

September 6, 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' Opposition to Motion for Stay 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 submit this opposition to Defendants' motion to stay discovery. 18-CV-2921, ECF No. 292; 18-CV-5025, ECF No. 116. Defendants' request is without merit. Nearly two months after this Court first authorized discovery in these matters, Defendants seek to strategically delay this litigation and undermine the scheduling order that has long been in place. Nowhere do Defendants explain why they delayed for two months in challenging the July 5 Order when it was clear that this Order authorized discovery beyond the Administrative Record and from the Department of Justice. Nor do Defendants come close to satisfying the requirements for a stay – they have not and cannot show irreparable harm; their legal position that this Court abused its discretion is without merit; and no other equities warrant a stay.

1. The Defendants Have Not Established Irreparable Harm. Defendants' cursory recitation of the "significant time and resources" to respond to discovery requests or to "prepare for and attend an inherently burdensome deposition" by one official does not constitute "irreparable injury." Before filing this motion, Defendants never articulated any particularized burden associated with discovery. Ex. 1. Indeed, Plaintiffs made clear during the meet and confer process that they are willing to try to accommodate any specific concerns about burden. See Ex. 1 & 2 (explaining that Plaintiffs agreed to Defendants' proposal to exclude voluminous press clippings from production). By way of comparison, the materials at issue are orders of magnitude less than the volume that the Second Circuit considered reasonable in denying the federal government's mandamus petition in the DACA litigation, where mandamus was denied. See *In re Nielsen*, No. 17-3345, slip op. at 3-4 (2d Cir. Dec. 27, 2017) ("Administrative records, particularly those involving an agency action as significant as the repeal of DACA, are often quite voluminous.") (Ex. 3). The purported discovery burden presented here does not come close to rising to the level of irreparable harm.

2. There are no "Exceptional Circumstances" or "Clear Abuse of Discretion" that Warrant Mandamus or a Stay. At the July 3 hearing, the Court properly applied the well-established standard to permit extra-record discovery in an Administrative Procedure Act case: "an extra-record investigation by the reviewing court may be appropriate when there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decisionmakers." *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 8, 14 (1997) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971)). As this Court recognized, substantial evidence supports a finding of bad faith, including the shifting timeline of decision set forth in the Secretary's original and supplemental decision memoranda, documents

suggesting that the Secretary's decision preceded his stated rationale, the overruling of senior scientific Census Bureau officials, deviation from the standard operating procedures in adding the citizenship question, and evidence that the stated reason – the enforcement of Section 2 of the Voting Rights Act – is pretextual. *See* Tr. at 80-84. This evidence included, *inter alia*:

- documentation of political interference in the decision including (1) discussions between senior Commerce Department aides, the Secretary, and Kris Kobach to add the question so as to, in Mr. Kobach's words, "address the problem that aliens who do not actually reside in the United States are still counted for congressional apportionment purposes," AR 763, (2) Secretary Ross's acknowledgment that "other senior Administration officials" first raised adding the question, AR 1321, and (3) the Trump Campaign's statement that the President "mandated" the addition of the question, 18-CV-5025 ECF 1 at ¶ 178;
- Secretary Ross's wholesale disregard of the recommendations of Census Bureau professional staff, who repeatedly advised that adding the question was "very costly, harms the quality of the census count, and would use substantially less accurate citizenship data than are available" from other sources. AR 1277, AR 1312; and
- significant efforts to conceal and actively mislead the public regarding the timing, genesis, and purpose of the question, including the misleading accounts in Secretary Ross's March 21 memo, his Congressional testimony, and the concealment of Mr. Gore's role in ghostwriting the request. *Compare* AR 1321 with AR 1313. *See also* 18-CV-5025 ECF 1 at ¶¶ 166-167.¹

The Court's decision from the bench aptly summarized the evidence of bad faith, laid out the correct legal standard, and carefully calibrated the scope of permitted discovery consistent with the Second Circuit's guidance in *National Audubon Society* and *Nielsen*. *See* 7/3 Tr. 76-89. Defendants cannot reasonably dispute the well-established authority that that political interference or discriminatory motivation warrants invalidation of an agency decision. *See, e.g., Town of Orangetown v. Ruckelshaus*, 740 F.2d 185 (2d Cir. 1984); *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1972); *Latecoere Int'l v. U.S. Dep't of Navy*, 19 F.3d 1342 (11th Cir. 1994); *Tummino v. Torti*, 693 F. Supp. 2d 519, 547 (E.D.N.Y. 2009). Indeed, the Supreme Court cases cited by the Defendants do not preclude extra-record discovery in appropriate circumstances – to the contrary, *Overton Park* expressly authorizes expansion of the administrative record and cautions that judicial review of the agency decision must be "searching and careful," 401 U.S. at 416. *State Farm* similarly emphasizes the rigor with which an agency decision is examined.² 463 U.S. at 43.

¹ While there was ample evidence of bad faith at the time of the July 3 decision, the completion of the Administrative Record and further discovery have confirmed that there is significant evidence of bad faith and improper behavior on the part of Defendants. *Compare* Comstock Dep. Tr. 266 (Ex. 4) ("[M]y job is to figure out how to carry out what my boss asks me to do. So you go forward and you find a legal rationale."), *and id.* at 267 ("I don't need to know what [the Secretary's] rationale might be, because it may or may not be one that is – that is something that's going to [be] a legally-valid basis."), *with Tummino v. Von Eschenbach*, 427 F. Supp. 2d 212, 233 (E.D.N.Y. 2006) ("[A] plausible interpretation . . . is that senior management . . . had long since decided" how to proceed, "but needed to find acceptable rationales for the decision"); *see also* Ex. 5 (AR excerpts).

² As discussed in *Nielsen*, the Defendants' interpretation of *Florida Power* as precluding extra-record discovery is incorrect. Ex. 3 (*Nielsen*, slip op. at 2 n.1).

Accordingly, Defendants cannot meet their heavy burden to show that the Court committed an abuse of discretion. Nor do Defendants address *NYIC* Plaintiffs' entitlement to discovery under their Equal Protection claim. *See, e.g., Webster v. Doe*, 486 U.S. 592, 604 (1988); *Crawford-El v. Britton*, 523 U.S. 574 (1998); *Nielsen*, slip op. at 3 n.2.³

For similar reasons, the Court's August 17 ruling compelling testimony from Mr. Gore was not an abuse of discretion. 18-CV-2921, ECF No. 261; 18-CV-5025, ECF No. 91. Starting in September 2017, Mr. Gore was the primary point of contact for the senior Commerce Department political appointees about the addition of the citizenship question, and ultimately ghostwrote the request submitted by the Department of Justice.⁴ Defendants have confirmed that Mr. Gore is among the government officials referenced in Secretary Ross's June 21 "supplemental" memo "who, before the December 12, 2017 Department of Justice letter . . . either (a) discussed the citizenship question with Secretary Ross, (b) had raised or discussed whether to reinstate a citizenship question, or (c) were consulted by Secretary Ross or his staff regarding whether the Department of Justice would support, and if so would request, inclusion of a citizenship question" Ex. 6. The August 17 Order noted that Mr. Gore possesses relevant information that cannot be obtained from another source, would not meaningfully "hinder" him, and would not "unduly burden" him. There is no blanket prohibition on deposing high level officials, *e.g., Clinton v. Jones*, 520 U.S. 681 (1997), and the deposition is justified because Mr. Gore "has unique first-hand knowledge related to the litigated claims" or possesses "necessary information [that] cannot be obtained through other, less burdensome or intrusive means." *Lederman v. New York City Dep't of Parks and Recreation*, 731 F.3d 199, 203 (2d Cir. 2013) (establishing an "exceptional circumstances" test in the Second Circuit for deposing high-ranking government officials); *United States v. City of New York*, No. 07-CV-2067 NGG/RLM, 2009 WL 2423307, at *3 (E.D.N.Y. Aug. 5, 2009) (authorizing deposition of then-Mayor Michael Bloomberg); *Sherrod v. Breitbart*, 304 F.R.D. 73, 76 (D.D.C. 2014) (authorizing deposition of U.S. Secretary of Agriculture). The Court's findings were in accordance with this guidance and not an abuse of discretion. Moreover, the deposition has been noticed for September 12 – a date the Department of Justice indicated Mr. Gore was available.

3. *Delay of this Matter injures Plaintiffs and the Public.* As this Court has previously recognized, "time is of the essence here because the clock is running on census preparations," and this matter needs to be resolved expeditiously. Tr. of July 3 Hearing at 77. It is in the interests all parties and the public to reach a resolution on the merits as expeditiously as possible. A stay of discovery would hinder that goal.

In addition, Plaintiffs' expert disclosures are due tomorrow, September 7; if a stay is entered after that date and extends to expert deadlines, Defendants would gain the advantage of a longer time to respond than the Court ordered. If the Court is inclined to grant any stay at all, it should only stay fact discovery and should not stay expert disclosures – both because of the imperative of keeping these lawsuits on schedule, as well as the inherent unfairness of Defendants obtaining a strategic unilateral extension of their expert disclosure deadlines.

³ At the July 3 hearing, the Court – although "inclined to disagree" with Plaintiffs' position – did not decide whether extra-record discovery was authorized in connection with the constitutional claims in this case. Tr. of July 3 Hearing at 85.

⁴ AR 2488, 2491, 2496, 2562, 2634, 2651, 2688, 11193; ECF 99-1 at ¶¶8, 227-28, 249-52, 258-59; Ex. 7.

Respectfully submitted,

ARNOLD & PORTER KAYE SCHOLER LLP
AMERICAN CIVIL LIBERTIES UNION

By: /s/ John A. Freedman

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** 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

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Attorney General of the State of New York

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

Exhibit 1

Freedman, John A.

From: Freedman, John A.
Sent: Thursday, August 30, 2018 7:45 PM
To: 'Federighi, Carol (CIV)'; zzz.External.DHo@aclu.org; Goldstein, Elena; Bailey, Kate (CIV); Coyle, Garrett (CIV); Kopplin, Rebecca M. (CIV); Halainen, Daniel J. (CIV); Tomlinson, Martin M. (CIV); Ehrlich, Stephen (CIV)
Cc: Colangelo, Matthew; Saini, Ajay; zzz.External.SBrannon@aclu.org; zzz.External.PGrossman@nyclu.org; Bauer, Andrew; Gersch, David P.; Grossi, Peter T.; Weiner, David J.; Young, Dylan Scot; Kelly, Caroline
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: Various Matters
Attachments: Rule 502(d) Order Edits.docx

Carol --

Can we talk to see if there is some way we might be able to accommodate your concerns?

I will admit I am confused by your reference to burden, as we are not aware of the Government previously articulating any particular burden associated with any of our requests that we have not tried to accommodate. In particular, we are unclear what aspects of our pending requests you consider uniquely burdensome — and burden is certainly not anything the Government has previously articulated to the Court.

We think our track record is we've been reasonable in accommodating the Government, most recently when we agreed there was no need for the Government to file its overdue answer while our motion to amend is pending. And we are fine accommodating the issue Kate raised to Elena today about the burden with DoJ having to review/produce press clippings. We are also happy to enter into a clawback agreement, and to that end, I have attached our proposed markup (which is fine with us, but is currently circulating among counsel in the other cases) -- we would be happy to discuss this as well -- the main substantive change is that we think it makes more sense to expressly incorporate the procedures specified in Rule 26(b)(5)(B) rather than spell these out. And as I hope I have made clear, we are always willing to discuss any concerns the Government has regarding burden.

Also it would help if you could clarify which of Judge Furman's discovery orders (or which aspects of his orders) that you deem overbroad and/or likely to cause Defendants irreparable harm? And why you can't go back to him with a request for more targeted relief? Or why, if your concern is burden, you wouldn't go to Judge Furman for a protective order rather than seeking mandamus?

So we really think it would be best to talk this through. That is called for by Judge Furman's July 5 order ("[a]ny party wishing to raise a discovery dispute with the Court must first confer in good faith with the opposing party, in person or by telephone") as well as Local Rule 37.3(a). If you can let us know some times tomorrow, we would be happy to meet-and-confer then.

Best regards,

John

John A. Freedman

Arnold & Porter

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From: Federighi, Carol (CIV) [mailto:Carol.Federighi@usdoj.gov]
Sent: Thursday, August 30, 2018 6:09 PM
To: zzz.External.DHo@aclu.org; Goldstein, Elena; Bailey, Kate (CIV); Freedman, John A.; Coyle, Garrett (CIV); Kopplin, Rebecca M. (CIV); Halainen, Daniel J. (CIV); Tomlinson, Martin M. (CIV); Ehrlich, Stephen (CIV)
Cc: Colangelo, Matthew; Saini, Ajay; zzz.External.SBrannon@aclu.org; zzz.External.PGrossman@nyclu.org; Bauer, Andrew; Gersch, David P.; Grossi, Peter T.; Weiner, David J.; Young, Dylan Scot; Kelly, Caroline
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: Various Matters

Dale – Thanks for getting back to me. We will be seeking a stay of all discovery, pending resolution of the mandamus petition, on the grounds that we are likely to prevail on our challenge to Judge Furman’s discovery orders in this case and that allowing discovery to go forward in the interim would cause irreparable harm. We are filing in the New York cases only because that is the case in which Judge Furman has issued the broadest discovery orders.

Thanks,
Carol

From: Dale Ho [mailto:dho@aclu.org]
Sent: Thursday, August 30, 2018 5:32 PM
To: Federighi, Carol (CIV) <CFederig@CIV.USDOJ.GOV>; Goldstein, Elena <Elena.Goldstein@ag.ny.gov>; Bailey, Kate (CIV) <katbaile@CIV.USDOJ.GOV>; Freedman, John A. <John.Freedman@arnoldporter.com>; Coyle, Garrett (CIV) <gcoyle@CIV.USDOJ.GOV>; Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>; Halainen, Daniel J. (CIV) <dhalaine@CIV.USDOJ.GOV>; Tomlinson, Martin M. (CIV) <mtomlins@CIV.USDOJ.GOV>; Ehrlich, Stephen (CIV) <sehrlich@CIV.USDOJ.GOV>
Cc: Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; Saini, Ajay <Ajay.Saini@ag.ny.gov>; Sarah Brannon <sbrannon@aclu.org>; Perry Grossman <PGrossman@nyclu.org>; Bauer, Andrew <Andrew.Bauer@arnoldporter.com>; Gersch, David P. <David.Gersch@arnoldporter.com>; Grossi, Peter T. <Peter.Grossi@arnoldporter.com>; Weiner, David J. <David.Weiner@arnoldporter.com>; Young, Dylan Scot <dylan.young@arnoldporter.com>; Kelly, Caroline <Caroline.Kelly@arnoldporter.com>
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: Various Matters

Carol,

Could you please briefly state the basis for the stay application, and the scope of the stay that you seek - i.e., whether it is to all discovery, or only to some? I assume it is the former, but just want to clarify. And, assuming it is the former, could you state why you are seeking a discovery only in this matter and not in all related cases?

