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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 STATES OF NEW YORK, COLORADO,
5 CONNECTICUT, DELAWARE, ILLINOIS,
6 IOWA, MARYLAND, MINNESOTA,
7 NEW JERSEY, NEW MEXICO,
8 NORTH CAROLINA, OREGON,
9 RHODE ISLAND, VERMONT,
10 and WASHINGTON, *et al.*,

11 Plaintiffs,

12 v.

18 Civ. 2921 (JMF)

13 UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,
14 Trial

15 Defendants.

16 -----x
17 NEW YORK IMMIGRATION COALITION, *et al.*,

18 Consolidated Plaintiffs,

19 v.

18 Civ. 5025 (JMF)

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

21 Defendants.

22 -----x

23 New York, N.Y.
24 November 15, 2018
25 9:45 a.m.

Before:

HON. JESSE M. FURMAN,

District Judge

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APPEARANCES

BARBARA D. UNDERWOOD

Acting Attorney General of the State of New York
Attorney for Plaintiff State of New York

BY: MATTHEW COLANGELO

ELENA S. GOLDSTEIN

DANIELLE FIDLER

SANIA W. KAHN

ELIZABETH MORGAN

AJAY P. SAINI

LAURA J. WOOD

DAVID E. NACHMAN

Assistants Attorney General

ARNOLD & PORTER KAYE SCHOLER LLP

Attorneys for Consolidated Plaintiffs NYIC

BY: DAVID P. GERSCH

JOHN A. FREEDMAN

ADA AÑON

- and -

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

BY: DALE E. HO

DAVIN ROSBOROUGH

SARAH E. BRANNON

GURBIR S. GREWAL

Attorney General of the State of New Jersey

Attorney for Plaintiff State of New Jersey

BY: MELISSA MEDOWAY

Assistant Attorney General

THOMAS J. DONOVAN, JR.

Attorney General of the State of Vermont

Attorney for Plaintiff State of Vermont

BY: JULIO A. THOMPSON

Assistant Attorney General

ROBERT W. FERGUSON

Attorney General of the State of Washington

Attorney for Plaintiff State of Washington

BY: LAURA K. CLINTON

Assistant Attorney General

IBFsNYS1

1 MARK R. HERRING

Attorney General of the Commonwealth of Virginia

2 Attorney for Plaintiff Commonwealth of Virginia

3 BY: MONA SIDDIQUI

Assistant Attorney General

4 EDWARD N. SISKEL

5 Corporation Counsel of the City of Chicago

Attorney for Plaintiff City of Chicago

6 BY: MARGARET SOBOTA

CHRISTIE L. STARZEC

7 Assistants Corporation Counsel

8 MARCEL S. PRATT

9 Acting City Solicitor of the City of Philadelphia

Attorney for Plaintiff City of Philadelphia

10 BY: MICHAEL W. PFAUTZ

Assistant City Solicitor

11 UNITED STATES DEPARTMENT OF JUSTICE

12 Civil Division, Federal Programs Branch

13 Attorneys for Defendants

14 BY: KATE BAILEY

CAROL FEDERIGHI

MARTIN M. TOMLINSON

15 STEPHEN EHRLICH

GARRETT J. COYLE

16 JOSHUA E. GARDNER

BRETT A. SHUMATE

17 ALICE S. LaCOUR

CARLOTTA P. WELLS

18 Assistant United States Attorneys

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(In open court; trial resumed)

THE COURT: Good morning. Welcome back.

Anything to discuss before we resume with Dr. Abowd's testimony?

MR. COLANGELO: Nothing for the plaintiffs, your Honor.

MR. GARDNER: Nothing for the defendants, your Honor.

THE COURT: All right. Mr. Ho, you may take the podium, but I'm actually going to start with questions of my own. You can relax for a minute.

Good morning, Dr. Abowd.

THE WITNESS: Good morning, your Honor.

THE COURT: Welcome back.

THE WITNESS: Thank you.

THE COURT: I promise I'll get you off the stand today.

THE WITNESS: That's good. I only have one more clean shirt.

THE COURT: You estimated it perfectly.

All right. Couple questions.

JOHN MARON ABOWD, resumed.

THE COURT: First of all, in no particular order, you heard testimony earlier in the trial, I think, from Dr. Salvo that New York had increased its outlays for sort of census outreach and the like from four something million to five

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1 something million, if I remember correctly, in the wake of, I
2 don't remember the timing exactly, but certainly after the
3 Department of Justice's letter in December.

4 Do you remember that testimony?

5 THE WITNESS: Yes, I do, your Honor.

6 THE COURT: In your judgment, given what you believe
7 the results of the citizenship question will have on the
8 census, is it reasonable for cities to increase their
9 expenditures to address any concerns about the addition of the
10 citizenship question?

11 THE WITNESS: So as I explained to your Honor
12 yesterday, I think I am not an expert on appropriation law.
13 I just want to circumscribe my answer with what I understand to
14 be allowable.

15 In that context, it is welcomed by the Census Bureau
16 to have local partners and, indeed, we have full comp
17 committees that we have sponsored and helped get organized in
18 order to promote local cooperation.

19 So to the extent that it is permitted by the law,
20 municipalities increasing their expenditures to help us make
21 sure there is a full count is welcome and encouraged even.

22 THE COURT: All right. Yesterday, if I remember your
23 testimony correctly or understood it correctly, you testified
24 in response to some questions of Mr. Ho that the NRFU
25 operations would do anything to address the problem of

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1 households that may leave people off the census roster, is that
2 correct?

3 THE WITNESS: That's right.

4 We have historically only done what we call quality
5 control, which means random revisits by our own interviewers to
6 houses that have already been enumerated. That is largely
7 quality control on the enumerator, but if that quality control
8 uncovered discrepancies in the household roster, they would be
9 corrected. But as far as I'm aware, that is the only operation
10 in which a household roster might be corrected.

11 THE COURT: But if someone actually does self-respond
12 and leaves someone off the roster, there is no mechanism to
13 correct for that?

14 THE WITNESS: There is no mechanism, other than
15 content reinterview, that isn't exclusively a NRFU operation.

16 THE COURT: What proportion, I mean, how extensively?

17 THE WITNESS: It is minuscule, your Honor.

18 THE COURT: I see. So it would not meaningfully
19 address any undercount as a result of or the omission of people
20 due to leaving them off the roster, is that a fair statement?

21 THE WITNESS: I think that is fair statement, yes.

22 THE COURT: I think you testified that, in your expert
23 opinion, that in the current climate and/or because of the
24 citizenship question, that the number of people who left
25 household members off of the roster was likely to increase, is

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1 that correct, or at least it wouldn't be surprising?

2 THE WITNESS: I think I said that in the current macro
3 environment, it would not be surprising, in my opinion, with or
4 without the citizenship question.

5 THE COURT: Would that not translate into a
6 differential net undercount, and if not, why not?

7 THE WITNESS: So all by itself, of course, it would.
8 While it is difficult to quantify, some of the other errors
9 offset, and they are also specific to race and ethnic groups.
10 I think it would probably require a large margin of offset in
11 order to offset a massive amount of what you just described.

12 THE COURT: You had that flow chart yesterday, I think
13 demonstratives 20 through 22.

14 Which of those categories would you expect an offset
15 to occur with respect to, say, Hispanics or noncitizen segment
16 of the population?

17 THE WITNESS: So the particular offsets I'm talking
18 about occur because a person that didn't appear on the roster
19 in one place, it appeared on the roster in the other place.
20 They were counted in the wrong place.

21 Those aren't from the same subset of households that
22 we were talking about now, but they occur within the same small
23 geographic area. They are generally representative of the
24 racial and ethnic background of the people who got missed from
25 the short rosters.

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1 Whether they fully -- and duplicates as well. So
2 whether they fully offset is, of course, a measurement issue,
3 but that is the sources of those errors.

4 THE COURT: Now, yesterday in response to a question
5 from Mr. Ho, maybe some from me, you testified that with
6 respect to the citizenship question on the ACS, that describing
7 it as well-tested, quote/unquote, was consistent with it,
8 quote-unquote, not performing adequately, and I think you said
9 that that was rather nuanced, but then didn't explain.

10 Can you explain what you mean by that?

11 THE WITNESS: Yes, your Honor, I would be delighted to
12 do that.

13 If asked for a survey question that's been tested and
14 is in inventory and has been used -- continuously used on the
15 ACS, then my expert opinion is that the best available question
16 was the ACS question on citizenship, that it had undergone all
17 of the testing that normally is appropriate, and it had
18 performed well throughout its use on the ACS in 41 million
19 households. That's a survey question.

20 The evidence undermining the accuracy of that survey
21 question is relatively recent, and if asked against the
22 alternative of using a different source for that information,
23 do I still think that the citizenship question performs
24 adequately.

25 I think the bulk of my testimony has indicated that I

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1 don't think so, that you should use the administrative record
2 data.

3 But that wasn't the question that we were asked to
4 address by the Secretary, and it wasn't the question put to the
5 survey methodologist and specialist inside the Census Bureau.
6 It was from our inventory of tested citizenship questions, is
7 there one that we would recommend if we were instructed to
8 insert the citizenship question on the census.

9 So that is the ACS question, and it certainly has been
10 certified by OMB on multiple occasions as being properly tested
11 and properly placed on the ACS. It has never been certified by
12 OMB as being properly tested and properly placed on a short
13 form. That is still within their prerogative. They can judge
14 the evidence that we have produced and instruct us to make
15 changes if they don't feel we have adequately documented the
16 providence of that question.

17 As a survey question, it is properly tested. Whether
18 you use adequately or well, it is our best available question
19 for this purpose. It is not the best available source for
20 those data, and that is an important distinction that I've made
21 continuously.

22 THE COURT: All right. It seems to me that -- maybe
23 you can draw the distinction between among the questions in the
24 available inventory, it is the best-tested versus describing it
25 as well-tested.

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1 Is that a fair difference?

2 THE WITNESS: I'm not sure, your Honor. I think I've
3 been clear. It would not be appropriate to describe it as
4 well-tested in the context of the 2020 questionnaire. That is
5 simply not true. It hasn't ever been tested in that context.

6 In that context, it is hard to describe it as
7 well-tested, and if any of my testimony has been interpreted
8 that way, then I believe I either misunderstood the question or
9 I misstated.

10 It has been well-tested in the context for which it
11 was developed, and in our opinion, an appropriate choice for a
12 question about citizenship on the 2020 census, if we are
13 instructed to put one on, since we have not had a testing
14 inventory on that subject --

15 THE COURT: I assumed --

16 THE WITNESS: -- in the 2020 census.

17 THE COURT: Would you agree that something can be
18 well-tested and then perform poorly in actual practice?

19 THE WITNESS: Yes, I think I have acknowledged that.
20 Yes, I agree.

21 THE COURT: For instance, you know, it seems to me
22 that election polls and predictions are quite refined and
23 sophisticated these days. As we know, sometimes they predict a
24 different outcome than the one that occurs on election day. So
25 something can be well-tested but perform poorly in practice.

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1 Is that a fair statement?

2 THE WITNESS: Yes. I believe that I have acknowledged
3 that, that since it hasn't been tested in context and since we
4 can't control the macro environment, in lieu of that, it could
5 certainly have problems on census day.

6 THE COURT: All right. Now, a couple final questions,
7 and then I'll let the lawyers do some work and earn their pay
8 or not, as the case may be.

9 My understanding of your testimony, correct me if I'm
10 mischaracterizing this -- and I want to be careful here -- is
11 that you believe there is no credible, quantifiable evidence
12 that the citizenship question will result in a net undercount
13 or net differential undercount, correct?

14 THE WITNESS: Specifically assigned to the citizenship
15 question, correct.

16 THE COURT: All right. Yet am I correct in also
17 understanding and believing that you are firmly of the view
18 that the citizenship question should not be included in the
19 decennial census?

20 THE WITNESS: Yes, your Honor.

21 THE COURT: Can you explain your having each of those
22 opinions succinctly?

23 THE WITNESS: I'll try to do it in a few sentences.

24 It was the opinion expressed in the January 19 memo,
25 and continues to be my expert opinion, that the disruption to

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1 the quality of the data in the 2020 census, even though we
2 don't have specific quantitative evidence pointing to a net
3 undercount from the citizenship question, the disruption in the
4 quality of the data, that the acknowledgment that there could
5 potentially be more erroneous enumerations, more incorrect --
6 fewer correct enumerations, more erroneous enumerations, both
7 of those things are related to omissions and more use of whole
8 imputation. Those quality components of the census are
9 controlling them is fundamental to delivering a high-quality
10 decennial census.

11 I appreciate that its primary or first use is in
12 reapportionment, and I understand the significance of the net
13 undercount statements that I have made. However, it is the
14 statistical foundation of the Census Bureau's work on
15 households and compromising its quality to produce a
16 citizenship tabulation that could be produced from other
17 sources more accurately is not a risk that I would be willing
18 to take, but I'm not the one that made that determination.

19 THE COURT: Understood.

20 Final question, which is, can you succinctly describe
21 the harms that arise from a disruption in the quality of the
22 census?

23 THE WITNESS: So the main harm is that those data are
24 the backbone of the rest of the statistical system that the
25 Census Bureau builds their own household data. The address

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1 list provides the frame, the characteristics that are gathered
2 in the census provide the stratifying variables for samples
3 that are done both within the Census Bureau and when we release
4 the public data for the polling and scientific sampling that is
5 done at many agencies within the United States.

6 Essentially, they rely on being able to benchmark not
7 just to the counts, but to the characteristics associated with
8 those counts when they develop other important statistical.
9 For me to develop them in the Census Bureau, when the Bureau of
10 Labor Statistics relies upon the current population survey,
11 when the National Center for Health Statistics relies on the
12 National Health Interview survey, all of those surveys have
13 their frames constructed from data that are fed by the
14 decennial census every ten years and kept up to date.

15 The quality of those data matter enormously for the
16 quality of the statistical products that the Census Bureau
17 produces.

18 THE COURT: All right. I changed my mind. I have
19 another question.

20 Would it be accurate to say that an agency, lets say
21 a local agency that uses that data in making decisions and
22 allocating resources, what have you, that it might not know the
23 ways in which the data are disrupted or less accurate, and in
24 that regard, it would be hard to predict the demonstrable
25 effect of the lesser quality, but one could be confident that

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1 it is having an effect?

2 THE WITNESS: One can be confident that it is having
3 an effect, and I think you summarized my testimony correctly
4 when you said it was difficult to predict the direction,
5 especially in zero sum allocation decisions.

6 THE COURT: All right. Thank you.

7 Mr. Ho, your turn.

8 MR. HO: Thank you, your Honor.

9 DIRECT EXAMINATION

10 BY MR. HO:

11 Q. Can we pull up Plaintiffs' Exhibit 22.

12 Dr. Abowd, this is your January 19 memo. I want to
13 look at page six, the second full paragraph on the page.

14 THE COURT: It is up.

15 THE WITNESS: It's not on my screen, your Honor.

16 THE COURT: Unfortunately, my deputy's screen which
17 has the controller has died altogether. She told me that your
18 screens were able to --

19 THE WITNESS: My screen was working earlier.

20 MR. HO: Your Honor, we do have hard copies. As
21 long as it is up on your screen, we could use hard copies of
22 exhibits for Dr. Abowd.

23 THE COURT: All right. Well, it is on my screen. I
24 don't know what that suggests, but lets proceed, and we'll do
25 our best.

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1 MR. HO: Permission to approach, your Honor?

