UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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STATE OF NEW YORK, et al.,

Plaintiffs,

v. 18 Civ. 2921 (JMF)

UNITED STATES DEPARTMENT OF COMMERCE, et al.,

Conference

Defendants.

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NEW YORK IMMIGRATION COALITION,et al.,

Plaintiffs,

v. 18 Civ. 5025 (JMF)

UNITED STATES DEPARTMENT OF COMMERCE, et al.,

Defendants.

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New York, N.Y.
September 14, 2018
2:00 p.m.

Before:

HON. JESSE M. FURMAN,

District Judge

APPEARANCES

NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL
Attorneys for Plaintiffs
BY: MATTHEW COLANGELO
- and -
ARNOLD & PORTER KAYE SCHOLER
BY: JOHN A. FREEDMAN
DAVID P. GERSCH
- and -
DEPARTMENT OF LABOR
BY: ELENA S. GOLDSTEIN
- and -
AMERICAN CIVIL LIBERTIES UNION FOUNDATION(DC)
BY: DALE E. HO.

United States Department of Justice
Civil Division, Federal Programs Branch
Attorneys for Defendants
BY: KATE BAILEY
CARLOTTA A. WELLS
MICHAEL A. CANNON

(In open court; case called)

THE COURT: Good afternoon. You may be seated.

Mr. Shumate and Mr. Reedler are not with us today. Are they still on this matter?

MS. BAILEY: No, your Honor. Just us today.

THE COURT: We're on CourtCall so I would just ask because of that and because the acoustics in the courtroom are a little bit challenging under the best of circumstances to make sure that you have a microphone handy and you speak loudly and clearly and into the microphone.

We have a number of items to cover today so let's get started. Before I get started with what I have to cover, let me just check and see if there is any updates that you all need to give me. I did get the plaintiffs' status update letter of last night. I assume that sort of brings us up to date, but I don't know if there is anything else I should know or needs to be said.

MR. FREEDMAN: One update, your Honor, which is that as we were going to court, the Justice Department advised us that there was a supplemental production of Justice Department documents on its way to us. So there is progress on that front.

THE COURT: Great.

MS. BAILEY: Your Honor, we have not had time to respond in writing to the plaintiffs' status letter of last

night, but we'll be happy to address the points raised in their letter in the course of today's conference.

THE COURT: Well, I am to not necessarily tracking their letter item by item; but certainly I think I will cover almost everything, if not everything, on there. Let's get started then.

Although, I did have one other question, which is I think I am apprised of the status of the litigation in California and Maryland and got the notice that plaintiffs filed with respect to the relevant dates there, which I think I knew from those judges already.

I gather that there is another lawsuit pending in Alabama that sort of touches on related issues, not necessarily directly connected to a citizen in question per se, but can the government tell me what is going on with that and whether it has any bearing on what we're doing here?

MS. BAILEY: There is an additional case filed in Alabama. It is not challenging the decision at issue here. It is about the status of -- it is not directly bearing on the censorship question here. Their theory is different. In that case the government hasn't filed any kind of dispositive motion or any brief in that. An extension has recently been granted. So the government will not be filing a motion for 28 day, I believe.

MS. WELLS: Your Honor, the government's response in

that case will be filed in November. Mid-November.

THE COURT: Am I wrong in thinking that there is at least a substantive overlap between these cases and that case? Again, I recognize that case isn't challenging the precise decision at issue here, but it does seem to me that if relief were granted in that case that it would have some bearing on the need for a question regarding citizenship on the census.

Am I wrong about that?

MS. WELLS: Your Honor, that case goes more to challenging the rules that the Census Bureau issued on how non -- anybody resident of the United States would be counted, including foreign nationals. So to some extent there may be -- I mean, it gets to how people are going to be counted in the census and who is going to be counted. It doesn't get to the decision that the Secretary issued in March on adding a citizenship question to the 2020 census.

THE COURT: You said the government's response to the complaint isn't due until November; is that correct?

MS. WELLS: Yes. We just recently filed a motion for an extension that the court granted. We have 60 days. Until November 13th.

THE COURT: So it sounds like that is on the slower track regardless.

Let me turn to a few things. First, let me start with the open discovery motions. The first is what I think has been

labeled the sixth motion to compel. It concerns the deliberative process privilege documents. Let me stay at the outset that I wasn't particularly happy to see the defendants' statement in their response that plaintiffs had filed their motion without first meeting and conferring in accordance with my rules.

That requirement is not an academic one. It is not for my health; though, it certainly helps my health. It is rooted in my belief that most discovery disputes are better resolved through good-faith discussion and meeting and conferring. Indeed, the government's decision to release almost half of the documents initially sought certainly attests to the fact that that can often be a more efficient route to resolving problems.

I am not asking for a response. It may be that there is more to the story than that, but suffice it to say that going forward I expect both sides to comply with the requirement strictly.

Where we are. There are 17 documents that remain in dispute. Per my order of other night, I did receive and have reviewed the 17 documents *in camera*. I will file and maintain those documents under seal so that they are made part of the record in these matters. One clarification, and then I think I can tell you how I come out on all these, several of the documents are put in the handwritten notes category.

Am I correct that the only materials that have been redacted and are at issue are the actual handwritten notes but the underlying document themselves were not withheld; is that accurate?

MS. BAILEY: I am not sure that is correct, your Honor. I believe that some of the handwritten notes were on drafts, that we did not waive deliberative process over drafts from within the Department of Commerce. I believe some of those documents would be properly withheld in full notwithstanding the handwritten notes.

THE COURT: Let me rephrase that. On your chart two out of the six documents that are listed under "Handwritten Notes" indicate that they were redacted in part rather than withheld in full. On those, which are 10273 and 10356, I take it that the redacted material is marked and I think only constitutes the handwritten notes; or is that not correct?

MS. BAILEY: Yes, your Honor. On those documents I believe it is just the handwritten notes.

THE COURT: I guess more to the point on 10273, one of the redactions includes typewritten material. I presume because it would have been hard if not impossible to redact the handwritten notes that are sort of interspersed within that typed written material, but had the underlying document been produced separately?

