UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATES OF NEW YORK, COLORADO, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, MARYLAND, MINNESOTA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, and WASHINGTON, *et al.*,

Plaintiffs,

v. 18 Civ. 2921 (JMF)

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

Oral Argument

Defendants.

NEW YORK IMMIGRATION COALITION, *et al.*,

Consolidated Plaintiffs,

v. 18 Civ. 5025 (JMF)

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

Defendants.

New York, N.Y.
November 27, 2018
9:30 a.m.

Before:

HON. JESSE M. FURMAN,

District Judge

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(Trial resumed)

THE COURT: You may be seated.

All right. Good morning to everyone.

I know some of you tried hard not to be here, but welcome back nonetheless. We are here for closing oral arguments in connection with the trial. I thank you for your certainly robust post-trial briefing. I was a little surprised by its length, but I was rather impressed, given the compressed amount of time, with the quality of both sides' briefing, so I thank you for that. I suspect one of those situations if you had more time, you would have made it shorter, and since I didn't give you much time, I take the blame for that.

We'll get started. We'll start with plaintiffs and then defendants. As I indicated in the order yesterday, I'll give each side essentially 20 to 30 minutes to sort of present what you think is the heart of your case, and I am not promising I won't interrupt at all, but for the most part I'll let you present your respective cases and then we'll proceed issue-by-issue as long as it is helpful to me.

We are on Court Call, I believe, so we just ask that you make sure you use the microphones and speak loudly, clearly and into them and then we can get started.

One housekeeping matter, am I correct, Mr. Shumate, Mr.Dryban is now the Assistant Attorney General for Civil Rights, making Mr. Gore the Former Acting Assistant for Civil

Rights?

MR. SHUMATE: That's correct. Mr. Gore is now Acting Directing Assistant Attorney General.

THE COURT: Who will be arguing for plaintiffs?

MR. COLANGELO: I will be, your Honor.

THE COURT: You may proceed.

MR. COLANGELO: Good morning, your Honor, Matthew Colangelo for New York on behalf of the governmental plaintiffs.

These consolidated cases challenge the commerce secretary's decision to add for the first time since 1950 a citizenship question to the decennial census questionnaire sent to every household in the country. This is not an ordinary challenge to federal agency action.

In an ordinary case, the record for review would be presumed to fairly reflect the information that was before the decision-maker; but here the record that was originally compiled was facially deficient and required multiple court orders to complete, not just to supplement, but simply complete the original record.

In an ordinary case, the Statement D of decision-makers reasoning could be fairly expected to reflect the actual considerations and the true course of events, but here the Secretary's decision, in fact, whitewashes the true course of events and fails to disclose the actual genesis of

his decision. In an ordinary case, the decision would find support in the factual records even if that record reflected some debatable calls and exercises of judgment, but here the decision is contradicted and rebutted point-by-point by the defendants' own subject matter experts.

In the ordinary case, the agency decision could have some discernable connection to its stated purpose, but here I don't think any party still argues that the stated purpose of improved Voting Rights Act enforcement is, in fact, advanced by the Secretary's decision.

In the ordinary case, your Honor, the defendants' own witness doesn't choke up on the witness stand while talking about how this decision was -- his recommendations were subverted by political interference, in contravention of the foundational principles that govern how statistical agencies operate.

I'll briefly the describe the evidence at trial, how it applies to the plaintiffs' claims and why that matters and we'll afford discussing in more detail the topics the court has identified and anything else the court wants to cover today.

In terms of standing, your Honor, the plaintiffs have identified five distinct injuries in fact all independently connected to the Secretary's decision to add a citizenship question.

First is the expenditure of resources. NYIC

plaintiffs and governmental plaintiffs have presented uncontested proof of actual expenditures of financial and other resources directly caused by and in the interests of counteracting the consequences of adding a citizenship question to the census questionnaire.

Secondly, the court heard a lot of questions what Dr. Abowd called the corruption to the data quality that will be an automatic consequence of adding a citizenship question to the census and the governmental plaintiffs as the non-profit plaintiffs are harmed by that corruption of the data quality because it renders impossible our ability to make resource allocations especially in a sum zero resource administration environment.

Third, the evidence shows the plaintiffs are harmed by impairments of their right to effective political representation. Even assuming only a minimal 2 percent undercount, the expert testimony showed that all but one of the local government plaintiffs would be materially disadvantaged relative to the share of the rest of their states, their representation would be undermined and the non-profit plaintiffs would feel the consequences of that weakened representation.

If you assume 5.8 percent undercount, California, Texas, Florida would always consequentially bear directly on representation of five of the local government plaintiffs;

Monterey County, San Francisco, California El Paso, Texas, and as well as the representation interests of all of the non-profit plaintiffs.

Your Honor, the fourth harm we have identified is a harm to our federal funding interests. Again, even assuming only a marginal undercount, the dozens of federal funding programs that rely to some extent on census-derived formula for the allocation of the resources, those programs will all be disrupted and the plaintiffs will suffer identical harms as a result of that.

Finally, your Honor, the NYIC plaintiffs have identified concrete harm caused by the loss of privacy and in particular connected to their reasonable expectation of fear supported by the defendants' own evidence that for immigrants in particular and members of immigrant households and non-citizen households, their information will be used against them by law enforcement and for other purposes.

Of those five showings of injury, only two of them depend at all on any evidence of an undercount. Three of those showings of injury, the harms to data quality, the expenditure of resources, and the loss of privacy all of those harms have accrued already and will continue to accrue to plaintiffs without with regard to the court's ultimate conclusion whether there is a differential undercount caused by the citizenship question.

The plaintiffs have clearly established standing and the court should reach the merits here. On the merits of the plaintiffs' claims under the Administrative Procedure Act, your Honor, the Supreme Court has said that an agency decision is arbitrary and capricious where it is contrary to the evidence, fails entirely to consider important aspects of the problem, or relies on inappropriate factors such as pretext or prejudgment. Every single measure the Secretary's decision here fails these standards.

First, it is contrary to the evidence in a dozen ways that we'll look forward to talking about in detail for your Honor. The secretary said in his decision that there was no evidence that adding a citizenship question would decrease response rates. There was evidence, his own team of experts, team of experts presented four different assessments through naturalized citizens to show response rates and it will, in fact, decrease response to the census.

The secretary also said it was necessary to add this question to provide the most accurate data. It will not, in fact, provide the most accurate data and there is no evidence it will. The secretary concluded alternative D, the option of both adding a citizenship question and using administrative records to fill in the gaps, he concluded alternative D was better than Secretary Ross's own preferred approach, relying exclusively on administrate centered record and the uncontested

evidence shows alternative D was worse on every single measure that the secretary claimed he was prioritizing.

Or if the secretary said that adding a question was necessary to respond to the DOJ request, but nobody thinks this is correct, and in subsequent filings the defendants themselves have pointed out that the DOJ letter does not even say that better data are necessary for effective enforcement of the Voting Rights Act.

Then finally, your Honor, there are half a dozen other fact-free assertions in the Secretary's memo that literally have no support in the record or are contradicted by the record. He said adding a question is no burden to the people who answer it. The record shows the Census Bureau believes in survey methodologies, but every question adds burden whether you answer it or not.

He said no one has identified any mechanism for figuring out what might happen. Not only is that untrue, the Census Bureau, in fact, demonstrated how they could apply those mechanisms to assess what might happen here. The secretary said it was difficult to assess costs, but Dr. Abowd's memo included a specific cost estimate of what might happen as a consequence of making this decision.

The second consideration courts look at is whether the agency decision-maker failed entirely to consider important aspects of the problem, and here again there are half a dozen

ways the Secretary's decision falls short of this requirement. He did not even reference in his decision or make any indication that he was aware of or was following.

The legal obligations, like the obligations in the Census Act, the binding constraints imposed by OMB statistical policy directives and the Census Bureau's own mandatory statistical quality guidelines, the secretary inverted the standard of proof justifying his decision on the ground that no one could prove definitively what the consequences would be when, in fact, the record evidence shows that the Census Bureau's long-standing practice is that every change to any statistical instrument has to be justified by showing of need.

The secretary failed even to mention disclosure of witness protocols. The court heard a lot of testimony about disclosure of witnesses. It is obvious the Census Bureau's mandate to make the data -- protect the data consistent with the confidentiality requirements of Section 9 of 13 U.S.C., that those efforts will make the data less useable, and the secretary didn't even mention that consideration even though the defendants now agree he was briefed on it.

The secretary bypassed the long-standing procedures that are intended to help the agency understand what, in fact, the need for a new statistical question is. The Department of Justice refused even to meet with the Census Bureau to discuss their needs, but instead of deciding that that may indicate a

lack of support for the question, the secretary plowed ahead nonetheless.

Third, your Honor, there is extensive pervasive evidence of pretext in this record. The evidence shows that the secretary knew what he wanted to do and then looked for a reason to justify it. We will talk about that in some detail.

The record also shows the defendants were not forthcoming about their reasons for and genesis of their decision. In fact, they misled the public and Congress and the court about the genesis of this process, insisting until months after this lawsuit was filed that the entire process was quote-unquote initiated by the Department of Justice letter when, in fact, we learned later that the secretary had been thinking about this since very shortly after he was confirmed as secretary of commerce in early 2017.

In fact, he gave a press interview just a couple of weeks ago, as the court knows, where he said added discussions about adding citizenship question were in the air from the early days of the administration. If that is the case, there was no reason to hide it from the public, Congress and the court.

The record will show that the secretary departed from typical practice, was subject to significant external political pressure and, importantly, your Honor, there are a number of key instances in which the administrative record is at best

misleading and more likely was falsified. The first instance is in the total mischaracterization of what the vice president for data science from Nielsen told the secretary.

The Secretary's decision reports that she presented empirical evidence that would support a conclusion that sensitive questions do not reduce response rates. Not only is there no such empirical evidence anywhere in the record, as this Court first mentioned on July 3 but, in fact, Ms. Pierce testified as a witness in this trial that she said no such thing and provided no such evidence, and the defendants didn't even cross-examine her, nor did they, in fact, mention her name once in what the court has already recognized in voluminous post-trial papers.