2 THE COURT: I told you at the final pretrial
3 conference that you should have a backup plan.

4 THE WITNESS: It just came up.

5 THE COURT: All right. Good.

6 MR. HO: May I proceed, your Honor?

7 THE COURT: You may.

8 I think for now it is on the screen, and you should
9 have your backup plan ready.

10 MR. HO: Thank you.

11 THE COURT: I was testing you.

12 MR. HO: Thank you, your Honor.

13 BY MR. HO:

14 Q. Dr. Abowd, this is page six of Plaintiffs' Exhibit 22, your
15 January 19, 2018, memo that we've discussed at some length.

16 In this paragraph, you're explaining some of the
17 numbers underlying your cost estimate as of that time for the
18 addition of the citizenship question, correct?

19 A. This particular paragraph, I'm describing the data quality
20 consequences, but I think it is near the use for cost analysis,
21 yes.

22 Q. OK. In developing the cost estimate, you assumed that
23 79 percent of households that do not respond to the census
24 because of the citizenship question would respond to an
25 in-person enumerator during NRFU, correct?

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1 A. Yes, that's correct.

2 Q. Your cost estimate assumes that, on average, three visits
3 will result in an enumeration of these households, correct?

4 A. That is correct.

5 Q. Dr. Abowd, you're not aware of any credible quantitative
6 evidence that, in fact, three visits will, on average, be
7 sufficient to enumerate a household that refuses to respond to
8 the census because of the citizenship question, correct?

9 A. That's correct.

10 Q. Dr. Abowd, you're not aware of any credible quantitative
11 evidence that someone who chooses not to respond to the 2020
12 census because of the citizenship question will respond at all
13 in a face-to-face encounter with a census enumerator, correct?

14 A. That's correct.

15 Q. And there is nothing in the administrative record
16 reflecting quantitative evidence that any drop in response
17 rates caused by the citizenship question can be remediated by
18 in-person enumerators, correct?

19 A. To the extent that that is a restatement of what I just
20 said, yes.

21 Q. Dr. Abowd, the Census Bureau believes, based on
22 quantitative evidence, that households that do not respond to
23 the census because of the citizenship question are also likely
24 to refuse to cooperate with in-person enumerators during the
25 NRFU process, correct?

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1 A. Yes.

2 Q. And that quantitative evidence is the best evidence that
3 the Census Bureau has about whether people who refuse to
4 self-respond to the census because of the citizenship question
5 will cooperate with in-person enumerators, correct?

6 A. That's correct.

7 Q. That quantitative evidence is sufficient for the Census
8 Bureau to form a belief that individuals who refuse to
9 self-respond to the census because of a citizenship question
10 will also refuse to cooperate with in-person enumerators,
11 correct?

12 A. As long as you can qualify that with tend to, yes, make it
13 more likely.

14 Q. Thank you, Dr. Abowd.

15 The view of the Census Bureau is that enumeration
16 errors resulting from a decline in self-response may be
17 unavoidable regardless of how much money the Census Bureau
18 spends on field work efforts, correct?

19 A. That's correct.

20 Q. I want to talk about the next step in the NRFU process
21 after sending out enumerators.

22 After the first in-person enumerator visit, the next
23 step is to look at administrative records, correct?

24 A. That's correct. It just sort of happens in a flash. The
25 administrative records are cued and ready to go.

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1 Q. Great.

2 You testified that using administrative records to
3 enumerate people is consistent with the Census Bureau's
4 obligation to control burden on respondents and costs, correct?

5 A. Yes.

6 Q. And the source of those obligations or the sources of
7 those obligations are OMB SPD 2 and the Census Bureau's own
8 statistical quality standards, correct?

9 A. And Section 6 of Title 13, yes.

10 Q. By contrast, Dr. Abowd, the Secretary's choice of option D,
11 adding the citizenship question, and looking at administrative
12 records over option C, relying on administrative records
13 exclusively, that is not consistent with the Census Bureau's
14 obligation to control burden on respondents and costs, correct?

15 A. That's correct.

16 Q. Now, you think that using administrative records to
17 enumerate households to mitigate the effect of a citizenship
18 question on self-response rates, correct?

19 A. Yes.

20 Q. All things being equal, though, you would rather have a
21 self-response than have to go to the administrative records,
22 correct?

23 A. I'm sorry. I don't understand the question.

24 Q. From a household, during the conduct of the 2020 census,
25 you would rather get a self-response from that household than

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1 have to enumerate that household using administrative records?

2 A. You're back on administrative records as they are in the
3 NRFU program and not with respect to the citizenship question?

4 Q. Yes, Dr. Abowd. I'm sorry. I jumped topics.

5 A. It's OK. I just wanted to be clear.

6 If you would repeat the question now that I understand
7 the changed context, I would appreciate it.

8 Q. Yes, of course.

9 So not talking about the assembly of the CVAP table
10 and just talking about the 2020 enumeration, you would rather
11 have a self-response from a household than have to enumerate
12 that household using administrative records, correct?

13 A. Yes.

14 Q. Using administrative records to enumerate households in
15 this way is something that was not done on a wide scale in the
16 2010 census, correct?

17 A. That's correct.

18 Q. So you don't have evidence from a previous decennial census
19 as to how effective using administrative records on a wide
20 scale will be for enumerating non-responding households,
21 correct?

22 A. We have accumulated a large amount of evidence over the
23 course of this decade in the various experiments about how
24 effective this can be, including in the 2018 end-to-end test.

25 So as wide scale as those experiments on field tests

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1 can be interpreted, I would say we do have accumulated
2 evidence, yes.

3 Q. You don't have evidence from an actual deployment of a
4 decennial census as to how well it works in practice in a
5 decennial census environment for enumerating non-responding
6 households, correct?

7 A. We didn't use it in 2010. That's correct.

8 Q. And there is nothing in the administrative record
9 reflecting credible quantitative evidence that populations
10 that are likely to see an increase in nonresponse due to the
11 citizenship question can be successfully enumerated on a wide
12 scale using administrative records, correct?

13 A. I believe the administrative record actually shows that we
14 concluded the opposite.

15 Q. But, Dr. Abowd, there is nothing in the administrative
16 record indicating that --

17 A. Maybe I've misinterpreted my answer. I'll just say yes.

18 Q. Thank you, Dr. Abowd. I'm sorry.

19 Dr. Abowd, the same hard-to-count populations that you
20 expect to be affected by the citizenship question also tend to
21 have gaps in the administrative records that you plan to use
22 for enumerating populations in 2020, correct?

23 A. Yes.

24 Q. So the Census Bureau cannot link, for example, Hispanics
25 to administrative records at as high a rate as it can for

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1 non-Hispanic whites, correct?

2 A. That's correct.

3 Q. And undocumented immigrants are also less likely to be
4 found in the administrative records than people with legal
5 status, correct?

6 A. That's correct.

7 Q. And you would agree that the Census Bureau will have a more
8 difficult time enumerating undocumented immigrants through the
9 use of administrative records than it will for persons who have
10 legal status, correct?

11 A. That's correct.

12 Q. You agree that it is reasonable to think that
13 administrative records are more likely to exist for citizens
14 than for noncitizens, correct?

15 A. That's correct.

16 Q. And overall, the Census Bureau expects that enumeration
17 using administrative records will be less successful for
18 noncitizens than for citizens, correct?

19 A. Yes.

20 Q. And you can arrive -- I'm sorry, strike that question.

21 Dr. Abowd, the next step after using administrative
22 records and further in-person visits if you don't get an
23 enumeration is to use a proxy, like a neighbor or a landlord,
24 right?

25 A. That's correct.

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1 Q. That's been done in prior censuses, correct?

2 A. Yes, it has.

3 Q. And your opinion is that the use of proxies can mitigate
4 the effect of the citizenship question on nonresponse rates,
5 right?

6 A. On the count from self-response rates, yes.

7 Q. But, again, all things being equal, you would rather have
8 a self-response from the household than a proxy response for
9 purposes of the decennial enumeration, correct?

10 A. Yes.

11 Q. There is nothing in the administrative record reflecting
12 credible quantitative evidence indicating that households that
13 fail to respond to the census because of a citizenship question
14 can be enumerated through the use of proxies as successfully as
15 other non-responding households, correct?

16 A. Yes, I think that's correct.

17 Q. Census respondents, generally speaking, are less likely --
18 you believe are less likely to answer a citizenship question
19 for their neighbors than for themselves, correct?

20 A. Yes.

21 Q. And the Census Bureau agrees that proxy responses,
22 generally speaking, are likely to result in lower quality
23 enumeration data than self-responses, correct?

24 A. Yes.

25 Q. You also believe that a proxy response is more likely

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1 to result in the omission of a household member than a
2 self-response, correct?

3 A. I don't recall testifying to that.

4 Could you refresh my memory?

5 Q. Sure.

6 Lets bring up the transcript of your third deposition,
7 one that took place on October 5, 2018, specifically page 382,
8 line 22, to page 383, line 5.

9 I'll let you read that to yourself, and when you're
10 ready let me know.

11 A. I'm waiting for the videographer to highlight it.

12 (Pause)

13 Q. Have you read it?

14 A. I have read it, yes.

15 Q. Does reading that refresh your recollection?

16 A. Yes.

17 My recollection says that I believed that the answer
18 was yes, but I didn't have any specific knowledge then and I
19 don't now have any specific knowledge to answer your question.

20 Q. But you believe that the answer is the proxy responses
21 are more likely to result in the omission of a member of a
22 household than a self-response, right, Dr. Abowd?

23 A. What I said in the deposition was I believe that's correct,
24 yes.

25 Q. We discussed earlier that the omission of a household

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1 member is one of the reasons to which the Census Bureau
2 attributes the historic undercount of Hispanics, correct?

3 A. I believe we established that, yes.

4 Q. We discussed, I believe you discussed this with Judge
5 Furman, no current protocols to address those situations where
6 you get a response for a household in all respects complete
7 except for the omission of a member of that household, correct?

8 A. That's correct.

9 Q. There has been no testing on the impact of a citizenship
10 question of the willingness of people to give proxy responses,
11 correct?

12 A. That's correct.

13 Q. I want to look at page 162, Plaintiffs' Exhibit 162, the
14 Brown, et al. memo, page 12, figure three.

15 Dr. Abowd, figure three in the Brown memo depicts unit
16 nonresponse that is the failure to respond at all to the
17 American Community Survey from the years 2010 through 2016,
18 comparing census tracts with the lowest decile of housing units
19 containing a noncitizen to the census tracts in the highest
20 decile of housing units containing a noncitizen, correct?

21 A. Yes.

22 Q. For each year of the ACS depicted here, census tracts in
23 the highest decile of housing units with a noncitizen have a
24 lower response rate to the ACS than census tracts in the lowest
25 decile of housing units with a noncitizen, correct?

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1 A. That's correct.

2 Q. If you compare 2016 to 2010 for both groups, unit
3 nonresponse to the ACS has declined, correct?

4 A. That's correct.

5 Q. Before we compare the two groups, you would agree that
6 this analysis is consistent with the notion that citizenship
7 questions have become more sensitive on surveys since the year
8 2010, correct?

9 A. Yes, it is.

10 Q. Now, between 2010 and 2016, response rates to the ACS
11 have fallen more in census tracts in the highest decile of
12 households with a noncitizen as compared to the households in
13 the lowest decile of having a noncitizen, correct?

14 A. That's correct.

15 Q. I want to ask you now about a separate analysis of the ACS
16 and specifically the ACS NRFU efforts.

17 The acronym for that is CAPI, correct, C-A-P-I?

18 A. That's correct.

19 Q. And that stands for computer-assisted personal interview,
20 right?

21 A. Yes, it does.

22 Q. CAPI, as it is used in the documents in AR, that refers to
23 the handheld computer nonresponse followup efforts for the
24 American Community Survey, right?

25 A. That's correct.

IBFsNYS1

Abowd - Redirect

1 Q. Basically what you do is, you send a census employee out to
2 a household that didn't respond to the ACS carrying a handheld
3 personal computer, right?

4 A. That's right.

5 Q. I want to bring up Plaintiffs' Exhibit 137.

6 THE COURT: While you're doing that, can I just
7 clarify, the figure that we had before that tracked the highest
8 census tracts with the highest number of households --

9 THE WITNESS: Yes. It's back on the screen, if you
10 want.

11 THE COURT: There you go. Thank you.

12 THE WITNESS: OK.

13 THE COURT: -- the top and bottom deciles, the tract
14 track level share of noncitizens, is that a different way of
15 saying, essentially, population density within a census tract?

16 THE WITNESS: A specific population density, yes.

17 THE COURT: Household?

18 THE WITNESS: With a citizen -- I'm sorry, with a
19 noncitizen.

20 So the blue line is, if you take all the tracts that
21 we have, we have data for all tracts in the survey, and you
22 compute the percentage of households that have a noncitizen.
23 That percentage can go from zero to 100. The bottom decile are
24 the tracts where the fewest households have noncitizens and the
25 top decile are the tracts where the most households have

IBFsNYS1

Abowd - Redirect

1 noncitizens.

2 THE COURT: Thank you.

3 THE WITNESS: You're welcome.

4 BY MR. HO:

5 Q. Sir, just to close the loop on that graph, Dr. Abowd, that
6 we were talking about from the Brown memo, in the census tracts
7 where there is a higher percentage of households with a
8 noncitizen, response rates to the ACS have fallen more than in
9 the census tracts with a lower percentage of noncitizens,
10 correct?

11 A. With the lowest percentage, correct.

12 Q. Thank you.

13 Now, lets talk about Plaintiffs' Exhibit 137.

14 MR. HO: For the record, your Honor, this has been
15 admitted into the trial record and is also in the
16 administrative record.

17 Q. Dr. Abowd, these tables show an analysis of census tracts
18 broken into deciles from the census tracts with the lowest
19 percentage of households with a noncitizen to the households
20 with the highest percentage -- to the census tracts with the
21 highest percentage of households with a noncitizen, correct?

22 A. Yes, that is correct.

23 I just want to say that because this particular
24 analysis didn't enter into the papers that I was supervising,
25 I'm somewhat less familiar with it. But that qualified, I'll

IBFsNYS1

Abowd - Redirect

1 continue to answer your questions, of course.

2 Q. Thank you, Dr. Abowd.

3 This table shows, in the third table, the CAPI
4 response rate. This is the ACS NRFU success rate by year for
5 census tracts broken down into deciles from those with the
6 least percentage of households with a noncitizen to those with
7 the highest percentage of households with a noncitizen,
8 correct?

9 A. Yes, that's correct.

10 Q. What the Census Bureau found was that nonresponse followup
11 success on the ACS has declined year over year essentially in
12 each of these deciles, correct?

13 A. Yeah. I think there are some uplifts in 2011, but I'll
14 give you the trend.

15 Q. The trend from 2010 to 2016 is declining ACS success rates
16 in NRFU, correct?

17 A. Yes.

18 Q. And this is another example of an analysis that shows that
19 a citizenship question has become more sensitive over the last
20 few years, correct?

21 A. To the extent that the ACS includes a citizenship question,
22 this analysis is consistent with that. It doesn't show it.

23 Q. Now, specifically, as a census tract has a higher
24 percentage of households with noncitizens, this table shows
25 that, generally speaking, ACS nonresponse followup in that

IBFsNYS1

Abowd - Redirect

1 census tract is less successful, correct?

2 A. Yes.

3 Q. And the Census Bureau believes that people who live in
4 census tracts with higher percentages of noncitizens will be
5 less likely to give proxy responses than people who live in
6 other areas, correct?

