

September 10, 2018

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

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

Dear Judge Furman,

Plaintiffs write to request an informal discovery conference with the Court or an order: (1) compelling full responses by Defendants to several interrogatories propounded nearly two months ago; and (2) requiring Defendants to produce responsive, relevant materials cited by Dr. John Abowd in his Census Bureau 30(b)(6) deposition.¹

A. The Court should compel a full response to the NYIC Plaintiffs' Interrogatory 1

Plaintiffs' Interrogatory No. 1, served on July 12, posed five questions to ascertain certain individuals and information referenced but not identified in Secretary Ross's June 21, 2018 "Supplemental Memorandum," 18-CV-2921, ECF 189-1, AR 1321:

- **Subpart A** seeks the identity of the unnamed "senior Administration officials" who "previously raised" the issue of adding the citizenship question to the Census, **prior to** when Secretary Ross "began considering" the issue, AR 1321;
- **Subparts D and E** request the **dates** on which those "senior Administration officials" first raised the issue, and **with whom**;
- **Subpart B** seeks the identity of the "other government officials" with whom Secretary Ross and his staff had "various discussions . . . about reinstating a citizenship question to the Census," **around the time and after** Secretary Ross began considering the issue, AR 1321;
- **Subpart C** requests the identity of the "Federal governmental components"—**government agencies and entities**—with whom Secretary Ross and his staff "consulted." AR 1321.

These Interrogatories are relevant to the decisionmaking process, the grounds for the decision, and whether there was political interference with the administrative process. *See, e.g., Tummino v. Torti*, 603 F. Supp. 2d 519, 542, 544 (E.D.N.Y. 2009); *Latecoere Int'l, Inc. v. U.S. Dep't of Navy*, 19 F.3d 1342, 1356 (11th Cir. 1994). Defendants served an initial response on August 13 but failed to respond to subparts A, D, or E. Ex. A. Defendants promised on three occasions to

¹ Plaintiffs write pursuant to Local Civil Rule 37.2 and Rule 2(C) of this Court's Individual Rules and Practices. Plaintiffs have been unable to resolve the disputes described in this letter-brief through good faith meet-and-confer discussions with Defendants.

supplement but failed to do so, forcing Plaintiffs to file their fifth letter-motion to compel responses. 18-CV-5025, ECF No. 117. After Defendants pledged to provide a complete response, Plaintiffs notified the Court, 18-CV-5025, ECF No. 125, at which time the Court denied the motion without prejudice and subject to renewal in the event the parties did not resolve the dispute, 18-CV-5025, ECF No. 126.

Defendants' Supplemental Response to Interrogatory No. 1 was provided on September 5. Ex. B. It fails to provide a full response to the questions posed. Rather, Defendants provide an aggregated response to subparts A, B, and C, and fail to identify any new individuals that were not identified in the August 13 response. In particular, Defendants have failed to identify the "senior Administration officials" who first raised the issue of adding the question prior to when Secretary Ross "began considering" the issue, and failed to provide the date that they did so. Defendants' explanations for the inadequacy of their response ignore their duties under Rule 33 and defy the case law interpreting that Rule.

First, in response to Plaintiffs' meet-and-confer request about the deficient Supplemental Response, Defendants responded that they treated the subparts of Plaintiffs' Interrogatory "interchangeably," and provided a single response to "this interrogatory and subparts as a whole." Ex. C. But as the Interrogatory plainly indicates, and as Plaintiffs clarified, *see* Ex. C, that Interrogatory 1(a) specifically seeks information as to the identity of "senior Administration officials" who "had previously raised" the citizenship question *before* Secretary Ross began considering it, separate and apart from the "other government officials" and "Federal governmental components" with whom Secretary Ross and his staff consulted once Secretary Ross's consideration of the issue began. Secretary Ross's Supplemental Memorandum itself makes this distinction, and the timing here is directly relevant to the issues of: (a) who may have influenced Secretary Ross to pursue the citizenship question to begin with, those individuals' motivations and, ultimately, Secretary Ross's; and (b) whether the decision to add the citizenship question was initiated or made *before* the development of the pretextual rationale offered for it. By providing undifferentiated responses that obscure the very information sought by Plaintiffs in their interrogatories, Defendants' responses remain deficient.

Second, other than providing a date range for one conversation (and another "possible . . . additional discussion") between Secretary Ross and Attorney General Sessions that took place *after* Secretary Ross began considering the citizenship question, the response provides no dates or date ranges whatsoever. It omits the very information sought by Plaintiffs: when "senior Administration officials had previously raised" the citizenship question *prior* to Secretary Ross's consideration of the issue.

The deficiencies here are likely due in part to the fact that the individual who certified the interrogatory responses, Earl Comstock, testified at his deposition (just one week prior to the certification) that he did not know the identities of the "senior Administration officials" referenced in Secretary Ross's Supplemental Memorandum; and further advised that, if Plaintiffs sought that information, they would need to ask the Secretary himself. Comstock Dep. Tr. at 111–12. Ex. D. Regardless of the personal knowledge of the official, however, when interrogatories are interposed to a corporate party or government agency, the official must provide the information in the possession of the party as a whole and "also the information within its control or otherwise obtainable by it." *In re Auction Houses Antitrust Litig.*, 196

F.R.D. 444, 445 (S.D.N.Y. 2000); *see also Tyler v. Suffolk County*, 256 F.R.D. 34, 37–38 (D. Mass. 2009) (applying principle to governmental party). Given Secretary Ross’s statements in the Supplemental Memorandum, it is clear that he—at a minimum—is aware of who “previously raised” the citizenship question, and with whom he subsequently spoke about it. Regardless of who responds, Defendants must provide complete responses to Interrogatory 1, which they have not yet done.

Plaintiffs served this Interrogatory nearly two months ago. It seeks simple information referenced but not identified in Secretary Ross’s Supplemental Memorandum, a document that is at the heart of the case. Despite extensive efforts to meet and confer, Defendants have yet to provide a complete response. The Court should compel them to do so.

B. The Court should Compel Defendants to Produce Responsive & Relevant Documents in their Possession Regarding Randomized Control Testing (RCT) Proposals and Attitudinal Research Conducted by Census Bureau Contractors.

In his deposition as a representative of the Census Bureau, Census Bureau Chief Scientist John Abowd testified that senior Census Bureau staff proposed to conduct randomized control testing (RCT) of the effect of adding a citizenship question after Secretary Ross’s decision to do so, and that this proposal was rejected by individuals including Commerce Undersecretary Karen Dunn Kelley and Defendant Ron Jarmin. Ex. E. Aug. 29 Abowd Dep. at 26–29, 101–05, 141–43, 334–35. Dr. Abowd also acknowledged that the Bureau has contracted with private firms Young and Rubicam and Reingold to conduct research about public attitudes regarding answering the citizenship question. *Id.* at 137–40, 267–71, 288–89, 317–19, 331–32. Defendants have thus far failed to produce any materials relating to (1) the Census Bureau’s rejected RCT proposal or (2) contracts with those communications firms, or their research planned or conducted. The RCT information is plainly relevant to the effect of adding the citizenship question, and the motivations of senior Census and Commerce officials in declining to research it. The communication firms’ research into the citizenship question is similarly relevant to the effect of the citizenship question and the knowledge of the Census Bureau about that effect. All of this material is plainly responsive to Requests for Production Nos. 1, 2, 9, 10, 11, and 15, Ex. F. Yet Defendants have not produced this information despite multiple requests and meet-and-confer sessions.

Plaintiffs first raised the failure to produce these materials during Dr. Abowd’s 30(b)(6) deposition on August 29 and in an email to Defendants on the same date. Ex. G. Defendants did not respond to that request. Again on September 4, in a meet-and-confer agenda, Plaintiffs cited the need to produce these documents. Ex. H. Defendants did not dispute the relevance or responsiveness of these documents, but only provided vague assurances of a response in the near future. On September 7, still lacking these documents or an update from Defendants, Plaintiffs again inquired as to the status of the documents, but in an email response, Defendants addressed only other requests in the email and ignored this category of documents entirely. Ex. I.

Because of the relevance and responsiveness of these documents, the looming discovery deadline, and Defendants’ failure to provide any meaningful response despite several attempts, Plaintiffs request that the Court compel Defendants promptly to produce these documents.

Respectfully submitted,

By: /s/ Dale E. Ho

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

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

CC: All Counsel of Record (by ECF)

EXHIBIT A

**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' OBJECTIONS AND RESPONSES TO PLAINTIFFS' FIRST SET OF
REQUESTS FOR EXPEDITED PRODUCTION OF DOCUMENTS AND 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 initial objections and responses to Plaintiffs' First Set of Requests for Expedited Production of Documents and First Set of Interrogatories to Defendants United States Department of Commerce and Wilbur Ross.

OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS

1. Defendants object to Instructions 4, 5, and 6 to the extent they imply any obligation outside of the scope of Federal Rules of Civil Procedure 26(b)(5) or 34 and the corresponding Local Civil Rules, and on the ground that they are unduly burdensome. In particular, Defendants will not "identify each PERSON or organization having knowledge of the factual basis, if any, upon which the objection, privilege, or other ground is asserted," because such a request has no basis in Rules 26(b)(5) or 34. Concerning privileged material, Defendants reserve the right to create a categorical privilege log as contemplated by Local Civil Rule 26.2(c) and the associated Committee Note. Additionally, documents created by or communications sent to or from litigation counsel (including

agency counsel responsible for this litigation after commencement of this matter) will not be logged, as information contained therein is not relevant to the claims and defenses in this litigation.

2. Defendants object to Instruction 7 as imposing obligations outside the scope of Federal Rule of Civil Procedure 34 and for being unduly burdensome insofar as it purports to require a document-by-document recounting without regard to the date on which the document was created, the date on which it was lost, discarded, destroyed, or otherwise disposed of, or whether litigation involving the substance of the document was reasonably foreseeable at that time it was lost, discarded, destroyed or otherwise disposed of.

3. Defendants object to the definition of “COMMUNICATION” and “COMMUNICATIONS” insofar as they exceed the definition of “communication” provided in Local Civil Rule 26.3(c)(1). Defendants’ production of documents will be limited to the definition of “communication” provided in Local Civil Rule 26.3(c)(1). Defendants also object to this definition as beyond the scope of Rule 34 to the extent it purports to require Defendants to create records of “oral contact, such as face-to-face meetings, video conferences, or telephonic conversations.” Oral communications are not documents or things within the scope of Federal Rule of Civil Procedure 34 and, accordingly, Defendants will not be producing such information.

4. Defendants object to the definition of “IDENTIFY” in reference to “a person” as unduly burdensome and going beyond the requirements of Federal Rule of Civil Procedure 34 and Local Civil Rule 26.3(c)(3). Defendants object to the definition of “IDENTIFY” in reference to “a document” as unduly burdensome and going beyond the requirements of Federal Rule of Civil Procedure 34 and Local Civil Rule 26.3(c)(4). Defendants object to the definition of “IDENTIFY” in reference to “an event, occurrence, act, transaction or conversation” as unduly burdensome and going beyond the requirements of Federal Rule of Civil Procedure 34.

5. Defendants object to the definition of “PERSON OR PERSONS” insofar as it exceeds the definition of “person” provided in Local Civil Rule 26.3(c)(6). Defendants will limit their search and production to the definition of “person” provided in Local Civil Rule 26.3(c)(6).

6. Defendants object to the definition of “OTHER GOVERNMENT AGENCIES” on the basis that it is overbroad, unduly burdensome, and outside the scope of discovery, insofar as it would expand the scope of discovery to the entire federal government.

7. Defendants object to the definition of “TRUMP ADMINISTRATION” as overbroad. Defendants will interpret “TRUMP ADMINISTRATION” to mean President Trump in his official capacity as President, as well as any other current or former employee of the Executive Office of the President acting in his or her official capacity.

8. Defendants object to the definition of “TRUMP CAMPAIGN” as overly broad and ambiguous. It is beyond Defendants’ capacity to determine, for any given person, whether that person sought the election or reelection of President Trump.

OBJECTION TO ALL REQUESTS FOR PRODUCTION

1. Defendants object to Plaintiffs’ discovery requests to the extent they seek documents that are publicly available, already produced to Plaintiffs in the administrative record, or are readily accessible to Plaintiffs or otherwise would be less burdensome for Plaintiffs to obtain than Defendants. *See* Fed. R. Civ. P. 26(b)(2)(C). Defendants will not reproduce documents already produced in the administrative record.

2. Defendants object to Plaintiffs’ requests to the extent that they seek (a) attorney work product; (b) communications protected by the attorney-client privilege; (c) information protected by the deliberative process privilege, the joint defense privilege, common interest privilege, or law enforcement privilege; (d) material the disclosure of which would violate legitimate privacy

Request for Production No. 9. All DOCUMENTS and COMMUNICATIONS that Defendants plan to introduce into evidence at trial.

Objections: Defendants object to this request on the ground that it is premature at this stage of the case, while discovery is still ongoing.

