreach programs is already underway, and the actual Count itself is set to begin in six months, as shown in the following timeline:

²² See Albert E. Fontenot, Jr., *Update on the 2020 Census: Presentation to the National Advisory Committee* (May 2, 2019), <https://www2.census.gov/cac/nac/meetings/2019-05/fontenot-update-on-2020-Census.pdf>.

Timeline of Selected Census Events²³

Key operation or activity	2019												2020						
	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J
Opening of 248 area census offices	[Blue bar spanning from Jan to Sep 2019]																		
In-field address canvassing													[Blue bar spanning from Aug to Sep 2020]						
Advertising campaign													[Blue bar spanning from Oct 2019 to Aug 2020]						
Self-response mailings													[Blue bar spanning from Apr to Aug 2020]						
NRFU													[Blue bar spanning from Apr to Aug 2020]						

★ Census Day
Apr. 1, 2020

The significant numbers of people who are missed in the earliest phases of the Census beginning now will be virtually impossible to recapture. As a result, expedited consideration is required to grant Plaintiffs effective relief.

21. Moreover, it will soon be too late to remedy the myriad problems caused by the Bureau's decisions not to expend the necessary and available resources

²³ Derived from GAO, 2020 Census: Further Actions Needed to Reduce Key Risks to a Successful Enumeration at 7 fig.2, GAO-19-431T (Apr. 2019), <https://www.gao.gov/assets/700/698794.pdf>; Final Operational Plan, *supra* note 10, at 52-54 figs. 23-25.

on the 2020 Census. Publicly available sources, discovery materials, and Plaintiffs' expert reports already disclosed to the Government, confirm the radical underfunding of the 2020 Census in the following areas that are crucial for reaching Hard-to-Count communities:²⁴

- a. ***In-Field Address Canvassing***. In the critical first phase of the 2020 Census to identify which housing units to contact, the Bureau has chosen to canvass only 38% of housing units "in field" using human workers, compared to nearly 100% in 2010. This cuts \$362 million from the cost, and nearly 50,000 workers or "listers."
- b. ***Questionnaire Assistance Centers***. During the 2010 Census, the Bureau established 29,157 staffed questionnaire assistance centers ("QACs") and 9,670 unstaffed Be Counted ("BC") sites. For 2020, the Bureau has replaced these sites entirely with phone questionnaire assistance to save \$46 million notwithstanding that hundreds of thousands of residents were counted in 2010 via these brick-and-mortar sites and despite an express instruction from Congress to fund QACs.
- c. ***Partnership Outreach***. In 2010, the Bureau hired 2,961 workers to conduct outreach, especially in Hard-to-Count communities, outreach that was proven to improve self-response rates particularly among Black residents. For 2020, the Bureau plans to hire only 1,630 outreach workers – a cut of almost half the total that will save \$102 million from the 2010 funding level.
- d. ***Non-Response Follow-Up ("NRFU")***. In 2010, the Bureau hired 516,709 human "enumerators" into communities to visit homes that had

²⁴ Plaintiffs are filing under seal the Expert Reports of Dr. Mark Doms and Professor Sunshine Hillygus, disclosed to Defendants in the proceeding below on July 23, 2019, which describe these deficiencies in detail and support their detrimental effects and harm to Plaintiffs' communities. Though the expert reports themselves contain information designated Confidential pursuant to the protective order below, they rely principally on publicly available materials detailing the deficiencies to the 2020 Census and the reduction in resources for counting Hard-to-Count Communities from the 2010 Census to the 2020 Census.

not “self-responded” to Census Bureau outreach. Despite using internet as the primary means for self-response for the first time in 2020 and the Bureau’s own testing showing that Hard-to-Count communities have much lower internet self-response rates than White communities, the Bureau plans to deploy only 260,829 enumerators in 2020 and to cut the number of field offices from 494 to just 248 – cuts that will save \$597 million off 2010 funding levels for NRFU.

22. After November 2019, there will be insufficient time to: expand use of in-field address canvassing; open QACs; purchase additional advertisements geared towards Hard-to-Count communities; hire additional enumerators; or open new field offices. The Bureau has the money to take these steps, having carried over \$1.3 billion unspent from its Fiscal Year 2019 appropriations. The Bureau’s refusal to spend already appropriated funds will irreparably harm Plaintiffs absent expedited review of this appeal.

23. The problems with the 2020 Census will only accumulate and magnify as the Census progresses. The complaint and publicly available documents susceptible of judicial notice clearly show that people missed in the early phase of the Census will not be picked up later in the Census process. The Doms and Hillygus Expert Reports provide further support for the imminent risk of irreparable injury as a result.

24. To begin, residents of addresses overlooked at the Where to Count stage are almost certain not to receive a questionnaire or follow-up visit. People who do not come into contact with the Bureau’s outreach programs are also likely to be

uncounted, particularly in Hard-to-Count communities. And people who are not targeted during the follow-up period due to the curtailment of those operations will not be enumerated at all. As the Where to Count process now begins, these errors will accumulate and become impossible to correct.

