

August 10, 2018

The Honorable Jesse M. Furman
United States District Court for the Southern District of New York
40 Centre Street, Room 2202
New York, NY 10007

RE: Plaintiffs' letter-motion regarding discovery dispute in *State of New York, et al. v. U.S. Dep't of Commerce, et al.*, 18-CV-2921 (JMF), and *New York Immigration Coalition, et al. v. U.S. Dep't of Commerce, et al.*, 18-CV-5025 (JMF)

Dear Judge Furman,

Plaintiffs write pursuant to Rule 2(C) of this Court's Individual Rules and Practices to request an informal discovery conference with the Court or an order compelling Defendants to make available for deposition Acting Assistant Attorney General for Civil Rights John Gore. Plaintiffs have been unable to resolve this dispute through good faith meet-and-confer efforts with Defendants' counsel.

On July 3, the Court authorized discovery from the Department of Justice in this action. *See* Hearing Tr. at 86 (July 3, 2018) (ECF No. 207). Pursuant to that order, on July 12, Plaintiffs requested that Defendants provide dates for the deposition of John Gore, the Acting Assistant Attorney General for Civil Rights. Ex. 1. On July 18, Defendants committed to provide a date for Mr. Gore's deposition "as quickly as we can." Ex. 2. Plaintiffs reiterated the request for dates for Mr. Gore's testimony on July 20, July 25, July 27, and July 31; and on July 31, the Defendants committed to provide dates by August 1. Ex. 3.

Having not previously raised any objection, on August 3 – more than three weeks after Plaintiffs first requested dates for Mr. Gore's deposition – the Defendants advised that they would not be producing Mr. Gore for deposition, contending without explanation that "the information possessed by Mr. Gore is either privileged or irrelevant to Plaintiffs' APA and equal protection claims." Ex. 4. During a meet-and-confer discussion on August 8, Defendants confirmed they will not voluntarily produce Mr. Gore, and declined Plaintiffs' request even to inquire as to dates for witness availability in the event the Court compels his testimony.

Defendants' relevance objection is unsupportable. The *NYIC* Plaintiffs specifically identified Mr. Gore as a critical witness in their June 26 letter brief on discovery because, among other reasons, FOIA productions from the Department of Justice reflect that he ghostwrote DOJ's December 12, 2017 letter requesting addition of the citizenship question. *See* 18-CV-5025 Docket No. 30, at 1-2, 5. The *State of New York* Plaintiffs similarly noted in their June 26 letter brief on discovery the inexplicable omission from the Administrative Record of materials regarding the Civil Rights Division's involvement, including from the Assistant Attorney General. *See* 18-CV-2921 Docket No. 193, at 1-2 & n.2. The Administrative Record as subsequently expanded in response to this Court's July 3 order has confirmed that after the Commerce Department solicited the December 2017 request from DOJ, Mr. Gore was DOJ's primary point of contact for communications with senior Commerce Department political appointees about the addition of the question. *See* AR 2488, 2491, 2496, 2562, 2634, 2651,

2688, 11193. And Defendants have themselves admitted that Mr. Gore was a central participant here: at a hearing before Judge Seeborg in the Northern District of California in June, counsel for Defendants conceded that “any requests for citizenship data with a Voting Rights Act enforcement rationale would naturally come from the head of the Civil Rights Division. That’s expected.” Hearing Tr. at 49-50, *California v. Ross et al.*, No. 3:18-cv-01865-RS (N.D. Cal. June 28, 2018) (Ex. 5). Having affirmatively conceded Mr. Gore’s participation in key events underlying this dispute – and having characterized that participation as both “natural” and “expected” – Defendants should not now be permitted to oppose on relevance grounds Plaintiffs’ effort to examine Mr. Gore about that participation.

In addition, under Rules 26 and 30 of the Federal Rules of Civil Procedure, the discovery sought from Mr. Gore is relevant to Plaintiffs’ claims and is proportional to the needs of the case. Among other matters, evidence from Mr. Gore is relevant to the issue of pretext, which bears on both the Administrative Procedure Act claims in 18-CV-2921 and 18-CV-5025, and on the Fifth Amendment equal protection claim in 18-CV-5025.

With regard to Defendants’ claim of privilege, they have cited no authority to Plaintiffs supporting their position that a witness may be entirely prohibited from examination based on a broadly stated claim of anticipatory, categorical privilege. And Mr. Gore’s name is notably absent from the privilege logs Defendants have produced. To the extent Defendants believe any particular question Mr. Gore is asked at his deposition is objectionable on privilege grounds, their appropriate course is to seek relief at that point as permitted by the Federal Rules. *See* Fed. R. Civ. P. 30(c)(2), (d)(3).

Testimony from Mr. Gore should be compelled.

Respectfully submitted,

BARBARA D. UNDERWOOD

Attorney General of the State of New York

By: /s/ Matthew Colangelo

Matthew Colangelo (MC-1746)

Executive Deputy Attorney General

Elena Goldstein (EG-8586), *Senior Trial Counsel*

Office of the New York State Attorney General

28 Liberty Street

New York, NY 10005

Phone: (212) 416-6057

Matthew.Colangelo@ag.ny.gov

Attorneys for *State of New York* Plaintiffs, 18-CV-2921

ARNOLD & PORTER KAYE SCHOLER LLP
AMERICAN CIVIL LIBERTIES UNION

By: /s/ John A. Freedman

Dale Ho
American Civil Liberties Union Foundation
125 Broad St.
New York, NY 10004
(212) 549-2693
dho@aclu.org

Andrew Bauer
Arnold & Porter Kaye Scholer LLP
250 West 55th Street
New York, NY 10019-9710
(212) 836-7669
Andrew.Bauer@arnoldporter.com

Sarah Brannon^{***}
American Civil Liberties Union Foundation
915 15th Street, NW
Washington, DC 20005-2313
202-675-2337
sbrannon@aclu.org

John A. Freedman
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Avenue, N.W.
Washington, DC 20001-3743
(202) 942-5000
John.Freedman@arnoldporter.com

Perry M. Grossman
New York Civil Liberties Union Foundation
125 Broad St.
New York, NY 10004
(212) 607-3300 601
pgrossman@nyclu.org

+ admitted pro hac vice

** Not admitted in the District of Columbia; practice limited pursuant to D.C. App. R.
49(c)(3).

Attorneys for *NYIC* Plaintiffs, 18-CV-5025

Exhibit 1

From: Freedman, John A.
Sent: Thursday, July 12, 2018 8:35 PM
To: 'Ehrlich, Stephen (CIV)'; 'Bailey, Kate (CIV)'; 'Federighi, Carol (CIV)'; 'Lara.Eshkenazi@usdoj.gov'; 'Tarczynska, Dominika (USANYS)'; 'Jeannette.Vargas@usdoj.gov'
Cc: 'Colangelo, Matthew'; 'Goldstein, Elena'; 'Saini, Ajay'; zzz.External.DHo@aclu.org; zzz.External.SBrannon@aclu.org; zzz.External.PGrossman@nyclu.org; Bauer, Andrew
Subject: State of New York v. Department of Commerce, S.D.N.Y. 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Deposition Scheduling

Counsel --

In advance of our meet and confer on Friday, and recognizing that many of the witnesses may have busy schedules or other commitments over the summer, we wanted to start the process of scheduling depositions.

