

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' letter-motion to compel deposition in *State of New York, et al. v. U.S. Dep't of Commerce, et al.*, 18-CV-2921 (JMF), and *New York Immigration Coalition, et al. v. U.S. Dep't of Commerce, et al.*, 18-CV-5025 (JMF).

Dear Judge Furman,

Plaintiffs write pursuant to Rule 2(C) of this Court's Individual Rules to request a discovery conference with the Court or an order compelling Defendants to make Secretary of Commerce Wilbur L. Ross, Jr., available for deposition. Plaintiffs have been unable to resolve this dispute through good faith meet-and-confer efforts with Defendants' counsel.

In authorizing discovery on July 3, 2018, the Court reserved decision on whether Secretary Ross's deposition would be allowed: "[A]lthough I suspect there will be a strong case for allowing a deposition of Secretary Ross himself, I will defer that question to another day." July 3 Oral Arg. Tr. at 86-87, Docket No. 205. The Court directed the parties to raise the issue "when it is both ripe but also timely and would allow for an orderly resolution." *Id.* at 87. Through discovery, Plaintiffs have confirmed that the Secretary's deposition is essential.

Compelled testimony of high-ranking government officials is justified under "exceptional circumstances." *Lederman v. N.Y. City Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013). Plaintiffs may satisfy this standard by demonstrating one of several alternative showings, including (1) "that the official has unique first-hand knowledge related to the litigated claims," or (2) "that the necessary information cannot be obtained through other, less burdensome or intrusive means." *Id.*; see Order Denying Stay 10, Docket No. 308. Plaintiffs can demonstrate exceptional circumstances under either of these grounds.

1. Secretary Ross has unique, first-hand knowledge related to the claims. The Secretary has direct knowledge of key events based on his own personal participation in critical conversations and steps in the decisional process, the substance of which are not memorialized in the Administrative Record. For example:

- After testifying to Congress that "[t]he Department of Justice . . . initiated the request for inclusion of the citizenship question,"¹ the Secretary acknowledged that the issue originated nearly a year before Commerce received the DOJ request. AR 1321 (Docket No. 189).
- The Secretary's early interactions regarding the citizenship question reflect a concern for reducing representation of immigrant communities, not Voting Rights Act enforcement; and indicate a White House imperative, not a DOJ request. See Ex. 1.
- Well before the DOJ request, the Secretary spoke with a number of third parties regarding the

¹ *Hearing on Recent Trade Actions, Including Section 232 Determinations on Steel & Aluminum: Hearing Before the H. Ways & Means Comm.*, 115th Cong. 24 (Mar. 22, 2018), at 2018 WLNR 8951469.

citizenship question, including Mark Neuman and Kris Kobach. *See* Ex. 2; Ex. 3.

- To solicit the request from DOJ, the Secretary spoke directly with Attorney General Sessions on at least two occasions. *See* Ex. 4; Ex. 5.

The Secretary has personal, first-hand knowledge of the circumstances and reasons for this initial consideration of the citizenship question in early 2017, and of the pretextual nature of the reasons that have been publicly proffered for the addition of the citizenship question. Ex. 1. He was a direct participant in conversations to solicit the request, and can testify as to details. Ex. 4; Ex. 5. Information regarding these events goes directly to Plaintiffs' APA and equal protection claims because it is relevant to showing an irregular process, political interference, disregard for the views of professional subject-matter experts, pretext, and discriminatory animus.

The Secretary's three closest and most senior advisors who advised on the citizenship question – Chief of Staff Wendy Teramoto, Acting Deputy Secretary Karen Dunn Kelley, and Policy Director / Deputy Chief of Staff Earl Comstock – themselves testified dozens of times that the Secretary was privy to unique, first-hand information central to these claims.² Because the Secretary has first-hand knowledge regarding the decision to add the citizenship question, and the details of the process he followed to reach that decision, Plaintiffs should be permitted to depose him. *See, e.g., Sherrod v. Breitbart*, 304 F.R.D. 73, 76 (D.D.C. 2014) (authorizing deposition of Secretary of Agriculture where “[i]t is clear . . . [he] has personal knowledge that is directly relevant to the claims and defenses”); *see also Fish v. Kobach*, 320 F.R.D. 566, 579 (D. Kan. 2017) (authorizing deposition of the Kansas Secretary of State where “[o]nly he can explain his thought processes . . . and his subsequent related actions”); *United States v. City of New York*, No. 07-cv-2067 (NGG) (RLM), 2009 WL 2423307, at *2-3 (E.D.N.Y. Aug. 5, 2009) (authorizing Mayor's deposition where his congressional testimony “suggests his direct involvement in the events at issue”).

2. *The necessary information cannot be obtained through less burdensome means.* In addition, although the Court is not required to consider whether there are “less burdensome means” to obtain the information in Secretary Ross's possession, *see Lederman*, 731 F.3d at 203, the Secretary's deposition is warranted because the information he possesses cannot be obtained from another source or through a less intrusive manner.

Plaintiffs have already deposed three of the Secretary's closest advisors. All three individuals repeatedly disclaimed knowledge of the Secretary's conversations and key facts regarding the Secretary's decision. For example, no witness has been able to:

- identify the “other senior Administration officials” who “previously raised” the idea of adding a citizenship question to the census prior to the Secretary's own consideration of the issue, as referenced in the Secretary's June 21, 2018 supplemental memorandum. *See* Ex. 6, Teramoto Dep. Tr. at 101 (“You would have to ask Secretary Ross.”); Ex. 7, Kelley Dep. Tr. at 71-73; Ex. 8, Comstock Dep. Tr. at 111-13 (“You'd have to ask the Secretary.”).
- testify about the substance and details of the Secretary's early conversations regarding the citizenship question with Attorney General Sessions or third parties such as Kris Kobach and

² *See, e.g.,* Ex. 6 (Teramoto Dep. Tr. at 32-33, 46, 66-67, 82-86, 100-01, 107, 118-20, 162-64, 167-68, 209-10); Ex. 7 (Kelley Dep. Tr. at 57-58, 70-73, 75-77, 88-90, 145-48, 312-14, 320-21); Ex. 8 (Comstock Dep. Tr. at 54-55, 65-71, 111-13, 115-18, 134-35, 146, 190-91, 205-07, 251-69, 285-86).

Mark Neuman. *See* Ex. 6 at 82-86, 119-20, 167-68; Ex. 7 at 57-58; Ex. 8 at 205-07.

- testify about the Secretary’s purpose in insisting that a citizenship question be added to the 2020 Census, contrary to the repeated and consistent recommendations of the Census Bureau. *See* Ex. 6 at 32; Ex. 8 at 254-55, 259-60.

Aside from the Secretary, there is no other source who can testify regarding his thought processes, key conversations that informed or reflected those thought processes, and subsequent actions. *See, e.g., Sherrod*, 304 F.R.D. at 76 (“[T]he Secretary has information not available elsewhere. The Secretary alone has precise knowledge of what factors he considered . . .”).

Defendants have suggested that Plaintiffs could instead “serve interrogatories requesting the information [Plaintiffs] wish to ask Secretary Ross.” Ex. 9. Courts authorizing the deposition of high-ranking officials have routinely held that written discovery is neither inherently less burdensome than a deposition, nor does it effectively substitute for deposition testimony.³ Moreover, Defendants’ incomplete responses to the interrogatories Plaintiffs served two months ago make clear that interrogatories will not substitute for a deposition of the Secretary here. As discussed in Plaintiffs’ fifth and seventh letter-motions to compel (Docket Nos. 293, 313), for two months Secretary Ross has steadfastly refused to identify the “other senior Administration officials” who first “previously raised” adding the citizenship question, as described in his June 2018 supplemental memorandum. Defendants initially responded that they “have not to date been able to identify individuals responsive to this request,” Ex. 3; and in a supplemental response, Defendants again refused to identify any officials who “previously raised” the citizenship question, instead referring to the *subsequent* consultations already identified. Ex. 5. Defendants’ intransigence regarding a single straightforward interrogatory demonstrates that written discovery is not an effective substitute for the Secretary’s deposition.⁴

3. *The public interest is best served by compelling the Secretary’s testimony.* The underlying purpose of the heightened standard for deposing high-ranking officials is to avoid interference with “the primary functions of the government.” *Marisol A. v. Giuliani*, No. 95 Civ. 10533 (RJW), 1998 WL 132810, at *3 (S.D.N.Y. Mar. 23, 1998). Here, as Secretary Ross has acknowledged, effective administration of the census *is* one of his “primary functions.”⁵ It is manifestly in the public interest that the census be transparent, effective, and nondiscriminatory. *See* Order Denying Stay 8, Docket No. 308. It would be hard to conceive of a *more* appropriate use of the Secretary’s time, consistent with “[t]he open nature of the census enterprise,” *id.*, than to testify regarding the justification for his consequential decision to add the citizenship question.

Secretary Ross’s testimony should be compelled.

Respectfully submitted,

³ *See Sherrod*, 304 F.R.D. at 76 (“[W]ritten questions lack the flexibility of oral examination, the latter of which allows the questioner to adjust on the fly and confine his questions to the relevant ones while still satisfying himself . . . that a particular line of inquiry has been exhausted.”); *see also Fish*, 320 F.R.D. at 579; *City of New York*, 2009 WL 2423307, at *3.

⁴ If the Court decides that Plaintiffs should proceed by written discovery, Plaintiffs request that the Court lift the limit on Plaintiffs’ interrogatories, and order expedited responses before the October 12 close of discovery.

⁵ *Hearing on the 2020 Census: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 115th Cong. 6 (Oct. 13, 2017) (testimony of Secretary Ross) (“[A] full, fair and accurate count has been one of my highest priorities”).

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Attorney General of the State of New York

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49(c)(3).

Attorneys for Plaintiffs in 18-CV-5025

Exhibit 1

To: Wilbur Ross [REDACTED]
Cc: Branstad, Eric (Federal) [REDACTED] Case 1:18-cv-02921-JMF Document 314-1 Filed 09/10/18 Page 2 of 7
From: Comstock, Earl (Federal)
Sent: Fri 3/10/2017 8:31:29 PM
Importance: Normal
Subject: Your Question on the Census
Received: Fri 3/10/2017 8:31:30 PM

I was not able to catch anyone at their desk when I called the numbers I have for the Census Bureau from their briefing. However, the

Census Bureau web page on apportionment is explicit and can be found at <https://www.census.gov/population/apportionment/about/faq.html#Q16> It says:

Are undocumented residents (aliens) in the 50 states included in the apportionment population counts?

Yes, all people (citizens and noncitizens) with a usual residence in the 50 states are to be included in the census and thus in the apportionment counts.

Further, this WSJ blog post from 2010 confirms that neither the 2000 nor the 2010 Census asked about citizenship. <http://blogs.wsj.com/numbers/the-pitfalls-of-counting-illegal-immigrants-937/>

THE NUMBERS

The Pitfalls of Counting Illegal Immigrants



By CARL BIALIK

May 7, 2010 7:05 pm ET

The debate over [Arizona's immigration law](#) has included several estimates of the state's illegal-immigrant population, at "almost half a million," "half a million" or "more than half a million." Arguing against the law, Homeland Security chief Janet Napolitano — who is the former governor of Arizona — pointed to decreasing illegal immigration in the state.

These estimates and claims rest on several annual efforts to count illegal immigrants in the U.S. The nonpartisan Pew Hispanic Center estimated that in 2008 the nationwide population was 11.9 million, and half a million in Arizona. The federal Department of Homeland Security and the Center for Immigration Studies, a Washington, D.C., research group that opposes increased immigration, agree on a figure of 10.8 million for 2009, with DHS putting the Arizona population at 460,000, down from 560,000 a year earlier.

But as my print column notes this week, these estimates are limited by several factors that make it difficult for researchers to count this population. No major government survey, including the decennial census now under way, asks Americans about their citizenship status. Thus estimates of the number of illegal immigrants in the country are indirect and possibly far off from the correct count.

These studies rely on census surveys, and assume that about 10% of illegal immigrants aren't counted in these surveys. But that figure largely is based on a 2001 survey of Mexican-born people living in Los Angeles. "I do not advise use of my estimated undercounts for the 2000 census outside of L.A. county, nor for migrants from other nations," said study co-author Enrico Marcelli, assistant professor of sociology at San Diego State University. "However, demographers do not have any other empirical evidence at the moment with which to proceed."

One concern is that the nearly two in five households who didn't respond to the 2001 survey may have included a

disproportionately large number who also didn't respond to census interviewers. Marcelli said further study would be needed to test that possibility, but he noted the extent of the efforts to select a representative sample and to put respondents at ease in order to elicit honest answers.

"As far as I know, there has not been a new, serious attempt to estimate the undercount of illegal immigrants in the census," said Steven Camarota, director of research for the Center for Immigration Studies.

In 2005, Robert Justich, then a portfolio manager for Bear Stearns, co-authored [a report](#) suggesting the population of illegal immigrants "may be as high as 20 million people." Jeffrey Passel, senior demographer for the Pew Hispanic Center, disputed that finding. For one thing, other data sources, such as U.S. birth rates and Mexico's own census, don't corroborate such a large number. If there were really so many more immigrants, than there would be more women of child-bearing age, and more births. And if instead the missing millions are mostly Mexican men working in the U.S. and sending money home, the flip side of that influx would be reflected as a gap in the Mexican census numbers.

"Definitely the number is not as high as 20 million," said Manuel Orozco, senior associate of the Inter-American Dialogue, a Washington, D.C., policy-analysis group.

Justich, who now owns a music and film production firm, countered that immigrants from countries other than Mexico may make up the rest. However, he added that the number is no longer as high as 20 million.