Response: Subject to and without waiving the above objection, Defendants refer Plaintiffs to the complete administrative record upon which the Secretary of Commerce based his decision to reinstate a question concerning citizenship on the 2020 Decennial Census, filed on June 8, 2018, *see* ECF No. 173, *New York v. U.S. Dep't of Commerce*, No. 18-cv-2921 (JMF), and the supplement to the administrative record, filed on June 21, 2018, *see* ECF No. 189, *New York v. U.S. Dep't of Commerce*, No. 18-cv-2921 (JMF).

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; and
- e. all PERSONS with whom the “senior Administration officials had previously raised” reinstating the citizenship question.

Objections: Defendants object to this interrogatory because it has five discrete subparts. This interrogatory therefore constitutes five interrogatories for purposes of the limit of 25 interrogatories.

See Fed. R. Civ. P. 33(a)(1).

Defendants further object to subparts b., c., and d. of this interrogatory insofar as they exceed the scope of information a party may seek at this stage of the litigation pursuant to Local Civil Rule 33.3(a). Consistent with this Local Civil Rule 33.3(a), Defendants construe subparts b.

and c. as requesting only the identities of individuals, and Defendants object to subpart d. as requesting information outside the scope of Local Civil Rule 33.3(a).

Defendants further 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. Specifically, Defendants object to subpart e. as overbroad and vague, as it sweeps in private conversations with any individual, without scope, that “senior Administration officials had previously raised” reinstating the citizenship question.

Defendants further object to the interrogatory to the extent that it purports to require the identification of the date, location, participants, and subject of any meetings involving the Executive Office of the President. *See Cheney v. U.S. District Court*, 542 U.S. 367, 388 (2004).

Response:

Subject to and without waiving these objections, Defendants state that the following individuals are responsive to this interrogatory:

- 1.a. Defendants have not to date been able to identify individuals responsive to subpart a. Defendants’ investigation is continuing, and Defendants will supplement this response as appropriate.
- 1.b. Subject to and without waiving the above objections: Mary Blanche Hanky, James McHenry, Gene Hamilton, John Gore, Danielle Cutrona, Jefferson Sessions, Kris Kobach, Steve Bannon, and Wilbur Ross.

1.c. Subject to and without waiving the above objections: Mary Blanche Hanky, James McHenry, Gene Hamilton, John Gore, Danielle Cutrona, Jefferson Sessions, Kris Kobach, Steve Bannon, and Wilbur Ross.

Defendants reserve the right to supplement this response with any additional relevant, responsive, non-privileged information that is within its possession, custody, or control and capable of being ascertained with reasonable diligence.

Interrogatory No. 2. Please IDENTIFY all persons involved in drafting, commenting on, or approving ROSS' March 26, 2018 memorandum.

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 ambiguous with respect to the term "approving," as the Secretary alone approved the decision and memorandum. Defendants further object to this interrogatory as vague and ambiguous with respect to the term "commenting on."

Response:

Subject to and without waiving these objections, Defendants state that the following individuals are responsive to this interrogatory: John Abowd, Earl Comstock, Peter Davidson, Jessica Freitas, Ron Jarmin, Christa Jones, Karen Dunn Kelley, Enrique Lamas, James Uthmeier, Victoria Velkoff, Michael Walsh, and Attorneys at the Department of Justice.

Defendants reserve the right to supplement this response with any additional relevant, responsive, non-privileged information that is within its possession, custody, or control and capable of being ascertained with reasonable diligence.

Defendants reserve the right to supplement this response with any additional relevant, responsive, non-privileged information that is within its possession, custody, or control and capable of being ascertained with reasonable diligence.

As to Interrogatories, see Verification page *infra*.

As to objections:

Dated: August 13, 2018

CHAD A. READLER
Acting Assistant Attorney General

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Director, Federal Programs Branch

CARLOTTA P. WELLS
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Counsel for Defendants

CERTIFICATION OF MICHAEL A. CANNON

I certify under penalty of perjury that the foregoing response to Plaintiffs' interrogatories are true and correct to the best of my knowledge, information, belief, understanding, and recollection, with the understanding that the Department of Commerce is continuing to research its responses to the Plaintiffs' interrogatories and reserves the right to supplement its response.

Dated: 8/13/18

A handwritten signature in blue ink, appearing to read "Michael A. Cannon", written over a horizontal line.

Michael A. Cannon

EXHIBIT B

**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

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Assistant Attorney General

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Director, Federal Programs Branch

CARLOTTA P. WELLS
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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 C

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

Sent: Friday, September 7, 2018 2:16 PM

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

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

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

Counsel,

Thank you for your email. Our responses are below, in red.

Kate Bailey

Trial Attorney

United States Department of Justice

Civil Division – Federal Programs Branch

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

Sent: Thursday, September 06, 2018 4:38 PM

To: Bailey, Kate (CIV) <katbaile@CIV.USDOJ.GOV>; Freedman, John A. <John.Freedman@arnoldporter.com>; Federighi, Carol (CIV) <CFederig@CIV.USDOJ.GOV>; 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: Sarah Brannon <sbrannon@aclu.org>; Perry Grossman <PGrossman@nyclu.org>; Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; 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>; Saini, Ajay <Ajay.Saini@ag.ny.gov>; Goldstein, Elena <Elena.Goldstein@ag.ny.gov>

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

Counsel,

Thank you for your response last night. We are conferring internally about narrowing terms to facilitate production of documents and will be back to you shortly. We will also get back to you about the draft status report soon. We write now to separately address the insufficiency of your supplemental response to our interrogatories.

1. Defendant's Supplemental Interrogatory Response is facially deficient because it was certified by Earl Comstock, who testified during his deposition last week that he does not have knowledge of the information sought in by Plaintiffs through Interrogatory 1.

- Interrogatory (1)(a) requests that you identify the "Senior Administration officials," referenced by Secretary Ross in AR 1321, who "previously raised" the issue of adding the citizenship question to the Census;
- (1)(d) requests that you identify when these officials raised the issue of the citizenship question; and
- (1)(e) requests that you identify with whom they raised this issue.

Mr. Comstock, however, testified repeatedly that he does not know, has no idea, and has never asked the Secretary who were the "senior administration officials" who "previously raised" the citizenship question referenced in the Secretary's memo. See Comstock Tr. at 111-113. Complete and accurate responses must be submitted by someone with actual knowledge of the information requested by Plaintiffs.

Response: As an initial matter, we disagree with your contention that Mr. Comstock “does not have knowledge of the information sought by Plaintiffs’ in Interrogatory 1.” For example, he expressly testified about his communications with individuals within the Department of Justice and the Department of Homeland Security regarding the possibility of reinstating a citizenship question on the 2020 decennial census. Moreover, the fact that Mr. Comstock may have lacked personal knowledge as to every aspect of the subject of the interrogatory in his capacity as an individual deponent under Rule 30 does not mean that he cannot sign an interrogatory as an officer or agent of a governmental agency based on information furnished to him in his official capacity. *See* Rule 33(b)(1)(B) (“The interrogatories must be answered if that part is . . . a governmental agency, by any officer or agent, who must furnish the information available to the party.”); *see Goldberger Co. v. Uneeda Doll Co.*, 2017 WL 3098100, 88 (S.D.N.Y. July 21, 2017) (“Holtzman’s personal knowledge at his deposition is different than information he learned as an officer of Goldberger and corporate representative signing interrogatory responses.”); *3M Co. v. ACS Indus., Inc.*, 2016 WL 9308317, *3 (D. Minn. Mar. 10, 2016) (holding that corporate agent that signed interrogatories did not need to have personal knowledge); *Chapman & Cole v. Intel Container Intern, B.V.*, 116 F.R.D. 550 (S.D. Tex. 1987) (holding that the phrase “such information as is available to the party” in Rule 33(a) has been construed to mean “all information available to the corporation’s officers, directors, employees and attorneys,” and thus does not require personal knowledge by the signatory). After Mr. Comstock’s deposition, he was furnished with information available to the Commerce Department sufficient for him to sign the interrogatory responses as an officer of the agency. Accordingly, Mr. Comstock’s signing of the supplemental interrogatory response is entirely appropriate.

2. Defendant’s Supplemental Interrogatory Response omits the information sought by Plaintiffs in Interrogatory 1. Defendant’s supplemental response indicates that Defendants “will construe subparts a, b, and c, as coextensive.” These subparts, however, clearly ask for different information:

Interrogatories (1)(a), (d), and (e). Interrogatory (1)(a) requests that you identify the “senior Administration officials” who “previously raised” reinstating the citizenship question. In AR 1321, Secretary Ross states, “[s]oon after my appointment as Secretary of Commerce, I began considering various fundamental issues regarding the upcoming 2020 Census, including... reinstating the citizenship question, which other Senior Administration officials had **previously raised**.” (emphasis added). Interrogatory (1)(a) therefore clearly requests that you identify the Administration officials to whom Secretary Ross referred as having “previously raised” the issue of adding the citizenship question to the Census **prior to** Secretary Ross’s consideration of this issue. As noted, (1)(d) requests that you identify when these officials raised the citizenship question, and (1)(e) requests that you identify with whom they raised this issue.

The supplemental response, however, does not provide an answer to subparts (1)(a), (d), or (e). While the supplemental response identifies a conversation between Secretary Ross and Attorney General Sessions in August 2017, and a "possible" conversation between them prior to then, it does not identify which Senior Administration officials "previously raised" the issue before Secretary Ross's consideration of it (which appears to have occurred "months prior" to May 2017), when they did so, or with whom.

Interrogatory (1)(b) requests that you identify the individuals referenced in Secretary Ross's statement that he and his staff had "various discussions with other government officials about reinstating a citizenship question to the Census." Interrogatory (1)(b) therefore clearly requests that you identify the government officials with whom Secretary Ross and his staff discussed the issue of the citizenship question **around the time of and after** Secretary Ross's initial consideration of this issue. The supplemental response, however, does not clearly identify with which government officials Secretary Ross and his staff discussed the citizenship question around the time of and after his initial consideration of the issue (1)(b).

Interrogatory (1)(c) requests that you identify the consultations Secretary and his staff participated in when they "consulted with Federal governmental components." In AR 1321, Secretary Ross states that, "[a]s part of that deliberative process, my staff and I consulted with Federal governmental components and inquired whether the Department of Justice (DOJ) would support, and if so would request, inclusion of a citizenship question..." Interrogatory (1)(b) therefore clearly requests that you identify the **government agencies** with whom Secretary Ross and his staff consulted as part of his deliberative process. The supplemental response, however, does not do so.

RESPONSE: As indicated in Commerce's supplemental response, Commerce treated the three phrases identified in the subparts of the interrogatory interchangeably and did not intend to treat these three subgroups with the level of specificity that you now seek. To provide you the most complete information we could, we identified each of the individuals who would be responsive to this interrogatory and its subparts as a whole, as well as dates to the extent such dates could be identified. We do not have any additional information at this juncture that would permit Commerce to provide more specific responses.

Plaintiffs' interrogatories were propounded on July 12 and responses have been due for almost two months. Interrogatory 1 requests simple information referenced by the Secretary in the Administrative Record in a memo less than three months ago. Complete responses—certified by an individual with actual knowledge of the information sought—should be a simple matter to produce immediately.

Please advise when you are able to meet-and-confer on these issues tomorrow.

Regards,

Dale Ho

(Pronouns: He/Him/His)

Director, Voting Rights Project

American Civil Liberties Union

125 Broad St.

New York, NY 10004

■ 212.549.2693 ■ dale.ho@aclu.org ■ @dale_e_ho

www.aclu.org



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

Sent: Wednesday, September 05, 2018 6:01 PM

To: Freedman, John A.; Federighi, Carol (CIV); Coyle, Garrett (CIV); Kopplin, Rebecca M. (CIV);

Halainen, Daniel J. (CIV); Tomlinson, Martin M. (CIV); Ehrlich, Stephen (CIV)

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

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

Counsel,

Please find attached (1) a letter to accompany our second production of documents responsive to the DOJ subpoena; (2) a privilege log for that production; and (3) our supplemental response to NYIC Plaintiffs' first interrogatory. The password for the disk that will be delivered to you shortly is F3dprg20M!!!

We look forward to receiving your response regarding our proposal to eliminate grounds of dispute in Plaintiffs' fifth motion to compel.

Kate Bailey

Trial Attorney

United States Department of Justice

Civil Division – Federal Programs Branch

20 Massachusetts Avenue, NW

Room 7214

Washington, D.C. 20530

202.514.9239 | kate.bailey@usdoj.gov

From: Freedman, John A. [<mailto:John.Freedman@arnoldporter.com>]
Sent: Wednesday, September 05, 2018 2:27 PM
To: Bailey, Kate (CIV) <katbaile@CIV.USDOJ.GOV>; Federighi, Carol (CIV) <CFederig@CIV.USDOJ.GOV>; 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: SBrannon@aclu.org; PGrossman@nyclu.org; Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; 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>; Saini, Ajay <Ajay.Saini@ag.ny.gov>; Goldstein, Elena <Elena.Goldstein@ag.ny.gov>; DHo@aclu.org
Subject: RE: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet & Confer Request & Other Matters

Counsel --

4:30 works for Plaintiffs. I will send a calendar invite, but we can use 866-802-1366, code 1658 0328.

