

September 29, 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' opposition to motion for stay in *State of New York, et al. v. U.S. Dep't of Commerce, et al.*, 18-CV-2921 (JMF).

Dear Judge Furman,

Just days ago, Defendants advised the Second Circuit that their mandamus petition sought relief only to protect agency officials from deposition, and that Defendants were not challenging expert discovery or completion of the administrative record. Contrary to that representation in open court, Defendants now ask this Court to stay *all* discovery pending further Second Circuit and possible Supreme Court review – without even identifying the legal standard that applies to their request for a stay, much less attempting to demonstrate that they meet it. Requiring Plaintiffs to oppose – and this Court to adjudicate – a motion that does not even bother to articulate a reasoned legal position is prejudicial and does not come close to meeting the applicable standard. Defendants' motion for a stay of discovery, Docket No. 359, is frivolous and should be denied.

District courts consider four factors in determining whether to grant a stay: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties . . . ; and (4) where the public interest lies.” Docket No. 308, at 3 (quoting *U.S. S.E.C. v. Citigroup Glob. Mkts., Inc.*, 673 F.3d 158, 162 (2d Cir. 2012)). Defendants do not meet this standard as to any of their requests for relief.

1. *The request for a stay of all discovery is baseless.* Defendants cannot meet the first two factors they must demonstrate to support a stay of discovery – likelihood of success, and irreparable injury absent a stay – because neither of their mandamus petitions would terminate discovery in this action even if successful. Just four days ago, Defendants conceded at the Second Circuit oral argument on their first mandamus petition that they were challenging this Court's discovery orders *only* to the extent those orders authorized the deposition of agency officials (in that case, Acting Assistant Attorney General John Gore). *See In re U.S. Dep't of Commerce*, No. 18-2652 (2d Cir. Sept. 25, 2018), oral arg. audio at 18:05 to 18:31 (“We are not here to quibble about what is and is not properly part of the administrative record. We are here about, once you draw that line, can you go beyond that. . . . The question is whether you can go beyond the administrative record and start deposing agency officials about their mental processes.”); *see also* U.S. Reply Supp. Pet'n for Writ of Mandamus 17, No. 18-2652 (2d Cir. Sept. 21, 2018) (“The government is not seeking relief from those portions of the district court's July 3 order that require the government to supplement the administrative record or that permit expert discovery on collateral matters such as plaintiffs' standing . . .”). Therefore, whatever the outcome of hypothetical Supreme Court review of the Second Circuit's order denying the

first petition for mandamus, any relief would be no broader than the deposition of Acting AAG Gore, because Defendants have conceded that their mandamus petition sought nothing more.

Defendants' second mandamus petition, filed two days ago, is similarly narrow: it seeks only to quash the deposition of Secretary Ross. *See* Pet'n for Writ of Mandamus 1, No. 18-2856 (2d Cir. Sept. 27, 2018). Thus, even if successful on their second mandamus petition, Defendants' relief would be limited solely to Secretary Ross's deposition. To ask this Court to stay *all* discovery pending appellate review of the allowability of two depositions is disproportionate and groundless. Defendants cannot succeed on a request they have not made, and cannot be injured absent a stay from this Court pending appellate relief they have not sought.

By contrast, a stay of all discovery would substantially injure Plaintiffs. By October 12 (nine work days from today), Plaintiffs are scheduled to take the deposition of six of Defendants' expert and fact witnesses – most of which were scheduled for the final two weeks of discovery at Defendants' express request or insistence. Defendants are also obligated by October 12 to complete their outstanding document productions – on requests that have in many instances been pending for weeks or months, *see* Ex. 1 – and respond to pending interrogatories and requests for admission. A stay of all discovery would reward Defendants' sandbagging, prejudice Plaintiffs, and hinder this Court's ultimate review on the merits of Secretary Ross's decision to demand to know the citizenship status of every resident in the country. *See* 5 U.S.C. § 706; *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977); *see also* Docket No. 308, at 4 (denying Defendants' previous motion to stay discovery altogether as "frivolous").

Nor should the October 12 discovery deadline, or the November 5 trial date, be extended to accommodate Defendants' unsupported request for a stay. As this Court has noted repeatedly, and as Defendants themselves concede, there is a "strong interest in resolving Plaintiffs' claims quickly given the need to prepare for the 2020 census." Docket No. 308, at 7-8. Acting Census Director Ron Jarmin has himself testified that the Census Bureau would like to have this dispute resolved this fall. *Id.* Any delay would be inconsistent with the statutory and practical deadlines in this case. Discovery should not be stayed.