Larger estimates also sometimes are based on border-patrol counts of apprehensions, which are far from reliable proxies. No one is sure of how many people are missed for each one who is caught trying to cross into the U.S. illegally. Many of those who do get through may return quickly, or cross back and forth. Also, some people are caught more than once, inflating the count. "It seems like we're not missing that many bodies in the United States," said Camarota, referring to the gap between the 20 million figure and his own.

The immigrant counters generally have seen a decline in the illegal-immigration population. "Economic drivers are very, very powerful" in lowering the illegal-immigrant population, said Hans Johnson, associate director of the Public Policy Institute of California. Others [point to](#) stepped-up enforcement efforts.

However, because of all the assumptions baked into these numbers, such drops come with so much statistical uncertainty that they may not be statistically significant. "The methodology for doing these estimates is not really designed to measure year-to-year change," Passel said.

One key difference between his count and the federal agency's: Homeland Security uses the Census Bureau's [American Community Survey](#), which has a much larger sample size than the [Current Population Survey](#), which Passel used. "I developed all of my methodology and all of the things that go with it when there wasn't an ACS," Passel said, "and I haven't gotten around to shifting to the new survey."

The ACS was introduced after the 2000 census, and may help overcome a problem with census numbers exposed in the last decennial census. [Many more foreign-born residents were counted in 2000 than was expected based on annual estimates produced by the bureau.](#) Census officials think these estimates have improved since 2000 thanks to the annual ACS surveys of three million households. "That's the source we're using to estimate the movement" of the foreign-born population, said Howard Hogan, the Census Bureau's associate director for demographic programs. "It's a huge improvement over anything we had available in the '90s."

Still, the Census Bureau doesn't ask people about their immigration status, in part because such questions may drive down overall response rates. Robert M. Groves, director of the Census Bureau, said he'd like to test that hypothesis. "We're sort of data geeks here," Groves said. "What we'd like to do to answer that question is an experiment."

That doesn't mean that census interviewers don't try to find and enumerate illegal immigrants. Groves compares counting that group to efforts to track another population that is hard to count, though not necessarily because of willful avoidance: people who are homeless. Census interviewers spend three days visiting soup kitchens, shelters and outdoor gathering spots such as under certain highway overpasses in Los Angeles. "You don't have to look at that operation very long to realize that though it's a heroic effort, there are all sorts of holes in it," Groves said. As a result, the Census Bureau includes anyone counted in that effort in the overall population, but doesn't break out a separate estimate of homeless people.

“We would like to do estimates that have the smallest number of assumptions we can’t test,” Groves said. When it comes to counting illegal immigrants, “there are a set of assumptions that we know we can’t test. When we find ourselves in that situation, then we’re uncomfortable giving a Census Bureau estimate that is subject to all of those debates.”

Further reading: Passel outlined methods for counting the illegal-immigrant population, while this paper analyzed some difficulties with the estimates. Earlier the Christian Science Monitor and I have examined these numbers. Immigration statistics have become a subject of debate in the U.K., as well.

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

Mrs. Ross,

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

Brooke V Alexander
Executive Assistant to the Secretary
The U.S. Department of Commerce
Washington, D.C. 20230
balexander@doc.gov
202-482-[REDACTED] office
[REDACTED] cell

From: Kris Kobach [mailto: [REDACTED]]
Sent: Monday, July 24, 2017 2:43 PM
To: Teramoto, Wendy (Federal) < [REDACTED] >
Cc: Alexander, Brooke (Federal) < [REDACTED] >; Hernandez, Israel (Federal) < [REDACTED] >
Subject: Re: Follow up on our phone call

Yes.

Sent from my iPhone

On Jul 24, 2017, at 1:39 PM, Teramoto, Wendy (Federal) < [REDACTED] > wrote:

Kris- can you do a call with the Secretary and Izzy tomorrow at 11 am? Thanks. Wendy

From: Kris Kobach [mailto: [REDACTED]]
Sent: Monday, July 24, 2017 12:02 PM
To: Teramoto, Wendy (Federal) < [REDACTED] >
Subject: Re: Follow up on our phone call

That works for me. What number should I call? Or would you like to call me?

On Mon, Jul 24, 2017 at 9:12 AM, Teramoto, Wendy (Federal) < [REDACTED] > wrote:

We can speak today at 230. Please let me know if that works. W

Sent from my iPhone

On Jul 21, 2017, at 4:34 PM, Kris Kobach < [REDACTED] > wrote:

Wendy,

Nice meeting you on the phone this afternoon. Below is the email that I sent to Secretary Ross. He and I had spoken briefly on the phone about this issue, at the direction of Steve Bannon, a few months earlier.

Let me know what time would work for you on Monday, if you would like to schedule a short call. The issue is pretty straightforward, and the text of the question to be added is in the email below.

000763

Thanks.

Kris Kobach

[REDACTED]

----- Forwarded message -----

From: **Kris Kobach** <[REDACTED]>

Date: Fri, Jul 14, 2017 at 9:12 AM

Subject: Follow up on our phone call

To: [REDACTED]

Secretary Ross,

Kansas Secretary of State Kris Kobach here. I'm following up on our telephone discussion from a few months ago. As you may recall, we talked about the fact that the US census does not currently ask respondents their citizenship. This lack of information impairs the federal government's ability to do a number of things accurately. It also leads to the problem that aliens who do not actually "reside" in the United States are still counted for congressional apportionment purposes.

It is essential that one simple question be added to the upcoming 2020 census. That question already appears on the American Community Survey that is conducted by the Census Bureau (question #8). A slight variation of that question needs to be added to the census. It should read as follows:

Is this person a citizen of the United States?

☐ **Yes, born in the United States**

☐ **Yes, born in Puerto Rico, Guam, the U.S. Virgin Islands, or Northern Marianas**

☐ **Yes, born abroad of U.S. citizen parent or parents**

☐ **Yes, U.S. citizen by naturalization – Print year of naturalization _____**

☐ **No, not a U.S. citizen – this person is a lawful permanent resident (green card holder)**

☐ **No, not a U.S. citizen – this person citizen of another country who is not a green card holder (for example holds a temporary visa or falls into another category of non-citizens)**

Please let me know if there is any assistance that I can provide to accomplish the addition of this question. You may reach me at this email address or on my cell phone at [REDACTED]

Yours,

Kris Kobach

000764

Exhibit 2

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

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

Sent from my iPhone

On May 2, 2017, at 7:17 AM, Teramoto, Wendy (Federal) <[REDACTED]> wrote:

I continue to talk frequently with Marc Neumann and we often have dinner together. He will not leave les but is in love with the census and talks about it non stop. [REDACTED]

Do you want me to set up another meeting? [REDACTED]

[REDACTED] Let me know if you want to have a drink or get together with him over the weekend.
Wendy

Sent from my iPhone

Begin forwarded message:

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

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

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

[REDACTED]

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

[REDACTED]

From: [REDACTED]@doc.gov [REDACTED]@doc.gov]
Sent: 10/8/2017 10:54:41 PM
To: Wilbur Ross [REDACTED]
Subject: Re: Letter from DoJ.

Will do...wrapping up my call now.

Sent from my iPhone

> On Oct 8, 2017, at 6:51 PM, Wilbur Ross <[REDACTED]> wrote:

>

> Please call me at [REDACTED] WLR

>

> Sent from my iPad

>

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

>>

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

>>

>> Sent from my iPhone

>>

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

>>>

>>> What is its status? WLR

>>>

>>> Sent from my iPad

From: Kris Kobach [mailto: [REDACTED]]
Sent: Monday, July 24, 2017 2:43 PM
To: Teramoto, Wendy (Federal) < [REDACTED] >
Cc: Alexander, Brooke (Federal) < [REDACTED] >; Hernandez, Israel (Federal) < [REDACTED] >
Subject: Re: Follow up on our phone call

Yes.

Sent from my iPhone

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To: Teramoto, Wendy (Federal) < [REDACTED] >
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Let me know what time would work for you on Monday, if you would like to schedule a short call. The issue is pretty straightforward, and the text of the question to be added is in the email below.

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Thanks.

Kris Kobach

[REDACTED]

----- Forwarded message -----

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Date: Fri, Jul 14, 2017 at 9:12 AM

Subject: Follow up on our phone call

To: [REDACTED]

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It is essential that one simple question be added to the upcoming 2020 census. That question already appears on the American Community Survey that is conducted by the Census Bureau (question #8). A slight variation of that question needs to be added to the census. It should read as follows:

Is this person a citizen of the United States?

☐ **Yes, born in the United States**

☐ **Yes, born in Puerto Rico, Guam, the U.S. Virgin Islands, or Northern Marianas**

☐ **Yes, born abroad of U.S. citizen parent or parents**

☐ **Yes, U.S. citizen by naturalization – Print year of naturalization _____**

☐ **No, not a U.S. citizen – this person is a lawful permanent resident (green card holder)**

☐ **No, not a U.S. citizen – this person citizen of another country who is not a green card holder (for example holds a temporary visa or falls into another category of non-citizens)**

Please let me know if there is any assistance that I can provide to accomplish the addition of this question. You may reach me at this email address or on my cell phone at [REDACTED]

Yours,

Kris Kobach

000764

Exhibit 3

**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

interests and expectations of persons not party to this litigation; (e) information protected by any form of executive privilege; or (f) any other applicable privilege or protection.

3. Defendants specifically decline to produce privileged information. A privilege log will be provided in the course of Defendants' rolling productions. Defendants further object to any requirement that they produce a privilege log for privileged material not otherwise properly within the scope of discovery and/or as to which no privilege log would be required pursuant to Federal Rule of Civil Procedure 26(b)(5).

4. Each and every response contained herein is subject to the above objections, which apply to each and every response, regardless of whether a specific objection is interposed in a specific response. The making of a specific objection in response to a particular request is not intended to constitute a waiver of any other objection not specifically referenced in the particular response.

5. Defendants specifically reserve the right to make further objections as necessary to the extent additional issues arise regarding the meaning of and/or information sought by discovery.

OBJECTIONS TO SPECIFIC REQUESTS FOR PRODUCTION

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.

Objections: Defendants object to this request as seeking, on its face, "drafts" that are subject to the deliberative-process privilege and other communications subject to the deliberative-process privilege, the attorney-client privilege, and/or the attorney work-product doctrine.

Defendants further object to this request on the ground that it is overbroad because it is unlimited as to time. Given that "DECENNIAL CENSUS" is defined to include every decennial

census dating back to the ratification of the Constitution, this request, as written, sweeps in decades- or centuries-old documents from long before the events at issue in this case without regard to their relevancy to Plaintiffs' claims, which concern a decision made in 2018. The burden of obtaining and producing all such documents disproportionately outweighs any possible need for the requested documents. Defendants will interpret this request to be limited to documents created after January 20, 2017.

Defendants further object to this request to the extent it seeks documents irrelevant to Plaintiffs' claims. Specifically, Defendants object that this request sweeps in press office activities irrelevant to Plaintiffs' claims.

Defendants further object to this request because it seeks documents that have already been produced to Plaintiffs as part of the administrative record and in response to the Court's July 3, 2018 order and are otherwise publicly available. Defendants will not reproduce documents already produced.

Response: Subject to the above objections, Defendants refer Plaintiffs to the complete administrative record, filed on June 8, 2018, *see* ECF No. 173, *New York v. U.S. Dep't of Commerce*, No. 18-cv-2921 (JMF), the supplement to the administrative record, filed on June 21, 2018, *see* ECF No. 189, and the supplemental materials filed pursuant to the Court's July 3, 2018 order in *New York v. U.S. Dep't of Commerce*, No. 18-cv-2921 (JMF). For example, Defendants refer Plaintiffs to previously produced documents Bates numbered 003694, 002634–002641, and 001198–001209. Defendants aver that they have no other responsive nonprivileged documents in their possession, custody, or control beyond what they have already produced.

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.

Objections: Defendants object to this request as seeking, on its face, “drafts” that are subject to the deliberative-process privilege and other communications subject to the deliberative-process privilege, the attorney-client privilege, and/or the work-product doctrine.

Defendants further object to this request on the ground that it is overbroad and not proportional to the needs of the case because it is unlimited as to time. Given that “DECENNIAL CENSUS” is defined to include every decennial census dating back to the ratification of the Constitution, this request, as written, sweeps in decades- or centuries-old documents from long before the events at issue in this case without regard to their relevancy to Plaintiffs’ claims, which concern a decision made in 2018. The burden of obtaining and producing all such documents disproportionately outweighs any possible need for the requested documents.

Defendants further object to this request on the ground that it is beyond Defendants’ capacity to know what the TRUMP ADMINISTRATION, a non-party, relied on.

Defendants further object to this request on the ground that it purports to seek “data or analysis” that do not constitute “DOCUMENTS.” Defendants will construe this request as seeking only “documents” as defined by Federal Rule of Civil Procedure 34(a)(1).

Defendants further object to this request to the extent it seeks documents irrelevant to Plaintiffs’ claims. Specifically, Defendants object that this request sweeps in press office activities irrelevant to Plaintiffs’ claims.

Defendants further object to this request because it seeks documents that have already been produced to Plaintiffs as part of the administrative record and in response to the Court’s July 3, 2018 order and are otherwise publicly available. Defendants will not reproduce documents already produced.

Response: Subject to the above objections, Defendants refer Plaintiffs to the complete administrative record, filed on June 8, 2018, *see* ECF No. 173, *New York v. U.S. Dep't of Commerce*, No. 18-cv-2921 (JMF), the supplement to the administrative record, filed on June 21, 2018, *see* ECF No. 189, and the supplemental materials filed pursuant to the Court's July 3, 2018 order in *New York v. U.S. Dep't of Commerce*, No. 18-cv-2921 (JMF). Defendants aver that they have no other responsive nonprivileged documents in their possession, custody, or control beyond what they have already produced.