For scheduling purposes, we have identified the first six witnesses whom we want to depose: John Abowd (Census), John Gore (DOJ), Christian Herren (DOJ), Ron Jarmin (Census), Wendy Teramoto (Commerce), and Michael Walsh (Commerce). Please provide all dates of availability when these witnesses might be deposed during the month of August.

In addition to these witnesses, we plan to issue a Rule 30(b)(6) notice to the Census Bureau. We expect to provide an preliminary list of topics next week, subject to amendment when the Government has completed production of the Administrative Record. For planning purposes, we expect that the 30(b)(6) topic will cover both custodial topics (e.g., the compilation and completeness of the administrative record and privilege log) and substantive topics related to specific documents in the Administrative Record (e.g., AR 1277-85, 1286-1303, 1304-05, 1308-12, 1313-1320, 1321, etc.).

Recognizing Judge Furman's comments regarding a potential deposition of Secretary Ross, we would also ask that you please provide dates of availability for Secretary Ross during August and first week of September after the dates for the six other witnesses, with sufficient time for Judge Furman to resolve the question whether his deposition may proceed.

Finally, in the interest of ensuring that each witness is only deposed once, we have had preliminary discussions with the plaintiffs in the California and Maryland cases about coordination of depositions. In order to reduce likelihood witnesses will need to be recalled or compelled to testify in other cases, we all believe that extending the length of deposition beyond the presumptive limit in Rule 30(d) is appropriate. Given the number of parties, we would ask the Government to consent to extend the length of each deposition to 12 hours.

We look forward to discussing these matters with you on Friday.

Best regards,

John

John A. Freedman

Arnold & Porter
601 Massachusetts Ave., NW

Washington | District of Columbia 20001-3743

T: +1 202.942.5316

John.Freedman@arnoldporter.com | www.arnoldporter.com

Exhibit 2

From: Bailey, Kate (CIV) <Kate.Bailey@usdoj.gov>
Sent: Wednesday, July 18, 2018 7:51 PM
To: Goldstein, Elena; Federighi, Carol (CIV); Wells, Carlotta (CIV); Ehrlich, Stephen (CIV); Tarczynska, Dominika (USANYS)
Cc: Colangelo, Matthew; Saini, Ajay; Freedman, John A.; zzz.External.DHo@aclu.org; zzz.External.PGrossman@nyclu.org; zzz.External.SBrannon@aclu.org; Gersch, David P.
Subject: Re: New York v. Commerce: Touhy issue

Elena,

Thank you for summarizing the outstanding questions below and for your patience as we work through these and other issues this week.

1. **Touhy Request to Commerce:** Thank you for providing additional information in your June 10 letter regarding your request to proffer expert testimony from former Census Bureau Deputy Director Dr. Herman Habermann. Based on your representation that you expect Dr. Habermann's expert testimony to describe standard practices for new question design, content testing, and cognitive testing, in addition to your representation that his testimony will not implicate confidential, non-public, or privileged data, including data protected under 13 U.S.C. § 9 and restrictions under 18 U.S.C. § 207(a)(1), the Department of Commerce will not object to you calling Dr. Habermann as an expert witness on the matters you described. Please note that by not objecting to the proffer of Dr. Habermann's testimony as you have described, the Department of Commerce does not waive its right to object to Dr. Habermann testifying to additional factual matters not mentioned in your letter. Additionally, the United States Government reserves the right to call Dr. Habermann as a fact witness if the Government deems it necessary in the defense of its position in this case.
2. **Deposition dates:** Wendy Teramoto is available August 29, 30, or 31; John Abowd is available August 15, 16, 29, 30, or 31; Ron Jarmin is available August 15, 16, 20, 21, 27, 28, 29, 30, or 31. We're still working to confirm dates for some other individuals and will get back with you as quickly as we can.
3. **Production of materials from DOJ:** Because the Department of Justice is not a party to this case, a request for information from DOJ must comply with the Department's *Touhy* regulations, which can be found at 28 C.F.R. §§ 16.21 *et seq.* We think it would be most efficient for Plaintiffs to send us a written request, similar to the process followed for your request for information from Dr. Habermann. We will evaluate your request and respond promptly.
4. **Discovery Issues:** We will consent to disputes arising from the depositions noticed in the SDNY cases being resolved by Judge Furman, *provided* that non-New York Plaintiffs also will agree to abide by Judge Furman's rulings.

Thank you again,
 Kate Bailey

----- Original message -----

From: "Goldstein, Elena" <Elena.Goldstein@ag.ny.gov>
 Date: 7/18/18 2:27 PM (GMT-05:00)
 To: "Federighi, Carol (CIV)" <CFederig@CIV.USDOJ.GOV>, "Bailey, Kate (CIV)" <katbaile@CIV.USDOJ.GOV>, "Wells, Carlotta (CIV)" <CWells@CIV.USDOJ.GOV>, "Ehrlich, Stephen (CIV)" <sehrlich@CIV.USDOJ.GOV>, "Tarczynska, Dominika (USANYS)" <Dominika.Tarczynska@usdoj.gov>
 Cc: "Colangelo, Matthew" <Matthew.Colangelo@ag.ny.gov>, "Saini, Ajay" <Ajay.Saini@ag.ny.gov>, "Freedman, John A." <John.Freedman@arnoldporter.com>, "Dale Ho (dho@aclu.org)" <dho@aclu.org>, 'Perry Grossman' <PGrossman@nyclu.org>, SBrannon@aclu.org, "Gersch, David P." <David.Gersch@arnoldporter.com>

Subject: RE: New York v. Commerce: Touhy issue

Thank you for your reply, Carol. During our call on July 13, Defendants represented when they would be able to provide answers on various outstanding issues; we have been following up based on that timeline. Just to ensure that we are all on the same page (and adding the NYIC plaintiffs to this email, as this communication relates to that case as well), our list of outstanding matters from our recent conversation include:

1. Touhy issue
2. Deposition availability dates (Defendants agreed to advise mid-week)
3. Whether Defendants will object to producing materials from the Department of Justice (Defendants agreed to advise mid-week)
4. Consent to Judge Furman handling discovery issues arising out of depositions noticed/cross-noticed in the SDNY cases (Defendants agreed to advise "soon")

We look forward to speaking with you soon on these matters.