Also -- attached please find a working draft of the joint status report.

Talk soon,

John

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

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

From: Bailey, Kate (CIV) [<mailto:Kate.Bailey@usdoj.gov>]
Sent: Wednesday, September 05, 2018 1:58 PM
To: Freedman, John A.; Federighi, Carol (CIV); Coyle, Garrett (CIV); Kopplin, Rebecca M. (CIV); Halainen, Daniel J. (CIV); Tomlinson, Martin M. (CIV); Ehrlich, Stephen (CIV)
Cc: zzz.External.SBrannon@aclu.org; zzz.External.PGrossman@nyclu.org; Colangelo, Matthew; Bauer, Andrew; Gersch, David P.; Grossi, Peter T.; Weiner, David J.; Young, Dylan Scot; Kelly, Caroline; Saini, Ajay; Goldstein, Elena; zzz.External.DHo@aclu.org
Subject: RE: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet & Confer Request & Other Matters

Counsel,

Are you available for a meet and confer today at 4:30pm? If not, please suggest an alternate time.

Thank you,

Kate Bailey

Trial Attorney

United States Department of Justice

Civil Division – Federal Programs Branch

20 Massachusetts Avenue, NW

Room 7214

Washington, D.C. 20530

202.514.9239 | kate.bailey@usdoj.gov

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

Sent: Tuesday, September 04, 2018 6:08 PM

To: Bailey, Kate (CIV) <katbaile@CIV.USDOJ.GOV>; Federighi, Carol (CIV) <CFederig@CIV.USDOJ.GOV>; 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: SBrannon@aclu.org; PGrossman@nyclu.org; Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; 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>; Saini, Ajay <Ajay.Saini@ag.ny.gov>; Goldstein, Elena <Elena.Goldstein@ag.ny.gov>; DH@aclu.org

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

Counsel --

There are several points we wanted to check in on, some of which we should cover in a meet and confer -- a proposed agenda is set forth below:

1. Please advise as to the timing when you will produce additional Department of Justice documents. We understood from Kate's August 27 email, as well as statements during the August 31 meet and confer that there was another tranche ready for production as soon as the clawback order was entered. As we previously advised, the priority should be materials from

and communications involving Mssrs. Gore and Gary. Given the timing of Mr. Gore's deposition and now that the clawback order is in place, these should be produced promptly.

2. With regard to your motion to stay, can you clarify whether the relief you are seeking would stay the parties obligations to make expert disclosures?

For the meet and confer, we would propose the following agenda:

1. Whether Defendants will make Secretary Ross available for deposition.
2. Defendants production of the materials discussed in my August 29 email that Dr. Abowd discussed at his deposition -- the Velkoff randomized controlled trials and the Reingold/Young & Rubicam documents.
3. The Parties' joint status report, which is due Thursday. We have been working on a draft submission, which we will provide tomorrow. For planning purposes, please advise whether the Defendants will voluntarily make Secretary Ross, Ms. Dunn Kelley, Ms. Teramoto, or Mr. Comstock available to testify at trial.

We are available to discuss tomorrow.

Thanks and best regards,

John

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

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

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EXHIBIT D

Page 1

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----
4 NEW YORK IMMIGRATION COALITION, ET AL.,

5 Plaintiffs,

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

7 UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

8 Defendants.
9 -----

10 Washington, D.C.

11 Thursday, August 30, 2018

12 Deposition of:

13 EARL COMSTOCK

14 called for oral examination by counsel for
15 Plaintiffs, pursuant to notice, at the office of
16 Arnold & Porter, 601 Massachusetts Avenue NW,
17 Washington, D.C., before KAREN LYNN JORGENSEN,
18 RPR, CSR, CCR of Capital Reporting Company,
19 beginning at 9:08 a.m., when were present on
20 behalf of the respective parties:
21
22

1 P R O C E E D I N G S

2 WHEREUPON,

3 VIDEOGRAPHER: Good morning. We are
4 going on the record at 9:01 a.m. on Thursday,
5 August 30, 2018. Please note that the microphones
6 are sensitive and may pick up whispering, private
7 conversations and cellular interference. Please
8 turn off all cell phones or place them away from
9 the microphones, as that can interfere with the
10 deposition audio. Audio and video recording will
11 continue to take place unless all parties agree to
12 going off the record.

13 This is Media Unit 1 of the video
14 recorded deposition of Earl Comstock to be taken
15 by counsel for the plaintiff in the matter of the
16 New York Immigration Coalition, et al., v. The
17 United States Department of Commerce, et al. This
18 case is filed in the United States District Court
19 for the Southern District of New York. This
20 deposition is being held at the law office of
21 Arnold & Porter located at 601 Massachusetts Avenue
22 Northwest, Washington, D.C. 20001.

1 My name is Dan Reidy from the firm
2 Veritext Legal Solutions, and I am the
3 videographer. The court reporter is Karen
4 Jorgenson from Veritext Legal Solutions.

5 I am not authorized to administer an
6 oath. I am not related to any party in this
7 action, nor am I financially interested in the
8 outcome.

9 Also, counsel appearances will be noted
10 on the stenographic report rather than orally at
11 this time.

12 Will the court reporter please swear in
13 the witness?

14 EARL COMSTOCK,
15 called as a witness, and having been first duly
16 sworn, was examined and testified as follows:

17 THE WITNESS: I do.

18 EXAMINATION BY MR. COLANGELO:

19 Q Please state your name and work address.

20 A Earl Comstock, U.S. Department of
21 Commerce.

22 Q And we met a minute ago, but for the

Page 111

1 mean to break your line of questioning. Actually,
2 we've been going about an hour and a half. Would
3 now be an appropriate time for a break?

4 MR. COLANGELO: Yes.

5 MR. GARDNER: Let's take a break.

6 VIDEOGRAPHER: This concludes Media Unit
7 Number 1. The time on the video is 10:32 a.m. We
8 are now off the record.

9 (Off the record.)

10 VIDEOGRAPHER: This begins Media Unit
11 Number 2. The time on the video is 10:45 a.m. We
12 are on the record.

13 BY MR. COLANGELO:

14 Q Mr. Comstock, we were talking about the
15 Secretary's June 21, 2018 memo which we marked as
16 Exhibit 5. Do you still have that in front of
17 you?

18 A I do.

19 Q Okay. That memo says that other senior
20 administration officials had previously raised
21 this question. Do you see that line?

22 A Yes.

1 Q Who are those other senior administration
2 officials?

3 A You'd have to ask the Secretary.

4 Q You don't know yourself?

5 A I don't.

6 Q You have no idea which other senior
7 administration officials raised this question,
8 other than the Secretary?

9 A No.

10 Q You never asked him where the idea came
11 from?

12 A Nope.

13 Q He never told you where the idea came
14 from?

15 A Nope.

16 Q You spent a lot of time on this issue?

17 A Not relative to a lot of other things I
18 work on, no.

19 Q How would you characterize the amount of
20 time you spent on this issue?

21 A One one-hundredth of my time.

22 Q You agree that it's an important issue?

1 * * * * *

2 CERTIFICATE OF REPORTER

3 I, KAREN LYNN JORGENSEN, RPR, CSR, CCR the
4 officer before whom the foregoing deposition was
5 taken, do hereby certify that the witness whose
6 testimony appears in the foregoing deposition was
7 duly sworn by me; that the testimony of said
8 witness was taken by me in stenotype and
9 thereafter reduced to typewriting under my
10 direction; that the said deposition is a true
11 record of the testimony given by said witness;
12 that I am neither counsel for, related to, nor
13 employed by any of the parties to the action in
14 which this deposition was taken; and further, that
15 I am not a relative or employee of any counsel or
16 attorney employed by the parties hereto, nor
17 financially or otherwise interested in the outcome
18 of this action.



19 _____
20 KAREN LYNN JORGENSEN, RPR, CCR, CSR

21 Dated this 3rd day
22 of September , 2018.

ACKNOWLEDGEMENT OF DEPONENT

I, EARL COMSTOCK, do hereby acknowledge I have read and examined the foregoing pages of testimony, and the same is a true, correct and complete transcription of the testimony given by me, and any changes or corrections, if any, appear in the attached errata sheet signed by me.

Date

EARL COMSTOCK

Joshua E. Gardner, Esquire

U.S. DEPARTMENT OF JUSTICE

20 Massachusetts Avenue

Washington, D.C. 20530

IN RE: New York Immigration Coalition, et al., v.
United States Department of Commerce, et al.

Page 439

1 Dear Mr. Gardner:

2 Enclosed please find your copy of the
3 deposition of EARL COMSTOCK, along with the
4 original signature page. As agreed, you will be
5 responsible for contacting the witness regarding
6 signature.

7 Within 21 days of receipt of transcript,
8 please forward errata sheet and original signed
9 signature page to counsel for, John Freedman and
10 all counsel of record.

11 If you have any questions, please do not
12 hesitate to call. Thank you.

13 Yours,



14 Karen Lynn Jorgenson, RPR, CCR, CSR
15 Capital Reporting Company
16 1821 Jefferson Place, Northwest
17 3rd Floor
18 Washington, D.C. 20006
19 (202) 857-3376
20
21
22

cc: All counsel of record

EXHIBIT E

Page 1

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----
4 NEW YORK IMMIGRATION COALITION, ET AL.,

5 Plaintiffs,

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

7 UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

8 Defendants.
9 -----

10 Washington, D.C.

11 Wednesday, August 29, 2018

12 Deposition of:

13 DR. JOHN ABOWD

14 called for oral examination by counsel for
15 Plaintiffs, pursuant to notice, at the office of
16 Arnold & Porter, 601 Massachusetts Avenue NW,
17 Washington, D.C., before KAREN LYNN JORGENSEN,
18 RPR, CSR, CCR of Capital Reporting Company,
19 beginning at 9:06 a.m., when were present on
20 behalf of the respective parties:

21 Veritext Legal Solutions

22 Mid-Atlantic Region

1250 Eye Street NW - Suite 350

Washington, D.C. 20005

1 P R O C E E D I N G S

2 WHEREUPON,

3
4 VIDEOGRAPHER: Good morning. We're going
5 on the record at 9:06 a.m. on Wednesday August 29,
6 2018. Please note that the microphones are
7 sensitive and may pick up whispering and private
8 conversations. Please turn off all cell phones
9 and place them away from the microphones, as they
10 can interfere with the deposition audio. Audio
11 and video recording will continue to take place
12 unless all parties agree to go off the record.

13 This is Media Unit 1 of the video
14 recorded deposition of Dr. John Abowd taken by
15 counsel for the plaintiff in the matter of the
16 New York Immigration Coalition, et al., v.
17 United States Department of Commerce, et al. This
18 case is filed in the U.S. District Court of the
19 Southern District of New York. This deposition is
20 being held at the law offices of Arnold & Porter
21 located at 601 Massachusetts Avenue Northwest,
22 Washington, D.C. 20001.

1 My name is Dan Reidy from the firm
2 Veritext Legal Solutions, and I'm the
3 videographer. The court reporter is
4 Karen Jorgenson from the firm Veritext Legal
5 Solutions.

6 I am not authorized to administer an
7 oath. I am not related to any party in this
8 action, nor am I financially interested in the
9 outcome.

10 Also, counsels' appearances will be noted
11 on the stenographic record rather than orally at
12 this time.

13 Will the court reporter please swear in
14 the witness?

15 DR. JOHN ABOWD,
16 called as a witness, and having been first duly
17 sworn, was examined and testified as follows:

18 THE WITNESS: I do.

19 EXAMINATION BY MR. HO:

20 Q Dr. Abowd, before we get started, I just
21 want to confirm something on the record with your
22 counsel.

1 form. I am certain that the questions for the
2 American Community Survey and the 2010 census were
3 put through the full battery of the tests.

4 If you would like, during the break, I
5 will call and ask for cognitive testing of the
6 censuses prior to the 2010.

7 Q Well, so just stick with the 2010. The
8 full short form census enumeration questionnaire
9 was cognitively tested before being deployed for
10 the actual 2010 census, correct?

11 A That is my understanding. But it may
12 have been question by question. I will -- I will
13 actually, during a break, ask a more specific
14 question about the form of the testing.

15 Q Dr. Abowd, has there been any field
16 testing of the citizenship question that's going
17 to be used on the 2020 census without a prefatory
18 question about nativity?

19 A No.

20 Q And there's been no field testing of the
21 full 2020 census questionnaire, including the
22 citizenship question, correct?

1 A That's correct.

2 Q And before the 2010 census, as far as you
3 know, there was field testing of the full short
4 form census questionnaire, right?

5 A Yes.

6 Q At present, there are no plans for field
7 testing of the full 2020 census questionnaire,
8 including the citizenship question; is that right?