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.

Objections: Defendants object to this request as seeking, on its face, "drafts" that are subject to the deliberative-process privilege and other communications subject to the deliberative-process privilege, the attorney-client privilege, and/or the work-product doctrine.

Defendants further object to this request on the ground that it is overbroad and not proportional to the needs of the case because it is unlimited as to time. Given that "DECENNIAL CENSUS" is defined to include every decennial census dating back to the ratification of the Constitution, this request, as written, sweeps in decades- or centuries-old documents from long before the events at issue in this case without regard to their relevancy to Plaintiffs' claims, which concern a decision made in 2018. The burden of obtaining and producing all such documents disproportionately outweighs any possible need for the requested documents.

Defendants further object to this request on the ground that it is beyond Defendants' capacity to know what the TRUMP ADMINISTRATION, a non-party, relied on.

Defendants further object to this request on the ground that information related to preparation for testimony of an OTHER GOVERNMENT AGENCY employee would not be within the custody or control of Defendants and is irrelevant to Plaintiffs' claims.

Defendants further object to this request on the ground that it purports to seek "data or analysis" that do not constitute "DOCUMENTS." Defendants will construe this request as seeking only "documents" as defined by Federal Rule of Civil Procedure 34(a)(1).

Defendants further object to this request because it seeks documents that have already been produced to Plaintiffs as part of the administrative record and in response to the Court's July 3, 2018 order and are otherwise publicly available. Defendants will not reproduce documents already produced.

Response: Subject to the above objections, Defendants will make rolling productions of responsive, non-privileged documents where the burden of searching, collecting, and producing such documents is not disproportionate to the needs of the case, beginning August 13, 2018 with anticipated substantial completion within a reasonable amount of time.

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.

Objections: Defendants object to this request on the ground that it is overbroad and not proportional to the needs of the case in that it seeks information about Voting Rights Act enforcement data other than citizenship, even though Plaintiffs' claims concern only the citizenship question.

Defendants further object to this request as seeking, on its face, "drafts" that are subject to the deliberative-process privilege and other communications subject to the deliberative-process privilege, the attorney-client privilege, and/or the work-product doctrine.

Defendants further object to this request on the ground that it is overbroad and not proportional to the needs of the case because it is unlimited as to time. This request, as written, sweeps in decades-old documents from long before the events at issue in this case without regard to their relevancy to Plaintiffs' claims, which concern a decision made in 2018. The burden of obtaining and producing all such documents disproportionately outweighs any possible need for the requested documents.

Defendants further object to this request because it seeks documents that have already been produced to Plaintiffs as part of the administrative record and in response to the Court's July 3, 2018 order and are otherwise publicly available. Defendants will not reproduce documents already produced.

Response: Subject to the above objections, Defendants will make rolling productions of responsive, non-privileged documents where the burden of searching, collecting, and producing such documents is not disproportionate to the needs of the case, beginning August 13, 2018 with anticipated substantial completion within a reasonable amount of time.

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.

Objections: Defendants object to this request on the ground that it is vague and does not provide an adequate description upon which to base a reasonable inquiry. The request for information about the "sufficiency" of data "necessary" to supply citizenship data is both unclear in its scope and confusing in its phrasing.

Defendants further object to this request as seeking, on its face, "drafts" that are subject to the deliberative-process privilege and other communications subject to the deliberative-process privilege, the attorney-client privilege, and/or the work-product doctrine.

Defendants further object to this request because it seeks documents that have already been produced to Plaintiffs as part of the administrative record and in response to the Court's July 3, 2018 order and are otherwise publicly available. Defendants will not reproduce documents already produced.

Response: Subject to the above objections, Defendants refer Plaintiffs to the complete administrative record, filed on June 8, 2018, *see* ECF No. 173, *New York v. U.S. Dep't of Commerce*, No. 18-cv-2921 (JMF), the supplement to the administrative record, filed on June 21, 2018, *see* ECF No. 189, and the supplemental materials filed pursuant to the Court's July 3, 2018 order in *New York v. U.S. Dep't of Commerce*, No. 18-cv-2921 (JMF). For example, Defendants refer Plaintiffs to previously produced documents Bates numbered 008219–008221, 008222–008226, 003240–003247, and 009356–009358.

Subject to the above objections, Defendants will make rolling productions of responsive, non-privileged documents where the burden of searching, collecting, and producing such documents is not disproportionate to the needs of the case, beginning August 13, 2018 with anticipated substantial completion within a reasonable amount of time.

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.

Objections: Defendants object to this request as seeking, on its face, pre-decisional materials subject to the deliberative-process privilege and other communications subject to the deliberative-process privilege, the attorney-client privilege, and/or the work-product doctrine.

Defendants further object to this request on the ground that it seeks documents that are publicly available and thus equally accessible to Plaintiffs. Defendants will not reproduce documents that are publicly available.

Response: Subject to and without waiving the above objections, Defendants refer Plaintiffs to the publicly available final version of these documents, available at <https://www.census.gov/programs-surveys/decennial-census/2020-census/planning-management/program-briefings.html>.

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.

Objections: Defendants object to this request as seeking, on its face, “drafts” that are subject to the deliberative-process privilege and other communications subject to the deliberative-process privilege, the attorney-client privilege, and/or the work-product doctrine. Defendants have already produced the nonprivileged final versions of these documents.

Defendants further object to this request on the ground that the term “in conjunction with” is vague and ambiguous. Defendants will construe this request as seeking documents explicitly referenced in the documents Bates numbered 001277–001285, 001286–001297, 001298–001303, 001304–001307, 001308–001312, and 001313–001320.

Response: Subject to the above objections, Defendants refer Plaintiffs to the complete administrative record, filed on June 8, 2018, *see* ECF No. 173, *New York v. U.S. Dep’t of Commerce*, No. 18-cv-2921 (JMF), the supplement to the administrative record, filed on June 21, 2018, *see* ECF No. 189, and the supplemental materials filed pursuant to the Court’s July 3, 2018 order in *New York v. U.S. Dep’t of Commerce*, No. 18-cv-2921 (JMF). Defendants aver that they have no other responsive nonprivileged documents in their possession, custody, or control beyond what they have already produced.

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.

Objections: Defendants object to this request on the basis that the terms “COMMERCE” is vague and ambiguous. Defendants will construe the term “COMMERCE” as meaning the component of the United States Department of Commerce likely to have responsive documents: the headquarters offices of the Department. Searches within other components of the Department—a large federal agency that includes, for example, the National Oceanic and Atmospheric Administration—are not likely to yield responsive information and would incur undue and disproportionate burden on Defendants.

Defendants further object to the request because, on its face, the request seeks documents likely covered by the deliberative-process privilege, the attorney-client privilege, and the work-product privilege.

Defendants further object to this request because there is no date limitation. The request seeks documents that Secretary Ross did not consider and that predate the Trump Administration. These documents are irrelevant to Plaintiffs’ claims. Defendants will interpret this request to be limited to documents created after January 20, 2018.

Defendants further object to this request because any responsive documents, subject to the above objections, have already been produced to Plaintiffs in the administrative record and are otherwise publicly available. Defendants will not reproduce documents already produced in the administrative record.

Response: Subject to the above objections, Defendants refer Plaintiffs to previously produced documents Bates numbered 002630 and 003685-003686. Defendants aver that they have no other responsive nonprivileged documents in their possession, custody, or control beyond what they have already produced.

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.

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.

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 request as overbroad and beyond the scope of discovery to the extent it seeks information on testifying officials from other government agencies not party to this lawsuit.

Defendants further object to this interrogatory as seeking information that is not relevant to any party's claim or defense. Preparations of the Secretary or any other official for congressional testimony have no bearing on Plaintiff's challenge to the reinstatement of the citizenship question.

Response:

Subject to and without waiving these objections, Defendants state that the following individuals are responsive to this interrogatory (all individuals employed by Department of Commerce unless otherwise indicated): Michael Phelps, Rachael Wilde, Traci Blyden, Rod Turk, Erin Cavanaugh, Joselyn Bingham, Barry Robinson, Melissa Creech, Beverly Hyson, Peter Davidson, Michelle McClelland, Kim Taylor, Alicia Price, Jonathan Baker, Lauren Didiuk, Nick Kornegay, Brian DiGiacomo, Michael Cannon, Beth Grossman, Beth Van Hanswyk, Jennifer Lucas, Hillary Davidson, Joe Bartels, Earl Comstock Sahra Park-Su, Michael Walsh, David Langdon, Henry Young, Jocelyn Burston, Graham Davidson, Anne Teague, Michael Platt, Kasey O'Conner, Lawson Kluttz, Ross Branson, Jacque Mason, Keven Valentin, Jenilee Keefe Singer, Burton Reist, Christa Jones, Jeffrey Weinberg (OMB), Rody Damis (OMB), and Rachel Snyderman (OMB).

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
Assistant Director, Federal Programs Branch

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

Counsel for Defendants

CERTIFICATION OF 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 4

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

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

Sent from my iPhone

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

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

Danielle:

Wendy's cell phone number is 2 [REDACTED]

Thanks.

Sent from my iPhone

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

Sent from my iPhone

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

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

Thanks.

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

Exhibit 5

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

NEW YORK IMMIGRATION
COALITION, *et al.*,

Plaintiffs,

v.

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

Defendants.

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

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

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

OBJECTIONS AND RESPONSES TO INTERROGATORIES

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

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

Objections:

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

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

Response:

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

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

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

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

As to Interrogatories, see Verification page *infra*.

As to objections:

Dated: August 30, 2018

JOSEPH H. HUNT
Assistant Attorney General

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Director, Federal Programs Branch

CARLOTTA P. WELLS
Assistant Director, Federal Programs Branch

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

Counsel for Defendants

CERTIFICATION OF EARL COMSTOCK

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

Dated: September 5, 2018

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

Earl Comstock

Exhibit 6

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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

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

5
6 Plaintiffs,

7
8 - against -
9

10 UNITED STATES DEPARTMENT OF COMMERCE,
ET AL.,

11 Defendants.

-----x

12 August 24, 2018
9:07 a.m.

13
14
15 Videotaped Deposition of WENDY
16 TERAMOTO, taken by Plaintiffs, pursuant to
17 Notice, held at the offices of Arnold &
18 Porter Kaye Scholer LLP, 250 West 55th
19 Street, New York, New York, before Todd
20 DeSimone, a Registered Professional
21 Reporter and Notary Public of the State of
22 New York.

23 VERITEXT LEGAL SOLUTIONS
MID-ATLANTIC REGION
24 1250 Eye Street NW - Suite 350
Washington, D.C. 20005
25

1 THE VIDEOGRAPHER: Good morning.
2 We are going on the record at 9:07 a.m. on
3 August 24th, 2018.

4 Please note that the
5 microphones are sensitive and may pick up
6 whispering, private conversations and
7 cellular interference. Please turn off all
8 cell phones or place them away from the
9 microphones as they can interfere with the
10 deposition audio. Audio and video
11 recording will continue to take place
12 unless all parties agree to go off the
13 record.

14 This is media unit number one
15 of the video-recorded deposition of Wendy
16 Teramoto taken by counsel for plaintiffs in
17 the matter of New York Immigration
18 Coalition, et al., versus United States
19 Department of Commerce, et al., filed in
20 the United States District Court, Southern
21 District of New York, case number
22 1:18-CF-05025-JMF. This deposition is
23 being held at the offices of Arnold &
24 Porter located at 250 West 55th Street, New
25 York, New York.

1 My name is Carlos King from the
2 firm of Veritext and I am the videographer.
3 The court reporter is Todd DeSimone also
4 from Veritext. I'm not authorized to
5 administer an oath, I'm not related to any
6 party in this action, nor am I financially
7 interested in the outcome.

8 All appearances will be noted
9 on the steno record. Will the court
10 reporter please swear in the witness.

11 * * *

12 W E N D Y T E R A M O T O,
13 called as a witness, having been first duly
14 sworn, was examined and testified
15 as follows:

16 EXAMINATION BY MR. GERSCH:

17 Q. Please state your name and work
18 address.

19 A. My name is Wendy Teramoto and I
20 work at the Department of Commerce in
21 Washington.

22 Q. Do you do your work in
23 Washington D.C.?

24 A. Yes, sir.

25 Q. And how are you employed at the

1 out that you say you can't read on here?

2 A. If that's what you are telling
3 me, I have no reason to believe that it's
4 not true.

5 Q. All right. When Secretary Ross
6 says "I'm mystified why nothing have been
7 done in response to my months old request,"
8 why did Secretary Ross request as of
9 several months apparently before May 2nd,
10 2017, why did he request that a citizenship
11 question be included on the census?

12 A. I have no idea. I mean, as you
13 have correctly pointed out, this was in
14 May. I didn't write the e-mail and I
15 wasn't even -- he didn't even send it to
16 me.

17 Q. I take it your testimony is
18 that Secretary Ross never told you the
19 reason that he made such a request?

20 A. I have never asked.

21 Q. That's not my question. Did he
22 ever tell you?

23 A. No.

24 Q. Did you ever learn to whom he
25 made that request?

1 A. Of what?

2 Q. The request to add a
3 citizenship question.

4 MS. WELLS: I object to form.

5 A. I guess I'm confused. Can you
6 please repeat the question?

7 Q. Certainly.

8 He says he "made a months old
9 request that we include a citizenship
10 question." Did you ever learn to whom he
11 made the request?

12 A. I have no idea.

13 Q. All right. So this is
14 forwarded to you by Brook Alexander, and
15 you respond by saying that you talk
16 frequently with Marc Neumann and asking if
17 the Secretary wants to meet with him.