MS. BAILEY: I am sorry. Which document, your Honor?

THE COURT: 10273.

MS. BAILEY: I am not positive on that particular one, your Honor; but I can check and get back with you shortly.

THE COURT: Well, I didn't understand your to be claiming deliberative process privilege with respect to the typed written portion and I wouldn't think that the handwriting merely because notes were taken on a document that would otherwise be privileged shouldn't render the underlying document privileged. So why don't you make sure that has been produced and if not produce it by Monday.

As both sides agree, the decision whether the deliberative process privilege is overcome with respect to the documents at issue here is based on balancing five factors. One, the relevance of the evidence the agency seeks to protect; two the availability of other evidence; three, the seriousness of the litigation; four, the role of the agency in the litigation; and five, the possibility that disclosure will inhibit future candid debates among agency decision-makers. See *Winfield v. City of New York*, 2018 WL 716013 at pages 5 to 6 (S.D.N.Y. February 1, 2018). Where "a deliberative or decision-making process" is itself a "central issue," the need for the documents will often "outweigh way the possibility that disclosure will inhabit future candid debate." *In Re Adelphi Corp.*, 276 F.R.D. 81 at 85 (S.D.N.Y. 2011).

In this case the seriousness of the litigation and the

role of the agency factors both cuts strongly in favor of disclosure substantially for the reasons stated in plaintiffs' letter motion. As I have written elsewhere, this case is of great public importance in my judgment given the central role and importance of the census and the need for public confidence in its transparency and integrity and the Commerce Department generally and Secretary Ross specifically obviously play a central role if not the central role in the case.

By contrast I think the fifth factor, the possibility that disclosure will inhibit future candid debate among agency decision-makers generally favors defendants, particularly with respect to the handwritten notes at issue substantially for the reasons stated in the defendants' letter. As the purpose of the privilege makes clear, it is critical that agency decision-makers have room to engage in open and candid conversations about complicated and sensitive decisions. That is no less true and indeed may even be more true whereas in this case we're dealing with a matter of such public interest.

Thus, in my judgment whether the deliberative process privilege is overcome as to the 17 remaining documents turns largely on how the other two factors -- the relevance of the evidence the agency seeks to protect and the availability of other evidence -- affect the overall balance of the five factors taken together. Based on my assessment of those factors and consideration of the other three factors that I

have already discussed, I conclude that defendants must produce three of the documents that remain at issue to plaintiffs, namely, Bates Nos. 2458, 3984 and 9834. The last one is duplicative of 2458 so in many respects it is really two documents. I also note that 3984 contains one redaction that was marked as both not responsive and deliberative. My ruling does not apply to that redaction insofar as I am addressing only the deliberative process privilege basis for the redactions.

In my view those three documents do go to the heart of the central issues in this case, namely, Secretary Ross's intent in making the decision that he made since they are either addressed to him or from him directly. Moreover, particularly in light of the fact that whether Secretary Ross will be deposed in this matter is an open question. I will have more to say on that shortly. At this point, I certainly cannot say that that evidence is available from another source. So those three documents are to be produced.

By contrast, I sustain the implication of the deliberative process privilege with respect to the 14 other documents at issue. Among other things, I find that those documents were the redacted portions thereof are not particularly relevant or probative of the issues at the heart of this case. Additionally, at least as to the handwritten notes as I said, the potential chilling effect is heightened.

On top of that, Bates No. 2461 is covered by the attorney-client privilege as defendants note and plaintiffs do not appear to challenge implication. In any event, it seems to me that it is well placed.

Accordingly, also no later than Monday, September 17th defendants are to turn over the documents with Bates Nos. 2458; 3984 and 9834 in accordance with the ruling that I just made.

Any questions about that?

MS. BAILEY: No, your Honor.

MS. GOLDSTEIN: No, your Honor.

MR. FREEDMAN: Your Honor, if I may briefly on two points. One is that on the meet and confer I know you don't want to hear the back and forth --

THE COURT: I don't.

MR. FREEDMAN: We believe that we got a blanket assertion from the government that they were maintaining privileges to everything reflected on the log. We had that discussion with them twice leading up to the direction of the log. I will make clear that going forward we understand that we need to identify specific documents we have pending with the government. 21 initial deliberative privileged assertions and two privilege assertions, one of which is 2461. So that is something that we're still -- the attorney-client privilege assertion of that document is something we have asked the government to meet and confer on.

THE COURT: In light of that, let me say that I will retract my comments about the attorney-client privilege seeming to be well placed. I think upon first glance it does seem to be well placed, but perhaps you have arguments that I haven't considered on that. In that regard, I will keep an open mind. I don't want to get into the meet and confer process; but again, the fact that they did voluntarily provide 15 of the original 32 attests to the fact that there is something to be gained from that process. In my experience litigants often say we object on some blanket basis or what have you and when you get into the nitty-gritty, you are willing to compromise in some fashion. So bottom line is going forward, you should meet and confer before raising any dispute.

Moving onto the seventh motion to compel I think it was labeled.

Hang on one second.

Let me ask the government I think it would actually make more sense if you could provide the other 14 documents that I did say were properly withheld at least on deliberative process grounds if you could file those with the sealed records department of the court to make sure that they are part of the records in this matter that will be great and easier than my doing it.

MS. BAILEY: Yes, your Honor.

THE COURT: Moving onto the seventh motion to compel.

This is with respect to the Interrogatory No. 1 and the randomized control testing and aptitudinal research materials. No. 1 Part A of that is the interrogatory. Let me say at the outset I don't see any particular problem with the defendants' lumping together the category of senior administration officials, other government officials, and federal government components. I query whether the memorandum should have been written with more precision in the first instance; but be that as it may, I think if the chronology were clear as to who Secretary Ross consulted with and spoke to and when, then those distinctions wouldn't necessarily matter.