Finally, your Honor, we have talked a little bit about Question 31. This was the question in the series of Q & A's that the Commerce Department and Census Bureau passed back-and-forth to help the Commerce Department understand the census Bureau's decision. Question 31 was the answer that went to what the Census Bureau's procedures were for changing the content on the census or another statistical instrument.

The court will remember the Census Bureau's initial draft of Question 31 laid out the well established and detailed process. That answer was modified, as the court knows, by the Commerce Department to significantly truncate it, and then the final answer that was included in the original administrative

record that was made public after we sued is itself different from the last version of Question 31 that anyone from the Census Bureau ever saw and not know where it came from, and it was changed in a material way to indicate that testing might not be needed, and there were, in fact, no procedures for making decisions of those kinds.

Your Honor, the non-profit plaintiffs will also argue that the evidence shows the Fifth Amendment violation of equal protection component of the due process clause, and there, your Honor, the record is just as clear there was and will be a disparate impact from this decision and all of the Arlington Heights factors proven intent through circumstantial evidence will combine to show the defendants were at least in part motivated by a prohibited discriminatory purpose in making their decision.

All of that evidence establishes that the decision should be set aside and enjoined. In getting here, we have talked a lot about persons census imputations and dual system estimator and differences between ignorable an non-ignorable imputation models and a lot of other important issues that we'll talk about most of today.

This case is fundamentally about a decision by the secretary that unless enjoined, will permanently impair core elements of our constitutional democracy. The reason that New York is here on behalf of nearly three dozen state and local

governments, the reason that the nonprofits are here on behalf of a coalition of leading organizations that represent diverse communities from around the entire country, the reason we are in the ceremonial courtroom this morning, the outcome of this trial will affect every community in the country.

It affects our representation in Congress, and not just how the seats are divided. It affects whether communities have the full weight of their actual presence represented at national, state and local representation in democracy or whether they will be marginalized and excluded for a decade.

The outcome of this trial affects the distribution of hundreds of billions of dollars, and you heard testimony that was intended to make that abstract number more concrete. It will impair the ability of, for example, New York City to know where it needs to place its curb cuts as its city population ages and folks need more mobility assistance. As Dr. Abowd testified convincingly, the outcome of this trial will affect the accuracy and quality of the data that form the statistical backbone of literally everything the federal government does with its data systems.

It will affect the ability of -- and he gave the example of the commissioner on labor statistics needs accurate data in order to be able to report the monthly employment and unemployment situation on the first Friday of every month, the National Center on Health Statistics needs accurate data in

order to be able to identify disease prevalence and better plan disease prevention and control methods. By corrupting that data, we are undermining all of those purposes.

For a decision that consequential to be justified on a record so thin and so unmoored to the actual facts and so transparently pre-textural is not compliant with the Administrative Procedure Act and is not compliant with the Fifth Amendment to the Constitution. The defendants' only arguments in defense are, first, that the plaintiffs are not injured. We have argued that we are and we'll explain that in more detail today.

Second, the court simply can't review this question, that these kinds of issues are committed entirely to the Secretary's discretion. The secretary of commerce is not above the law. The facts showed that his decision violates the Constitution, and the plaintiffs respectfully request the court set aside and enjoin that decision.

Thank you.

THE COURT: Thank you very much, Mr. Colangelo.

Mr. Shumate.

MR. SHUMATE: Good morning, your Honor. May it please the court. Brett Shumate for the United States.

Secretary Ross reasonably decided to reinstate the citizenship question to the decennial census. This is a question that had been asked by our country for most of the

last 200 years. As recently as 2000 on the long-form census, it is a question of 41 million Americans have already answered on the American Community Surveys since 2005. It is a question that many other governments ask the people in their countries, and it is a question that our government is legally entitled to ask.

In light of DOJ's request for better citizenship data to enforce the Voting Rights Act, there is lack of definitive empirical evidence that the citizenship question will cause a material drop in the response question. In light of the fact people in this country have a legal obligation to respond to the census, it was entirely reasonable for Secretary Ross to make a policy judgment that the benefits of adding a question to the census outweighed the costs.

The fact that the experts disagree with Secretary Ross's decision is irrelevant to this case. The only opinion that matters is Secretary Ross's opinion and the reasons that he provided in his decision memo from March 26 and the administrative record that was before him at the time he made his decision.

Before we get too far in the merits, I do want to make a few remarks about standing and then I'll return to the APA claim. I will leave any remarks about equal protection claims and any Q & A the court may have. I would like to focus on one point on the standing argument and few points on the APA claim.

Our principal point on standing is the plaintiffs have not carried their burden to demonstrate an injury that is certainly impending and traceable to the addition of the citizenship question because they have to engage in far too much speculation between now and 20/20.

The main point I want to emphasize and point out for the court is any injury to the plaintiffs is traceable to the independent decisions of people who decide not to respond to the census because of the macro-environment, not the addition of the citizenship question. I would like to start with three undisputed facts:

First, self-response rates to the census have been declining for decades even before the addition of the citizenship question;

Second, there is historically been a differential undercount of Hispanics even before the addition of the citizenship question;

Third, since 2016, political climate or macro-environment which we heard so much about at trial has made it less likely certain groups will respond to the census in 2020.

All of this was happening before Secretary Ross decided to add the Citizenship question to the census, and it is speculative to conclude simply adding this one question to the census will materially cause some people who would

otherwise have responded to the census to decide not to respond to the census.

Instead, the overwhelming evidence at trial showed that some people will not respond to the census because of the macro-political environment regardless of the addition of citizenship question. I would like to walk the court through a couple of key pieces of evidence that make that point.

First there is the Census Bureau CBAMS study. The focus groups show responses are concerned about confidentiality of the census with or without the citizenship question. That is at PX-662, at page 43. One of the participants in that study said a lot of people are afraid. It doesn't matter what they are asking, a lot of people are afraid. It doesn't matter if they ask you whether or not you are a citizen. The first question they ask you, are you a Hispanic or Latino? And that is enough. That is all they need and people are scared.

Census Bureau's research, PX-448, page 8, also reflects concerns about confidentiality well before the addition of the citizenship question. One of the questions from that evidence shows that particularly in our political climate, the Latino community will not sign up because they think Census Bureau will pass their information on and people can come looking for them. It goes on to say politics have changed everything. Three years ago it was so much easier to get responses compared to now because of government changes in

trust factors. Three years ago I didn't have problems with immigration questions.

Dr. Barreto talked a lot about macro-political environment. PDX-26 changes in the macro-socio political environment since 2016, people in Latino communities lost trust in the federal government. The plaintiffs' declarations -- Plum, Pfautz, Warshaw, Choi -- all blame the macro-political environment for decline in people willing to participate in the census regardless of the citizenship question.

I'll point out one. The Plume declaration, Paragraph 13, NYIC plaintiffs, say that they were also facing more significant challenges in its census outreach before the decision to institute the citizenship question. More of this evidence is described in the plaintiffs' proposed findings of fact at pages 157 to 161 and 183 to 189. I won't go into any more detail, but the reason I bring this up is all of this supports Secretary Ross's conclusion, at page 5 of his memo, that some people will simply not respond and participate in the census because of distrust in government or they dislike the current administration regardless of whether the census includes a citizenship question.

To be sure, there is some evidence in the record that a citizenship question could be expected to reduce self-response rates, but that evidence is not enough for the plaintiffs to carry their burden to show injury and it

certainly relates to the citizenship question.

Talking about Dr. Abowd's January 2018 memo in which he identified a 5.1 percent decline in non-citizen households due to citizenship question, but it is undisputed that is only a natural experiment, doesn't assign causation to the citizenship question. It is not a controlled study, doesn't control for other factors like macro-environment.

It doesn't account for information or factors that cause a drop in self-response. Dr. Abowd said in his memo to Secretary Ross, 1281 of the record, this is a reasonable inference that a question on citizenship would lead to some decline in overall self-response, but it wasn't predicting with any certainty. Although this is credible quantitative evidence, he said the citizenship question could be expected to cause a decline in self-response. Secretary Ross correctly observed that this is not definitive empirical evidence that the citizenship question will cause a material drop in the self-response rates.

We make a number of other standing points in our brief. I won't belabor the point. I point out that the other arguments we make are even if you assume there will be a drop in the self-response because of the citizenship question, Dr. Abowd has put on testimony that non-response follow-up operations will cure any undercount or any drop in the self-response. We have also argued that the plaintiffs have

not shown that they will suffer a loss in representation or loss in funding due to the citizenship question. That is all I would like to say automatic standing now.

I'll turn to APA claim and make a few more detailed remarks to explain why the plaintiffs have not carried their burden to show that the Secretary's decision is arbitrary and capricious.

First, the secretary provided a rational reason for reinstating the citizenship question. He explained that he had decided to reinstate the question to provide DOJ with better citizenship data to help with enforcing the Voting Rights Act. The plaintiffs try to attack DOJ's letter, but they haven't undermined the letter or request in any material respect. It is undisputed that DOJ needs citizenship data at the block level to enforce the Voting Rights Act. It is undisputed the American Community Survey data is not available at the census block level and the ACS data contains large errors.

The fact DOJ can adequate litigate Section 2 cases with ACS data shouldn't prelude DOJ from trying to obtain a better source of data. Experts may disagree with the letter as a policy matter, but there is nothing unusual or unlawful about DOJ reaching out to the Census Bureau to try to obtain more granular citizenship data to help them enforce the Voting Rights Act.

Secretary Ross considered alternatives to his decision

to add the citizenship question to the census, including the alternative that the Census Bureau wanted to discuss with DOJ option C. He acknowledged the option C administrative record option was an optionally appealing solution to the DOJ request and acknowledged the administrative records couldn't be more accurate than self-response in the case of non-citizens, but he concluded quite reasonably that option C was not the best option.

There is not a complete set of administrative records for the entire population. So more than 10 percent of the population, 25 million voting Americans, would have to have their data, citizenship data, imputed and plaintiffs' own experts testified that errors get introduced when imputation is introduced. It was entirely reasonable for Secretary Ross to conclude that that option was not the best option.

Dr. Abowd's memo also supports his conclusion option C was not the perfect solution because he said surveys have, "more complete coverage of citizenship than administrative record data," page 1284.