18 Who is Marc Neumann?

19 A. So Marc Neumann was somebody
20 that I met on the transition team who had
21 worked at Census before.

22 Q. And did you discuss the
23 citizenship question with Marc Neumann?

24 A. Did I?

25 Q. Yes.

1 in the day-to-day workings of the census.
2 I think that's also demonstrated by the
3 fact that I wasn't -- I don't remember ever
4 being on this call, and it doesn't look
5 like when I set it up, I had any intention
6 of being on that call.

7 Q. In his e-mail to you, Kris
8 Kobach also said that when he spoke to the
9 Secretary, he did so at the direction of
10 Steve Bannon.

11 Steve Bannon worked in the
12 White House, correct?

13 A. Yes.

14 Q. Did you ever talk to Steve
15 Bannon about the census?

16 A. Never.

17 Q. Did you ever set up a call for
18 the Secretary and Steve Bannon about the
19 census?

20 A. No.

21 Q. Would there be notes of the
22 Secretary's conversation with Kris Kobach?

23 A. I have no idea, sir, because I
24 wasn't part of that call.

25 Q. Were there -- but as his chief

1 I'm sorry, a citizenship question to the
2 census?

3 MS. WELLS: I object to form.

4 A. Did I learn throughout 2017?

5 Q. During 2017.

6 A. It is hard for me to say very
7 interested. It clearly was a topic that
8 had come up.

9 Q. Did you learn that it was a
10 matter of importance for him?

11 A. I don't know how to engage
12 matter of importance. There is a lot of
13 things that are important to him.

14 The budget on census, I
15 remember that being extremely important to
16 him. I remember --

17 Q. Wasn't the -- I'm sorry, go
18 ahead.

19 A. -- spending time trying to
20 figure out how we are going to ramp up the
21 employment for census. I remember those.

22 Q. Wasn't the citizenship question
23 important to Secretary Ross?

24 MS. WELLS: I object to the
25 form.

1 A. Again, I can't answer, sir,
2 what is or is not important to the
3 Secretary.

4 Q. Who could?

5 A. The Secretary.

6 (Teramoto Exhibit 7 marked for
7 identification.)

8 Q. Ms. Teramoto, I have handed you
9 what has been marked Teramoto Exhibit 7,
10 which at the top is a memo -- an e-mail,
11 sorry, from Earl Comstock dated September
12 16, 2017 to you. Do you see that?

13 A. Yes, sir. Would you like me to
14 read it?

15 Q. In a moment.

16 Earl's memo to you says
17 "Morning Wendy: Here is the memo I gave
18 SWLR regarding my discussions with DOJ.
19 Earl."

20 I take it SWLR will refer to
21 the Secretary, Secretary Wilbur L. Ross?

22 A. Yes, sir.

23 Q. And then below that is the memo
24 or e-mail that he sent to the Secretary
25 which is dated September 8, 2017 from Earl

1 that.

2 Q. Yes or no.

3 A. Did I know -- I would say --

4 Q. One or the other.

5 A. Could you please -- could you
6 please repeat the question?

7 Q. Sure. Whether or not you
8 recall speaking to the Attorney General,
9 you knew that the Attorney General of the
10 United States and Secretary Ross were
11 working together to add a citizenship
12 question to the census, didn't you?

13 MS. WELLS: I object to form.

14 A. I was not part of discussions
15 between the Attorney General and Secretary
16 Ross.

17 Q. Do you have that understanding
18 from any source?

19 MS. WELLS: I object to the
20 form.

21 Q. You've got to answer that.

22 A. Do I have -- could you repeat
23 it, please?

24 Q. Yeah. I have been asking you
25 didn't you know that Secretary Ross and the

1 Attorney General were working together to
2 add a citizenship question to the census,
3 and I understood you to say that you don't
4 remember being in discussions with them.

5 A. Right.

6 Q. And so my question is, did you
7 learn this from any source, whether you
8 were in discussions with them or not?

9 A. I don't remember any specific
10 discussions from others.

11 Q. All right. At the top of this
12 e-mail you say, in response to Ms. Cutrona,
13 you say "They connected. Thanks for the
14 help. Wendy."

15 I take it you are saying the
16 Attorney General and the Secretary spoke
17 with each other?

18 MS. WELLS: I object to form.

19 A. Yes, sir.

20 Q. And that e-mail is September
21 18th, 2017. Let's mark this as Teramoto
22 Exhibit 10.

23 (Teramoto Exhibit 10 marked for
24 identification.)

25 Q. For the record, this is an

1 exhibit Bates stamped 2528. It is a single
2 page and it is an e-mail from Wilbur Ross
3 to Peter Davidson, "Subject: Census."

4 It contains a single line of
5 text which reads as follows: "Wendy and I
6 spoke with the AG yesterday. Please follow
7 up so we can resolve this issue today.
8 WLR."

9 Didn't you and Secretary Ross
10 speak to the Attorney General on September
11 18th, 2017?

12 MS. WELLS: I object to form.

13 A. I don't remember being a part
14 of that call at all.

15 Q. Do you deny being part of the
16 call?

17 A. I said I don't remember being a
18 part of that call. I remember calls with
19 different cabinet members. I don't ever
20 remember being on a call with the AG.

21 Q. Can you think of any reason why
22 Mr. Ross would get this wrong just a day
23 after the call?

24 MS. WELLS: I object to form.

25 A. You would have to ask him, but

1 I don't remember being on the call with the
2 AG.

3 Q. Do you have any reason to
4 believe Mr. Ross would make up the fact
5 that you were on the call with him and the
6 Attorney General on or about September
7 18th, 2017?

8 MS. WELLS: I object to form.

9 A. You would have to ask him.
10 Again, I don't remember being on the call
11 with the AG.

12 Q. "Him" being Secretary Ross?

13 MS. WELLS: I object to the
14 form.

15 A. I don't remember being on a
16 call with the AG.

17 Q. You said you will have to ask
18 him. By "him," you meant Secretary Ross,
19 correct?

20 A. Yes, sir.

21 Q. Okay. Regardless of whether
22 you remember being on the call, isn't it
23 true that this call had to do with adding a
24 citizenship question to the census?

25 MS. WELLS: Objection to the

1 form. Asked and answered.

2 A. Sir, I don't remember being on
3 the call, so I can't tell you what was
4 discussed.

5 Q. Let's go back to Exhibit, I
6 think 9. This one. Let's go back to
7 Exhibit 9.

8 A. Okay.

9 Q. Going back to the e-mail from
10 Ms. Cutrona, toward the top of the page,
11 September 17, 2017 at 12:10, Ms. Cutrona
12 says, again, this is in the e-mail to you,
13 the one that begins "Wendy, from what John
14 told me, it sounds like we can do whatever
15 you all need us to do."

16 So John, I take it, must be
17 John Gore, because he is the one who
18 introduces Ms. Cutrona to you, and this is
19 following up on a call that Mr. Gore had
20 with you.

21 So when Ms. Cutrona says "It
22 sounds to me like we can do whatever you
23 all need us to do," what did you need for
24 the Department of Justice to do?

25 MS. WELLS: I object to form.

1 MS. WELLS: I object to the
2 form, and it also mischaracterizes the
3 testimony, I believe.

4 Q. I'm characterizing the
5 transcript, which I'm looking at.

6 A. I have not specifically asked
7 for this letter that you're talking about.

8 Q. I take it you haven't asked for
9 it generally either?

10 A. I don't know what you mean,
11 generally.

12 Q. You said specifically. I don't
13 know if you are meaning to exclude
14 something.

15 A. I'm not a lawyer, so all I'm
16 saying is I have not asked for it.

17 Q. Okay. I know you haven't seen
18 this before today, but I want to point you
19 to something just so we can have a
20 framework.

21 Sort of almost halfway down the
22 first paragraph of Teramoto Exhibit 1,
23 Secretary Ross says that with respect to
24 the fundamental issues regarding the
25 census, he says "Part of these

1 considerations included whether to
2 reinstate a citizenship question which
3 other senior Administration officials had
4 previously raised."

5 Do you know who the other
6 senior Administration officials are?

7 A. I have no idea.

8 Q. Who would know?

9 A. You would have to ask Secretary
10 Ross.

11 Q. I will represent to you that
12 the Commerce Department, through its
13 lawyers at the Department of Justice, said
14 they can't figure out the answer to this
15 question.

16 Do you have reason to believe
17 that the identity of the senior
18 Administration officials is some kind of
19 state secret?

20 MS. WELLS: I object to the
21 form of the question.

22 A. Are you being serious?

23 Q. Yeah. I'm, frankly, shocked
24 that the Commerce Department and the United
25 States Justice Department can't figure out

1 messaging app such as Signal, Confide or
2 WhatsApp?

3 A. No.

4 Q. Do you know what those are?

5 A. I have heard of WhatsApp, but I
6 don't know, what are the other ones?

7 Q. To your knowledge, does
8 Secretary Ross --

9 A. I'm sorry, what were the other
10 ones?

11 Q. Oh, I'm sorry, the other ones
12 were Signal or Confide.

13 A. No.

14 Q. To your knowledge, does
15 Secretary Ross use a personal e-mail to
16 communicate for government business?

17 A. I know that he uses his
18 government account.

19 Q. My question is, does he ever
20 use a personal account?

21 A. I don't know. He has a
22 personal account. You would have to ask
23 him.

24 Q. And has Secretary Ross ever
25 used text messaging on a personal -- on a

1 reason that the Department of Justice asked
2 the citizenship question is because
3 Secretary Ross asked the Department of
4 Justice to ask the citizenship question?

5 MS. WELLS: I object to form.

6 A. I'm sorry if I don't understand
7 your question, but when you ask it to me,
8 it makes it sound like you are asking me if
9 I understand why the Justice Department did
10 something, and, again, I have no idea how
11 the Justice Department works, so I can't
12 tell you why they do or do not do anything;
13 I'm sorry, I just don't.

14 Q. Do you understand from any
15 source that Secretary Ross went to the
16 Department of Justice and asked them to ask
17 for a citizenship question on the census?

18 A. Again, I don't know what direct
19 conversations the Secretary has had with
20 the Justice Department.

21 Q. You haven't heard about that
22 from any source?

23 A. Heard about what?

24 Q. That Secretary Ross went to the
25 Department of Justice and asked the

1 Department of Justice to please request the
2 addition of a citizenship question.

3 A. I have no recollection of the
4 Secretary ever going to the Department of
5 Justice.

6 Q. Including you have no
7 recollection of the Secretary talking to
8 Assistant Attorney -- I'm sorry, to
9 Attorney General Jeff Sessions about that?

10 A. No, that's not what I said.

11 Q. I know. That's a different
12 question.

13 A. Okay. Can you ask your new
14 question, please?

15 Q. Yes.

16 You understand that Attorney
17 General Jeff Sessions spoke to Secretary
18 Ross about asking a citizenship question on
19 the census?

20 MS. WELLS: I object to the
21 question, the form of the question.

22 A. From the e-mails, I can see
23 that the Secretary and the AG spoke. What
24 they spoke about, I don't know, because, as
25 I said, I have no recollection of ever

1 being on a call between the two of them.

2 Q. Did you learn from any source
3 that the Department of Commerce had made a
4 decision in connection with the decisional
5 memorandum not to let Congress and the
6 public know that it was the Secretary who
7 wanted the Department of Justice to add the
8 citizenship question?

9 Withdrawn. Let me rephrase
10 that.

11 A. Okay.

12 Q. Did you learn from any source
13 that the Department of Commerce had made a
14 decision in connection with the decisional
15 memorandum not to let Congress and the
16 public know that it was the Secretary who
17 went to the Department of Justice, and it
18 was the Secretary, the Secretary of
19 Commerce, that is, who pressed the
20 Department of Justice to ask for a
21 citizenship question?

22 A. Sir, I'm not trying to be
23 difficult. Can you shorten your questions,
24 because there is a lot of notes and --

25 Q. Sure.

1 Q. Are you aware of him having
2 meetings there regarding the census?

3 A. No.

4 Q. Not --

5 A. Not to my knowledge.

6 Q. What topics are you aware that
7 he discusses when he goes to the White
8 House?

9 A. Well, you mean topics or
10 meetings?

11 Q. Well, what is discussed during
12 these meetings as far as you're aware?

13 A. I'm not always there, so I
14 don't know.

15 Q. When you are there.

16 A. He will go there for trade
17 meetings, and I'm a part of some of those.
18 I have never heard census mentioned once in
19 a single trade meeting the entire time I've
20 been there.

21 And he will go for other
22 meetings that I'm not a part of. So I
23 don't know what's discussed at the meetings
24 that I'm not a part of.

25 Q. Do you know if he has ever had

1 discussions, during those meetings,
2 regarding immigration enforcement?

3 MS. WELLS: I object to the
4 form.

5 A. Again, you would have to ask
6 him. I can't --

7 Q. I'm asking --

8 A. I can't testify for a meeting
9 that I'm not a part of what he discussed.

10 Q. I'm asking about what you are
11 aware of. So if you are not aware, you can
12 just say I'm not aware of anything.

13 Voter fraud?

14 A. What?

15 Q. Voter fraud?

16 A. Never -- I'm not aware of any.

17 Q. An undercount that may result
18 in the census?

19 A. Just to back up, these are have
20 I ever heard these topics at a meeting with
21 the Secretary in the White House?

