

September 13, 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' Status Report 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,

Pursuant to Paragraph 1(A) of this Court's Individual Rules and Practices, and to facilitate the Court's consideration of open discovery issues at the September 14 status conference, Plaintiffs submit this update on several pending motions and other developments since the parties' joint status report was filed on September 6. 18-CV-2921 ECF 293, 18-CV-5025 ECF 117.¹ Plaintiffs are prepared to address these items tomorrow.

1. *Update on Motion for Leave to Depose Secretary Ross*, 18-CV-2921 ECF 314, 18-CV-5025 ECF 139. Following Plaintiffs' Sixth Motion to Compel, 18-CV-2921 ECF 299, 18-CV-5025 ECF 133, on September 11, Defendants made a supplemental production of 18 additional documents, including an August 10, 2017 email chain in which Mr. Comstock wrote "since this issue will go to the Supreme Court we need to be diligent in preparing the administrative record," to which Secretary Ross responded "we should be very careful, about everything, whether or not it is likely to end up in the SC." Ex. 1. Given the dearth of information in the Administrative Record about the substance of Defendants' interagency and external consultations regarding the addition of the citizenship question, *see* 18-CV-2921 ECF 237, 18-CV-5025 ECF 82, combined with the Secretary's concealment until these lawsuits of the existence of interagency consultation prior to December 12, 2017, this email chain appears to reflect a deliberate effort to whitewash the record. And the emails, which Defendants produced only *after* Mr. Comstock's deposition, confirm that the Secretary has unique, first-hand knowledge central to Plaintiffs' claims, and that there is no less burdensome means to obtain this information than a deposition of the Secretary.

2. *Update on Plaintiffs' Seventh Motion to Compel*, 18-CV-2921 ECF 313, 18-CV-5025 ECF 137. With respect to part B of the motion concerning the proposed randomized controlled trial (RCT) and the Young and Rubicam and Reingold public attitude research, Plaintiffs filed this motion on September 10, after first requesting the materials on August 29 when Dr. Abowd described them in a Rule 30(b)(6) deposition. On the evening of September 10, after Plaintiffs' motion to compel was filed, Defendants produced one document and three emails constituting eight pages of materials related to the proposed RCT. However, Defendants failed to produce

¹ Pursuant to the Court's scheduling order, the parties filed a joint status report eight days before the status conference. Given the fast-moving pace of this litigation, the number of open issues, and the fact that only four weeks remain until the close of all discovery, Plaintiffs believe this update is warranted and best conserves the resources of the Court.

any documents or correspondence about the decision to reject the proposed RCT, any correspondence between the Census Bureau and the Department of Commerce, or any documents reflecting the role of Acting Deputy Secretary Karen Dunn Kelley in rejecting the proposed tests. Similarly, with respect to documents concerning public attitude research, Defendants produced various documents concerning requests for proposals to conduct focus group research, but only one document reflecting the research the Census Bureau has in fact conducted. Ex. 2 at 5.² This document notes that “Researchers asked about the citizenship question after it was announced 3/27, which resulted in feedback from 30 out of 42 focus groups, including all Spanish-language groups” and states that “A number of focus group participants responded negatively to adding the citizenship question, most notably Spanish (U.S. mainland) as well as Vietnamese, Chinese, NHPI, and members of the female MENA group.” Evidence that the Census Bureau’s own recent research confirms central facets of Plaintiffs’ claims is clearly relevant to this litigation and responsive to Plaintiffs’ document requests. The Defendants, however, have not produced any of the underlying focus group reports, any other research performed by these vendors, or any correspondence or documents related to these results.

3. *Rule 45 Depositions and Related Issues.* On September 11, Defendants issued seven Rule 45 subpoenas to non-party members of three *NYIC* clients. These subpoenas were issued without having obtained leave of the Court, in clear contravention of the Court’s July 3 Order limiting third party discovery to the Department of Justice.³ Nothing in the Court’s September 4 Order permits these subpoenas to issue. 18-cv-5025 ECF 119. Rather, the Court specifically denied without prejudice Defendants’ request for an order compelling depositions of these third-party individuals noting the Defendants had failed to explain “with specificity what information they seek from individual members or how deposing individual members . . . would advance their standing arguments.” *Id.* The *NYIC* Plaintiffs previously noted that there is no legitimate discovery need for these depositions and is intended to harass the Plaintiffs’ members, 18-cv-5025 ECF 110, and intend to move to quash once Defendants make themselves available for a meet and confer.⁴

In contrast, Defendants have refused to offer any potential dates for Mr. Gore’s deposition “until or unless” the Second Circuit lifts the stay. The Second Circuit has added Defendants’ mandamus petition as a submitted case to the September 25 substantive motions calendar. There are two and a half weeks between that date and the discovery cutoff (during which time the parties also expect to be engaged in expert depositions), and there is no burden to Defendants ascertaining the witness’s availability in the event their position is not sustained by the Second Circuit.

Defendants also advise that they are still reviewing a substantial volume of documents responsive to the Plaintiffs’ July 20 subpoena to the Department of Justice, including Mr. Gore’s

² Defendants also produced 16 documents reflecting the request for proposal and statement of work.

