U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, DC 20530

July 19, 2018

By ECF
The Honorable Jesse M. Furman
United States District Judge
Southern District of New York
Thurgood Marshall Courthouse
40 Centre Street
New York, New York 10007

Re: *State of New York, et al., v. U.S. Dep't of Commerce, et al.*, 18-cv-2921
New York Immigration Coalition, et al., v. U.S. Dep't of Commerce, et al., 18-cv-5025

Dear Judge Furman:

Defendants write to address Plaintiffs' letter of July 17, 2018 [Dkt. No. 201 in No. 18-cv-2921].

1. Defendants oppose Plaintiffs' request seeking to shorten Defendants' time to respond to Plaintiffs' First Discovery Requests ("Requests") by 12 days, from August 13 to August 1, 2018. As Plaintiffs recognize, Defendants are currently working on complying with the Court's Order of July 5, 2018 [Dkt. No. 199], requiring Defendants to supplement the Administrative Record, provide a privilege log, and provide initial disclosures by July 23, 2018. Because of the significant amount of work involved in these endeavors, it would be unreasonable to require Defendants to complete the similarly significant effort involved in responding to Plaintiffs' discovery requests and producing all responsive documents by August 1, 2018. Nor have Plaintiffs established that they have a sufficient need for production on such an expedited schedule.

The standard applicable to Plaintiffs' motion for expedited discovery is not settled in this Circuit. Some courts require the moving party to show "(1) irreparable injury, (2) some probability of success on the merits, (3) some connection between the expedited discovery and the avoidance of the irreparable injury, and (4) some evidence that the injury that will result without expedited discovery looms greater than the injury that the defendant will suffer if the expedited relief is granted." *Notaro v. Koch*, 95 F.R.D. 403, 405 (S.D.N.Y. 1982); *see Cecere v. Cty. of Nassau*, 258 F. Supp. 2d 184, 186 (E.D.N.Y. 2003). However, more recently, courts in this Circuit have applied the standard of "reasonableness" and "good cause." *Stern v. Cosby*, 246 F.R.D. 453, 457 (S.D.N.Y. 2007), or have "blend[ed] the two tests, the *Notaro* four-factor test and the reasonableness and good cause standard." *N. Atl. Operating Co., Inc. v. Evergreen Distribs., LLC*, 293 F.R.D. 363, 368 (E.D.N.Y. 2013).

Even under "reasonableness" or "good cause" test, Plaintiffs have not established that the Court should order further expedition at this point. First, Plaintiffs have not established good cause for expedition. Plaintiffs represent only that they need the information sought as soon as possible so as to inform the depositions they intend to take of "fact" witnesses, and that these fact depositions must occur sufficiently in advance of the date their expert reports are due (September 7) so as to inform those experts' reports. But Plaintiffs' asserted need is too unfocused and abstract to justify expedition. Plaintiffs have not even attempted to explain how any of their broad requests is necessary to inform a particular deposition that is scheduled to occur before the date Defendants' response is currently due (August 13). Before the

Court considers Plaintiffs' request for expedition, Plaintiffs should be required to identify specific requests for which they need a quick response, the depositions for which those documents are necessary, and the scheduled date for such depositions. Defendants should not be required to undertake the enormous burden of expediting their responses, if those responses are only going to sit unused on Plaintiffs' counsel's desks while they pursue other topics in the near-term. *See Litwin v. OceanFreight, Inc.,* 865 F. Supp. 2d 385, 402 (S.D.N.Y. 2011) (denying expedited discovery where "[t]he sheer volume and breadth of plaintiff's discovery requests further renders them unreasonable, and plaintiff has offered no concrete basis whatsoever to justify expedited discovery"); *Irish Lesbian & Gay Org. v. Giuliani*, 918 F. Supp. 728, 731 (S.D.N.Y. 1996) (denying request for expedited discovery where "the plaintiff's discovery request is a broadside not reasonably tailored to the time constraints under which both parties must proceed or to the specific issues that will have to be determined at the preliminary injunction hearing.").

Second, as indicated, expediting discovery will impose an undue burden on Defendants, who are presently fully engaged in responding to the Court's July 5 order regarding supplementing the Administrative Record, providing a privilege log, and providing initial disclosures. This effort has required (in less than three weeks) the collection and uploading of documents onto a suitable review platform, the review of the collected documents for relevance and privilege, the redaction of documents where necessary, and the drafting and review of a privilege log. Requiring Defendants to complete discovery responses and the collection, review, and production of additional documents and preparation of an additional privilege log in a just over a week after that deadline will impose an impossible burden on Defendants' limited resources.[1] *See N. Atl. Operating Co., Inc.*, 293 F.R.D. at 368 ("The reasonableness analysis considers the practical implications of the request—for example, can the requested materials physically be gathered on the proposed timeline … .").

Moreover, Defendants note that each set of plaintiffs in both of the above-referenced cases served their own sets of requests, notwithstanding the Court's admonition to the parties in these and the related cases pending nationwide to attempt to coordinate. Having two sets of discovery requests unduly multiplies the burden on Defendants.

2. With regard to Plaintiffs' request to expand the time allotted for depositions by three hours, from the seven hours permitted by the Federal Rules of Civil Procedure to ten hours, Defendants oppose this request as premature. Plaintiffs have not established the necessity for this expansion, prior to the commencement of *any* deposition in this case. Defendants do not believe that it can be concluded *ab initio* that any one witness should require more than seven hours.

Plaintiffs' sole ground for seeking longer depositions is that the non-New York plaintiffs will also be participating in the depositions. Plaintiffs do not contend that the ordinary seven hours would be insufficient for Plaintiffs alone. And the non-New York plaintiffs raise virtually identical claims to the claims raised in these cases. All of the claims challenge the reinstatement of the citizenship question on the 2020 census. All of the claims seek the same relief. The *California*, *San Jose*, *Kravitz*, and *LUPE* plaintiffs raise an Enumeration Clause claim, just like both the *New York* plaintiffs and the *NYIC* plaintiffs.[2] The

[1] Defendants are assuming that Plaintiffs are asking for document production to be complete by August 1, at the same time that they are requesting that Defendants provide their written responses to the Requests. However, Defendants note that the Federal Rules of Civil Procedure allow them to "specif[y]" a "reasonable time" for production in their responses. Fed. R. Civ. P. 34(b)(2)(B)).

[2] *Compare* ECF No. 1 at ¶¶ 33-38, *California v. Ross*, N.D. Cal. No. 18-cv-1865; ECF No. 1 at ¶¶ 90-96, *City of San Jose v. Ross*, N.D. Cal. No. 18-cv-2279; ECF No. 17 at ¶¶ 143-53, *Kravitz v. U.S. Dep't of Commerce*, D. Md. No. 18-cv-1041; and ECF No. 42 at ¶¶ 364-68, *LUPE v. Ross*, D. Md. No. 18-cv-1570,

LUPE plaintiffs raise an Equal Protection claim, just like the *NYIC* plaintiffs.[3] And the *California*, *San Jose*, *Kravitz*, and *LUPE* plaintiffs raise an APA claim, just like the *New York* and *NYIC* plaintiffs.[4] Thus, even though there might be more parties present at the depositions, there are not significantly more claims requiring additional time to question the witnesses.[5] And it is fair to assume that the parties will cooperate in good faith to eliminate duplicative questioning, as directed by the Court.

There are no other factors suggesting the need for extended depositions here. This is a case primarily involving review on an Administrative Record, for which the need (if any) for testimonial evidence is limited. Defendants further note that the proposed deponents are senior, experienced government officials who can be expected to answer or object to questions promptly and concisely.

In sum, Plaintiffs should be required to make their request for an extension of deposition length only after a need becomes apparent in the course of a particular deposition or for a particular witness. The premature nature of Plaintiffs' request is underscored by the case on which they rely, where the court permitted additional time when a witness had *already* proven "recalcitrant and uncooperative in her refusal to answer questions." *Calderon v. Symeon*, No. 3:06CV1130 AHN, 2007 WL 735773, at *2 (D. Conn. 2007). *Arista Records LLC v. Lime Group LLC*, No. 06 CIV. 5936 (GEL), 2008 WL 1752254, at *2 (S.D.N.Y. 2008), can also be distinguished because, there, additional time was sought for the deposition of a single witness, whom the Court found to be a witness of particular significance. The case was a complex copyright infringement and antitrust suit, and the witness at issue was a co-defendant and chief operating and technical officer of the defendant corporation, who might also "be able to testify on matters that were expected to be covered in the deposition of another witness." *Id.* Plaintiffs have not made out such a special case here. Notably, in both of the cited cases, additional time was sought only *after* the depositions had begun.

Respectfully submitted,

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with ECF No. 85 at ¶¶ 176-80, *New York v. U.S. Dep't of Commerce*, S.D.N.Y. No. 18-cv-2921, and ECF No. 1 at ¶¶ 201-07, *NYIC v. Census Bureau*, S.D.N.Y. No. 18-cv-5025.

[3] *Compare* ECF No. 42 at ¶¶ 369-72, *LUPE v. Ross*, D. Md. No. 18-cv-1570, *with* ECF No. 1 at ¶¶ 193-200, *NYIC v. Census Bureau*, S.D.N.Y. No. 18-cv-5025.

[4] *Compare* ECF No. 1 at ¶¶ 39-44, *California v. Ross*, N.D. Cal. No. 18-cv-1865; ECF No. 1 at ¶¶ 105-17, *City of San Jose v. Ross*, N.D. Cal. No. 18-cv-2279; ECF No. 17 at ¶¶ 154-65, *Kravitz v. U.S. Dep't of Commerce*, D. Md. No. 18-cv-1041; and ECF No. 42 at ¶¶ 382-92, *LUPE v. Ross*, D. Md. No. 18-cv-1570, *with* ECF No. 85 at ¶¶ 181-95, *New York v. U.S. Dep't of Commerce*, S.D.N.Y. No. 18-cv-2921, and ECF No. 1 at ¶¶ 208-12, *NYIC v. Census Bureau*, S.D.N.Y. No. 18-cv-5025.

[5] The *San Jose* and *LUPE* plaintiffs also assert an Apportionment Clause claim, but those claims are entirely duplicative of their Enumeration Clause claims. *See* ECF No. 1 at ¶¶ 97-104, *City of San Jose v. Ross*, N.D. Cal. No. 18-cv-2279; ECF No. 42 at ¶¶ 378-81, *LUPE v. Ross*, D. Md. No. 18-cv-1570.

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