I think what is more troubling to the extent that the supplemental memo indicates that he had been consulted or others first raised issue with him shortly after he was appointed, that is well before the Department of Justice letter in this case. Identifying who those people are and when those conversations took place, those seem fairly critical to me in connection with the claims in this case. At the same time I don't quite know what to do given the defendants' response that they have conducted a reasonable search and simply don't have that information. It may well bear on the question that I have to decide whether about the deposition of Secretary Ross is appropriate here; but putting that aside, I obviously cannot make the defendants provide information that they don't have.

So given that I am not sure what to do here, but I am

open to hearing your further thoughts on it or suggestion. Let me start with the folks at the front table.

Mr. Ho, are you taking that?

MR. HO: Yes, I am, your Honor.

Secretary Ross's supplemental memo makes it very clear that there were at least some senior administration officials who previously had raised the issue of the census -- the citizenship question of the census before Secretary Ross himself began. So the formal memo that Secretary Ross signed, these are his words and that defendants specifically put into the administrative record. So someone has to know the identity of these officials who have already raised this issue before Secretary Ross did. None of the high-ranking Commerce Department officials were able to provide that information. So I think it perhaps does speak to the needs that to go to Secretary Ross.

I will say that the deputy chief of staff, Mr. Comstock, testified during his deposition that the Department of Justice assisted in the drafting of the supplemental memo and someone clearly had someone in mind when they talked about previous administration -- administration officials raising the issue chronologically in time prior to Secretary Ross's consideration of the issue. So I don't know if the defendants could perhaps identify who was involved in the drafting of that memo. It seems clear that if we had simply limited our

interrogatory to Question 1 A and not asked Question 1 B about who secretary -- with whom Secretary Ross consulted afterwards that this would be a very clearly defined in terms of the temporal nature of the request who he was asking for the defendants to identify. If they cannot do that, they ought to at least be able to identify who is involved in the drafting of this memo so we can question that person.

THE COURT: Ms. Bailey or Ms. Wells, Mr. Hoe's points I think are somewhat well taken, which is to say that somebody knew enough to state in that memorandum in Secretary Ross's words and under his signature that the issue was raised by senior administration officials. Presumably someone may know who those people are. Again, let's put aside for the moment whether that bears on the question whether Secretary Ross should be deposed.

I would think that that information should be available somehow, no?

MS. BAILEY: Your Honor, the defendants have undertaken a reasonable inquiry to ascertain the information that plaintiffs are looking for and we have provided all of the information that is available within the agency at this time. In drafting the memo, we advised that the drafters did not intend a level of specificity that the plaintiffs are looking for and that the information that they can seeking is not available after a reasonable inquiry in the department.

THE COURT: Well, the question put simply can somebody identify who Secretary Ross spoke to about this issue before the December letter from Department of Justice or before some date even earlier than that?

MS. BAILEY: After undertaking an a reasonable search, we have identified all the individuals that we believe were involved in discussions that the defendants are aware of involved in discussions about this before DOJ's letter. As far as who first raised it and exactly when that information is unavailable after a reasonable inquiry.

THE COURT: Did that reasonable inquiry involve consultation with Secretary Ross?

MS. BAILEY: Yes, your Honor, it did.

THE COURT: Well, again, I think it may well bear on the question that I am being asked to decide about deposing him. Beyond that one cannot draw blood from a stone. I do not know what to do since defendants claim that they have conducted a reasonable inquiry and that there is no further information that they have to provide.

MS. BAILEY: Your Honor, respectfully we don't think the amount of information available would differ depending on the circumstances. Additional information isn't available. We don't think it will bear on the propriety of deposing Secretary Ross.

THE COURT: I certainly understand that argument. I

am not deciding it now, but I am take it under advisement. So the bottom line is to the extent that plaintiffs seek relief on that front, it is denied based on defendants' representation that they have provided everything they have to provide.

With respect to Part B, defendants in their response last night indicated that it is moot that they provided the relevant information, but plaintiffs seem to differ with that and indicate that they didn't receive certain categories of documents that presumably exist and presumably are within the scope of the request, namely, any documents or correspondence about the decision to reject the proposed randomized control testing, any correspondence between the Census Bureau and the Department of Commerce, or any documents reflecting the role of Acting Deputy Security Karen Dunn Kelley in rejecting the proposed tests; and second, any of the underlined focus group reports, any other research performed by these vendors or any correspondence or documents related to these results.

So, Ms. Bailey, do you want to speak to those?

MS. BAILEY: Yes, your Honor.

We have two different categories of documents here regarding correspondence about the decision not to undertake additional randomized control testing, we have provided all the documents that we exist and we have searched for other communications about that. We have been advised that there was a meeting that took place and a decision was made not to pursue

that testing at a meeting where it was oral discussion. So there are not additional documents reflecting those communications because they took place in person. So we have provided all the documents that we can provide regarding the randomized control testing.

As far as the focus group research, we have provided the results of that research and we have provided it so expeditiously it was only just produced. So it was provided to plaintiffs before it was even briefed with senior officials within the Commerce Department. We did not understand their request to be looking for any communications related to the contracts that perform that additional work. We think that is a new request that they have made and we think that just goes far beyond what they are entitled to here. They are continuing to just reach father and father into the Census Bureau and these are documents that we think go far beyond anything that would be proportional and relevant to the case.

THE COURT: Well, first with respect to the randomized control testing, it sounds like once again defendants represent that they have produced what they have to produce that is responsive. I don't think there is much more I can say or do on that unless plaintiffs have some demonstrable basis to suggest otherwise.

With respect to the second matter, the focus groups and alike, I guess I will hear from plaintiffs' counsel and

also try and find the actual request here to see if it is within the scope of that.

MR. HO: Yes, your Honor.

So with respect to the public opinion research that the conducted by the Census Bureau, the sum total of production from the defendants is a single, very-high level PowerPoint that includes one sentence summarizing a conclusion that of 30 focus groups there were extremely negative responses to the inclusion of the citizenship question. All the other documents that the defendants produced were of the nature of requests for proposals to conduct this research. So there is nothing that defendants have produced that provides any of the actual underlying research of those 30 focus groups beyond the single one-line summary in the high-level PowerPoint that they produced or any correspondence about the results or any evaluation of those results.

