

October 10, 2018

The Honorable Jesse M. Furman  
United States District Court for the Southern District of New York  
Thurgood Marshall U.S. Courthouse  
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).

Dear Judge Furman,

Pursuant to Paragraph 1(A) of the Court's Individual Rules and Practices, Plaintiffs write to advise the Court of developments since the administrative stay was issued by Justice Ginsburg on October 9, and not otherwise mentioned in Defendants' October 10 notice to this Court. (Docket No. 374.)

First, Defendants have taken the position that the administrative stay applies unilaterally to stay Plaintiffs' discovery, but not Defendants' discovery. *See* Ex. 1. In particular, Defendants have taken the position that Justice Ginsburg's stay order does not affect Defendants' ability to continue taking depositions scheduled for this week of Plaintiffs' expert or fact witnesses. *Id.* Accordingly, Defendants deposed Plaintiffs' expert John Thompson, the former Census Director, earlier today; will depose Dr. Matthew Barreto tomorrow; and will depose Dr. Hermann Habermann on Friday. Defendants also intend to take fact depositions of the individual members of the NYIC Plaintiff organizations this week. Defendants have not yet confirmed that they will make Dr. John Abowd – Defendants' rebuttal expert – available on his scheduled deposition date of October 12, notwithstanding Defendants' view that discovery related to Plaintiffs' standing is unaffected by the stay. *See* Ex. 2.

Second, Defendants have advised the parties of their view that the administrative stay applies to separate litigation in other jurisdictions for which Defendants never sought or requested a stay. *See* Ex. 1. Plaintiffs in the Maryland and California lawsuits challenging the citizenship question – as well as the New York Plaintiffs – noticed the depositions of several fact witnesses to be deposed on October 10 and 11. In addition to the depositions of Secretary Ross and Mr. Gore, two other Commerce Department fact witnesses were scheduled to be deposed this week: David Langdon (scheduled for today, October 10) and Sahra Park-Su (October 11). Yesterday evening, after the administrative stay was issued by Justice Ginsburg, counsel for the plaintiffs in the Maryland and California cases asked Defendants to confirm that the Langdon and Park-Su depositions would proceed because Defendants have never sought a stay of discovery in those cases. Defendants responded that in light of Justice Ginsburg's stay, they would not make those fact witnesses available for their scheduled depositions in those cases either. Ex. 1. Mr. Langdon's deposition therefore did not proceed today, and Ms. Park-Su's deposition will not proceed tomorrow unless the stay is lifted. Plaintiffs intend to depose these witnesses on the earliest possible date once authorized to conclude discovery.

With respect to Defendants' request that the Court schedule a conference to set future proceedings, Plaintiffs' position is that no adjustments to the pretrial and trial calendar are necessary or warranted at this point. In light of the Court's prior orders, Plaintiffs are proceeding on the expectation that all deadlines scheduled by this Court are intact. (Docket No. 363, Docket No. 362, Docket No. 323, Docket No. 199.) Defendants have offered to make their four remaining fact deponents available "promptly" if those depositions are authorized following Supreme Court review, "including after the scheduled close of discovery," Ex. 1. In the interest of concluding discovery as soon as the administrative stay is lifted, Plaintiffs have asked Defendants to provide conditional dates for the depositions of Secretary Ross and Mr. Gore, *see* Ex. 2, and if necessary will seek leave of Court to conduct those depositions after October 12.

Finally, there were several remaining disputes regarding the adequacy of Defendants' document productions and privilege assertions that were open when Justice Ginsburg's administrative stay was issued. Plaintiffs wish to advise the Court that if the parties do not resolve those disagreements, Plaintiffs intend to seek expedited relief from this Court as soon as the administrative stay is lifted.