2. *The deposition of Acting AAG Gore should not be stayed.* Defendants' request to stay the deposition of Acting AAG Gore is no less frivolous. This Court already denied a stay of the Gore deposition, *see* Docket No. 308 at 8-11, and Defendants offer no new grounds for the Court to revisit that order. In addition, the Second Circuit rejected Defendants' request to quash Gore's deposition, explaining that this Court did not clearly abuse its discretion in determining that Gore "possesses relevant information that cannot be obtained from another source about plaintiffs' allegations that the Secretary used" a letter written by Gore "as a pretextual legal justification for adding the citizenship question." *In re U.S. Dep't of Commerce*, No. 18-2652, slip op. at 2 (2d Cir. Sept. 25, 2018). Defendants' attempt to relitigate these issues should be rejected.

In addition, *before* filing this motion for stay, Defendants sought a stay of the Gore deposition from the Second Circuit (again), Ex. 2; and that court referred the renewed Gore request to the panel that heard Defendants' first mandamus petition. *In re U.S. Dep't of Commerce*, No. 18-2856 (2d Cir. Sept. 28, 2018) (Hall, J.), attached as Ex. 3. There is no cause to litigate this issue simultaneously in multiple fora, and without even advising this Court that the Second Circuit motions panel was concurrently considering this aspect of Defendants' request.

In any event, Gore's deposition is not scheduled to occur until October 10 – a date set at Defendants' request. Defendants have not yet bestirred themselves to seek the Supreme Court review they say is forthcoming, and the Court should not authorize a stay of Gore's deposition in the meantime.

3. *Secretary Ross's deposition should not be stayed.* As to Defendants' request to stay Secretary Ross's deposition, no intervention from this Court is necessary, because the Second Circuit already ordered the Secretary's deposition stayed pending resolution of Defendants' second petition for mandamus. *In re U.S. Dep't of Commerce*, No. 18-2856 (2d Cir. Sept. 28, 2018) (Hall, J.) (order granting administrative stay). Defendants' motion is therefore academic as to Secretary Ross. Defendants cite no authority for their request that this Court enter a duplicative and contingent stay that would become operative only in the event that multiple future events occur (including that the Second Circuit stay is later lifted, and that Defendants thereafter decide to seek Supreme Court review).

In addition, the Secretary's deposition is currently scheduled for October 11, and the Second Circuit can resolve Defendants' second mandamus petition before that date. Plaintiffs' opposition is due on October 4, and the petition will be heard by the motions panel sitting on October 9. There is nothing this Court needs to or should do now.

Defendants' stay request fails on the merits as well. Defendants make no attempt to demonstrate that this Court's order compelling Secretary Ross's deposition amounts to "a judicial usurpation of power" that warrants "a drastic and extraordinary remedy reserved for really extraordinary causes." *In re Roman Catholic Diocese of Albany, N.Y., Inc.*, 745 F.3d 30, 35 (2d Cir. 2014). Given this extremely high burden, Defendants cannot demonstrate both that this Court clearly erred *and* that the Second Circuit is likely to grant mandamus. The Court's order authorizing Secretary Ross's deposition applied controlling law and carefully reviewed the record in this case to determine that the Secretary's deposition was warranted and justified under both the APA and the equal protection claims in this case. Docket No. 345. That Defendants disagree with this decision does not establish a "judicial usurpation of power."

The remaining factors weigh in favor of denying the motion as well. In particular, the public interest is best served by denying a stay of Secretary Ross's deposition: transparency regarding the Secretary's decision is necessary to preserve confidence in the integrity of the census process. Docket No. 345, at 11 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 818 (1992) (Stevens, J., concurring in part and concurring in the judgment)); Docket No. 308, at 8.

Finally, Defendants appear to be advising the Court that they filed this request for a stay solely so they can later tell the Supreme Court they did so. Docket No. 359 (quoting S. Ct. R. 23.3). Exhaustion requirements are not box-checking exercises; they serve the important purposes of, among others, promoting judicial efficiency and allowing for development of a complete record for subsequent review. *Cf. Polera v. Bd. of Educ.*, 288 F.3d 478, 487 (2d Cir. 2002). Defendants' pro forma motion – which states no basis for relief and fails to disclose that parts of the request are simultaneously pending before the Second Circuit – is an inappropriate burden on the Court and the Plaintiffs, and is inconsistent with Supreme Court Rule 23.3 in any event (which requires an applicant for a stay to "set out with particularity why the relief sought is not available from any other court or judge"). The motion should be denied.