Best,
Elena

Elena Goldstein | Senior Trial Counsel

Civil Rights Bureau

New York State Office of the Attorney General

28 Liberty Street, 20th Floor | New York, New York 10005

Tel: (212) 416-6201 | Fax: (212) 416-6030 | elena.goldstein@ag.ny.gov | www.ag.ny.gov

From: Federighi, Carol (CIV) <Carol.Federighi@usdoj.gov>

Sent: Wednesday, July 18, 2018 12:33 PM

To: Goldstein, Elena <Elena.Goldstein@ag.ny.gov>; Bailey, Kate (CIV) <Kate.Bailey@usdoj.gov>; Wells, Carlotta (CIV) <Carlotta.Wells@usdoj.gov>; Ehrlich, Stephen (CIV) <Stephen.Ehrlich@usdoj.gov>; Eshkenazi, Lara (USANYS) <Lara.Eshkenazi@usdoj.gov>; Tarczynska, Dominika (USANYS) <Dominika.Tarczynska@usdoj.gov>

Cc: Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; Saini, Ajay <Ajay.Saini@ag.ny.gov>

Subject: RE: New York v. Commerce: Touhy issue

Elena – We will try to get back to you today. As you may know, we had a hearing in the Kravitz case in the District of Maryland today, so much of the first part of this week has been taken up preparing for that (as well as getting ready to produce the materials we are due to produce in the New York cases on July 23). C

Thanks for your patience!
Carol

Carol Federighi
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044
Phone: (202) 514-1903
Email: carol.federighi@usdoj.gov

From: Goldstein, Elena [<mailto:Elena.Goldstein@ag.ny.gov>]

Sent: Wednesday, July 18, 2018 11:12 AM

To: Bailey, Kate (CIV) <katbaile@CIV.USDOJ.GOV>; Wells, Carlotta (CIV) <CWells@CIV.USDOJ.GOV>; Ehrlich, Stephen (CIV) <sehrlich@CIV.USDOJ.GOV>; Eshkenazi, Lara (USANYS) <Lara.Eshkenazi@usdoj.gov>; Tarczynska, Dominika (USANYS) <Dominika.Tarczynska@usdoj.gov>; Federighi, Carol (CIV) <CFederig@CIV.USDOJ.GOV>

Cc: Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; Saini, Ajay <Ajay.Saini@ag.ny.gov>

Subject: RE: New York v. Commerce: Touhy issue

Counsel,

I write again to follow up on the *Touhy* issue. As requested below, kindly confirm that you will not object to Hermann Habermann's testimony on *Touhy* grounds. If we do not hear from you by the close of business today, Plaintiffs will be forced to seek relief from the court. Please do not hesitate to reach out to myself and Matthew with any questions. We hope to hear from you soon.

Best,
Elena

Elena Goldstein | Senior Trial Counsel

Civil Rights Bureau

New York State Office of the Attorney General

28 Liberty Street, 20th Floor | New York, New York 10005

Tel: (212) 416-6201 | Fax: (212) 416-6030 | elena.goldstein@ag.ny.gov | www.ag.ny.gov

From: Goldstein, Elena

Sent: Tuesday, July 17, 2018 3:06 PM

To: 'Bailey, Kate (CIV)' <Kate.Bailey@usdoj.gov>; Wells, Carlotta (CIV) <Carlotta.Wells@usdoj.gov>; Ehrlich, Stephen (CIV) <Stephen.Ehrlich@usdoj.gov>; Eshkenazi, Lara (USANYS) <Lara.Eshkenazi@usdoj.gov>; Tarczynska, Dominika (USANYS) <Dominika.Tarczynska@usdoj.gov>; Federighi, Carol (CIV) <Carol.Federighi@usdoj.gov>

Cc: Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; Saini, Ajay <Ajay.Saini@ag.ny.gov>

Subject: New York v. Commerce: Touhy issue

Counsel,

We had understood that we would hear from you yesterday regarding whether you anticipated objecting to Hermann Habermann's proposed testimony on *Touhy* grounds; kindly confirm that you do not object to his testimony, or please advise us as to the basis for continued objection. We look forward to hearing from you soon.

Best,
Elena

Elena Goldstein | Senior Trial Counsel

Civil Rights Bureau

New York State Office of the Attorney General

28 Liberty Street, 20th Floor | New York, New York 10005

Tel: (212) 416-6201 | Fax: (212) 416-6030 | elena.goldstein@ag.ny.gov | www.ag.ny.gov

Exhibit 3

From: Bailey, Kate (CIV) <Kate.Bailey@usdoj.gov>
Sent: Wednesday, August 01, 2018 7:01 PM
To: Freedman, John A.; Federighi, Carol (CIV); Ehrlich, Stephen (CIV); Coyle, Garrett (CIV)
Cc: Colangelo, Matthew; 'Goldstein, Elena'; Saini, Ajay; 'dale.ho@aclu.org';
zzz.External.SBrannon@aclu.org; zzz.External.PGrossman@nyclu.org; Bauer, Andrew
Subject: RE: State of New York v. Department of Commerce, S.D.N.Y. 18-CV-2921; NYIC v.
Department of Commerce, S.D.N.Y. 18-CV-5025: Meet & Confer Follow Up
Attachments: T13 prohibition on disclosure.pdf; 2018_08_01_proposed coordination
procedures.for circulation_usg_cmts.docx

Counsel—

Thank you for summarizing our discussion yesterday.

- Attached is a draft of the coordination procedures with our edits. Please let us know if you will not accept any of our edits. If you do accept all edits, feel free to file at your convenience.
- Also attached is a letter, as discussed, explaining the prohibitions on release of certain data covered by Title XIII.
- Regarding executive privilege, it is correct that we have not asserted executive privilege over any materials responsive to our supplemental production in response to Judge Furman's order. We do not waive executive privilege as to any materials not encompassed within our search in response to the judge's order.
- Thank you for sharing the list of privilege log entries which you contend are deficient. We are working to correct and update the log. We will provide you an updated privilege log as quickly as possible, and anticipate completing that by the end of the week. We believe the updated log will ameliorate the disagreement on this point.
- We will be responding to the DOJ subpoena no later than Friday, the deadline for lodging our objections.

Thank you,

Kate Bailey

Trial Attorney

United States Department of Justice

Civil Division – Federal Programs Branch

20 Massachusetts Avenue, NW

Room 7214

Washington, D.C. 20530

202.514.9239 | kate.bailey@usdoj.gov

From: Freedman, John A. [mailto:John.Freedman@arnoldporter.com]

Sent: Tuesday, July 31, 2018 10:07 PM

To: Bailey, Kate (CIV) <katbaile@CIV.USDOJ.GOV>; Federighi, Carol (CIV) <CFederig@CIV.USDOJ.GOV>; Ehrlich, Stephen (CIV) <sehrlich@CIV.USDOJ.GOV>; Coyle, Garrett (CIV) <gcoyle@CIV.USDOJ.GOV>; Eshkenazi, Lara (USANYS) <Lara.Eshkenazi@usdoj.gov>; Vargas, Jeannette (USANYS) <Jeannette.Vargas@usdoj.gov>; Tarczynska, Dominika (USANYS) <Dominika.Tarczynska@usdoj.gov>

Cc: Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; 'Goldstein, Elena' <Elena.Goldstein@ag.ny.gov>; Saini, Ajay <Ajay.Saini@ag.ny.gov>; 'dale.ho@aclu.org' <dale.ho@aclu.org>; SBrannon@aclu.org; PGrossman@nyclu.org;