Mr. Thompson's testimony supports Secretary Ross's conclusion that administrative records are not perfect, are less likely to represent administrative records. Thompson's Declaration, Paragraph 118.

After consulting with the Census Bureau, Secretary Ross asked them to prepare four options, option D, combine the

adding citizenship question with greater use of administrative records, and ultimately Secretary Ross's view that was the best option to respond to DOJ's request, to provide DOJ with most complete and accurate CAPE data.

Dr. Abowd's memo again provides support for that conclusion. He said, at page 1278 of the record, adding a citizenship question would improve block level data because it would be a direct measure of self-reporting citizenship for the whole population, one of the advantages of this option he identified.

He also pointed out to the secretary non-citizens answer the ACS citizenship question incorrectly 30 percent of the time. It was quite reasonable for him to conclude the ACS data was not the best sorts of data for DOJ to be using for Voting Rights Act enforcement.

Third, Secretary Ross considered carefully the most important factor here, whether the citizenship question might cause some people not to respond to the census. He reviewed the Census Bureau's memos and he acknowledged the concern that lower response rate could reduce the accuracy of the census and increase costs for non-response follow-up operations. He said although there is a widespread belief the citizenship question could reduce response rates, he concluded there was no definitive empirical evidence in the Census Bureau, agreed there could be docketed response, a decline in response to

rates that would decline materially.

Ultimately, he made a policy judgment that the benefits of asking the question to provide DOJ with better citizenship data outweighed the costs, especially in light of the fact the question had been asked repeatedly in the past and most recently as 2000. The lack of empirical evidence, definitive empirical evidence response rates would materially impact and, in fact, people have legal obligation to answer the census.

It was entirely reasonable for him to conclude, in the face of inconclusive evidence about the impact of the citizenship question, that it was more important to provide DOJ with granular citizenship data than any adverse impact from people violating their legal duty to respond to the census. This was a policy judgment, not a scientific judgment.

The fact the Census Bureau expressed technical concerns is important, and Secretary Ross considered those concerns and explained his disagreement, but ultimately the plaintiffs and experts disagree with Secretary Ross's policy decision is not a basis to set aside the decision.

Fourth, Secretary Ross reasonably concluded that the citizenship question didn't need to be separately tested before being added to the census. He concluded that the citizenship question has been well tested because it had been on the ACS survey since 2005 and it had been asked on prior decennial

census surveys. That conclusion is well supported in the record. Dr. Abowd's memo, page 1279 in the records, says since the question is already asked on the ACS, we will accept the cognitive research and questioning on ACS instead of independently retesting the citizenship question.

He also testified the citizenship question was extensively tested before going on ACS, and 41 million Americans have responded to the ACS citizenship question since 2005. He also pointed out there was precedent for adding questions to the decennial census without additional testing. He pointed to the addition of his possibility in the original question of 1997, and the question about race in 1990.

Fundamentally, there is no legal requirement that the citizenship question had to be tested before being added to the census. There is no established process for adding a question to the decennial census. It hadn't been done in ages.

Secretary Ross wasn't bound to follow the Census Bureau statistical guidelines before adding the question. The case law is clear the staff cannot bind an agency head. I point the court to the D.C. Circuit decision in *Comcast v. FCC*, 2008, 526 F3d. 763. There is no authority for the proposition that a lower component of a government agency may bind the decision-making of the highest level.

The fact the plaintiffs' experts would have liked more testing for the citizenship question was added to the census is

beside the point. It doesn't render the Secretary's decision unreasonable. Even though the court may believe additional testing would have been a better thing to do before adding the question, courts don't impose procedural requirements on agencies. That is something that is left to the discretion of the agencies. If the OMB concludes additional testing is required, OMB can require that work with the Census Bureau to conduct additional testing for the citizenship question before the 2020 census.

Finally, I want to explain plaintiffs have failed to show the secretary acted in bad faith or for some pretextual reason. I want to be clear what we mean by bad faith and pretext. This is before the Supreme Court. What we have said is to demonstrate bad faith and pretext, it requires evidence the secretary irreversibly prejudged the issue or didn't believe the reason or rationale provided or acted for some illicit purpose. There is none of that evidence here. There is no evidence that Secretary Ross had irreversibly prejudged the addition of the citizenship question. To be sure, the record shows he thought adding the question could be warranted and reached out to DOJ and other officials to see if there is support for adding the question.

It doesn't show or indicate prejudgment. It simply shows he had an initial possible preference, and this was something he wanted to do, but it wasn't something he could or

felt he could do without a request from DOJ.

The fact that Secretary Ross conducted a thorough process before or after the DOJ letter is not indicative of pretext or prejudgment. It is indicative he had an open mind and he carefully considered the Census Bureau's input before reaching his decision. There is no evidence he would have gone forth with the addition of the question in the absence of DOJ's request and rationale of DOJ provided.

There is no evidence Secretary Ross didn't believe the VRA questionable or DOJ didn't believe the VRA rationale. John Gore, in his deposition, stood by the DOJ letter and didn't back away from it at all. There is evidence in the record Commerce believed DOJ has a legitimate need for citizenship data to enforce the Voting Rights Act.

Secretary Ross never concealed or misrepresented any aspect of his decision. His original memo described the formal process that led to the decision to add the citizenship question to the census. It is hardly enough that there was an informal process prior to the DOJ letter. The memo accurately states that once the DOJ letter came in, the secretary took a hard look at DOJ's request, involved the Census Bureau in those discussions an ultimately reached a reasonable conclusion.

I would like to say a few more words about Secretary's decision-making process. The plaintiffs, the plaintiffs try to paint a picture of the government acting in secret cutting

corners, ignoring experts, giving in to political pressure and even lying to Congress. None of it is true. A fair review of the record does not support the story that the plaintiffs are trying to advance.

What the record actually shows is a new cabinet secretary coming into office, pushing staff to get things done, a policy preference, collaboration within the federal government and consultations with career staff. This is exactly how policy is made in any administration, and nothing about it is unusual or circumspect in any way. When Secretary Ross took office, he thought reinstating a question on census would be a good idea, but he hadn't made up his mind, but he did whatever any cabinet secretary would do.

He asked questions and directed his staff to look into the issue. One of the things his staff did was reach out to other federal agencies, including DOJ, to see if there is support for adding a question to the census. It made perfect sense Commerce would reach out to DOJ. DOJ had been using census data to enforce the Voting Rights Act for decades, and DOJ had asked for the addition of a citizen question to ACS in 2005.

The question for DOJ was whether it could benefit from more granular citizenship data. DOJ said yes. Asking a citizenship question on census could be helpful. DOJ did not say it needed a citizenship question to be added to the census.

Instead, DOJ said getting citizenship data from the census with the block level would be helpful in enforcing the Voting Rights Act.

So in December 2007, DOJ sent the letter to the Census Bureau formally requesting the citizenship question adding to the decennial census. It is hardly surprising Secretary Ross would have reached out to Attorney General Sessions to discuss this issue. This was a major policy decision. There is nothing unusual about one cabinet official consulting with each other, especially the chief law enforcement officer of the United States. Those types of interactions between cabinet officials should be encouraged, not criticized.

Plaintiffs try to make much of the fact that DOJ declined to meet with the Census Bureau after DOJ sent the letter. Well, the letter stated DOJ's views on the subject. It was up to Secretary Ross, not DOJ and not the Census Bureau, to decide how to proceed in light of the DOJ letter. Ultimately, Secretary Ross considered and rejected the option that the Census Bureau wanted to advance to the Department of Justice. It was option C.

When Secretary Ross received DOJ's letter, he and his staff took a hard look at DOJ's request. He didn't whitewash the record. He built one as he is legally obligated to do. He did not ignore the Census Bureau. He consulted with them. He reviewed with them their memos and asked them questions. He

ultimately explained his disagreement with the Census Bureau.

Dr. Abowd's testimony about his meeting with Secretary Ross was quite telling. He said it didn't appear the secretary had already made up his mind. He said the secretary had asked really sophisticated questions that showed he understood all of the alternatives. This did not reflect a decision-maker that prejudged the issue.

After all, if Secretary Ross had already prejudged the issue, why would he engage in all of this process, why would he ask questions of the Census Bureau, review all of their memos? Ultimately, why would he write a very sophisticated, detailed decision memo?

That is all I wanted to cover right now in my opening remarks. I thank you for your attention to this. We agree it is very important, and we thank the court.

THE COURT: Thank you very much, Mr. Shumate.

We'll proceed issue-by-issue, as I indicated, starting with ripeness and then standing, so sort of two jurisdictional threshold issues.

Who is addressing those issues for plaintiffs?

MR. COLANGELO: I'll handle ripeness for plaintiffs your Honor.

THE COURT: All right. My question, the defendants have argued the case is not ripe for decision for either of two reasons. One is that the question of whether the citizenship

question should appear on the census has not yet been cleared by OMB, the process required the Commerce Department to submit its proposed questionnaire to OMB, and it is up to OMB ultimately to decide whether to accept that, to require additional testing or to reject it.

Now, given that, what is your answer to that argument?

MR. COLANGELO: Two answers, your Honor:

First, is that any argument about ripeness or final agency action is waived because not only did the government not raise it until their post-trial brief, but they, in fact, affirmatively characterized the Secretary's decision as a final decision throughout the course of the litigation.

THE COURT: Well, let me interrupt.

My understanding is ripeness, there are two different, distinct, but related concepts. One is the jurisdictional threshold requirement. Presumably, that couldn't be waived.

The second is some sort of precedential concerns about ripeness. Presumably that can be waived. Is it your argument that ripeness here is of the precedential variety and not jurisdictional variety?

MR. COLANGELO: Yes, and they haven't characterized it as an jurisdictional obligation. I can direct the court's attention to their motion to dismiss. It is at Docket No. 155, page 39. I don't know, Matt, if you can bring that up. In the motion to dismiss, they referred to this as the final agency

action taking the form of a statutorily mandated report to Congress. If you can pull that up. You don't need to.

This is at the first full paragraph. You can pull that down. You're on the wrong page. Sorry. I'll give you a better page next time.