³ The Defendants did not consult with Plaintiffs regarding availability of counsel or witnesses, and unilaterally scheduled all of these depositions all to take place between September 25-28 -- in the narrow ten day window between Defendants’ expert disclosure deadline and the deadline for Plaintiffs to file reply expert reports.

⁴ In response to a Plaintiffs’ September 11 request sent for a meet and confer on this and other issues, Defendants advised late on September 12 that they have a single, half-hour of availability before the status conference, a time that does not work for either Plaintiffs’ counsel.

correspondence. In addition, from the Department of Justice's initial production, Plaintiffs have identified 23 documents withheld on basis of deliberative privilege which they intend to challenge if an agreed resolution cannot be reached once Defendants make themselves available for a meet and confer.

4. *Update on Status of the Parties' Dispute Regarding the Completion of the Administrative Record.* As set forth in point 3 of the parties' joint status update, 18-cv-2921 ECF 305, 18-cv-5025 ECF 130, the parties have continued their ongoing discussions regarding whether additional documents will be produced. Plaintiffs' Fifth Motion to Compel explained that Defendants failed to collect materials from key Commerce Department appointees and Census Bureau employees, some of whose emails were withheld on the basis of deliberative privilege, and failed to use search terms reasonably calculated to identify documents reflecting political or discriminatory motivations or interagency consultations. *See* Ex. 3; *see generally* 18-cv-2921 ECF 293, 18-cv-5025 ECF 117. Plaintiffs agreed to hold that motion in abeyance in response to Defendants' offer to take additional curative steps. 18-cv-2921 ECF 301, 302; 18-cv-5025 ECF 125, 126. Defendants subsequently advised that they have now collected an additional 25 gigabytes of materials responsive to Plaintiffs' Fifth Motion to Compel, and agreed to run the supplemental searches Plaintiffs proposed as a way to prioritize and narrow Defendants' review of those potential administrative record materials. Ex. 4.

These belated searches violate the Court's scheduling orders, which required completion of the Administrative Record by July 26. 18-cv-2921 ECF 199, 211, 18-cv-5250 ECF 48, 66. Defendants' failure to abide by the Court's deadline in a timely manner has hindered the efficient conduct of discovery, including fact depositions, in this case.

Defendants' overbroad assertions of privilege have likewise hindered the litigation of these cases and required needless motions practice. After withholding approximately sixty documents on a claim of Title 13 protection, Defendants submitted those documents to the Disclosure Review Board in response to Plaintiffs' successful motion to compel. 18-cv-2921 ECF 241; 18-cv-5025 ECF 83. Following DRB review, Defendants re-produced those documents several weeks later with nearly *all* redactions removed. Some - but not all - of these documents were first produced after 6 pm on the evening before Plaintiffs' 30(b)(6) deposition of the Census Bureau, prejudicing Plaintiffs' ability to effectively take that deposition. And Defendants' production of 18 documents on September 11 that had previously been withheld on deliberative privilege grounds, and only in response to a motion to compel, confirm central points of Plaintiffs' claims: that adding the question derived from a concern about "the counting of illegal immigrants" for apportionment purposes, that the Department of Justice had no interest in the data before Secretary Ross suggested it to them, and the efforts of political appointees at the Commerce Department to interfere with the Census Bureau's standard processes and recommendations. Ex. 3. These documents appear to have been withheld solely because they undermine Defendants' position in this case, and should have been produced months ago, in advance of key depositions.

Plaintiffs will be prepared to address these and any other issues at the September 14 status conference.

Respectfully submitted,

ARNOLD & PORTER KAYE SCHOLER LLP
AMERICAN CIVIL LIBERTIES UNION

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

Attorneys for *NYIC* Plaintiffs, 18-CV-5025

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EXHIBIT 1

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

I would like to be briefed on Friday by phone. I probably will need an hour or so to study the memo first. We should be very careful about everything, whether or not it is likely to end up in the SC. WLR

Sent from my iPad

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

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> PREDECISIONAL AND ATTORNEY-CLIENT PRIVILEGED

> Mr. Secretary - we are preparing a memo and full briefing for you on the citizenship question. The memo will be ready by Friday, and we can do the briefing whenever you are back in the office. Since this issue will go to the Supreme Court we need to be diligent in preparing the administrative record.

> Earl

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

> [Not Responsive / Deliberative]

[Not Responsive / Deliberative] Were you on the call this morning about Census? [Deliberative]
[Deliberative] where is the DOJ in their analysis? If they still have not come to a conclusion please let me know your contact person and I will call the AG.
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>> On Aug 8, 2017, at 10:52 AM, Comstock, Earl (Federal) [PII] wrote:

>> [Not Responsive / Deliberative]
>
>

EXHIBIT 2

2020 Census Census Barrier Attitudes Motivators Survey (CBAMS) High-Level Findings August 29, 2018



Purpose of CBAMS findings

CBAMS preliminary findings will be used to inform the 2020 Integrated Communications Campaign (ICC) strategy, creative, messaging, and tactics, including:

- Provide strategic insights to inform development of the campaign's creative platform and media plan.
- Identify key motivators and potential barriers to participation.
- Craft key messaging and identify area of emphasis for specific audiences.
- Focus and inform outreach and partnership efforts.
- Create final reports that include comprehensive reviews of the data.