7 A. I think that's a reasonable characterization of the
8 sentence from the working paper that you'll show me if I don't
9 say yes. So yes.

10 Q. Just so we're clear, the census tract analysis that we
11 talked about earlier about ACS response rates and this census
12 tract analysis, about ACS NRFU response rates, based on those
13 analyses, the Census Bureau can form a belief that it is likely
14 that in areas where there are higher percentages of noncitizen
15 households, you're less likely to get a proxy response in the
16 decennial enumeration, correct?

17 A. Yes.

18 Q. And you can arrive at that belief without direct
19 quantitative evidence about the effect on citizenship questions
20 on proxy response rates, correct?

21 A. You can arrive at that belief by assembling a variety of
22 statistical and quantitative evidence that suggest that it is
23 correct.

24 Q. The Census Bureau hasn't done anything specifically to
25 address the issue of lower rates of ACS nonresponse followup

IBFsNYS1

Abowd - Redirect

1 success in areas that have higher percentages of noncitizens,
2 correct?

3 A. I'm not sure I know the answer to that question. I believe
4 that you're correct.

5 Q. So lets talk about the last step in NRFU after proxies,
6 imputation.

7 Dr. Abowd, hard-to-count populations are going to be
8 imputed at a greater rate in the decennial census than the
9 general population overall, correct?

10 A. More likely to be imputed, yes.

11 Q. Now, your opinion in this case is that imputation may
12 mitigate the effect of the citizenship question and the
13 concomitant reduction in self-response rates caused by the
14 question, correct?

15 A. Yes.

16 Q. But, generally speaking, again, you would rather have a
17 self-response from a household than have to impute that
18 household, correct?

19 A. Yes.

20 Q. The precise methods that the Census Bureau will use for
21 imputation in the 2020 census have not yet been publicly
22 disclosed, correct?

23 A. That's correct. That's correct.

24 Q. You haven't set the imputation algorithms for the 2020
25 census yet, correct?

IBFsNYS1

Abowd - Redirect

1 A. The test ones are being developed and programmed as we
2 speak.

3 Q. But they haven't been locked in, as you would say, right?

4 A. They have not been locked in.

5 Q. There is nothing in the administrative record reflecting
6 credible quantitative evidence that any drop in nonresponse
7 rates caused by the citizenship question specifically will be
8 remediated by the 2020 census imputation algorithms, correct?

9 A. The quantitative evidence in the administrative record is
10 consistent with the remediating with respect to the count.

11 Q. Dr. Abowd, you would characterize whole person imputations
12 as being not very accurate, correct?

13 A. I think I explained that yesterday in the variability, not
14 the bias sense, yes.

15 Q. The way the imputation works, basically, is you take
16 households that have been enumerated and you use information
17 from those households to impute information about nearby
18 households that have not been enumerated, correct?

19 A. That's basically correct, yes.

20 Q. Now, you agree that if nonresponse correlates to a
21 particular characteristic, then attempting to use a model that
22 is based on the responding households to impute information
23 about the non-responding households, that that could result in
24 bias, correct?

25 A. I think you're asking me if using an ignorable missing data

IBFsNYS1

Abowd - Redirect

1 model when you have evidence that the missing data aren't
2 ignorable can bias the ignorable missing data model, and the
3 answer is yes.

4 Q. Dr. Abowd, nonresponse, we have established, is highly
5 correlated with citizenship, correct?

6 A. The bulk of the evidence suggests that the citizenship
7 question is likely to be responsible for the decline in
8 self-response.

9 Q. Lets bring up the Brown memo, Plaintiffs' Exhibit 162,
10 page 44. I want to look at the first paragraph, the last two
11 sentences here.

12 The last two sentences read: The accuracy of this
13 imputation system is unknown at this time. As discussed, the
14 imputation will be challenging due to the fact that nonresponse
15 is highly correlated with citizenship.

16 I read that correctly, right?

17 A. Yes, you did.

18 Q. The Census Bureau agrees with that conclusion, correct?

19 A. Yes, we do.

20 Q. So the pool of households that do self-respond to the
21 census, you would expect that pool to be disproportionately
22 comprised of all citizen households, correct?

23 A. Yeah. I think the math works out that way, yes.

24 Q. To be clear, you're going to do imputation based on those
25 self-responding, those enumerated households, correct?

IBFsNYS1

Abowd - Redirect

1 A. Yes.

2 Q. Dr. Abowd, overall, the Census Bureau's enumeration
3 procedures --

4 A. Excuse me, Mr. Ho. I think I gave an inconsistent answer.
5 I would like to modify my answer to the last question.

6 Q. Please.

7 A. I think I said several times that we have charged an expert
8 panel within the Census Bureau to examine the processing of the
9 questionnaire, including the citizenship questionnaire.

10 It is within their scope to modify the imputation
11 algorithm, if they can figure out a way to do so successfully,
12 but I will say that no such modification has been proposed to
13 date.

14 Q. Thank you, Dr. Abowd.

15 I just want to back up for a minute.

16 Overall, the Census Bureau's various enumeration
17 procedures, they are more likely to miss Hispanics as compared
18 to non-Hispanic whites, correct?

19 A. I think we have gone through the evidence on that. That is
20 my recollection, yes.

21 Q. The Census Bureau's enumeration procedures overall are more
22 likely to miss people living in areas that --

23 A. Excuse me, Mr. Ho.

24 The previous question was about enumeration procedures
25 or imputation procedures?

IBFsNYS1

Abowd - Redirect

1 I heard imputation. Did you say enumeration?

2 Q. Well, lets do both. I think I said enumeration, but why
3 don't we ask the question you thought I was.

4 So the record is clear, lets start with imputation.

5 The Census Bureau's imputation procedures are more
6 likely to miss Hispanics as compared to non-Hispanic whites,
7 correct?

8 A. So that is where I wasn't sure we have seen anything on
9 that subject. If the question was enumeration, the answer is
10 yes.

11 Q. Just so the record is clear, overall, the Census Bureau's
12 enumeration procedures, they are more likely to miss Hispanics
13 as compared to non-Hispanic whites, correct?

14 A. That's correct.

15 Q. And overall, the Census Bureau's enumeration procedures are
16 more likely to miss people who live in areas where there is a
17 higher percentage of bilingual households as compared to the
18 U.S. population as a whole, correct?

19 A. I don't remember looking at that one recently, but I assume
20 you'll remind me.

21 Q. Is the answer yes?

22 A. Could you show me the table you're referring to?

23 Q. Why don't I show you your deposition transcript from your
24 second deposition, August 29, 2018. I don't think we've talked
25 about this one yet.

IBFsNYS1

Abowd - Redirect

1 I have to ask you, you were under oath that day,
2 right, Dr. Abowd?

3 A. Yes, I was.

4 Q. And you answered truthfully that day, right?

5 A. Yes, I did.

6 Q. We'll bring that up on the screen. It is page 261, lines
7 11 to 16.

8 Why don't you go ahead and read that and let me know
9 when you're ready.

10 (Pause)

11 A. If the videographer could take down the specific lines, I
12 would like to read the context, please.

13 May I see the previous page?

14 Mr. Ho, I am just trying to establish what table we
15 were talking about.

16 Q. Take your time.

17 (Pause)

18 A. May I see page 259?

19 I don't know how far back I'm going to go to figure
20 out the providence of the number.

21 THE WITNESS: Your Honor, I'm sure this is going to
22 refresh my memory. I still have not been able to establish
23 what specific study I was being asked about at this particular
24 moment in that deposition.

25 A. Can you go back one more page?

IBFsNYS1

Abowd - Redirect

1 It appears we were talking about table nine in memo
2 G-1.

3 Q. The Mule memo, right?

4 A. Dr. Mule was the author of many of those memos, but this
5 may be the one that is most frequently cited.

6 May I please see table nine?

7 Q. Sure. I believe it is Plaintiffs' Exhibit 267.

8 A. I don't see a row for bilingual households.

9 The reason why I haven't answered your question yet is
10 because I'm sure that we discussed something that had evidence
11 about bilingual households in it. I would just like to see
12 what that was before I confirm under oath what I said about it,
13 if it is not this table.

14 Q. OK. So looking at this table from the Mule memo and those
15 pages from your deposition transcript, neither of those things
16 refresh your recollection, Dr. Abowd?

17 A. It is clear that we were discussing a table that had
18 bilingual households in it, and I haven't yet understood how
19 we got there from table nine, because it doesn't contain
20 bilingual households.

21 As soon as I get the context, I'm happy to -- I'll
22 probably have to ask you to repeat the question, but I'm happy
23 to either confirm what I said in deposition or explain why it
24 is consistent with a different answer to the question you're
25 asking me now.

IBFsNYS1

Abowd - Redirect

1 Q. That's fine. We can come back to this.

2 A. Thank you.

3 Q. Why don't we move on, Dr. Abowd.

4 You agree that it is highly unlikely that the Census
5 Bureau can eliminate the effect of adding a citizenship
6 question through the Integrated Partnership and Communications
7 Program, correct?

8 A. Eliminate as opposed to mitigate?

9 Q. Correct.

10 A. It is highly unlikely it would eliminate it, yes.

11 Q. You also agree it is highly unlikely that the Census Bureau
12 can eliminate the differential undercount through NRFU,
13 correct?

14 A. Yes, that's correct.

15 Q. You also agree that it is highly unlikely that the Census
16 Bureau can adjust NRFU to eliminate the effects of adding the
17 citizenship question on response rates, correct?

18 A. I'm not sure the context in which you're asking that
19 modify it specifically to address the issues arising from the
20 citizenship question.

21 Is that the context you're asking me?

22 Q. Yes.

23 A. Yes. We don't plan to modify the NRFU operation to address
24 the citizenship question. We plan to modify the communication
25 campaign and to use the NRFU operation as vigilantly as we can.

IBFsNYS1

Abowd - Redirect

1 Q. Thank you, Dr. Abowd.

2 Dr. Abowd, a question about Secretary Ross' decision
3 memo.

4 Is it your understanding that Secretary Ross justified
5 adding the citizenship question to the 2020 census based, in
6 part, on what he characterized as the absence of definitive
7 evidence that the citizenship question will affect response
8 rates?

9 A. As I think I have consistently testified, I don't wish to
10 speak for the Secretary in any capacity. I'm willing, sentence
11 by sentence, to say what I understand that sentence to mean,
12 but as to his decision-making process and how he weighed the
13 evidence, I don't have any opinion.

14 Q. I understand that you don't wish to talk about what you
15 think the Secretary intended.

16 But is your understanding of the justification laid
17 out in the memo that Secretary Ross stated that a citizenship
18 question can be added to the 2020 census because there is, in
19 his view, an absence of evidence that the question will, in
20 fact, reduce response rates?

21 MR. EHRLICH: Objection.

22 THE COURT: Overruled.

23 It is just asking for your understanding, Dr. Abowd,
24 not what the secretary actually intended. We know you don't
25 know that.

IBFsNYS1

Abowd - Redirect

1 A. Would you mind repeating the question?

2 Q. Sure.

3 Is it your understanding of the justification laid out
4 in Secretary Ross' decision memo, that a citizenship question
5 can be added to the 2020 census because there is, in Secretary
6 Ross' view, an absence of evidence that the question will, in
7 fact, reduce response rates?

8 A. Yes.

9 Q. Dr. Abowd, that's not a statistical quality standard for
10 the Census Bureau to add questions simply because there is an
11 absence of evidence that the question will affect response
12 rates, correct?

13 A. Our standards require that we demonstrate that it is
14 necessary to ask the question in order to balance the benefit
15 and cost of collecting the information.

16 Q. So the answer to my question is no?

17 A. I think so, yes.

18 Q. Dr. Abowd, I want to ask you briefly about Defendants'
19 Demonstrative 21, DDX 21.

20 This flow chart depicts how the Census Bureau might
21 expect to enumerate households in a scenario where there is a
22 citizenship question on the 2020 census, correct?

23 A. Yes.

24 Q. The households that you start with for enumeration, those
25 are all households that are in the master address file, or MAF,

IBFsNYS1

Abowd - Redirect

1 correct?

2 A. The redline at the far left of the graph is the MAF
3 addresses that are in the MAF at the start of peak operations.

4 Q. The MAF does not have all households in the United States
5 in it, correct?

6 A. Well, at the moment, we don't know the answer to that
7 question, but at the point at which we start peak operations,
8 it has every address that we know about either through the
9 updating or through the address canvassing that precedes the
10 peak operations, and addresses can be added over the course
11 of the self-response and NRFU. But I think it would be OK to
12 concede that it might be incomplete even at the end of the
13 census. That is the best effort.

14 Q. Not every person living in the United States lives at an
15 address in the MAF, correct?

16 A. Well, every person enumerated in a type of enumeration area
17 that uses the list has to live in an address enumerated in the
18 MAF, and the remote Alaska is the exception to that.

19 Q. But my question wasn't about people who were enumerated in
20 the census, Dr. Abowd. It was actually about people actually
21 not enumerated in the census.

22 There are people living in the United States that are
23 not living at an address in the MAF, right?

24 A. So they would be in the group quarters operations, which we
25 haven't discussed in this litigation.

IBFsNYS1

Abowd - Redirect

1 Q. Well, I'm not even talking about the group quarters.

2 I'm just saying, there are people living somewhere in
3 this country that aren't in the MAF, right?

4 A. So what I am trying to stress is that there are operations
5 designed to find them, and then they are actually associated
6 with an address in the MAF, even though they might not be
7 living there in your interpretation.

8 Q. But you don't find everyone through those operations to
9 update the MAF, right, Dr. Abowd?

10 A. Those are difficult operations, and they have evolved over
11 the course of multiple censuses. I think it would be safe to
12 say that they might miss some people, yes.

13 Q. OK.

14 A. They might double count some people as well.

15 Q. If a household is not in the MAF and is not captured in
16 that process that you described of adjusting the MAF, that
17 household never enters this flow chart, correct?

18 A. If an address is not in the MAF and is not inserted in the
19 MAF through either the NRFU or housing units or the group
20 quarters collection, group quarters operations, then when the
21 census terminates, no population can be associated with that
22 address.

23 Q. Now, this is a scenario, as you have set forth in DDX 21
24 and described in your testimony, it assumes that people who
25 don't respond to the citizenship question will be enumerated

IBFsNYS1

Abowd - Redirect

1 through each of the NRFU steps in almost the same proportion as
2 other non-respondents to the census, correct?

3 A. That is the base assumption here that the extra NRFU
4 workload will be distributed through NRFU, like an average
5 address in the NRFU workload.

6 Q. Dr. Abowd, there is no quantitative evidence which you are
7 aware that households that don't respond to the census because
8 of the citizenship question will be enumerated by the different
9 NRFU steps at roughly the same rate as other non-responding
10 households, correct?

11 A. That's correct.

12 Q. I think we were getting at this earlier, why, Dr. Abowd,
13 you would agree with me that in every census, there is some
14 households that the census fails to enumerate, right?

15 A. We call those coverage errors, yes.

16 Q. Lets talk about the coverage error -- the coverage, the
17 post-enumeration coverage memo, Plaintiffs' Exhibit 267.

18 We sometimes call this the Mule memo, right,
19 Dr. Abowd?

20 A. Yes, there it is. Yes, it is.

21 For the record, it is census coverage measurement
22 memorandum series 2010-G-01. Dr. Mule is the author.

23 Q. Thanks, Dr. Abowd.

24 For the record, this has been admitted into the trial
25 record.

IBFsNYS1

Abowd - Redirect

1 Can we turn to page 17 of the memo, which is page 20
2 of the PDF.

3 This is table nine, which we were looking at earlier,
4 entitled Components of Census Coverage by Race and Hispanic
5 Origin, correct?