Respectfully submitted,

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September 25, 2018

Via Electronic Mail

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Re: Outstanding discovery matters that require resolution in *State of New York, et al. v. United States Department of Commerce, et al.*, 18-cv-2921 (JMF).

Dear Ms. Bailey:

Plaintiffs write to enumerate the many outstanding discovery issues in this matter and to request that Defendants make themselves available for a meet and confer no later than tomorrow to discuss each of these issues. As Defendants are aware, there are less than three weeks remaining in the discovery period, which closes on October 12. Plaintiffs have raised all of these issues with Defendants in the past, many of them on multiple occasions. Given the extremely short time remaining in the discovery period, the parties must confer on these issues and obtain resolution or Plaintiffs may seek redress from the Court.

1. **Deposition dates.** We have requested the deposition dates for the fact deposition of Secretary Ross (see John Freedman email 9/21) and received no response. In addition, we would like to confer regarding the date proposed by Defendants for Dr. Abowd's expert deposition.
2. **Department of Justice documents.** We would like to confer on the outstanding materials responsive to the Department of Justice and John Gore subpoenas (see John Freedman emails dated 9/11, 9/16, 9/21).
3. **Supplemental searches to complete the administrative record.** Defendants agreed on September 10 to run the agreed-upon supplemental searches of additional search terms and additional custodians (see John Freedman 9/11 email; Kate Bailey 9/10 email). These included:
 - a. *Secretary Ross Materials.* To the extent these supplemental searches needed to be prioritized, Plaintiffs requested that Defendants prioritize running supplemental terms on Secretary Ross's email, as well as that of his two assistants (Ms. Alexander, Ms. Leach), Mr. Comstock, and Ms. Teramoto (see John Freedman 9/21 email).

- b. *Additional priority custodians.* Plaintiffs also asked that the Langdon, Park-Su, and Willard searches be prioritized (see Elena Goldstein 9/21 email, requesting priority be given to these custodians).
 - c. *Other outstanding custodians.* The remaining supplemental searches are still pending, with no update from Defendants on expected timing; these include materials from additional custodians (Branstad, Lenihan, Velkoff, Raglin), as well as the supplemental search terms on other custodians (see John Freedman 9/11 email; Kate Bailey 9/10 email).
4. **Remaining Commerce Department documents.** On the parties' August 31 meet-and-confer call, Ms. Federighi explained that there were further Commerce Department responses to Plaintiffs' requests for production, and promised to follow up the following week (see John Freedman 8/31 email). Plaintiffs followed up on 9/21, but we have received no response, no production of records, and no further description of the outstanding materials (see John Freedman email 9/21 email).
5. **Responses to the Court's order to produce focus group materials.**
 - a. At the status conference on September 14, the Court ordered Defendants to produce responsive focus group materials by September 20. On the evening of September 20, Ms. Bailey emailed records responsive to the Court's order to the Plaintiffs, but NYAG counsel did not receive one of the files, and we were unable to open the attachments we did receive. Defendants agreed to send these files to NYAG on a CD by overnight mail, which we have not received.
 - b. In addition, we understand that there are additional CBAM focus group and public opinion documents that have not yet been produced. Particularly in light of Defendants' proposal that the 30(b)(6) deposition conclude next week, all documents on this subject must be produced.
6. **Stakeholder briefing memos.** Plaintiffs previously requested materials similar to AR 3907 that were withheld on deliberative process privilege grounds (see John Freedman email 9/16). We have not received these materials or a date by which Defendants will produce them.
7. **Expert disclosures and depositions.** Plaintiffs seek to confer on several open issues relating to expert disclosures, including:
 - a. Defendants' refusal to identify the sources supporting Dr. Abowd's opinions (see Dale Ho 9/22 email; Kate Bailey 9/24 email).
 - b. Plaintiffs have received no response to our request for consent that experts designated by plaintiffs in other jurisdictions will not be deposed more than once (see Elena Goldstein 9/21 email).

We look forward to speaking about these matters with you very soon.

Sincerely,

/s/Elena S. Goldstein
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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MOTION INFORMATION STATEMENT

Docket Number(s): 18-XXXX Caption [use short title]

Motion for: Emergency Motion for Immediate Administrative Stay Pending Resolution of the Government's Petition For Writ of Mandamus by this Court and the Supreme Court In re United States Department of Commerce

Set forth below precise, complete statement of relief sought: We ask this Court to stay the district court's orders compelling the deposition testimony of Secretary of Commerce Wilbur Ross and Acting Assistant Attorney General John Gore, and the court's order permitting extra-record discovery until this Court, and, if necessary, the Supreme Court resolves the government's petition for the writ of mandamus.