Respectfully submitted,

BARBARA D. UNDERWOOD  
Attorney General of the State of New York

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Attorneys for the *NYIC* Plaintiffs

# Exhibit 1

**From:** [Bailey, Kate \(CIV\)](#)  
**To:** [Case, Andrew](#); [Federighi, Carol \(CIV\)](#); [Coyle, Garrett \(CIV\)](#); [Ehrlich, Stephen \(CIV\)](#)  
**Cc:** [Goldstein, Elena](#); [McGuinness, John](#); ["Thomas, Tina \(TThomas@cov.com\)"](#); ["Niyati Shah \(nshah@advancingjustice-aajc.org\)"](#); [Colangelo, Matthew](#); ["Gersch, David P. \(David.Gersch@arnoldporter.com\)"](#); ["Freedman, John A. \(John.Freedman@arnoldporter.com\)"](#); ["pbduke@cov.com"](#); ["asenteno@MALDEF.org"](#); ["Denise M. Hulett \(dhulett@maldef.org\)"](#); ["Todd Grabarsky \(Todd.Grabarsky@doj.ca.gov\)"](#)  
**Subject:** Re: Depositions This Week  
**Date:** Wednesday, October 10, 2018 12:08:22 AM

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Andrew,

Thank you for writing to confirm next steps for this week's schedule.

We agree with you that Justice Ginsburg's order does not affect discovery related to standing, and you are correct that we did not seek a stay of discovery related to Plaintiffs' standing. Accordingly, we will proceed as planned with the scheduled depositions of Plaintiffs' experts and the remaining individual members of plaintiff organizations.

Regarding the depositions of Langdon and Park-Su, on the other hand, we do understand Justice Ginsburg's order to include a stay of further fact discovery, as such discovery was initially authorized by Judge Furman's July 3rd order and later authorized to the same extent by Judges Seeborg and Hazel. Mr. Langdon and Ms. Park-Su will thus not be made available while the Supreme Court's stay is in place but, should the Court ultimately deny Defendants' mandamus petition, the four remaining fact deponents will promptly be made available, including after the scheduled close of discovery, if necessary.

Thank you for your understanding and flexibility.

Kate Bailey

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

**From:** "Case, Andrew" <ACase@manatt.com>  
**Date:** 10/9/18 10:19 PM (GMT-05:00)  
**To:** "Bailey, Kate (CIV)" <katbaile@CIV.USDOJ.GOV>, "Federighi, Carol (CIV)" <CFederig@CIV.USDOJ.GOV>, "Coyle, Garrett (CIV)" <gcoyle@CIV.USDOJ.GOV>, "Ehrlich, Stephen (CIV)" <sehrlich@CIV.USDOJ.GOV>  
**Cc:** "Goldstein, Elena (Elena.Goldstein@ag.ny.gov)" <Elena.Goldstein@ag.ny.gov>, "McGuinness, John" <JMcGuinness@manatt.com>, "Thomas, Tina (TThomas@cov.com)" <TThomas@cov.com>, "Niyati Shah (nshah@advancingjustice-aajc.org)" <nshah@advancingjustice-aajc.org>, "Colangelo, Matthew (Matthew.Colangelo@ag.ny.gov)" <Matthew.Colangelo@ag.ny.gov>, "Gersch, David P. (David.Gersch@arnoldporter.com)" <David.Gersch@arnoldporter.com>, "Freedman, John A. (John.Freedman@arnoldporter.com)" <John.Freedman@arnoldporter.com>, "pbduke@cov.com" <pbduke@cov.com>, "asenteno@MALDEF.org" <asenteno@MALDEF.org>, "Denise M. Hulett (dhulett@maldef.org)" <dhulett@maldef.org>, "Todd Grabarsky (Todd.Grabarsky@doj.ca.gov)" <Todd.Grabarsky@doj.ca.gov>  
**Subject:** Depositions This Week

Kate,

We saw the order staying certain orders in the New York cases tonight. We are writing regarding the fact depositions noticed by the California and Maryland plaintiffs and the expert depositions that you have planned over the next few days.

The California and Maryland plaintiffs have noticed the deposition of David Langdon tomorrow and Sahra Park-Su for Thursday. Both were noticed pursuant to Judge Seeborg's 8/17 order and Judge Hazel's 8/20 and subsequent orders, none of which have been stayed.

In addition, there are expert depositions scheduled over the next few days, including Thompson (tomorrow), Barreto (Thursday), Habermann (Friday), and Abowd (Friday). You argued in your 9/21/18 mandamus reply in the Second Circuit that you were not seeking relief from orders that "permit expert discovery on collateral matters such as plaintiffs' standing." These experts have been made available after careful coordination. Numerous attorneys are now in transit to conduct and defend these depositions, and we cannot guarantee that these experts will be available again.

We therefore understand that the expert and fact depositions (aside from Ross and Gore) scheduled for the next few days will go forward as scheduled.