On the merits, the ripeness argument fails for multiple reasons. Courts considering ripeness look at three factors:

First, the prejudice to plaintiffs from delay and review, and here withholding judicial review would clearly prejudice the plaintiffs. We have already been harmed and we continue to be harmed. Any delay for an uncertain amount of time would allow that harm to continue, to continue to accrue. It would not only jeopardize any opportunity for the court to resolve plaintiffs' claims before the census questionnaires are printed, but would allow what the Census Bureau already called unprecedented levels of concern to perpetuate.

Related to that point, your Honor, it would be particularly prejudicial to plaintiffs to allow this requirement for judicial review because the timing of their second submission to OMB is entirely within their control. According to their own operational plans which they first published in 2016, they were already supposed to have submitted the second Paperwork Reduction Act clearance package to OMB as of August, so it could be approved by September. So the second

package has not gone over to OMB. There is no explanation for the four-month delay, and to withhold judicial review pending an OMB clearance process is entirely within their control so time would be particularly damaging to the plaintiffs' Claims.

I think the sort of second factor the courts consider in looking at ripeness is whether as a practical matter judicial review is premature or whether the agency has, in fact, come to rest in its decision-making. In other words, the court should be concerned about whether or not it would disrupt the ordinary process of agency decision-making, and here as a practical matter, the Secretary's decision is final. It has been communicated as final. They have represented to the court repeatedly it was final, and there is no concern that judicial review would disrupt that ordinary decision-making process.

Relatedly, your Honor, as a practical matter, the Paperwork Reduction Act review process has never in 42 years resulted in any changes to the decennial census questionnaire. That is dating back to the decennial census submission starting after 1976 amendments to the Census Act.

The information collection request packages that were cleared in 1980, 1990, 2000 and 2010, in every single instance the OMB review process resulted in no changes to the questionnaire. So it would be particularly unusual to argue now there is something less than final about the Secretary's decision when the OMB clearance process has never modified that

decision in the past.

THE COURT: Although you started by telling me this case was unusual in all sorts of respects, so maybe they will surprise us.

MR. COLANGELO: This is the exception that proves the rule.

THE COURT: The second ripeness question, unless you have more to comment?

MR. COLANGELO: Briefly, your Honor, the third ripeness requirement is whether the court is at risk of becoming involved in an abstract disagreement or whether, in fact, the case is sufficiently presented that the court can understand the resolution. I think it is clear this is not an abstract disagreement.

THE COURT: The second way in which they've argued their ripeness issues, this sort of bleeds into the question of standing, but the defendants' argument is that, as I understand it, that the NRFU operations, including imputation, will address any differential undercount properly, or in the alternative, plaintiffs, you have not proved that the NRFU operations won't address any problems, but, of course, that ultimately turns in large part or at least in part on the process of imputation and how successful that process would be, and Dr. Abowd testified that the algorithms for imputation have not yet been determined and they would, in fact, need to be

adjusted and tinkered with in order to address the potential problems arising from the citizenship question.

Given that, how can I resolve the question of standing at this point and, relatedly, why is the question ripe?

(Continued on next page)

MR. COLANGELO: Your Honor, I'll defer the standing question to my colleague, Mr. Freedman, who is going to be arguing as to standing principally for the plaintiffs.

As to the question of the ripeness in particular, your Honor, I would make two observations. First, the question of any future testing, we think, is irrelevant at least to three of the plaintiffs' showings upon, and potentially all five, as to the injuries that we have accrued that have nothing to do with how well the question ultimately performs in practice. Those injuries will not be mitigated in any way by testing.

I think, secondly, as Dr. Abowd testified, the point of testing any question on the statistical instrument is to develop actionable results. OMB can't order, or it would be irrelevant to the questions the Court is considering for OMB to order, testing that it's too late for the Census Bureau even at the time, that the only point of testing would be to make some change, whether it's to modify the census questionnaire in some way. But where there's only six months left or seven months left until the questionnaire has to be printed, no testing has been ordered, the submission hasn't even gone over to OMB yet, I don't think there's any reason the Court should withhold review based on speculative forthcoming possibility that there's no evidence in the record that that actually proves the fact.

If your Honor allows, I have one more observation I

want to make on the Paperwork Reduction Act process.

Just for the Court's awareness, the statutory requirement for OMB review, at the second step of the PRA process, which is where we are now, provides for a public comment period and then either approval by the OMB director or presumptive approval if the OMB director does nothing. In other words, if nothing else happens, under the statute, if the commerce department sends over the PRA package and the OMB director takes no action, then under the Paperwork Reduction Act, the questionnaire is presumptively approved. I think that's another reason why the dispute here is sufficiently ripe for the Court to adjudicate it.

THE COURT: Is there an amount of time, akin to the "possibly knew," that one has to wait in order for it to be presumptively approved by lack of action?

MR. COLANGELO: Yes, your Honor. The second paperwork submission requires a 30-day comment period, and then if the OMB director takes no action after a second 30-day waiting period, it's presumptively approved, so the answer is 60 days; 30 days for comment and 30 days for the OMB director either to do something or to take no action.

THE COURT: All right. Thank you.

I think what I would propose we do is I'll hear from Mr. Freedman regarding standing and then from the defendants regarding both of these issues, since they're somewhat

intertwined.

Mr. Freedman.

MR. FREEDMAN: Thank you, your Honor.

Do you want me to start with the imputation point?

THE COURT: Sure.

MR. FREEDMAN: Imputation is the last stage after NRFU is unsuccessful. I can walk you through the trial evidence that we put on that shows that NRFU, at best, could mitigate some of it and our expert testimony on the various stages of NRFU that will actually exacerbate, and I can walk you through that, but just focusing on --

THE COURT: A little more slowly for the court reporter's sake, please.

MR. FREEDMAN: Just focusing on imputation, and I can circle back around why we think the evidence shows that the NRFU is going to exacerbate, the whole range of issues through NRFU is actually going to exacerbate the undercount.

The evidence in the record is that the Census Bureau's past imputation procedures have all involved an algorithm that uses data from households that respond to impute the size of households that don't respond. You use what you know to predict what you don't know.

The evidence is also in the record that noncitizens and Hispanics live in larger households, on average, than households of citizens and non-Hispanic whites.

There's also evidence in the record that household size is related to census participation. Dr. Hillygus testified about the studies that show that households that participate in the census tend to be smaller than households that do not.

Dr. Abowd testified, and I can pull up his testimony, PDX-83.

THE COURT: Why don't you carry on.

MR. FREEDMAN: Dr. Abowd testified that the pool used for imputation draws disproportionately from all citizen households. This is page 1352 to 1353:

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

"A. Yeah, I think the math works out that way. Yes.

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

"A. Yes."

Dr. Abowd, as your Honor noted, testified that the Census Bureau hasn't exactly figured out how to do imputation, but Dr. Abowd conceded -- can we see PDX-84 -- that there is evidence that count imputation disadvantages hard-to-count populations. That's what the evidentiary record shows.

We know what's happened in the past. The fact that they haven't exactly figured out how they're going to do it in

the future doesn't overcome the evidence of what they've done in the past and what Dr. Abowd has conceded is likely to be the case no matter what process they adopt.

THE COURT: All right. On standing more generally, let me focus for a moment on the diversion or expenditure of resources. How does that square with the Supreme Court's decision in *Clapper* which, at least in part, stands for the proposition that a party can't create its own injury; that is to say, simply by saying I'm spending money to avoid some abstract harm, I now have proved injury? How does it square with that? In other words, Mr. Colangelo argued that that form of standing does not require proof of a differential undercount. Doesn't it, at least in part, require proof that that is not inherently speculative to justify that expenditure of resources, and if so, doesn't it essentially collapse into the same inquiry?

MR. FREEDMAN: Let me take a step back and explain the theory here. Our clients, my clients, are trusted partners. They're a critical part of the Census Bureau's outreach to hard-to-count populations. They played a significant role in the last census, in the 2010 census, in helping the Census Bureau count the hard-to-count populations.

THE COURT: Is there evidence in the record that your clients specifically are "trusted partners"; that is, that they're deemed by the Census Bureau to be trusted partners?

MR. FREEDMAN: There is evidence in the record about the role my clients played in the prior censuses. That's in the various client declarations, the Altschuler declarations.

THE COURT: All right.

MR. FREEDMAN: And it's entirely consistent with the definition that Dr. Abowd testified to as to what a trusted partner is.

THE COURT: Go ahead.

MR. FREEDMAN: The Census Bureau recognizes that the addition of a citizenship question is conservatively expected to decrease self-response by 5.8 percent. That translates into millions of additional individuals; in the Brown memo, the number they come up with is 6-1/2 million.

Our clients are on the front line of getting those individuals counted. If the decline in self-responses is as low as the 5.8 percent conservative estimate, that's because, in large part, the trusted partners are out there convincing people, notwithstanding their concerns, to go ahead and self-respond. And if these individuals, the individuals who don't initially self-respond and cooperate with NRFU efforts, that's also in large part because the trusted voice, the trusted partner is able to convince them to cooperate when the enumerator comes around or to cooperate when somebody comes around asking about the census.

Even if my clients are successful beyond their wildest

dreams, and this is relevant to our other standing claims, my clients are still injured because they are out of pocket because they have had to respond to the burgeoning decrease -- this is probably the wrong way to put it -- the decrease in self-response, the people who are not submitting a response because of the question, and my clients are further out of pocket because of all the additional people going into the NRFU process.

Dr. Abowd admitted that there are significant barriers to self-response, and this is his quote, "that may plausibly and credibly be related to a citizenship question which will make outreach efforts more difficult for trusted partners." That's his trial testimony at 1123.

Each of my clients has explained how they are planning to dedicate or how they have already dedicated funds, staff, resources in response to the citizenship question. That's in each of their declarations. Each of them ties a specific dollar number, percentage increase or describes what they're planning to do in response. They are compelled to do this. It's not a voluntary choice. They are compelled to do this by their missions.

Their missions are to promote engagement and representation for their communities. If they don't do this and organizations like them don't do this, the census will be a failure. The trusted partners play a critical role both in

making sure that self-response is not worse than what the Census Bureau hopes it will be and in the success of NRFU.