22 Q. Are you aware of the Secretary
23 having these conversations with anyone at
24 the White House?

25 A. Okay, no.

1 Q. Congressional apportionment?

2 A. No.

3 Q. Redistricting?

4 A. No.

5 Q. Have you ever had any
6 conversations, and excuse my pronunciation,
7 with Reince Priebus?

8 A. Have I ever had a conversation
9 with him?

10 Q. Uh-huh.

11 A. He was on that plane back from
12 Saudi, but, again, nobody really spoke
13 because you couldn't hear over the engines.
14 I can't think of any. I don't think Reince
15 knows who I am.

16 Q. Are you aware of Secretary Ross
17 having conversations with Mr. Priebus?

18 A. I'm sure they have, but I have
19 no idea about what.

20 Q. Anyone at the Department of
21 Commerce, are you aware of anyone at the
22 Department of Commerce having conversations
23 with Mr. Priebus?

24 A. I mean, it's not like people
25 have conversations and then come and notify

1 Department of Commerce has ever had
2 conversations with General Kelly about any
3 of the topics we have just discussed?

4 A. I have no idea.

5 Q. Have you ever spoken to Kris
6 Kobach, besides last summer?

7 A. Well, I don't even remember
8 speaking to him, so other than that e-mail.

9 Q. Do you know if Secretary Ross
10 has communicated with him before?

11 A. I have no idea.

12 Q. What about anyone at the
13 Department of Commerce?

14 A. No idea.

15 Q. Are you aware that he also made
16 a request to add a citizenship question to
17 the 2020 census?

18 MS. WELLS: I object to the
19 form.

20 A. Well, I mean, I've read the
21 e-mail.

22 Q. Aside from the e-mail.

23 A. No.

24 Q. Have you ever spoken to
25 Attorney General Jeff Sessions?

1 A. I think I might have said hi to
2 him at the chief of staff meeting, but now
3 that I think about it, I was late, so I
4 don't even think I even shook his hand.

5 Q. How about Secretary Ross and
6 Attorney General Jeff Sessions, are you
7 aware of conversations between them?

8 A. I'm aware that they've had
9 conversations. I'm not aware of the
10 content of those conversations.

11 Q. Do you know if they have ever
12 spoken about the census generally?

13 A. I have no idea.

14 Q. Do you know if they have ever
15 spoken about immigration enforcement?

16 A. I have no idea.

17 Q. Voter fraud?

18 A. Zero idea.

19 Q. An undercount?

20 A. No idea.

21 Q. Congressional apportionment?

22 A. No idea.

23 Q. Redistricting?

24 A. No idea.

25 Q. So earlier you mentioned you

1 2018 deadline for submitting questions to
2 Congress for the 2020 census?

3 A. I have no idea.

4 Q. And who would know?

5 A. Wilbur Ross.

6 Q. And I want you to look at what
7 I believe was marked as Exhibit 2 today,
8 which is document number 3699. Is it not?
9 Is it Exhibit 3? It is the May 2nd e-mail.

10 A. Mine are all messed up.

11 Q. It is Exhibit 2. I have
12 another copy of it if you want to look at
13 it. It is not stamped.

14 A. I have it. I will find it.

15 Q. It is this one, if you want to
16 go visually. I think that's it, the next
17 one there.

18 A. Okay.

19 Q. Great.

20 Looking at the May 2nd e-mail
21 from Ross to Comstock, copying Ellen
22 Herbst, I understand you're not on that
23 original e-mail, the sentence "Worst of
24 all, they emphasize that they have settled
25 with Congress on the questions to be

1 asked."

2 Do you know who Secretary Ross
3 means when he says "they"?

4 A. I have no idea.

5 Q. And who would know?

6 A. Wilbur Ross.

7 Q. And in the e-mail that you
8 write above, in this e-mail, are you
9 providing any information to Wilbur Ross to
10 assist him in arriving at his decision to
11 add the citizenship question to the 2020
12 census looking at just what you wrote?

13 MS. WELLS: I object to the
14 form.

15 A. What I wrote is "I continue to
16 talk frequently with Marc Neumann and we
17 often have dinner together. He will not
18 leave les, but is in love with the census
19 and talks about it nonstop. Do you want me
20 to set up another meeting? Let me know if
21 you want to have a drink or get together
22 with him over the weekend. Wendy."

23 I don't see anything in there
24 about the citizenship question.

25 Q. In fact, you have testified

CERTIFICATION

I, TODD DeSIMONE, a Notary Public for
and within the State of New York, do hereby
certify:

That the witness whose testimony as
herein set forth, was duly sworn by me; and
that the within transcript is a true record
of the testimony given by said witness.

I further certify that I am not related
to any of the parties to this action by
blood or marriage, and that I am in no way
interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set
my hand this 24th day of August, 2018.

Todd Desimone

TODD DESIMONE

* * *

Exhibit 7

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 Tuesday, August 28, 2018

12 Deposition of:

13 KAREN DUNN KELLEY

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 9:04 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 VIDEOGRAPHER: Good morning. We are
4 going on the record at 9:04 a.m. on Tuesday,
5 August 28, 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 and place them away from
9 the microphones, as they can interfere with the
10 deposition audio. Audio and video recording will
11 continue to take place unless all parties agree to
12 go off the record.

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

22 My name is Dan Reidy from the firm

1 Veritext Legal Solutions, and I'm the
2 videographer. The court reporter is
3 Karen Jorgenson from the firm Veritext Legal
4 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. Also, counsels' appearances will be
9 noted on the stenographic record rather than
10 orally at this time.

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

13 KAREN DUNN KELLEY,
14 called as a witness, and having been first duly
15 sworn, was examined and testified as follows:

16 THE WITNESS: Yes, I do.

17 EXAMINATION BY MR. GROSSI:

18 Q Good morning, Secretary Kelley. We met
19 briefly in the hall. But for the record, my name
20 is Peter Grossi, and I'm an attorney here with
21 Arnold & Porter. And I'm going to be leading off
22 this morning. We represent the plaintiffs, the

1 Mr. Kobach to talk about the addition of a
2 citizenship question, correct?

3 MR. GARDNER: Objection. Lack of
4 foundation.

5 THE WITNESS: I'm reading that. Your
6 description is appropriate.

7 BY MR. GROSSI:

8 Q And, of course, you knew Ms. Teramoto
9 from your time at Invesco, right?

10 A Yes, I did. Not my entire time.

11 Q Of course.

12 Did you know in July of 2017 that
13 Mr. Kobach had been talking and writing to
14 Secretary Ross and to Ms. Teramoto about adding a
15 citizenship question?

16 A No.

17 Q You didn't know it then; is that right?

18 A Correct.

19 Q Have you subsequently heard from Mr. Ross
20 that Mr. Kobach was one of the people who was
21 interested in adding the citizenship question?

22 I'm now looking at the entire time frame

1 up until today.

2 A Not that I recall.

3 Q Secretary Ross has never advised you in
4 any way, shape or form that at any time,
5 Mr. Kobach was interested in adding a citizenship
6 question? Is that what your testimony is --

7 MR. GARDNER: Objection. Asked and
8 answered.

9 BY MR. GROSSI:

10 Q -- or do you think it possible?

11 MR. GARDNER: Objection. Form.

12 THE WITNESS: I have never seen this
13 email until right this -- this document until this
14 moment in time.

15 BY MR. GROSSI:

16 Q Uh-huh.

17 A As the process evolved and we got to
18 March of 2018, no. I did not know. I did not
19 know.

20 Q Let me ask you about one thing that
21 Mr. Kobach says. He says that one of the problems
22 with not having a citizenship question is, quote,

1 to the final form is a draft. So anybody who saw
2 it at that point was in the draft mode.

3 So I apologize. I just don't want -- I
4 don't want to not answer your question, because I
5 know this is such a very, very important topic.

6 BY MR. GROSSI:

7 Q We'll hold it until this afternoon when
8 I'll be able to put the document in front of you.

9 A Okay.

10 Q In the supplemental memorandum in the
11 second sentence, Secretary Ross states, quote,
12 soon after my appointment as
13 Secretary of Commerce, I began considering various
14 fundamental issues regarding the upcoming 2020
15 census, including funding and content. Part of
16 these considerations included whether to reinstate
17 a citizenship question which other senior
18 administration officials had previously raised.

19 Do you see that?

20 A Yes. I do see that.

21 Q Okay. So we know from the supplemental
22 memorandum, that there were senior administration

1 officials who raised the issue of reinstating the
2 citizenship question shortly after
3 Secretary of Commerce Ross assumed the position in
4 January 2017, correct?

5 MR. GARDNER: Objection. Lack of
6 foundation.

7 THE WITNESS: I know what I read here.

8 BY MR. GROSSI:

9 Q Fair enough.

10 What I want to do is find out what you
11 know from anything anybody has told you about
12 which senior administration officials raised the
13 issue of adding a citizenship question in this
14 time frame soon after Secretary of Commerce Ross
15 took the position.

16 Tell me from any source, including
17 Secretary Ross or anything else you've been told,
18 about who those senior administration officials
19 were?

20 A I do not know.

21 Q You don't know who they are? You've
22 never asked Secretary Ross where he got the idea

1 to add a citizenship question?

2 A I never asked the Secretary.

3 Q And he never told you?

4 A Again, I think you're conflating two
5 questions. You asked about senior officials,
6 administrative officials, and now you're saying
7 how he got the idea. There's two separate topics
8 here.

9 Could you clarify what you're asking me?

10 Q Well, Secretary Ross says he got the idea
11 from senior administration officials, okay?

12 MR. GARDNER: Objection. Lack of
13 foundation.

14 THE WITNESS: Okay. I know, again, what
15 I've just read here.

16 BY MR. GROSSI:

17 Q Right. What we're trying to figure out
18 from any source -- and remember, it might even be
19 hearsay -- is who did Secretary Ross talk to in
20 the spring of 2017 about this idea of adding a
21 citizenship question? Any knowledge that you have
22 from any source?

1 A I don't remember any. No. I do not
2 remember any.

3 Q Let me ask about some of the names that
4 the government has mentioned in a slightly
5 different capacity, which are the people who did
6 discuss the topic, whether they raised it or not.

7 Taking a look at Page 14 of the
8 government's responses, they list the following
9 people in response to the question of who
10 discussed this with Secretary Ross. The first one
11 is Mary Blanche Hankey.

12 Do you know her?

13 A No.

14 Q Do you know that she works at the
15 White House?

16 A No.

17 Q You've never heard her name in connection
18 with this topic?

19 A No.

20 Q James McHenry, do you know who he is?

21 A No.

22 Q And your testimony is, you've never heard

1 A I don't know when he got involved. I do
2 not know the answer.

3 Q Danielle Cutrona?

4 A No. Do not know her.

5 Q Doesn't help you if I tell you she works
6 at the Justice Department?

7 A I do not know her.

8 Q Jefferson Sessions, you know?

9 A Yes.

10 Q Have you ever met Attorney General
11 Sessions?

12 A Onetime at a holiday event, and I simply
13 said hello, Merry Christmas.

14 Q Do you have any knowledge of what he told
15 Secretary Ross about the --

16 A No.

17 Q -- about the question?

18 A No.

19 Q Kris Kobach we've already discussed, and
20 you don't -- doesn't help you to remember anything
21 that Secretary Ross ever told you about his
22 association and discussions with Mr. Kobach?

1 A No.

2 Q Steve Bannon?

3 A No.

4 Q You've never --

5 A I know the name. Of course, I know the
6 name.

7 Q Have you ever met him?

8 A No.

9 Q Were you ever told by Secretary Ross that
10 he had discussions with Mr. Bannon about the
11 citizenship question in April of 2017 or at any
12 time?

13 A No.

14 Q Okay. And, of course, Mr. Ross?

15 A I do know him.

16 Q Is there anybody other than
17 Secretary Ross that would have the information on
18 who Secretary Ross talked to back in the spring of
19 2017 about this question?

20 MR. GARDNER: Objection. Calls for
21 speculation.

22 THE WITNESS: I don't know the answer to

1 that.

2 BY MR. GROSSI:

3 Q Well, apart from what your counsel just
4 said, you know whether you know. Is there anyone
5 other than Secretary Ross that you can help us
6 with who might be able to tell us who the senior
7 administration officials were who first raised the
8 question?

9 MR. GARDNER: Objection. Lack of
10 foundation.

11 THE WITNESS: I -- I would be of no help
12 to you.

13 BY MR. GROSSI:

14 Q You don't know of any other person who
15 could provide that answer?

16 A No.

17 Q And same question: You don't know of any
18 other person who could provide an answer to the
19 question of who Secretary Ross discussed the
20 citizenship question back in the spring of 2017?

21 A No.

22 Q Okay. We're going to mark as Exhibit 6

1 A In preparation for my -- my hearing.

2 Q Okay. And you -- did you communicate
3 with any of those people by email?

4 A No. They were communicated by -- with
5 the people at -- the four people that worked with
6 me. I didn't have an email at Commerce at that
7 time.

8 Q I understand. You had an email at
9 Invesco or your personal email account?

10 A Right. And we did not -- we did not
11 email.

12 Q But we haven't checked that out yet,
13 right?

14 A Right.

15 Q Okay. Well, let me just ask about
16 Exhibit 7, in the hopes it might refresh your
17 recollection about other things.

18 Do you recall hearing, perhaps when you
19 came in in late August, that Secretary Ross was
20 attempting to get the Department of Justice to
21 request that the citizenship question be added?
22 And maybe it's August, maybe it's September of

1 2017, when you first came on board.

2 A No. I was not aware of that.

3 Q You didn't know that he was attempting to
4 get people at the Department of Justice to say
5 they wanted a citizenship question?

6 A I knew he was in conversation with
7 people, but you said that he was trying to get
8 them to do something. I have no -- what the
9 Secretary tried to get people to do or try to do.