Regards,

Dale Ho
(Pronouns: He/Him/His)
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From: Federighi, Carol (CIV) [<mailto:Carol.Federighi@usdoj.gov>]

Sent: Thursday, August 30, 2018 5:12 PM

To: Goldstein, Elena; Bailey, Kate (CIV); Dale Ho; Freedman, John A.; Coyle, Garrett (CIV); Kopplin, Rebecca M. (CIV); Halainen, Daniel J. (CIV); Tomlinson, Martin M. (CIV); Ehrlich, Stephen (CIV)

Cc: Colangelo, Matthew; Saini, Ajay; Sarah Brannon; Perry Grossman; Bauer, Andrew; Gersch, David P.; Grossi, Peter T.; Weiner, David J.; Young, Dylan Scot; Kelly, Caroline

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: Various Matters

Thanks Elena. To clarify, we will just be filing the motions in the SDNY cases, so I just need the position of the NYIC plaintiffs in 18-5025. Thanks all. Carol

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

Sent: Thursday, August 30, 2018 5:09 PM

To: Federighi, Carol (CIV) <CFederig@CIV.USDOJ.GOV>; Bailey, Kate (CIV) <katbaile@CIV.USDOJ.GOV>; Dale Ho <dho@aclu.org>; Freedman, John A. <John.Freedman@arnoldporter.com>; Coyle, Garrett (CIV) <gcoyle@CIV.USDOJ.GOV>; Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>; Halainen, Daniel J. (CIV) <dhalaine@CIV.USDOJ.GOV>; Tomlinson, Martin M. (CIV) <mtomlins@CIV.USDOJ.GOV>; Ehrlich, Stephen (CIV) <sehrlich@CIV.USDOJ.GOV>

Cc: Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; Saini, Ajay <Ajay.Saini@ag.ny.gov>; Sarah Brannon <sbrannon@aclu.org>; Perry Grossman <PGrossman@nyclu.org>; Bauer, Andrew <Andrew.Bauer@arnoldporter.com>; Gersch, David P. <David.Gersch@arnoldporter.com>; Grossi, Peter T. <Peter.Grossi@arnoldporter.com>; Weiner, David J. <David.Weiner@arnoldporter.com>; Young, Dylan Scot <dylan.young@arnoldporter.com>; Kelly, Caroline <Caroline.Kelly@arnoldporter.com>

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: Various Matters

Carol,

Plaintiffs in 18-cv-2921 will strongly oppose these motions. To the extent that you wish to ascertain the position of other groups of plaintiffs not included on this email, I'd recommend that you ask them.

Best,
Elena

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

Sent: Thursday, August 30, 2018 5:05 PM

To: Bailey, Kate (CIV) <Kate.Bailey@usdoj.gov>; Dale Ho <dho@aclu.org>; Freedman, John A. <John.Freedman@arnoldporter.com>; Coyle, Garrett (CIV) <Garrett.Coyle@usdoj.gov>; Kopplin, Rebecca M. (CIV) <Rebecca.M.Kopplin@usdoj.gov>; Halainen, Daniel J. (CIV) <Daniel.J.Halainen@usdoj.gov>; Tomlinson, Martin M. (CIV) <Martin.M.Tomlinson@usdoj.gov>; Ehrlich, Stephen (CIV) <Stephen.Ehrlich@usdoj.gov>

Cc: Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; Goldstein, Elena <Elena.Goldstein@ag.ny.gov>; Saini, Ajay <Ajay.Saini@ag.ny.gov>; Sarah Brannon <sbrannon@aclu.org>; Perry Grossman <PGrossman@nyclu.org>; Bauer,

Andrew <Andrew.Bauer@arnoldporter.com>; Gersch, David P. <David.Gersch@arnoldporter.com>; Grossi, Peter T. <Peter.Grossi@arnoldporter.com>; Weiner, David J. <David.Weiner@arnoldporter.com>; Young, Dylan Scot <dylan.young@arnoldporter.com>; Kelly, Caroline <Caroline.Kelly@arnoldporter.com>

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: Various Matters

Counsel – As we've indicated, we plan to file a mandamus petition shortly, with or shortly after a motion for a stay of discovery pending resolution of the mandamus petition. Our stay motion will be addressed to the district court, following up with a similar stay motion in the Court of Appeals if necessary. Can you please let me know the position of each group of plaintiffs on the two stay motions? Thanks!

Carol
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From: Bailey, Kate (CIV)

Sent: Thursday, August 30, 2018 3:59 PM

To: Dale Ho <dho@aclu.org>; Freedman, John A. <John.Freedman@arnoldporter.com>; Coyle, Garrett (CIV) <gcoyle@CIV.USDOJ.GOV>; Federighi, Carol (CIV) <CFederig@CIV.USDOJ.GOV>; Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>; Halainen, Daniel J. (CIV) <dhalaine@CIV.USDOJ.GOV>; Tomlinson, Martin M. (CIV) <mtomlins@CIV.USDOJ.GOV>; Ehrlich, Stephen (CIV) <sehrlich@CIV.USDOJ.GOV>

Cc: 'Colangelo, Matthew' <Matthew.Colangelo@ag.ny.gov>; 'Goldstein, Elena' (Elena.Goldstein@ag.ny.gov) <Elena.Goldstein@ag.ny.gov>; 'Saini, Ajay' <Ajay.Saini@ag.ny.gov>; Sarah Brannon <sbrannon@aclu.org>; Perry Grossman <PGrossman@nyclu.org>; Bauer, Andrew <Andrew.Bauer@arnoldporter.com>; Gersch, David P. <David.Gersch@arnoldporter.com>; Grossi, Peter T. <Peter.Grossi@arnoldporter.com>; Weiner, David J. <David.Weiner@arnoldporter.com>; Young, Dylan Scot <dylan.young@arnoldporter.com>; Kelly, Caroline <Caroline.Kelly@arnoldporter.com>

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: Various Matters

Counsel,

Thank you for your patience. As I believe you are aware, Defendants will be filing shortly a motion for a stay of discovery. In addition, the Court's 7/3 order did not permit third party discovery. Defendants therefore do not consent to this request.

Kate Bailey

Sent from my Verizon, Samsung Galaxy smartphone

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

From: Dale Ho <dale.ho@aclu.org>

Date: 8/30/18 1:30 PM (GMT-05:00)

To: "Bailey, Kate (CIV)" <katbaile@CIV.USDOJ.GOV>, "Freedman, John A." <John.Freedman@arnoldporter.com>, "Coyle, Garrett (CIV)" <gcoyle@CIV.USDOJ.GOV>, "Federighi, Carol (CIV)" <CFederig@CIV.USDOJ.GOV>, "Kopplin, Rebecca M. (CIV)" <rkopplin@CIV.USDOJ.GOV>, "Halainen, Daniel J. (CIV)" <dhalaine@CIV.USDOJ.GOV>, "Tomlinson, Martin M. (CIV)" <mtomlins@CIV.USDOJ.GOV>, "Ehrlich, Stephen (CIV)" <sehrlich@CIV.USDOJ.GOV>

Cc: "Colangelo, Matthew" <Matthew.Colangelo@ag.ny.gov>, "Goldstein, Elena (Elena.Goldstein@ag.ny.gov)" <Elena.Goldstein@ag.ny.gov>, "Saini, Ajay" <Ajay.Saini@ag.ny.gov>, Sarah Brannon <sbrannon@aclu.org>, Perry Grossman <PGrossman@nyclu.org>, "Bauer, Andrew" <Andrew.Bauer@arnoldporter.com>, "Gersch, David P." <David.Gersch@arnoldporter.com>, "Grossi, Peter T." <Peter.Grossi@arnoldporter.com>, "Weiner, David J." <David.Weiner@arnoldporter.com>, "Young, Dylan Scot" <dylan.young@arnoldporter.com>, "Kelly, Caroline" <Caroline.Kelly@arnoldporter.com>

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: Various Matters

Counsel –

We are following up on the request below for your consent to our motion for leave to seek third-party discovery from Kris Kobach. I believe that Carlotta indicated yesterday after the 30(b)(6) deposition that defendants were likely to consent to this request; we would like to confirm one way or the other by close of business today so that we can state your position in our motion, which we intend to file today.

Regards,

Dale Ho

(Pronouns: He/Him/His)

Director, Voting Rights Project

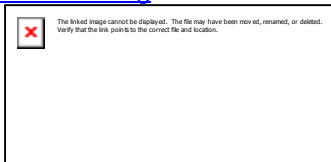
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From: Dale Ho

Sent: Tuesday, August 28, 2018 1:47 PM

To: Bailey, Kate (CIV); Freedman, John A.; Coyle, Garrett (CIV); Federighi, Carol (CIV); Kopplin, Rebecca M. (CIV); Halainen, Daniel J. (CIV); Tomlinson, Martin M. (CIV); Ehrlich, Stephen (CIV)

Cc: 'Colangelo, Matthew'; 'Goldstein, Elena' (Elena.Goldstein@ag.ny.gov) (Elena.Goldstein@ag.ny.gov); 'Saini, Ajay'; Sarah Brannon; Perry Grossman; Bauer, Andrew; Gersch, David P.; Grossi, Peter T.; Weiner, David J.; Young, Dylan Scot; Kelly, Caroline

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: Various Matters

Counsel,

Thank you for your email. Our responses on various items are below -

Item 2 (Gore deposition and DOJ documents). We will review your proposed clawback agreement and get back to you. We note that you still have not provided dates for Mr. Gore's availability for the weeks of 9/3 and 9/10.

Item 3(2) (Title 13 review). Thank you for your response regarding Title 13 review. Given that Title 13 review was completed last week for the first tranche of documents, we do not understand why these documents have not yet been produced, particularly in light of the 30(b)(6) deposition tomorrow. Please produce these documents immediately.

Item 3(3) (Abowd documents). We have not received an explanation as to why these documents have not been produced. Please produce these documents immediately in light of the 30(b)(6) deposition tomorrow.

In addition to the materials we have previously requested, counsel from one of the other actions has asked that the Government also identify or produce the following:

- The analysis that estimates a 5.8 percentage point differential decrease in self-response caused by the citizenship question, and all related documents and data. (Abowd Tr. 202-03.)
- Documents concerning field instructions for how hard to press for proxies. (Abowd Tr. 216.)
- Documents concerning the relationship between self-response rate and net undercount. (Abowd Tr. 228-29.)
- Documents concerning procedures for whole-person imputation for the 2020 census. (Abowd Tr. 233.)
- Documents concerning the use of administrative records for imputation for the 2020 census. (Abowd Tr. 233.)

Item 3(4)(a) (Interrogatories). Please confirm that you will respond to our modified interrogatories and by what date.

Items 3(4)(b)-(c) (completeness of the record). We understand your position that the AR is complete and that you will not perform searches of additional custodians or search terms beyond the ones that you have already conducted.

Last, we write to request your consent for limited third-party discovery, in the form of a Rule 45 request for production of documents from, and deposition of, Kris Kobach. As you know, the Administrative Record reveals that Mr. Kobach was intimately involved in Secretary Ross's decision to add a citizenship question to the 2020 Census. See AR 763, 764. The AR includes an email exchange between Mr. Kobach and Wendy Teramoto, and references to at least one conversation between the two of them.

At her deposition on Friday, however, Ms. Teramoto testified that she "ha[s] no idea" who Mr. Kobach is. In response to the question, "[d]o you recall speaking with Kris Kobach," Ms. Teramoto replied, "[n]ot at all." She also testified "I have no recollection of ever speaking to him," and that she "had no idea" who Mr. Kobach was at the time of their interactions. In response to the question "why did you set up a call with him [and] the Secretary," she responded "I don't remember." She further testified that she "ha[s] no idea" whether there are any notes of Secretary Ross's subsequent conversation with Mr. Kobach.

In light of Mr. Kobach's apparent role in the Secretary's decision to add the citizenship question, and Ms. Teramoto's inability to testify about her interactions Mr. Kobach—including those interactions with Mr. Kobach to which she was the only Commerce Department official who was a party—we intend to seek leave of

the Court to take discovery from Mr. Kobach. Please confirm whether you will oppose or consent to this request.

Regards,

Dale Ho
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From: Bailey, Kate (CIV) <Kate.Bailey@usdoj.gov>

Sent: Monday, August 27, 2018 11:42:35 PM

To: Dale Ho; Freedman, John A.; Coyle, Garrett (CIV); Federighi, Carol (CIV); Kopplin, Rebecca M. (CIV); Halainen, Daniel J. (CIV); Tomlinson, Martin M. (CIV); Ehrlich, Stephen (CIV)

Cc: 'Colangelo, Matthew'; 'Goldstein, Elena' (Elena.Goldstein@ag.ny.gov) (Elena.Goldstein@ag.ny.gov); 'Saini, Ajay'; Sarah Brannon; Perry Grossman; Bauer, Andrew; Gersch, David P.; Grossi, Peter T.; Weiner, David J.; Young, Dylan Scot; Kelly, Caroline

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: Various Matters

Counsel—

The depositions of Karen Dunn Kelley and Earl Comstock will be attended by myself, Josh Gardner, David Dewhirst, and Mike Walsh. The Census Bureau 30(b)(6) deposition will be attended by Dr. Abowd, Stephen Ehrlich, Carlotta Wells, and Michael Cannon.

We are ready to produce to you another batch of documents from DOJ and an accompanying privilege log, but we need to first secure a clawback agreement. Attached to this email is a proposed agreement and joint motion. Please review and let us know if you have any concerns; we'd like to get this on file ASAP so we may promptly overnight you additional responsive documents.

Regarding the points below, your email contains several misstatements of the positions we took in our August 21 meet and confer. For example, I represented on that call our position that we have searched the appropriate custodians based on each individuals' involvement (or lack thereof) in the process. I also represented our position that the search terms selected were designed to capture responsive documents in a manner proportional to the needs of the case, and that the search terms you proposed would be overbroad and would likely pull in a large number of materials unrelated to the issues presented in this litigation.

In response to your questions and your representation that you believed, based on the materials we have produced, that some individuals had more-substantial involvement, we agreed to confirm with the agency the role of a smaller group of "priority" individuals and to *consider* whether those individuals are likely to have responsive and relevant information the production of which would be proportional to the needs of this case. But **we did not agree to perform new searches either on additional custodians or using additional search terms for those custodians whose materials we've already searched.** I would also point out that the fact that a particular individual "was . . . involved in Dr. Abowd's analysis," or "is on roughly 50 emails already in the record" does not, by itself, indicate that a particular individual should be included as a custodian. Both Dr. Abowd's and Dr. Jarmin's files and emails were searched, as well as those of Secretary Ross's advisors within Commerce, and any relevant information provided by your proposed custodians to

those individuals already has been produced. Consistent with my representation last week, we will consult with the agency on the level of involvement of the individuals you've identified, but we do not at this time agree to add additional custodians.