9 A That's correct.

10 Q Why not?

11 A In May of 2016 the -- Enrique Lamas, the
12 associate director for demographic programs, who
13 is performing the nonexclusive functions and
14 duties of the deputy director -- and I'm going to
15 call him the acting deputy director from now on --
16 the acting deputy director asked Victoria Velkoff,
17 the chief of the American Community Survey Office,
18 to design a field experiment for the census
19 questions in the exact ACS form and without a
20 lead-in nativity question using the experimental
21 components of the American Community Survey, which
22 allow us to deploy test instruments without

1 disrupting the production instrument, but with a
2 proper experimental design.

3 Tori drafted such an experiment. It
4 included multiple forms of the citizenship
5 question; the one that is in the ACS, the shorter
6 one that's in the Current Population Survey, and
7 no citizenship question, at all. Designed a
8 randomized controlled trial of those questions,
9 controlled to produce sampling errors of either a
10 half of a percent or one percentage point and
11 presented the plan to the acting deputy director
12 and its budget.

13 The acting deputy director and
14 Ron Jarmin, the deputy director performing the
15 nonexclusive functions and duties of the director,
16 and I'm going to call him the acting director from
17 now on. The acting director and Enrique decided
18 that the experiment which could not be deployed
19 until the earliest, November of 2019, and possibly
20 not until the following February, I believe, was
21 not going to produce sufficient information to be
22 worth deploying. In their opinion, and in the

1 opinion of the Census Bureau professionals, the
2 citizenship question, even without a nativity
3 lead-in, has been adequately tested.

4 Q I believe you said that it was in May of
5 2016 --

6 A I said -- I may have said '19, but I
7 meant May of 2018. It was after the
8 Secretary -- sorry. Thank you for correcting me.
9 It was after the Secretary instructed us to add
10 the question. It was in May of this year.

11 Q Thank you for clarifying.

12 Dr. Abowd, what is the Center For Survey
13 Measurement within the Census Bureau?

14 A The Center For Survey Measurement is a
15 group of, primarily, behavioral scientists and
16 survey methodologists led by Paul Beatty who is
17 the chief.

18 Q And what does -- I'll call it CSM for
19 short -- what does CSM do?

20 A CSM does a variety of questionnaire
21 testing and qualitative research, leading content
22 recognition questionnaire layout, ISR -- Internet

1 that block-level CVAP data will be larger or
2 smaller than the error margins associated with the
3 block-level CVAP data that DOJ currently uses,
4 based on ACS estimates?

5 A I have to give a nuanced answer to that
6 question. We don't know, because we haven't set
7 the parameters of the disclosure avoidance system
8 yet. That's somewhat new territory for my
9 colleagues, and I am certain that one of the
10 things we will be discussing is whether the error
11 margins associated with both the P.L. 94 and the
12 CVAP table at the block level still allow
13 redistricting offices and the
14 Department of Justice to use the data effectively.
15 That is the use case for those data.

16 Q Would you agree -- never mind. That's
17 fine.

18 You testified a little bit about a
19 possible RCT of the citizenship question and
20 request from, I believe it was Enrique Lamas, to
21 get a proposal for doing an RCT of the citizenship
22 question without the prefatory nativity question

1 that's been used in past questionnaires.

2 Did I get that right?

3 A Everything you just said is what I said,
4 I think, yes.

5 Q Okay. And that was in March of 2018?

6 A May.

7 Q May of 2018.

8 And are there documents to reflect the
9 request from Mr. Lamas to conduct an RCT of the
10 citizenship question without a prefatory question
11 without nativity?

12 A First of all, he didn't request an RCT.
13 He requested a proposal for an RCT.

14 Q Thank you.

15 A And I have seen Victoria Velkoff's
16 response to that request. So there are artifacts,
17 yes.

18 Q Was that request, or Ms. Velkoff's
19 response, were those in emails?

20 A I do not know how the correspondence
21 between Enrique and Tori Velkoff was conducted.
22 But there is a document that is the proposal of

1 American Community -- ACS office produced, and
2 that was transmitted to me by email.

3 Q And when you say there was a document
4 produced, was that like a memorandum attached to
5 an email or was it in the text of an email?

6 A It was a separate document, short summary
7 of the proposal. I think it was all of the
8 proposal, but it was short.

9 Q As set forth in that proposal, how long
10 would the RCT have taken?

11 A I did read it very recently, but I did
12 not memorize it. The way it works in the
13 experimental components of the American Community
14 Survey is you designate certain months in the
15 field for data collection. And then the
16 American Community Survey data are processed in a
17 flow, but we don't release the official products
18 until the flow of an entire year has been
19 processed, but we would have been able to evaluate
20 an experiment as soon as the months that were in
21 the experiment were evaluated.

22 She gave two separate start dates for the

1 experiment. One was November and one was early in
2 2019. But I don't remember her saying how many
3 months it had to run to achieve the standard
4 errors that -- that it was designed to produce, so
5 that's -- it may not have been in there.

6 Q Do you know how expensive either of those
7 proposals to conduct an RCT of the citizenship
8 question would have been?

9 A Would you remember to re-ask that
10 question after the next break? I would rather
11 give you exactly the right answer than the two
12 numbers I remember, and I think I have transposed
13 digits in one of them, so I'm just going to go
14 look.

15 Q I appreciate that. And if it's not me,
16 then it might be somebody else.

17 A Right. As long as someone knows to
18 re-ask, I know my counsel will remind me to check.

19 Q Was that RCT proposal discussed with
20 anyone outside of the Census Bureau?

21 A When I discussed that RCT proposal with
22 the acting deputy director, he took

1 responsibility, in conjunction with the acting
2 director, for giving me the no-go, but he didn't
3 tell me whether he discussed with anyone else
4 outside the Bureau.

5 Q So you're aware that Dr. Jarmin and -- I
6 don't know if it's Dr. or Mr. Lamas?

7 A It's doctor. It's Dr. Velkoff, too.

8 Q Okay. You don't know if anyone other
9 than Dr. Jarmin and Dr. Lamas were involved in
10 this -- the decision not to do the RCT of the
11 citizenship question?

12 A I do not know.

13 Q You testified at one point whether or
14 not -- excuse me -- you testified at one point
15 that there are indicators in that -- let me try
16 again.

17 I think you testified earlier that there
18 are indicators suggesting that nonresponse rates
19 to a citizenship question among noncitizens are
20 increasing; is that right?

21 A Yes.

22 Q What are those indicators that you were

1 my rank, but some will send a specialist. And
2 then the director conveys to the Department of
3 Commerce a set of recommendations to fill a
4 vacancy. It's the Department of Commerce then
5 decides to whom to extend that invitation.

6 Q Is it fair to say that, generally
7 speaking, CSAC members are highly regarded as
8 social scientists by the Census Bureau?

9 A Yes.

10 Q You're familiar with former Census Bureau
11 director John Thompson?

12 A I have met Dr. Thompson. Mr. Thompson,
13 excuse me.

14 Q Fair to say that the Census Bureau has a
15 high opinion of Dr. Thompson as a scientist?

16 A It is Mr., and yes.

17 Q Fair to say the Census Bureau considers
18 him well versed in standard Census Bureau testing
19 practices?

20 A Yes.

21 Q Has the Census Bureau contracted with any
22 private companies or PR firms to conduct research

1 on public attitudes with respect to answering a
2 citizenship question?

3 A The Census Bureau has awarded the
4 integrated communication contract for the 2020
5 census. Under task orders associated with that
6 contract, the CBAMS -- I expanded the acronym
7 earlier -- the CBAMS surveys and the CBAMS focus
8 groups were conducted. They were conducted by the
9 contractor, who I believe satisfies the definition
10 of an external expert on collecting survey
11 opinion.

12 And after the Secretary instructed us to
13 put the citizenship question on the 2020 census,
14 the focus group protocol was modified to begin
15 collecting information on it, but it was not time
16 to modify the survey protocol.

17 Q Who is that external contractor?

18 A So the lead contractor is
19 Young & Rubicon.

20 Q Has the Census Bureau contracted with a
21 company named Reingold to conduct research on
22 public attitudes with respect to answering a

1 citizenship question?

2 Reingold spelled R-E-I-N-G-O-L-D.

3 A I do not know whether Reingold is a
4 subcontractor in the integrated communication
5 contract. If they are, then the answer could be
6 yes. I'm not aware of another contract, but I
7 will check during a break.

8 Q Okay. Does the Census Bureau think that
9 adding a citizenship question to the 2020
10 enumeration questionnaire is a good idea?

11 A No.

12 MR. HO: Can we go off the record for a
13 second?

14 VIDEOGRAPHER: We're going off the
15 record. The time on the video is 12:07 p.m.

16 (Off the record.)

17 VIDEOGRAPHER: This begins Media Unit
18 Number 3. The time on the video is 1:03 p.m. We
19 are on the record.

20 BY MR. HO:

21 Q Dr. Abowd, I don't have any other
22 questions for you at this time, but I know you

1 said you were going to check on a few things at
2 lunch, and I just wondered if there was anything
3 in particular that you wanted to offer any detail
4 about that you were unable to -- for which you
5 were unable to do earlier?

6 A Yes. First of all, let's go to the
7 easiest one. Reingold is a contractor for the
8 Census Bureau.

9 Q Okay. What are they a contractor for?

10 A They're in -- they have one of the
11 decennial communications contracts. I have
12 requested a summary of the task orders. I haven't
13 received it yet.

14 Q Do you know what work they've performed
15 for the Census Bureau?

16 A That's why I asked for a summary of the
17 task orders. I do not.

18 Q Do you know if there are any documents
19 reflecting the work that Reingold has done for the
20 Census Bureau?

21 A I didn't ask that. I will at the next
22 break.

1 Q Any other issues you'd like to clarify?

2 A In the ACT -- I'm sorry -- ACS RCT, the
3 design was to last for six weeks of data
4 collection, so the one that would -- had it
5 started in November, those data would have been
6 collected by mid-January. There were two designs.
7 They both involved a control group, which in these
8 experiments just means the ACS says it is being
9 run, so we don't have a separate control group.

10 A questionnaire that just had the
11 American Community Survey citizenship question,
12 just the citizenship question, and a group -- a
13 treatment group that just had the CPS version, yes
14 or no. It wasn't the exact CPS version but a
15 two-choice version. And then --

16 (Thereupon, the court reporter
17 clarified.)

18 THE WITNESS: A treatment group that had
19 no citizenship question.

20 To achieve the high level of accuracy
21 would have been \$4 million. To achieve the lower
22 level of accuracy would have been 2 million, same

1 field period.

2 BY MR. HO:

3 Q Thank you. And this would have been the
4 only testing of the 2020 decennial questionnaire
5 with a citizenship question in it, correct?

6 A This is the only field testing with and
7 without citizenship question, directly analyzing
8 the citizenship question that we have considered
9 at the Census Bureau.

10 I also verified that the 2010 census
11 questionnaire had full cognitive and field
12 testing. That the 2020 questionnaire without the
13 citizenship question had -- so I asked him the
14 same way you asked me, was adequately, cognitively
15 tested; yes.

16 Q I'm sorry. Who did you ask whether or
17 not?

18 A I asked my staff -- the same group that I
19 had been asking generally about the testing, I
20 specifically asked about the cognitive testing for
21 the 2020 questionnaire, with and without the
22 citizenship question, and their answer was that it

1 was adequately tested with the citizen- -- without
2 the citizenship question, but not adequately
3 tested with the citizenship question, cognitive
4 testing.

5 Q Thank you.

6 A Okay.

7 And, thirdly, in this table, Exhibit 12,
8 the third panel, the CAPI response rate, I
9 confirmed, so I can now say the way the tract was
10 put into deciles was based on the five-year
11 American Community Survey for the middle five
12 years of the table, so 2011 through 2015. That
13 the CAPI response rate is just the CAPI response
14 rate in the nonresponse follow-up system, okay.

15 I think those were all the things we had
16 unresolved. If you think there were others -- we
17 went over our notes, but I think I've answered the
18 questions that that were unresolved.

19 MR. HO: I don't have any others right
20 now, so I'm going to pass you along to one of the
21 other lawyers for one of the other plaintiff
22 groups, subject, of course, to the issue that I've

1 MAFIDs. Then the -- the primary instrument was an
2 Internet self-response instrument run off the same
3 computer system with the American Community Survey
4 and many of the economic surveys are run off of.

5 If the -- if the contact, which is by
6 mail, comes back determining that there's nobody
7 living there, so they're removed from the scope of
8 the sample, and then we calculate the percentage
9 of households that we get a response from. So
10 about 17 percent -- about 17,000 of the 50,000
11 households responded. In the way we calculate
12 response rates, that's about a 38 percent response
13 rate.

14 Q And I'm going to hand you what's going to
15 be marked as Exhibit 18.

16 (Plaintiffs' Exhibit 18, 2020 CBAMS
17 survey, was marked.)

18 BY MR. ADAMS:

19 Q And I will represent that this is a
20 document downloaded from the Census Bureau's
21 website and identified as the 2020 CBAMS survey.
22 Do you recognize the document as being the 2020

1 CBAMS survey?

2 A So I've only ever seen the code book, not
3 the instrument. But I recognize questions, so I
4 think this is the right questionnaire.