Bauer, Andrew <Andrew.Bauer@arnoldporter.com>

Subject: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet & Confer Follow Up

Counsel --

To summarize our discussion this afternoon:

1. We look forward to receiving the deposition dates for the remaining requested witnesses and the explanation of the basis for redaction and withholding Title 13 information tomorrow.
2. We also look forward to your answer on the DOJ subpoena, your answers to our questions about the productions from Secretary Ross, Ms. Teramoto, Ms. Alexander, and Messrs. Comstock, Branstad, Hernandez, and Uthmeier (including his August 11, 2017 memorandum), and the supplemental production (including the "swat" team's shared file, the Marc Neuman document misdesignated as privileged, and the other materials that were inadvertently omitted from the last production), and your proposal on the native file and encrypted documents by the end of the week.
3. This will also confirm your representation that the Government is not asserting executive privilege over any materials from Commerce or the Census Bureau, and has not withheld anything on the basis of executive privilege.
4. This will confirm our understanding that the Government continues to assert a deliberative privilege and work product over certain documents, as well as the sufficiency of the logs provided. We believe we are at impasse on these issues and will raise with the Court. We will evaluate your Title 13 explanation, but in the absence of a satisfactory explanation, we will also raise this with the Court.
5. As a follow up to our discussion, we have attached the relevant excerpts of the logs that we have identified that do not comply with Rule 26(b)(5) and S.D.N.Y. Local Rule 26.2(a)(2)(A). There may be additional entries that are not reflected in these charts. As we advised, under the Rules and governing law, the withholding party has the obligation to establish the applicability of the privilege, and in the absence of this information, there is no valid basis to withhold these documents.

Best regardsm

John

From: Freedman, John A.

Sent: Monday, July 30, 2018 6:40 PM

To: 'Bailey, Kate (CIV)'; Ehrlich, Stephen (CIV); Federighi, Carol (CIV); Eshkenazi, Lara (USANYS); Tarczynska, Dominika (USANYS); Vargas, Jeannette (USANYS); Coyle, Garrett (CIV)

Cc: zzz.External.DHo@aclu.org; zzz.External.SBrannon@aclu.org; zzz.External.PGrossman@nyclu.org; Bauer, Andrew; Colangelo, Matthew; Goldstein, Elena; Saini, Ajay

Subject: RE: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet & Confer Request

Counsel --

A number of us have re-arranged our schedules, and we are able to proceed at 3:30 tomorrow. We will send a calendar invite.

If you are able to address any of the technical issues in advance of the call, that will shorten the time necessary for the call. That said, in addition to the issues we have asked you to look into, we have serious concerns about the Government's compliance with the Court's orders -- there are significant gaps in the Administrative Record and a large number of documents (or information contained within the documents) have been withheld on highly questionable assertions of privilege. We will be prepared to discuss these issues with you in detail tomorrow.

Talk to you tomorrow.

John

From: Bailey, Kate (CIV) [<mailto:Kate.Bailey@usdoj.gov>]

Sent: Monday, July 30, 2018 5:05 PM

To: Freedman, John A.; Ehrlich, Stephen (CIV); Federighi, Carol (CIV); Eshkenazi, Lara (USANYS); Tarczynska, Dominika (USANYS); Vargas, Jeannette (USANYS); Coyle, Garrett (CIV)

Cc: zzz.External.DHo@aclu.org; zzz.External.SBrannon@aclu.org; zzz.External.PGrossman@nyclu.org; Bauer, Andrew; Colangelo, Matthew; Goldstein, Elena; Saini, Ajay

Subject: RE: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet & Confer Request

Counsel—

Thank you for your email. While we understand your desire to move these matters quickly, it would not be appropriate to submit a joint filing without receiving our edits or position. Please refrain from assuming our position without hearing from us. We are available tomorrow afternoon after 3:30 pm to meet and confer.

Regarding the coordination procedures in particular, certain aspects of your proposal exceed the substance of our discussion last week. We will send you edits representing our points of disagreement by the close of business tomorrow.

In addition, we anticipate providing you with additional deposition dates on our call tomorrow. Thank you for advising us that the deposition of Mr. Herren likely will not be needed.

We do not consent to your proposal to amend your complaint(s) to add the Department, AG Sessions, or Mr. Gore as official-capacity defendants.

Thank you,

Kate

Kate Bailey

Trial Attorney

United States Department of Justice

Civil Division – Federal Programs Branch

20 Massachusetts Avenue, NW

Room 7214

Washington, D.C. 20530

202.514.9239 | kate.bailey@usdoj.gov

From: Freedman, John A. [<mailto:John.Freedman@arnoldporter.com>]

Sent: Monday, July 30, 2018 3:11 PM

To: Ehrlich, Stephen (CIV) <sehrlich@CIV.USDOJ.GOV>; Bailey, Kate (CIV) <katbaile@CIV.USDOJ.GOV>; Federighi, Carol (CIV) <CFederig@CIV.USDOJ.GOV>; Eshkenazi, Lara (USANYS) <Lara.Eshkenazi@usdoj.gov>; Tarczynska,

Dominika (USANYS) <Dominika.Tarczynska@usdoj.gov>; Vargas, Jeannette (USANYS) <Jeannette.Vargas@usdoj.gov>; Coyle, Garrett (CIV) <gcoyle@CIV.USDOJ.GOV>

Cc: DHo@aclu.org; SBrannon@aclu.org; PGrossman@nyclu.org; Bauer, Andrew <Andrew.Bauer@arnoldporter.com>; Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; Goldstein, Elena <Elena.Goldstein@ag.ny.gov>; Saini, Ajay <Ajay.Saini@ag.ny.gov>

Subject: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet & Confer Request

Counsel --

We wish to raise three matters:

1. This is the fourth email we are sending since last Wednesday to request a meet and confer regarding the Government's production of the supplemental administrative record. Counsel for both the State of New York and NYIC cases remain available to discuss this afternoon and tomorrow morning.

Judge Furman's practice requires disputes of this nature to be raised "promptly." In the event we do not hear from you shortly, we will assume the Government does not wish to confer about these matters and will proceed accordingly.

2. In advance of the meet and confer, we have identified several further issues we hope the Government will address to shorten our agenda:

- a. Log Entries that Fail to Comply with Rule 26(b)(5) and S.D.N.Y. Local Rule 26.2(a)(2)(A): For many documents that appear to have been withheld in their entirety, the log fails to identify sufficient information to enable us to identify assess the privilege claim -- many log entries identify neither the date of the document, the author or custodian or any other recipients of the documents, e.g., 3902, 4054, 4349, 5418, etc. The Government should promptly produce a log that provides this information for every document withheld.
- b. Census Bureau Team Folder: We have seen references in the production to Mr. Abowd's "swat" team having a team folder and/or a shared drive or intranet site. In a related context, we have also seen a reference to a site his team used called: SECURE_ADREC_2020, e.g., 7505, 9616, 11200. Have the contents of these folders been provided? If so, where are they in the record?
- c. Native Files and Other Withheld Materials: There are documents we have seen where a slip sheet has been produced indicating the original document was not produced because it is a native file or encrypted, e.g., 7516, 9570, 9621, 9836, 9837. These are not a valid basis to withhold materials. These and any similar materials should be produced.
- d. Work Product Assertions: With regard to the work product assertions, we have found a document (3888) asserting work product as early as May 24, 2017. So our questions regarding work product assertions should be addressed relative to that date.

To be clear, there are a number of other substantive points we plan to raise when we talk. But our hope is that you will be able to address these before our discussion.

3. We wanted to check whether you will have any changes to the coordination procedures letter that New York sent last Wednesday. We believe this reflects the agreements we reached when we met and conferred on July 13 and accurately reports the points of disagreement. We plan to submit to the Court tomorrow, so in the absence of receiving any edits from you, we will assume you still agree with the outlined procedures.

Thanks and best regards,

John

From: Freedman, John A.

Sent: Friday, July 27, 2018 3:54 PM

To: 'Ehrlich, Stephen (CIV)'; Bailey, Kate (CIV); Federighi, Carol (CIV); Lara.Eshkenazi@usdoj.gov; Tarczynska, Dominika (USANYS); Jeannette.Vargas@usdoj.gov

Cc: zzz.External.DHo@aclu.org; zzz.External.SBrannon@aclu.org; zzz.External.PGrossman@nyclu.org; Bauer, Andrew; Colangelo, Matthew; Goldstein, Elena; Saini, Ajay

Subject: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Department of Justice Discovery

Counsel --

This will acknowledge Garrett's email from 10:30 this morning. I have instructed the NYIC team in accordance with Rule 26(b)(5), and understand the State of New York team has as well.

We wanted to check in on a few things:

1. Attached please find deposition notices for Messrs. Abowd (for August 15) and Jarmin (for August 20). We should be able to lock in the date for Ms. Teramoto's testimony early next week.
2. Last week, we sent a copy of the Department of Justice subpoena (with a return date for testimony starting on August 13) and a draft Census Bureau Rule 30(b)(6) notice. As I advised when I sent the notice, we plan to revise the list of Census Bureau topics in light of the supplements to the Administrative Record, and send a final notice next week, with a notice date of August 14. That date was requested by counsel from the various California cases, who have asked that we try to cluster depositions because of travel considerations.
3. We are still waiting for dates from you for Messrs. Gore and Comstock and Ms. Dunn Kelley. Also -- we should advise that we believe the testimony called for in the Department of Justice Rule 30(b)(6) notice may be adequate to cover the testimony we requested from Mr. Herren.
4. We are still waiting on your position whether you will consent to the filing of an amended complaint naming DOJ, the Attorney General and Mr. Gore (in their official capacities) as Defendants.
5. Earlier this week, the State of New York sent a draft of proposed coordination procedures, which reflect the discussion from our last meet and confer, as well as the positions of the plaintiffs in the California and Maryland cases. Could you let us know whether the Government is OK with plaintiffs submitting this letter jointly?
6. We are still waiting for a response on the request we made earlier this week for a meet and confer on Monday afternoon or Tuesday morning regarding the supplement to the Administrative Record and the assertions of privilege reflected in the log, as well as depositions and the Department of Justice subpoena.

In advance of the meet and confer, we wanted to raise three issues regarding privilege assertions to see if we might be able to shorten the agenda by getting appropriate relief.

- a. There are approximately 60 documents we have identified where materials have been improperly redacted, ostensibly because of Title 13. The relevant provisions of Title 13 are geared to ensure data privacy for individuals. Title 13 protects, at most, the identities of persons and arguably raw Census data reported by or on behalf of individuals. Based on the sample we have reviewed, the redactions we have seen all appear to be of summary statistical conclusions made about aggregated data, which in no way implicate any individuals' privacy. See AR 10509, 10742, 10849, 10975, 11003. We request that the improperly redacted documents be reproduced promptly.

b. We have seen assertions of attorney work product that significantly pre-date the onset of litigation in this matter, and accordingly do not appear to have been prepared in anticipation of litigation. For example, AR 3984 asserts work product over a document sent on August 10, 2017 and AR 2035 asserts work product over a document sent September 7, 2017. We do not see any indicia on the privilege log or production log that any litigation hold notice was ever sent, much less prior to these communications. Can you advise when the earliest litigation hold notice issued by the Department of Commerce was sent and point us to where it can be found in your production? Alternatively, if you conclude that work product was not properly asserted as to these documents, please reproduce the relevant documents.

c. We have seen at least one instance where there has been an attorney-client privilege assertion with regard to communications between a government lawyer and an individual we understand is not a government employee -- A. Mark Neuman. See AR 2051. The other privileges asserted over the document are questionable if Mr. Neuman was not a government employee. If you conclude that this document is not privileged, please reproduce the relevant document.

There are a number of other issues we plan to raise on the meet and confer. But if you are able to address these issues, that will shorten our agenda.

Thanks and best regards,

John

John A. Freedman
Arnold & Porter
601 Massachusetts Avenue, NW
Washington, DC 20001

Office: +1 202.942.5316
john.freedman@arnoldporter.com
www.arnoldporter.com

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Exhibit 4

Freedman, John A.

From: Bailey, Kate (CIV) <Kate.Bailey@usdoj.gov>
Sent: Friday, August 03, 2018 8:54 PM
To: Freedman, John A.; Federighi, Carol (CIV); Ehrlich, Stephen (CIV); Coyle, Garrett (CIV); Kopplin, Rebecca M. (CIV); Halainen, Daniel J. (CIV); Tomlinson, Martin M. (CIV)
Cc: Colangelo, Matthew; 'Goldstein, Elena'; Saini, Ajay; 'dale.ho@aclu.org'; zzz.External.SBrannon@aclu.org; zzz.External.PGrossman@nycclu.org; Bauer, Andrew
Subject: RE: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet & Confer Follow Up
Attachments: Corrected privilege log (2018.07.25).pdf; Corrected supplemental privilege log (2018.07.27) (Final).pdf; R45 Objections and Responses.pdf; R45 Production Letter.pdf; 08.03.18 Supplemental Production Priv Log.pdf

Counsel,

Following up on our discussion Tuesday afternoon:

