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

September 5, 2018

By ECF
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 this Court's Rules of Individual Practice 2.C, Defendants write to oppose Plaintiffs' letter seeking leave to depose a third-party, Kansas Secretary of State Kris Kobach.

I. Defendants' Request for a Stay of Discovery Until the Petition for Writ of Mandamus Is Resolved Should Apply to Plaintiffs' Efforts to Depose Mr. Kobach.

As an initial matter, Defendants note that they have recently filed with this Court a motion to stay all discovery pending the outcome of a petition for writ of mandamus, No. 18-2921 ECF No. 292, No. 18-5025 ECF No. 116. The petition for writ of mandamus will soon be filed with the United States Court of Appeals for the Second Circuit. The basis for the petition is that Plaintiffs have not made the required strong showing of "bad faith," and are not entitled to extra-record discovery under the APA. *Cf. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (upholding agency decision so long as agency had a rational basis for decision). Defendants' argument is, in part, that extra-record discovery about prior conversations or considerations about the possible reinstatement of a citizenship question on the 2020 Census is not relevant to whether Secretary Ross articulated a rational basis for reinstating a citizenship question, and particularly given the extreme burden, any further extra-record discovery should be stayed pending the outcome of the petition for mandamus. Because the basis for Defendants' motion to stay discovery in the case applies with equal force to the proposed deposition of Mr. Kobach, any such deposition should be stayed pending the outcome of Defendants' petition for mandamus.

II. Plaintiffs Have Failed to Demonstrate that Deposing Mr. Kobach Is "Necessary or Appropriate."

Furthermore, Plaintiffs have failed to demonstrate that it is "necessary or appropriate" to depose Mr. Kobach. At this Court's July 3, 2018 hearing in which the Court authorized discovery outside of the administrative record, the Court held that, while Plaintiffs are entitled to some extra-

record discovery, the Court will limit the scope of discovery consistent with the APA. Tr.[1] at 85. The Court explicitly stated that it is "mindful that discovery in an APA action, when permitted, 'should not transform the litigation into one involving 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.'" *Id.* (quoting *Ali v. Pompeo*, 2018 WL 2058152 at *4 (E.D.N.Y. May 2, 2018)) (emphasis added). The Court went on to explicitly limit any extra-record discovery by Plaintiffs "absent agreement of the defendants or leave of Court" to the Department of Justice and the Department of Commerce, noting that "I am not persuaded that discovery from other third parties would be necessary or appropriate; to the extent that third parties may have influenced Secretary Ross's decision, one would assume that the influence would be evidenced in Commerce Department materials and witnesses themselves." *Id.* at 86.

Plaintiffs' basis for seeking leave to depose Mr. Kobach arises almost entirely from an email exchange appearing at pages 763 and 764 of the record. The emails were sent between July 14, 2017 and July 24, 2017. In a July 14, 2017 email to Secretary Ross, Mr. Kobach stated that he believed it was "essential" that a citizenship question be on the 2020 census. AR 763. On July 21, 2017, Mr. Kobach emailed Secretary Ross's chief of staff, Wendy Teramoto, to follow up on his previous email. Mr. Kobach mentioned that he and Secretary Ross had "spoken briefly on the phone" about the citizenship question "a few months earlier," and sought to schedule a call with Secretary Ross, to which Ms. Teramoto responded on July 24, 2017, setting up a call for the following day, July 25, 2017. AR 764. There is no indication in the record that Mr. Kobach spoke to Secretary Ross about a citizenship question after that call (if in fact that call ever occurred). Mr. Kobach later re-stated his views in a letter dated February 12, 2018. AR 1141.

As the Court recognized at the July 3, 2018 hearing, discovery in an APA action is generally disfavored, and, when allowed, should be narrowly tailored to the specific issue of allowing the court sufficient information to review the actual decision of the agency. Here, the decision of the agency occurred on March 26, 2018, when Secretary Ross issued the memorandum reinstating the citizenship question for the 2020 Census and explaining the basis for the decision. While the Court held that Plaintiffs have made a *prima facie* allegation that the stated basis for the decision "was pretextual," Tr. at 83, the limited extra-record discovery authorized by the Court should be targeted towards whether Secretary Ross's decision to reinstate a citizenship question was arbitrary and capricious.