5 Q And how -- how are these questions
6 selected for inclusion in the survey?

7 A We conducted a much more limited CBAMS in
8 2008. That, I believe, was the first time we
9 attempted to get pre-census information on factors
10 that might affect the costs of carrying out the
11 census, the effectiveness of the census. There is
12 a -- there is a research staff led by one of
13 the -- by a senior survey methodologist,
14 Nancy Bates, and with other senior mathematical
15 statisticians and with other senior survey
16 measurement experts, some in the Center For Survey
17 Measurement and some in the decennial census
18 statistical divisions, and some in the other parts
19 of the Census Bureau. They put this instrument
20 and the survey through our lifecycle survey
21 development program.

22 They had constructs that they were trying

1 to capture. Some of which they believed to be
2 well captured by questions that had been used in
3 older CBAMS. Some of which come from questions
4 that are used by other survey organizations to
5 measure general attitudes. There are a large
6 number of those and our survey measurement experts
7 are very familiar with them.

8 So -- so they would have had a set of
9 candidate questions -- they have, generally
10 speaking, a known budget or approximate budget,
11 and experience in planning how much of that budget
12 has to be allocated to instrument development,
13 instrument testing. So if it's an Internet
14 self-response, so there's no field operations for
15 the data collection operation. There was no
16 nonresponse follow-ups, so that phase isn't there.
17 And then, post -- post-response processing and
18 data editing tabulation. So they would have had a
19 tentative plan for allocating their budget across
20 the steps and then put the questionnaire through
21 cognitive testing, the questions, unless the
22 question has been previously cognitively tested,

1 and then laboratory testing of the whole form.

2 And then I believe they used a small
3 experimental sample. Our -- I'm not sure they
4 used an experimental sample. They might have all
5 been done with laboratory samples, so those are
6 people that were recruited into our labs to take
7 whole instruments as opposed to single questions
8 or focus groups. The Center For Survey
9 Measurement has laboratory facilities that can
10 simulate the survey environment or simulate
11 questions or conduct a focus group. They would
12 have used a combination of those tools to get the
13 instrument in place.

14 One of the statisticians on the team
15 would have drawn the address sample from the MAF.
16 The addresses would have been prepared, mail-out
17 materials inviting you to participate would have
18 been prepared, and then the effort staged during a
19 fixed field operation.

20 The survey was conducted in collaboration
21 with -- in collaboration of Y&R, Young & Rubicon,
22 the lead contractor in the integrated

1 communication contract, and Y&R and other
2 subcontractors in that contract also participated
3 in the development and some of their resources
4 were used, as well.

5 Q Will the result of the 2020 CBAMS be used
6 only for the purposes of the 2020 census?

7 A Well, I'm sure the answer to that
8 question is no, because our data can be used
9 regularly. They were collected primarily in
10 support of the 2020 census. That's a funding
11 issue. So we couldn't have run a survey like this
12 intending to use it primarily for the SIPP and
13 charged it to 2020. So its principal reason for
14 being conducted was in support of the 2020 census.
15 But it produced useful data. We are still using
16 the data for the one we conducted in 2008 in
17 support of the 2010 census. So it's a reasonable
18 presumption that the data will be used for other
19 purposes, but their primary purpose is in support
20 of the 2020 census.

21 Q I believe you testified earlier that when
22 you were trying to draft the protocol for adding a

1 operation under a budget from the decennial. We
2 don't get a separate -- we have lots of
3 enumerators who haven't worked for us except for
4 the census, but their -- that whole process is run
5 through the field directorate.

6 Q How are the results from the CBAMS
7 currently being used? Are the results currently
8 being used to modify protocols, to design
9 messaging campaigns or other -- in other ways?

10 A The results are currently in the hands of
11 a small team from Young & Rubicon and the
12 Census Bureau, being coordinated within the
13 Census Bureau by Nancy Bates, and Gina Walejko on
14 the technical side. They were the core of the
15 team that did this successfully. By this, I mean
16 focused the advertising and focused the field
17 effort on quantitatively-identifiable low response
18 areas that -- Nancy, in particular, is something
19 of a pioneer in this area. So she is using her
20 expertise. Gina is using her expertise. The Y&R
21 team is using their expertise, which comes from a
22 different domain, and the field staff is using

1 their expertise to try to learn what we can from
2 these data, in addition to the other tools that
3 we've already produced, like the -- the low
4 response indicators in the planning database. So
5 all of those tools will get used.

6 Some of those tools have been actively
7 incorporated into the operational control systems
8 optimizer so that it can use them as a part of its
9 scheduling algorithm. The field supervisors and
10 the managers will get briefed, but the primary
11 use, right now, is to ramp up the communication
12 campaign.

13 Q And just to confirm, the final report
14 will be publicly available, you anticipate, in
15 November or December?

16 A I'm guessing it's still going to be
17 labelled an interim report, but it will be the
18 first public report from the CBAMS.

19 MR. ADAMS: Let's go off the record.

20 VIDEOGRAPHER: We're going off the
21 record. The time on the video is 4:53 p.m.

22 (Off the record.)

1 of that recruitment plan.

2 Q But it's fair to say that the low levels
3 of unemployment right now will make it more
4 difficult to hire enumerators?

5 MR. EHRLICH: Objection. Form.

6 THE WITNESS: It's fair to say it will
7 make it more expensive to hire enumerators. And
8 if that's not acknowledged, then it will make it
9 more difficult to hire enumerators.

10 BY MS. GOLDSTEIN:

11 Q So, previously, you testified about the
12 work that Young & Rubicon was retained to do,
13 correct?

14 A So I testified about the work of the
15 integrated communication contract for which Y&R is
16 the lead contractor.

17 Q Have they done attitudinal studies on the
18 citizenship question as part of that contract?

19 A I do not know whether they have done
20 them. I do know that they are being actively
21 discussed.

22 Q And has Reingold performed attitudinal

1 studies on the citizenship question?

2 A So, as I said earlier, I would learn what
3 Reingold -- so Reingold is a partner in the
4 integrated communication contract, one of the
5 subcontractors. Reingold has been involved in the
6 task orders associated with the integrated
7 communication contract to date. Reingold did
8 participate in the CBAMS task order. I asked
9 whether the task orders were public, and the task
10 orders are not public. So they either have to be
11 FOIA'd or if they're discovered, they have to be
12 redacted to remove confidential information from
13 them. I think that that's what I promised to get
14 in terms of an answer about Reingold.

15 Q But do you know if they have performed
16 attitudinal studies as part of this?

17 A So I do not know whether Reingold was the
18 specific subcontractor or on the subcontractor
19 team to do them. That would be in the task
20 order -- the task order would say this has to be
21 done, and then Y&R would assemble the team that
22 did it. So I might not necessarily know, but the

1 financial officer paying the bills would know
2 whether contractors --

3 The Census Bureau's answer to that
4 question is they have actively participated in the
5 task orders to date and -- and that included the
6 CBAMS, which did have attitudinal -- I think
7 you're not talking about those attitude studies.

8 Q There are other attitudinal studies
9 pursuant to that contract, correct?

10 A There is discussion of other attitudinal
11 work broadly interpreted, but we're not done
12 collecting data - - -

13 Q Right.

14 A -- about things that might make it easier
15 or more difficult to conduct the census.

16 Q So are -- there are no results yet to be
17 analyzed from those studies?

18 A As far as I know, yes. The agency's
19 answer is there are no --

20 (Thereupon, the court reporter
21 clarified.)

22 THE WITNESS: There are not yet any data

1 are on the record.

2 BY MS. GOLDSTEIN:

3 Q Dr. Abowd, I think I have just one more
4 question.

5 If you will turn to the last page of the
6 exhibit in front of you Bates marked 1320.

7 A Okay.

8 Q In light of the Census Bureau's analysis
9 of Alternative C versus Alternative D, do you
10 agree that reinstatement of a citizenship
11 question on the 2020 decennial census is necessary
12 to provide complete and accurate data in response
13 to the DOJ request?

14 A No.

15 Q And that is the position of the
16 Census Bureau, correct?

17 A Yes.

18 MS. GOLDSTEIN:

19 Q Thank you, Dr. Abowd.

20 I just want the record to reflect and
21 that plaintiffs -- and I speak to all plaintiffs
22 with respect to this -- are leaving the record

1 open, because, among other reasons, the documents
2 that were produced last evening that we have not
3 had time to review that are relevant to this
4 deposition, both with respect to the underlying
5 documents, as well as to how the documents relate
6 to many of the topics listed in the 30(b)(6)
7 deposition notice, as well as documents that were
8 identified this afternoon that have not yet, to
9 our knowledge, been produced. These include the
10 Reingold documents, documents relating to the Y&R
11 contract, the CBAMS microdata file that was given
12 to Y&R, and the July extended white paper and
13 possible other documents that we will confer with
14 counsel on.

15 MR. EHRLICH: I think Dr. Abowd said the
16 July white paper was the same as the August white
17 paper we sent you.

18 MS. GOLDSTEIN: There were some small
19 modifications. So to the extent there is another
20 version of that white paper that should be
21 produced to us, okay?

22 MR. EHRLICH: We can talk about that.

1 Q And is there a place -- a place where you
2 could find the expected enumeration from the
3 administrative records?

4 A That's a component of the lifecycle cost
5 estimates.

6 Q And why was it that the RCTs that we've
7 discussed previously were not put into the field?

8 A Acting Deputy Director Lamas,
9 Acting Director Jarmin, and Under Secretary Kelley
10 conferenced about that proposal and determined
11 that the 42 million households that had already
12 asked -- had already answered the existing
13 citizenship question constituted adequate testing
14 and that we would use that question.

15 MR. EHRLICH: I have nothing else.

16 FURTHER EXAMINATION BY MS. GOLDSTEIN:

17 Q One follow-up question on that,
18 Dr. Abowd. Sorry.

19 Was the Census Bureau team of experts
20 consulted on Director Jarmin, Under Secretary
21 Kelley and Dr. Lamas's decision not to put those
22 RCTs into the field?

1 A Tori Velkoff, although she's not an
2 author of the paper that you got, was a member of
3 the SWAT team. She had staff supported.

4 So in these situations, the senior
5 leadership of the Census Bureau consults with the
6 internal experts they believe are most salient. I
7 mean, Tori preferred the cost estimate, so that
8 was -- that's who got consulted.

9 Q So Ms. Velkoff got consulted?

10 A Yes.

11 Q Thank you.

12 And were you -- were you consulted?

13 A No.

14 Q Thank you.

15 VIDEOGRAPHER: This concludes today's
16 video deposition. The time on the video is
17 6:14 p.m. We are off the record.

18 (Whereupon, at 6:14 p.m., the deposition
19 of Dr. John Abowd was concluded.)
20
21
22

* * * * *

CERTIFICATE OF REPORTER

I, KAREN LYNN JORGENSEN, RPR, CSR, CCR the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me in stenotype and thereafter reduced to typewriting under my direction; that the said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.



KAREN LYNN JORGENSEN, RPR, CCR, CSR

Dated this 1st day
of September , 2018.

ACKNOWLEDGEMENT OF DEPONENT

I, DR. JOHN ABOWD, do hereby acknowledge I have read and examined the foregoing pages of testimony, and the same is a true, correct and complete transcription of the testimony given by me, and any changes or corrections, if any, appear in the attached errata sheet signed by me.

Date

DR. JOHN ABOWD

Stephen Ehrlich, Esquire

U.S. DEPARTMENT OF JUSTICE

20 Massachusetts Avenue

Washington, D.C. 20530

IN RE: New York Immigration Coalition, et al., v.
United States Department of Commerce, et al.

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1 Dear Mr. Ehrlich:

2 Enclosed please find your copy of the
3 deposition of DR. JOHN ABOWD, along with the
4 original signature page. As agreed, you will be
5 responsible for contacting the witness regarding
6 signature.

7 Within 21 days of receipt of transcript,
8 please forward errata sheet and original signed
9 signature page to counsel for, John Freedman and
10 all counsel of record.

11 If you have any questions, please do not
12 hesitate to call. Thank you.

13 Yours,



14 Karen Lynn Jorgenson, RPR, CCR, CSR
15 Capital Reporting Company
16 1821 Jefferson Place, Northwest
17 3rd Floor
18 Washington, D.C. 20006
19 (202) 857-3376
20
21
22

cc: All counsel of record

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E R R A T A S H E E T

Case Name: New York Immigration Coalition, et
al., v. United States Department of Commerce, et
al.,

Witness Name: DR. JOHN ABOWD

Deposition Date: Wednesday, August 29, 2018

Page No.	Line No.	Change/Reason for Change
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Signature

Date

EXHIBIT F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK IMMIGRATION
COALITION, *et. al*,

Plaintiff,

v.

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

Defendant.