MOVING PARTY: U.S. Dept of Commerce et al. (petitioners for writ of mandamus) OPPOSING PARTY: State of New York, et al. Plaintiff Defendant Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Mark B. Stern OPPOSING ATTORNEY: Judith N. Vale [name of attorney, with firm, address, phone number and e-mail]

U.S. Department of Justice New York State Office of Attorney General 950 Pennsylvania Ave. NW, Washington, DC 20530 28 Liberty Street, 23rd Floor, New York, NY 10005 (202) 514-5089; Mark.Stern@usdoj.gov (212) 416-6274; judith.vale@ag.ny.gov

Court-Judge/Agency appealed from: S.D.N.Y. Honorable Jesse M. Furman, No. 18-CV-2921 (JMF)

Please check appropriate boxes: Has movant notified opposing counsel (required by Local Rule 27.1): Yes No (explain): Opposing counsel's position on motion: Unopposed Opposed Don't Know Does opposing counsel intend to file a response: Yes No Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL: Has request for relief been made below? Yes No Has this relief been previously sought in this Court? Yes No Requested return date and explanation of emergency: 5pm EST Monday, October 1, 2018. The depositions of Commerce Secretary Ross and Acting AAG Gore will occur imminently, and the government intends to seek Supreme Court review if a stay is not granted.

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted) Has argument date of appeal been set? Yes No If yes, enter date:

Signature of Moving Attorney: /s/ Mark B. Stern Date: Sept. 27, 2018 Service by: CM/ECF Other [Attach proof of service]

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of September, two thousand and eighteen.

Before: Peter W. Hall,
Circuit Judge.

In Re: United States Department of Commerce, Wilbur L. Ross, in his official capacity as Secretary of Commerce, United States Census Bureau, an agency within the United States Department of Commerce, Ron S. Jarmin, in his capacity as the Director of the U.S. Census Bureau,

ORDER

Docket No. 18-2856

Petitioners.

United States Department of Commerce, Wilbur L. Ross, in his official capacity as Secretary of Commerce, United States Census Bureau, an agency within the United States Department of Commerce, Ron S. Jarmin, in his capacity as the Director of the U.S. Census Bureau,

Petitioners,

v.

State of New York, State of Connecticut, State of Delaware, District of Columbia, State of Illinois, State of Iowa, State of Maryland, Commonwealth of Massachusetts, State of Minnesota, State of New Jersey, State of New Mexico, State of North Carolina, State of Oregon, Commonwealth of Pennsylvania, State of Rhode Island, Commonwealth of Virginia, State of Vermont, State of Washington, City of Chicago, Illinois, City of New York, City of Philadelphia, City of Providence, City and County of San Francisco, California, United States Conference of Mayors, City of Seattle, Washington, City of Pittsburgh, County of Cameron, State of Colorado, City of Central Falls, City of Columbus, County of El Paso, County of Monterey, County of Hidalgo,

Respondents.

In Re: United States Department of Commerce, Wilbur L. Ross, in his official capacity as Secretary of Commerce, United States Census Bureau, an agency within the United States Department of Commerce, Ron S. Jarmin, in his capacity as the Director of the U.S. Census Bureau,

Docket No. 18-2857

Petitioners.

United States Department of Commerce, Wilbur L. Ross, in his official capacity as Secretary of Commerce, United States Census Bureau, an agency within the United States Department of Commerce, Ron S. Jarmin, in his capacity as the Director of the U.S. Census Bureau,

Petitioners,

v.

New York Immigration Coalition, CASA de Maryland, Inc., American-Arab Anti-Discrimination Committee, ADC Research Institute, Make the Road New York,

Respondents.

As part of its petitions for writ of mandamus, the Government seeks an administrative stay of the depositions of Secretary of Commerce Wilbur Ross and John Gore, the Acting Assistant Attorney General of the Department of Justice’s Civil Rights Division.

IT IS HEREBY ORDERED that the deposition of Secretary Ross is stayed pending determination of the petitions. Answers to the petitions must be filed by October 4, 2018 at noon. The petitions, as they pertain to Secretary Ross, are REFERRED to the motions panel sitting on Tuesday, October 9, 2018. To the extent the Government seeks a stay of Acting Attorney General Gore’s deposition, that request is REFERRED to the panel that determined the petitions in docket numbers 18-2652 and 18-2659.

For the Court:
Catherine O’Hagan Wolfe,
Clerk of Court




A True Copy

Catherine O’Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit


