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

By ECF

August 15, 2018

The Honorable Jesse M. Furman
United States District Judge
Southern District of New York
Thurgood Marshall Courthouse
40 Foley Square
New York, New York 10007

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

Dear Judge Furman:

Pursuant to Local Rule 37.2 and Individual Practice 2.C, the Department of Justice (DOJ) opposes Plaintiffs' letter requesting a conference or an order compelling DOJ to produce for deposition Acting Assistant Attorney General (AAG) for Civil Rights John Gore. DOJ further requests that the Court issue a protective order precluding such a deposition.

DOJ is not a party to this lawsuit, and Plaintiffs must therefore "take reasonable steps to avoid imposing undue burden or expense" in serving Rule 45 subpoenas on DOJ. *In re Fitch, Inc.*, 330 F.3d 104, 108 (2d Cir. 2003) (quoting Fed. R. Civ. P. 45(d)(a)). Plaintiffs nonetheless seek to depose AAG Gore, apparently in large part to probe *DOJ's* intent in sending the December 12, 2017 letter to Ron Jarmin (the "Gary Letter"). Plaintiffs make this request despite the low likelihood of AAG Gore's testimony resulting in any relevant evidence concerning *Secretary Ross's* decision or intent, and despite the burden such a deposition would place on DOJ. A court evaluating a Rule 45 subpoena must "balance the interests served by demanding compliance with the subpoena against the interests furthered by quashing it." *Hermitage Glob. Partners LP v. Prevezon Holdings Ltd.*, No. 13-CV-6326, 2015 WL 728463, at *3 (S.D.N.Y. Feb. 19, 2015). Here, few interests would be served by compliance because AAG Gore's testimony would be irrelevant and privileged; moreover, compliance would unduly burden DOJ by requiring the preparation and deposition of a high-level official in a case in which DOJ is not even a party and did not issue the decision being challenged.

I. A Deposition of AAG Gore Is Unlikely to Produce Information Relevant to Secretary Ross's Decision.

Plaintiffs' claims center on Secretary Ross's decision to reinstate a citizenship question on the 2020 Census, which they claim was arbitrary and capricious (or motivated by discriminatory animus). As this Court has held, although discovery normally is precluded in an APA case, limited discovery may be permitted under certain circumstances. *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997). But as the Court recognized, a plaintiff in this scenario is not entitled to "all the liberal discovery available under the federal rules. Rather, the Court must permit only that discovery necessary to effectuate the Court's judicial review; i.e., review the decision of the agency

under Section 706." Transcript at 85:11-14, Hearing of July 3, 2018 [hereinafter, "Tr."] (citation and internal quotation marks omitted). The Court has explained that the limited discovery may encompass "materials from the Department of Justice" to the extent that they "shed light on the motivations for Secretary Ross's decision." Tr. at 86:11-13. Consistent with that directive, DOJ has already begun producing non-privileged, non-burdensome, responsive documents in accordance with Plaintiffs' Rule 45 subpoena. But Plaintiffs have not demonstrated a need to take the much more significant, indeed extraordinary, step of taking deposition discovery of DOJ, which is not the agency that issued the decision being challenged here.

This Court has given no indication that Plaintiffs are permitted, under the limited scope of discovery, to take DOJ depositions at all, much less without meeting the standards of reasonableness and undue burden that govern Rule 45 subpoenas. Plaintiffs have already overreached the bounds of this Court's limited authorization by seeking extensive discovery from DOJ as if DOJ were a party to an ordinary civil case, including requesting that DOJ prepare a Rule 30(b)(6) deponent on numerous burdensome topics and serving extremely broad document discovery into irrelevant and privileged topics (including all documents relating to DOJ's enforcement of the Voting Rights Act). The Court should not permit Plaintiffs to expand discovery even further by taking the extraordinary step of deposing the Acting Assistant Attorney General.

Plaintiffs suggest that AAG Gore's testimony could be relevant to "pretext," ECF No. 236 at 2, but they are wrong. The relevant question here (in light of the Court's ruling at the July 3 hearing) is whether *Commerce's* stated reasons for reinstating the citizenship question were pre-textual, not whether DOJ's reasons for sending the Gary Letter were pre-textual. Commerce was the decision-maker, not DOJ. Under the Court's July 3 Order, therefore, Commerce's intent is at issue not DOJ's.[1] And in any event, the Gary Letter states DOJ's request and rationale, so there is no basis to probe DOJ's "intent" behind that letter.[2]

II. In Addition to Its Irrelevance, Nearly All Testimony by AAG Gore Would Be Privileged.

Plaintiffs further have not shown that they could elicit any non-privileged information in a deposition of AAG Gore. The deliberative process privilege would apply to AAG Gore's involvement in the DOJ process resulting in the Gary Letter, *see Tigue v. U.S. Dep't of Justice*,

[1] Although not necessary to demonstrate that a deposition of AAG Gore is uncalled for, Defendants reiterate the Government's position that this case should be decided based on the administrative record compiled by the Department of Commerce. Furthermore, although the Court's July 3 ruling necessarily raises the issue of *Commerce's* intent, under a pretext theory, the relevant question is not whether Commerce had additional motives for adopting the policy in question beyond the reasons set forth in its final decision. The sole inquiry should be whether Commerce actually believed the articulated basis for adopting the policy.