Civil Action No. 18-CV-5025-JMF

Hon. Jesse M. Furman

**PLAINTIFFS' FIRST SET OF REQUESTS
FOR EXPEDITED PRODUCTION OF
DOCUMENTS TO DEFENDANTS UNITED
STATES CENSUS BUREAU AND RON
JARMIN**

Pursuant to Federal Rule of Civil Procedure 34 ("Rule 34"), by and through their attorneys of record, Plaintiffs request that Defendants, or those authorized to act on behalf of Defendants, respond to the following Requests for Production of Documents and produce for inspection, copying, and use all responsive documents requested herein. Documents should be produced by July 31, 2018 to the offices of Arnold & Porter Kaye Scholer LLP, 601 Massachusetts Avenue, N.W., Washington, D.C. 20001.

Notwithstanding any definition set forth below, each word, term, or phrase used in these Requests is intended to have the broadest meaning permitted under the Federal Rules of Civil Procedure. As used in these Requests, the following terms are to be interpreted in accordance with the following definitions.

DEFINITIONS

1. CENSUS BUREAU means the United States Census Bureau, including all regional offices and subdivisions of the Census Bureau.

2. CITIZENSHIP QUESTION means a question posed by the CENSUS BUREAU inquiring as to a PERSON's citizenship status.

3. COMMUNICATION or COMMUNICATIONS includes any contact between two or more PERSONS (including any individual, corporation, proprietorship, partnership, association, government agency or any other entity) by which any information, knowledge or opinion is transmitted or conveyed, or attempted to be transmitted or conveyed, and shall include, without limitation, written contact by means such as letters, memoranda, e-mails, text messages, instant messages, tweets, social networking sites, or any other DOCUMENT, and oral contact, such as face-to-face meetings, video conferences, or telephonic conversations.

4. DECENNIAL CENSUS means the constitutionally mandated census that is administered every ten years by the Census Bureau to count the number of people residing in the United States.

5. DOCUMENT means any "document or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form." Fed. R. Civ. P. 34(a)(1)(A).

6. IDENTIFY means:

- a. When referring to a person, you shall set forth the following information: (i) Full Name; (ii) Present or last known residential address; (iii) Present or last known telephone number; (iv) Present occupation, job title, employer and employer's address; and (v) Occupation, job title, employer, and employer's address at the time of the event or period referred to in each particular interrogatory.
- b. When referring to a document, you shall set forth the following information: (i) the nature (*e.g.*, e-mail, letter, handwritten note) of the document; (ii) the subject line, title, or heading that appears on the document; (iii) the date of the document and the date of each addendum, supplement or other addition or change; (iv) identification of the author and of the signer thereof, and of the person on whose

behalf or at whose request or direction the document was prepared or delivered; (v) identification of the addressee or recipient thereof, if any; and (vi) the present locations of the document, and the name, address, position or title, and telephone number of the person or persons having custody.

- c. When referring to an event, occurrence, act, transaction or conversation, you shall set forth the following information: (i) the date and place of such event; (ii) the persons involved; and (iii) a description of the event.

7. PERSON OR PERSONS means any natural person, firm, partnership, association, joint venture, public or private corporation, individual, proprietorship, governmental entity, organization, other enterprise, group of natural persons or other entity that has a separate legal existence.

8. OTHER GOVERNMENT AGENCIES means the United States Department of Justice, the United States Department of Homeland Security, the United States Department of State, and any other agencies of the United States Government, including any PERSON OR PERSONS currently or formerly employed by such agencies since January 20, 2017.

9. TRUMP CAMPAIGN means any PERSON or PERSONS, organizations, or agents seeking the election or reelection of Donald J. Trump, including but not limited to employees of the presidential campaign committees, Donald J. Trump for President, Inc.

10. TRUMP ADMINISTRATION means President Donald J. Trump, Vice President Michael R. Pence, and any PERSON or PERSONS currently or formerly employed at, for, or within the Executive Office of the President and all of its components at any time since January 20, 2017.

11. The use of the singular form of any word shall include the plural and vice versa.

12. The connectives “and,” “or,” and “and/or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses which might otherwise be construed outside the scope.

INSTRUCTIONS

1. The word “any” includes all and the word “all” includes any.
2. These Requests require the production of all responsive DOCUMENTS within the sole or joint possession, custody, or control of Defendants including, but not limited to, any such DOCUMENT or thing that is within the possession, custody, or control of any agents, agencies, departments, attorneys, employees, consultants, investigators, representatives, or other PERSONS or entities acting for, or otherwise subject to the control of, Defendants.
3. Defendants shall answer each Request and each part or subpart of a Request separately. Defendants shall leave no part of a Request unanswered merely because an objection is interposed to another part of the Request. If Defendants are unable to answer fully any of these Requests, after exercising due diligence to secure the information to do so, Defendants should so state, answer to the extent possible, specify Defendants’ inability to answer the remainder and provide or state whatever information is in Defendants’ possession, custody, control, or knowledge concerning any unanswered portion.
4. If Defendants object to or otherwise decline to answer any portion of a Request, Defendants shall identify the portion of the Request to which they object or otherwise decline to answer, state with particularity the reason for such objection or declination, and identify each PERSON or organization having knowledge of the factual basis, if any, upon which the objection, privilege, or other ground is asserted.
5. For any responsive DOCUMENT or portion thereof that is either redacted or withheld, in whole or in part, on the basis of any assertion of privilege or other asserted exemptions from discovery, identify each DOCUMENT so redacted or withheld. With regard to all DOCUMENTS or portions of documents redacted or withhold on this basis, identify:
 - a. the type of DOCUMENT;

- b. the subject matter of the DOCUMENT;
- c. the date of the DOCUMENT; and
- d. such other information as is sufficient to identify the DOCUMENT, including, where appropriate, the author, addressee, custodian, and any other recipient of the DOCUMENT, and, where not apparent, the relationship of the author, addressee, custodian, and any other recipient to each other.

6. If Defendants refuse to provide any information demanded herein on the ground that said information is protected from discovery by a privilege (including executive or deliberative privilege) or other protection (including work product doctrine), then Defendants shall:

- a. specify with particularity the nature of the privilege or other protection (including the work product doctrine) being claimed;
- b. provide a specific statement of the ground and authority on which Defendants rely in withholding information;
- c. provide a statement setting forth each PERSON having knowledge of the factual basis, if any, on which the claim or privilege or immunity or other ground is based; and
- d. in the case of a DOCUMENT or COMMUNICATION, a privilege log, served at the time of production identifying the DATE, description, author (s), addressee(s), recipient(s), and subject matter and state the factual basis for the claim of privilege.

7. If any DOCUMENT has been lost, discarded, or destroyed, identify such DOCUMENT. State the type of DOCUMENT, its date, the approximate date it was lost, discarded, or

destroyed, the reason it was lost, discarded, or destroyed, a summary of its substance, and the identity of each PERSON having knowledge of the contents thereof.

8. If any information contained in the requested documents is confidential, requiring secured transfer and management, Plaintiffs have the capacity through consultants to receive information through a Federal Statistical Research Data Centers.

9. These requests require any responsive data files to be in provided in STATA, ASCII or SAS data file format.

REQUEST FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 1.

All COMMUNICATIONS, including drafts and documents reflecting COMMUNICATIONS, regarding or concerning the inclusion of a CITIZENSHIP QUESTION on the DECENNIAL CENSUS, including but not limited to COMMUNICATIONS with or about COMMERCE, OTHER GOVERNMENT AGENCIES, the TRUMP ADMINISTRATION, the TRUMP CAMPAIGN, NIELSEN, Kris Kobach, Steve Bannon, Stephen Miller, Andrew Bremberg, Steve King, Steven Camarota, Hermann Habermann, and Robert Groves.

REQUEST FOR PRODUCTION NO. 2.

All DOCUMENTS, including drafts, regarding or concerning the inclusion of a CITIZENSHIP QUESTION on the DECENNIAL CENSUS, including, but not limited to, all research, analysis, testing, or planning regarding or relating to the inclusion of a CITIZENSHIP QUESTION on the DECENNIAL CENSUS, the Current Population Survey (CPS) or the American Community Survey (ACS). This Request includes all DOCUMENTS related to testing or surveying that is being conducted or considered by the CENSUS BUREAU on the impact of inclusion of a CITIZENSHIP QUESTION on response or non-response rates,

evaluating the messaging around that question, any pre-testing projects, focus groups, field or other tests, any survey instruments, or any raw data from such testing.

REQUEST FOR PRODUCTION NO. 3.

All COMMUNICATIONS and DOCUMENTS, including drafts, generated by, prepared by, relied upon by, referenced, or otherwise produced by the CENSUS BUREAU in conjunction with the documents found in the Administrative Record at 1277-1285, 1286-1297, 1298-1303, 1304-1307, 1308-1312, and 1313-1320.

REQUEST FOR PRODUCTION NO. 4.

All DOCUMENTS, including drafts, regarding, relating, or concerning analysis or data assessing or analyzing the inclusion of a CITIZENSHIP QUESTION on the DECENNIAL CENSUS, including but not limited to (a) DOCUMENTS, data or analysis generated by or relied upon by COMMERCE, the CENSUS BUREAU, or the TRUMP ADMINISTRATION in preparing for Congressional testimony by ROSS or any COMMERCE, CENSUS BUREAU or OTHER AGENCY employee related to the inclusion of a CITIZENSHIP QUESTION on the DECENNIAL CENSUS, (b) DOCUMENTS, data or analysis generated by or relied upon by COMMERCE, the CENSUS BUREAU, or the TRUMP ADMINISTRATION in preparing ROSS' March 26, 2018 memorandum, and (c) DOCUMENTS, data, or analysis considered by, or reflecting information considered by, ROSS, the CENSUS BUREAU, COMMERCE, or the TRUMP ADMINISTRATION in proposing, evaluating, or analyzing the CITIZENSHIP QUESTION.

REQUEST FOR PRODUCTION NO. 5.

All DOCUMENTS constituting or relating to the monthly responses rates, including survey/unit and item non-response, and demographics of the Current Population Survey (CPS) responses between January 2015 and May 2018. This includes, but is not limited to, the file of

the birthplace and citizenship information from the Census Bureau's enhanced Social Security Administration Numident file as merged with the CPS results. Personal identifying data such as social security number, Protected Identification Keys (PIKs) name, date and place of birth and parent's names can be redacted from any version of this merged file that is produced.

REQUEST FOR PRODUCTION NO. 6.

All DOCUMENTS and COMMUNICATIONS constituting or reflecting the 2017 American Community Survey results. This includes the actual survey results at the block group level, as well as any tracking, quality control or analysis of item non-response rates on the 2017 American Community Survey, including but not limited to any quality control done to evaluate performance of interviews/enumerators. This includes, but is not limited to, the file of the birthplace and citizenship information from the Census Bureau's enhanced Social Security Administration Numident file as merged with the ACS results. Personal identifying data such as social security number, Protected Identification Keys (PIKs) name, date and place of birth and parent's names can be redacted from any version of this merged file that is produced.

REQUEST FOR PRODUCTION NO. 7.

All DOCUMENTS and COMMUNICATIONS constituting or reflecting actual survey results at the block group level, as well as any tracking, quality control or analysis of item non-response rates on the American Community Survey from January 2013 to 2016, including but not limited to any response break off paradata collected (including response break off paradata on the Internet Self-Response instrument), any quality control done to evaluate performance of interviews/enumerators and any data reviewed as part of analysis and research done for the John Abowd's January 19, 2018 Memorandum addressing the "Technical Review of the Department of Justice Request to Add Citizenship Question on the 2020 Census." This includes, but is not limited to, the file of the birthplace and citizenship information from the Census Bureau's

enhanced Social Security Administration Numident file as merged with the ACS results. Personal identifying data such as social security number, Protected Identification Keys (PIKs) name, date and place of birth and parent's names can be redacted from any version of this merged file that is produced.

REQUEST FOR PRODUCTION NO. 8.

All DOCUMENTS and COMMUNICATIONS constituting or reflecting actual survey results at the block group level, as well as any tracking, quality control or analysis of item non-response rates on the 2010 Decennial Census, 2010 American Community Survey, and the 2000 Decennial Census Long and Short Form reviewed as part of analysis and research done for the John Abowd's January 19, 2018 Memorandum addressing the "Technical Review of the Department of Justice Request to Add Citizenship Question on the 2020 Census."

REQUEST FOR PRODUCTION NO. 9.

All DOCUMENTS, including those relating to surveys and focus groups, related to the Census Barriers, Attitudes, and Motivators Survey (CBAMS) for the 2010 DECENNIAL CENSUS, from January, 2007 through June 2012 final report, and the 2020 DECENNIAL CENSUS, from January 2017 through the present, including but not limited to the results and all related documents for of the 2020 CBAMS survey and focus groups conducted in 2018.

REQUEST FOR PRODUCTION NO.10.

All DOCUMENTS constituting or reflecting any end-to-end DECENNIAL CENSUS test (including the Rhode Island tests, the Washington tests, and the West Virginia tests), including data or analysis of the daily self-response rate, the item non-response rate, door-to-door canvassing response and non-response rate, as well as an data or analysis from focus groups, and any consideration, testing, evaluation or analysis of a CITIZENSHIP QUESTION.