Furthermore, we do not agree to search all custodians for "concepts" such as "aliens," "illegals," and "undocumented." The decision at issue concerns a question on citizenship, not legal status, and including such terms would be irrelevant and disproportionate to the case. We similarly believe that the sparse references to Steve Bannon, James McHenry, Gene Hamilton, and Marc Neumann within the record do not justify re-searching all custodians to search for these names. These individuals may interact with the Department on matters unconnected to citizenship and the census. And any responsive materials would also contain the terms we have used, including "citizenship" and "census," and have been produced. In particular, we disagree with your contention that "Mr. Bannon played a large role in precipitating the addition of the question." Also inaccurate is your assertion that "Mr. Comstock wrote in his September 8th memo that he had discussions with Mr. McHenry about the possibility of EOIR requesting addition of the question"; **the memo in question did not mention EOIR, and it is not clear that Mr. McHenry even worked in that office during the relevant timeframe.**

Additionally, I confirmed that the names Kris Kobach, Jeff Sessions, and John Gore have been searched. **I did not make any representations regarding "variants" of those names, nor did I agree to "run such terms for new custodians."**

Regarding the documents submitted for Title XIII review, the DRB has completed its review for one tranche of 22 documents, and review of the remaining documents is pending. We expect to provide an update on the first tranche shortly, including providing updated versions of the documents as appropriate, and we anticipate having a better understanding of the timing for the remaining documents later this week.

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: Dale Ho [<mailto:dho@aclu.org>]

Sent: Monday, August 27, 2018 5:44 PM

To: Bailey, Kate (CIV) <katbaile@CIV.USDOJ.GOV>; Freedman, John A. <John.Freedman@arnoldporter.com>; Coyle, Garrett (CIV) <gcoyle@CIV.USDOJ.GOV>; Federighi, Carol (CIV) <CFederig@CIV.USDOJ.GOV>; Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>; Halainen, Daniel J. (CIV) <dhalaine@CIV.USDOJ.GOV>; Tomlinson, Martin M. (CIV) <mtomlins@CIV.USDOJ.GOV>; Ehrlich, Stephen (CIV) <sehrlich@CIV.USDOJ.GOV>

Cc: 'Colangelo, Matthew' <Matthew.Colangelo@ag.ny.gov>; 'Goldstein, Elena' (Elena.Goldstein@ag.ny.gov) (Elena.Goldstein@ag.ny.gov) <Elena.Goldstein@ag.ny.gov>; 'Saini, Ajay' <Ajay.Saini@ag.ny.gov>; Sarah Brannon <sbrannon@aclu.org>; Perry Grossman <PGrossman@nyclu.org>; Bauer, Andrew <Andrew.Bauer@arnoldporter.com>; Gersch, David P. <David.Gersch@arnoldporter.com>; Grossi, Peter T. <Peter.Grossi@arnoldporter.com>; Weiner, David J. <David.Weiner@arnoldporter.com>; Young, Dylan Scot <Dylan.Young@arnoldporter.com>; Kelly, Caroline <Caroline.Kelly@arnoldporter.com>

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: Various Matters

Counsel,

We write to address three topics.

First, can you provide the names of attendees for each of the depositions this week?

Second, can you provide dates of availability for Mr. Gore and timing on production of his documents, including a privilege log? It has now been 10 days since the court's order compelling Mr. Gore's deposition.

Third, we are writing to follow up on our August 21 meet and confer.

1. This will serve to confirm your representation that the Government has produced all records from the "secured share drive" referenced in Mr. Cannon's declaration and did not limit the production from that folder to specific search terms. Please let us know immediately if that understanding is inaccurate.
2. We had understood that from the discussion on August 21 that the Disclosure Review Board was expected to review the Title 13 assertions on August 23 or 24, and the Government was going to provide an update on August 23 on status. We did not receive this update. Please advise on the status of the review, and when we should expect to receive the additional materials.
3. We have previously noted that we have been unable to find certain materials referenced by Dr. Abowd during his deposition. These are the open issues:
 - We understand that the longer version of the white paper referenced by Dr. Abowd on pages 89-90 of the final transcript (pages 83-84 in the rough draft) is included in the documents that you are reviewing and plan to produce. We have not yet received those documents.
 - At page 166-167 (formerly 159-161), Dr. Abowd mentioned that he believed that the Census Bureau had done analysis referenced in Secretary Ross' March 26 memo in tables showing the differential response rates for other ACS questions. We do not believe this analysis has been produced.
 - At page 179 (formerly page 173), Dr. Abowd testified about his review of drafts of the March 26 memo that does not appear to be privileged. We do not believe these drafts have been produced.
 - At page 206-207, Dr. Abowd testified about the August 3 report. We do not believe this has been produced. You agreed to look into this at the meet and confer.
 - On additional document that we have not previously raised is the spreadsheet Dr. Abowd testified about at page 315. We do not believe this has been produced.

Each of these documents should be identified in the record or produced immediately, i.e., before the Census Bureau 30(b)(6) deposition.

4. As we agreed to, we have conferred about our concerns about the completeness of the administrative record, we have conferred internally about prioritization of additional custodians and search terms, as well as modifications to Interrogatories 1.d and 1.e.

a. With respect to the interrogatories, we will make the following modifications to 1.d and 1.e to address the issues you raised at the meet and confer.

1.d. the date on which the "senior Administration officials" who "previously raised" reinstating the citizenship question first raised this subject with SECRETARY ROSS or with COMMERCE;

1.e. all PERSONS with whom, to the knowledge of COMMERCE and SECRETARY ROSS, the "senior Administration officials had previously raised" reinstating the citizenship question.

Please confirm that the Department of Commerce and Secretary Ross will now respond to the interrogatories under these modified requests, and please also provide a date by which you will provide your responses.

b. With respect to additional custodians to search, we ask that you prioritize the following custodians:

- Victoria Velkoff: She was heavily involved in the analysis performed by Dr. Abowd's team.
- David Raglin: Like Ms. Velkoff, he was heavily involved in Dr. Abowd's analysis.
- Eric Branstad: He served as a point person in communicating with DOJ about the addition of the citizenship question. He was also on the email where Mr. Comstock informed Secretary Ross that "illegal aliens" are counted for purposes of redistricting.
- David Langdon: He plays an active role in a number of early emails about adding the citizenship question (including AR 3685, 3686, 3702, 3888).
- Sahra Park-Su: She is on roughly 100 emails already in the record about adding the question, and participated at the August 29 meeting with Comstock.
- Brian Lenihan: He is on roughly 50 emails already in the record about adding the question.
- Aaron Willard: He is on roughly 50 emails already in the record about adding the question.

At the present time, we are willing to postpone requesting the addition of Fotnenot, Treat, Dinwiddle, Whitehorne, Herbst, and Semsar as custodians, reserving all rights as we obtain additional discovery.

Please confirm that you will search the additional custodians requested above, and please also provide a date by which you will produce responsive materials from these additional custodians.

c. With respect to search terms:

1. All custodians should be searched for concepts referencing immigrants such as "aliens," "illegals," and "undocumented";
2. All custodians should be searched for the following names:
 - Steve Bannon (and variants of his name): It is clear that Mr. Bannon played a large role in precipitating the addition of the question, and certainly as large a role as Kris Kobach, who you have already included as a search term.
 - James McHenry (and variants of his name): Mr. Comstock wrote in his September 8th memo that he had discussions with Mr. McHenry about the possibility of EOIR requesting addition of the question.
 - Eugene (Gene) Hamilton (and variants of his name): Mr. Comstock wrote in his September 8th memo that he had discussions with Mr. Hamilton about the possibility of DHS requesting addition of the question.
 - Marc Neuman (and variants of his name): The records demonstrates that he was involved in ongoing discussions with senior Commerce leadership about adding the question.

For now, we are willing to forego adding Mary Blanche Hankey and Danielle Cutrona as search terms, reserving all rights as we obtain additional discovery.

3. This will confirm that you represented that the Government has previously searched variants of Kris Kobach, Jeff Sessions, and John Gore for previously searched custodians, and will run such terms for new custodians.

Please confirm that you will add the additional search terms requested above, and please also provide a date by which you will produce responsive materials.

Regards,

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dale.ho@aclu.org

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

Sent: Sunday, August 19, 2018 3:39:56 PM

To: Freedman, John A.; Coyle, Garrett (CIV); Federighi, Carol (CIV); Kopplin, Rebecca M. (CIV); Halainen, Daniel J. (CIV); Tomlinson, Martin M. (CIV); Ehrlich, Stephen (CIV)

Cc: 'Colangelo, Matthew'; 'Goldstein, Elena' (Elena.Goldstein@ag.ny.gov) (Elena.Goldstein@ag.ny.gov); 'Saini, Ajay'; Dale Ho; Sarah Brannon; Perry Grossman; Bauer, Andrew; Gersch, David P.; Grossi, Peter T.; Weiner, David J.; Young, Dylan Scot; Kelly, Caroline

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: Various Matters

Thank you, John, for the thorough and prompt response. As an initial matter, we agree that this at least substantially narrows the parties' disagreement as to the proper scope of the 30(b)(6) deposition.

We will share and discuss this with our client as soon as possible, but it will not be possible to do so before the 9am start to Dr. Jarmin's deposition tomorrow, which means we will not be able to meet and confer during the lunch break. We intend to have a response quickly thereafter.

Kate

Sent from my Verizon, Samsung Galaxy smartphone

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

From: "Freedman, John A." <John.Freedman@arnoldporter.com>

Date: 8/19/18 1:03 PM (GMT-05:00)

To: "Bailey, Kate (CIV)" <katbaile@CIV.USDOJ.GOV>, "Coyle, Garrett (CIV)" <gcoyle@CIV.USDOJ.GOV>, "Federighi, Carol (CIV)" <CFederig@CIV.USDOJ.GOV>, "Kopplin, Rebecca M. (CIV)" <rkopplin@CIV.USDOJ.GOV>, "Halainen, Daniel J. (CIV)" <dhalaine@CIV.USDOJ.GOV>, "Tomlinson, Martin M. (CIV)" <mtomlins@CIV.USDOJ.GOV>, "Ehrlich, Stephen (CIV)" <sehrlich@CIV.USDOJ.GOV>

Cc: "'Colangelo, Matthew'" <Matthew.Colangelo@ag.ny.gov>, "'Goldstein, Elena' (Elena.Goldstein@ag.ny.gov) (Elena.Goldstein@ag.ny.gov)" <Elena.Goldstein@ag.ny.gov>, "'Saini, Ajay'" <Ajay.Saini@ag.ny.gov>, DHo@aclu.org, SBrannon@aclu.org, PGrossman@nyclu.org, "Bauer, Andrew" <Andrew.Bauer@arnoldporter.com>, "Gersch, David P." <David.Gersch@arnoldporter.com>, "Grossi, Peter T." <Peter.Grossi@arnoldporter.com>, "Weiner, David J." <David.Weiner@arnoldporter.com>, "Young, Dylan Scot" <Dylan.Young@arnoldporter.com>, "Kelly, Caroline" <Caroline.Kelly@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: Various Matters

Counsel --

Per my email on August 17, these are responses to the objections to the Census Bureau Rule 30(b)(6) topics identified in the Defendants' August 15 letter.

1. Per Defendants' objections to topic 5 that the list includes Commerce Department documents, Plaintiffs withdraw topics 5.f & 5.g. If there are other documents that are not Census Bureau documents, please identify them. The remaining documents all appear to be Census Bureau documents, and Dr. Abowd testified about many of them during his August 15 deposition.
2. Per Defendants' objections to topics 11 & 12, Plaintiffs withdraw topics 11 and 12.a and 12.b. Topics 12.c-12.f concern the Census Bureau's adherence to the relevant agency directives, guidelines and policies during its consideration of adding the citizenship question to the Decennial Census. The witness will not be asked for legal interpretations of these standards.
3. With regard to Defendants' objections to topic 13, we understand the Census Bureau is prepared to provide a witness to discuss the designated topic for the 2000, 2010 and 2020 Census. At the meet and confer, please be prepared to discuss whether or not there is a current Census Bureau employee who can testify regarding this topic for the 1990 Census.
4. With respect to Defendants' objections to topic 15, we will reformulate and narrow the request to be "The current estimate of the Census Bureau's Population Estimates Program for the population of the United States at present and its projection for United States population at the time the apportionment calculation will be conducted, including breakdown of this information by metropolitan and micropolitan statistical areas, counties, cities, and towns. And general information about the process by what these numbers are calculated." To facilitate the Census Bureau's ability to provide this information, Plaintiffs would be willing to accept a proposed stipulation with the data as to the numbers themselves.
5. With respect to Defendants' Title 13 objections to topics 17 and 20, we are prepared to discuss the specific Title 13 concerns. We note that significant ACS data has been publicly released, and additional data for the 2017 ACS is scheduled to be released in early September. We would also suggest that any Title 13 covered information should be submitted immediately to the DRP for review.
6. With respect to Defendants' objections to topic 18, Plaintiffs agree to narrow the scope of discussion about the CPS as follows: "Current Population Survey results since January 1, 2015, including any analysis of unit and item non-response rates, with breakdowns by demographic group and geography." Dr. Abowd knowledgeably discussed the CPS during the August 15 deposition. In the event he is not able to discuss in detail, the Census Bureau should produce a witness with sufficient knowledge.
7. With respect to Defendants' objections to topic 20, Plaintiffs agree to reformulate the topic to "Census Barriers, Attitudes and Motivators Surveys (CBAMS) in preparation of the 2010 Decennial Census and in preparation for the 2020 Decennial Census." Given the Census Bureau's reliance on data from the 2010 census in analyzing the potential addition of a citizenship question, we think that the information from CBAMS for 2010 census is relevant to matters at issue in this case.

As for the current CBAMS, Dr. Abowd already mentioned an August 3, 2018 report about this work and also there have been several public presentations (in Nov. 2017 and May 2018) about the results from focus group work that the Census Bureau has been conducting in relation to the 2020 Decennial Census. To the extent Dr. Abowd is not able to discuss this topic, the Census Bureau should produce a witness with sufficient knowledge.

8. Plaintiffs withdraw topics 1, 2, 3 & 4.

We trust these positions address the overwhelming majority of issues Defendants have raised and have significantly narrow the remaining issues. As we indicated on Friday, all counsel who need to participate from

the Plaintiffs' side will be available to meet and confer about the full agenda we have proposed during the lunch break on Monday.

Best regards,

John

John A. Freedman

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Exhibit 2

Freedman, John A.

From: Freedman, John A.
Sent: Friday, August 31, 2018 5:11 PM
To: 'Federighi, Carol (CIV)'; zzz.External.DHo@aclu.org; 'Goldstein, Elena'; 'Bailey, Kate (CIV)'; 'Coyle, Garrett (CIV)'; 'Kopplin, Rebecca M. (CIV)'; 'Halainen, Daniel J. (CIV)'; 'Tomlinson, Martin M. (CIV)'; 'Ehrlich, Stephen (CIV)'
Cc: 'Colangelo, Matthew'; 'Saini, Ajay'; zzz.External.SBrannon@aclu.org; zzz.External.PGrossman@nyclu.org; Bauer, Andrew; Gersch, David P.; Grossi, Peter T.; Weiner, David J.; Young, Dylan Scot; Kelly, Caroline
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: Various Matters

Carol --

Thanks for the time to talk today. To recap our position:

1. We are happy to discuss the scope of the DOJ subpoena, including whether there are accommodations we can make on scope and custodians that would reduce burden on DOJ. We understand that DOJ has a set of materials ready for production that will be produced once the clawback agreement has been signed, and that approximately 10,000 documents have been collected for review. We agree there is no need to review or produce press clips (which we understand from Kate are a substantial portion of the 10,000 documents), and we are willing to discuss further whether there are other things that can be done to address DOJ's burden concerns.
2. On the clawback agreement, you indicated you were fine with our proposed edits. We have asked counsel in the other cases to confirm they are OK with the scope of the proposed order. At this time we can report the California, San Jose, and LUPE plaintiffs are fine with the agreement. We will report back when we hear from the Kravitz plaintiffs.
3. On the Census Bureau RFPs, we are still evaluating the objections. We are working on identifying specific areas for follow up, and will be willing to work with the Defendants to address any concerns about burden associated with the requests.
4. On the Commerce Department RFPs, we understand that rolling productions are still being made in five categories. We remain willing to work with the Defendants to address any concerns about burden associated with the requests. Also -- I should be clear that when I made observations to the effect I thought the Commerce Department had completed production, I was referring specifically to the RFP production; as reflected in my recent emails, we have ongoing concerns about the comprehensiveness of the search terms and selection of custodians for purposes of assembling the Administrative Record.
5. We are not willing to consent to a discovery stay, and we believe the mutual exchange of productions should continue and the deposition of John Gore should proceed, as should the briefing on the Kris Kobach deposition.