10 Q Is that another question that we could
11 ask Secretary Ross --

12 MR. GARDNER: Objection. Form.

13 BY MR. GROSSI:

14 Q -- best?

15 MR. GARDNER: Calls for speculation.

16 BY MR. GROSSI:

17 Q Would Secretary Ross be the best person
18 to ask about what Secretary Ross was doing with
19 the Department of Justice on this issue?

20 A I would always say that -- best to ask
21 the person that you're speaking about questioning.
22 I don't exactly know how to answer that. I mean,

1 just as we asked Karen what I said, which was on
2 the record.

3 Q Let me have marked the next exhibit.

4 (Plaintiffs' Exhibit 8, Email, was
5 marked.)

6 BY MR. GROSSI:

7 Q We're marking as Exhibit 8 a
8 memorandum -- I'm sorry -- an email. The top one
9 of which is dated August 16, 2017.

10 Now, this email indicates that
11 Mr. Earl Comstock wrote to Secretary Ross on
12 August 11th and he stated, quote, per your
13 request, here is a draft memo on the citizenship
14 question that James Uthmeier in the Office of
15 General Counsel prepared and I reviewed. Once you
16 have had a chance to review, we should discuss so
17 we can refine the memo to better address any
18 issues.

19 And it appears that Ms. Teramoto then
20 followed up on that by saying that Peter Davidson
21 and Karen Dunn Kelley will both be here Monday.
22 Let's spend 15 minutes together and sort this out.

1 whether it was statutorily mandated or appropriate
2 was something that was normally done when a new
3 census -- citizenship question was asked -- I'm
4 sorry -- when a new census question was asked?

5 A That was my understanding from the
6 technical experts at the Census.

7 The -- it was also my understanding that
8 the Census lawyers and the Department lawyers
9 worked together.

10 Q I'm going to mark as Exhibit 14 another
11 email from the same day, the same time.

12 (Plaintiffs' Exhibit 14, Email, was
13 marked.)

14 BY MR. GROSSI:

15 Q And this is from Enrique Lamas. He is
16 the assistant director of the Census, correct?

17 A He is the acting assistant director, sir,
18 to be technical.

19 Q And it's to, again, Mr. Willard, that
20 we've talked about, but also cc's to Mr. Jarmin,
21 and he's responding to an earlier email from 12:01
22 from Mr. Willard saying, "Hey, guys. Karen got a

1 call from the Secretary and has an update for all
2 of you. If you can step away from the FESAC" --
3 F-E-S-A-C -- "it is regarding a letter from the
4 Department of Justice," unquote.

5 Do you recall getting a call from
6 Secretary Ross presumably either on or shortly
7 before December 15th?

8 A I don't recall what this is about. I
9 don't recall what this is about, but --

10 Q Well, it says it is regarding a letter
11 from DOJ.

12 Do you see that?

13 A And if you see the page before, which
14 your handed me, and the bottom, which I
15 articulated to you that I asked James Uthmeier
16 that -- and I told you -- it doesn't say it
17 here -- but that James sent them the letter that
18 afternoon, the -- the problem with making
19 assumptions or speculating is that I could be
20 totally wrong. So I am -- I -- I don't
21 necessarily want to do that.

22 But if I were to be making an educated

1 guess, would you tolerate an educated guess --

2 Q Yes, please.

3 A -- that could be wrong?

4 I learned we had the letter. I said
5 let's get those guys, but they're in the FESAC
6 meeting, which is federal economic statistical
7 committee, so it's an important committee, so I
8 didn't want to -- if they could come out, and that
9 we would -- we got the letter, we will send it to
10 them.

11 That would be me taking a -- seeing these
12 things and saying -- but do I specifically
13 remember this? No, I can't tell you I do.

14 Q Okay. That was helpful. So what you're
15 saying is you do -- do you remember calling them
16 out of a meeting that was important?

17 A No. That's -- that -- that says if you
18 can step away the FESAC. That means if there's a
19 break or whatever. I am extremely respectful of
20 these guys, and I think you've met Dr. Jarmin and
21 you've met Dr. Abowd. These guys are brilliant.
22 They are hard working. They are incredible. I

1 don't call them out of anything. I say when you
2 can speak to me, I appreciate. No. No. No. I
3 would never call anybody out of anything, sir.

4 Q So this was a relatively unusual thing,
5 for you to be pressing on their time in this way,
6 right?

7 A Yes.

8 Q What was it that Secretary Ross told you
9 was so important?

10 A As I said, sir, I don't remember -- and,
11 also, I didn't write this. So people love to use
12 the Secretary's name in the vernacular of, the
13 Secretary called. It could have been the
14 Secretary's office. It could have been somebody
15 in connection. So people love to use that,
16 Number 1. Whether the Secretary called or not, I
17 can't speak to that, okay.

18 And all I'm trying to do is say from this
19 document, because I generically remember what
20 happened, that we got the letter. They did not
21 get the letter until later, because it came with a
22 post stamp on it, and I felt very strongly as soon

1 January 19, 2018 memo to the Department of
2 Commerce, correct?

3 A That's what the document says.

4 Q Okay. So if you go down to consideration
5 of income -- I'm sorry. Let's skip that.

6 If you go to the middle of the last full
7 paragraph on this page, one, two, three, four,
8 five, six, seven, eight, nine, ten -- I believe
9 it's ten lines down, "Other stakeholders
10 referenced the political climate generally."

11 Do you see that?

12 MR. GARDNER: I believe here -- it's
13 right --

14 THE WITNESS: Yep.

15 BY MS. GOLDSTEIN:

16 Q Do you see that?

17 A Other stakeholders reference --

18 Q Do you know what the Secretary is
19 referring to when he talks about the political
20 climate generally?

21 A No. I would not put words in the
22 Secretary's mouth.

1 Q I'd have to ask him?

2 A Please.

3 Q And then it says, the next full sentence,
4 "But no one provided evidence that reinstating a
5 citizenship question on the decennial census would
6 materially decrease response rates among those who
7 generally distrusted government and government
8 information collection efforts, dislike the
9 current administration or fear of law
10 enforcement."

11 Do you see that?

12 A Yes.

13 Q You didn't ask the Census Bureau to test
14 that question, correct?

15 A The Census Bureau indicated that they
16 felt the question had been tested.

17 Q Now, this says that no one provided
18 evidence that reinstating the question -- I'm just
19 going to paraphrase -- that reinstating the
20 question in this climate with these people who
21 generally distrusted government would decrease
22 response rates, correct?

1 A That's what it says, which is
2 paraphrased.

3 Q Yeah.

4 A You read it verbatim before.

5 Q But fair enough, right?

6 No one in Commerce asked the
7 Census Bureau to provide that evidence through
8 additional testing, correct?

9 MR. GARDNER: Objection. Calls for
10 speculation. Lack of foundation.

11 BY MS. GOLDSTEIN:

12 Q To your knowledge?

13 A The Census Bureau -- excuse
14 me -- Commerce asked the Census Bureau whether
15 they felt the question was adequately tested.

16 Q And Secretary Ross felt that there was no
17 evidence, at least with respect to this
18 implication of the citizenship question, correct?

19 A I can't tell you what he felt or anything
20 else.

21 Q That's just what he wrote --

22 A We know what he wrote.

1 "While the reinstatement of a citizenship question
2 may be a data point on which these interest groups
3 seize in 2019, past experience demonstrates that
4 it is likely efforts to undermine the decennial
5 census will occur -- will occur again, regardless
6 of whether the decennial census includes a
7 citizenship question."

8 Now, I only want to know, have you seen
9 any empirical data that relates to that point?

10 A No.

11 Q And do you know if Secretary Ross has
12 seen any empirical data --

13 MR. GARDNER: Objection.

14 BY MS. GOLDSTEIN:

15 Q -- relating to that point?

16 MR. GARDNER: Calls for speculation.

17 THE WITNESS: I'm not going to speak for
18 Secretary Ross.

19 BY MS. GOLDSTEIN:

20 Q I need to speak to him --

21 MR. GARDNER: Objection

22 BY MS. GOLDSTEIN:

1 Q -- to find out the answer to that
2 question, correct?

3 MR. GARDNER: Calls for speculation.

4 THE WITNESS: You're not going to -- you
5 can't get it from me. So if you want to know what
6 he thinks --

7 BY MS. GOLDSTEIN:

8 Q Or what he saw, I need to speak to
9 Secretary Ross, correct?

10 A Yep.

11 Q So let's go to --

12 A Yes.

13 Q -- the next page.

14 Do you know -- let's put that down for a
15 second. Can you put the --

16 A You told me to go here.

17 Q I know. Put it down for a second.

18 Do you know what weight Secretary Ross
19 gave to the Census Bureau's memos on the
20 citizenship question?

21 A In terms of making his decision, no. But
22 the Secretary is very thoughtful and weighs --

CERTIFICATE OF REPORTER

Karen Lynn Jorgensen

Dated this 31st day
of August, 2018.

Exhibit 8

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

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

6 UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,
7 Defendants.
8 -----

9 Washington, D.C.

10 Thursday, August 30, 2018

11 Deposition of:

12 EARL COMSTOCK

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

1 stakeholders?

2 A I take meetings when the Secretary can't,
3 yes.

4 Q Do you ever take meetings independent of
5 filling in for the Secretary?

6 A Yeah, on major policy issues I'm working
7 on.

8 Q Did you meet with outside stakeholders on
9 the citizenship question?

10 A No.

11 Q You didn't attend any meetings, including
12 with the Secretary, on the citizenship question --

13 A I --

14 Q -- with outside stakeholders?

15 A With the outside stakeholders groups, no.

16 Q When did you first hear about the notion
17 of adding a question about citizenship to the
18 decennial census?

19 A Sometime in -- shortly after the
20 confirmation.

21 Q And who did you hear it from?

22 A The Secretary.

1 Q And the Secretary was confirmed on
2 February 28, 2017; is that right?

3 A I -- like I said, you'd have to confirm
4 that date, but I think that was the date, yes.

5 Q And what did the Secretary tell you about
6 the idea of adding a question on citizenship to
7 the census during that first conversation shortly
8 after his confirmation?

9 A Again, the exact time frame of the
10 conversation, I can't tell you. It was sometime
11 in that spring period. I don't recall the
12 details. I think he simply inquired as to why
13 don't we have a citizenship question on the
14 census.

15 Q Okay. And what did you say to him when
16 he inquired?

17 A Short answer, I don't know. I'll check.

18 Q Okay. And would that interaction be
19 reflected in any documents?

20 A I don't -- I don't believe so, but it's
21 possible it's in an email exchange.

22 MR. COLANGELO: Can we mark as Exhibit 1,

1 to Secretary Ross on Friday, March 10th. Do you
2 know why the Secretary asked you whether
3 undocumented people were counted?

4 A I have no idea.

5 Q Okay. Did he ask you whether noncitizen
6 people were counted for apportionment purposes?

7 A Well, based on the answer, it appears he
8 might have.

9 Q Appears he might have or appears he did?

10 A I couldn't tell you the answer on that.

11 Q Okay.

12 A I don't recall the question, so --

13 Q Okay. But you sent this email to the
14 Secretary in response to a question?

15 A Yes.

16 Q And you would have presumably tried to
17 make your answer responsive to his question?

18 A I generally do that, yes.

19 Q So you think it's likely that his
20 question was about whether undocumented immigrants
21 were counted for apportionment purposes?

22 A That's entirely possible, but he might

1 have also just asked do we count undocumented
2 persons, and this is what I found on the Census
3 website.

4 Q How do you think you found it on the
5 Census website?

6 A By typing in census and going to their
7 website and seeing what their FAQs say.

8 Q So you think you would have gone directly
9 to the frequently asked questions page?

10 A That would not be unusual for me to do,
11 yes.

12 Q This link you've identified at
13 www.census.gov, that's the Census Bureau's
14 frequently asked web page for Congressional
15 apportionment; is that right?

16 A Again, without pulling it up, I couldn't
17 tell you specifically what it says.

18 Q Okay. If I represent to you that if you
19 pulled up that website, it would say frequently
20 asked questions for Congressional apportionment,
21 would that assist you?

22 A I'd be happy to take your word for it.

1 Q So does that assist you in recalling that
2 the Secretary asked whether noncitizens were
3 counted for apportionment purposes?

4 A And I have no recollection of the
5 question, so I can only go by the answer.

6 Q Okay. The email also includes a blog
7 post from the Wall Street Journal; is that right?

8 A Uh-huh.

9 Q Okay. And your email to the Secretary
10 says that this blog post, quote, confirms that
11 neither the 2000s, nor the 2010 census asked about
12 citizenship?

13 A Correct.

14 Q So does that lead you to conclude that
15 the Secretary asked about whether the decennial
16 census asks about citizenship?

17 A That would be a reasonable supposition,
18 based on the response.

19 Q And this blog post is called the pitfalls
20 of counting illegal immigrants; is that right?

21 A Yep.

22 Q And were you concerned on March 10, 2017

1 about counting illegal immigrants?

2 A I -- no, not personally.

3 Q Was the Secretary concerned on
4 March 10, 2017 about counting illegal immigrants?

5 A Again, I have no recollection of the
6 question, so I couldn't speculate as to what his
7 concern was.

8 Q But you testified that a significant part
9 of your job function involves answering questions
10 from the Secretary on issues that matter to him,
11 right?

12 A Correct.

13 Q And if he asked you a question, you would
14 try to be responsive?

15 A Generally, yes.

16 Q You wouldn't ordinarily send him
17 information that wasn't responsive to a question
18 he asked, would you?

19 A Not -- not characterized this way, no.

20 Q So you testified a minute ago that the
21 Secretary -- that you first heard about the notion
22 of adding a question about citizenship to the

1 census when the Secretary raised it with you
2 shortly after his confirmation. Does this email
3 indicate to you that it was by March 10th that the
4 Secretary first raised it with you?