These documents are clearly responsive to a number of discovery requests that we have propounded. Those are Exhibit F to our motion, specifically Request No. 2, which is found at the bottom of page 6 which asks for all documents including drafts regarding research analysis testing or planning regarding or relating to the inclusion of the citizenship question. It is direct -- these documents are also responsive to our Request No. 10, which is at the bottom of page 9, which asks for all documents constituting or reflecting tests

including data or analysis of the daily response rate, the item nonresponse rate -- I am skipping ahead here a little bit -- any data or analysis from focus groups in consideration, testing, evaluation or analysis of a citizenship question.

So focus group research we think is clearly responsive and I think it strains frugality when you conduct 30 focus groups and you get a lot of negative responses to the item during those focus groups to suggest that the only responsive document in the possession of the defendants is a high-level PowerPoint with one sentence about those three focus groups.

THE COURT: Ms. Bailey, certainly to the extent you had two points, one is that it is not responsive, I think that one seems pretty wrong to me based on what Mr. Ho just read.

What do you have to say to that?

MS. BAILEY: A couple points, your Honor.

One, at the July 3rd hearing your Honor admonished plaintiffs that the Court was mindful that because discovery was warranted that that did not mean that all the liberal discovery permitted under the federal rules should be warranted. Plaintiff has served 45 request for productions. We feel like the scope of the discovery that plaintiffs continues to seek goes well beyond what should be permitted into APA record review case. We did not understand their request to understand correspondence about the focus group testing that was going on and we think that the data underlying

those focus group reports exceeds the proportionality and relevance test for what should be produced here. We don't think that that data is slightly subject to privacy concerns. We don't think that they should be entitled to production with all of the underlying data produced with respect to those groups.

THE COURT: Did you object on that basis?

MS. BAILEY: The focus group material in particular my understanding is that came to light in the 30(b)(6) deposition that was taken after we filed our response and objections.

MR. HO: If I may, your Honor. I think that representation by Ms. Bailey underscores precisely the problem here, which is that there are documents in the possession of the defendants that are clearly responsive to our discovery requests. The only reason we learned about them is not because the defendants raised a proper objection to our discovery requests as being overbroad or seeking documents protected by certain privacy or -- unnamed privacy or confidentiality protections but because we asked questions during the 30(b)(6) deposition that revealed the existence of both the randomized control testing and these focus groups.

So the only reason that we knew about these documents, your Honor, is because we were able to adduce that information through a deposition. Defendants never complied with their obligations to conduct a reasonable search of the documents in

their possession, custody or control that are responsive to these documents. If there is an objection, they should have made it in a timely manner. These requests were served at the beginning of July.

THE COURT: So I think there is a reason that there is a standard process on this front, which is to say that to the extent that they were responsive, the government was required to respond to them. If you have any objections to make, you could lodge those objections. I think again to the extent that you're arguing now that it is not responsive, I find that unpersuasive. The bottom line is I will grant the motion and require the government to respond to that particular request or cure any problems with that particular request, let's say, by next Thursday.

To the extent that you have a valid objection and that objection has not been waived by your failure to interpose it previously, you can certainly make it. I would urge you again to meet and confer with one another to the extent that there are any disputes with respect to what you do or don't produce by that time. I think it is important to stick to the standard process and that is what you will do.

MR. HO: Thank you, your Honor.

THE COURT: Anything else on that?

MS. BAILEY: No, your Honor.

I would add that the Census is a giant undertaking.

It is a moving process. There are a lot of moving pieces. We are undertaking diligent efforts to be responsive, but there are things that are coming to light and that are moving pieces within the Census Bureau as this process proceeds as well.

THE COURT: I understand that litigation is also a moving process and you need to make sure that you are complying with your obligations as part of that litigation and I expect and assume that you are.

I think that leaves own the eighth motion to compel, which is the one concerning Secretary Ross's deposition. Per my order this morning the plaintiffs were granted leave and should file a reply by Monday, and in light of that I will obviously reserve judgment on the issue.

The one question I have, which then brings us to scheduling issues more generally, is assuming I have granted the application -- I am not intimating a view at this time -- what it would mean for our schedule particularly in light of what I understand to be the government's indications that it may well seek review of any such decision if I were to make it. I don't know if we can even speak to that now or if it is premature, but I obviously want to make sure the schedule remains as intact as possible. So this is more a question for the back table than the front.

I will say that my task is complicated a little bit by the Jewish holiday that interrupts next week, but my goal would

be to decide the question certainly by the end of the week if not sooner, which is to say hopefully you will have my answer sooner rather than later.

Ms. Bailey.

MS. BAILEY: Should the Court decide to grant the motion to compel the deposition of Secretary Ross, we think the schedule should build in time for appellate particular review.

THE COURT: The problem I have is I don't know how that process may take. Obviously you filed the petition for mandamus with respect to the Gore deposition. I know that is on the calendar to be heard a week from Tuesday. I cannot make that the Circuit decide that in any time. I wish I could; it doesn't work that way. So I don't know what that means is the question.

MS. BAILEY: We also aren't sure how quickly the Second Circuit would act on issuing an order in response to the petition. I think that we could seek consolidation of the petition if that were permitted so that both issues could be heard together.

THE COURT: Well, the problem with that is if I decide the question with respect to Secretary Ross by the end of next week, it is on the calendar for the following Tuesday before the Circuit. The odds of your being able to brief that question, which I think involves potentially very different issues than those involved with Assistant Attorney General

Gore, with enough time for the Circuit to put it on the calendar for that same Tuesday seems far fetched to me. I cannot speak for them on their process or schedule.

Mr. Colangelo, did you have something you wanted to say?

MR. COLANGELO: Yes, your Honor. For the plaintiffs we believe there is more than sufficient time for the Court to resolve this motion and for the Justice Department to seek any -- I am sorry, your Honor.