As discussed, for purposes of your motion to stay discovery, we would ask you include the following statement regarding our position. "The *New York* and *NYIC* Plaintiffs oppose a discovery stay, and remain willing to work with the Defendants to address or otherwise accommodate any concerns about burden associated with our discovery requests."

Thanks & best regards,

John

John A. Freedman

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Exhibit 3

E.D.N.Y.-Bklyn
16-cv-4756
17-cv-5228
Garaufis, J.
Orenstein, M.J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of December, two thousand seventeen.

Present:

Barrington D. Parker,
Gerard E. Lynch,
Christopher F. Droney,
Circuit Judges.

In re Kirstjen M. Nielsen, Secretary of Homeland
Security,

17-3345

*Petitioner.**

Petitioner Kirstjen M. Nielsen, the Secretary of the Department of Homeland Security, seeks a writ of mandamus to stay discovery orders entered by the District Court that required the Government (1) to supplement the administrative record it filed with the District Court and (2) to file a privilege log, in litigation challenging the decision to rescind the Deferred Action for Childhood Arrivals (“DACA”) program.

Upon due consideration, it is hereby ORDERED that the mandamus petition is DENIED, and the stay of the District Court’s discovery orders is LIFTED. Mandamus is “a drastic and extraordinary remedy reserved for really extraordinary causes.” *Balintulo v. Daimler AG*, 727 F.3d 174, 186 (2d Cir. 2013) (quoting *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004)). To be entitled to mandamus relief, a petitioner must show (1) that it has “no other adequate means to obtain the relief [it] desires,” (2) that “the writ is appropriate under the circumstances,” and (3) that the “right to issuance of the writ is clear and undisputable.” *In re Roman Catholic Diocese of Albany, Inc.*, 745 F.3d 30, 35 (2d Cir. 2014) (quoting *Cheney*, 542 U.S. at 380–81). We have “expressed reluctance to issue writs of mandamus to overturn discovery rulings,” and will do so only “when a discovery question is of extraordinary significance or there is an extreme need for reversal of the district court’s mandate before the case goes to judgment.” *In re City of New York*, 607 F.3d 923, 939 (2d Cir. 2010) (internal quotation marks omitted). “Because the writ of mandamus is such an extraordinary remedy, our analysis of whether the petitioning party has a

* In accordance with Fed. R. App. P. 43(c)(2), the Clerk of Court is directed to amend the caption as set forth above.

clear and indisputable right to the writ is necessarily more deferential to the district court than our review on direct appeal,” *Linde v. Arab Bank, PLC*, 706 F.3d 92, 108–09 (2d Cir. 2013) (internal quotation marks omitted), and the writ will not issue absent a showing of “a judicial usurpation of power or a clear abuse of discretion,” *In re City of New York*, 607 F.3d at 943 (emphasis omitted) (internal quotation marks omitted).

The Government argues that it cannot be ordered (1) to supplement its administrative record or (2) to produce a privilege log for materials withheld from the record. With respect to the Government’s first argument, the Government’s position appears to be that in evaluating agency action, a court may only consider materials that the Government unilaterally decides to present to the court, rather than the record upon which the agency made its decision. To the contrary, judicial review of administrative action is to be based upon “the full administrative record that was before the Secretary at the time [s]he made [her] decision.” *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). “The [Administrative Procedure Act (“APA”)] specifically contemplates judicial review on the basis of the agency record compiled in the course of informal agency action in which a hearing has not occurred.” *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Allowing the Government to determine which portions of the administrative record the reviewing court may consider would impede the court from conducting the “thorough, probing, in-depth review” of the agency action with which it is tasked. *Overton Park*, 401 U.S. at 415.¹

We have previously held that whether the complete record is before the reviewing court “may itself present a disputed issue of fact when there has been no formal administrative proceeding.” *Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982). This is particularly true in a case like the one before us “where there is a strong suggestion that the record before the Court was not complete.” *Id.* In such a situation, a court must “permit[] plaintiffs some limited discovery to explore whether some portions of the full record were not supplied to the Court.” *Id.*

Plaintiffs in the District Court have identified specific materials that appear to be missing from the record. For example, in her memorandum terminating DACA, then-Acting Secretary Elaine C. Duke indicated that “[United States Citizenship and Immigration Services] has not been able to identify specific denial cases where an applicant appeared to satisfy the programmatic categorical criteria as outlined in the [original DACA] memorandum, but still had his or her application denied based solely upon discretion.” Elaine C. Duke, *Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA)*, Dep’t of Homeland Security (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>. Presumably, then-Acting Secretary Duke based this factual assertion upon evidence, yet that evidence is not in the record filed in the District Court. Additionally, in parallel litigation challenging the repeal of DACA in

¹ In arguing for a different rule, the Government cites language from *Florida Power* indicating that the “task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court.” 470 U.S. at 743–44 (citation omitted). However, the Government takes this language out of context. The *Florida Power* Court used this language in explaining that, ordinarily, additional factfinding in the District Court is inappropriate; the Court did not suggest that the Government may prevent a reviewing court from considering evidence that the agency considered by not filing that evidence as part of the administrative record in the reviewing court. *Id.* at 743–45.

the Northern District of California in which the Government filed the same administrative record, the District Court—following *in camera* review of documents considered during the repeal of DACA but not included in the record filed with the court—concluded that 48 of those documents were not subject to privilege. *See* Statement of District Court in Response to Application for a Stay at 3, *In re United States*, 583 U.S. ___, 2017 WL 6505860 (Dec. 20, 2017) (No. 17-801); *see also Regents of Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, Nos. C 17-05211, C 17-05235, C 17-05329, C 17-05380, 2017 WL 4642324, at *8 (N.D. Cal. Oct. 17, 2017). Also, as the Supreme Court pointed out, nearly 200 pages of the 256 page record submitted to the District Court consist of published opinions from various federal courts. *In re United States*, 2017 WL 6505860, at *1. It is difficult to imagine that a decision as important as whether to repeal DACA would be made based upon a factual record of little more than 56 pages, even accepting that litigation risk was the reason for repeal. Accordingly, “there is a strong suggestion that the record before the [District Court] was not complete,” entitling the plaintiffs to discovery regarding the completeness of the record. *Dopico*, 687 F.2d at 654.

The Government also argues that it should not be required to produce a privilege log of documents that it withheld from the record on the basis of privilege because disclosure would “‘probe the mental processes’ of the agency.” Full Pet. For Mandamus 22 (quoting *United States v. Morgan*, 304 U.S. 1, 18 (1938)). First, while it is true that “review of deliberative memoranda reflecting an agency’s mental process . . . is usually frowned upon, in the absence of formal administrative findings”—*e.g.*, in the case of “[a] nonadjudicatory, nonrulemaking agency decision”—“they may be considered by the court to determine the reasons for the decision-maker’s choice.” *Suffolk v. Sec’y of the Interior*, 562 F.2d 1368, 1384 (2d Cir. 1977) (citations omitted). Thus, the possibility that some documents not included in the record may be deliberative does not necessarily mean that they were properly excluded. Second, without a privilege log, the District Court would be unable to evaluate the Government’s assertions of privilege. *See Nat’l Nutritional Foods Ass’n v. Mathews*, 557 F.2d 325, 333 (2d Cir. 1977) (finding no abuse of discretion in District Court refusal to compel disclosure *after* it reviewed documents *in camera* and concluded they were protected by deliberative privilege).²

We are unpersuaded by the Government’s argument that compliance with the orders would be overly burdensome due to the scope of the documents that it must review to comply with the District Court’s order and the protracted timeline allowed for compliance. Administrative records, particularly those involving an agency action as significant as the repeal of DACA, are often quite voluminous. *See, e.g., Georgia ex. rel. Olens v. McCarthy*, 833 F.3d 1317, 1320 (11th

² We express no opinion at this juncture as to whether discovery is appropriate in connection with plaintiffs’ non-APA claims. We note, however, that even if the Government were correct that a deliberative privilege prevents discovery with respect to the APA claims, the Government could not rely on such privilege to avoid all discovery with respect to plaintiffs’ constitutional claims. *See Webster v. Doe*, 486 U.S. 592, 604 (1988) (holding that in the context of a suit against the Central Intelligence Agency, “the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent’s need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission.”); *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998) (“If the plaintiff’s cause of action is directed at the government’s intent, however, it makes no sense to permit the government to use the [deliberative process] privilege as a shield.”).

Cir. 2016) (noting that the administrative record “is more than a million pages long”); *Chem. Mfrs. Ass’n v. U.S. EPA*, 870 F.2d 177, 184 (5th Cir. 1989) (noting that the administrative record was 600,000 pages). Moreover, in order to accommodate the Government’s concerns, the District Court three times modified the magistrate judge’s discovery order, the first time by extending the deadline, the second time by limiting the order’s scope to documents before the Department of Justice and the Department of Homeland Security, and the third time by limiting it to documents considered by then-Acting Secretary Duke or Attorney General Jefferson B. Sessions or their “first-tier subordinates—i.e., anyone who advised them on the decision to terminate the DACA program.” *Batalla Vidal v. Duke*, Nos. 16 CV 4756, 17 CV 5228, 2017 WL 4737280, at *5 (E.D.N.Y. Oct. 19, 2017). At oral argument, the Government conceded that the number of documents covered by the order, as modified, is approximately 20,000, a far smaller number than the Government’s papers led this Court to believe. We are satisfied that under the circumstances, compliance with the District Court’s order would not be an undue burden on the Government.

We have been particularly attentive to the Supreme Court’s recent opinion granting certiorari and remanding to the District Court in parallel litigation in the Northern District of California. *See In re United States*, 2017 WL 6505860. Contrary to the Government’s argument, however, we conclude that that decision does not strengthen the Government’s position in the matter before this Court, because the posture of this case in the District Court here, and the orders issued by the District Court in this matter, are significantly distinguishable from those in the California case. Further, the Supreme Court did not decide the merits of the discovery dispute, instead remanding to the District Court to first resolve the Government’s threshold arguments “that the Acting Secretary’s determination to rescind DACA is unreviewable because it is ‘committed to agency discretion,’ 5 U.S.C. § 701(a)(2), and that the Immigration and Nationality Act deprives the District Court of jurisdiction.” *Id.* at *2. In the case before this court, the District Court has already considered and rejected these threshold arguments. *Batalla Vidal v. Duke*, No. 16 CV 4756, 2017 WL 5201116, at *9, 13 (E.D.N.Y. Nov. 9, 2017). Of course, as the Supreme Court pointed out, the Government has the right to ask the District Court to certify its ruling for interlocutory appeal under 28 U.S.C. § 1292(b), and has announced its intention to do so. While we decline to reserve decision on this petition while the Government pursues an interlocutory appeal, it may be prudent for the District Court to stay discovery pending the resolution of such proceedings. *See In re United States*, 2017 WL 6505860, at *2.

We acknowledge that the Supreme Court noted that “[t]he Government makes serious arguments that at least some portions of the District Court’s order are overly broad.” *Id.* However, in the case pending in the Northern District of California, the District Court’s discovery order applied to documents considered by persons “anywhere in the government,” *id.*, which appears to include White House documents, creating possible separation of powers issues not at issue in this case, *see Cheney*, 542 U.S. at 382 (“[S]eparation-of-powers considerations should inform a court of appeals’ evaluation of a mandamus petition involving the President or the Vice President.”) The California order also appears to cover a far larger universe of documents than the contested orders before this Court. In contrast, here, the District Court’s order covers only documents considered by then-Acting Secretary Duke and Attorney General Sessions, as well as their first-tier subordinates. The order thus does not encompass White House documents, and, as noted above,

the number of officials whose files would be reviewed, and the number of documents that would be involved in that review, would be dramatically fewer than in the case before the Supreme Court.

The Supreme Court also indicated that “the District Court may not compel the Government to disclose any document that the Government believes is privileged without first providing the Government with the opportunity to argue the issue.” *In re United States*, 2017 WL 6505860, at *2. The District Court here has required only a privilege log, and has not ordered the production of any documents over which the Government asserts privilege. The order thus plainly contemplates an orderly resolution of any claims of privilege, and we are confident that the District Court will provide the Government with an opportunity to be heard on any claims of privilege it may assert.

We have considered Petitioner’s additional arguments and find no basis for the extraordinary remedy of mandamus relief. Accordingly, the petition is DENIED, and the stay of the District Court’s discovery orders is LIFTED.

FOR THE COURT:

Catherine O’Hagan Wolfe, Clerk of Court

The block contains a handwritten signature in cursive script that reads "Catherine O'Hagan Wolfe". Overlaid on the signature is the official seal of the United States Second Circuit Court of Appeals. The seal is circular with a blue border. Inside the border, the words "UNITED STATES" are at the top, "SECOND CIRCUIT" is in the center, and "COURT OF APPEALS" is at the bottom. There are small stars on either side of the central text.

Exhibit 4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK IMMIGRATION COALITION, ET AL.,

Plaintiffs,

vs. Case No. 1:18-CF-05025-JMF

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

Defendants.

Washington, D.C.

Thursday, August 30, 2018

Deposition of:

EARL COMSTOCK

called for oral examination by counsel for
Plaintiffs, pursuant to notice, at the office of
Arnold & Porter, 601 Massachusetts Avenue NW,
Washington, D.C., before KAREN LYNN JORGENSEN,
RPR, CSR, CCR of Capital Reporting Company,
beginning at 9:08 a.m., when were present on
behalf of the respective parties:

1 reported back to the Secretary, I'm sorry,
2 Mr. Secretary, it does not appear we can
3 accomplish this objective.

4 Q Why did you need to come up with a reason
5 for asking the question, separate and apart from
6 whatever reason the Secretary had in his own head?

7 A Again, my job is to figure out how to
8 carry out what my boss asks me to do. So you go
9 forward and you find a legal rationale. Doesn't
10 matter what his particular personal perspective is
11 on it. It's not -- it's not going to be the basis
12 on which a decision is made.