5 A I wouldn't necessarily draw that
6 conclusion from this email.

7 Q Would you draw the conclusion that it was
8 later than March 10?

9 A No, I wouldn't. Again, this -- this
10 question does not directly address -- it's a
11 question about how -- who do we count, not whether
12 or not -- and whether there's a citizenship
13 question. So I don't know at this point whether
14 he indicated he was interested in such a question,
15 other than getting the factual information.

16 Q Okay. Who would know when the Secretary
17 was interested in adding a citizenship question?

18 MR. GARDNER: Objection. Calls for
19 speculation.

20 BY MR. COLANGELO:

21 Q You can answer.

22 A My counsel just objected, so why can --

1 would I answer?

2 Q So let me -- an additional ground rule
3 that I -- let's cover one additional ground rule.
4 I will ask questions and your job is to answer
5 them fully and truthfully.

6 A Okay.

7 Q Your counsel may state objections if he
8 finds my questions objectionable for a range of
9 reasons. If he states an objection, you can,
10 nonetheless, answer the question unless he
11 instructs you not to answer.

12 Do you understand?

13 A Well, you used the word "can," which
14 means that I have the discretion.

15 Am I instructed to answer the question
16 notwithstanding his objection or is it -- should I
17 follow my counsel's objection?

18 MR. GARDNER: You should do your best to
19 answer the question posed to the extent you
20 understand.

21 THE WITNESS: Thank you for the
22 clarification.

1 Again, you'd have to ask the Secretary.

2 BY MR. COLANGELO:

3 Q The -- the -- let's go back to Exhibit 2,
4 subject line, your question on the census, and
5 tell me how the Secretary's question was
6 communicated to you?

7 A It appears orally.

8 Q Okay. Why do you say it appears orally?

9 A Well, we did a very extensive email
10 search, including the Secretary's email, and so if
11 you don't have an email from him to me asking
12 about this, and normally I would reply back if he
13 had sent me an email asking me about this. So,
14 therefore, I would conclude that it was oral.

15 Q Okay. And you don't recall -- strike
16 that.

17 Was that oral question in a meeting, on
18 the telephone? How do you remember receiving that
19 question?

20 A I have no recollection.

21 Q Okay. Your email says -- let me direct
22 you to the first line of your message to 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 A Correct.

2 Q It was important to the Secretary?

3 A Correct.

4 Q He was motivated to get this done?

5 A He was working on a lot of different
6 issues at the time.

7 Q But this one was important to him?

8 A Yes. Absolutely.

9 Q Okay. And when you saw the draft of this
10 memo before June 21st and it refers to other
11 senior administration officials, you didn't
12 yourself have any view or understanding of who
13 those other administration officials were?

14 A I did not, no.

15 Q You didn't ask the secretary who those
16 other administration officials were?

17 A No.

18 Q Okay. When recommending that he sign the
19 memo, he didn't say to you who are the other
20 senior -- who the other senior administration
21 officials were?

22 A We did not discuss that, no.

1 A I think so, yes.

2 Q And you see this is an email from
3 Brooke Alexander to Hillary Geary?

4 A Yes.

5 Q Who is Brooke Alexander?

6 A She is the Secretary's confidential
7 assistant -- or at the time, she was. She's no
8 longer.

9 Q And do you understand the recipient of
10 this email to be the Secretary's wife?

11 A That appears to be who it's directed to,
12 yes.

13 Q And this email is dated March 5th of
14 2017, correct -- I'm sorry. Strike that.

15 This email is dated April 5th of 2017; is
16 that correct?

17 A That's what's on there, yes.

18 Q And you see that Ms. Alexander is
19 emailing Ms. Ross and says, quote, do you have
20 plans following Newseum? I'm asking because
21 Steven Bannon has asked that the Secretary talk to
22 someone about the census, and around 7:00 to

1 7:30 p.m. is the available time.

2 Do you see that?

3 A Yeah.

4 Q Okay. You know who Steven Bannon is?

5 A I do.

6 Q Who is Steve Bannon?

7 A He was an advisor to the President.

8 Q And he had that position at the time of
9 this email, correct?

10 A I do not know.

11 Q And who did Mr. Bannon want the Secretary
12 to talk to?

13 MR. GARDNER: Objection. Calls for
14 speculation. Lack of foundation.

15 THE WITNESS: I have no idea.

16 BY MR. COLANGELO:

17 Q Do you understand that the
18 second -- that -- strike that.

19 Do you understand that Mr. Bannon wanted
20 the Secretary to talk to Kris Kobach?

21 A I wasn't part of this email or this
22 conversation, so I don't know who he wanted him to

1 talk to.

2 Q Did the Secretary speak with Mr. Bannon
3 that night?

4 A I don't know.

5 MR. GARDNER: Objection. Calls for
6 speculation. Lack of foundation.

7 THE WITNESS: I do not know.

8 BY MR. COLANGELO:

9 Q Did the Secretary speak with Kris Kobach
10 on April 7, 2017?

11 A No idea.

12 Q Did you join a call with the Secretary
13 regarding the census on April 5th of 2017?

14 A I have no idea.

15 Q You don't know if you joined the call
16 with the Secretary on April 5th of 2017?

17 A I don't know what I was doing on
18 April 5, 2017 without looking at a calendar or
19 something else that would remind me. I'd have to
20 go through my emails that day. I could not tell
21 you what I was doing on that day.

22 Q Do you know who Kris Kobach is?

1 A I believe he's somebody with State of
2 Kansas maybe.

3 Q And have you spoken to Mr. Kobach before?

4 A I've never spoken to Mr. Kobach.

5 Q Have you emailed with Mr. Kobach?

6 A I've never emailed with Mr. Kobach.

7 Q And after the call that's referred to in
8 this email, did the Secretary tell you what he
9 discussed?

10 A No.

11 MR. GARDNER: Objection. Lack of
12 foundation.

13 THE WITNESS: No.

14 BY MR. COLANGELO:

15 Q Who would know what was discussed on this
16 phone call?

17 MR. GARDNER: Objection. Calls for
18 speculation. Also, lack of foundation.

19 BY MR. COLANGELO:

20 Q You can answer.

21 A The parties to the call.

22 Q You were working on the census in the

1 THE WITNESS: Again, if we were
2 considering changing the questions, it would be
3 important to know.

4 BY MR. COLANGELO:

5 Q And if you're considering adding a
6 citizenship question, it would also be important
7 to know the response rates on all demographic
8 questions; is that right?

9 A That would be one of the questions you
10 would ask, yes.

11 Q Okay. Did the Secretary discuss the
12 citizenship question with Mr. Newman in the spring
13 of 2017?

14 A You'd have to ask the Secretary.

15 MR. GARDNER: Objection. Lack of
16 foundation.

17 BY MR. COLANGELO:

18 Q I'm sorry. You were both speaking at the
19 same time.

20 MR. GARDNER: Objection. Lack of
21 foundation.

22 BY MR. COLANGELO:

1 Q And now please answer.

2 A I would say you'd have to ask the
3 Secretary.

4 Q Did he ever tell you that he spoke with
5 Mr. Newman about the citizenship question?

6 A I'm fairly certain he was -- he did talk
7 to him at some point.

8 Q Okay. When was that?

9 A I couldn't tell you.

10 Q Did Mr. Newman ever say to you that he
11 had spoken to the Secretary about adding a
12 citizenship question?

13 A It's possible, yeah.

14 Q Okay. When did he tell you?

15 A Again, I don't recall the exact date.

16 Q Try to place it, roughly.

17 A To your question, was there discussion of
18 the possibility of adding a citizenship question
19 in the spring? Yes. That does not mean any firm
20 decision had been made. We were exploring the
21 opportunity.

22 Q I'm not asking you about decisions. I'm

1 Q Okay. And you see that the Secretary has
2 written you an email on May 2, 2017 that says,
3 quote, worst of all, they emphasize they have
4 settled with Congress on the questions to be
5 asked. I am mystified why nothing has been done
6 in response to my months' old request that we
7 include the citizenship question. Why not?

8 Do you see that?

9 A I see that.

10 Q When did the Secretary make his months'
11 old request to include the citizenship question?

12 A Again, sometime in the spring.

13 Q Probably on March 10th when you emailed
14 him the Wall Street Journal blog post?

15 A Potentially. I don't recall.

16 Q Who does the "they" refer to in the line
17 I just read you from the Secretary's email?

18 MR. GARDNER: Objection. Calls for
19 speculation.

20 THE WITNESS: I don't know.

21 BY MR. COLANGELO:

22 Q You mentioned a minute ago the Census

1 was that?

2 A A call from the Secretary to talk to the
3 Attorney General about whether or not Justice
4 would be interested in a citizenship question.

5 Q And why was the Secretary talking to the
6 Attorney General about whether or not Justice
7 would be interested in the citizenship question?

8 A Again, if -- if the -- if the
9 Justice Department was not going to request the
10 question, had no use for the information, then
11 that would probably put an end to the citizenship
12 question.

13 Q And the Secretary wanted the citizenship
14 question?

15 A I think he felt -- well, I don't know
16 what he felt. Yes. He was continuing to explore
17 that possibility.

18 MS. BOUTIN: I'm sorry. Can you speak
19 up?

20 THE WITNESS: I don't know what he felt,
21 but he was continuing to explore the possibility.

22 BY MR. COLANGELO:

1 Q And when did the Secretary speak with the
2 Attorney General?

3 A I don't know that.

4 Q Were you on that call?

5 A I don't recall being on the call.

6 Q Who else was on the call?

7 A I don't know.

8 Q Okay. Did -- did Wendy ask to see this
9 memo, or did you send it to her without her
10 asking?

11 A Again, I don't recall the context, but
12 based on what the memo says, it appears she might
13 have asked --

14 (Thereupon, the court reporter
15 clarified.)

16 THE WITNESS: For it.

17 BY MR. COLANGELO:

18 Q Okay. I want to go back for a second
19 here, May 2nd email --

20 MR. GARDNER: Which exhibit number?

21 MR. COLANGELO: This is Exhibit --

22 MR. GARDNER: Oh, the 12 --

1 A Just a minute.

2 Yes.

3 Q Okay. And Exhibit 7 is the email
4 exchange with Kris Kobach; is that right?

5 A It's an email exchange between
6 Kris Kobach and Wendy Teramoto.

7 Q And the Secretary, correct, on the second
8 page?

9 A Yes. Appears to be one to the Secretary
10 on the second page.

11 Q Okay.

12 A Though it's blanked out as to who it goes
13 to.

14 Q If I represent to you that the government
15 has represented to us that this was an email to
16 the Secretary and that they've blanked out his
17 name for personal privacy reasons, can we agree
18 that it's an email to the Secretary on July 14th?

19 A I'll stipulate to that, yes.

20 Q And Mr. Gardner will tell me after lunch
21 if that's wrong.

22 The -- so you see that the -- that

1 Mr. Kobach, who identifies himself as the Kansas
2 Secretary of State, emailed the Secretary on
3 July 14, 2017, correct?

4 A Correct.

5 MR. GARDNER: Objection. Lack of
6 foundation.

7 BY MR. COLANGELO:

8 Q And you'll see that it says I'm following
9 up on our telephone discussion from a few months
10 ago, correct?

11 MR. GARDNER: Objection. Lack of
12 foundation.

13 THE WITNESS: And you're reading from the
14 email. So I have no idea if the email is correct
15 or not.

16 BY MR. COLANGELO:

17 Q Did the Secretary ever tell you that he
18 spoke to Kris Kobach?

19 MR. GARDNER: Objection. Asked and
20 answered.

21 BY MR. COLANGELO:

22 Q You can still answer.

1 A No.

2 Q Sorry. We were speaking at the same
3 time.

4 A I don't recall him ever telling me that
5 he spoke to Kris Kobach.

6 Q This email reads, "As you may recall, we
7 talked about the fact that the U.S. Census does
8 not currently ask respondents their citizenship."

9 Do you see that?

10 A I see that.

11 Q The email also reads, "It also leads to
12 the problem that aliens who do not actually reside
13 in the United States are still counted for
14 Congressional apportionment purposes."

15 Do you see that?

16 A I see that.

17 Q Did the Secretary ever tell you he was
18 concerned about the problem that aliens who do not
19 reside in the United States are still counted for
20 Congressional apportionment purposes?

21 A He never expressed an opinion on that.

22 Q And when the Secretary asked you on

1 inclusion of a citizenship question on the census.
2 At that point in time, the Department of Justice
3 had made no request to Commerce for the addition
4 of a citizenship question, correct?

5 A That's correct.

6 Q And they certainly hadn't
7 asked -- withdrawn.

8 The Department of Justice certainly
9 hadn't asked Commerce to add a citizenship
10 question because of the VRA. That's also correct;
11 isn't it?

12 A Well, they didn't ask us to add a
13 citizenship question at that point. So
14 speculating as to why they would ask is
15 irrelevant.

16 Q I'm not asking you to speculate. The one
17 thing we can be sure of is they didn't ask about
18 the VRA is because they didn't ask at all?

19 A Correct.

20 Q All right. And when Secretary Ross says
21 to you in the spring, in whatever words he used,
22 that he wants a citizenship question added to the

1 census, wouldn't you have had a discussion with
2 him at the time about why he wants that?

3 MR. GARDNER: Objection. Asked and
4 answered.

5 THE WITNESS: Again, the answer is no, I
6 would not have a discussion. My boss, if he asked
7 me to investigate something, I investigate it and
8 report back the results.