We think there is sufficient time for the Court to resolve this motion and for the Justice Department to seek appellate review if they need to. There are four weeks from today remaining in the discovery period. If the Court is able to rule by the end of next week, there will still be 21 days remaining. Even granting the defendants' amount of time they have asked for to raise the issue as an interlocutory matter with the Second Circuit, the discovery period would still be open and we can still conduct a deposition of the Secretary if authorized. So we think at this point there is no reason it should affect the schedule in the case.

THE COURT: I suppose that is all we can say for now, but it does raise issues relating to the Gore deposition. I understand from the plaintiffs' letter of yesterday that the government is resisting scheduling it pending the Circuit's decision on the present petition.

Is that correct?

MS. BAILEY: Correct, your Honor. We don't know how quickly of course the Second Circuit will issue a ruling or when there will be a final ruling on that matter. So it doesn't make sense to tie up a day in Mr. Gore's schedule before we know what the result of that will be. Should there be a final decision authorizing his deposition, we would of course expeditiously schedule it. We don't think it makes sense to schedule it now.

THE COURT: Let me respond first and then I will hear from plaintiffs' counsel. I don't necessarily have a problem with that as long as you and he understand that if the Circuit decides he is going to deposed before the discovery deadline in this case -- so if it takes the Circuit a couple weeks to decide the question and then they lift the school and that leaves a week or so before the discovery deadline, then he will sit for a deposition during that week and whatever affect it may have on his schedule. So I want to be respectful of his case. I know he has important things to do. This also goes for Secretary Ross. If you are not willing to tentatively schedule it and block out a day, I think you are taking your chances that he is not going to have a whole lot of options and choice with respect to what day it ends up being.

What say you to that? In other words, I think you can pick your poison. One is to block out a day now recognizing it

may be a day he gets back if the Circuit imposes or overturns my ruling; but if they lift the stay, then he wouldn't have to append his schedule to proceed. That strikes me as the more sensible way to do it than to take your chances, particularly I have over spoken to my view on the likelihood of your success on the merits. I have been wrong before; but assuming that I am right, it may make more sense to schedule something with the understanding that it is easier to cancel than it is to put it on the calendar after the fact.

MS. BAILEY: We understand, your Honor. We will make sure to schedule it expeditiously once there is a final ruling if that ruling is in favor of plaintiff.

THE COURT: I want you to understand what I understand expeditiously to mean is before the discovery deadline.

Do you understand that?

MS. BAILEY: Yes, your Honor.

THE COURT: Mr. Ho, do you have anything you want to say?

MR. HO: The only thing I would say, your Honor, is that we have tried to work cooperatively with respect to scheduling Mr. Gore's deposition after your Honor granted our motion to compel on the issue. It took about two weeks before the defendants would give us any dates for Mr. Gore's deposition, which is why I think this process has taken as long as it has including the mandamus briefing.

The other thing I would note is that there are six different plaintiff groups involved in litigating. It just takes a lot of coordination and scheduling. I think it would enure to everyone's benefit if we can have one or two tentative dates after the July 25th so that people can make travel arrangements. There are people coming from California and Maryland. Otherwise, we'll just have to notice it when it is convenient for them and it is possible for all these different plaintiff groups.

The last thing I would note, your Honor, is that defendants have unilaterally issued, which we can address later, third-party deposition notices on various members of the plaintiff organizations here without consulting with us about availability or time and notwithstanding our willingness to accept service of those third-party notices. It seems odd to us that the defendants won't work collaboratively with us to schedule a conditional date for a deposition while at the same time are unilaterally trying to dictate the timing of some third-party depositions.

THE COURT: Understood. I think we'll leave it where it is and defense counsel has heard my views on the matter. If I were you, I would go to Assistant Attorney General Gore and explain the predicament that he is in and the fact that it may upend his schedule on relatively short notice if the Circuit lifts the stay and a date has not been preset on a tentative

basis.

I understand the challenges involved in scheduling a deposition when you have so many different plaintiff groups involved, but the fact of the matter is I think they will rise to the occassion if or when the Assistant Attorney General sits for a deposition. I will leave it at that. I would think it would be better practice and a better course to tentatively schedule it and he can pencil things in for that day recognizing that they may need to be moved and/or may need to go forward, but we'll see what happens.

Having said that, let me say that if the Circuit hasn't decided the matter, let's say, by the end of the week of September 24th -- they are hearing it on the 25th -- I am hopeful they will immediately rule, but I don't have a say in that. Why don't you talk about it and you can reach out to me if you think that there is a different course that we should take given that the clock will be running at that point. I will leave it at that for now.

Mr. Ho adverted to the subpoenas that have been served on the individual members of the plaintiff groups in the 5025 matter. Let me say at the outset that I am not persuaded by and reject the plaintiffs' contention that they make in their status letter and made earlier when this issue first arose that defendants' subpoenas are improper because they didn't seek my permission to serve them. Plaintiffs read too much into my

July 3rd ruling. That ruling was in reference to the plaintiffs' application to extra record discovery. I didn't speak to the defendants' entitlement to or right to discovery of their own. I don't see anything improper or inconsistent with any prior orders that I made in that regard.

Having said that if there is a Rule 45 motion coming down the pike, there is obviously an interest in getting that expeditiously briefed and decided. Tell me what we can do on that front or where that matter stands.

MR. FREEDMAN: We've been trying to meet and confer with the government since the subpoenas were issued. We're planning to meet them right after this conference. Our motion will be filed if not today then on Monday.

THE COURT: All right.

MS. BAILEY: If I may, your Honor, I would like to clarify that the subpoenas were issued because we have repeatedly asked plaintiffs' counsel to confirm whether they represent these individuals and they have declined to do so. So we have issued those subpoenas and we did notice dates, but we specifically stated that if those dates don't work for the individuals to contact us to work out alternate dates.

THE COURT: I really don't want to get into the business of deposition scheduling. I trust that you can work that out. The threshold question of course is whether those individuals should be deposed and I ordered you to meet and

confer about that and see if you can resolve or at least narrow your disputes. I should say it doesn't necessarily have to be an either or answer. It may be that all should be deposed, it may be that none should be deposed, or it may be that some subset of them could be deposed and there is no need to depose all. Keep all of those options in mind as you meet and confer and for that matter as you brief any motions that are coming down the pike.