[2] In any event, Plaintiffs provided no basis to believe that the reasons stated in the Gary Letter were not DOJ's actual reasons (under the counterfactual assumption that DOJ's intent is relevant). DOJ uses citizenship data in a variety of ways, including in its own redistricting cases and in its role as amicus in Voting Rights Act cases before the Supreme Court. *Cf. Benavidez v. Irving Indep. Sch. Dist.*, 690 F. Supp. 2d 451 (N.D. Tex. 2010) (rejecting a plaintiff's attempt to support his Section 2 Voting Rights Act claim with only ACS statistics for citizen voting age population).

312 F.3d 70, 80 (2d Cir. 2002), whether or not he was "the primary point of contact for communications with senior Commerce Department political appointees," ECF No. 236 at 1. The deliberative process privilege also likely encompasses any information that AAG Gore could offer about his oral communications with Commerce (as part of Commerce's deliberative process) and DOJ's enforcement of the Voting Rights Act (an area where several other privileges may also apply), contrary to Plaintiffs' suggestion that a privilege log *from Commerce* is somehow salient to the privileges applicable to AAG Gore's deposition testimony, ECF No. 236 at 2. Plaintiffs further argue that Defendants have not "cited . . . authority," ECF No. 236 at 2, for a court's power to quash a deposition based on privilege, but it is well established that evaluating a Rule 45 subpoena requires balancing the interests favoring compliance with the burden, *Hermitage Glob. Partners*, No. 13-CV-6326, at *3 (quoting Wright & Miller, Fed. Practice & Proc. § 2463.1 (3d ed. 2008)), and here the interests served by compliance are accordingly lessened because Plaintiffs are unlikely to elicit much, if any, non-privileged material. It would be a waste of time and resources for AAG Gore to prepare for a deposition in which he could not provide any non-privileged information relevant to Plaintiffs' claims.

III. A Deposition of AAG Gore Would Unduly Burden DOJ.

Finally, a deposition of AAG Gore would unduly burden DOJ, a non-party to this litigation. AAG Gore leads the Civil Rights Division of DOJ, a law enforcement agency comprised of 590 employees that enforces critical civil rights guarantees. A deposition would hinder AAG Gore from performing his numerous important duties as a high-ranking DOJ official, and further sap DOJ resources in preparation. *See Anwar v. Fairfield Greenwich Ltd.*, 297 F.R.D. 223, 228 (S.D.N.Y. 2013) (denying a motion to compel Rule 45 testimony of SEC officials based in part on the undue burden from preparation). Indeed, "courts analyzing . . . a third party subpoena . . . may take into account not only the direct burdens caused by the testimony, but also 'the government's serious and legitimate concern that its employee resources not be commandeered into service by private litigants to the detriment of the smooth functioning of government operations.'" *Id.* (quoting *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 779 (9th Cir. 1994)). Plaintiffs cite no precedent authorizing the deposition of a high-ranking DOJ official in a case where DOJ merely provided input to another agency, which then issued the decision being challenged. Permitting such a deposition would impose unnecessary burdens on DOJ, threaten privileges—including the attorney-client privilege—and chill DOJ's (and other agencies') willingness to assist other agencies in their policy deliberations by consulting and providing information.

In sum, the Court should deny Plaintiffs' request to compel deposition testimony from AAG Gore because the burden imposed on DOJ by such a deposition outweighs the minimal value of AAG Gore's testimony, which would be irrelevant to the case and largely privileged. It should also clarify that discovery of DOJ is limited to non-privileged, non-burdensome document discovery. Alternatively, the Court could revisit AAG Gore's proposed deposition after Plaintiffs review DOJ's document productions, complete their discovery on Commerce, and make a persuasive showing of need. *See Solomon v. Nassau Cty.*, 274 F.R.D. 455, 461 (E.D.N.Y. 2011) ("In weighing the undue burden against the necessity of the testimony, the Court may also consider under Rule 26(b)(2)(C)(i) if the discovery can be 'obtained from some other source that is more convenient' or 'less burdensome.'").

Dated: August 15, 2018

Respectfully submitted,

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