REQUEST FOR PRODUCTION NO.11.

All DOCUMENTS and COMMUNICATIONS constituting, discussing, or concerning analysis or data assessing or analyzing respondent confidentiality concerns, including but not limited to all COMMUNICATIONS and DOCUMENTS, including drafts, constituting, reflecting, or referring to the Memorandum from the Center for Survey Measurement (CSM) dated September 20, 2017, including all data related to the Memorandum, as well as any subsequent activities, presentations or memorandum from 2017 or 2018 addressing confidentially and/or privacy concerns of respondents as part of multilingual focus groups/ multilingual pretesting studies, and Privacy Act Studies (including but not limited to the presentations in November 2017, March 2018, and May 2018).

REQUEST FOR PRODUCTION NO. 12.

All DOCUMENTS and COMMUNICATIONS, including drafts, internal comments and notes relating to the topics of the 2020 Census Operational Plan or the addition of a CITIZENSHIP QUESTION in the 2020 Census Memorandum Series from January 2017 to present.

REQUEST FOR PRODUCTION NO.13.

All DOCUMENTS and COMMUNICATIONS, including drafts, internal comments and notes relating to the topics of the 2020 Census Operational Plan, privacy and/or respondent confidentiality in the 2020 Census Memorandum Series from January 1, 2015 to the present.

REQUEST FOR PRODUCTION NO. 14.

All DOCUMENTS and COMMUNICATIONS, including drafts, hard copy and electronic notes, memoranda and any requested changes by COMMERCE, the TRUMP ADMINISTRATION or OTHER GOVERNMENT AGENCIES, relating to the 2020 Census

Program Management Reviews regarding or relating to the inclusion of a CITIZENSHIP QUESTION on the DECENNIAL CENSUS since January 2017.

REQUEST FOR PRODUCTION NO. 15.

All DOCUMENTS, including drafts, constituting or reflecting, data, analysis, and research done to evaluate the response rate by undercounted or hard to count populations, in DECENNIAL CENSUSES or other CENSUS BUREAU surveys, including the 2010 Post-Enumeration Survey. This Request includes any research, analysis, surveys, focus groups, communications, or notes on the effects of including specific questions or changes in the wording of questions on the response rate for hard to reach populations in DECENNIAL CENSUSES or other CENSUS BUREAU surveys.

REQUEST FOR PRODUCTION NO. 16.

All DOCUMENTS and COMMUNICATIONS constituting or reflecting results and analysis of the daily survey questions for the Census Bureau by Gallup Daily Tracking Survey related to trust, privacy and/or respondent confidentiality since 2015.

REQUEST FOR PRODUCTION NO. 17.

All DOCUMENTS and COMMUNICATIONS related to the design, implementation, operation and results of the April 2017 Census Test, include but not limited to any results for the self-response testing.

REQUEST FOR PRODUCTION NO. 18.

All DOCUMENTS and COMMUNICATIONS that Defendants plan to introduce into evidence at trial.

Dated: July 12, 2018

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+ admitted pro hac vice.

* designates *pro hac vice* application forthcoming.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 12, 2018, the foregoing was served on counsel for Defendants United States Department of Commerce and Wilbur L. Ross and on the United States Attorney for the Southern District of New York by email and first class mail.

By: /s/ John A. Freedman

EXHIBIT G

From: [Freedman, John A.](#)
To: [Halainen, Daniel J. \(CIV\)](#); [Dale Ho](#); [Bailey, Kate \(CIV\)](#); [Coyle, Garrett \(CIV\)](#); [Federighi, Carol \(CIV\)](#); [Kopplin, Rebecca M. \(CIV\)](#); [Tomlinson, Martin M. \(CIV\)](#); [Ehrlich, Stephen \(CIV\)](#)
Cc: [Dale Ho](#); [Sarah Brannon](#); [Colangelo, Matthew](#); ["Goldstein, Elena"](#); [Fidler, Danielle](#); [Perry Grossman](#); [Gersch, David P.](#); [Grossi, Peter T.](#); [Weiner, David J.](#); [Jacobson, Daniel](#); [Bauer, Andrew](#); ["Saini, Ajay"](#)
Subject: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Further Production Deficiencies
Date: Wednesday, August 29, 2018 3:15:38 PM
Attachments: [Census 2nd Rgs 8.29.pdf](#)

Counsel --

Attached please find the NYIC Plaintiffs' Second Set of Interrogatories.

I also write to inquire about the production status of two sets of documents Dr. Abowd testified about today:

1. Dr. Abowd testified that in or around May 2018, Victoria Velkoff proposed at least two randomized controlled trials concerning the addition of a citizenship question to the decennial census, which was not conducted. We have received no documents related to this. The substance of the Velkoff RCT proposal as well all communications about the proposed Velkoff RCT (as well as any other proposed tests of the citizenship question) and the decision not to conduct the Velkoff RCT are responsive to our July 12 requests for production Nos. 1, 2 and 10 and should be produced immediately. As we have previously discussed, we will be raising the Defendants' failure to conduct a custodial search of Ms. Velkoff's materials with the Court.
2. Dr. Abowd testified that the Census Bureau has contracted with the public relations firm Reingold to conduct research about attitudes towards answering the citizenship question. We have received no documents about this. The research conducted by Reingold as well as communications about such research are responsive to our July 12 requests for production Nos. 1, 2, 9, 11, and 15 and should be produced immediately.

We are reserving all rights regarding the need to recall witnesses in light of these production deficiencies.

Please advise as to your availability to meet and confer regarding your plan to address these production deficiencies.

Thanks,

John

John A. Freedman

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Washington, DC 20001

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EXHIBIT H

From: [Freedman, John A.](#)
To: [Bailey, Kate \(CIV\)](#); [Federighi, Carol \(CIV\)](#); [Coyle, Garrett \(CIV\)](#); [Kopplin, Rebecca M. \(CIV\)](#); [Halainen, Daniel J. \(CIV\)](#); [Tomlinson, Martin M. \(CIV\)](#); [Ehrlich, Stephen \(CIV\)](#)
Cc: [Sarah Brannon](#); [Perry Grossman](#); [Colangelo, Matthew](#); [Bauer, Andrew](#); [Gersch, David P.](#); [Grossi, Peter T.](#); [Weiner, David J.](#); [Young, Dylan Scot](#); [Kelly, Caroline](#); [Saini, Ajay](#); [Goldstein, Elena](#); [Dale Ho](#)
Subject: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet & Confer Request & Other Matters
Date: Tuesday, September 04, 2018 6:07:52 PM

Counsel --

There are several points we wanted to check in on, some of which we should cover in a meet and confer -- a proposed agenda is set forth below:

1. Please advise as to the timing when you will produce additional Department of Justice documents. We understood from Kate's August 27 email, as well as statements during the August 31 meet and confer that there was another tranche ready for production as soon as the clawback order was entered. As we previously advised, the priority should be materials from and communications involving Mssrs. Gore and Gary. Given the timing of Mr. Gore's deposition and now that the clawback order is in place, these should be produced promptly.
2. With regard to your motion to stay, can you clarify whether the relief you are seeking would stay the parties obligations to make expert disclosures?

For the meet and confer, we would propose the following agenda:

1. Whether Defendants will make Secretary Ross available for deposition.
2. Defendants production of the materials discussed in my August 29 email that Dr. Abowd discussed at his deposition -- the Velkoff randomized controlled trials and the Reingold/Young & Rubicam documents.
3. The Parties' joint status report, which is due Thursday. We have been working on a draft submission, which we will provide tomorrow. For planning purposes, please advise whether the Defendants will voluntarily make Secretary Ross, Ms. Dunn Kelley, Ms. Teramoto, or Mr. Comstock available to testify at trial.

We are available to discuss tomorrow.

Thanks and best regards,

John

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EXHIBIT I

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

Sent: Friday, September 7, 2018 7:44 PM

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

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

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

Counsel,

I note that your email below mischaracterizes the government's position as I represented during our meet and confer in several ways:

- First, I indicated that Defendants had **gathered** all of the materials potentially responsive to your motion to compel, and that, although we had not yet been able to review those materials, we had determined that they exceeded 25GB of data. I informed you specifically that the material we had collected corresponded to **the search terms and custodians referenced in your motion**. Your list below is not what I understood us to be discussing as it is not the same list included in your motion.
- Second, my notes reflect that Plaintiffs offered to confer among themselves and propose search terms to apply to that very large volume of materials in order to speed our review. During the call, Plaintiffs represented they would get back to us with a proposal soon, and Dale Ho confirmed that understanding in his September 6th email (attached): "We are conferring internally about narrowing terms to facilitate production of documents and will be back to you shortly." Because of this representation, I did not indicate that we would send you a proposal.
- Third, I did not "indicate[]" that Mark Neuman's [sic] name was generating documents relevant to the case." To the contrary, I represented that more than 25GB of material had been collected and that it would take some time to load into our database to permit review; in no way did I state that we had reviewed any of the material or determined the presence of Mr. Neumann's name on documents. I did say that, based on what I understood from the agency, we believe Bannon's name may be generating a lot of false positives due to his interactions with the agency on-matters unrelated to the census citizenship question. But at that point one member of Plaintiffs' team indicated that Plaintiffs also do not want to review voluminous, nonresponsive materials and would get back to us with proposed narrowing terms. As you are aware, it takes considerable time to transfer and load such a large volume of material, and we do not yet have a firm idea what is contained within that data.

We look forward to receiving your proposal for narrowing the scope of material gathered. If, however, you are no longer amenable to proposing search terms designed to yield a reasonable volume of documents responsive to what Plaintiffs requested in their motion to compel, we can review and process all of the documents responsive to your request, but please understand that it will take considerable time to do so.

Regarding your request to depose Secretary Ross, the government has important institutional interests in not producing Cabinet level officials for depositions and we decline to depart from our usual position here. We believe, however, that Plaintiffs can obtain the information they seek through other means without the extraordinary burden of deposing a cabinet secretary. We propose that Plaintiffs either (1) serve interrogatories requesting the information they wish to ask Secretary Ross, or (2) serve a 30(b)(6) deposition notice on the Department of Commerce, which would allow Plaintiffs to obtain any relevant, nonprivileged information they could have received from the Secretary himself. Please let us know if you wish to proceed with one of these options.

Thank you,

Kate Bailey

Trial Attorney

United States Department of Justice

Civil Division – Federal Programs Branch

20 Massachusetts Avenue, NW

Room 7214

Washington, D.C. 20530

202.514.9239 | kate.bailey@usdoj.gov

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

Sent: Friday, September 07, 2018 5:24 PM

To: Bailey, Kate (CIV) <katbaile@CIV.USDOJ.GOV>; DHo@aclu.org; Federighi, Carol (CIV) <CFederig@CIV.USDOJ.GOV>; 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: SBrannon@aclu.org; PGrossman@nyclu.org; Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; 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>; Saini, Ajay <Ajay.Saini@ag.ny.gov>; Goldstein, Elena <Elena.Goldstein@ag.ny.gov>

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

Counsel,

We write to follow-up on several discovery and other issues.

1. 1. Documents referenced in Dr. Abowd's 30(b)(6) deposition, including documents related to a proposal to the Velkoff proposals for randomized controlled trials, and the Reingold/Young & Rubicam documents. We have raised these documents with you multiple times, including in-person and in writing during Dr. Abowd's deposition on August 29; and on a meet-and-confer on September 4. Our understanding was that you were going to respond by the end of this week. Please advise on the status of producing these documents.
2. 2. Secretary Ross Deposition. During the meet-and-confer on September 4, we ask if you would make Secretary Ross available for a deposition. Our understanding was that you were going to respond by the end of this week. Please advise today if you will make Secretary Ross available for a deposition.
3. 3. DOJ Documents. Thank you for producing DOJ documents earlier this week. We write regarding three issues.
 - a. Completion of Mr. Gore's Production. From our discussion, we understood that DOJ was continuing to review responsive materials. In light of his forthcoming deposition, we reiterate our request that you prioritize completion of the production of materials from Mr. Gore's work or non-governmental accounts and produce them immediately.
 - b. Missing attachments. A number of emails have been produced without attachments. E.g., DOJ 2738.
 - c. Improper Deliberative Privilege Assertions. A number the privilege assertions appear invalid because, on their face, the log description does not suggest they are deliberative or otherwise should be produced under the balancing test. We intend to move on the following documents, and would ask that you take another look and advise as to your position: DOJ 2739, 2924-2927, 2951, 2966, 3094, 3098, 3101, 3103, 3105, 3352, 3356, 3357, 3365, 3367, 3371, 3374, 3376, 3382, & 3723. In light of Mr. Gore's impending deposition on Wednesday 9/12, we intend to move expeditiously on these, so please advise of a time on Monday when you will be available to meet and confer.
4. Supplementation of the Administrative Record: During our meet-and-confer on September 4, you indicated your clients were prepared to conduct searches of the custodians we identified in our August 27 email (Branstad, Willard, Lenihan, Park-Su, Langdon, Velkoff & Raglin).