It sounds like a motion will be filed at the latest by Monday. If you can't resolve things, then defendants would then have until next Thursday to file a response. I will try to decide that by the end of next week as well particularly because there are even more Jewish holidays the following week.

What else?

Obviously the big-ticket item on the agenda is where this case is headed -- summary judgment versus trial. I am happy to turn to that unless there are other discovery-related matters that we should be discussing.

MR. HO: None at this time from the plaintiffs, your Honor.

THE COURT: Ms. Bailey?

MS. BAILEY: No, your Honor.

THE COURT: Let me just say one final word on the discovery front. I would urge you to try to work things out as much as possible. I have already admonished you about the need

to do that before you seek any relief. There obviously has been a large number of discovery motions in this case already. I am certainly trying my best to deal with them expeditiously and ensure that the case remains on track. For the reasons I described, and obviously it is better if you can work things out without the need to seek Court intervention, that insures that the process will run smoothly.

Now, I should also say that plaintiffs in their letter made some noise about the pace of defendants' production. I do recognize that there is a lot here and I recognize your argument that the plaintiffs are seeking and perhaps getting more than they are entitled to. I do want to remind you that there is a living deadline here and in that regard it is important to make sure that the pace is appropriate and that you are producing what you need to produce in an expeditious fashion.

Let's turn to the summary judgment, slash, trial question. Let me start by saying that I am skeptical that I would be able to grant a summary judgment motion here given what I have seen and read in the record. It seems to me that the issues at least as to the due process claim turn on or are likely to turn on the intent of the relevant decision-makers and that there are likely to be disputes of material fact that would preclude me from granting a summary judgment on that issue. Given the importance of resolving the case as quickly

as possible and to that end my general view that it is more efficient in a bench trial to proceed directly to a trial -- I should note that the government itself has expressed its view that this case should be resolved expeditiously in no small part because I assume whoever loses is likely to seek review of my decisions elsewhere -- my strong intuition is that we should in accordance with my standard operating procedures proceed directly to a trial with pretrial memoranda and perhaps posttrial submission of proposed findings of fact and conclusions of law.

Now, having said that I am certainly open to hearing your views on why you think a summary judgment motion would be appropriate here, why you think it would dispose of the case and defendants case and maybe I will reconsider.

Let me start with you, Ms. Bailey.

MS. BAILEY: Your Honor, recognizing earlier this Court made a ruling that the record in this case should be expanded beyond what defendants already had filed --

THE COURT: Let me stop you for a second. I meant to say that I am not persuaded by the argument that the review should be limited to the administrative record. So make a different argument than that.

MS. BAILEY: Well, your Honor, what I meant to say is we think that even with the finding that the record should be expanded, that the basis for review should be expanded, we

think this is still an APA case that should be decided on the basis of record that is produced through the discovery we're engaging in. In other words, we don't believe that a trial should be warranted on the APA issue here and that the constitutional issue is still reviewed on the APA strictures. So we think this case should be resolved on the cross-motions for summary judgment.

THE COURT: Meaning that there is no basis to expand the record beyond whatever is produced as part of discovery?

MS. BAILEY: Yes, your Honor. It is still a record review case.

THE COURT: Do you have authority for that proposition?

MS. BAILEY: Yes, your Honor. Not at hand but I will be happy to file a supplemental memo on that quickly.

THE COURT: I understand the argument; but if then there are factual disputes within the existing record concerning intent and it turns on credibility, for example, how could I possibly resolve the matter? I understand your argument that the due process claim is -- the vehicle for raising that is the APA and that therefore it is in essence an APA claim; but at the same time if it turns on intent, presumably it cannot be decided solely on the existing record.

MS. BAILEY: Respectfully, your Honor, we disagree. We think that either of those disputed facts can still be

resolved by your Honor on the basis of the record that is produced and submitted at summary judgment. I think that is the way that APA cases happen even when the record -- or even expanded in an APA case that it still remains a record review case so that your Honor would resolve those disputes on the basis of that record.

THE COURT: Even where credibility is central to that determination?

MS. BAILEY: Yes, your Honor.

THE COURT: I will be curious to see your citations for that proposition. You may be right. I don't know, but it seems curious to me.

Can you give me a preview of what the arguments would be? Putting aside whether as a matter of the APA it should be done on the existing record, can you preview why you think the case can be resolved on summary judgment?

MS. BAILEY: We don't think that plaintiffs will be able to create trial issues of material fact in particular on their claims of discriminatory animus. Dispite all the discovery that has been produced and engaged in, we don't think that plaintiffs at this time have evidence of discriminatory animus, so we don't think they will be able to create a trial issue on that fact.

Furthermore, the APA issues as is routine in APA record review cases, it should be determined on the basis of

the record before the Court and this Court will be deciding whether or not the decision was arbitrary and capricious or maybe upheld on the state of rationale.

THE COURT: To the extent that that may turn on whether the decision was pretextual, you think that that is determined on the basis of the existing record alone?

MS. BAILEY: We think that the question for review is whether or not the decision is arbitrary and capricious. So the pretext we think goes to whether or not the basis for review is expanded, and your Honor has already determined that it has. On the merits we think the question before the Court will be whether or not the decision was arbitrary and capricious. So all the evidence gathered by plaintiff will go toward whether or not the decision is arbitrary and capricious.

THE COURT: Except that Mr. Shumate stood up at the May conference, as I noted in my motion to dismiss opinion, and conceded that if I were to conclude with the stated rationale is not the actual rationale that Secretary Ross had for the decision, at a minimum that would require remand and therefore relief.

MS. BAILEY: I think that what Mr. Shumate was saying was that if your Honor were to conclude -- of course we dispute this -- that the state reason were not the real reason that that would be a factor for review under the arbitrary and capricious standard; that the decision would not be rational

for the stated reason. We don't think there is evidence of that at this stage, but that is the way we think the analysis would work.