THE COURT: Let me just interrupt. My point is that there's, under Supreme Court case law, *Clapper*, *Lujan*, clearly a relationship between proof of injury separate and apart from the diversion of resources and the diversion of resources. That is to say, there is certainly a line of Supreme Court case law that suggests that diversion or expenditure of resources is sufficient to prove injury-in-fact, but there has to be a relationship between that expenditure and the proof of injury separate and apart from that expenditure; otherwise, it would be that anyone could create their own standing simply by spending money to address something that they claim is a harm. Do you agree with that?

MR. FREEDMAN: I do agree with that, but I think that the --

THE COURT: Let me carry on. I take it your argument is that for the expenditure of resources to constitute injury-in-fact and give rise to standing -- obviously, traceability and redressability are requirements as well -- that the proof of injury does not necessarily have to be as certain as it would be independent of the expenditure; that is to say, that as long as it's reasonable that the expenditure of resources can give rise to standing, that doesn't require the same level of proof, certainly impending or substantial risk,

that would be required apart from the expenditure of resources. Is that your argument?

MR. FREEDMAN: Yes, your Honor.

THE COURT: And is it your argument that the Brown memo alone, for example, suffices; that because the Census Bureau's own view seems to be that there will be at least a 5.8 percent differential response rate or reduction in response rate from the addition of the question, that because of that alone, separate and apart from whether the NRFU will or won't address that problem, it is reasonable for the plaintiffs, trusted partners or otherwise, to spend money to address that?

MR. FREEDMAN: We put in a whole raft of evidence that supports the conclusion of the Brown memo, and I think the Brown memo is conservative, but fundamentally I think your Honor is right. The decline in self-response, conservatively estimated at 5.8 percent, is only going to come out at 5.8 percent if the trusted partners are enlisted.

THE COURT: Moving on to proof of a differential undercount or the like, what is your view of the relationship between the standard of proof with respect to proving injury at a trial and the substantial risk standard; that is to say, do you have to prove by a preponderance of the evidence that there is a substantial risk? Does that mean something less? I don't know how those two interact, because both of them are probabilistic, if you understand what I'm saying.

MR. FREEDMAN: Your Honor, we believe that we have shown by a preponderance of the evidence, in the form of our own witness declarations, that our clients do face a substantial risk. It's not only our fact declarations but our expert declarations that make clear how people, experts in this field, think that this is going to play out.

THE COURT: I guess this goes to the arguments about injury with respect to proving loss of political representation, loss of federal funding, my question is what level of proof do you need? Is it your view that you need to prove by a preponderance of the evidence that there's a substantial risk that the plaintiffs will be harmed in their political representation or in connection with receipt of federal funds? Is that a correct statement?

MR. FREEDMAN: Yes, your Honor. We believe we've shown by a preponderance of the evidence that there's a substantial risk of loss of political representation both at and interstate and an intrastate level.

THE COURT: Let me ask you one last question, and then I'll hear from Mr. Shumate, or whoever is handling this on the other side.

With respect to the loss of privacy argument, it seems to me that there are sort of two different arguments being made there. One is that the form of injury is simply the fear that your clients, or members that your clients, have by virtue of

the addition of the question. The second is some sort of possibility that because, through disclosure of CVAP or citizen data at the census block level and because of the size of the census blocks and the inability to apply disclosure-avoidance techniques sufficiently that people's citizenship data, information concerning their citizenship, or lack thereof, will be released publicly, it would somehow violate the confidentiality that is reasonably assured by Title 13. Am I correct that both of those arguments are being made?

MR. FREEDMAN: Yes, your Honor. I would say for our clients more emphasis is on the fear, but yes, we are advancing both of those arguments.

THE COURT: All right. And presumably there, too, there would have to be a relationship with the likelihood of the actual harm occurring; in other words, it can't just be that somebody articulates that they're worried about something and that that suffices to give rise to standing, or cases that support that conclusion.

MR. FREEDMAN: That's right, your Honor. We cite them in our conclusions of law, District of Connecticut case, *Friedman*, talks about how it has to be sufficiently real and immediate but that you don't have to show that it is literally certain to come about, and we think that the declarations we put in as well as the evidence from the Census Bureau itself, the CBAMS studies, center for survey measurement analysis,

establishes we are talking about real fear.

THE COURT: And does it matter whether that's rationally based fear? In other words, the testimony in the record from Dr. Abowd and, I think, other sources is that the Census Bureau will apply disclosure-avoidance techniques to ensure that no individual's citizenship information is revealed publicly. Indeed, part of your argument with respect to the irrationality, if you will, of the Department of Justice request, or doing this would lead the justice department to request, is that by following those techniques, you will, in essence, be introducing some level of inaccuracy or error rate into the Census Bureau block-level data, so your own argument depends on taking them at their word in saying that they're not going to be releasing this. If that's the case, it seems that the fear may be based, in part, on a misimpression that their information may be publicly released by ICE, or what have you.

MR. FREEDMAN: Well, let's be clear. Sec'y Ross has made clear that he expects the Census Bureau to provide, in the words of his memo, complete and accurate CVAP data at the block level.

Dr. Abowd, who is an expert on disclosure avoidance, who's been working very hard on what he's going to do, testified he doesn't know what he's going to do. You heard Dr. Hillygus, though, testify, and this is at 136 and 137 of the trial transcript, that because citizenship data is so

particularized, the risk of disclosure increases the more data that's collected, and in particular the citizenship data is so particularized the greater risk there is for somebody to reconstruct the database and identify actual people.

The other point, and your Honor's right, it does need to be a rational fear, but you look at the rational fear against the environment where you do have the administration using data that it has available to target individuals, from examples we showed the Court, and you have examples of the administration using data to conduct sweeps, immigration enforcement sweeps, and we have a history in this country of misuse of census data for these purposes, for example, during World War II when census data was used for internment, laws can change, policies can change.

The other point I would make, and I just want to come back to your opening questions about *Clapper*, I want to remind the Court I think that the *Havens* standing issue is not necessarily an issue of manufacturing, but the standards for when an organization is bringing suit in its own right, under *Havens Realty*, the latest articulation of that is *Bank of America v. City of Miami*. The standard articulated there is injury-in-fact is established if an organization spends money to combat activity that harms its core activities. I think we have established that *Clapper* does raise a question about what the proof is and the validity of the proof, but here, I think

the only question -- and there was no cross-examination of these witnesses, nothing to test these declarations as to what the organizations are planning to do, how they're planning to go about it and that it's in response to the citizenship question.

THE COURT: Thank you.

Mr. Shumate.

MR. SHUMATE: Your Honor, I'll address ripeness first and then I'll address standing and then the loss of privacy injury.

THE COURT: On ripeness, is it your argument that there's a jurisdictional ripeness issue here?

MR. SHUMATE: Ripeness is jurisdictional, your Honor. It is a subject matter issue.

THE COURT: I think it's both, so you're arguing that jurisdictionally there's a ripeness problem here.

MR. SHUMATE: I think there is a concern here. Again, it's not an argument that we have advanced. We agree there is final agency action in the sense that the Department of Commerce concluded its decision-making process. It is final for purposes of the APA and statutory review is permissible, but there is case law that suggests that when OMB still needs to approve the information collection, the case is not ripe.

THE COURT: What is that case?

MR. SHUMATE: *CTIA v. FCC*, 530 F.3d 984 (D.C. Cir.

2008).

Unfortunately, we didn't cite it in our posttrial brief, but that's a case where there was a final FCC rule, review was permissible under the APA but the court said that because OMB still hadn't approved the information collection, there was a contingent future event, judicial review may be unnecessary, so in that case the court said the case isn't ripe; they just held the case in abeyance.

THE COURT: And what do I make of the fact that you didn't argue the issue of ripeness? You seem to have argued pretty much every possible thing you could and tried everything possible you could to avoid a decision on the merits in this case, so it's striking that you haven't argued ripeness and you didn't argue it until I raised it at the end of trial.

MR. SHUMATE: Right. First of all, we think it's jurisdictional. It can't be raised. Because you raised it, we took another look at it. I think it's a hard question, your Honor. There are two factors I think the Court should look at: Fitness of the issue for judicial review and then hardship of the parties.

Fitness of the issue for review, I think, is addressed by that D.C. Circuit case I referenced. The hardship of the parties, I agree, is a hard question.

THE COURT: Would you agree that if it's not ripe until OMB either clears it, or presumptively clears it, that it

would effectively render it impossible to issue a final judgment before the OMB could review it?

MR. SHUMATE: I wouldn't say it's impossible. My best understanding of the facts --

THE COURT: Well, your argument would suggest that the case should be dismissed and then refiled if or when OMB clears it. At that point, taken to its logical conclusion, I should have dismissed the case months ago, plaintiffs should have had to wait until OMB cleared it, presumably sometime in the spring, early next year at a minimum, and then the process we just went through over the course of the last six months would have run its course and run its course well beyond the June printing date. How does that make any sense?

MR. SHUMATE: Your Honor, it probably does not.

My best understanding is that the package goes over to OMB in December. I have no idea how long it will take OMB to clear it. It's possible it could be cleared early next year, and there could be time for a final adjudication before the printing date, but I totally understand the concern.

One of the concerns with the ripeness doctrine is the Court has to look at the hardships of the parties, and that is a concern, that there wouldn't be time for judicial review if OMB doesn't clear it until after the printing date.

THE COURT: How do you square your argument on ripeness with the Supreme Court's decision in the *U.S. House of*

Representatives case, in 1999, where, No. 1, they found that the question was ripe, and No. 2, stated that "it is certainly not necessary for this Court to wait until the census has been conducted to consider the issues presented here, because such a pause would result in extreme -- possibly irremediable -- hardship"? Why is that not the case here?

MR. SHUMATE: It very well may be the case here, your Honor, but that case involved a statistical sampling technique. I don't think it involved information and collection that had to go to OMB for approval.

The only point, the only reason we raised the issue is because it is something the Court needs to address because it goes to subject matter jurisdiction. It is a contingent future event. I think the hardship to the parties waiting for judicial review is a significant factor here, and it is a difficult factor for us to argue, but the Court asked us to brief it. We did brief it, and it is an issue that I think the Court needs to consider.

THE COURT: All right. Why don't you turn to standing then. I take it you concede that the substantial risks standard is still good law.

MR. SHUMATE: It is, your Honor. I think you addressed that in your motion to dismiss opinion. *Clapper* primarily uses a "certainly impending" standard, but they also reference substantial risks.

THE COURT: It seems to me it postdates *Clapper*, and *Clapper* relies on the substantial risk standard, correct?

MR. SHUMATE: I think your Honor's correct.

THE COURT: OK. Can you talk about the expenditure of resources argument first. Do you agree it cannot be, I would think, that the plaintiffs have to prove to the same degree of certainty that an undercount will result -- in other words, that there will be a loss of either federal funding or loss of political representation -- in order to render their expenditure of resources an injury-in-fact? Do you agree with that?

MR. SHUMATE: Yes.

THE COURT: There has to be daylight between those. Otherwise, the *Havens Realty* line of case doesn't make any sense. It would be a null set, right?

MR. SHUMATE: I disagree with the question. I don't concede that.

I think your question to Mr. Freedman correctly summarized that this all collapses into whether the plaintiffs are going to suffer an injury-in-fact that's traceable to the citizenship question in 2020.

Under *Clapper*, they need to show that this injury is certainly impending or they face a substantial risk. They can't manufacture their own standing by spending money now to avert the injury that is speculative in the future, so it all

collapses into the primary inquiry about whether this injury is speculative.

THE COURT: Then why wouldn't that make the *Havens Realty* line of cases a null set if you have to prove certainly impending or substantial risk separate and apart from the expenditure of resources? Presumably, the expenditure of resources in and of itself could never give rise to standing because the other injury would always suffice.

MR. SHUMATE: *Havens Realty* applies in a different situation, where the agency's action, or the government's action, is having a perceptible impact on the organization, and as a consequence of those activities by the government, the organization has to spend money or divert resources to counteract that action. That's not this case, because I think we all agree -- we should all agree -- that the citizenship question is not having a perceptible impact on anybody yet, and it won't until 2020.

THE COURT: Except that your own witness testified that part of the process of ensuring an accurate and well-conducted census relies on the expenditure of resources and actions, outreach actions and otherwise, of quote/unquote trusted partners, which is to say the defendants themselves seem to be relying upon the assumption that plaintiffs and organizations like the plaintiffs will spend their resources to deal with this.

MR. SHUMATE: I think Dr. Abowd said that they certainly encourage partners to work with them and expend these moneys, but to the extent that the Census Bureau would ever ask somebody to take an action or spend money, that's something the Census Bureau would reimburse them for. But I think the declarations make quite clear that these organizations were going to be spending money on the census anyway, and they pointed to changes in the political environment, the macro environment, that have caused them to increase their efforts.

I alluded to a couple of them earlier, and I won't repeat them, but they can't show, and I don't think they have shown, that it is the citizenship question itself that's going to cause them to spend additional money. And again, the question itself is not on the form yet. The form is not out there until 2020. They aren't spending money to redress or counteract a specific impairment of their organization because the form hasn't been printed yet. It's still speculative at this point whether they will ever suffer injury because this falls under the *Clapper* line of cases. The injury is ultimately speculative, spending money at this point to counteract an injury that may never happen.

Now, the Supreme Court rejected the Second Circuit's reasonable-fear test in *Clapper*. They may have a reasonable fear that the citizenship question may cause people not to respond to the census, but that wouldn't be sufficient under

Clapper, because they have to show that their injury is certainly impending or that there's a substantial risk. So it's not reasonable simply to point to the Brown data and say we're reasonably spending this money. They have to show that that money is necessary to be spent to counteract some harm that the organization is suffering now because of the citizenship question.

THE COURT: And didn't your own witness testify that it would be reasonable for both the governmental plaintiffs and the NGO plaintiffs to be spending additional money to counteract the problems that are likely to arise from the citizenship question?

MR. SHUMATE: I don't remember if Dr. Abowd said that, but even if he did say it's reasonable, that wouldn't be sufficient under *Clapper*, because reasonable fear that there might be harm to them in the future isn't enough. They have to show that that injury is going to be certainly impending or that there's a substantial risk. Simply spending money reasonably is not enough under *Clapper*.

THE COURT: All right. I was a little surprised to see, because I did ask at the close of trial if you would concede that the evidence was undisputed that there would be a reduction in the self-response rate as a result of the citizenship question, and you declined at that time to concede the point and then argued in your posttrial briefs very much

aggressively to the contrary. That surprises me. I mean, the Brown paper seems to support it and indeed says that it would be a conservative estimate if the decline in self-response were to be 5.8 percent. Your own expert witness supports that and said that there's credible quantifiable data to support it.

How can you stand here and dispute that?

MR. SHUMATE: Your Honor, I tried to address that in my opening. I think the reason that I don't concede that is because your question implies causation, and we're not conceding that the citizenship question itself is going to cause a material drop in self-response rates. We certainly acknowledge that there is evidence in the record from Dr. Abowd and Dr. Brown, credible quantitative evidence, that the citizenship question could be expected to reduce response rates. I'm not disputing that.

What I do dispute is as a legal matter whether that is sufficient to prove their burden that any injury is fairly traceable to the citizenship question.

THE COURT: And I imagine if the plaintiffs had endeavored to conduct a randomized controlled test, you would be standing here arguing that it wasn't under the same conditions that the census is conducted and, therefore, is not actually a valid test; that is to say, it strikes me as a little bit ironic, which is an understatement, perhaps, for the Census Bureau itself to decide that it's not going to conduct a

randomized controlled test and then point to the absence of that test as proof that there's no harm here, and therefore, the question is appropriate.

MR. SHUMATE: Your Honor, as you know, the plaintiffs have the burden to prove standing, so the fact that there may be a deficiency in the evidence is not our fault. It's the plaintiffs' fault for not conducting their own RCT.

I think Dr. Abowd testified that the plaintiffs could have conducted an RCT, which would have attributed causation to the citizenship question, but the natural experiment that Dr. Abowd did by comparing the 2010 census data to the 2010 ACS data is not a randomized controlled study. It's doesn't attribute causation; it's a natural experiment.

The reason I'm making that argument is because of the failure to demonstrate causation. Certainly there's some evidence but not enough to prove causation.

THE COURT: All right. A couple times in your brief you suggest that the plaintiffs haven't proved the quote/unquote magnitude of any effect of adding the question. I assume you would agree they don't have to prove the precise magnitude of adding the question so long as they prove that it will have a demonstrable effect and therefore cause harm, and that would suffice; it doesn't require proof of an actual percentage, or the like.

MR. SHUMATE: I think that they need to show that any

drop in response rates would be material, because remember, they have a long chain of briefing speculative inferences that they're asking the Court to draw before you get ultimately to injury, and the first link in the chain is drop in response rates. That needs to be material in a way that nonresponse follow-up operations can't remedy it and ultimately in a way that will impact the funding and their representation at the end of the day. If it's a negligible drop in the undercount --

THE COURT: Fine, but my point is that as long as they prove that there is a substantial risk that they will, for example, lose federal funding or a substantial risk that it will harm the political representation interests of any of the plaintiffs, that would presumably suffice. They don't have to prove that it would cause X drop in response or X differential undercount leading to Y reduction in funding, right?

MR. SHUMATE: I think that's correct, but I don't see how they could prove the last element in the chain, which is loss of funding or loss of representation, without showing some magnitude of drop in self-response that's ultimately going to affect the ultimate question of whether they're going to lose money or lose representation.

THE COURT: All right. In your posttrial brief, you also argue, at page 16, that NRFU efforts "will be sufficient to mitigate any potential decline in self-response." What is the support for that assertion?

MR. SHUMATE: I believe that is Dr. Abowd's testimony, your Honor.

THE COURT: My recollection of Dr. Abowd's testimony is that he said that he hasn't seen any credible quantitative evidence that NRFU will not cure the problems. That strikes me as very different from the claim that NRFU operations will cure any decline, and I think he actually was very careful in not actually articulating that.

MR. SHUMATE: I definitely know he testified that there's no credible quantitative evidence that their nonresponse follow-up operations will fail to remedy the undercount. My recollection of the testimony was that he went further and said that it will remedy any undercount, because he's confident that those efforts will redress any potential undercount or drop in self-response, so I think that conclusion is supported by his testimony.

THE COURT: I'm pretty sure that he didn't say that. I think there were questions posed in connection with the commerce department's statement that was issued during trial as a result of his testimony, and the word "will" was in that statement and the question was posed to him as to whether he agreed with that and he said no.

I'll look back at it myself, but I don't think you've accurately characterized his testimony. Be that as it may, isn't it the case that NRFU operations have never succeeded in

eliminating a differential undercount, and if that's the case, what's the basis to conclude that they will do so here?

MR. SHUMATE: I think that's right. As I said earlier, there's always been a differential undercount in Hispanics, and it's fluctuated wildly from 1990 to 2000 to 2010, so obviously NRFU efforts have not been perfect, but it hadn't been perfect before the addition of the citizenship question.

THE COURT: Right, but doesn't that suggest that if the plaintiffs have introduced quantifiable credible evidence that it will cause a decline in the self-response rate and that there's no dispute that NRFU operations have never succeeded in fully mitigating a decline in differential in self-response rate, it would presumably follow that there is a substantial risk that it will not do so this time around?

MR. SHUMATE: I think ultimately it comes down to whether that step in the chain of inferences is speculative or not. We think we've done enough to demonstrate that it is speculative whether those nonresponse follow-up operations will fail to remedy any drop in self-response due to the citizenship question, and Dr. Abowd's testimony, I think, supports that.

THE COURT: Why is it not your argument that it's speculative since it rests on essentially Dr. Abowd's faith that he will be able to come up with an imputation algorithm that will address any problems that are caused by the

citizenship question, and he hasn't yet done so?

MR. SHUMATE: Again, it's the plaintiffs' burden that an injury is certainly impending or a substantial risk. We've identified the significant flaw in their line of arguments to get to injury, and one of those is the effectiveness of the nonresponse follow-up operation. If you agree it's speculative, that is something that causes the plaintiffs to fail to meet their burden, not cause us to fail to demonstrate that they're lacking in standing.

THE COURT: All right. Can you talk about the traceability requirement? You have argued in your motion to dismiss that, as a matter of law, it's not traceable to the decision to add a citizenship question because it depends upon the actions of those third parties who fail to comply with their legal duty to answer the census. I didn't see that argument made in your posttrial brief.

Am I correct that you're no longer making that argument?

MR. SHUMATE: No. I do believe we did make that argument briefly in our posttrial brief, if you'll give me a second.

THE COURT: I think that was about the only thing that wasn't in your posttrial briefs.

MR. SHUMATE: I can't find it, your Honor, but we are not waiving that argument. It was preserved in the Court's

motion to dismiss opinion. My recollection is it was in our posttrial brief.

THE COURT: All right. How do you square that with the Brown paper and Dr. Abowd's own testimony which, again, granted, there's no randomized controlled test? And I understand your argument that in the absence of such test there can't be proof of causation per se, but certainly that does provide evidence that the addition of the question will cause a predictable response even if it's through actions of third parties at a statistically proveable level.

MR. SHUMATE: But your Honor, you rejected our purely legal argument that the injury is not traceable to the question because people have a legal duty. That is an argument that, to my recollection, has been preserved, but we're making a different argument now.

THE COURT: My point is you describe it as a purely legal argument, but I think there's now evidence in the record that actually supports the point that I was making, which is that at the aggregate statistical level, if you can actually show A will result in B, that is therefore fairly traceable. There's no proximate cause requirement here. It just has to be a causal relationship, and if you can predictably plot from A to B, then that literally satisfies it, not to mention if there's evidence that in the absence of A, B would not occur, and then to address it. Would you agree with that?

MR. SHUMATE: I do not, your Honor. Again, this is a purely legal argument we're making, that it's the independent choices of third parties who make an illegal decision not to respond to the census. You've already addressed that argument and the fact that there may be facts that go to that issue I don't think undermines the legal argument we're making, but the additional traceability argument that we're making, based on the evidence at trial, is that the evidence shows that people will not respond to the census and make that independent decision because of the macro environment, not the citizenship question.

THE COURT: You tried to separate the macro environment from the citizenship question. As I understand it, a lot of the evidence concerning the macro environment was introduced by the plaintiffs to support the proposition that the citizenship question can't be considered in a vacuum, that at least part of the decline in the self-response rate is because it is against the backdrop of the macro environment.

I will grant you, I think, it would be hard to disentangle one from the other, but it seems a little odd to be pointing to the macro environment as the cause for this when I understand their argument to be, Yes, that is part of the cause, and that's why the citizenship question is going to cause a greater harm than it might otherwise cause.

MR. SHUMATE: Right.

THE COURT: In other words, these two are not separate.

MR. SHUMATE: And they can't be separate. They can't isolate on the addition of the citizenship question as contributing to some cause in the drop in the self-response rates.

To be sure, they have the Brown evidence and they have the Abowd testimony that the citizenship question could be expected to lead to a drop in self-response, but none of that analysis is able to isolate on the question itself and divorce it from the macro environment. But a lot of their evidence did show that the macro environment factors preexisted the citizenship question. Our argument is those factors that preexisted the citizenship question are what will cause people not to respond to the census regardless of the addition of the citizenship question.

THE COURT: All right. Can you talk to me about the interest in the accuracy of the data? Dr. Salvo's testimony, as I indicated at the close of trial, seemed to support the proposition that New York City, for example, has an interest in the data that they receive from the census being accurate, that it has an impact on their distribution of resources in a zero-sum environment; it has demonstrable effect on where and how they allocate those resources.

It seems undisputed that this is going to harm the

accuracy of the data. Again, I think Dr. Abowd's testimony was clear on that, and even if he said that there was no credible quantifiable evidence that it would result in bias, that he couldn't predictably prove, in his view, or no one has proved, that it would affect the particular bias one way or the other, and that it does result in a reduction and corruption in the accuracy of it.

Why are those two not sufficient to give rise to standing?

MR. SHUMATE: Your Honor, I didn't think his testimony was sufficiently concrete.

THE COURT: His being Dr. Salvo or Dr. Abowd?

MR. SHUMATE: Dr. salvo.

He testified about the need for accurate data and the concern that they would have in New York City if the data were corrupted and how they rely on that data, but I didn't think he went beyond demonstrating an abstract interest in having accurate data. He didn't, for example, provide certainly an analysis of how if the data were materially wrong in this way it's going to affect funding decisions and what decisions they have to make within the city.

That's how I would respond to the question about Dr. Salvo's testimony.

THE COURT: All right. Do you agree that only one plaintiff has to have standing in order to satisfy Article

III's requirements?

MR. SHUMATE: I do, your Honor. However, I think it's necessary to decide the standing of a number of plaintiffs to decide what the remedy is going to look like. For example, if you were to decide that only New York State has standing and nobody else has standing, I think in those circumstances the Court should limit any injunctive relief to New York State and leave the policy decision to Sec'y Ross.

THE COURT: We're jumping ahead to the question of remedy. Does that mean that every other state in the country would receive a citizenship question, but respondents in New York would not?

MR. SHUMATE: I think that would be up to Sec'y Ross to decide how he wanted to proceed in light of an injunction that the question couldn't be asked in New York State.

I think the point that we have made in this case and other cases is that courts should limit relief to what's necessary to remedy injury of the plaintiff before the court. If the Court were to find only New York State had standing, an injunction limited to New York State would remedy that injury and leave it to the policy makers to decide how to respond to that.

THE COURT: All right. In your posttrial briefing, there were various paragraphs that state, in sum and substance, that they identify plaintiffs, say that plaintiffs failed to

prove standing, ergo that plaintiff should be dismissed. It's not your position that I need to go through that exercise with respect to each and every plaintiff, is it, as long as it suffices to determine that there is a case or controversy and it doesn't have a material bearing in my judgment on the scope of any remedy, if there is a remedy?

MR. SHUMATE: I think if the Court decides that the decision is arbitrary and capricious and an injunction is warranted, you need to consider the plaintiffs that have standing in terms of crafting any relief that would be consistent with Article III and the APA. I agree with your question that you only need one plaintiff with standing to address the merits of the case, but when crafting a remedy, the Court needs to be careful and limit any injunctive relief to a plaintiff that has standing. At the end of the day, you may need to decide whether all the plaintiffs have standing to grant complete relief to those plaintiffs.

THE COURT: All right. Very good. Anything else on standing?

MR. SHUMATE: I did want to address the argument about standing based on privacy concerns.

I think that is the most speculative of all the injuries, your Honor, because as you referenced, Title 13 does prohibit the sharing of this data. The fact that there may be changes in the law in the future is a contingent future event,

and who knows whether that's likely to occur, and Dr. Abowd testified about the disclosure-avoidance techniques that would be used to prevent the Department of Justice from identifying specific households that may be citizens or noncitizens. And it's unclear whether the plaintiffs have even identified a specific member of the organizations that has a reasonable fear or fears that their particular data might be shared with government authorities. We think this is the most speculative of all the injuries.

THE COURT: All right. Let's move on to the question of the administrative record and whether I can consider materials outside of it. I'm actually inclined to leave you up there, if you don't mind, and start with you on this.

First of all, you concede that I can consider extra-record evidence in deciding the question of standing, correct?

MR. SHUMATE: Correct.

THE COURT: All right. And are you willing to concede at this point there is or was a material disputed fact on the issues related to standing that would justify a trial?

MR. SHUMATE: No, because we maintain our purely argument that the injury is not traceable to the addition of the question because of the argument that you addressed in your motion to dismiss opinion.

THE COURT: All right. Do you have any support for

the proposition that that's a purely legal argument? In other words, it seems to me that some of the evidence, and I cited some of it a few minutes ago, actually goes to that factually. Why is that a purely legal question?

MR. SHUMATE: It's undisputed, as a matter of law, that citizens are legally obligated to respond to the census. As a matter of law, regardless of all these facts we heard at trial, any injury that is caused by the citizenship question -- excuse me, any injury that plaintiffs ultimately suffer is traceable to the independent decisions of third parties because they make an illegal decision not to respond to the census. That's a legal question. It doesn't matter. None of these facts that we discussed at trial matter for purposes of that argument.

THE COURT: Your view is that as a legal matter the chain of causation, if you will, is cut off because it depends upon the decision of third parties to violate their legal duties?

MR. SHUMATE: That's correct, and I know your Honor addressed that in your motion to dismiss opinion so I don't intend to press that argument again today.

THE COURT: Do you have any authority to supports that argument?

MR. SHUMATE: We briefed it in our motion to dismiss earlier. I don't intend to tread that ground today.

THE COURT: All right. Very good.

Turning, then, to the APA and the process questions with respect to the administrative record, plaintiffs argue that I can consider extra-record evidence as background to explain or clarify scientific or technical subjects that require specialized knowledge. I'll grant you that ultimately the question there might well be whether the secretary's decision based on what he had before him was arbitrary and capricious, but to the extent that these matters are somewhat complicated and involve fairly technical matters, why is that not a basis for me to look to the expert testimony that was introduced at trial?

MR. SHUMATE: Your Honor, APA cases are often complicated and involve complex issues. I think the general rule is there's not extra-record evidence, including expert testimony, in APA cases so we think it would be inappropriate for the Court as a matter of first principle to look to expert testimony that certainly was not before the decision-maker.

THE COURT: Do you concede there is case law that supports the proposition that a court can have expert testimony to elucidate technical, scientific matters even if ultimately the decision is a question of whether the decision-maker's decision was arbitrary and capricious based on the administrative record?

MR. SHUMATE: Right. I think one of the cases in the

Supreme Court involving the census did involve expert testimony, so I do acknowledge that there had been expert testimony admitted in census cases.

We maintain our argument that it was inappropriate to go beyond the administrative record to decide this case.

THE COURT: All right. And do you concede that I can consider extra-record evidence in deciding whether Sec'y Ross failed to consider all relevant factors or ignored important aspects of the problem; in other words, those prongs of the APA analysis?