Note: 2020 CBAMS Survey was designed to be more robust methodologically to cover more themes and issues than the CBAMS survey for 2010*

Distrust In Census and Government May Complicate Outreach to Some Communities

- Social science research finds overall trust in government has been declining for decades*
- While 71% of respondents correctly indicated that the Census Bureau is required by law to keep information confidential...
 - Respondents indicated they were “extremely concerned” or “very concerned” that:
 - 28% - the Census Bureau will **not keep** answers to the 2020 Census confidential.
 - 24% - the Census Bureau **will share answers** to the 2020 Census with government agencies.
 - 22% - their answers will be **used against them** (32% for Hispanic respondents, 34% for foreign-born).
- ... only 53% correctly indicated the census is not used to **locate people** living in the country without documentation (10% indicated it is used, 37% don’t know).
- A number of focus group participants responded negatively to adding the citizenship question, most notably Spanish (U.S. mainland) as well as Vietnamese, Chinese, NHPI, and members of the female MENA group.
 - Researchers asked about the citizenship question after it was announced 3/27, which resulted in feedback from 30 out of 42 focus groups, including all Spanish-language groups.

Note*: *[Pew Research Center Studies and American National Election Studies](#)

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> Sent from my iPhone

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>> [Not Responsive / Deliberative]

>

To: Kelley, Karen (Federal) [REDACTED] **PII**
From: Willard, Aaron (Federal)
Sent: Mon 10/9/2017 9:03:50 PM
Importance: Normal
Subject: Notes from drive
Received: Mon 10/9/2017 9:03:52 PM

- 1) must come from DOJ
- 2) court cases you can hang your hat on
- 3) every Census since 1880, except 2000

Sent from my iPhone

To: Comstock, Earl (Federal); Herbst, Ellen (Federal) [EHerbst@doc.gov]
From: Langdon, David (Federal)
Sent: Wed 5/24/2017 9:38:29 PM
Importance: High
Subject: Counting of illegal immigrants
Received: Wed 5/24/2017 9:38:30 PM
Crawford Letter & DOJ Memo.pdf

Case 1:18-cv-02921-JMF Document 318-3 Filed 09/13/18 Page 4 of 6

Earl and Ellen,

Long story short is that the counting of illegal immigrants (or of the larger group of non-citizens) has a solid and fairly long legal history.

The most recent case was Louisiana v. Bryson. In a lawsuit filed directly in the Supreme Court, without prior action in lower courts, the state contended that it has been denied one potential seat in the House because illegal immigrants are counted in census totals, putting Louisiana at a disadvantage in House apportionment. The motion for leave to file was denied.

A second piece of interest in a Bush 41 era DOJ opinion that proposed legislation to exclude illegal aliens from the decennial census was illegal.

Let me know if you need additional background on the legal arguments.

Dave

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

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

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

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

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

It might be good to have in our backpocket the criteria used to pick topics for 2020 versus ACS. Say, citizenship. What criteria drives us to put it on ACS but not 2020?

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

David,

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

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

Burton

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

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

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

Thank you!

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

This is a lot to digest, but Louisiana v. Bryson seems the most timely, along with the 1989 DOJ letter.

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

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

To: Langdon, David (Federal); [REDACTED] PII

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

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

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

Burton

From: Misty L Reed (CENSUS/DEPDIR FED)

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

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

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

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

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

Thanks,

Misty

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

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

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

EXHIBIT 4

Supplemental Searches

Commerce Department Witnesses

1. For custodians identified in August 15, 2018 Declaration of Michael Cannon ("Cannon Declaration") Exhibit A, run the following supplemental searches:

a. (Aliens or immigrants or illegals or noncitizen! or non-citizen! or Democrat!) and (census or apportionment or enumerate! or districting or redistricting or counting)

b. (Bannon or Koback or "Mark Neuman" or "Marc Neuman" or "Mark Neumann" or "Marc Neumann" or "Mark Newman" or "Marc Newman" or "Gene Hamilton" or "Eugene Hamilton" or "Zadronzy" or "Sherk")

2. For Earl Comstock and Wendy Teramoto only, run the additional search terms: "McHenry" or "Cutrona" or "Hankey"

3. For Eric Branstad, run searches 1.a and 1.b, the additional terms "Hankey" and "Cutrona," and the terms identified in Cannon Declaration Ex. B.

4. For Aaron Willard, run searches 1.a and 1.b, and the terms identified in Cannon Declaration Ex. B.

5. For Brian Lenihan, run searches 1.a, 1.b and the terms identified in Cannon Declaration Ex. B.

6. For David Langdon, run search 1.a and the searches identified in Cannon Declaration Ex. B.

7. For Sahra Park-Su, run search 1.a and the searches identified in Cannon Declaration Ex. B.

Census Bureau Witnesses

1. For Victoria Velkoff, run searches identified in Cannon Declaration Ex. B.

2. For David Raglin, run searches identified in Cannon Declaration Ex. B.