THE COURT: Does anyone at the front table want to be hear?

MS. GOLDSTEIN: Yes, your Honor.

For the plaintiffs we believe that particularly given the need as the Court has noted for an expeditious resolution of this matter and given I think at least three different buckets of disputed fact here that a trial is the most efficient and logical way to go.

Separating out the discussion pretext, which I will get to in a moment, there are large categories of disputed facts centering around the impact of this citizenship question, the impact of the question on self-response rates on a differential undercount. These are matters that will be opined upon we anticipate by expert testimony. And as case law in this jurisdiction specific to census cases makes clear those are matters that are appropriate on trial. *Carey v. Klutznick* and its progeny, including *Cuomo v. Baldrige*, those were trial cases. The cases leading up to the Wisconsin case, those were trial cases in which experts opined on the Secretary's decision. So that alone I think is a basis for a trial in this case to resolve these competing expert views.

In addition, your Honor, I think that it is, setting

aside Mr. Shumate's concession on page 15 of that May conference, very clear with respect to pretext. I think that there are substantial issues of dispute of material fact that require a credibility determination with respect to whether or not this decision was prejudged, whether or not the Voting Rights Act rationale is pretextual, whether or not there has been impermissible political interference with this matter. It is difficult to see how without making credibility determinations the Court can resolve those questions.

Third, your Honor, there are questions and disputes of fact regarding deviations from standard operating procedures with respect to the Census Bureau. And, again, that will be the subject of expert testimony and again are material disputes of fact that will require review by the Court and will be done more efficiently and cleaner on a trial.

THE COURT: Can you tell me what you would envision a trial looking like? In the joint status letter, you indicated that you presently intend to call eight experts and four senior Commerce Department witnesses and a quote, unquote representative sample of plaintiff groups; but you also indicated that you would use deposition experts or sworn witness affidavits for the balance of the case.

I don't quite know what that means. I don't know if you are proposing with the Commerce Department witnesses be called as live witnesses, or you would anticipate using their

deposition testimony. In bench trials that I typically do, I have direct testimony by affidavit, except for adverse party witnesses, witnesses testifying pursuant to subpoena or witnesses as to whom I grant leave to call live.

So what do you envision here?

MS. GOLDSTEIN: We would anticipate with respect to the experts and for the plaintiffs' fact declarants for the NYAG as well as we would be presenting those by affidavit in concurrence with the Court's individual practice.

With respect to the Commerce witnesses, we would request to seek leave to work with defendants to see if we could bring them live. If not, we would consider doing de bene esse depositions for use at trial.

With respect to the Census Bureau witnesses that we would be using on our direct, we would anticipate using deposition excerpts for those witnesses.

THE COURT: The Commerce Department witnesses that you are saying you would discuss, that presumably includes Secretary Ross. Which is to say that coming down the pike it is not necessarily just a question of whether he is deposed as part of discovery but whether he would have to sit for a second deposition or testify live?

MS. GOLDSTEIN: Your Honor, I think that that decision is premature given that we have not yet gotten a ruling on whether or not we may depose him; but it does seem clear that

Secretary Ross's intent here is a central issues in the case particularly given the NYIC plaintiffs' discrimination claims, and it would be likely that we would seek to have testimony from him in some form at trial.

THE COURT: What about on the NYIC side of things?

MR. FREEDMAN: Your Honor, I think the trial presentation is consistent with what the NYAG suggested it would be. The eight expert witnesses includes joint experts as well as separate experts.

THE COURT: What are the separate experts that we're talking about?

MR. FREEDMAN: There were eight total experts. There are two that we have, two that they have, and four joint experts.

THE COURT: Why are there separate ones?

MR. FREEDMAN: Because of different emphasis and elements of proof.

THE COURT: All right.

MR. FREEDMAN: With regard to our fact witnesses, we would have a similar trial strategy. We would put in affidavits from our four organizations. Two of them are based in New York. It would be very easy for us to have them come live. Obviously if the defendants wanted to cross-examine any of them, we would make any of them available.

With regard to the Commerce witnesses, again those

would be adverse witnesses. We have had a pending request with defendants since before we filed the status report to make those witnesses live at trial and have not gotten response to that. Failing reaching an agreement on that, we propose to proceed by de bene esse deposition.

And then the Census Bureau witnesses we believe that the deposition transcripts are adequate.

THE COURT: What was the last category?

MR. FREEDMAN: The two Census Bureau witnesses who will testify.

THE COURT: Gotcha.

Ms. Bailey, on the question of trial if there were to be a trial, what is your vision?

MS. BAILEY: Your Honor, I don't mean to repeat myself but just to respond to what Ms. Goldstein said, we have produced over 40,000 pages here and that is ongoing. We think that there is more than amble information here both for plaintiffs to make out their case, for us to respond, and for your Honor to decide.

THE COURT: I got that part. So assume for the moment that I am not in agreement on that, what would a trial look like?

MS. BAILEY: We don't think a trial would be warranted. We certainly don't think that there would be any cause to have Secretary Ross take the stand. We think that

would be an unprecedented step.

THE COURT: The first one is irrelevant because I have said to assume for the moment that I disagree and that we're going to trial. The second is not yet relevant because it is not yet ripe and it may not ever become ripe.

My question, putting aside the Secretary Ross testifying part, is what do you think the trial would look like if there were to be a trial in this matter? Surely you have thought about that. I recognize that you don't want it, but you also recognize that it might be coming down the pike. There are trials scheduled in the other two matters in Maryland and California already. I recognize there is also summary judgment practice there. Surely you are contemplating that there might be trials in one or the other of these matters.

MS. BAILEY: Yes, your Honor.

We don't disagree with the broad outline of what plaintiffs have set forth. We think a lot of their requests for testimony of the Commerce Department officials could instead take place with both the deposition transcripts and the admission that they assert a large number of. Aside from that, we would anticipate cross-examining experts and putting on at least one expert of our own. Otherwise, we agree with the broad outlined of what plaintiffs have set forth for trial.