13 Q That's your understanding, that the way
14 you should do it, is come up with a rationale that
15 has nothing to do with what's in the Secretary's
16 mind as to why he wants it; is that your
17 understanding of how it's supposed to work?

18 A No. Again, you continue to characterize
19 things in a way that you believe may be correct,
20 but not the way I believe to be correct. My job,
21 as a person who has been doing this for 30-plus
22 years for clients and people in the government, is

1 if they would like to accomplish an objective, I
2 see if there's a way to do that. And, again, if
3 it's not legal, you tell them that. If it can't
4 be done, you tell them that. If there's a way to
5 do it, then you help them find the best rationale
6 to do it. That's what a policy person does.

7 And so, again, if I came up with a
8 rationale that the Secretary didn't agree with or
9 didn't support, then he was going to tell me that.
10 I have no doubt about that. But in the meantime,
11 he doesn't -- I don't need to know what his
12 rationale might be, because it may or may not be
13 one that is -- that is something that's going to a
14 legally-valid basis.

15 So, again, he's got -- he's asked, can we
16 put -- can we put a question on? The job of a
17 policy person is go out and find out how you do
18 that. Whether that decision is going to be made
19 ultimately to do it or not, that's up to the
20 decision-maker.

21 Q Are you saying you're better off not
22 knowing what the Secretary's own rationale is for

1 wanting the citizenship question?

2 A The Secretary, as you would point out, is
3 not a voting rights lawyer, so I would not expect
4 him to necessarily come up with a rationale.
5 That's the job of the staff at work.

6 Q You certainly wouldn't expect the
7 Secretary to have come up with the idea that the
8 reason he should want the citizenship question is
9 the Voting Rights Act; you wouldn't expect him to
10 come up that on his own?

11 A I -- he might well. I don't know.

12 Q You have no reason to believe that he
13 did, right?

14 MR. GARDNER: Objection. Calls for
15 speculation.

16 THE WITNESS: I'm not going to speculate
17 about what his rationale was. You'd have to --

18 BY MR. GERSCH:

19 Q Because --

20 A -- ask him.

21 Q -- because you have no idea what his
22 rationale is?

1 A That's correct.

2 Q Counsel asked you about contact you made
3 with the Department of Justice --

4 A Correct.

5 Q -- starting with a Ms. Haney [sic], I
6 believe.

7 Do you recall that?

8 A Yes. I believe her name is Hankey,
9 but --

10 Q Hankey. I apologize.

11 What was the full name? I can get it out
12 if you don't know it offhand.

13 A Mary Blanche, but --

14 Q I'll find it in here.

15 A It's in one of these exhibits, the memo
16 that I wrote. Here.

17 Q Mary Blanche --

18 A Yep.

19 Q -- Hankey; is that right?

20 A Yeah.

21 Q All right. So you went -- you called
22 Mary Blanche Hankey --

1 A Correct.

2 Q -- with regard to adding a citizenship
3 question to the census, right?

4 A Correct.

5 Q And you wanted to see if the
6 Department of Justice would sponsor the question?

7 A Correct.

8 Q And you had a phone call with her, and
9 you had at least a meeting with her, right?

10 A Right.

11 Q So at least two contacts?

12 A Three, when she called me back with
13 somebody else's name.

14 Q Fair enough.

15 Didn't -- didn't Ms. Hankey say, why do
16 you want to have a citizenship question?

17 A No, she didn't.

18 Q Didn't come up, at all?

19 A Nope.

20 Q She referred you to a Mr. McHenry; is
21 that right?

22 A Correct.

Exhibit 5

To: hilary geary [REDACTED]
From: Alexander, Brooke (Federal)
Sent: Wed 4/5/2017 4:24:19 PM
Importance: Normal
Subject: tonight
Received: Wed 4/5/2017 4:24:00 PM

Mrs. Ross,

Do you have plans following the Newseum? I'm asking because Steve Bannon has asked that the Secretary talk to someone about the Census and around 7-7:30 pm is the available time. He could do it from the car on the way to a dinner ...

Brooke V Alexander

Executive Assistant to the Secretary

The U.S. Department of Commerce

Washington, D.C. 20230

balexander@doc.gov

202-482-[REDACTED] office

[REDACTED] cell

From: A M Neuman [REDACTED]
Sent: 4/14/2017 3:41:31 AM
To: Comstock, Earl (Federal) [REDACTED]
Subject: Re: Census Question

I believe that the annual notification to Congressional committee relating to questionnaire content additions for 2020 Census just took place. (Which is why there were a few articles about the lack of planned questions relating to sexual orientation).
Let me double-check on that.

There will be another opportunity next year.

I recommend that you ask the Bureau to provide a list of the response rates on ALL demographic questions currently asked on the ACS. You will see whether certain demographic questions have lower response rates than others -- especially among certain demographic groups. That is something that can be provided OFF THE SHELF.

A. Mark Neuman

> On Apr 13, 2017, at 9:58 PM, Comstock, Earl (Federal) <[REDACTED]> wrote:
>
> Hi Mark -- quick question. When does Census need to notify Congress regarding the questions that will be on (A) the ACS and (B) the decennial Census?
>
> Thanks. Earl
>
> Sent from my iPhone

From: Wilbur Ross [REDACTED]
Sent: 5/2/2017 2:23:38 PM
To: Teramoto, Wendy (Federal) [REDACTED]
Subject: Re: Census

Let's try to stick him in there for a few days to fact find. W

Sent from my iPhone

On May 2, 2017, at 7:17 AM, Teramoto, Wendy (Federal) <[REDACTED]> wrote:
I continue to talk frequently with Marc Neumann and we often have dinner together. He will not leave les but is in love with the census and talks about it non stop. [REDACTED] Do you want me to set up another meeting? [REDACTED]
[REDACTED] Let me know if you want to have a drink or get together with him over the weekend.
Wendy

Sent from my iPhone

Begin forwarded message:

From: "Alexander, Brooke (Federal)" <[REDACTED]>
Date: May 2, 2017 at 7:10:21 AM PDT
To: "Teramoto, Wendy (Federal)" <[REDACTED]>
Subject: FW: Census

-----Original Message-----

From: Wilbur Ross [REDACTED]
Sent: Tuesday, May 02, 2017 10:04 AM
To: Comstock, Earl (Federal) <[REDACTED]>; Herbst, Ellen (Federal) <[REDACTED]>
Subject: Census

[REDACTED]

Worst of all they emphasize that they have settled with congress on the questions to be asked. I am mystified why nothing have been done in response to my months old request that we include the citizenship question. Why not? [REDACTED]

[REDACTED]

From: Comstock, Earl (Federal) [REDACTED]
Sent: 5/2/2017 2:19:11 PM
To: Wilbur Ross [REDACTED]
CC: Herbst, Ellen (Federal) [REDACTED]
Subject: Re: Census

I agree Mr Secretary.

On the citizenship question we will get that in place. The broad topics were what were sent to Congress earlier this year as required. It is next March -- in 2018 -- when the final 2020 decennial Census questions are submitted to Congress. We need to work with Justice to get them to request that citizenship be added back as a census question, and we have the court cases to illustrate that DOJ has a legitimate need for the question to be included. I will arrange a meeting with DOJ staff this week to discuss.

Earl

Sent from my iPhone

> On May 2, 2017, at 10:04 AM, Wilbur Ross [REDACTED] wrote:
>

[REDACTED]

[REDACTED] worst of all they emphasize that they have settled with congress on the questions to be asked. I am mystified why nothing have been done in response to my months old request that we include the citizenship question. Why not? [REDACTED]

[REDACTED]

> Sent from my iPhone

From: Comstock, Earl (Federal) [REDACTED]@doc.gov]
Sent: 5/4/2017 11:58:40 AM
To: [REDACTED]@usdoj.gov
Subject: Call today to discuss DoC Issues

Hi Mary Blanche –

Contacts over the White House said that you would be the best person for me to talk to at DoJ on Commerce issues. I am the new Director of Policy and Strategic Planning at Commerce and was the confirmation Sherpa on the transition for Secretary Ross.

If you or your assistant could let me know a couple of times today that work for you for a call I would appreciate it.

Thank you in advance,

Earl

Earl W. Comstock
Director
Office of Policy and Strategic Planning
United States Department of Commerce
[REDACTED]

From: Comstock, Earl (Federal) [REDACTED]
Sent: 5/4/2017 12:27:32 AM
To: Branstad, Eric (Federal) [EBranstad@doc.gov]
Subject: Re: DOJ contact

Thanks Eric! Earl

Sent from my iPhone

On May 3, 2017, at 8:10 PM, Branstad, Eric (Federal) <[REDACTED]> wrote:

Eric D Branstad
Senior White House Advisor
Department of Commerce
[REDACTED]
(202) 531-1620

Begin forwarded message:

From: "Flynn, Matthew J. EOP/WHO" <[REDACTED]>

Date: May 3, 2017 at 7:15:56 PM EDT

To: "Branstad, Eric (Federal)" <[REDACTED]>

Subject: RE: DOJ contact

DOJ Mary Blanche Hankey [REDACTED] [REDACTED]

-----Original Message-----

From: Branstad, Eric (Federal) [REDACTED]

Sent: Wednesday, May 3, 2017 3:41 PM

To: Flynn, Matthew J. EOP/WHO [REDACTED]

Subject: DOJ contact

Who is best counterpart to reach out to at DOJ - Regarding Census and Legislative issue?

Thanks

Eric

Branstad, Eric (Federal)
Senior White House Advisor
Department of Commerce
(202) 531-1620
[REDACTED]

Withheld as Privileged

From: Langdon, David (Federal) [REDACTED]
Sent: 5/24/2017 10:51:56 PM
To: Blumerman, Lisa M [lisa.m.blumerman@census.gov]
Subject: Fwd: Requested Information - Legal Review All Residents...

Fyi on the citizenship question below. Can you provide a short answer? Ideally this evening.

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

From: "Langdon, David (Federal)"
Date: 05/24/2017 5:53 PM (GMT-05:00)
To: "Reist, Burton H (CENSUS/ADDC FED)"
Cc: "Creech, Melissa L" , "Dinwiddie, James L"
Subject: RE: Requested Information - Legal Review All Residents...

Actually, the Secretary seemed interested on subjects and puzzled why citizenship is not included in 2020.

[REDACTED] Say, citizenship. What criteria drives us to put it on ACS but not 2020?

From: Reist, Burton H (CENSUS/ADDC FED) [mailto:burton.h.reist@census.gov]
Sent: Wednesday, May 24, 2017 5:42 PM
To: Langdon, David (Federal) <[REDACTED]>
Cc: Creech, Melissa L <melissa.l.creech@census.gov>; Dinwiddie, James L <james.l.dinwiddie@census.gov>
Subject: Re: Requested Information - Legal Review All Residents...

David,

Melissa and I will be in early tomorrow. If you need anything let us know.

Lisa and I are also happy to discuss the Lifecycle stuff I sent and answer the questions you have.

Burton

From: Langdon, David (Federal) <[REDACTED]>
Sent: Wednesday, May 24, 2017 5:24:30 PM
To: Reist, Burton H (CENSUS/ADDC FED)

Cc: Melissa L Creech (CENSUS/PCO FED); James L Dinwiddie (CENSUS/ADDC FED)

Subject: RE: Requested Information - Legal Review All Residents...

Thank you!

I apologize for not answering sooner, but I honestly have been in meeting with SWR all afternoon. (Not the norm.)

This is a lot to digest, but I [REDACTED]

From: Reist, Burton H (CENSUS/ADDC FED) [<mailto:burton.h.reist@census.gov>]

Sent: Wednesday, May 24, 2017 4:10 PM

To: Langdon, David (Federal) [REDACTED]

Cc: Creech, Melissa L <melissa.l.creech@census.gov>; Dinwiddie, James L <james.l.dinwiddie@census.gov>

Subject: Fw: Requested Information - Legal Review All Residents...

This is the more complete set of documents that I referenced in my earlier email.

Burton

From: Misty L Reed (CENSUS/DEPDIR FED)

Sent: Wednesday, May 24, 2017 4:02 PM

To: Reist, Burton H (CENSUS/ADDC FED)

Subject: Requested Information - Legal Review All Residents...

Hotspots are amazing and luckily I scanned the files (Melissa gave me hard copies).

Let me know if there's anything else I can provide.

Thanks,

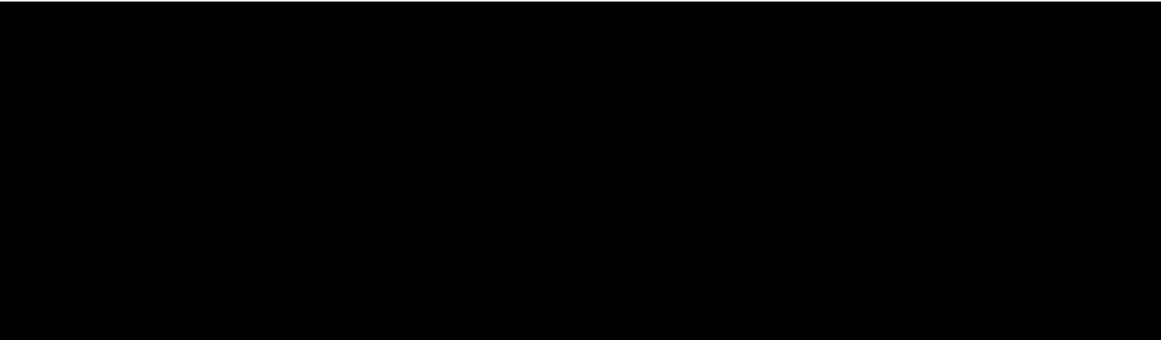
Misty

Misty Reed, PhD, PMP, Special Assistant, Communications Directorate, U.S. Census Bureau

Office 301.763.0228 Cell [REDACTED] misty.l.reed@census.gov

census.gov Connect with us on [Social Media](#)

To: Wilbur Ross[REDACTED]
From: Comstock, Earl (Federal)
Sent: Tue 8/8/2017 7:44:29 PM
Importance: Normal
Subject: Re: [REDACTED]
Received: Tue 8/8/2017 7:44:29 PM



Will be back shortly with an update on the census question. I have two attorneys in the DoC General Counsel's office working on it.