- A supplemental production including the documents inadvertently omitted from last week's productions, along with the Neuman email no longer designated as privileged, is being uploaded to the DOC FOIA reading room this evening. No new link is required; the additional documents will go live on the link provided to you last Thursday.
- Attached is a Production Letter, along with our Objections and Responses to your Rule 45 subpoena issued to the Department of Justice. As indicated in the Letter, a disc containing the first document production in response to the subpoena was sent via FedEx tonight. The Password for that disc is [REDACTED]
- Regarding depositions, Karen Dunn Kelley is available August 28; Earl Comstock is available August 30; and Wendy Teramoto is available September 7 in New York. We realize that we'd previously provided you a different date for Ms. Teramoto, but unfortunately, she no longer is available on that date. We have also confirmed the availability of Dr. Abowd on August 15 and Dr. Jarmin on August 20. We will follow up about the Census 30(b)(6) deposition shortly. As for deposition dates for John Gore, consistent with our objections to Plaintiffs' third-party subpoena to the Department of Justice (attached), the information possessed by Mr. Gore is either privileged or irrelevant to Plaintiffs' APA and equal protection claims. Accordingly, we will not provide deposition dates for Mr. Gore at this time.
- Regarding the legal memo prepared by Mr. Uthmeier, Esq., I inadvertently misspoke during our call Tuesday. That memo was among the documents mistakenly omitted from last week's production. It is included within the attached "08.03.18 Supplemental Production Priv Log," which encompasses all privileged materials within today's supplemental production.
- Although we continue to disagree about the sufficiency of the privilege logs we have provided, corrected versions of our previous logs are attached. We have reviewed each of the entries included in your attachment to your email below, and we have updated the log to include "To," "From," and/or "Date" where such information is apparent from the face of the document. Although the log now contains information for many of the entries you have challenged, we intend also to collect metadata, where available, from the underlying files and use that information to further supplement the log, in the interest of transparency. Early next week we will send you final, updated versions of the privilege log to include additional details obtainable from metadata.

Thank you,

Kate Bailey

Trial Attorney

United States Department of Justice

Civil Division – Federal Programs Branch

20 Massachusetts Avenue, NW

Room 7214

Washington, D.C. 20530

202.514.9239 | kate.bailey@usdoj.gov

From: Freedman, John A. [mailto:John.Freedman@arnoldporter.com]

Sent: Tuesday, July 31, 2018 10:07 PM

To: Bailey, Kate (CIV) <katbaile@CIV.USDOJ.GOV>; Federighi, Carol (CIV) <CFederig@CIV.USDOJ.GOV>; Ehrlich, Stephen (CIV) <sehrlich@CIV.USDOJ.GOV>; Coyle, Garrett (CIV) <gcoyle@CIV.USDOJ.GOV>; Eshkenazi, Lara (USANYS) <Lara.Eshkenazi@usdoj.gov>; Vargas, Jeannette (USANYS) <Jeannette.Vargas@usdoj.gov>; Tarczynska, Dominika (USANYS) <Dominika.Tarczynska@usdoj.gov>

Cc: Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; 'Goldstein, Elena' <Elena.Goldstein@ag.ny.gov>; Saini, Ajay <Ajay.Saini@ag.ny.gov>; 'dale.ho@aclu.org' <dale.ho@aclu.org>; SBrannon@aclu.org; PGrossman@nyclu.org; Bauer, Andrew <Andrew.Bauer@arnoldporter.com>

Subject: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet & Confer Follow Up

Counsel --

To summarize our discussion this afternoon:

1. We look forward to receiving the deposition dates for the remaining requested witnesses and the explanation of the basis for redaction and withholding Title 13 information tomorrow.
2. We also look forward to your answer on the DoJ subpoena, your answers to our questions about the productions from Secretary Ross, Ms. Teramoto, Ms. Alexander, and Messrs. Comstock, Branstad, Hernandez, and Uthmeier (including his August 11, 2017 memorandum), and the supplemental production (including the “swat” team’s shared file, the Marc Neuman document misdesignated as privileged, and the other materials that were inadvertently omitted from the last production), and your proposal on the native file and encrypted documents by the end of the week.
3. This will also confirm your representation that the Government is not asserting executive privilege over any materials from Commerce or the Census Bureau, and has not withheld anything on the basis of executive privilege.
4. This will confirm our understanding that the Government continues to assert a deliberative privilege and work product over certain documents, as well as the sufficiency of the logs provided. We believe we are at impasse on these issues and will raise with the Court. We will evaluate your Title 13 explanation, but in the absence of a satisfactory explanation, we will also raise this with the Court.
5. As a follow up to our discussion, we have attached the relevant excerpts of the logs that we have identified that do not comply with Rule 26(b)(5) and S.D.N.Y. Local Rule 26.2(a)(2)(A). There may be additional entries that are not reflected in these charts. As we advised, under the Rules and governing law, the withholding party has the obligation to establish the applicability of the privilege, and in the absence of this information, there is no valid basis to withhold these documents.

Best regardsm

John

From: Freedman, John A.
Sent: Monday, July 30, 2018 6:40 PM
To: 'Bailey, Kate (CIV)'; Ehrlich, Stephen (CIV); Federighi, Carol (CIV); Eshkenazi, Lara (USANYS); Tarczynska, Dominika (USANYS); Vargas, Jeannette (USANYS); Coyle, Garrett (CIV)
Cc: zzz.External.DHo@aclu.org; zzz.External.SBrannon@aclu.org; zzz.External.PGrossman@nyclu.org; Bauer, Andrew; Colangelo, Matthew; Goldstein, Elena; Saini, Ajay
Subject: RE: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet & Confer Request

Counsel --

A number of us have re-arranged our schedules, and we are able to proceed at 3:30 tomorrow. We will send a calendar invite.

If you are able to address any of the technical issues in advance of the call, that will shorten the time necessary for the call. That said, in addition to the issues we have asked you to look into, we have serious concerns about the Government's compliance with the Court's orders -- there are significant gaps in the Administrative Record and a large number of documents (or information contained within the documents) have been withheld on highly questionable assertions of privilege. We will be prepared to discuss these issues with you in detail tomorrow.

Talk to you tomorrow.

John

From: Bailey, Kate (CIV) [<mailto:Kate.Bailey@usdoj.gov>]
Sent: Monday, July 30, 2018 5:05 PM
To: Freedman, John A.; Ehrlich, Stephen (CIV); Federighi, Carol (CIV); Eshkenazi, Lara (USANYS); Tarczynska, Dominika (USANYS); Vargas, Jeannette (USANYS); Coyle, Garrett (CIV)
Cc: zzz.External.DHo@aclu.org; zzz.External.SBrannon@aclu.org; zzz.External.PGrossman@nyclu.org; Bauer, Andrew; Colangelo, Matthew; Goldstein, Elena; Saini, Ajay
Subject: RE: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet & Confer Request

Counsel—

Thank you for your email. While we understand your desire to move these matters quickly, it would not be appropriate to submit a joint filing without receiving our edits or position. Please refrain from assuming our position without hearing from us. We are available tomorrow afternoon after 3:30 pm to meet and confer.

Regarding the coordination procedures in particular, certain aspects of your proposal exceed the substance of our discussion last week. We will send you edits representing our points of disagreement by the close of business tomorrow.

In addition, we anticipate providing you with additional deposition dates on our call tomorrow. Thank you for advising us that the deposition of Mr. Herren likely will not be needed.

We do not consent to your proposal to amend your complaint(s) to add the Department, AG Sessions, or Mr. Gore as official-capacity defendants.

Thank you,

Kate

Kate Bailey

Trial Attorney

United States Department of Justice

Civil Division – Federal Programs Branch

20 Massachusetts Avenue, NW

Room 7214

Washington, D.C. 20530

202.514.9239 | kate.bailey@usdoj.gov

From: Freedman, John A. [<mailto:John.Freedman@arnoldporter.com>]

Sent: Monday, July 30, 2018 3:11 PM

To: Ehrlich, Stephen (CIV) <sehrlich@CIV.USDOJ.GOV>; Bailey, Kate (CIV) <katbaile@CIV.USDOJ.GOV>; Federighi, Carol (CIV) <CFederig@CIV.USDOJ.GOV>; Eshkenazi, Lara (USANYS) <Lara.Eshkenazi@usdoj.gov>; Tarczynska, Dominika (USANYS) <Dominika.Tarczynska@usdoj.gov>; Vargas, Jeannette (USANYS) <Jeannette.Vargas@usdoj.gov>; Coyle, Garrett (CIV) <gcoyle@CIV.USDOJ.GOV>

Cc: DHo@aclu.org; SBrannon@aclu.org; PGrossman@nyclu.org; Bauer, Andrew <Andrew.Bauer@arnoldporter.com>; Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; Goldstein, Elena <Elena.Goldstein@ag.ny.gov>; Saini, Ajay <Ajay.Saini@ag.ny.gov>

Subject: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet & Confer Request

Counsel --

We wish to raise three matters:

1. This is the fourth email we are sending since last Wednesday to request a meet and confer regarding the Government's production of the supplemental administrative record. Counsel for both the State of New York and NYIC cases remain available to discuss this afternoon and tomorrow morning.

Judge Furman's practice requires disputes of this nature to be raised "promptly." In the event we do not hear from you shortly, we will assume the Government does not wish to confer about these matters and will proceed accordingly.

2. In advance of the meet and confer, we have identified several further issues we hope the Government will address to shorten our agenda:

a. Log Entries that Fail to Comply with Rule 26(b)(5) and S.D.N.Y. Local Rule 26.2(a)(2)(A): For many documents that appear to have been withheld in their entirety, the log fails to identify sufficient information to enable us to identify assess the privilege claim -- many log entries identify neither the date of the document, the author or custodian or any other recipients of the documents, e.g., 3902, 4054, 4349, 5418, etc. The Government should promptly produce a log that provides this information for every document withheld.

b. Census Bureau Team Folder: We have seen references in the production to Mr. Abowd's "swat" team having a team folder and/or a shared drive or intranet site. In a related context, we have also seen a reference to a site his team used called: SECURE_ADREC_2020, e.g., 7505, 9616, 11200. Have the contents of these folders been provided? If so, where are they in the record?

c. Native Files and Other Withheld Materials: There are documents we have seen where a slip sheet has been produced indicating the original document was not produced because it is a native file or encrypted, e.g., 7516, 9570, 9621, 9836, 9837. These are not a valid basis to withhold materials. These and any similar materials should be produced.

d. Work Product Assertions: With regard to the work product assertions, we have found a document (3888) asserting work product as early as May 24, 2017. So our questions regarding work product assertions should be addressed relative to that date.

To be clear, there are a number of other substantive points we plan to raise when we talk. But our hope is that you will be able to address these before our discussion.

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Counsel --

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We wanted to check in on a few things:

1. Attached please find deposition notices for Messrs. Abowd (for August 15) and Jarmin (for August 20). We should be able to lock in the date for Ms. Teramoto's testimony early next week.

2. Last week, we sent a copy of the Department of Justice subpoena (with a return date for testimony starting on August 13) and a draft Census Bureau Rule 30(b)(6) notice. As I advised when I sent the notice, we plan to revise the list of Census Bureau topics in light of the supplements to the Administrative Record, and send a final notice next week, with a notice date of August 14. That date was requested by counsel from the various California cases, who have asked that we try to cluster depositions because of travel considerations.

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5. Earlier this week, the State of New York sent a draft of proposed coordination procedures, which reflect the discussion from our last meet and confer, as well as the positions of the plaintiffs in the California and Maryland cases. Could you let us know whether the Government is OK with plaintiffs submitting this letter jointly?

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a. There are approximately 60 documents we have identified where materials have been improperly redacted, ostensibly because of Title 13. The relevant provisions of Title 13 are geared to ensure data privacy for individuals. Title 13 protects, at most, the identities of persons and arguably raw Census data reported by or on behalf of individuals. Based on the sample we have reviewed, the redactions we have seen all appear to be of summary statistical conclusions made about aggregated data, which in no way implicate any individuals' privacy. See AR 10509, 10742, 10849, 10975, 11003. We request that the improperly redacted documents be reproduced promptly.

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Thanks and best regards,

John

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Arnold & Porter
601 Massachusetts Avenue, NW
Washington, DC 20001

Office: +1 202.942.5316

john.freedman@arnoldporter.com

www.arnoldporter.com

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Exhibit 5

Pages 1 - 62

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Richard Seeborg, Judge

STATE OF CALIFORNIA, BY AND)
THROUGH ATTORNEY GENERAL)
XAVIER BECERRA,)
Plaintiff,)

VS.)

NO. C 18-01856 RS

WILBUR J. ROSS, JR., IN HIS)
OFFICIAL CAPACITY AS SECRETARY)
OF THE U.S. DEPARTMENT OF)
COMMERCE; U.S. DEPARTMENT OF)
COMMERCE; RON JARMIN, IN HIS)
OFFICIAL CAPACITY AS ACTING)
DIRECTOR OF THE U.S. CENSUS)
BUREAU; U.S. CENSUS BUREAU;)
DOES 1-100,)
Defendants.)

CITY OF SAN JOSE, a municipal)
corporation; and BLACK ALLIANCE)
FOR JUST IMMIGRATION, a)
California nonprofit)
corporation,)
Plaintiffs,)

VS.)

NO. C 18-02279 RS

WILBUR L. ROSS, JR., in his)
official capacity as Secretary)
of the U.S. Department of)
Commerce; U.S. DEPARTMENT OF)
COMMERCE; RON JARMIN, in his)
official capacity as Acting)
Director of the U.S. Census)
Bureau; U.S. CENSUS BUREAU,)
Defendants.)