6 A. Yes.

7 Q. The far right-hand column in this table is labeled
8 omissions.

9 Do you see that?

10 A. Yes.

11 Q. And the second to far right column is labeled percent
12 undercount, right?

13 A. That's correct.

14 Q. Those are different numbers. Omissions is not equal to
15 percent undercount, right?

16 A. Yes, that's right.

17 Q. OK. Overall, the Census Bureau estimates that it omitted
18 5.3 percent of the population in the 2010 census, correct?

19 A. Yes, that's correct.

20 Q. But for total population, the Census Bureau estimates that
21 you had an overcount statistically inconsistent, but the point
22 estimate is an overcount, right?

23 A. That's correct.

24 Q. Now, I want to talk about some of the individual groups by
25 race and ethnicity, starting with non-Hispanic whites alone.

IBFsNYS1

Abowd - Redirect

1 The Census Bureau estimates that 3.8 percent of people
2 who were non-Hispanic white alone were omitted from the 2010
3 census, correct?

4 A. That's correct.

5 Q. You estimate that you had an overcount of this population
6 by .83 percent, and that was statistically significant,
7 correct?

8 A. Correct.

9 Q. Now, if we look at people who are identified as black in
10 the census, the census estimates that had a higher omission
11 rate, 9.3 percent of blacks, in the 2010 census, correct?

12 A. Yes.

13 Q. And the Census Bureau estimates that blacks were
14 undercounted in the 2010 census by 2.06 percent, correct?

15 A. That's correct.

16 Q. And so that was a statistically significant undercount of
17 blacks in the 2010 census, correct?

18 A. Yes.

19 Q. Now, I want to look at Hispanics.

20 The Census Bureau estimates that you had omitted
21 7.7 percent of Hispanics in the 2010 census, correct?

22 A. Yes.

23 Q. And you had an undercount of Hispanics in the 2010 census
24 by 1.54 percent, correct?

25 A. Yes.

IBFsNYS1

Abowd - Redirect

1 Q. And that is statistically significant, correct?

2 A. Yes.

3 Q. So if we summarize these three groups, you had omissions in
4 all three of these groups, right?

5 A. Yes.

6 Q. But the racial or ethnic group with the highest percentage
7 of omissions amongst these three groups, blacks, also had the
8 highest undercount rate, correct?

9 A. Yes.

10 Q. And the group with the second highest omission rate from
11 these three groups had the second highest undercount rate,
12 right?

13 A. Yes.

14 Q. Now, the 2010 census included NRFU efforts, right?

15 A. Yes, it did.

16 Q. And that included using in-person enumerators, right?

17 A. Yes.

18 Q. It included using proxy responses, right?

19 A. Yes.

20 Q. It included using imputation, right?

21 A. Yes.

22 Q. And it included using administrative records on an
23 experimental but not wide-scale basis, correct?

24 A. Experimental. I don't think they were used in any census
25 tabulation.

IBFsNYS1

Abowd - Redirect

1 Q. After all of the NRFU efforts in the 2010 census, there was
2 no net undercount in terms of total population at the national
3 level, right?

4 A. That's correct.

5 Q. But despite those NRFU --

6 A. Estimated net undercount.

7 Q. Thank you.

8 Despite those NRFU efforts, you did still have net
9 undercounts in certain states and localities, right, Dr. Abowd?

10 A. I don't believe any of those are statistically significant.

11 Q. But you had an estimated, a point estimate of a net
12 undercount in some states and localities, correct?

13 A. We published point estimates for states and larger
14 localities that included both point estimates and margins of
15 error, with the usual disclaimer that the vast majority of
16 these are not statistically significant.

17 Q. Dr. Abowd, I would just like to bring up your third
18 deposition in this case, October 5, 2018.

19 I would like to look at page 407, lines three through
20 eight.

21 "Q. And while there was overall across the nation no net
22 undercount, there were also in certain states and localities
23 net undercounts, correct?

24 "A. We did produce estimates that suggest that, yes."

25 Q. Dr. Abowd, was that the question posed to you that day and

IBFsNYS1

Abowd - Redirect

1 was that your answer?

2 A. Yes.

3 Q. Dr. Abowd, after the NRFU estimates in the 2010 census, you
4 had no net total population undercount, but you did have
5 differential undercounts by race and ethnicity, correct?

6 A. Yes.

7 Q. So to be clear, you had no net undercount, despite the
8 undercount of blacks and Hispanics in 2010, essentially because
9 you overcounted non-Hispanic whites, correct?

10 A. These are summary data, so all the words were right except
11 for "because." We overcounted whites and we undercounted
12 Hispanics, and the net was essentially zero.

13 Q. If you had the same net undercount of blacks and Hispanics
14 in 2010, but you didn't have an overcount of whites, that
15 likely would have translated into a net overall undercount,
16 correct?

17 A. Yes.

18 Q. So the reason why there is no net overall undercount is the
19 undercount of blacks and Hispanics in 2010 was washed out by an
20 overcount of whites, correct?

21 A. I would have said offset by, but yes.

22 Q. Now, Dr. Abowd, you defined the 2010 census as a success,
23 right?

24 A. I was using a consensus opinion, but I'll say yes on my own
25 too.

IBFsNYS1

Abowd - Redirect

1 Q. Under that definition of success, if the 2020 census had a
2 larger differential net undercount by race and ethnicity due to
3 the citizenship question, but no overall total population net
4 undercount, that would satisfy that definition of success,
5 correct?

6 A. The definition of success for the 2010 census was an
7 undefined primitive in these questions.

8 That is an assessment based on all of the evaluations,
9 not just coverage evaluations. And the coverage evaluations
10 acknowledge, at least I think I have acknowledged, that while
11 it was successful, it was not perfect.

12 Q. Is the answer to my question yes?

13 A. I'm not sure.

14 I'm not sure what criteria we would use to make an
15 overall assessment of the 2020 census given the unusual
16 circumstances that is likely we are going to have to conduct it
17 in.

18 I think it is reasonable to ask the Census Bureau, are
19 you going to state some criteria that might indicate that the
20 presence of the citizenship question could have harmed the
21 count. I think it would be reasonable to ask us to evaluate
22 that and, indeed, we expect to evaluate that.

23 I think in light of those evaluations, we would be
24 willing to make a credible scientific statement about whether
25 the census was harmed by the presence of the citizenship

IBFsNYS1

Abowd - Redirect

1 question.

2 Q. Dr. Abowd, you want to show you a different document now.
3 This is Plaintiffs' Exhibit 684.

4 For the record, it is a statement from a Commerce
5 Department spokesperson, which was issued on November 13, 2018,
6 I think after you testified that day.

7 I want to look at the second paragraph in this
8 statement, which reads: Under authority granted to the
9 Secretary of Commerce, Ross determined that the addition of the
10 question, combined with administrative records, would provide
11 the best results to fulfill DOJ's request. While his decision
12 was ultimately different from Dr. Abowd's representation, the
13 Secretary reached his decision, in part, due to the Census
14 Bureau's assurances that any drop in self-response rates can
15 and will be remediate by nonresponse followup operations.

16 Do you see that, Dr. Abowd?

17 A. Yes, I do.

18 Q. Dr. Abowd, Secretary Ross' decision memo does not state
19 that he, in fact, relied on assurances from the Census Bureau
20 that any drop in self-response rates can and will be remediate
21 by nonresponse followup operations, does it?

22 A. I don't recall. I don't recall.

23 Q. You don't recall Secretary Ross, in his decision memo,
24 making any reference whatsoever to assurances from the Census
25 Bureau that any drop in self-response rates can and will be

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Abowd - Redirect

1 remediated by nonresponse followup operations, correct?

2 A. I don't recall any mention of it, that's correct.

3 Q. Dr. Abowd, there were no documents in the administrative
4 record in this case indicating that the Census Bureau, in fact,
5 assured Secretary Ross that any drop in self-response rates can
6 and will be remediate by nonresponse followup operations,
7 correct?

8 A. I'm not aware of any such documents.

9 Q. Dr. Abowd, there are no documents in the administrative
10 record indicating that during your one meeting with Secretary
11 Ross, before he made the decision to include the citizenship
12 question, that the Census Bureau gave him assurances that,
13 quote, any drop in self-response rates can and will be
14 remediated by nonresponse followup operations, correct?

15 A. None that I recall.

16 Q. Dr. Abowd, there are no documents in the administrative
17 record in this case indicating that Secretary Ross reached his
18 decision, in part, due to assurances from the Census Bureau
19 that any drop in self-response rates can and will be remediated
20 by nonresponse followup operations, correct?

21 A. No documents that I'm aware of.

22 (Continued on next page)

23

24

25

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Abowd - Redirect

1 BY MR. HO:

2 Q. And Dr. Abowd --

3 MR. HO: I'm sorry. I'll withdraw that question.

4 Your Honor, at this time plaintiffs offer Plaintiffs'
5 Exhibit 684 into evidence as an opposing party statement.

6 THE COURT: Any objection?

7 MR. EHRLICH: No objection, your Honor.

8 THE COURT: Admitted.

9 (Plaintiffs' Exhibit 684 received in evidence)

10 BY MR. HO:

11 Q. Dr. Abowd, I want to show you now what's been marked as
12 plaintiffs' exhibit --

13 THE COURT: Before you move on, can I ask you a
14 question, Dr. Abowd?

15 In the same sentence that we were looking at a moment
16 ago, in the second paragraph, is it your judgment that any drop
17 in self-response rates can and will be remediated by
18 nonresponse follow-up operations?

19 THE WITNESS: It is my opinion that the nonresponse
20 follow-up operations will produce a relatively complete
21 enumeration.

22 THE COURT: Will or can?

23 THE WITNESS: Sorry. Can.

24 THE COURT: All right.

25 Mr. Ho.

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Abowd - Redirect

1 MR. HO: Thank you, your Honor.

2 Q. At this time, we'd like to show you, Dr. Abowd, Plaintiffs'
3 Exhibit 687, which is a video of an interview that Sec'y Ross
4 gave -- I apologize -- 688, two days ago, while you were
5 testifying.

6 (Video played)

7 MR. HO: The audio's terrific for this.

8 Could we try to start that from the beginning?

9 (Video played)

10 BY MR. HO:

11 Q. Dr. Abowd, had you seen that interview prior to now?

12 A. I have not.

13 Q. Had you read those comments prior to now?

14 A. Yes, I have.

15 Q. Dr. Abowd, what's your understanding of "in the air" when
16 Sec'y Ross says that questions about the census including the
17 citizenship question were in the air in the early days of the
18 administration?

19 A. I don't understand the question.

20 Q. Well, Sec'y Ross said, during the interview, that questions
21 about the census, including citizenship, were in the air in the
22 early days of the administration. Do you remember seeing that
23 a moment ago?

24 A. Yes, I do.

25 Q. What's your understanding of what that meant?

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Abowd - Redirect

1 A. I would take by that that there had been discussions in the
2 political stratosphere about it.

3 Q. What do you mean by political stratosphere?

4 A. The media, the Congress, the politicoes that occupy inside
5 the Beltway, general political discussion.

6 I don't know what the secretary meant, but if you're asking
7 about what I understood, that's what I understood; there had
8 been talk about it.

9 Q. At the time that you had your meeting with Sec'y Ross on
10 February 12, 2018, to talk about the citizenship question, you
11 were not aware of the fact that the citizenship question had
12 been in the air in the early days of the administration,
13 correct?

14 A. That's correct.

15 Q. It was not in the air at the Census Bureau, so to speak,
16 correct?

17 A. Not the air I was breathing.

18 Q. Dr. Abowd, just a few more questions.

19 THE COURT: Are you offering that into evidence?

20 MR. HO: Yes, your Honor. I apologize. Plaintiffs
21 offer Plaintiffs' Exhibit 687 into evidence.

22 THE COURT: I think it's 688.

23 MR. HO: 688. Excuse me.

24 THE COURT: Any objection?

25 MR. EHRLICH: No objection, your Honor.

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Abowd - Redirect

1 THE COURT: Admitted.

2 (Plaintiffs' Exhibit 688 received in evidence)

3 BY MR. HO:

4 Q. Dr. Abowd, during your testimony with Mr. Ehrlich, you
5 didn't change your view that in comparison to the Census
6 Bureau's recommendation of alternative C -- that is, relying
7 exclusively on administrative records to develop CVAP data --
8 alternative D, the secretary's chosen option of using a
9 citizenship question in combination with administrative
10 records, will result in worse quality data for the 2020 census
11 overall, correct?

12 A. I did not change my testimony. That's correct.

13 Q. And you didn't change your testimony that alternative D,
14 adding a citizenship question, will result in worse quality
15 CVAP data specifically, correct?

16 A. I did not change my testimony, correct.

17 Q. And you didn't change your testimony that alternative D,
18 which includes adding the citizenship question, will be more
19 expensive than alternative C, correct?

20 A. I did not change my testimony, correct.

21 Q. OK. I just want to make sure the record's clear here. In
22 comparison to alternative C, adding the citizenship question
23 under the secretary's chosen alternative, alternative D, that's
24 worse for the Census Bureau's goal of conducting an accurate
25 2020 census, right?

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Abowd - Redirect

1 MR. EHRLICH: Objection.

2 THE COURT: Overruled.

3 A. Correct.

4 Q. And the secretary's choice is worse for the Department of
5 Justice's goal of having accurate block-level CVAP data,
6 correct?

7 A. Correct.

8 Q. But the secretary's choice is better for the goal of
9 creating a climate of fear in immigrant communities, correct?

10 MR. EHRLICH: Objection.

11 THE COURT: Sustained.

12 MR. HO: I don't have any other questions, Dr. Abowd.

13 THE COURT: All right. Since it's 11:00, why don't we
14 take our morning break there, and then we'll pick up with
15 Ms. Goldstein.

16 See you in ten minutes. Thanks.

17 (Recess)

18 THE COURT: You may be seated.

19 Dr. Abowd, you're still under oath, as you know.

20 Ms. Goldstein, you may proceed.

21 MS. GOLDSTEIN: Thank you, your Honor.

22 FURTHER REDIRECT EXAMINATION

23 BY MS. GOLDSTEIN:

24 Q. Dr. Abowd, we've met a number of times before. My name is
25 Elena Goldstein, and I'm from the New York Office of the

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Abowd - Redirect

1 Attorney General.

2 Given the amount of time you've spent on the stand, I think
3 there is very little to continue to ask you, so I will be
4 brief, but Dr. Abowd, you are familiar with plaintiffs' expert,
5 the former U.S. chief statistician, Dr. Habermann, correct?

6 A. Yes.

7 Q. And you are familiar with his professional qualifications?

8 A. Yes.

9 Q. And you have no question about his qualifications to
10 provide the opinion that he provided in this case, correct?

11 A. That's correct.

12 Q. And you are also familiar with Dr. Joseph Salvo, correct?

13 A. Yes.

14 Q. And you are familiar with Dr. Salvo's professional
15 qualifications?

16 A. Yes.

17 Q. And you have no doubt as to his qualifications to provide
18 the opinions that he provided in court this week, correct?

