

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 FOR IMMEDIATE ISSUANCE OF MANDATE**

The government respectfully opposes plaintiffs-appellants' motion for immediate issuance of the mandate. On December 19, 2019, this Court reversed in part and affirmed in part the judgment of the district court, and remanded for further proceedings. Under 28 C.F.R. § 0.20, the Solicitor General is responsible for determining whether, and to what extent, the government should seek further review of the panel opinion. In making that decision, the Solicitor General must consult with the client agencies and other concerned offices. The Federal Rules of Appellate Procedure accordingly provide 45 days for the government to file a rehearing petition if authorized. *See* Fed. R. App. P. 35(c). Plaintiffs offer no plausible basis for curtailing that time here.

1. Plaintiffs brought this action alleging that the Census Bureau’s funding for and planned methods of carrying out the 2020 Census violated the Administrative Procedure Act and Enumeration Clause. *See* 5 U.S.C. §§ 701 *et seq.*; U.S. Const. art. I, § 2, cl. 3. The district court dismissed all of plaintiffs’ claims as non-justiciable. *See* JA 564; 623.

2. On December 19, 2019, this Court affirmed in part and reversed in part the judgment of the district court. The Court agreed that plaintiffs’ suit to compel an overhaul of the Census Bureau’s methods and means of conducting the Census did not implicate reviewable final agency action. *See* Op. 14. The Court, however, reversed the district court’s determination that plaintiffs’ constitutional claim was unripe. *See id.* at 17. Without “express[ing] any view regarding the ultimate viability” of plaintiffs’ Enumeration Clause claim, the Court remanded for consideration of the government’s alternative grounds for dismissal. *Id.* at 18.

3. On December 30, 2019, plaintiffs moved this Court “for immediate issuance of the mandate.” Pls. Mot. 5. Plaintiffs maintain that they “do not intend to petition for rehearing nor to seek Supreme Court review of the panel’s December 19 decision,” and that “[u]nder the circumstances, there is no good reason” for the Court to adhere to the deadlines for rehearing and issuance of the mandate prescribed by the Federal Rules of Appellate Procedure. *See id.* at 3.

4. That plaintiffs do not intend to seek further review is not a basis for expediting the issuance of the mandate. As noted, the Federal Rules of Appellate

Procedure provide 45 days for the filing of rehearing petitions in cases in which the government is a party. *See* Fed. R. App. P. 35(c). The time period protects the Solicitor General's ability to exercise his responsibility under 28 C.F.R. § 0.20 to determine whether, and to what extent, the government should seek further review of the panel opinion. In this case, that process requires examination by the Solicitor General's office after consultation with the Department of Commerce and Census Bureau as well as any other concerned offices.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for immediate issuance of the mandate should be denied.

Respectfully submitted,

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January 2020

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 481 words according to the count of Microsoft Word.

/s/ Thais-Lyn Trayer
THAIS-LYN TRAYER

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2020, 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