San Francisco, California
Thursday, June 28, 2018

TRANSCRIPT OF PROCEEDINGS

Reported By: Lydia Zinn, CSR No. 9223, FCRR, Official Reporter

APPEARANCES :

For Plaintiff State of California:

Office of the Attorney General
State of California
Department of Justice
1300 I Street - P. O. Box 944255
Sacramento, California 94244-2550
(916) 210-6046
(916) 324-8835 (fax)

**BY: GABRIELLE D. BOUTIN
R. MATTHEW WISE**

Office of the Attorney General
State of California
Department of Justice
300 Spring Street, #1702
Los Angeles, CA 90013
(213) 269-6256

BY: MARK BECKINGTON

For Plaintiff City of Oakland:

City of Oakland
Office of the City Attorney
One Frank Ogawa Plaza, 6th Floor
Oakland, CA 94612
(510) 238-3814
(510) 238-6500 (fax)

BY: MARIA BEE

For Plaintiffs Black Alliance for Just Immigration; City of San Jose:

Manatt Phelps & Phillips, LLP
11355 West Olympic Boulevard
Los Angeles, CA 90064-1614
(310) 312-4000
(310) 312-4224 (fax)

**BY: JOHN FREDERICK LIBBY
EMIL PETROSSIAN**

Lawyers' Committee for Civil Rights
Under Law
1401 New York Avenue, NW, Suite 400
Washington, DC 20005-2124
(202) 662-8600
(888) 299-5227 (fax)

BY: EZRA D. ROSENBERG

APPEARANCES :

For Defendants U.S. Census Bureau; U.S. Department of Commerce;
Ron Jarmin; Wilbur Ross, Jr.:

U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W., Room
Room 6139
Washington, D.C. 20001
(202) 514-9239

BY: KATE BAILEY

U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
(202) 514-1903

BY: CAROL FEDERIGHI

1 across the Administration. We don't know who that is. It
2 could include people in the White House. So we're certainly
3 entitled, I think, to discovery of those issues.

4 Again, there's -- there's -- other than the short,
5 substantive summaries that are included in the
6 Administrative Record, there must have been other
7 conversations. Those are not included. And those -- and that
8 makes the Administrative Record incomplete.

9 There are studies and other materials that Dr. Abowd
10 refers to in his -- in his Report that were obviously
11 indirectly considered, so those should be produced.

12 And then, yes, I've referred to the supplement, and the
13 reference to the communications with Administration officials,
14 and other components.

15 So anyway, those are just some points I just wanted to add
16 to Mr. Wise's argument.

17 **THE COURT:** Thank you.

18 **MR. LIBBY:** Thank you.

19 **THE COURT:** Yes, Ms. Bailey.

20 **MS. BAILEY:** Thank you, Your Honor.

21 We, first of all, would disagree with our colleague that
22 there's inconsistency between the two memos. We briefly
23 addressed that.

24 But filing a supplemental memo is not evidence of bad
25 faith. It actually would be evidence of good faith that, in

1 the interest of transparency, the Secretary decided to produce
2 the memo that gives a fuller, more robust picture of the events
3 that led up to his decision.

4 All of the material that plaintiffs are pointing to as
5 purported evidence of bad faith is material that we voluntarily
6 produced. This isn't an instance where the Agency has produced
7 an Administrative Record that only includes material that
8 supports the decision. We have produced here both material
9 that supports and material that goes against the ultimate
10 decision. We have produced an Administrative Record that
11 includes all nonprivileged materials that was directly or
12 indirectly considered by Secretary Ross, and that's all that's
13 required.

14 As far as the constitutional claim, plaintiffs press that
15 because there's a different issue here, that they are entitled
16 to discovery; but not only is there a dearth of case law
17 actually establishing that as a rule, but they're portraying
18 their APA claim here is that -- as though that goes to the
19 process, and that the Enumeration Clause claim goes to the
20 result.

21 That's not a viable distinction. If you look at their
22 Complaint -- they brought both a procedural and a substantive
23 APA claim -- the reasons that a decision would be arbitrary and
24 capricious under the APA very much overlap with the
25 constitutional claim.

1 But setting that aside, even in the complete absence of an
2 APA claim, their arguments still would lack merit.

3 Congress has set up a particular way to review Agency
4 Action. They've waived sovereign immunity through the APA.
5 And there's no ambiguity, because Section 706(2)(B)
6 specifically provides for a Court to set aside Agency Action
7 that's contrary to a constitutional right. So you don't need
8 Final Agency Action, necessarily, in order to challenge an
9 Agency decision as a constitutional claim; but if you bring
10 just a standalone constitutional claim against an Agency,
11 that's still subject to the strictures on review under the APA.
12 And the cases that plaintiffs have pointed to don't establish
13 to the contrary.

14 And in particular, I would point to the *Jarita Mesa* case.
15 I think that case strongly supports our position. Plaintiffs
16 have attempted to distinguish that by saying that that Court
17 talked about how the parties there were in a different posture;
18 but what I think that case stands for is -- it's speaking more
19 broadly to the way Agency decisions come up for judicial
20 review.

21 I don't read *Jarita Mesa* to say that the parties there
22 were more in the context of -- as opposed to adversary, as
23 opposed to Agency decision-maker and litigant.

24 I read the opinion there to be talking more broadly about
25 how, when a District Court sits in judgment of an Agency

1 decision, that the District Court is more in the nature of an
2 appellate body, because it's reviewing a decision that's been
3 made, and that principles of appellate review inform the way
4 that the District Judge approaches that case.

5 So, in other words, read broadly, I think that the section
6 of *Jarita Mesa* that plaintiffs attempt to use to distinguish
7 actually supports our position, by setting forth a framework
8 that Districts Courts should use to review Agency Action more
9 broadly.

10 As far as the arguments about bad faith, they argue that
11 the VRA rationale seems questionable; that Secretary Ross
12 overruled professional staff and deviated from Agency practice.

13 Those are completely merits inquiries. Those are -- those
14 go to whether or not the decision, itself, is arbitrary or
15 capricious; whether or not the stated rationale actually
16 supports the decision.

17 And if plaintiff believes those are reasons to set aside
18 the decision, then the proper way to go about it is to move for
19 summary judgment on the basis of the Administrative Record,
20 because the Administrative Record we've produced contains all
21 of the material that would be needed for them to make out their
22 case, and for Your Honor to reach a decision.

23 They point to the involvement of John Gore. I think
24 that's irrelevant. Regardless of what Gore engaged in in
25 private practice, he's the head of the Civil Rights Division.

1 So any requests for citizenship data with a Voting Rights Act
2 enforcement rationale would naturally come from the head of
3 Civil Rights Division. That's expected.

4 The plaintiffs have pointed to Trump's campaign e-mails.
5 That's not relevant. There's no connection between the
6 fund-raising e-mails of a political campaign, versus an Agency
7 decision. And, in fact, to the extent that the Hawaii decision
8 has any relevance, it would show that when you have a facially
9 legitimate Agency decision, that it wouldn't be proper to come
10 in and attack it with all kinds of extraneous statements.

11 Your Honor asked about the difference between an
12 Executive Order versus an Agency Action. I think that's a very
13 strong point. When a Court is considering an Executive Order,
14 they are considering the constitutional power, the
15 constitutional prerogatives of the President.

16 When a Court is reviewing an Agency Action, they're
17 reviewing something that falls under the Administrative
18 Procedures Act. Congress has set up particular strictures and
19 a particular vehicle for reviewing Agency Action. And so you
20 have a robust body of case law that has been devised in
21 interpreting that statute, and that confines the method for
22 review here. And that's why discovery's not appropriate.

23 Plaintiffs point strongly to the opinions of other
24 Administration officials, and whether they were senior
25 Administration officials involved. That also is not relevant.