19 A. That's correct.

20 Q. Now, you reviewed Dr. Salvo's expert report prior to your
21 deposition, is that right?

22 A. Yes, that's correct.

23 Q. And you didn't have very many criticisms of Dr. Salvo's
24 work in that report, correct?

25 A. I don't recall how many I had, but I don't think they were

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Abowd - Redirect

1 numerous.

2 MS. GOLDSTEIN: Can we please bring up Dr. Abowd's
3 expert deposition from the 12th, page 115.

4 It's OK. Let's move on.

5 Q. You testified regarding the decennial census that you will
6 use administrative records to determine the occupancy status of
7 housing units, is that right?

8 A. There is a process for using administrative records to, to
9 do vacant delete, which -- yes.

10 Q. And you testified about how that process was tested in 2016
11 in, among other places, Los Angeles, right?

12 A. That's correct.

13 Q. And with respect to that Los Angeles testing, the Census
14 Bureau did an analysis as to how many of the units deemed
15 vacant by administrative records were actually occupied when a
16 field evaluator went to visit, correct?

17 A. Yes.

18 Q. And that analysis reflected, you testified, about a 17
19 percent to a 20 percent error rate, right?

20 A. I believe that's correct, yes.

21 Q. And --

22 A. That was characterizing a larger group of analyses, but I
23 think that's also right for those too.

24 Q. So that means that roughly 17 to 20 percent of the units
25 deemed vacant by the administrative records were, in fact,

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Abowd - Redirect

1 occupied, right?

2 A. Yes, that's what that means.

3 Q. And you testified that following those test results, the
4 Census Bureau made some changes to how it's going to use
5 administrative records in that process; yes?

6 A. That's correct.

7 Q. You added another records check?

8 A. That's correct.

9 Q. And there's going to be a direct visit, is that right?

10 A. Direct visit will be announced in the next operational
11 plan, yes.

12 Q. Now, in the Los Angeles and the other tests that you
13 mentioned, you did an analysis to come up with that 17 to 20
14 percent error rate, correct?

15 A. Yes.

16 Q. And since those modifications of that administrative record
17 vacant-delete check, the Census Bureau has not done an analysis
18 to see how accurate those modified procedures are, correct?

19 A. Analysis is underway for the first modification in the
20 end-to-end test, but the decision's already been made to add
21 the direct visit.

22 Q. But we don't know how accurate those procedures will be
23 with the modifications at this point, correct?

24 A. I'm not sure I understand the question. We can't test the
25 procedure that we -- that we have put in place as a result of

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Abowd - Redirect

1 our other tests, that's right. But it involves a human visit,
2 which is the way that NRFU has been run previously.

3 Q. But unlike in the Los Angeles example, where we could tell
4 that there was roughly a 17 to 20 percent error rate, we can't
5 tell what the error rate will be with the new procedures,
6 right?

7 A. Not until after we analyze them in place, that's right.

8 Q. Which hasn't happened yet, correct?

9 A. That's right.

10 Q. Now, let's talk briefly about your criticisms of
11 Dr. Barreto's survey.

12 Now, you criticized Dr. Barreto's survey in part because it
13 asks respondents about their intention to participate in the
14 census rather than actually testing to see if they would
15 participate in simulated contact, in a simulated census,
16 correct?

17 A. When asked how I would do it, I suggested a simulated
18 contact, but I did say that what he asked was about intentions,
19 that's right.

20 Q. So you believe that what Dr. Barreto conducted was
21 basically an attitudinal survey?

22 A. I would have called it an opinion survey, yes.

23 Q. Now, CBAMS surveys include an opinion component to it as
24 well?

25 A. Yes, I think I directly compared Dr. Barreto's survey to

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Abowd - Redirect

1 CBAMS, the survey component of CBAMS, yes.

2 Q. And in CBAMS, participants are asked, among other things,
3 whether they're willing to fill out a census questionnaire with
4 a citizenship question on it, correct?

5 A. Yes, they are.

6 Q. And Census Bureau considers CBAMS to provide important
7 information, right?

8 A. Yes.

9 Q. And for example, you testified that the CBAMS results have
10 informed marketing and partnership decisions, correct?

11 A. Yes.

12 Q. Which are an important part of the NRFU operations, right?

13 A. They're an important part of the entire operation.

14 Q. Now, you're aware of the research in the social sciences
15 which validates respondent behavior from public opinion
16 surveys, correct?

17 A. I'm aware of some of it, yes.

18 Q. And you're aware of social science literature showing, for
19 example, in the voting context, that there is typically a high
20 correlation between respondents giving a particular answer and
21 the validated answer, right?

22 A. Yes.

23 Q. Now, you testified just a moment ago that if you wanted to
24 design an experiment to determine whether the citizenship
25 question decreased the response rate, you would design a

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Abowd - Redirect

1 different experiment than what Dr. Barreto did, right?

2 A. Yes.

3 Q. You would design an experiment where you would send out a
4 questionnaire to households; yes?

5 A. I think that's what I said, yes.

6 Q. And invite households to participate in the survey?

7 A. Yes.

8 Q. And try to re-create something like the census environment,
9 correct?

10 A. Yes.

11 Q. Now, you admit that prior to the secretary's decision to
12 add the citizenship question, the Census Bureau did not design
13 an experiment of this sort to test the impact of the
14 citizenship question on self-response rates, correct?

15 A. That's correct.

16 Q. And prior to the secretary's decision to add the question,
17 the Census Bureau did not implement any such experiment,
18 correct?

19 A. That's correct.

20 Q. You also testified that Dr. Barreto could have designed an
21 experiment that included a simulated follow-up a few days
22 later, correct?

23 A. Yes.

24 Q. And that would have given some information about how
25 successful such follow-up efforts would be, correct?

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Abowd - Redirect

1 A. What I said was the second contact would give the
2 information, yes.

3 Q. Now, the Census Bureau could have designed such an
4 experiment as well, right?

5 A. Yes.

6 Q. And prior to the secretary's decision, the Census Bureau
7 did not design such an experiment, correct?

8 A. That's correct.

9 Q. And did not implement such an experiment, correct?

10 A. That's correct.

11 Q. Now, you testified that Dr. Barreto's analysis did not
12 adequately reflect the Census Bureau's nonresponse follow-up
13 efforts, right?

14 A. I think I said it didn't adequately simulate them, but --

15 Q. And --

16 A. -- yes.

17 Q. And those nonresponse follow-up efforts include the trusted
18 voices campaign, correct?

19 A. Yes.

20 Q. Because the trusted voices campaign is a key part of the
21 Census Bureau's efforts to mitigate the decline in
22 self-response, right?

23 A. Yes.

24 MS. GOLDSTEIN: Can you please pull up PDX-29.

25 Q. Dr. Abowd, you know Arturo Vargas, correct?

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Abowd - Redirect

1 A. Yes, I do.

2 Q. And you're aware that Mr. Vargas offered testimony in this
3 case?

4 A. Yes, I am.

5 Q. Mr. Vargas is a member of the Census Bureau's national
6 advisory committee on racial, ethnic and other populations,
7 what we've been referring to as the NAC, correct?

8 A. Yes.

9 Q. And he's also the chief executive officer of the NALEO
10 educational fund?

11 A. Yes.

12 Q. And NALEO is the kind of organization that is one of the
13 trusted voices that you referred to, right?

14 A. Yes.

15 Q. Now, you testified earlier that you were aware that NALEO
16 is opposed to the addition of the citizenship question,
17 correct?

18 A. I missed at least one word in the question. I'm sorry.

19 Q. You were aware that NALEO is opposed to the addition of the
20 citizenship question, right?

21 A. Yes.

22 Q. And NALEO believes that it would have catastrophic
23 consequences, correct?

24 A. Yes.

25 Q. Are you aware that Mr. Vargas has testified that NALEO has

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Abowd - Redirect

1 not yet determined how they will advise their members in terms
2 of messaging for the census?

3 A. I'm not aware of the testimony, but he made a statement to
4 that effect at the last NAC, so yes.

5 Q. And are you aware that Mr. Vargas testified that the
6 research that NALEO has done shows that individuals are scared
7 to answer the citizenship question for fear of disclosure of
8 that information to government entities?

9 A. So, I'm not aware of that specific testimony, but I'm aware
10 of that conclusion among -- at NALEO, yes.

11 Q. And if there's a citizenship question on the census,
12 trusted partners, like NALEO, will have additional challenges
13 in convincing their communities to participate, right?

14 A. Yes.

15 Q. Now, just briefly, on imputation, you testified, I think,
16 at length as to your belief that there is no quantitative
17 evidence that count imputation results in a net differential
18 undercount, correct?

19 A. That's correct.

20 Q. But you acknowledge that there is qualitative evidence that
21 count imputation disadvantages hard-to-count subpopulations,
22 correct?

23 A. Yes.

24 Q. In particular, noncitizens and households containing
25 noncitizens?

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Abowd - Recross

1 A. They are among the hard-to-count populations, yes.

2 Q. And that qualitative evidence that count imputation
3 disadvantages hard-to-count subpopulations includes
4 ethnographic case studies, correct?

5 A. Yes.

6 Q. And it includes other follow-ups that the Census Bureau has
7 conducted, correct?

8 A. Yes.

9 Q. And other follow-ups that other demographers have
10 conducted, correct?

11 A. Yes.

12 MS. GOLDSTEIN: No further questions.

13 THE COURT: All right.

14 I guess recross.

15 RECROSS-EXAMINATION

16 BY MR. EHRLICH:

17 Q. Hi, Dr. Abowd.

18 A. Good morning.

19 Q. Do you recall on your redirect with Mr. Ho that you said
20 that you've only designed one survey in the past?

21 A. Yes.

22 Q. Have you consulted on survey design before?

23 A. Yes.

24 Q. About how many times?

25 A. Difficult to say. I was on the bureau of labor statistics

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Abowd - Recross

1 technical advisory committee for quite a few years, and I
2 chaired it for two years and consulted on the design of the
3 national longitudinal surveys, both the in-the-field ones and
4 the ones that were being developed. I also served on the
5 committee on national statistics for six years and on multiple
6 national academy panels where we were consulted on the designs
7 of surveys.

8 Q. And have you ever consulted on the design of Census Bureau
9 surveys?

10 A. Yes, I've been consulted in my current capacity and, since
11 1998, on the design of the survey of income and program
12 participation, current population survey and other surveys,
13 yes.

14 Q. And do you recall on redirect you testified that you had
15 never designed a decennial census questionnaire?

16 A. That's correct.

17 Q. As chief scientist at the Census Bureau, do you oversee
18 individuals who have designed other decennial census
19 questionnaires?

20 A. Yes.

21 Q. And do you consult with them about the design of the
22 decennial census questionnaire?

23 A. Yes, I do. I ask them to bring to my attention any
24 concerns they have at any point in the decennial census or
25 other major products.

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Abowd - Recross

1 Q. And you testified on redirect that you had never designed a
2 NRFU field operation. Do you remember that?

3 A. Yes.

4 Q. Have you ever designed anything that was statistically
5 similar to the NRFU field operation?

6 A. I've designed statistical analyses designed to inform field
7 operations and I've supervised staff who designed statistical
8 analyses designed to improve the performance of field
9 operations, yes.

10 Q. And as chief scientist at the Census Bureau, do you oversee
11 individuals who have designed NRFU field operations in the
12 past?

13 A. Yes.

14 Q. And as chief scientist at the Census Bureau, do you oversee
15 individuals who have implemented NRFU field operations in the
16 past?

17 A. Yes.

18 Q. And do you consult with them about these operations?

19 A. They are among the technical specialists who sit on the
20 various committees that I sit on and offer technical advice in
21 evaluating the programs of the decennial census and other
22 operations of the Census Bureau.

23 Q. And you testified on redirect that you've never designed an
24 integrated communications plan. Do you remember that?

25 A. Yes.

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Abowd - Recross

1 Q. Who is responsible for designing the integrated
2 communications plan for the 2020 census?

3 A. Overall responsibility rests with the decennial census
4 communications office in collaboration with the principal
5 contractor for the integrated communication contract and the
6 field office, which is largely responsible for the partnership
7 recruiting program. Field directorate. Excuse me.

8 Q. So is it fair to say that it's the Census Bureau in
9 coordination with a professional marketing firm?

10 A. Yes, that's a fair characterization.

11 Q. And have the professional marketing firms and the Census
12 Bureau previously implemented communications plans for the
13 decennial census?

14 A. In 2000 and in 2010, yes.

15 Q. And have professional marketing firms, in coordination with
16 the Census Bureau, previously designed partnership campaigns in
17 the decennial census?

18 A. Yes.

19 Q. And have those, have professional marketing firms, in
20 conjunction with the Census Bureau, implemented partnership
21 campaigns in the decennial census?

22 A. Yes, although the 2020 census is more extensive than the
23 way that was done in 2010. In 2010, as I understand it, there
24 was more of a separate -- there was more separation between the
25 partnership and the communication campaign, but there was also

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Abowd - Recross

1 a lot more of the communication campaign that was done
2 internally rather than with the lead contractor.

3 Q. And as chief scientist at the Census Bureau, do you consult
4 with others at the Census Bureau and the professional marketing
5 firms in designing and implementing the integrated
6 communications and partnership campaign?

7 A. Yes, I've been in many meetings with the Team Y&R and the
8 other professionals inside the Census Bureau in discussing the
9 design and implementation of those programs.

10 Q. I'd like to turn to the issue of pretesting.

11 On redirect you testified about the differences in the
12 macro environment at different times when the citizenship
13 question has been asked in the past. Do you remember that?

14 A. Yes, I do.

15 Q. Is it standard practice at the Census Bureau to retest
16 previously used questions due to changes in the macro
17 environment?

18 A. Not unless there's some evidence that the performance of
19 the survey has become problematic, but in general, no.

20 MR. EHRLICH: I'd like to turn to the Census Bureau
21 quality standards, Plaintiffs' Exhibit 260, and if we could go
22 to page 18, please.

23 Q. Now, the note below subrequirement A2-3.3, further down on
24 the page, says, "Pretesting is not required for questions that
25 performed adequately in another survey." Is that right?

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Abowd - Recross

1 A. Yes, it is.

2 Q. And if we look at the note above that and subrequirement
3 A2-3.3, if that note about the exception for pretesting were
4 not there, how would the Census Bureau handle situations in
5 determining whether to put a question on a survey?

6 A. In the absence of the note you're showing me or the one
7 that went off the screen a second ago?

8 Q. The one that went off the screen a second ago.

9 A. So, in the absence of the pretesting exception, it would be
10 necessary to determine what kind of testing procedure we would
11 use for a particular circumstance. If we had the normal time
12 frame, then, of course, the question would go through the full
13 battery of tests. If we had a constrained time frame, then the
14 question would be put through those tests that were feasible
15 and within that -- within, you know, feasible in terms of both
16 cost and quality within that time frame.

17 Q. Does this substandard and this note contemplate a waiver
18 procedure?

19 A. Yes, it does. In the absence of enough time to test, a
20 waiver would be sought.

21 Q. Can you explain briefly how that waiver process works?

22 A. The application to waive one of the standards is made by
23 the program area that wishes to proceed in the manner that's
24 not covered by the standards or prohibited by the standards.
25 That waiver is presented to the methods and standards council

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Abowd - Recross

1 at the Census Bureau, which consists of the lead mathematical
2 statisticians and methodologists from all the directorates, and
3 I chair it.

4 Q. And --

5 A. That council would decide whether to grant the waiver, to
6 finish the sentence.

7 Q. And if the Census Bureau determined that the ACS
8 citizenship question required a waiver before being used on the
9 2020 census, could it seek a waiver before seeking OMB
10 approval?