Earl

On 8/8/17, 1:20 PM, "Wilbur Ross" [REDACTED] wrote:

[REDACTED]
[REDACTED] Were you on the call this morning about Census? [REDACTED]
[REDACTED] where is the DoJ in their analysis ? If they still have not come to a conclusion please let me know your contact person and I will call the AG. Wilbur Ross

Sent from my iPhone

> On Aug 8, 2017, at 10:52 AM, Comstock, Earl (Federal) <[REDACTED]> wrote:

>

> [REDACTED]

From: Wilbur Ross [REDACTED]
Sent: 8/10/2017 7:38:25 PM
To: Comstock, Earl (Federal) [REDACTED]
Subject: Re: Census Matter

I would like to be briefed on Friday by phone. I probably will need an hour or so to study the memo first. [REDACTED] WLR

Sent from my iPad

> On Aug 9, 2017, at 10:24 AM, Comstock, Earl (Federal) <[REDACTED]> wrote:

>
> PREDECISIONAL AND ATTORNEY-CLIENT PRIVILEGED
>

> Mr. Secretary - we are preparing a memo and full briefing for you on the citizenship question. The memo will be ready by Friday, and we can do the briefing whenever you are back in the office. [REDACTED]

> Earl

> On 8/8/17, 1:20 PM, "Wilbur Ross" [REDACTED] wrote:

> [REDACTED] Were you on the call this morning about Census? [REDACTED]
> [REDACTED] where is the DOJ in their analysis? If they still have not come to a conclusion please let me know your contact person and I will call the AG.
Wilbur Ross

> Sent from my iPhone

>> On Aug 8, 2017, at 10:52 AM, Comstock, Earl (Federal) [REDACTED] wrote:

>> [REDACTED]
>
>

From: Comstock, Earl (Federal) [REDACTED]@doc.gov]
Sent: 8/16/2017 8:44:41 PM
To: Teramoto, Wendy (Federal) [REDACTED]@doc.gov]
CC: Wilbur Ross [REDACTED]
Subject: Re: Memo on Census Question

Thanks Wendy. That works for me. Earl

From: Wendy Teramoto <[REDACTED]@doc.gov>
Date: Wednesday, August 16, 2017 at 4:24 PM
To: "Comstock, Earl (Federal)" <[REDACTED]@doc.gov>
Cc: Wilbur Ross <[REDACTED]>
Subject: Re: Memo on Census Question

Peter Davidson and Karen Dunn Kelly wi both be here Monday. Let's spend 15 min together and sort this out. W

Sent from my iPhone

On Aug 11, 2017, at 4:12 PM, Comstock, Earl (Federal) <[REDACTED]@doc.gov> wrote:

Mr. Secretary –

Per your request, here is a draft memo on the citizenship question that James Uthmeier in the Office of General Counsel prepared and I reviewed. Once you have a chance to review we should discuss so that we can refine the memo to better address any issues.

Before making any decisions about proceeding I would also like to bring in Peter Davidson and Census counsel to ensure we have a comprehensive analysis of all angles.

Thanks. Earl

<Census Memo Draft2 Aug 11 2017.docx>

From: Neuhaus, Chelsey [REDACTED]
Sent: 8/29/2017 5:42:15 PM
To: Park-Su, Sahra [REDACTED]; Comstock, Earl (Federal) [REDACTED]
CC: Leach, Macie (Federal) [REDACTED]; Hernandez, Israel (Federal) [REDACTED]; Dorsey, Cameron [REDACTED]; Bedan, Morgan (Federal) [REDACTED]
Subject: RE: Census

Done. Anyone else?

Chelsey Neuhaus

Scheduler | Office of the Secretary

United States Department of Commerce

[REDACTED]

From: Park-Su, Sahra
Sent: Tuesday, August 29, 2017 1:26 PM
To: Comstock, Earl (Federal) [REDACTED]
Cc: Neuhaus, Chelsey [REDACTED]; Leach, Macie (Federal) [REDACTED]; Hernandez, Israel (Federal) [REDACTED]; Dorsey, Cameron [REDACTED]; Bedan, Morgan (Federal) [REDACTED]
Subject: Re: Census

Chelsey,

Please add me to the list of attendees. Thank you.

Sahra Park-Su

Sent from my iPhone

On Aug 29, 2017, at 1:23 PM, Comstock, Earl (Federal) [REDACTED] wrote:

Yes. That is the list as far as I know. Earl

From: "Neuhaus, Chelsey" <CNeuhaus@doc.gov>

Date: Tuesday, August 29, 2017 at 1:18 PM

To: Macie Leach [REDACTED], "Park-Su, Sahra" [REDACTED], "Hernandez, Israel (Federal)" [REDACTED], "Dorsey, Cameron" [REDACTED], "Comstock, Earl (Federal)" [REDACTED]

Cc: "Bedan, Morgan (Federal)" <[REDACTED]>

Subject: FW: Census

Hi All – Would one of you be able to confirm that these are the only attendees that should be included in next Wednesday's census briefing RE: legal questions:

Wendy Teramoto (Federal) <[REDACTED]>

Israel Hernandez (Federal) <[REDACTED]>

Earl Comstock (Federal) <[REDACTED]>

James Uthmeier (Federal) <[REDACTED]>

Davidson, Peter (Federal) <[REDACTED]>

Kelley, Karen (Federal) <[REDACTED]>

Thanks!

Chelsey Neuhaus

Scheduler | Office of the Secretary

United States Department of Commerce

From: Kelley, Karen (Federal)

Sent: Tuesday, August 29, 2017 1:11 PM

To: Teramoto, Wendy (Federal) <[REDACTED]>

Cc: Davidson, Peter (Federal) <[REDACTED]>; Hernandez, Israel (Federal) <[REDACTED]>; Comstock, Earl (Federal) <[REDACTED]>; Uthmeier, James (Federal) <[REDACTED]>; Neuhaus, Chelsey <[REDACTED]>; Bedan, Morgan (Federal) <[REDACTED]>

Subject: Re: Census

Good with me..

Sent from my iPhone

On Aug 29, 2017, at 12:36 PM, Teramoto, Wendy (Federal) <[REDACTED]> wrote:

Yes – how about next wed at 10 am --- ccing KDK.

From: Davidson, Peter (Federal)

Sent: Tuesday, August 29, 2017 12:07 PM

To: Hernandez, Israel (Federal) [REDACTED] Comstock, Earl (Federal) [REDACTED] Uthmeier, James (Federal) [REDACTED]
Cc: Teramoto, Wendy (Federal) [REDACTED]
Subject: Census

The Secretary asked to set up a briefing on some of the key legal questions he is concerned about. Can we get something on the books for next week when Izzy returns? I can't find Karen in the directory...but she should be included as well. Izzy, I know you and James have been working on this for a while...so I will hand off to you to coordinate.

From: Wilbur Ross [REDACTED]
Sent: 9/1/2017 3:12:16 AM
To: Comstock, Earl (Federal) [REDACTED]
CC: Teramoto, Wendy (Federal) [REDACTED]
Subject: Re: [REDACTED]

I have received no update, nor has there been an update [REDACTED], nor the issue of the census question, nor whether KDB thinks we have our arms around the census cost data nor another candidate. To run census, [REDACTED]

Sent from my iPad

> On Aug 31, 2017, at 6:29 AM, Comstock, Earl (Federal) [REDACTED] wrote:
>

> [REDACTED]
>
> Earl
>
> On 8/30/17, 10:37 PM, "Wilbur Ross" [REDACTED] wrote:

>
> Sent from my iPad

>
>> On Aug 30, 2017, at 5:47 PM, Comstock, Earl (Federal) [REDACTED] wrote:
>>

>> [REDACTED]
>>
>> From: "Comstock, Earl (Federal)" [REDACTED]
>> Date: Wednesday, August 30, 2017 at 5:44 PM
>> To: "Ross, Wilbur (Federal)" [REDACTED]
>> Cc: Wendy Teramoto [REDACTED]
>> Subject: [REDACTED]
>>

>> Mr. Secretary -

>> Thank you.

>>
>> Earl

>>
>> [cid:image001.png@01D321B8.05B678E0]
>> [cid:image002.png@01D321B8.05B678E0]
>> [FU ScanSnap Manager #ix500]
>>

>>
>>
>> <image001.png>
>> <image002.png>
>> <image003.png>

From: Comstock, Earl (Federal) [REDACTED]@doc.gov]
Sent: 9/1/2017 3:21:06 AM
To: Wilbur Ross [REDACTED]
CC: Teramoto, Wendy (Federal) [REDACTED]@doc.gov]
Subject: Re: ITA Request for [REDACTED]

Understood. Wendy and I are working on it.

On Census, I have a meeting tomorrow morning with Ellen and Karen where they are supposed to have definitive numbers. I will send you a report on the meeting and the numbers as soon as that finishes. I will ask Karen to report to you on any candidates and thoughts.

Earl

On 8/31/17, 11:12 PM, "Wilbur Ross" <[REDACTED]> wrote:

I have received no update, nor has there been an update on [REDACTED] nor the issue of the census question, nor whether KDB thinks we have our arms around the census cost data nor another candidate. To run census, [REDACTED]

Sent from my iPad

> On Aug 31, 2017, at 6:29 AM, Comstock, Earl (Federal) <[REDACTED]@doc.gov> wrote:

> [REDACTED]
 > [REDACTED]
 > Earl

> On 8/30/17, 10:37 PM, "Wilbur Ross" <[REDACTED]> wrote:

> Sent from my iPad

>> On Aug 30, 2017, at 5:47 PM, Comstock, Earl (Federal) <[REDACTED]@doc.gov> wrote:

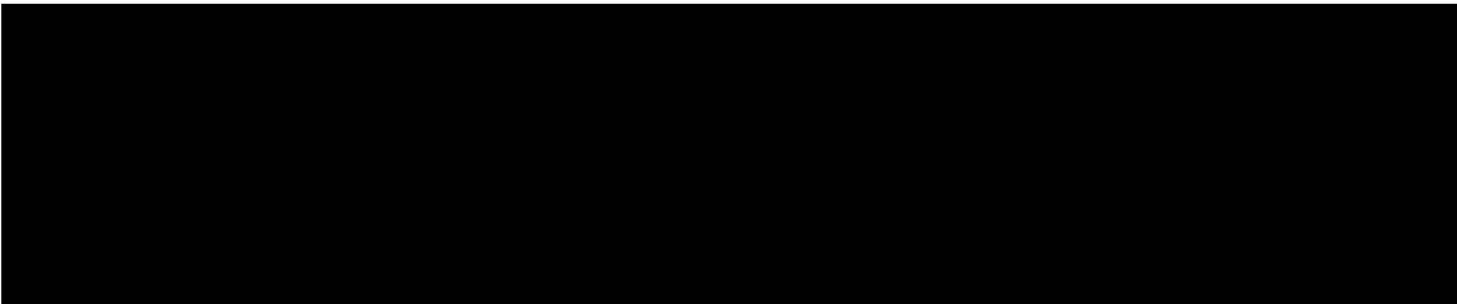
>> From: "Comstock, Earl (Federal)" <[REDACTED]@doc.gov>
 >> Date: Wednesday, August 30, 2017 at 5:44 PM
 >> To: "Ross, Wilbur (Federal)" <[REDACTED]>
 >> Cc: Wendy Teramoto <[REDACTED]@doc.gov>
 >> Subject: ITA Request for [REDACTED]

>> Mr. Secretary -
 >>

>> Thank you.
>>
>> Earl
>>
>> [cid:image001.png@01D321B8.05B678E0]
>> [cid:image002.png@01D321B8.05B678E0]
>> [FU ScanSnap Manager #iX500]
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>>
>>
>> <image001.png>
>> <image002.png>
>> <image003.png>
>
>

From: JUthmeier@doc.gov [PII]
Sent: 9/7/2017 8:58:18 PM
To: Comstock, Earl (Federal) [PII]
CC: Davidson, Peter (Federal) [PII]
Subject: Re: Census Matter Follow-Up

Hi Earl-



James

On Sep 7, 2017, at 4:53 PM, Comstock, Earl (Federal) <[PII]> wrote:
Hi Peter and James –

As I discussed with James a little while ago, the Secretary would like an update on progress since the discussion yesterday regarding the citizenship question.

If we could get a short email or memo today that would be great.

Thanks. Earl

From: Comstock, Earl (Federal) [REDACTED]@doc.gov]
Sent: 9/7/2017 10:13:10 PM
To: Davidson, Peter (Federal) [REDACTED]@doc.gov]; Uthmeier, James (Federal) [REDACTED]@doc.gov]
CC: Teramoto, Wendy (Federal) [REDACTED]@doc.gov]
Subject: Re: Census Matter Follow-Up

I suggest setting up a call for tomorrow. The Secretary is asking for progress on this. Earl

From: "Davidson, Peter (Federal)" <[REDACTED]@doc.gov>
Date: Thursday, September 7, 2017 at 5:30 PM
To: "Uthmeier, James (Federal)" <[REDACTED]@doc.gov>, "Comstock, Earl (Federal)" <[REDACTED]@doc.gov>
Cc: Wendy Teramoto <[REDACTED]@doc.gov>
Subject: RE: Census Matter Follow-Up

[REDACTED]

From: Uthmeier, James (Federal)
Sent: Thursday, September 07, 2017 4:58 PM
To: Comstock, Earl (Federal) <[REDACTED]@doc.gov>
Cc: Davidson, Peter (Federal) <[REDACTED]@doc.gov>
Subject: Re: Census Matter Follow-Up

Hi Earl-

[REDACTED]

James

On Sep 7, 2017, at 4:53 PM, Comstock, Earl (Federal) <[REDACTED]@doc.gov> wrote:

Hi Peter and James –

[REDACTED]

[REDACTED]

Thanks. Earl

Sent: 9/7/2017 9:26:42 PM
To: Uthmeier, James (Federal) [REDACTED]@doc.gov]; Comstock, Earl (Federal) [REDACTED]@doc.gov]
Subject: RE: Census Matter Follow-Up

[REDACTED]

From: Uthmeier, James (Federal)
Sent: Thursday, September 07, 2017 4:58 PM
To: Comstock, Earl (Federal) <[REDACTED]@doc.gov>
Cc: Davidson, Peter (Federal) <[REDACTED]@doc.gov>
Subject: Re: Census Matter Follow-Up

Hi Earl-

[REDACTED]

James

On Sep 7, 2017, at 4:53 PM, Comstock, Earl (Federal) <[REDACTED]@doc.gov> wrote:
Hi Peter and James –

[REDACTED]

Thanks. Earl

To: Teramoto, Wendy (Federal) [REDACTED]@doc.gov]
From: Comstock, Earl (Federal)
Sent: Sat 9/16/2017 11:33:38 AM
Importance: Normal
Subject: Calls with DoJ
Received: Sat 9/16/2017 11:33:38 AM

Case 1:18-cv-02921-JMF Document 304-5 Filed 09/06/18 Page 24 of 45

Morning Wendy –

Here is the memo I gave SWLR regarding my discussions with DoJ.

Earl

September 8, 2017

To: Secretary Wilbur Ross

Fr: Earl Comstock

Re: Census Discussions with DoJ

In early May Eric Branstad put me in touch with Mary Blanche Hankey as the White House liaison in the Department of Justice. Mary Blanche worked for AG Sessions in his Senate office, and came with him to the Department of Justice. We met in person to discuss the citizenship question. She said [REDACTED]

[REDACTED] A few days later she directed me to James McHenry in the Department of Justice.

I spoke several times with James McHenry by phone, and after considering the matter further James said [REDACTED]

[REDACTED] James directed me to Gene Hamilton at the Department of Homeland Security.

Gene and I had several phone calls to discuss the matter, and then Gene relayed that after discussion DHS really felt that it was best handled by the Department of Justice.

At that point the conversation ceased and I asked James Uthmeier, who had by then joined the Department of Commerce Office of General Counsel, to [REDACTED]

From: [REDACTED]@doc.gov [REDACTED]
Sent: 9/18/2017 3:10:02 PM
To: Gore, John (CRT) [REDACTED]
Subject: Re: Call

Hi. AG and Sec spoke. Pls let me know when you have a minute.