THE COURT: One other question. In the joint letter plaintiffs indicate that if summary judgment were allowed that

plaintiffs would cross-move for partial summary judgment.

Can somebody tell me what that means and what you are envisioning on that front?

MS. GOLDSTEIN: Your Honor, while we believe that trial is most appropriate for these matters, I believe that plaintiffs have a reasonable basis for concluding that no reasonable fact finder could find on the record that has been produced thus far the materials produced thus far that this decision was not arbitrary and capricious. So we would anticipate cross-moving for summary judgment in the event that the Court so ordered.

THE COURT: Very good.

Here is what we're going to do: Number One, I am going to set it down for trial, but with the caveat that I will address in a moment. I am going to set it down for trial to begin on November 5th of this year. I plan to block off all of that week and the following week. Except that I anticipate we may not sit on November 8th or I may have to sit for only a portion of November 8th.

I will note as well that Veterans' Day is November 12th so the courthouse is closed on that day. I will also note that the courthouse is not closed on Election Day. So that will be the schedule for the time being at least.

Assuming that we stick to that, and I will assure you that I will do everything in my power to ensure that we stick

to that, we'll have a final pretrial conference on November 1st at 11:00 a.m. and then we'll go from there.

Having said that, I will give the government an opportunity to submit a letter, let's say, by next Tuesday citing authority for the proposition that trial in the case of this nature is not appropriate and that a decision has to be made on the existing record or created during discovery. As well, I would like you to preview whatever arguments you would have for summary judgment citing relevant authority for those arguments as well. I will give plaintiffs until Friday of next week at noon, however, to respond to that. Those letters cannot exceed five pages each. I will decide after reading those whether there is any reason to deviate from the course that I have described and to entertain summary judgment motions in lieu or before trial.

My stroke instinct is that the case does require a trial and will require a trial and for that reason I think it makes sense to schedule it now with the understanding that that could obviously change.

Any questions on that?

MS. GOLDSTEIN: Yes, your Honor.

I know that your individual rules typically requires submission of pretrial materials 30 days earlier. Discovery will still be ongoing in this case. If we can just clarify when and what the Court would like with respect to pretrial

submissions.

THE COURT: Yes. My standard schedule doesn't work here obviously. What I would propose to do or plan to do is issue a fairly detailed order spelling out precisely what you have to file and when in light of the fact that discovery closes on October 12th. We'll go from there. If you have any questions, you can ask me after that order. I think it makes more sense.

Yes?

MR. FREEDMAN: Your Honor, my assumption was for the filing of next Friday you would like a joint letter from plaintiffs, but I want to confirm that.

THE COURT: Yes.

Any other questions?

MS. GOLDSTEIN: No, your Honor.

MS. BAILEY: No, your Honor.

THE COURT: The question about the joint submission raises another question I have, which is consolidation. Right now these cases have been proceedings together but not formally consolidated.

Any reason not to formally consolidate them under Rule 42? I don't see one.

MS. GOLDSTEIN: It is fine with us, your Honor.

MR. FREEDMAN: Us as well, your Honor.

MS. BAILEY: We agree.

THE COURT: Very good. I will issue an order formally consolidating them under Rule 42.

Oftentimes when I do that, I direct the clerk to close the later filed case and all filings would be in the first filed case. I can do that here unless you think for some reason it would be better to maintain two separate dockets.

Does anyone have a view on that?

MS. GOLDSTEIN: Not from us, your Honor.

MR. FREEDMAN: No, your Honor.

MS. BAILEY: We agree.

THE COURT: I don't know what you are agreeing to.

MS. BAILEY: We think it would be best to close the later filed case.

THE COURT: Any objection to the NYIC plaintiffs since you are the only ones who have any stake in that docket?

MR. FREEDMAN: No, your Honor.

THE COURT: I will do that and it will make things a little bit easier.

I should also say that I would say unless I grant leave to do otherwise, as far as I am concerned all submissions should be joint among the plaintiffs in these cases. Obviously there may be some discovery-related issues or issues that are unique to one plaintiff or the other and that plaintiff would presumably make the relevant submissions there. With respect to, say, the pretrial submissions or posttrial submissions if

there are any, I would expect that they are done jointly. To the extent that there are unique issues that there be would sections of the joint submissions that would be devoted to those issues. I don't see why we would need to multiply filings and what would ultimately be duplicative briefing as a result.

My next question is whether there is need or reason to have a conference between now and the final pretrial conference if that is the direction that things take. I recognize you have plenty to do in the next few weeks. In that regard, I don't necessarily think it would make a whole lot of sense to drag you in here, but perhaps it would make sense to have you back shortly after the close of discovery to make sure we're all on the same page with respect to what you should be preparing and filing and what trial is if there is going to be a trial or what have you. Or we can play it by ear and I can bring you if there is an issue or a dispute that arises between now and the final pretrial conference.

Does anyone have a view on those options?

MR. FREEDMAN: It might be good to have something tentative on the calendar, your Honor.

THE COURT: Why don't we do that. Why don't I have you in on, let's say, Wednesday, October 17th at 3:30.

I am pretty sure the order I entered earlier would require you to submit a status letter by the Thursday before

that conference, but regardless I will make that formal. So by the Thursday before that conference -- you know what? -- why don't I give you through the 12th since that is the discovery deadline to focus on discovery. By the 15th submit a joint status letter and a letter setting forth whatever items you think we should address at a conference on October 17th.

Now, if you think that there is no need for that conference, you can also indicate that in a letter. And if you think your time is better spent preparing whatever you need to be preparing at that time and that there is nothing really to be discussed, suffice it to say I will not be unhappy if I take something off my calendar. I think Mr. Freedman is right in thinking it is easier to cancel than to schedule as I indicated before in a different context.

Anything else?

MS. GOLDSTEIN: Not from NYAG.

MR. HO: Nothing from us, your Honor.

MS. BAILEY: No, your Honor.

THE COURT: In that case I will issue various orders memorializing what we have done today. I am assume there is stuff coming down the pike and I will deal with that when it comes.

Thank you. I wish everybody a very pleasant weekend. We are adjourned.

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