11 A. Yes, it could.

12 Excuse me, Mr. Ehrlich.

13 THE WITNESS: Excuse me, your Honor.

14 THE COURT: I'll stay on the bench, but the witness is
15 excused for five minutes, and we'll pick up.

16 Thank you.

17 (Recess)

18 THE WITNESS: Thank you, your Honor.

19 THE COURT: You're welcome.

20 All right. We will carry on. You're still under
21 oath.

22 Mr. Ehrlich, you may proceed.

23 BY MR. EHRLICH:

24 Q. Dr. Abowd, a moment ago we were talking about seeking a
25 waiver before OMB clearance. If you sought OMB clearance and

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Abowd - Recross

1 they disagreed with the Census Bureau's determination, could it
2 order additional testing before granting a clearance for the
3 2020 census questionnaire?

4 A. Yes.

5 MR. EHRLICH: I'd like to turn to Plaintiffs' Exhibit
6 134, at page 7. Oh, yes. Here it is.

7 Q. Dr. Abowd, do you recall testifying about this on redirect?

8 A. Yes, I do.

9 Q. And you were attempting to testify about certain steps in
10 this process that were followed. Can you explain which steps
11 in this process were followed with respect to the citizenship
12 question on the 2020 census questionnaire?

13 A. Yes, I can. I'll need to read through it.

14 So, I have no knowledge about determinations of
15 whether the legal status of the Department of Justice to
16 request the question was conducted, but we did cooperate
17 with -- we did and are cooperating with OMB with respect to
18 step 1.

19 Now going to step 2. So, the Census Bureau did
20 perform step 2. It did communicate to the secretary and then
21 to Congress the intention to put the citizenship question on
22 the 2020 census.

23 And immediately after that questionnaire was received,
24 a Federal Register notice was opened up for public comment, and
25 it received a very large number of public comments, I believe

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Abowd - Recross

1 on the order of 147,000. It was necessary for the Census
2 Bureau to address those public comments before it could proceed
3 in the OMB clearance package.

4 Go to No. 4. As I've already acknowledged, no testing
5 of the citizenship question occurred prior to the secretary's
6 decision, but as the questionnaire that contains the
7 citizenship question, both in its printed and Internet forms,
8 is being developed, it's being subjected to additional testing
9 in place.

10 Can we go to step 5. All of the things -- all of the
11 items mentioned in step 5 are in progress.

12 MR. EHRLICH: Thank you, Dr. Abowd.

13 We can take this down.

14 Q. I'd just like to ask you a few questions about the NRFU
15 process. Do you remember testifying a moment ago about certain
16 households leaving people off of the household roster?

17 A. Yes, I do.

18 Q. Are you aware of any evidence that people will -- that
19 households will leave people off of their household roster due
20 to the citizenship question?

21 A. Incrementally, no.

22 Q. And do you remember testifying a moment ago about
23 qualitative evidence on imputation procedures?

24 A. Yes, I do.

25 Q. Has the Census Bureau taken this qualitative evidence into

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Abowd - Recross

1 account?

2 A. Yes. The qualitative evidence is the basis for the way in
3 which we attempt to modify imputation procedures and look for
4 ways to either detect or correct for it. Generally speaking,
5 they require additional data, and sometimes when we have it, we
6 can modify the imputation procedure.

7 MR. EHRLICH: If we could pull up defendants'
8 demonstrative 21 for a moment.

9 Q. Do you remember testifying about this on redirect a moment
10 ago?

11 A. Yes, I do.

12 Q. Do you have any quantitative evidence about the likelihood
13 of those not self-responding due to the citizenship question
14 being enumerated as depicted here?

15 A. The quantitative evidence that I'm aware of suggests that
16 they can be enumerated as depicted here.

17 MR. EHRLICH: If we could go to demonstrative 22 for a
18 moment.

19 Q. Dr. Abowd, are you aware of any quantitative evidence about
20 the likelihood of those not self-responding to the census due
21 to the citizenship question being enumerated in the scenario
22 depicted here?

23 A. I don't know any quantitative evidence that suggests that
24 those people not responding to the census because of the
25 citizenship question will fail to be enumerated as they are

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1 depicted here.

2 MR. EHRLICH: If we could go to plaintiffs'
3 demonstrative 29 for one moment.

4 Q. Dr. Abowd, are you familiar with the trusted partners
5 program?

6 A. Yes, I am.

7 Q. Are you familiar with the trusted partners depicted on this
8 slide?

9 A. I'm not equally familiar with all of them, but yes.

10 Q. Are you aware of either these or other trusted partners
11 that say they are not going to participate in the trusted
12 partners program because of the citizenship question?

13 A. I'm aware that many of our partners are working hard to
14 understand whether they can continue to be trusted partners in
15 the presence of the citizenship question. I'm not aware of any
16 who have told us that they won't partnership with us at this
17 time.

18 Q. Have the Census Bureau and the professional marketing firms
19 that you testified about a moment ago taken into account these
20 concerns by trusted partners?

21 A. They are in the process of taking account, into account
22 these concerns and working with trusted partners at all levels
23 to determine if there is a better way to deliver the message
24 and to use the trusted voices.

25 MR. EHRLICH: Thank you, Dr. Abowd. No further

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1 questions.

2 THE COURT: All right. I'm inclined to say that we
3 can let Dr. Abowd go at this point. Correct?

4 MR. HO: I have, maybe, one minute of questions, your
5 Honor. If you're inclined not to allow it, that's fine.

6 THE COURT: I think he has paid his price, in this
7 trial, at least. He may have two more, I gather, but that's
8 not for me to say.

9 Dr. Abowd, I'm pleased to say that you may step down,
10 and thank you very much for your testimony.

11 THE WITNESS: Thank you, your Honor.

12 THE COURT: You're excused.

13 (Witness excused)

14 THE COURT: I take it that's the close of the defense
15 case. Is that correct?

16 MR. GARDNER: Yes, your Honor. The government --
17 sorry. The defendant rests.

18 THE COURT: I think defendants.

19 All right. Rebuttal case? I know there are some open
20 evidentiary issues as well, but I would propose that we take
21 those up afterwards.

22 Is there anything else?

23 MS. BRANNON: Yes, your Honor. We would like to
24 briefly call Professor Hillygus to the stand.

25 THE COURT: All right.

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Hillygus - Direct

1 DIONE SUNSHINE HILLYGUS, recalled.

2 THE COURT: Welcome back, Professor Hillygus. I'll
3 remind you you're still under oath since you're testifying
4 again in the same proceeding.

5 Ms. Brannon, you may proceed.

6 MS. BRANNON: Thank you, your Honor.

7 For the record, I'm Sarah Brannon for the NYIC
8 plaintiffs.

9 Can we see plaintiffs' demonstrative exhibit PDX-15.

10 DIRECT EXAMINATION

11 BY MS. BRANNON:

12 Q. Dr. Hillygus, do you remember that Dr. Abowd distinguished
13 your citations, as reflected on this slide, about proxy because
14 they were older and did not directly address the citizenship
15 question?

16 A. Yes.

17 Q. Do you have a reaction to his testimony?

18 A. Yes. Had Dr. Abowd read my report, these are just a small
19 number of citations used in forming my opinions. So, for
20 instance, in addition to the Martin 1999, there's a Martin
21 2007; in addition to the Fay 1989, there's some recent work by
22 Mary Borey and Andrew Keller within the Census Bureau about the
23 quality of proxy respondents. On some of these particular
24 points, there's a terrific bit of analysis from the Census
25 Bureau about the undercount of young children.

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Hillygus - Direct

1 MS. BRANNON: Can we see plaintiffs' --

2 MR. GARDNER: Your Honor, I'm sorry. We object and
3 move to strike that testimony. That was not in response to
4 Dr. Abowd's testimony. Dr. Abowd, as Dr. Hillygus
5 acknowledged, responded to this demonstrative. She's now
6 testifying beyond that demonstrative. That's not proper
7 rebuttal.

8 THE COURT: All right. Let's allow plaintiffs to make
9 their record. To the extent that you have a motion to strike
10 any of it, for reasons we discussed yesterday, we'll take it up
11 after her testimony, but rather than interrupt question by
12 question, I think it's better to get it out there and then you
13 can make whatever motion you want.

14 MR. GARDNER: Thank you, your Honor.

15 MS. BRANNON: Yes. Can we see Plaintiffs' Exhibit
16 339.

17 Q. Is this the document you're referring to?

18 A. Yes.

19 Q. If there is some particular testimony you would like to
20 direct us to?

21 A. Yes.

22 MS. BRANNON: Can we have a call-out on page 23 of 26.

23 Q. Can you explain the significance of this to your opinions
24 reflected on slide PDX-15?

25 A. Yes. So, this is Census Bureau research that confirms the

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Hillygus - Direct

1 opinion that I put forward separate from the particular
2 citation that Dr. Abowd had criticized, that proxy
3 respondents -- that the analysis suggests unknowledgeable or
4 unwilling proxy respondents may be a key factor in the
5 undercount of young children.

6 Q. Is there another document from 2017?

7 A. Yes. Again, supporting the conclusions I reached separate
8 from the particular citation that Dr. Abowd criticized, again,
9 from internal census research by Terry *et al.* Jennifer Childs
10 is also one of the --

11 MS. BRANNON: Can we see Plaintiffs' Exhibit 385.

12 Q. And is there a particular point that you would like to
13 direct us to in this document?

14 A. Yes. Again, in support of the conclusion on the slide,
15 separate from the particular citation that Dr. Abowd criticized
16 here, here again, is the same conclusion: "Another cultural
17 issue was respondents' resistance to participating in the
18 census due to concerns about confidentiality, deportation --"

19 THE COURT: Slow down a little bit.

20 A. "-- and the general trust in government in the Hispanic
21 site. Some proxy respondents resisted the interview by
22 providing data that seemed inaccurate or incomplete just to
23 comply with the interview. The Hispanic site also had a high
24 initial refusal rate, which suggests respondent concern about
25 confidentiality and fear of deportation during the highly

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Hillygus - Direct

1 charged debate about strong anti-immigration laws at that
2 time."

3 Q. Why are these citations important to the opinions you've
4 offered in this case?

5 A. They, again, just offer additional evidence backing up my
6 conclusion that an addition of a citizenship question and the
7 increased use of proxy respondents will contribute to increased
8 omissions of noncitizens and Hispanics.

9 MS. BRANNON: Can we go back to demonstrative exhibit
10 plaintiffs' 15.

11 Q. Do you also remember that Dr. Abowd testified about bias in
12 proxies?

13 A. Yes.

14 Q. What is your response to his testimony about that topic?

15 A. So, Dr. Abowd agreed with the conclusion that an addition
16 of a citizenship question will decrease the accuracy of the
17 census count, and the way that he concluded that the accuracy
18 was going to be affected was because of increase in variance.
19 I agree with that opinion, but I am also of the -- my opinion
20 is, is that there is sufficient evidence to suggest that an
21 increase in proxy respondents associated with citizenship
22 question will also reduce accuracy because of the direction of
23 some of those inaccuracies; in other words, there will be bias.
24 Q. And can you think of an example of where this bias can be
25 shown?

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Hillygus - Direct

1 A. Well, Dr. Abowd agreed with some of the points already this
2 afternoon in terms of increased omissions, would be one source
3 of bias; that Hispanic respondents are less likely to fully
4 roster, again, is another source of bias in the count. But I
5 think the clearest evidence that we have talked about is the
6 increase in bias associated with the citizenship question
7 itself, a characteristic.

8 MS. BRANNON: Can we see Plaintiffs' Exhibit PX-162.

9 Q. And then can you explain why imputation per this call-out
10 of citizenship data is going to be challenging?

11 A. Yes. So, so the Brown memo is acknowledging that --
12 essentially that the missing-ness on citizenship will not be
13 ignorable, that it is related to the decision to respond or
14 not. And so if you apply an ignorable assumption in the
15 imputation methods, then you will end up with bias. Again,
16 Dr. Abowd acknowledged that. He concluded that, you know, for
17 the sake of transparency, that the Census Bureau has to use the
18 data that they have, but that doesn't mean that external data
19 doesn't show that, in fact, the missing-ness is nonignorable.

20 Q. And when you're talking about bias, are you talking about
21 count imputation, character imputation or both?

22 A. Well, I've given examples now of both. This particular
23 example is about bias in characteristic imputation.

24 Q. And why is bias in characteristic imputation important in
25 general?

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Hillygus - Direct

1 A. I thought that Dr. Abowd did a terrific job of it, of
2 giving some examples of why the characteristics of the census
3 really matter. They form the frame against which every survey
4 conducted in the U.S. is compared. But even more than that,
5 that there are federal funding decisions made on the basis of
6 the characteristics of the population, not just the count of
7 the population.

8 MS. BRANNON: Can we see plaintiffs' PX-329, and then
9 can we highlight row 15 and 16.

10 Q. Is this an example of where characteristics are important
11 in federal funding decisions?

12 A. Yes, and so these particular examples, again, something
13 that was already in the record, are cases in which the age
14 matters and determines the distribution of federal funding.

15 Again, I would just highlight that we have focused so much
16 attention on the accuracy of the count, and Dr. Abowd agrees
17 that the addition of a citizenship question is going to reduce
18 the accuracy through increased variance. I've made the case
19 that there's increased variance, but also it found bias. But
20 in terms of characteristic imputation, the Brown memo confirms
21 that there's -- there's going to be issues of bias, not just
22 variance.

23 MS. BRANNON: And just for the record, your Honor, all
24 of the exhibits we referred to are admitted into evidence.

25 Can we see plaintiffs' demonstrative PDX-11.

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Hillygus - Direct

1 Q. Dr. Hillygus, do you remember that Dr. Abowd also testified
2 about this slide, and in particular, about your point 4?

3 A. Yes, both point 3 and point 4 were ones that Dr. Abowd
4 concluded were inaccurate, and I think we have a call-up just
5 to show where they're --

6 MS. BRANNON: Sure. Can we see PX-162, footnote 29,
7 which is on page 15 of 7 of the PDF.

8 Q. Can you explain your opinion and how it relates to this
9 language and slide, as presented?

10 A. Sure. Both of those points on which Dr. Abowd, you know,
11 said they were incorrect, it is true that they did later
12 analysis in the paper and that those were criticisms for
13 earlier analyses. So, for instance, footnote 29, analysis in
14 later sections of citizenship paper labeled "initial
15 assumptions" instead treats all persons with missing
16 citizenship values, they are citizens whether they are U.S.- or
17 foreign-born.

18 And so the key point here is, is that yes, in terms of the
19 5.8 percentage point, you know, estimate that Dr. Abowd has
20 focused on, that those particular criticisms, you know, apply
21 to other analyses in that paper. But the point is, is that
22 those issues are what led to the particular analysis that is
23 conservative. It's because of those criticisms they had to
24 rely on a different subset of control and treatment groups, and
25 so, again, the conclusion -- I know the judge has heard this

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Hillygus - Direct

1 too much from this particular paper, but the conclusion that
2 the 5.8 is likely too small is, is, I believe, a fair
3 interpretation of their analysis.