Sent from my iPhone

On Sep 16, 2017, at 3:55 PM, Gore, John (CRT) <[REDACTED]> wrote:
Wendy:

By this email, I introduce you to Danielle Cutrona from DOJ. Danielle is the person to connect with about the issue we discussed earlier this afternoon.

Danielle:

Wendy's cell phone number is 2 [REDACTED]

Thanks.

Sent from my iPhone

On Sep 13, 2017, at 4:57 PM, Teramoto, Wendy (Federal) [REDACTED] wrote:
Yes. CC'ing macie to set up. Look forward to connecting. W

Sent from my iPhone

On Sep 13, 2017, at 4:44 PM, Gore, John (CRT) <[REDACTED]> wrote:
Wendy:

My name is John Gore, and I am an acting assistant attorney general in the Department of Justice. I would like to talk to you about a DOJ-DOC issue. Do you have any time on your schedule tomorrow (Thursday) or Friday for a call?

Thanks.

John M. Gore
Acting Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
[REDACTED]
[REDACTED]

From: [REDACTED]@doc.gov [REDACTED]
Sent: 9/18/2017 12:24:55 AM
To: Cutrona, Danielle (OAG) [REDACTED]
Subject: Re: Call

They connected. Thanks for the help. Wendy

Sent from my iPhone

On Sep 17, 2017, at 12:10 PM, Cutrona, Danielle (OAG) <[REDACTED]> wrote:

Wendy,

The Attorney General is available on his cell. His number is 2 [REDACTED]. He is in Seattle so he is 3 hours behind us. From what John told me, it sounds like we can do whatever you all need us to do and the delay was due to a miscommunication. The AG is eager to assist. Please let me know if you need anything else. You can reach me at [REDACTED].

Thanks,

Danielle

Sent from my iPhone

On Sep 17, 2017, at 10:08 AM, Cutrona, Danielle (OAG) <[REDACTED]> wrote:

Checking now. Will let you know as soon as I hear from him.

Sent from my iPhone

On Sep 16, 2017, at 6:29 PM, Teramoto, Wendy (Federal) <[REDACTED]> wrote:

Thanks. Danielle-pls let me know when the AG is available to speak to Secretary Ross. Thanks. Anytime on the weekend is fine too. W

Sent from my iPhone

On Sep 16, 2017, at 3:55 PM, Gore, John (CRT) <[REDACTED]> wrote:

Wendy:

By this email, I introduce you to Danielle Cutrona from DOJ. Danielle is the person to connect with about the issue we discussed earlier this afternoon.

Danielle:

Wendy's cell phone number is [REDACTED]

Thanks.

Sent from my iPhone

On Sep 13, 2017, at 4:57 PM, Teramoto, Wendy (Federal) <[REDACTED]> wrote:

Yes. CC'ing macie to set up. Look forward to connecting. W

Sent from my iPhone

On Sep 13, 2017, at 4:44 PM, Gore, John (CRT) [REDACTED] wrote:
Wendy:

My name is John Gore, and I am an acting assistant attorney general in the Department of Justice. I would like to talk to you about a DOJ-DOC issue. Do you have any time on your schedule tomorrow (Thursday) or Friday for a call?

Thanks.

John M. Gore
Acting Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
[REDACTED]
[REDACTED]

From: Wilbur Ross [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=6EA444C1E0EB42CF8DC621A7B6D014B4-WLR]
Sent: 9/19/2017 3:02:32 PM
To: Davidson, Peter (Federal) [REDACTED]@doc.gov]
Subject: Census

Wendy and I spoke with the AG yesterday. Please follow up so we can resolve this issue today. WLR

Sent from my iPhone

From: Wilbur Ross [REDACTED]
Sent: 10/8/2017 10:51:01 PM
To: Davidson, Peter (Federal) [REDACTED]@doc.gov]
Subject: Re: Letter from DoJ.

Please call me at [REDACTED] WLR

Sent from my iPad

> On Oct 8, 2017, at 6:47 PM, Davidson, Peter (Federal) <[REDACTED]@doc.gov> wrote:

>

> I'm on the phone with Mark Neumann right now...he is giving me a readout of his meeting last week. I can give you an update via phone if you'd like...

>

> Sent from my iPhone

>

>> On Oct 8, 2017, at 2:56 PM, Wilbur Ross [REDACTED] wrote:

>>

>> What is its status? WLR

>>

>> Sent from my iPad

To: Davidson, Peter (Federal) [REDACTED]
From: Murnane, Barbara (Federal)
Sent: Mon 11/27/2017 5:27:47 PM
Importance: Normal
Subject: John Gore from DOJ called - his number is: [REDACTED]
Received: Mon 11/27/2017 5:27:48 PM

To: Wilbur Ross [REDACTED]
From: Davidson, Peter (Federal)
Sent: Tue 11/28/2017 12:53:51 AM
Importance: Normal
Subject: Re: Census. Questions
Received: Tue 11/28/2017 12:53:52 AM

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I can brief you tomorrow...no need for you to call. I should have mentioned it this afternoon when we spoke.

Sent from my iPhone

On Nov 27, 2017, at 7:23 PM, Wilbur Ross <[REDACTED]> wrote:

Census is about to begin translating the questions into multiple languages and has let the printing contact.
We are out of time. Please set up a call for me tomorrow with whoever is the responsible person at Justice.
We must have this resolved. WLR

Sent from my iPhone

Withheld as Privileged

From: Stephen L Buckner (CENSUS/ADCOM FED) [Stephen.L.Buckner@census.gov]
Sent: 12/19/2017 6:49:06 PM
To: Ron S Jarmin (CENSUS/ADEP FED) [Ron.S.Jarmin@census.gov]; Enrique Lamas (CENSUS/ADDP FED) [Enrique.Lamas@census.gov]
Subject: Fwd: DOC guidance sought on questions arising from the DOJ letter

Begin forwarded message:

From: "Alan Lang (CENSUS/OCIA FED)" <alan.lang@census.gov>
Date: December 19, 2017 at 1:46:51 PM EST
To: "Platt, Mike (Federal)" <[REDACTED]>, Brian Lenihan [REDACTED]>
Cc: "Stephen L Buckner (CENSUS/ADCOM FED)" <Stephen.L.Buckner@census.gov>, "[REDACTED]" <[REDACTED]>
Subject: DOC guidance sought on questions arising from the DOJ letter
Mike et al,

Stephen is en route to DOC and asked me to let you know that he'd like to synch up with you on potential questions regarding the DOJ letter. With tomorrow's All Senate briefing set for 10 am and the briefing request from Rep. Cuellar regarding the ACO issue, we'd like to have DOC guidance on how to respond to certain questions that may be posed to Census briefers this week. Stephen will follow up with you in person shortly...

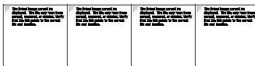
Many thanks,

Alan

Alan Lang

Acting Chief, Office of Congressional and
Intergovernmental Affairs, U.S. Census Bureau
U.S. Department of Commerce
Office: [301-763-1950](tel:301-763-1950)

Connect with us:



From: Zadrozny, John A. EOP/WHO [PII]
Sent: 12/20/2017 1:46:17 AM
To: Uthmeier, James (Federal) [PII]
Subject: RE: Census Question Request

James:

10-4. I am more or less online now, [REDACTED] I can either talk around 9:00 p.m., or we can connect around 8:00 a.m. tomorrow morning, if that worked for you.

I just wanted to make sure you were looped in to this. The only questions I really have are, [REDACTED]
[REDACTED]

JZ

W: [PII]
C: [PII]

From: Uthmeier, James (Federal) [mailto:[PII]]
Sent: Tuesday, December 19, 2017 8:01 PM
To: Zadrozny, John A. EOP/WHO <[PII]>
Subject: Re: Census Question Request

Hi John. I'm looped in. Should be available to talk in about 10-15. Can give more context. My number is [PII]

Sent from my iPhone

On Dec 19, 2017, at 6:47 PM, Zadrozny, John A. EOP/WHO <[PII]> wrote:

James:

Heads-up. Might need your help with this ASAP.

I'm about to leave the office and will be out of pocket for about an hour, but should be online and able to talk around 8:00 p.m. at the latest.

Thanks in advance for your assistance,

John A. Zadrozny

Special Assistant to the President

Justice and Homeland Security

Domestic Policy Council

Executive Office of the President

W: PII
C: PII

From: Page, Ben J. EOP/OMB [mailto:PII]

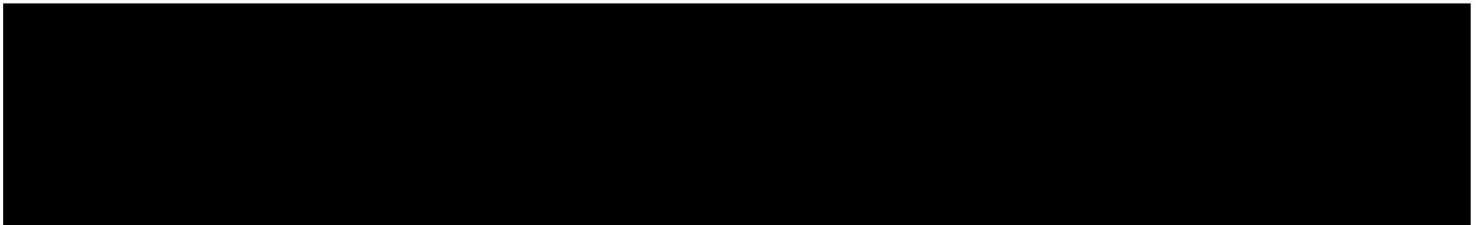
Sent: Tuesday, December 19, 2017 5:52 PM

To: Simms, Cindy B. EOP/WHO <PII>; Lenihan, Brian (Federal) <PII>;
Anderson, Jessica C. EOP/OMB <PII>

Cc: Platt, Mike (Federal) <PII>; Lai, Joseph G. EOP/WHO <PII>; Swonger, Amy H.
EOP/WHO <PII>; Zadrozny, John A. EOP/WHO <PII>; Flynn,
Matthew J. EOP/WHO <PII>; Kraninger, Kathleen L. EOP/OMB
<PII>; Enger, Michelle A. EOP/OMB <PII>; Marten, Lexi
N. EOP/OMB <PII>

Subject: RE: Census Question Request

+ others from OMB



From: Simms, Cindy B. EOP/WHO <PII>

Sent: Tuesday, December 19, 2017 5:44 PM

To: Lenihan, Brian (Federal) <PII>; Page, Ben J. EOP/OMB <PII>;
Anderson, Jessica C. EOP/OMB <PII>

Cc: Platt, Mike (Federal) <PII>; Lai, Joseph G. EOP/WHO <PII>; Swonger, Amy H.
EOP/WHO <PII>; Zadrozny, John A. EOP/WHO <PII>; Flynn,
Matthew J. EOP/WHO <PII>

Subject: RE: Census Question Request

Adding Ben Page and Jessica Anderson from OMB.

From: Lenihan, Brian (Federal) [<mailto:PII>]
Sent: Tuesday, December 19, 2017 5:10 PM
To: Simms, Cindy B. EOP/WHO <PII>
Cc: Platt, Mike (Federal) <PII>; Lai, Joseph G. EOP/WHO <PII>; Swonger, Amy H. EOP/WHO <PII>; Zadrozny, John A. EOP/WHO <PII>; Flynn, Matthew J. EOP/WHO <PII>
Subject: Re: Census Question Request

I believe we have a reprieve but we should still visit on this matter.

Brian J. Lenihan

Commerce O/S

PII

On Dec 19, 2017, at 4:56 PM, Simms, Cindy B. EOP/WHO <PII> wrote:

John Zadrozny from our DPC team is going to reach out to you. Not sure we'd be able to clear an official position that quickly but I know John will follow up.

From: Lenihan, Brian (Federal) [<mailto:PII>]
Sent: Tuesday, December 19, 2017 3:39 PM
To: Platt, Mike (Federal) <PII>; Simms, Cindy B. EOP/WHO <PII>
Cc: Lai, Joseph G. EOP/WHO <PII>; Swonger, Amy H. EOP/WHO <PII>
Subject: RE: Census Question Request

This is a short fuse – before COB, we need to advise the Secretary of the WH view on notifying Congress on the DOJ request and how that would affect the agenda for the remainder of the week.

From: Platt, Mike (Federal)
Sent: Tuesday, December 19, 2017 3:36 PM
To: Simms, Cindy B. EOP/WHO <PII>
Cc: Lenihan, Brian (Federal) <PII>; Lai, Joseph G. EOP/WHO <PII>; Amy H. EOP/WHO Swonger <PII>
Subject: Re: Census Question Request

Any feedback on this.

On Dec 19, 2017, at 10:29 AM, Simms, Cindy B. EOP/WHO <[REDACTED] PII > wrote:

Thanks, Brian. Let me do some internal outreach before I put everyone on an email. Will be in touch.

From: Lenihan, Brian (Federal) [[mailto:\[REDACTED\] PII](#)]

Sent: Tuesday, December 19, 2017 10:14 AM

To: Simms, Cindy B. EOP/WHO <[REDACTED] PII >; Lai, Joseph G. EOP/WHO <[REDACTED] PII >

Cc: Platt, Mike (Federal) <[REDACTED] PII >

Subject: Census Question Request

Cindy/Joe –

The Census Bureau has received a request from DOJ to reinstate the citizenship question on the 2020 Decennial. Can you assist with looping in the policy and legal staff that can assist with addressing this matter.

Regards,

Brian

Brian J. Lenihan

Deputy Assistant Secretary

Office of Legislative and Intergovernmental Affairs

U.S. Department of Commerce

D: 202.482.[REDACTED] PII C: [REDACTED] PII

From: [REDACTED] [REDACTED]
Sent: 12/20/2017 1:01:09 AM
To: Zadrozny, John A. EOP/WHO [REDACTED]
Subject: Re: Census Question Request

Hi John. I'm looped in. Should be available to talk in about 10-15. Can give more context. My number is [REDACTED]

Sent from my iPhone

On Dec 19, 2017, at 6:47 PM, Zadrozny, John A. EOP/WHO <[REDACTED]> wrote:
 James:

Heads-up. Might need your help with this ASAP.

I'm about to leave the office and will be out of pocket for about an hour, but should be online and able to talk around 8:00 p.m. at the latest.