With regard to search terms, you indicated that use of certain of the names we had proposed (e.g., Steve Bannon) were generating a large volume of irrelevant materials. As we indicated, we are prepared to work with Defendants on developing targeted search terms. We had understood that you would propose some alternative terms to what we suggested. In general, we would be fine using terms that should limit the number of false positives -- for example one of the proper names [Steve Bannon/James McHenry/ Gene Hamilton/ etc.] in the same email with one of the key concepts in the case [census/ citizenship/ immigrants/ aliens/ illegals/ undocumented]. Please advise when you will have a proposal for our review.

During this discussion, you indicated that Mark Neuman's name was generating documents relevant to the case. Those materials should be produced expeditiously. Please advise when we can expect to receive them.

Best regards,

John

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EXHIBIT J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK IMMIGRATION
COALITION, *et. al*,

Plaintiff,

v.

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

Defendant.

Civil Action No. 1:18-cv-05025-JMF

Hon. Jesse M. Furman

**PLAINTIFFS' FIRST SET OF REQUESTS
FOR EXPEDITED PRODUCTION OF
DOCUMENTS AND FIRST SET OF
INTERROGATORIES TO DEFENDANTS
UNITED STATES DEPARTMENT OF
COMMERCE AND WILBUR ROSS**

Pursuant to Federal Rules of Civil Procedure 33 and 34, by and through their attorneys of record, Plaintiffs request that Defendants, or those authorized to act on behalf of Defendants, respond to the following Interrogatories and Requests for Production of Documents and produce for inspection, copying and use all responsive documents requested herein. Documents should be produced by July 31, 2018 to the offices of Arnold & Porter Kaye Scholer LLP, 601 Massachusetts Avenue, N.W., Washington, D.C. 20001.

Notwithstanding any definition set forth below, each word, term, or phrase used in these Requests is intended to have the broadest meaning permitted under the Federal Rules of Civil Procedure. As used in these Requests, the following terms are to be interpreted in accordance with the following definitions.

DEFINITIONS

1. CENSUS BUREAU means the United States Census Bureau, including all regional offices and subdivisions of the Census Bureau, including any PERSON or PERSONS.

2. CITIZENSHIP QUESTION means a question posed by the CENSUS BUREAU inquiring as to a PERSON's citizenship status.

3. COMMUNICATION or COMMUNICATIONS means any contact between two or more PERSONS (including any individual, corporation, proprietorship, partnership, association, government agency or any other entity) by which any information, knowledge or opinion is transmitted or conveyed, or attempted to be transmitted or conveyed, and shall include, without limitation, written contact by means such as letters, memoranda, e-mails, text messages, instant messages, tweets, social networking sites, or any other DOCUMENT, and oral contact, such as face-to-face meetings, video conferences, or telephonic conversations.

4. COMMERCE means the United States Department of Commerce and all of its component agencies, including the Census Bureau.

5. DECENNIAL CENSUS means the constitutionally mandated census that is administered every ten years by the Census Bureau to count the number of people residing in the United States.

6. DOJ means the United States Department of Justice, including any PERSON OR PERSONS currently or formerly employed by such agency since January 20, 2017.

7. DOCUMENT means any "document or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form." Fed. R. Civ. P. 34(a)(1)(A).

8. IDENTIFY means:

- a. When referring to a person, you shall set forth the following information: (i) Full Name; (ii) Present or last known residential address; (iii) Present or last known

telephone number; (iv) Present occupation, job title, employer and employer's address; and (v) Occupation, job title, employer, and employer's address at the time of the event or period referred to in each particular interrogatory.

- b. When referring to a document, you shall set forth the following information: (i) the nature (*e.g.*, e-mail, letter, handwritten note) of the document; (ii) the subject line, title, or heading that appears on the document; (iii) the date of the document and the date of each addendum, supplement or other addition or change; (iv) identification of the author and of the signer thereof, and of the person on whose behalf or at whose request or direction the document was prepared or delivered; (v) identification of the addressee or recipient thereof, if any; and (vi) the present locations of the document, and the name, address, position or title, and telephone number of the person or persons having custody.
- c. When referring to an event, occurrence, act, transaction or conversation, you shall set forth the following information: (i) the date and place of such event; (ii) the persons involved; and (iii) a description of the event.

9. NEILSEN means Nielsen Media Research, and any PERSON OR PERSON employed by Nielsen Media Research, including Christine Pierce.

10. PERSON OR PERSONS means any natural person, firm, partnership, association, joint venture, public or private corporation, individual, proprietorship, governmental entity, organization, other enterprise, group of natural persons or other entity that has a separate legal existence.

11. OTHER GOVERNMENT AGENCIES means the DOJ, the United States Department of Homeland Security, the United States Department of State, and any other agencies of the United States Government, including any PERSON OR PERSONS currently or formerly employed by such agencies since January 20, 2017.

12. SECRETARY ROSS means Wilbur J. Ross, Secretary of COMMERCE.

13. TRUMP CAMPAIGN means any PERSON or PERSONS, organizations, or agents seeking the election or reelection of Donald J. Trump, including but not limited to employees of the presidential campaign committee, Donald J. Trump for President, Inc.

14. TRUMP ADMINISTRATION means President Donald J. Trump, Vice President Michael R. Pence, and any PERSON or PERSONS currently or formerly employed at, for, or within the Executive Office of the President and all of its components at any time since January 20, 2017.

15. The use of the singular form of any word shall include the plural and vice versa.

16. The connectives “and,” “or,” and “and/or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses which might otherwise be construed outside the scope.

INSTRUCTIONS

1. The word “any” includes all and the word “all” includes any.

2. These Requests require the production of all responsive DOCUMENTS within the sole or joint possession, custody, or control of Defendants including, but not limited to, any such DOCUMENT or thing that is within the possession, custody, or control of any agents, agencies, departments, attorneys, employees, consultants, investigators, representatives, or other PERSONS or entities acting for, or otherwise subject to the control of, Defendants.

3. Defendants shall answer each Request and each part or subpart of a Request separately. Defendants shall leave no part of a Request unanswered merely because an objection is interposed to another part of the Request. If Defendants are unable to answer fully any of these Requests, after exercising due diligence to secure the information to do so, Defendants should so state, answer to the extent possible, specify Defendants’ inability to answer the remainder and provide or state whatever information is in Defendants’ possession, custody, control, or knowledge concerning any unanswered portion.

4. If Defendants object to or otherwise decline to answer any portion of a Request, Defendants shall identify the portion of the Request to which they object or otherwise decline to

answer, state with particularity the reason for such objection or declination, and identify each PERSON or organization having knowledge of the factual basis, if any, upon which the objection, privilege, or other ground is asserted.

5. For any responsive DOCUMENT or portion thereof that is either reacted or withheld, in whole or in part, on the basis of any assertion of privilege or other asserted exemptions from discovery, identify each DOCUMENT so redacted or withheld. With regard to all DOCUMENTS or portions of documents redacted or withhold on this basis, identify:

- a. the type of DOCUMENT;
- b. the subject matter of the DOCUMENT;
- c. the date of the DOCUMENT; and
- d. such other information as is sufficient to identify the DOCUMENT, including, where appropriate, the author, addressee, custodian, and any other recipient of the DOCUMENT, and, where not apparent, the relationship of the author, addressee, custodian, and any other recipient to each other.

6. If Defendants refuse to provide any information requested herein on the ground that said information is protected from discovery by a privilege (including executive or deliberative privilege) or other protection (including work product doctrine), then Defendants shall:

- a. specify with particularity the nature of the privilege or other protection (including the work product doctrine) being claimed;
- b. provide a specific statement of the ground and authority on which Defendants rely in withholding information;

- c. provide a statement setting forth each PERSON having knowledge of the factual basis, if any, on which the claim or privilege or immunity or other ground is based; and
- d. in the case of a DOCUMENT or COMMUNICATION, a privilege log, served at the time of production identifying the DATE, description, author (s), addressee(s), recipient(s), and subject matter and state the factual basis for the claim of privilege.

7. If any DOCUMENT has been lost, discarded, or destroyed, identify such DOCUMENT. State the type of DOCUMENT, its date, the approximate date it was lost, discarded, or destroyed, the reason it was lost, discarded, or destroyed, a summary of its substance, and the identity of each PERSON having knowledge of the contents thereof.

8. If any information contained in the requested documents is confidential, requiring secured transfer and management, Plaintiffs have the capacity through consultants to receive information through a Federal Statistical Research Data Centers.

REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 1.

All COMMUNICATIONS, including drafts and DOCUMENTS reflecting COMMUNICATIONS, regarding or relating to the inclusion of a CITIZENSHIP QUESTION on the DECENNIAL CENSUS, including but not limited to COMMUNICATIONS with or about the CENSUS BUREAU, OTHER GOVERNMENT AGENCIES, the TRUMP ADMINISTRATION, the TRUMP CAMPAIGN, NIELSEN, Kris Kobach, Steve Bannon, Stephen Miller, Andrew Bremberg, Steve King, Steven Camarota, Hermann Habermann, and Robert Groves.

REQUEST FOR PRODUCTION NO. 2.

All DOCUMENTS, including drafts, regarding, relating, or concerning the inclusion of a CITIZENSHIP QUESTION on the DECENNIAL CENSUS, including but not limited to: (a) DOCUMENTS, analysis or data considered by (or reflecting information considered by) COMMERCE in proposing, evaluating, or analyzing the citizenship question, (b) DOCUMENTS analysis or data considered by (or reflecting information considered by) by ROSS in proposing, evaluating, or analyzing the citizenship question, or (c) DOCUMENTS, analysis or data generated by or relied upon by COMMERCE, the CENSUS BUREAU, or the TRUMP ADMINISTRATION in preparing ROSS' March 26, 2018 memorandum.

REQUEST FOR PRODUCTION NO. 3.

All DOCUMENTS, including drafts, regarding, relating, or concerning the inclusion of a CITIZENSHIP QUESTION on the DECENNIAL CENSUS, including but not limited to: DOCUMENTS, data or analysis generated by or relied upon by the CENSUS BUREAU, COMMERCE, or the TRUMP ADMINISTRATION in preparing for Congressional testimony by ROSS, any COMMERCE, CENSUS BUREAU, or OTHER GOVERNMENT AGENCY employee related to the inclusion of a citizenship question on the DECENNIAL CENSUS.

REQUEST FOR PRODUCTION NO. 4.

All DOCUMENTS, including drafts, regarding, relating, or concerning the sufficiency of available data for federal enforcement of the Voting Rights Act, 52 U.S.C. 10101.

REQUEST FOR PRODUCTION NO. 5.

All DOCUMENTS, including drafts, discussing, regarding or relating to the sufficiency of administrative data necessary for the CENSUS BUREAU to create the citizenship data that DOJ requested in its December 2017 memo.

REQUEST FOR PRODUCTION NO. 6.

All DOCUMENTS regarding or relating to changes or edits made by COMMERCE, the TRUMP ADMINISTRATION or OTHER GOVERNMENT AGENCIES to CENSUS BUREAU Quarterly Program Management Reviews since January 2017 regarding or relating to the inclusion of CITIZENSHIP QUESTION on the DECENNIAL CENSUS.

REQUEST FOR PRODUCTION NO. 7.

All COMMUNICATIONS and DOCUMENTS, including drafts, generated by, prepared by, relied upon by, referenced, or otherwise produced by COMMERCE, the CENSUS BUREAU, or the TRUMP ADMINISTRATION in conjunction with the documents found in the Administrative Record at 1277-1285, 1286-1297, 1298-1303, 1304-1307, 1308-1312, and 1313-1320.

REQUEST FOR PRODUCTION NO. 8.

All DOCUMENTS AND COMMUNICATIONS concerning the decision whether to include a Citizenship Question on the 2020 DECENNIAL CENSUS before December 12, 2017, including but not limited to, those related to whether to include citizenship as a subject in the March 2017 Report to Congress.

REQUEST FOR PRODUCTION NO. 9.

All DOCUMENTS and COMMUNICATIONS that Defendants plan to introduce into evidence at trial.

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; and
- e. all PERSONS with whom the “senior Administration officials had previously raised” reinstating the citizenship question.

INTERROGATORY NO. 2.

Please IDENTIFY all persons involved in drafting, commenting on, or approving ROSS’ March 26, 2018 memorandum.

INTERROGATORY NO. 3.

With respect to any Congressional testimony by ROSS or any COMMERCE, CENSUS BUREAU, or OTHER GOVERNMENT AGENCY concerning the inclusion of a question concerning citizenship on the DECENNIAL CENSUS, please IDENTIFY all persons involved in the preparation for such testimony.

Dated: July 12, 2018

By: /s/ John A. Freedman

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49(c)(3).

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 12, 2018, the foregoing was served on counsel for Defendants United States Department of Commerce and Wilbur L. Ross and on the United States Attorney for the Southern District of New York by email and first class mail.

By: /s/ John A. Freedman