4 Q. Finally, do you have any reaction to Dr. Abowd's testimony
5 about Hispanic nonresponse rates?

6 A. Yes. So, again, the Census Bureau has provided lots of
7 evidence where they have broken, say, breakoff rates and item
8 nonresponse by Hispanic. But their primary analysis in which
9 they've looked at the impact of the citizenship question was
10 just for noncitizens, and I have -- my opinion on the basis of
11 the available empirical analysis is that the impact is likely
12 to be on Hispanics, including Hispanic citizens. And there is
13 compelling evidence of likely impacts from outside of the
14 Census Bureau. It is the best available empirical evidence
15 because the Census Bureau hasn't done the analysis to evaluate
16 the impact on Hispanic citizens, which, frankly, I'm not sure
17 why they haven't.

18 Q. Could the Census Bureau have done an evaluation of the
19 impact of the citizenship question on response rates of
20 Hispanic citizens?

21 MR. GARDNER: Objection. Calls for speculation.

22 THE COURT: I think it's well within the scope of her
23 expertise. Overruled.

24 A. I can certainly say that it is my opinion that it is quite
25 puzzling that the Census Bureau did not directly estimate the

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Hillygus - Cross

1 impact for Hispanic citizens.

2 MS. BRANNON: Thank you, your Honor. I have no
3 further questions.

4 THE COURT: Cross-examination.

5 MR. GARDNER: Josh Gardner.

6 CROSS-EXAMINATION

7 BY MR. GARDNER:

8 Q. Good morning, Dr. Hillygus. I should say good afternoon.
9 We haven't met before, but my name's Josh Gardner with the
10 Department of Justice.

11 THE COURT: It's 11:58, so it's still morning.

12 MR. GARDNER: Just beat the clock.

13 THE COURT: All right.

14 MR. GARDNER: Can we please put up PDX-15.

15 Q. I believe that's the demonstrative that you were talking
16 about.

17 Now, Dr. Hillygus, you just testified that Dr. Abowd did
18 not consider all of the sources you relied upon for your
19 opinions about the effect of proxies, correct?

20 A. Correct.

21 Q. Because there are sources that you considered that aren't
22 on demonstrative PDX-15, correct?

23 A. Correct.

24 Q. But those are sources that you did rely upon in your expert
25 report in this case, correct?

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1 A. Correct.

2 Q. That you did not discuss during your initial direct
3 testimony earlier in this trial, correct?

4 A. They formed the basis of the opinions, which I did discuss.

5 Q. But were not expressly addressed during your initial direct
6 testimony, correct?

7 A. I want to be a little bit careful, because I know that I
8 talked about some citations during the direct that -- but on
9 this particular slide, I'm not sure if I mentioned any other
10 citations, correct.

11 MR. GARDNER: No further questions, your Honor.

12 THE COURT: All right.

13 I assume Dr. Hillygus can step down.

14 MS. BRANNON: Yes. Dr. Hillygus can step down. Thank
15 you.

16 THE COURT: You may step down.

17 Thank you.

18 (Witness excused)

19 MR. COLANGELO: Your Honor, plaintiffs would keep the
20 record open not only for the evidentiary issues that the Court
21 is still considering but also for the possible deposition
22 testimony of the secretary in the event that the Justice
23 Department's mandamus petition is denied and the Court's order
24 is allowed to take effect.

25 THE COURT: All right. I'm prepared to address most

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1 of the former -- that is, the open evidentiary issues -- but
2 any objection to the latter -- that is to say, if the Supreme
3 Court allows the deposition to proceed and I have not yet
4 ruled -- that we could add it to the record? I don't know if
5 it is necessary to keep it open or stipulate that in that event
6 it would be reopened for that purpose. But any objection?

7 MR. GARDNER: Your Honor, I think we would agree that
8 the record should be closed now after your evidentiary rulings
9 and then could be possibly reopened later depending on how the
10 Supreme Court rules.

11 THE COURT: Well, I would like something better than
12 that. Do you agree that, prior to my ruling if that is the
13 Supreme Court's ruling, you would agree to reopen the record
14 and allow his testimony into it?

15 MR. GARDNER: Sorry if I wasn't being clear. Yes, of
16 course.

17 THE COURT: OK. Very good.

18 MR. COLANGELO: No objection from the plaintiffs, your
19 Honor.

20 THE COURT: All right. I'll address some of the
21 evidentiary issues that are open. I'm not going to be able to
22 address all of them right now, but let's proceed.

23 First, I'm going to deny the plaintiffs' motion to
24 add, and I don't know what the number is -- the one exhibit or
25 portion of an exhibit that is in dispute with respect to

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1 whether it should be part of the administrative record. That
2 motion is denied.

3 Based on Dr. Abowd's testimony yesterday, it seems
4 clear to me that that raw data was not considered, either
5 directly or indirectly, by the secretary in the lead-up to his
6 decision. I think to be part of the administrative record, as
7 I think I made clear back in July, that includes not only
8 materials directly considered by the agency decision-maker but
9 also all materials that might have influenced the agency's
10 decision, including any working recommendations of his
11 subordinates on which the agency decision-maker based his or
12 her decision. That is from the *Batalla Vidal* case. I think
13 the testimony yesterday, which was not controverted in redirect
14 today, is that the raw data was not considered even by
15 Dr. Abowd before the completion of all 42 CBAMS sessions. In
16 light of that, I don't think there's any basis to include the
17 12 that had been completed prior to March 26 in the
18 administrative record, so that motion is denied.

19 Next is the motion at docket No. 522. The first
20 motion to admit certain trial exhibits. Let me run through
21 that category by category.

22 First is articles authored by Census Bureau employees.
23 I'm not prepared to resolve all disputes here at the moment. I
24 do need to go through them, I think, a little bit more
25 carefully. I'll reserve judgment in part, but by agreement,

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1 Plaintiffs' Exhibit 387, pages 173 to 192, is admitted.

2 (Plaintiffs' Exhibit 387, pps. 173-192 received in
3 evidence)

4 THE COURT: Plaintiffs' Exhibit 390, pages 62 to 86,
5 is admitted.

6 (Plaintiffs' Exhibit 390, pps. 62-86 received in
7 evidence)

8 THE COURT: And Plaintiffs' Exhibit 502 is admitted.

9 (Plaintiffs' Exhibit 502 received in evidence)

10 (Continued on next page)

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1 THE COURT: I am going to sustain defendants'
2 objection to Plaintiffs' Exhibit 382. That's the paper with
3 multiple authors, only one or some of whom are Census Bureau
4 employees.

5 In light of that, I have no idea what statements are
6 attributable to the Census Bureau employees as opposed to
7 others. That objection is sustained and that exhibit is not
8 admitted. That is 382.

9 I will reserve judgment on the remainder and give you
10 a ruling probably by order later today or tomorrow.

11 I guess one question on that front, though, I take it
12 there is no dispute that at least Plaintiffs' Exhibit 377 is a
13 document that is available on the Census Bureau's own website,
14 is that correct?

15 MR. GARDNER: I believe that is correct, your Honor.

16 THE COURT: In light of that, what is the basis for
17 the objection?

18 MR. GARDNER: The basis for the objection on this
19 entire category is there is a legend on each of these documents
20 that expressly say that these are not necessarily the views of
21 the Census Bureau, they are the views of the individual author.

22 So we do have a hearsay objection to all of these
23 exhibits for that reason.

24 THE COURT: All right. Do you have authority for the
25 proposition that adding a disclaimer of that sort is sufficient

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1 in and of itself to render that portion of Rule 801
2 inapplicable?

3 In other words, if it is a statement made by an
4 employee, it is within the scope of his or her employment, can
5 one just simply add that disclaimer and take it out of the
6 realm of Rule 801?

7 MR. GARDNER: Well, so the direct answer to your
8 question is, I am not aware of any case law that expressly
9 addresses this question, but I think the whole purpose of that
10 legend is to be clear to the public, there are certain
11 statements made on behalf the Census Bureau and there are other
12 statements made by these individuals in their individual
13 capacity because the Census Bureau wants to encourage their
14 employees to do research and promote it publicly.

15 So the best answer I can give you is, I am aware of no
16 case law in support of the proposition that when individuals in
17 this context do this sort of work with this sort of legend,
18 that it is anything other than hearsay.

19 THE COURT: All right. At least as to Plaintiffs'
20 Exhibit 377, does not the fact that it is held out to the world
21 and available on the Census Bureau's own website constitute an
22 adoption or vouching of that particular paper?

23 MR. GARDNER: I don't think so, your Honor, and here
24 is why.

25 My understanding of the Census Bureau's entire

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1 philosophy, they want to get as much information out there as
2 possible. That legend ensures the public that this information
3 is information done by an individual at the Census Bureau, but
4 it do not represent the Census Bureau's views or positions
5 necessarily. I think that is just a function of the fact that
6 the Census Bureau wants to get as much information out there as
7 possible.

8 MR. COLANGELO: Your Honor, this is a test that
9 Mr. Gardner is proposing that is nowhere contained within the
10 text of 801(d)(2)(D). 801(d)(2)(D) simply refers to whether
11 the agent has made a statement on a matter within the scope of
12 that relationship and while it existed. This is, in fact, the
13 same objection that defendants raised on the first day of trial
14 and that the court overruled.

15 THE COURT: I'll take the parties' arguments under
16 advisement and issue a ruling with respect to the remainder of
17 the exhibits in that category in short order.

18 Turning to category two, which are the Department of
19 Justice communications. I don't think there is any dispute
20 that I can consider the testimony of Assistant Attorney General
21 John Gore, number one. Defendants concede I can take judicial
22 notice of it, and beyond that, I agree that it is admissible
23 under Rule 803(8). I think I addressed this in an opinion in
24 the General Motors MDL, but it does fit the parameters of
25 Rule 803(8).

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1 Plaintiffs' Exhibit 272, 273, and 509 are admitted.

2 (Plaintiffs' Exhibits 272, 273, and 509 received in
3 evidence)

4 Defendants' objections to the remainder of the
5 exhibits in this category are sustained.

6 Number one, I am not sure they've been properly
7 authenticated. Putting that aside, I'm not persuaded that the
8 members of the Department of Justice were serving as counsel to
9 or agents of the Department of Commerce for purposes of Rule
10 801(d)(2)(D), and for the reasons stated yesterday, I'm not
11 persuaded by plaintiffs' argument that the documents are being
12 offered for something other than the truth of the matter
13 asserted, or if they are being offered to prove the falsity of
14 other statements, that is, indeed, dependent on their being
15 offered for the truth.

16 The hearsay objections with respect to the remainder
17 of the documents in that category are sustained and those are
18 not admitted.

19 The third category is communications between the
20 Census Bureau and the Department of Justice. The statements of
21 Dr. Jarmin in those documents are admitted for their truth. I
22 don't think there is any dispute that they are not hearsay,
23 since he is a party.

24 Mr. Gary's statements in those documents are admitted
25 for context, but I will not consider them for their truth for

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1 the same reasons that I just indicated.

2 With that caveat, Plaintiffs' Exhibits 197 through 200
3 are admitted.

4 (Plaintiffs' Exhibits 197 through 200 received in
5 evidence)

6 The documents set forth in category four, other
7 publications, are admitted by agreement. Defendants have no
8 objection to their admission.

9 With respect to category five, the only document in
10 dispute is Plaintiffs' Exhibit 309, which is the brief
11 submitted by, I think, for former directors of the Census
12 Bureau to the Supreme Court. I think there is no dispute that
13 I can consider, take judicial notice of that document, and I am
14 prepared to do so. But I agree that it is otherwise hearsay,
15 and in that regard, I will not consider it for its truth. It
16 is admitted with that understanding and subject to that caveat.
17 The remaining exhibits in that category are admitted without
18 objection.

19 So I think that resolves all of the open evidentiary
20 disputes, with the exception of the Census Bureau employee
21 papers that I'll issue a ruling on later, subject to -- well,
22 sorry. There is one remaining thing, which is any application
23 by defendants with respect to Dr. Hillygus' testimony.

24 I am inclined to say that you should submit a motion
25 in writing so that I can consider the relevant portions of the

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1 record if you think it wasn't proper rebuttal. I'll say
2 candidly, I'm not sure it is worth your time.

3 MR. GARDNER: We agree, your Honor.

4 THE COURT: Very good. I think everything she said I
5 probably could find in the direct testimony, and in that
6 regard, it is not worth it.

7 Good. We'll leave that aside. With the exception of
8 the articles question, on which I am reserving, I think that
9 does resolve everything that is open.

10 Can we say subject to the stipulation by defendants
11 and my ruling, that the record is closed?

12 MR. COLANGELO: Just one question, your Honor.

13 But if you would give me one second to confer with
14 defense counsel?

15 THE COURT: Sure.

16 (Counsel conferring)

17 MR. COLANGELO: Your Honor, going back for one moment
18 to the court's ruling on the administrative record.

19 The court has just denied plaintiffs' motion to
20 include PX 15 in the administrative record. We had pointed out
21 to defense counsel a day or two ago that they inadvertently
22 agreed to include PX 152 in the AR, which is in part a
23 duplicate of PX 15.

24 So by agreement, we think that 152 is out of the
25 administrative record on the basis of your Honor's reasoning,

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1 and we can accomplish that in whatever way the court likes. It
2 was included in the first joint stipulation, which the court so
3 ordered.

4 THE COURT: Understood. Thank you for pointing that
5 out.

6 What I would propose is, after I issue a ruling on the
7 remainder of the exhibits in category one, what I would like
8 you to do is file an updated revised version of the exhibit
9 list that includes the dates on which any exhibit was admitted
10 and whether it is part of the AR or not, and make sure that
11 that is agreed upon by all parties before it is filed, and then
12 that will be essentially the official record of what is in
13 evidence.

14 All right?

15 MR. COLANGELO: Yes, your Honor. That works.

16 MR. GARDNER: Your Honor, there is one other matter
17 that we just conferred about briefly, and that is the
18 objections to the various deposition designations, in terms of
19 closing the record before resolving that.

20 Obviously we don't want to burden the court at all.
21 One possibility is we just proceed with the post-trial briefing
22 without the benefit of those rulings, and where there is
23 reliance on objected-to testimony, we can note that for the
24 court, because we recognize there is a lot of that designated
25 testimony and that can be a slog.

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1 We are happy to proceed any way the court wishes. We
2 just wanted to alert the court before the record closes that
3 there is still that outstanding issue.

4 THE COURT: Fair enough. I think I made clear at the
5 final pretrial conference that my plan on that was to reserve
6 judgment and basically resolve objections only as needed in
7 connection with my ruling. That is to say, there is little
8 point in my taking time to resolve objections, if I don't end
9 up relying on that particular testimony.

10 But for those reasons, I am not going to issue those
11 rulings until my final decision, but it would be very helpful
12 if, in your proposed findings and conclusions, if you're
13 relying on testimony as to which there has been an objection,
14 to at least note that. You don't need to argue the point you
15 have already made the objection. At least note that it is
16 testimony to which there is an objection so that I can make
17 sure that if I do rely on that particular testimony that I
18 resolved. That would be helpful.

19 MR. GARDNER: Thank you.

20 MR. COLANGELO: One other open issue, your Honor. I
21 believe we have a pending set of proposed joint stipulations
22 that are with the defendants, that if the parties can reach
23 agreement on, we will want to submit as soon as possible.

24 MR. GARDNER: That is fine. We can do that.

25 THE COURT: Do we know when that would likely occur?

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1 MR. COLANGELO: They've already gone over it, your
2 Honor.

3 MR. GARDNER: I apologize, your Honor.

4 In complete candor, I am not entirely sure what he is
5 referencing, but we will absolutely get back to that
6 immediately and get back to the court as quickly as we can.

7 THE COURT: I guess that is another caveat to the
8 record being closed.

9 Anything else?

10 MR. COLANGELO: Nothing for the plaintiffs right now.

11 MR. GARDNER: Nothing for the defendants.

12 THE COURT: All right. I think we are almost done.

13 A few housekeeping matters, and then I mentioned that
14 I was going to leave you with some or pose some questions and
15 leave you with some issues to make sure you address in your
16 post-trial briefing.

17 First, as discussed the other day, that briefing
18 should be submitted no later than next Wednesday, that is
19 proposed findings of fact and conclusions of law. I expect
20 that you will include specific citations to the record,
21 including both testimony, affidavits or including testimony,
22 affidavits, depositions, and exhibits, and a reminder that,
23 particularly because a lot of exhibits came in by agreement and
24 were not necessarily even shown in court, unless you sort of
25 point the way, there is a chance that I would overlook

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1 something. If you think it is important, it is up to you to
2 make sure that you bring that to my attention.

3 I would also remind you, as I have stated a couple
4 times in writing and orally, I think it is important, given the
5 absence of Supreme Court guidance on the issue at the moment,
6 to distinguish between reliance on the administrative record
7 and reliance on materials outside of the administrative record.

8 I'll leave that to you to figure out the best way to
9 brief it, but I think being as clear as you possibly can, even
10 in different sections of your argument about which arguments
11 rely on which, would be very helpful to me in making a clear
12 record and assisting me in making a clear record. I already
13 indicated that I am prepared in a ruling -- again, absent
14 guidance before I issue a ruling -- to distinguish as needed.

15 I will hold oral argument, closing arguments, whatever
16 you want to call it, on Tuesday, November 27. I think I had
17 tentatively indicated as much to you and will confirm that now.
18 We will begin those as 9:30 in the morning. I would anticipate
19 that they will be fairly lengthy. At a minimum, probably
20 through lunch or until lunch, I should say. If they are
21 helpful to me, I may keep you even thereafter. But the bottom
22 line is, you should probably plan on being here for a little
23 while.

24 They will be here in this courtroom, courtroom 110.
25 If you think that there is need for an overflow courtroom, it

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1 is fairly sizeable in here, but if you anticipate a larger
2 attendance than can fit here, please let me know either now or
3 as soon as possible so I can make the necessary arrangements.

4 Any questions on those fronts before I turn to more
5 substantive questions or matters?

6 MR. COLANGELO: Just two questions, your Honor, for
7 the oral argument on the 27th.

8 First, can parties not present in New York participate
9 by Court Connect?

10 THE COURT: Participate meaning listen?

11 MR. COLANGELO: I'm sorry.

12 Can we have Court Correct established for that hearing
13 so parties not present can listen in, but not participate?

14 THE COURT: Yes. Listen-only privileges, that is
15 fine. I'll make those arrangements.

16 MR. COLANGELO: Thank you.

17 To the extent the parties or the court would find it
18 helpful to display exhibits, we may need to make arrangements
19 for courtroom technology again, assuming there is no concerns
20 by the court.

21 THE COURT: That's fine. You know the drill. Get
22 whatever approvals and orders you need from me in advance, and
23 coordinate with the DE's office to bring or get whatever you
24 need in here, including Courtroom Connect. I guess you may
25 need additional permission from me on that front.

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1 But bottom line is, coordinate with my chambers, with
2 the District Executive's office, and make sure that you are in
3 here and test it before that day.

4 MR. COLANGELO: Thank you, your Honor.

5 THE COURT: Mr. Gardner?

6 MR. GARDNER: Nothing from the defendants.

7 THE COURT: All right. Then lets turn to a couple
8 substantive questions or issues, in part, to make sure that
9 we're all on the same page and, in part, to sort of identify
10 some issues that I want to make sure that you address that you
11 probably would have addressed anyway.

12 First, let me just direct a question at defense
13 counsel.

14 Mr. Gardner, are you the unfortunate victim of who is
15 answering?

16 MR. GARDNER: Depends on what the question is, your
17 Honor. In seriousness, I think Mr. Schumate will likely answer
18 most of the questions you have.

19 THE COURT: All right.

20 MR. GARDNER: Hopefully.

21 THE COURT: All right. Lucky for you.

22 Mr. Schumate then, I guess I wanted to just confirm,
23 is there any dispute, that I know that there is a big issue
24 looming here whether and to what extent I can rely on materials
25 outside of the administrative record. Do you dispute that I

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1 can rely on such materials for purposes of evaluating
2 plaintiffs' standing?

3 MR. SCHUMATE: Your Honor, I don't think we dispute
4 that the court can consider extra-record evidence for purposes
5 of standing, but depending on what the Supreme Court rules on
6 our mandamus petition, that would define the scope of what the
7 court could consider with respect to the merits.

8 THE COURT: Understood.

9 But in other words, a lot of the testimony, certainly
10 in court, has been, I think, largely relevant to the question
11 of standing, whether there is any injury, whether the injury is
12 fairly traceable to the citizenship question and so forth.

13 There is no dispute that I can consider all of that
14 testimony in evaluating that question?

15 MR. SCHUMATE: I think that is correct, your Honor.

16 THE COURT: All right. Thank you.

17 Good. I guess there are a couple things that I would
18 like to make sure you address, and you probably would have done
19 so for any number of reasons, including inferring some of my
20 thinking from the questions I have posed to the witnesses in
21 the last few days.

22 But one is, it seems to me that if you take
23 Dr. Abowd's testimony and Dr. Salvo's testimony together, that
24 there doesn't seem to be any -- first of all, I don't think
25 there is any dispute -- let me back up.

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1 Am I correct, Mr. Schumate, that there is no dispute,
2 either whether I consider evidence beyond the administrative
3 record or not, that the addition of the citizenship question
4 will result in a reduction of the self-response rate for
5 certain segments of the population?

6 I take it that is not in dispute?

7 MR. SCHUMATE: Your Honor, I am not going to concede
8 anything today. I think that is a question that we would like
9 to think about and address in our post-trial briefing, take a
10 look at all the evidence, but I would be reluctant to concede
11 anything today.

12 THE COURT: All right. I don't really see how you can
13 not concede that, given your own expert's testimony and the
14 analysis in the Brown memorandum, a draft of which is in the
15 administrative record, but I'll leave that to you to decide.

16 I guess one question I have is, it seems to me that
17 taking Dr. Abowd's testimony together with Dr. Salvo's, that
18 it is fair to say that state and local governments, and more
19 specifically New York City, use the census data to allocate
20 various resources and identify where to -- well, where and how
21 to allocate resources, and that in that regard, they have an
22 interest in the data being accurate, and that the accuracy --
23 you know, that a reduction in the accuracy of the data at a
24 granular level and having nothing to do with the overall count
25 harms the city in that respect.

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1 I don't think that that is really disputable, although
2 I would invite you to address that as a question of fact. The
3 legal question is whether that is sufficient to establish
4 standing on the part of New York City or any other state or
5 local government that would rely on data for that purpose.

6 Second is whether the expenditure of resources,
7 either by the city or by the private groups, including the
8 plaintiffs in the NYIC case, are sufficient to establish
9 standing, that is to say, whether they constitute injury in
10 fact. I understand their arguments about traceability and the
11 like, but whether those constitute injury in fact within the
12 meaning of standing doctrine.

13 Third is what role -- there has been some testimony
14 about -- and I recognize this is a problem with respect to
15 litigation of matters that are sort of happening in realtime,
16 that is to say, that the census hasn't yet happened. I think
17 on the one hand, I certainly understand that plaintiffs can't
18 wait for it to happen. If they do, then their arguments would
19 be moot.

20 On the other hand, as we heard from Dr. Abowd, there
21 are certain things that are ongoing, putting aside the
22 potential for RCTs, since that was stricken from the record. I
23 gather that there is a clearance package that was submitted to
24 OMB, but OMB hasn't yet actually cleared it, in that regard
25 could conceivably, I suppose, respect the questionnaire with

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1 the citizenship question on it. I am not saying that is
2 likely, but it is possible.

3 Similarly, Dr. Abowd testified that the Census Bureau
4 has not yet determined what the algorithms would be for the
5 imputation process, and that there is an expert panel, I think,
6 if I remember correctly, that has been tasked with coming up
7 with that and trying to incorporate and address any effects
8 that the citizenship question may have on the count.

9 I guess my question is what affects those sort of
10 open issues may have on the analysis here and, relatedly, if I
11 were to find that the addition of a citizenship question is
12 likely to cause or at least not -- well, is likely to cause a
13 decline in self-response rate, and that at every step of the
14 NRFU operations process, short of imputation, that it is not
15 likely to eliminate that disparity, what effect the sort of
16 open question of the imputation process would have. That is to
17 say, it is sort of unknowable at this point whether and to what
18 extent it would address it and what does that mean for purposes
19 of standing analysis.

20 Next, on the question of the record rule, I assume you
21 will address the sort of question that has been at the heart of
22 recent litigation, namely, obviously, I made a finding back in
23 July that there had been a strong, quote-unquote, preliminary
24 showing of bad faith and pretext, and on that basis decided
25 that plaintiffs were entitled to look beyond the record for

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1 evidence of bad faith or pretext.

2 I do think that it is a different question whether I
3 can then consider that evidence. In other words, does there
4 need to be a separate showing, not preliminary, that there is
5 a, in fact, evidence of it.

6 I presume I can look at evidence outside the record at
7 least to make that determination. Bottom line is, I don't know
8 if the case law is 100 percent clear on what is required for me
9 to consider evidence outside the record, but I would expect
10 that you would brief that question and whether it is
11 permissible for me to do so here.

12 Next is there was some testimony from Dr. Abowd, I
13 believe, with respect to statements that he and others may have
14 made in the February 12 meeting with Secretary Ross. I don't
15 know whether all of those, all that testimony, all of those
16 statements, that is, are memorialized somewhere in the
17 administrative record. If they are, I expect that you point
18 them out in your briefing.

19 I guess the question I have is, to the extent that he
20 testified as to anything that the Census Bureau officials said
21 to Secretary Ross in that meeting, that is something that he
22 was told before he made the decision, if it is not reflected in
23 a document, is it, or can it nonetheless be treated as part of
24 the administrative record.

25 I don't know the answer to that. It certainly seems

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1 relevant to what he knew or understood before he made the
2 decision. In particular, for example, there was some
3 testimony, I think, regarding what Dr. Abowd may have told the
4 Secretary concerning the application of disclosure avoidance
5 techniques at the block level. I'm not sure that that is
6 memorialized somewhere in the record, but my question is, what
7 effect that has if there is testimony about statements that
8 were made to the Secretary, but they are not memorialized in
9 writing as part of the administrative record.

10 Next, a merits question. In plaintiffs' pretrial
11 brief, they made an argument that the Secretary's decision was
12 contrary to law because, under Section 141(f) of the Census
13 Act, the Secretary was required to submit a report to congress
14 three years in advance of the census, so in or about March of
15 2017, identifying the subjects that would be inquired about on
16 the questionnaire, and that that report which is in evidence
17 does not contain any reference to citizenship. I don't think
18 that that is a disputable proposition. It does not.

19 I notice that that argument was not responded to by
20 defendants in their pretrial briefing. I have two questions.

21 One is what effect, if any, the failure to respond to
22 that argument has? Is there any sort of argument for waiver or
23 the like by virtue of failing to respond?

24 Number two, I think you should respond and both sides
25 should brief that question. The question is, number one, what

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1 effect does the failure to include it in the three-year report
2 submitted in 2017 have or the circumstances set forth in
3 subsection three of that statute that would allow for new
4 subjects to be added, even after the report is due, has that
5 been met?

6 What evidence can I consider in making that
7 determination, and what would a remedy be in the event that I
8 found that there was a violation of that provision?

9 Another question on the merits. Let me ask plaintiffs
10 now, specifically Mr. Ho, since I think it is on claims made by
11 your clients.

12 With respect to the due process claim, am I correct
13 that discrimination, you have to prove discrimination on the
14 basis of either race or national origin, correct?

15 MR. HO: Yes, your Honor.

16 THE COURT: All right. Focusing on the national
17 origin part of that, do you concede that that does not mean
18 discrimination against noncitizens, against immigrants, against
19 foreigners, writ large? That is to say, all of immigration law
20 seems to discriminate, in some sense, against people who are
21 not citizens of the United States. It certainly has a
22 desperate impact on them, and in some instances, is intended
23 to disadvantage them, I would think. All sorts of laws
24 discriminate in the sense of, you know, allowing citizens to do
25 things that noncitizens are not allowed to do and so forth.

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1 I assume that that alone would not satisfy your
2 burden, that national origin discrimination requires something
3 more than that, and either discrimination on the basis of
4 specific national origin or subset of, you know, all
5 non-Americans?

6 MR. HO: I don't think we would concede it requires
7 identification of a specific national origin, your Honor. I
8 think what we would say is that animus towards people whose
9 origin is not in the United States is disqualifying under the
10 Fifth Amendment as a basis for government action.

11 There may be justifications for drawing distinctions
12 on the basis of citizens and noncitizens, of course, as your
13 Honor points out, but the desire to harm a group of people
14 because they are not born in the United States, I think, even
15 if that doesn't capture every -- even if that action doesn't
16 capture every person not born in the United States, your Honor,
17 we would submit that that constitutes a Fifth Amendment
18 violation.

19 THE COURT: All right. Thank you.

20 That is helpful. Although, I think both sides should
21 plan to address that question in their briefing on that, and
22 beyond that, would expect plaintiffs, that is NYIC counsel, to
23 marshal the evidence that you think would support a finding of
24 animus in violation of the due process clause.

25 Then finally, an issue that I would make sure you

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1 address. I do not mean to intimate any views on the merits
2 here. I want to make sure that the record is sufficient for me
3 to decide whatever I need to decide, but that is to say, don't
4 read too much into this. You should plan to address the
5 question of remedies, that is to say, if I find a violation of
6 either the APA or the due process clause, what the appropriate
7 remedy is.

8 There is certainly, in some context, I think, the
9 remedy for an APA violation would be remand. I don't know if
10 that is appropriate, or if some sort of injunctive relief would
11 be appropriate, if there is injunctive relief. I'm well aware
12 of controversies regarding the scope of injunctive relief that
13 district judges should be entering and would expect that you
14 would address that and so forth. It would be helpful if you
15 addressed that.

16 I understand that defendants' view is there should be
17 no remedy at all, and I am mindful of that. Again, don't read
18 into my telling you to address it that I have just made up my
19 mind on the merits.

20 All right. Any questions?

21 Anything else?

22 MR. SCHUMATE: No, your Honor. Thank you.

23 MR. COLANGELO: Nothing for the plaintiffs.

24 THE COURT: Give me one moment.

25 (Pause)

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1 With that then, I'm closing down my computer, since
2 I'm not going to be back here for a couple weeks. Let me just
3 say, before we're here on the 27th and before I issue a ruling,
4 more to the point, I really enjoyed the trial, and I commend
5 both sides on really doing what I think was a phenomenal job in
6 making a record and presenting your cases. It was a joy to
7 watch at times and it is nice to see lawyers who know how to
8 try a case. Thank you for that.

9 I will see you on the 27th. I wish everybody a very
10 happy Thanksgiving. I'm sure your families will be pleased
11 that your papers are due the day before.

12 We are adjourned. Thank you.

13 (Adjourned to November 27, 2018, at 9:30 a.m.)
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PLAINTIFF EXHIBITS

Exhibit No. Received

6841371

6881374

387, pps. 173-1921409

390, pps. 62-861409

5021409

272, 273, and 5091413

197 through 2001414