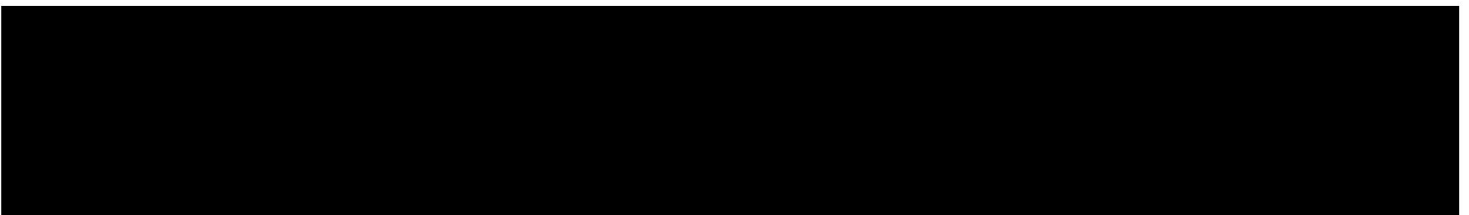
Thanks in advance for your assistance,

John A. Zadrozny
 Special Assistant to the President
 Justice and Homeland Security
 Domestic Policy Council
 Executive Office of the President

W: [REDACTED]
 C: [REDACTED]

From: Page, Ben J. EOP/OMB [mailto:[REDACTED]]
Sent: Tuesday, December 19, 2017 5:52 PM
To: Simms, Cindy B. EOP/WHO <[REDACTED]>; Lenihan, Brian (Federal) <[REDACTED]>;
 Anderson, Jessica C. EOP/OMB <[REDACTED]>
Cc: Platt, Mike (Federal) <[REDACTED]>; Lai, Joseph G. EOP/WHO <[REDACTED]>; Swonger, Amy H.
 EOP/WHO <[REDACTED]>; Zadrozny, John A. EOP/WHO <[REDACTED]>; Flynn,
 Matthew J. EOP/WHO <[REDACTED]>; Kraninger, Kathleen L. EOP/OMB
 <[REDACTED]>; Enger, Michelle A. EOP/OMB <[REDACTED]>; Marten, Lexi
 N. EOP/OMB <[REDACTED]>
Subject: RE: Census Question Request

+ others from OMB



From: Simms, Cindy B. EOP/WHO [mailto:PII]
Sent: Tuesday, December 19, 2017 5:44 PM
To: Lenihan, Brian (Federal) <PII>; Page, Ben J. EOP/OMB <PII>;
Anderson, Jessica C. EOP/OMB <PII>
Cc: Platt, Mike (Federal) <PII>; Lai, Joseph G. EOP/WHO <PII>; Swonger, Amy H.
EOP/WHO <PII>; Zadrozny, John A. EOP/WHO <PII>; Flynn,
Matthew J. EOP/WHO <PII>
Subject: RE: Census Question Request

Adding Ben Page and Jessica Anderson from OMB.

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To: Simms, Cindy B. EOP/WHO <PII>
Cc: Platt, Mike (Federal) <PII>; Lai, Joseph G. EOP/WHO <PII>; Swonger, Amy H.
EOP/WHO <PII>; Zadrozny, John A. EOP/WHO <PII>; Flynn,
Matthew J. EOP/WHO <PII>
Subject: Re: Census Question Request

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Brian J. Lenihan
Commerce O/S

PII

On Dec 19, 2017, at 4:56 PM, Simms, Cindy B. EOP/WHO <PII> wrote:
John Zadrozny from our DPC team is going to reach out to you. Not sure we'd be able to clear an official position that quickly but I know John will follow up.

From: Lenihan, Brian (Federal) [mailto:PII]
Sent: Tuesday, December 19, 2017 3:39 PM
To: Platt, Mike (Federal) <PII>; Simms, Cindy B. EOP/WHO <PII>
Cc: Lai, Joseph G. EOP/WHO <PII>; Swonger, Amy H. EOP/WHO
<PII>
Subject: RE: Census Question Request

This is a short fuse – before COB, we need to advise the Secretary of the WH view on notifying Congress on the DOJ request and how that would affect the agenda for the remainder of the week.

From: Platt, Mike (Federal)
Sent: Tuesday, December 19, 2017 3:36 PM

To: Simms, Cindy B. EOP/WHO <[PII]>
Cc: Lenihan, Brian (Federal) <[PII]>; Lai, Joseph G. EOP/WHO <[PII]>; Amy H. EOP/WHO Swonger <[PII]>
Subject: Re: Census Question Request

Any feedback on this.

On Dec 19, 2017, at 10:29 AM, Simms, Cindy B. EOP/WHO <[PII]> wrote:
Thanks, Brian. Let me do some internal outreach before I put everyone on an email. Will be in touch.

From: Lenihan, Brian (Federal) [mailto:[PII]]
Sent: Tuesday, December 19, 2017 10:14 AM
To: Simms, Cindy B. EOP/WHO <[PII]>; Lai, Joseph G. EOP/WHO <[PII]>
Cc: Platt, Mike (Federal) <[PII]>
Subject: Census Question Request

Cindy/Joe –

The Census Bureau has received a request from DOJ to reinstate the citizenship question on the 2020 Decennial. Can you assist with looping in the policy and legal staff that can assist with addressing this matter.

Regards,
Brian

Brian J. Lenihan

Deputy Assistant Secretary
Office of Legislative and Intergovernmental Affairs
U.S. Department of Commerce
D: 202.482.[PII] C: [PII]

To: Davidson, Peter (Federal) [REDACTED]
From: Murnane, Barbara (Federal)
Sent: Wed 1/3/2018 6:58:52 PM
Importance: Normal
Subject: John Gore from DOJ returned your call - [REDACTED]
Received: Wed 1/3/2018 6:58:53 PM

From: Murnane, Barbara (Federal) [REDACTED@doc.gov]
Sent: 1/10/2018 7:21:26 PM
To: Davidson, Peter (Federal) [REDACTED@doc.gov]
Subject: Messages

John Gore – DOJ – [REDACTED]
[REDACTED]

From: Zadrozny, John A. EOP/WHO [PII]
Sent: 2/21/2018 11:02:38 PM
To: Lenihan, Brian (Federal) [PII]
CC: Uthmeier, James (Federal) [PII]; Hamilton, Gene (OAG) [PII]; Sherk, James B. EOP/WHO [PII]
Subject: RE: Conversation Next Week

Thanks, Brian.

JZ

w: [PII]
c: [PII]

From: Lenihan, Brian (Federal) [mailto:[PII]]
Sent: Wednesday, February 21, 2018 5:52 PM
To: Zadrozny, John A. EOP/WHO <[PII]>
Cc: Uthmeier, James (Federal) <[PII]>; Hamilton, Gene (OAG) <[PII]>; Sherk, James B. EOP/WHO <[PII]>
Subject: Re: Conversation Next Week

Monday afternoon is good on my end

BJL

[PII]
via iPad

On Feb 21, 2018, at 5:49 PM, Zadrozny, John A. EOP/WHO <[PII]> wrote:
James:

If Brian is okay with it, I have no problem on waiting until you get back. I know this conversation is somewhat time-sensitive, though.

I should be able to do Monday 2/26, working around some PCCs and a couple of other meetings.

Does 4:00-5:00 p.m. work for the group on Monday? If so, I can set logistics and send out a calendar appointment.

(Also, I am adding James Sherk.)

JZ

W:
C:

PII

From: Uthmeier, James (Federal) [[mailto:](#) PII]

Sent: Wednesday, February 21, 2018 5:00 PM

To: Zadrozny, John A. EOP/WHO <PII>; Lenihan, Brian (Federal) <PII>

Cc: Hamilton, Gene (OAG) <PII>

Subject: Re: Conversation Next Week

Hey John,

I can make a call work tomorrow but would prefer Monday if at all possible. Let me know - we might have some better updates at that time.

Thanks,

James

On: 21 February 2018 20:36,

"Zadrozny, John A. EOP/WHO" <PII> wrote:

Brian:

Let me know. I can track down a call-in number.

JZ

W:
C:

PII

From: Lenihan, Brian (Federal) <PII>

Sent: Wednesday, February 21, 2018 1:24 PM

To: Zadrozny, John A. EOP/WHO <PII>

Cc: Uthmeier, James (Federal) <PII>; Hamilton, Gene (OAG) <PII>

Subject: Re: Conversation Next Week

I am checking to see if James can call in from abroad (7+ hrs)

BJL

[REDACTED] PII

via iPad

On Feb 16, 2018, at 12:58 PM, Zadrozny, John A. EOP/WHO <[REDACTED] PII > wrote:
Brian, James, and Gene:

I wanted to connect with the three of you about having that conversation we discussed at some point next week.

Please let me know who else from your respective agencies needs to be in attendance. We will host. We have significant scheduling flexibility after next Tuesday 2/20, but as a starter suggestion, how about **Thursday 2/22 from 11:00 a.m.-noon**? Once we pin down time, I will send out a WAVES link and make other necessary arrangements.

Please do not hesitate to call me if questions.

John A. Zadrozny

Special Assistant to the President

Justice and Homeland Security

Domestic Policy Council

Executive Office of the President

w: [REDACTED] PII
c: [REDACTED] PII

Exhibit 6

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NEW YORK IMMIGRATION
COALITION, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
COMMERCE, *et al.*,

Defendants.

No. 1:18-cv-5025 (JMF)

**DEFENDANTS' SUPPLEMENTAL RESPONSES TO PLAINTIFFS' FIRST SET OF
INTERROGATORIES TO DEFENDANTS UNITED STATES DEPARTMENT OF
COMMERCE AND WILBUR ROSS**

Pursuant to Federal Rules of Civil Procedure 26, 33, and 34, Defendants United States Department of Commerce and Wilbur Ross submit these supplemental objections and responses to Plaintiffs' First Set of Interrogatories to Defendants United States Department of Commerce and Wilbur Ross, as modified by Plaintiffs' counsel by email dated August 27, 2018.

OBJECTIONS AND RESPONSES TO INTERROGATORIES

Interrogatory No. 1. With regard to the document found in the Administrative Record at 1321, please IDENTIFY:

- a. the "senior Administration officials" who "previously raised" reinstating the citizenship question;
- b. the "various discussions with other government officials about reinstating a citizenship question to the Census";
- c. the consultations Secretary and his staff participated in when they "consulted with Federal governmental components";
- d. the date on which the "senior Administration officials" who "previously raised" reinstating the citizenship question first raised this subject with SECRETARY ROSS or with COMMERCE; and
- e. all PERSONS with whom, to the knowledge of COMMERCE and SECRETARY ROSS, the "senior Administration officials had previously raised" reinstating the citizenship question.

Objections:

Defendants object to this interrogatory to the extent that it seeks (a) communications or information protected by the attorney-client privilege or (b) communications or information protected by the deliberative-process privilege.

Defendants further object to this interrogatory as vague and overbroad to the extent it seeks information about meetings or conversations with government officials and other persons whose identities are immaterial to the claims in this litigation, and because the burden of responding is disproportionate to the needs of this case.

Response:

After conducting a diligent search, Defendants do not distinguish among the terms used synonymously in the Secretary's Supplemental Memorandum: "senior Administration officials," "other government officials," and officials at other "Federal governmental components". In order to respond as fully as possible to this interrogatory, Defendants therefore will construe subparts a, b, and c, as coextensive and will identify, as a single group, the individuals within the executive branch but outside the Department of Commerce who, before the December 12, 2017 Department of Justice letter, and as referenced in the Secretary's Supplemental Memorandum, either (a) discussed the citizenship question with Secretary Ross, (b) had raised or discussed whether to reinstate a citizenship question, or (c) were consulted by Secretary Ross or his staff regarding whether the Department of Justice would support, and if so would request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act. In accordance with that interpretation, and subject to and without waiving the above objections, Defendants identify the following individuals:

Mary Blanche Hankey, James McHenry, Gene Hamilton, Danielle Cutrona, John Gore and Jefferson Sessions. Although Kris Kobach is not a "government official" within the meaning of the Supplemental Memorandum, the Defendants identify him nonetheless for

the sake of completeness. Lastly, the Defendants cannot confirm that the Secretary spoke to Steve Bannon regarding the Citizenship Question. However, since the current Administrative Record indicates that Mr. Bannon was attempting to put Mr. Kobach in touch with the Secretary, the Defendants are also listing Mr. Bannon for the sake of completeness.

With respect to Interrogatory 1, subparagraphs a, d, and e, as reflected in the Administrative Record, Secretary Ross discussed the possible reinstatement of a citizenship question on the 2020 decennial census with Attorney General Sessions in August 2017. In addition, it is possible that the two had an additional discussion concerning this issue, and although the date of that conversation is unknown, Defendants believe it took place earlier in 2017.

As to Interrogatories, see Verification page *infra*.

As to objections:

Dated: August 30, 2018

JOSEPH H. HUNT
Assistant Attorney General

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Director, Federal Programs Branch

CARLOTTA P. WELLS
Assistant Director, Federal Programs Branch

/s/ Kate Bailey
KATE BAILEY
GARRETT COYLE
STEPHEN EHRLICH
CAROL FEDERIGHI
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W.
Washington, DC 20530
Tel.: (202) 514-9239
Email: kate.bailey@usdoj.gov

Counsel for Defendants

CERTIFICATION OF EARL COMSTOCK

I certify under penalty of perjury that the foregoing supplemental response to Plaintiffs' Interrogatory No. 1 is true and correct to the best of my knowledge, information, belief, understanding, or recollection, with the understanding that the Department of Commerce is continuing to research its responses to Plaintiffs' interrogatories and reserves the right to further supplement its responses.

Dated: September 5, 2018

A handwritten signature in black ink, appearing to read 'Earl Comstock', written over a horizontal line.

Earl Comstock

Exhibit 7

From: Gary, Arthur (JMD)
To: Posner, Morton J (JMD)
Subject: FW: Close Hold: Draft Letter
Date: Friday, November 03, 2017 5:17:00 PM
Attachments: Letter (rev).docx

Here ya go!

From: Gore, John (CRT)
Sent: Friday, November 03, 2017 5:11 PM
To: Gary, Arthur (JMD) <agary@jmd.usdoj.gov>
Subject: Close Hold: Draft Letter

Art:

The draft letter that we discussed earlier this week is attached. Let's touch base early next week once you've had a chance to review it.

Thanks, and have a great weekend.

John M. Gore
Acting Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
(b) (6)
john.gore@usdoj.gov

From: Gary, Arthur (JMD)
To: Flores, Sarah Isgur (OPA); Gore, John (CRT)
Cc: Allen, Michael (JMD DAAG); Lofthus, Lee J (JMD); Prior, Ian (OPA); Hornbuckle, Wyn (OPA)
Subject: FW: DOJ / Census story (Deadline 2:45pm)
Date: Friday, December 29, 2017 1:04:00 PM
Attachments: Dr. Ron Jarmin - US Census Bureau.pdf

Sarah & John - I've received both the email below (as has OPA) and a VM asking about my letter to Commerce/Census, which I sent on December 18 on behalf of the Department at the request of leadership, working with John. A copy of my letter is attached. I'm in all afternoon -- happy to discuss. My direct line is (b) (6).

Thanks,

Art

Arthur E. Gary
General Counsel
Justice Management Division
U.S. Department of Justice
Two Constitution Square, Suite 8E.500
145 N. Street, NE
Washington, DC 20530
202-514-3452 (OGC main line)

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From: Justin Elliott [mailto:Justin.Elliott@propublica.org]
Sent: Friday, December 29, 2017 12:47 PM
To: Press <Press@jmd.usdoj.gov>
Cc: Gary, Arthur (JMD) <agary@jmd.usdoj.gov>
Subject: DOJ / Census story (Deadline 2:45pm)

Hi,

I'm a reporter with ProPublica in New York. I'm working on a story today on Arthur Gary's Dec. 12 letter to Dr. Ron Jarmin of the Census Bureau requesting that the Census add a question about immigration status. I've pasted the full text of the letter below.

My deadline is 2:45 pm EST today (Friday).