Plaintiffs have not explained how being allowed to depose Mr. Kobach would reveal any material information about the basis for Secretary Ross's decision. Mr. Kobach's views on the citizenship question are not in doubt, and in fact are clearly articulated in the July 14, 2017 email and February 12, 2018 letter to Secretary Ross. AR 763, 1141. There is no reason to conclude that, apart from conveying his views on reinstating a citizenship question, Mr. Kobach would have any information relevant to the issue of whether the basis for the decision provided by Secretary Ross was rational. *Cf. Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 462 (D.C. Cir. 2014) (Agency decision-makers "should be judged by what they decided, not for matters they considered before making up their minds."). As is apparent from the Administrative Record, Mr. Kobach is just one of many interested parties who conveyed their views or comments to Secretary Ross, none of whom participated in the decision itself. In short, the fact that Mr. Kobach, a high-ranking elected

[1] Excerpts from the July 3, 2018 hearing are attached to this response as Exhibit A.

official in the State of Kansas, participated in a brief email exchange, one or (possibly) two conversations that took place more than eight months prior to Secretary Ross's decision, and later sent an official letter, falls well short of establishing that Mr. Kobach would have "necessary or appropriate" information regarding the basis for Secretary Ross's decision to reinstate a citizenship question on the 2020 Census. Accordingly, this Court should deny Plaintiffs' request for leave to conduct extra-record third-party discovery on their APA claim.

Conclusion

For the foregoing reasons, Defendants request that this Court deny Plaintiffs' letter motion requesting leave to depose Kansas Secretary of State Kris Kobach.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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STATE OF NEW YORK, et al.,

Plaintiffs,

v. 18 Civ. 2921 (JMF)

UNITED STATES DEPARTMENT OF COMMERCE, et al.,

Argument

Defendants.

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NEW YORK IMMIGRATION COALITION,et al.,

Plaintiffs,

v. 18 Civ. 5025 (JMF)

UNITED STATES DEPARTMENT OF COMMERCE, et al.,

Argument

Defendants.

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New York, N.Y.
July 3, 2018
9:30 a.m.

Before:

HON. JESSE M. FURMAN,

District Judge

APPEARANCES

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(Case called)

MR. COLANGELO: Good morning, your Honor.

Matthew Colangelo from New York for the state and local government plaintiffs.

One housekeeping matter, your Honor, if I may. The plaintiffs intended to have two lawyers oppose the Justice Department's motion to dismiss; Mr. Saini argue the standing argue and Ms. Goldstein argue the remaining 12(b)(1) and 12(b)(6) arguments; and then I will argue the discovery aspect of today's proceedings. And I may ask my cocounsel from Hidalgo County, Texas, Mr. Rios, to weigh in briefly on one particular aspect of expert discovery that we intend to proffer. So with the Court's indulgence, we may swap counsel in and out between those arguments.

THE COURT: Understood. Thank you.

MS. GOLDSTEIN: Elena Goldstein also from New York for the plaintiffs.

MR. SAINI: Ajay Saini also from New York for the plaintiffs.

MR. FREEDMAN: Good morning, your Honor.

John Freedman from Arnold & Porter for the New York Immigration Coalition plaintiffs.

MR. RIOS: Rolando Rios for the Cameron and Hidalgo County plaintiffs, your Honor.

MR. SHUMATE: Good morning, your Honor.

full scope of such materials. Accordingly, plaintiffs' request for an order directing defendants to complete the Administrative Record is well founded.

Finally, I agree with the plaintiffs that there is a solid basis to permit discovery of extra-record evidence in this case. To the extent relevant here, a court may allow discovery beyond the record where "there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decision-makers." National Audubon Society v. Hoffman, 132 F.3d 7, 14 (2d Cir. 1997). Without intimating any view on the ultimate issues in this case, I conclude that plaintiffs have made such a showing here for several reasons.

First, Secretary Ross's supplemental memorandum of June 21, which I've already discussed, could be read to suggest that the Secretary had already decided to add the citizenship question before he reached out to the Justice Department; that is, that the decision preceded the stated rationale. See, for example, Tummino v. von Eschenbach, 427 F.Supp. 2d 212, 233 (E.D.N.Y. 2006) authorizing extra-record discovery where there was evidence that the agency decision-makers had made a decision and, only thereafter took steps "to find acceptable rationales for the decision." Second, the Administrative Record reveals that Secretary Ross overruled senior Census Bureau career staff, who had concluded -- and this is at page