9 BY MR. GERSCH:

10 Q Is your testimony you did not have a
11 discussion?

12 A I did not.

13 Q And you're not saying -- well, withdrawn.

14 Wouldn't it be helpful to you in your job
15 to assist the Secretary to have an understanding
16 of why he wanted the citizenship question?

17 MR. GARDNER: Objection. Form.

18 BY MR. GERSCH:

19 Q You can answer.

20 A Again, I didn't have any particular
21 doubts about why a citizenship question would be
22 useful, so, no, it would not have hurt me to ask.

1 Q I'm not asking whether you had doubts.

2 My question to you is a little bit --

3 A I understand your question.

4 Q My question, sir, is: Wouldn't it be
5 helpful to you in your job of assisting the
6 Secretary to have a complete understanding of why
7 the Secretary wants to add a citizenship question?

8 MR. GARDNER: Objection. Form.

9 THE WITNESS: Again, it's not relevant to
10 the question of whether or not he needs -- of
11 whether or not a question should be added, so, no.

12 BY MR. GERSCH:

13 Q Is it your testimony that why he wants a
14 citizenship question to be added is not relevant
15 to whether it should be added? Did I -- did I
16 hear that right?

17 MR. GARDNER: Objection.

18 Mischaracterizes the witness's prior testimony.

19 THE WITNESS: My test- --

20 MR. COLANGELO: That's exactly what he
21 said, Counsel.

22 THE WITNESS: No. My testimony is: The

1 rationale for why he would want it added is not
2 relevant to my initial inquiry as to whether or
3 not a question can be added.

4 BY MR. GERSCH:

5 Q Yeah. My question was a little
6 different. The question I am trying to get you to
7 focus on is: In your work for the Secretary,
8 wouldn't it be helpful to you to understand as
9 fully as possible why he thinks it's a good idea
10 to add a citizenship question?

11 A And let --

12 MR. GARDNER: Objection. Asked and
13 answered.

14 THE WITNESS: And let me get you to
15 understand my answer, which is, no, it would not
16 make a difference, because I don't need that
17 information to investigate the question.

18 BY MR. GERSCH:

19 Q Anyone ever say anything to you about why
20 the Secretary thought it was a good
21 idea -- withdrawn.

22 Am I right that your testimony is that

1 you've never had a discussion with the Secretary
2 about why he thought it was a good idea to have a
3 citizenship question added?

4 A That's correct. I have not had a
5 conversation with him, no.

6 Q Okay. And did anyone else say anything
7 to you about why the Secretary thought it was a
8 good idea to have a citizenship question added?

9 MR. GARDNER: Objection. Form.

10 THE WITNESS: Again, no.

11 BY MR. GERSCH:

12 Q All right. If I remember correctly, you
13 testified you worked in a bullpen area?

14 A Correct.

15 Q Outside the Secretary's office?

16 A Yes.

17 Q I'm not sure I've got all the people who
18 were there, but Wendy Teramoto was there, right?

19 A Correct.

20 Q James Uthmeier was there?

21 A No.

22 Q I'm sorry.

1 You were there?

2 A Yes.

3 Q Eric Branstad, was he there?

4 A Yes.

5 Q That's three.

6 Izzy Hernandez, that's four. Was he
7 there?

8 A Yes.

9 Q Who was the fifth?

10 A James Rockas.

11 Q And I'm right that there were five?

12 A Correct.

13 Q Okay.

14 A At times.

15 Q So you're all sitting there -- and are --
16 do you work in cubicles, open desks, how does it
17 work?

18 A Wendy Teramoto had a seated desk. I had
19 a standing desk. Izzy had a standing desk with a
20 stool. James had a standing desk with a stool.
21 Eric Branstad had a standing desk with a stool.

22 Q Are there walls? Are there partitions?

1 Are you all in an open space?

2 A I'm facing -- I was facing Wendy. Izzy,
3 who was rarely there, but his desk was next to
4 mine, facing Eric, and then James was on the end.

5 Q And there are no walls, correct?

6 A No walls.

7 Q No partitions?

8 A No partitions.

9 Q Okay. In all the time that you're
10 sitting there and you're all working together, no
11 one says, why does the Secretary want to add a
12 citizenship question -- citizenship question?

13 A That's correct. Because, again, this was
14 one of well over 100 different items we were
15 working on. All of us were working on different
16 things. I'm primarily tasked with policy. James
17 is primarily tasked with press. And so you're
18 dealing with all of these other issues. There's
19 no reason to discuss it.

20 Q I'm not even talking about discussing it.
21 No one mentioned? Did anyone mention it?

22 A Not that I recall.

1 Q No one says the reason the Secretary
2 wants to add a citizenship question is whatever
3 the reason is, no one ever said anything like
4 that?

5 A No.

6 MR. GARDNER: Objection to form.

7 THE WITNESS: Not to my recollection.

8 BY MR. GERSCH:

9 Q Okay. Did you ever have a discussion
10 with people from the Office of General Counsel at
11 Commerce about why the Secretary wanted to add a
12 citizenship question?

13 A No.

14 Q And in your time there, did you never see
15 a document analyzing why it was a good idea for
16 Census to add a citizenship question?

17 A Again, you're -- we have a fundamental
18 disagreement on the premises of your question.
19 Your premise is that somehow a reason needs to be
20 provided. The question before us is the Secretary
21 has the legal authority to add questions to the
22 census. Is there a governmental need? And if

1 there is, then you're off to the races.

2 Q My question was a little different. My
3 question was --

4 A I understand your question.

5 Q Sir, I'll repeat it for you.

6 My question is: In all the time you're
7 there, did you never see a document spelling out
8 the reasons why it would be a good idea to add a
9 citizenship question? Why it would be good from
10 Commerce's perspective?

11 MR. GARDNER: Objection. Form.

12 THE WITNESS: Again, that's not the
13 question. Commerce --

14 BY MR. GERSCH:

15 Q Excuse me, sir. That is my question.
16 Could you answer my question?

17 A Okay. No.

18 Q Not even a scrap of paper, right?

19 A Nope.

20 Q No memoranda, right?

21 A No.

22 Q No emails?

1 A Not that I recall.

2 Q And I just want to be straight on my
3 understanding. I think I got you correctly, but I
4 just want to make sure and test that I'm right.

5 It couldn't possibly assist you in your
6 work, in any way, to know why the Secretary wanted
7 to add a citizenship question? Do I understand
8 that correctly?

9 A It's not relevant to my analysis.

10 Q And so it couldn't possibly help you in
11 any way in your work?

12 A I'm not going to agree with your
13 statement that way, no.

14 Q Well, that's my question -- withdrawn.

15 Well, is there any way in which knowing
16 what the Secretary's reason was for wanting to add
17 a citizenship question, is there any way that
18 could assist you in your work at
19 Department of Commerce?

20 A Assist me on my work at the Department of
21 Commerce, no.

22 Q Is there any way that it could help you

1 help the Secretary add a citizenship question?

2 A If I had found it difficult or
3 challenging, yes. Knowing more about why he
4 wanted it would have been helpful, but I didn't
5 say that there was an issue. It had been asked
6 for hundreds of years, and it had been asked on
7 the ACS. So, clearly, there's a need for it. And
8 so, no, that was not a particularly troublesome
9 aspect of the question I was being asked to look
10 into.

11 Q When you said if I had found it difficult
12 or challenging, what did you mean? What's the it?

13 A If -- if what I had been requested to do
14 seemed to have significant legal obstacles to the
15 ability to do that question or take that action,
16 then I would probably inquire more fully to see if
17 there's an alternative way to address what the
18 Secretary is trying to get to. In this particular
19 case, you have something that has been on the
20 decennial census before that is currently being
21 asked on the ACS. There's clear legal authority
22 for him to add the question. So, frankly, the

1 reasons that he wants to add it doesn't add
2 anything to the analysis. There is a governmental
3 need for this information. That's a question
4 that's already established, so I don't need to
5 inquire further as to what his personal beliefs
6 regarding this question might be.

7 Q What's the governmental need for the
8 question?

9 A Enforcement to the Voting Rights Act,
10 determining how many undocumented citizens there
11 are. You name it, there's a whole bunch of
12 reasons. That's why every government in the world
13 collects this information.

14 Q Well, correct me if I'm wrong, we're
15 talking about at a period in the spring of 2017
16 when the Voting Rights Act hadn't come up, the
17 Department of Justice hadn't made a request for
18 it. What does the Voting Rights Act got to do
19 with it in the spring of 2017?

20 A When you inquire as to what does the
21 Department of Justice use the citizenship data
22 on --

1 Q That wasn't my question. My question
2 is --

3 A I'm answering your --

4 Q -- why is it a good idea, why does the
5 government need it back in the spring of 2017?

6 A Finished with your question?

7 Q That's my question.

8 A The answer is for the same reason they've
9 been collecting it for the last 200-plus years.

10 Q What's the government need in the spring
11 of 2017?

12 A I already answered that question. If
13 they collect the data under the ACS for Voting
14 Rights Act enforcement, that is one of the primary
15 reasons they collect the data.

16 Q Okay. It's on the ACS. What's the
17 need -- governmental need for it to be on the
18 census?

19 MR. GARDNER: Objection. Asked and
20 answered.

21 THE WITNESS: The governmental need is,
22 again, if you're going to get more detailed

1 information, then you need that information.

2 BY MR. GERSCH:

3 Q Who said in the spring of 2017 that the
4 government needed more detailed information?

5 A Again, I'm presented with a request by
6 the Secretary to say, can we add this question to
7 the census? I inquire about that, and I looked at
8 it. One of the reasons you would need it is
9 voting rights. If you're going to do voting
10 allocations on the basis of census allocations,
11 that's the reason it's perfectly sufficient.

12 Q Who said that in the spring of 2017?

13 A That was -- that was determined after
14 taking a quick look at the issue. I don't need
15 more than that to continue to pursue the question.

16 Q Who told you that the government needed,
17 in the spring of 2017, more detailed information
18 about citizenship than was contained in the ACS?

19 A Nobody.

20 Q You came to that decision on your own; is
21 that right?

22 A Correct.

1 Q But you're not a voting rights lawyer,
2 right?

3 A Irrelevant to the question.

4 Q That's not my question. You're not a
5 voting rights lawyer, right?

6 A I've already said that.

7 Q So you decided on your own in the spring
8 of 2017 that it would be a good idea for the
9 government to have more information than was
10 available from the ACS about citizenship to
11 enforce the Voting Rights Act, even though you're
12 not a voting rights lawyer?

13 A I don't agree with that characterization,
14 at all. I decided that there was sufficient
15 information for me to pursue the Secretary's
16 request to consider placing a citizenship question
17 on the decennial census and that there was
18 sufficient potential reason to collect that
19 information to warrant moving forward. If I'd
20 come to an opposite conclusion that there was not
21 sufficient potential reason or that there was some
22 insurmountable legal bar, then I would have

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

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

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

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

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

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

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

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

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

1 wanting the citizenship question?

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

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

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

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

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

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

18 BY MR. GERSCH:

19 Q Because --

20 A -- ask him.

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

1 A That's correct.

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

4 A Correct.

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

7 Do you recall that?

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

10 Q Hankey. I apologize.

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

13 A Mary Blanche, but --

14 Q I'll find it in here.

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

17 Q Mary Blanche --

18 A Yep.

19 Q -- Hankey; is that right?

20 A Yeah.

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

1 both the workload I was under and the workload
2 that they're under that I think is misinformed.

3 In fact, several of my calls with
4 Mr. McHenry were made while I was driving into
5 work, so there was no opportunity to call somebody
6 and do that research.

7 And, besides, this wasn't about getting
8 leverage on Mr. McHenry. This was simply to
9 ask -- following up on the person I'd been
10 directed to, who, based on the fact that it was
11 recommended by an assistant to the AG, I'm
12 assuming is going to at least be somewhat
13 receptive. Probably an error on my part, but
14 that's -- I've got a dozen other things I'm
15 dealing with at the same time. So, no, I'm not
16 going to spend a lot of time researching this guy.

17 BY MR. GERSCH:

18 Q You didn't spend any time researching
19 this guy?

20 A Correct. I didn't.

21 Q Secretary Ross certainly knows why he
22 wanted a citizenship question back in the spring

1 of 2017, right?

2 A You'd have to ask him.

3 Q Is there anyone besides Secretary Ross
4 who we could go to who would have that
5 information?

6 MR. GARDNER: Objection. Lack of
7 foundation. Calls for speculation.

8 THE WITNESS: I'm not aware of anybody.

9 BY MR. GERSCH:

10 Q Do you have any reason to believe that
11 Secretary Ross's rationale for wanting to add a
12 citizenship question is some kind of supersecret?

13 A No.

14 Q Doesn't involve national security, right?

15 MR. GARDNER: Objection. Lack of
16 foundation. Calls for speculation.

17 THE WITNESS: I don't know what the
18 Secretary's rationale is. You'd have to ask him.

19 BY MR. GERSCH:

20 Q But you don't think it involves national
21 security?

22 MR. GARDNER: Same objections.

Exhibit 9

From: [Bailey, Kate \(CIV\)](#)
To: [Freedman, John A.](#); [DHo@aclu.org](#); [Federighi, Carol \(CIV\)](#); [Coyle, Garrett \(CIV\)](#); [Kopplin, Rebecca M. \(CIV\)](#); [Halainen, Daniel J. \(CIV\)](#); [Tomlinson, Martin M. \(CIV\)](#); [Ehrlich, Stephen \(CIV\)](#)
Cc: [SBrannon@aclu.org](#); [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](#)
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
Date: Friday, September 7, 2018 7:45:05 PM
Attachments: [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.msg](#)

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

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

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

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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. 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. 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. 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

John A. Freedman

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