25. Plaintiffs' Second Amended Complaint targets these erroneous decisions by the Census Bureau, and their inevitable effect of producing a greater undercount among Plaintiffs' communities. If the present appeal is not heard before those decisions take effect, Plaintiffs will be unable to obtain effective relief.

26. This case can be heard expeditiously on the available appellate record. Plaintiffs' claims were dismissed on a motion to dismiss. The key facts that this Court will consider are either set forth in the Second Amended Complaint or are matters of public record: the Bureau has refused to spend over a billion dollars appropriated by Congress and held in reserve,²⁵ and studies by the Department of Commerce Inspector General and by the Government Accountability Office detail the facts underlying the Census Bureau's plans for a Census that will exclude racial

²⁵ See, e.g., H.R. Rep. No. 116-101, at 14 (2019), <https://www.congress.gov/116/crpt/hrpt101/CRPT-116hrpt101.pdf>; Census Bureau, Budget: Fiscal Year 2020 at CEN-51 (Mar. 2019), <https://www2.census.gov/about/budget/FY-2020-Congressional-Budget-Submission.pdf>.

and ethnic minorities and other members of Hard-to-Count communities.²⁶ Judicial notice may be taken of the relevant facts outside the face of the SAC.²⁷

27. Counsel for Plaintiffs consulted with the Government concerning this motion, and the Government does not consent to expedited consideration of this appeal.

28. Plaintiffs also request that the Court advance this case on its argument calendar, ideally scheduling argument for October 2019.

²⁶ See, e.g., GAO, 2020 Census: Bureau Is Making Progress Opening Offices and Recruiting, but Could Improve Its Ability to Evaluate Training at 22, No. GAO-19-602 (July 2019), <https://www.gao.gov/assets/710/700375.pdf>; Department of Commerce, OIG, 2020 Census: Issues Observed During the 2018 End-to-End Census Test's Address Canvassing Indicate Risk to Address List Quality at 1, No. OIG-19-008-A (Feb. 2019), <https://www.oig.doc.gov/OIGPublications/OIG-19-008-A.pdf>; GAO, 2020 Census: Continued Management Attention Needed to Address Challenges and Risks with Developing, Testing, and Securing IT Systems at 9-12, GAO-18-655 (August 2018), <https://www.gao.gov/assets/700/694169.pdf>; GAO, 2020 Census: Actions Needed to Address Challenges to Enumerating Hard-to-Count Groups at 25 (July 2018), <https://www.gao.gov/assets/700/693766.pdf>; GAO, 2020 Census: Actions Needed to Improve In-Field Address Canvassing Operation at 4-5, No. GAO-18-414 (June 2018), <https://www.gao.gov/assets/700/692990.pdf>; Department of Commerce, OIG, 2020 Census: The Number and Location of Area Census Offices May Not Reflect NRFU Workload Demands and Will Not Result in Projected Cost Savings at 1, No. 18-018-A (Apr. 2018), <https://www.oig.doc.gov/OIGPublications/OIG-18-018-A.pdf>; GAO, 2020 Census: Bureau Is Taking Steps to Address Limitations of Administrative Records, GAO-17-664 (July 2017), <https://www.gao.gov/assets/690/686099.pdf>.

²⁷ See, e.g., *Goldfarb v. Mayor & City Council of Baltimore*, 791 F.3d 500, 508 (4th Cir. 2015) (court may take judicial notice of “matters of public record”); *South Carolina v. United States*, 2017 WL 976298, at *5 (D.S.C. Mar. 14, 2017) (noting that “official publications by federal agencies” including GAO reports are “properly the subject of judicial notice”).

For the foregoing reasons, Plaintiffs-Appellants respectfully request that this Court grant the motion to expedite their appeal.

Dated: August 12, 2019

Respectfully submitted,

/s/ Susan J. Kohlmann

Rachel Brown,^{*} Law Student Intern
Nikita Lalwani,^{*} Law Student Intern
Renee Burbank
Michael J. Wishnie[‡]
Peter Gruber Rule of Law Clinic
Yale Law School[†]
127 Wall Street
New Haven, CT 06511
Tel: (203) 436-4780
michael.wishnie@ylsclinics.org
Counsel for all Plaintiffs

Susan J. Kohlmann[‡]
Jeremy M. Creelan
Michael W. Ross
Jacob D. Alderdice
Logan J. Gowdey
Jenner & Block LLP
919 Third Avenue
New York, NY 10022-3908
Counsel for all Plaintiffs

Anson C. Asaka
National Association for the
Advancement of Colored People, Inc.
4805 Mt. Hope Drive
Baltimore, MD 21215
Tel: (410) 580-5797
Fax: (410) 358-9350
*Counsel for Plaintiffs NAACP and
Prince George's County NAACP Branch*

^{*} Law student interns. Petitions for practice forthcoming.

[†] This motion does not purport to state the views of Yale Law School, if any.

[‡] Admitted in the United States Court of Appeals for the Fourth Circuit.

**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 2537 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: August 12, 2019

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

CERTIFICATE OF SERVICE

I, Susan J. Kohlmann, certify that today, August 12, 2019, I have caused a true and correct copy of the foregoing Motion to Expedite Briefing and Oral Argument 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
Susan J. Kohlmann