1277 of the record -- that reinstating the citizenship question would be "very costly" and "harm the quality of the census count." Once again, see Tummino, 427 F.Supp. 2d at 231-32, holding that the plaintiffs had made a sufficient showing of bad faith where "senior level personnel overruled the professional staff." Third, plaintiffs' allegations suggest that defendants deviated significantly from standard operating procedures in adding the citizenship question. Specifically, plaintiffs allege that, before adopting changes to the questionnaire, the Census Bureau typically spends considerable resources and time -- in some instances up to ten years -- testing the proposed changes. See the amended complaint which is docket no. 85 in the states' case at paragraph 59. Here, by defendants' own admission -- see the amended complaint at paragraph 62 and page 1313 of the Administrative Record -- defendants added an entirely new question after substantially less consideration and without any testing at all. Yet again Tummino is instructive. See 427 F.Supp. 2d at 233, citing an "unusual" decision-making process as a basis for extra-record discovery.

Finally, plaintiffs have made at least a prima facie showing that Secretary Ross's stated justification for reinstating the citizenship question -- namely, that it is necessary to enforce Section 2 of the Voting Rights Act -- was pretextual. To my knowledge, the Department of Justice and

civil rights groups have never, in 53 years of enforcing Section 2, suggested that citizenship data collected as part of the decennial census, data that is by definition quickly out of date, would be helpful let alone necessary to litigating such claims. See the states case docket no. 187-1 at 14; see also paragraph 97 of the amended complaint. On top of that, plaintiffs' allegations that the current Department of Justice has shown little interest in enforcing the Voting Rights Act casts further doubt on the stated rationale. See paragraph 184 of the complaint which is docket no. 1 in the Immigration Coalition case. Defendants may well be right that those allegations are "meaningless absent a comparison of the frequency with which past actions have been brought or data on the number of investigations currently being undertaken," and that plaintiffs may fail "to recognize the possibility that the DOJ's voting-rights investigations might be hindered by a lack of citizenship data." That is page 5 of the government's letter which is docket no. 194 in the states case. But those arguments merely point to and underscore the need to look beyond the Administrative Record.

To be clear, I am not today making a finding that Secretary Ross's stated rationale was pretextual -- whether it was or wasn't is a question that I may have to answer if or when I reach the ultimate merits of the issues in these cases. Instead, the question at this stage is merely whether --

assuming the truth of the allegations in their complaints -- plaintiffs have made a strong preliminary or prima facie showing that they will find material beyond the Administrative Record indicative of bad faith. See, for example, Ali v. Pompeo, 2018 WL 2058152 at page 4 (E.D.N.Y. May 2, 2018). For the reasons I've just summarized, I conclude that the plaintiffs have done so.

That brings me to the question of scope. On that score, I am mindful that discovery in an APA action, when permitted, "should not transform the litigation into one involving 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." That is from Ali v. Pompeo at page 4, citing cases. I recognize, of course, that plaintiffs argue that they are independently entitled to discovery in connection with their constitutional claims. I'm inclined to disagree given that the APA itself provides for judicial review of agency action that is "contrary to" the Constitution. See, for example, Chang v. USCIS, 254 F.Supp. 3d 160 at 161-62 (D.D.C. 2017). But, even if plaintiffs are correct on that score, it is well within my authority under Rule 26 to limit the scope of discovery.

Mindful of those admonitions, not to mention the separation of powers principles at stake here, I am not

inclined to allows as much or as broad discovery as the plaintiffs seek, at least in the first instance. First, absent agreement of defendants or leave of Court, of me, I will limit plaintiffs to ten fact depositions. To the extent that plaintiffs seek to take more than that, they will have to make a detailed showing in the form of a letter motion, after conferring with defendants, that the additional deposition or depositions are necessary. Second, again absent agreement of the defendants or leave of Court, I will limit discovery to the Departments of Commerce and Justice. As defendants' own arguments make clear, materials from the Department of Justice are likely to shed light on the motivations for Secretary Ross's decision -- and were arguably constructively considered by him insofar as he has cited the December 2017 letter as the basis for his decision. At this stage, however, I am not persuaded that discovery from other third parties would be necessary or appropriate; to the extent that third parties may have influenced Secretary Ross's decision, one would assume that that influence would be evidenced in Commerce Department materials and witnesses themselves. Further, to the extent that plaintiffs would seek discovery from the White House, including from current and former White House officials, it would create "possible separation of powers issues." That is from page 4 of the slip opinion in the Nielsen order. Third, although I suspect there will be a strong case for allowing a