Thank you,

Andrew

**Andrew Case**

Associate

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# Exhibit 2

**From:** [Freedman, John A.](#)  
**To:** [Bailey, Kate \(CIV\)](#)  
**Cc:** [Case, Andrew](#); [Federighi, Carol \(CIV\)](#); [Coyle, Garrett \(CIV\)](#); [Ehrlich, Stephen \(CIV\)](#); [Goldstein, Elena](#); [McGuinness, John](#); [Thomas, Tina \(TThomas@cov.com\)](#); [Niyati Shah \(nshah@advancingjustice-aajc.org\)](#); [Colangelo, Matthew](#); [Gersch, David P.](#); [pbduke@cov.com](#); [asenteno@MALDEF.org](#); [Denise M. Hulett \(dhulett@maldef.org\)](#); [Todd Grabarsky \(Todd.Grabarsky@doj.ca.gov\)](#)  
**Subject:** Re: Depositions This Week  
**Date:** Wednesday, October 10, 2018 4:00:59 PM

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Counsel --

Thank you for the clarification. While we do not believe your interpretation of the scope of the stay is consistent with Justice Ginsburg's order, for the avoidance of doubt, we understand that Dr. Abowd's expert report addresses issues of standing, and accordingly per your interpretation of the scope of the stay, we will plan to see him for his deposition on Friday. For security purposes, please send us your attendee information as soon as you have it.

If you do not make Dr. Abowd available on Friday, we will cite your failure to produce him for deposition before the discovery cutoff as an additional ground why his expert testimony should be excluded at trial.

Please also provide us with tentative dates for availability including Friday 10/12 (when we understand from your prior emails John Gore is available) through the end of next week (Friday 10/19) for the depositions of John Gore and Commerce Secretary Ross, conditional upon the stay being lifted with respect to either or both witnesses.

Thank you,

John

On Oct 10, 2018, at 12:09 AM, Bailey, Kate (CIV) <[Kate.Bailey@usdoj.gov](mailto:Kate.Bailey@usdoj.gov)> wrote:

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Cc: "Goldstein, Elena ([Elena.Goldstein@ag.ny.gov](mailto:Elena.Goldstein@ag.ny.gov)) ([Elena.Goldstein@ag.ny.gov](mailto:Elena.Goldstein@ag.ny.gov))" <[Elena.Goldstein@ag.ny.gov](mailto:Elena.Goldstein@ag.ny.gov)>, "McGuinness, John" <[JMcGuinness@manatt.com](mailto:JMcGuinness@manatt.com)>, "Thomas, Tina ([TThomas@cov.com](mailto:TThomas@cov.com))" <[TThomas@cov.com](mailto:TThomas@cov.com)>, "Niyati Shah ([nshah@advancingjustice-aajc.org](mailto:nshah@advancingjustice-aajc.org))" <[nshah@advancingjustice-aajc.org](mailto:nshah@advancingjustice-aajc.org)>, "Colangelo, Matthew ([Matthew.Colangelo@ag.ny.gov](mailto:Matthew.Colangelo@ag.ny.gov))" <[Matthew.Colangelo@ag.ny.gov](mailto:Matthew.Colangelo@ag.ny.gov)>, "Gersch, David P. ([David.Gersch@arnoldporter.com](mailto:David.Gersch@arnoldporter.com))" <[David.Gersch@arnoldporter.com](mailto:David.Gersch@arnoldporter.com)>, "Freedman, John A. ([John.Freedman@arnoldporter.com](mailto:John.Freedman@arnoldporter.com))" <[John.Freedman@arnoldporter.com](mailto:John.Freedman@arnoldporter.com)>, "[pbduke@cov.com](mailto:pbduke@cov.com)" <[pbduke@cov.com](mailto:pbduke@cov.com)>, "[asenteno@MALDEF.org](mailto:asenteno@MALDEF.org)" <[asenteno@MALDEF.org](mailto:asenteno@MALDEF.org)>, "Denise M. Hulett ([dhulett@maldef.org](mailto:dhulett@maldef.org))" <[dhulett@maldef.org](mailto:dhulett@maldef.org)>, "Todd Grabarsky ([Todd.Grabarsky@doj.ca.gov](mailto:Todd.Grabarsky@doj.ca.gov))" <[Todd.Grabarsky@doj.ca.gov](mailto:Todd.Grabarsky@doj.ca.gov)>

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**Andrew Case**

Associate

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