MR. SHUMATE: No, I don't, your Honor.

THE COURT: Doesn't that essentially give the agency the ability to curate the administrative record in a way that simply doesn't have the important or relevant factors that should have been considered as part of the administrative record?

MR. SHUMATE: There's a way to address that concern, and you addressed that concern in your July 3 order when you found --

THE COURT: You're challenging that order of the Supreme Court.

MR. SHUMATE: Right. You're now asking a different question, whether expert testimony should then be admitted to evaluate whether the decision was arbitrary and capricious, and our argument is no.

THE COURT: I'm asking whether I can and should consider extra-record evidence in making that evaluation, and that isn't limited to expert testimony. It's limited to evidence that's not in the administrative record. My question is how can I make a determination as to whether the secretary considered all relevant information or ignored important aspects of the problem if there are important aspects of the problem that don't appear in the administrative record. Isn't that relevant to that question?

MR. SHUMATE: No, I don't think it is, and I think that approach is inconsistent with fundamental APA principles. You decide the case based on the record before the decision-maker, and you can certainly make a judgment whether, based on that record, Sec'y Ross considered all the important factors, and I can take you through some of the reasons why he considered all those factors. But I don't think it's appropriate for the Court, for example, to consider expert testimony about why testing would have been important and would have affected the decision.

Well, that was an issue that was before the decision-maker. It was in Dr. Abowd's memo. Sec'y Ross considered that concern. It wouldn't be appropriate to go beyond the record to consider new things that some expert thought maybe would be appropriate for him to consider but he didn't because it wasn't in the record.

THE COURT: All right. Let me understand your argument on bad faith or pretext. I take it from your introductory argument that you don't dispute the proposition that a court can look to extra-record evidence to determine if there's bad faith or pretext.

MR. SHUMATE: Your Honor, I think our papers in the Supreme Court have made clear that the Court is allowed to go beyond the administrative record if there's a particularly strong showing of bad faith.

THE COURT: So the argument here, and in the Supreme Court, is a factual one that that showing has not been made to the requisite degree. Is that true?

MR. SHUMATE: Correct, and that the Court applied the wrong standard in deciding what is bad faith.

THE COURT: I think the language you used here and in your petition to the Supreme Court is, for example, irreversible prejudgment of the question. What's your support that that is the relevant standard for prejudgment, that it has to be irreversible?

MR. SHUMATE: I believe the Supreme Court petition cited a D.C. Circuit case that held arbitrary and capricious means that an agency decision where the decision-maker had irreversibly prejudged the issue -- I'm sorry. I don't have that case handy, but that was one of the cases that the solicitor general has cited in that petition, arguing that

standard.

THE COURT: All right. And assuming that I was right in authorizing discovery, and I recognize that that question is pending before a different tribunal, is there an additional showing that needs to be made for that evidence then to be admissible at a trial and an additional showing that needs to be made before it actually is found to be evidence of pretext or bad faith that would be sufficient to give rise to relief under the APA?

MR. SHUMATE: Yes. I think you need to make a further findings, and let me explain.

The Court, at the July 3 hearing, made a preliminary showing that the plaintiffs had made a threshold showing of bad faith and pretext, and that allowed, in your view, the plaintiffs to obtain extra-record evidence. Now we are at trial and all that evidence has come in, and I think what the Court needs to do is now make a final finding that there has been bad faith or pretext. And to be clear, our view of what bad faith and pretext is, you can consider that evidence to decide whether Sec'y Ross irreversibly prejudged the issue or didn't believe the decision. I explained in my opening why we don't think that evidence makes that showing, and if you agree with us that the extra-record evidence does not support the showing of bad faith, all that evidence goes back in the box. It can't be considered to demonstrate whether the decision was

arbitrary and capricious in the sense that the decision-maker didn't consider relevant factors or should have ordered the testing or the undercount -- it improperly accounts for an undercount.

I think that's the best way I can answer the question.

THE COURT: What do I make of Ms. Pierce's affidavit which Mr. Colangelo argued was evidence that the administrative record and Sec'y Ross's memo in particular was at a minimum incomplete and perhaps misleading?

MR. SHUMATE: I also don't think that's fair, your Honor. There has been extraordinary discovery in this case that has opened up all the files in the Department of Commerce and the Census Bureau about how this decision was made, and the Pierce declaration comes well after the fact. I think it was signed in October.

THE COURT: Right, but there's no contemporaneous notes or records of that conversation as part of the administrative record so the only record of it is Sec'y Ross's characterization in the memo and the testimony of Ms. Pierce herself, which seems to dispute many of those records.

(Continued on next page)

MR. SHUMATE: I respectfully disagree. I think there is a record of the conversation in the administrative record that was typed up contemporaneously with the conversation with Ms. Pierce that we believe supports Secretary Ross's decision, and now you have somebody who clearly disagrees with the decision who months after-the-fact is submitting testimony to argue that her conversation was misrepresented.

Two people can remember a conversation in different ways, but I think you should rely on contemporaneous notes that support the conclusions reached in the memo as opposed to notes that were drafted after-the-fact from trial months later.

THE COURT: And, relatedly, are there any contemporaneous notes of what occurred in the February 21st meeting when the secretary recognized Dr. Abowd and others from the Census Bureau?

MR. SHUMATE: The testimony of Dr. Abowd when he described that meeting. There was something in the record from a subordinate that described action items from that meeting, but one of my colleagues may be able to help me in identifying the record.

THE COURT: There is an email from the day after I believe that has full pointers or action items, but it is not a record of what occurred at that meeting, and I don't think, for example, there is anything in that record regarding the fact that there was discussion about, just to pick a random example,

disclosure avoidance techniques, but Dr. Abowd testified there was such a discussion at that meeting, correct?

MR. SHUMATE: I believe that's correct.

THE COURT: My question is to the extent the administrative record is intended to include any information, quote-unquote that was considered, directly or indirectly, by the agency in rendering a decision, is that not properly considered to be part of the administrative record?

It is not written down, but presumably there is some obligation on the part of the agency to produce a record in good faith, and if it doesn't include something like that, what am I to do a with that?

MR. SHUMATE: I think we addressed that in a lengthy footnote in post-trial briefs. I don't think it comes in under the general principle that you're not supposed to create records after-the-fact. If it is not before the decision-maker, it wasn't created --

THE COURT: You rely on the proposition that an agency can't justify a decision after-the-fact with a post hoc rationale. That strikes me as very different proposition than one that an agency can essentially curate the administrative record in a way that excludes evidence that may be contrary to its decision. One doesn't necessarily follow from the other.

MR. SHUMATE: I am relying on the general principle that generally you don't an create agency record in the first

place in court. You rely on the administrative record before the agency. Here that evidence, Dr. Abowd's testimony was not part of the paper record that was submitted to the court. I don't think it is appropriate to use trial testimony to create an additional record in the trial.

THE COURT: All right. Let me hear briefly from plaintiffs on this issue, and I think what we'll do is take a brief break just to spare everybody a little bit and then turn to the merits.

MR. COLANGELO: Your Honor, on the question of the scope of review, we set this out in some detail in our post-trial briefs. We think that it appears there is no disagreement that the court can consider extra-record evidence for the purpose of assessing standing, so I won't belabor that.

The case law is also clear, including in the Second Circuit, that the court can look at expert testimony for the purpose, as your Honor said, of the elucidating complex or complicated topics, and there were a lot of topics. There were a lot of complicated issues that were discussed at the trial and are referenced in the Secretary's memo, but we think the expert testimony we presented for the purpose simply of helping the court understand some of the concepts, some of the sort of background principles that lie here make sense.

The testimony, expert testimony regarding statistical processes is, in fact, one of the areas I mentioned to the

court at our initial case management conference in May as the kind of evidence that we thought would be useful in explaining to your Honor how federal statistical agencies work and why it is important that they follow standardized scientific procedures.

Let me go sort of to the point that you were just discussing with Mr. Shumate regarding oral conversations, and I think the case law is clear that the record for the court's review is the whole record before the agency. In this case, nobody disagrees that the whole record before the decision-maker includes:

A. The conversation that the secretary had with Christine Pierce; and

B. The conversation that the secretary had with Dr. Abowd on February 12th where he briefed the secretary on the consequences of disclosure avoidance.

We know from Dr. Abowd's trial testimony what was said regarding disclosure avoidance, but you wouldn't know it from the Secretary's memo which nowhere mentions disclosure avoidance, precisely for the reason that is both necessary to provide the court with the whole record, but then separately because it is necessary for the court to understand what considerations were not evaluated in reaching the decision, I think it is appropriate to treat those six lines of testimony as part of the record for review.

THE COURT: How do you square that with the general proposition that APA cases are supposed to be decided based on the administrative record by way of summary judgment motions or otherwise and certainly not by way of trial you concluded it is unusual to have a trial on an APA case. Is that a fair statement?

MR. COLANGELO: Yes, your Honor.

THE COURT: How do you square with that.

In other words, it seems to me in any case based on informal agency decision-making process, in the absence of everybody meeting and every conversation that precedes that decision being recorded, there is always the possibility that something will be omitted from the written administrative record. There is always the possibility that a witness like Ms. Pierce or Dr. Abowd could elucidate, add to, recharacterize or differently characterize something that appears in the administrative record.

Wouldn't on your argument, what you concede is an exception, wouldn't that have to become the rule?

MR. COLANGELO: No, your Honor, not at all.

The reason it wouldn't have to become the rule, we are only arguing for the inclusion of these discrete memorializations of these particular conversations where we have specific evidence that critical factors were omitted from the public presentation when the secretary gave of his

decision.

THE COURT: But you have that only because I authorized expert record discovery.

MR. COLANGELO: Not necessarily, your Honor, in two ways:

First, the order authorizing extra-record discovery was also an order compelling the defendants to complete the record because the record was incomplete on its face. One of the key crowns for incompleteness that the court mentioned at the July 3rd hearing was that the memo refers to empirical evidence from Nielsen, but nothing in any of the pages that were produced included any of the empirical evidence from Nielsen.

The court correctly pointed out we know the record we originally received was incomplete because it referenced something that was before the secretary that was not, in fact, in any of the materials that were produced, is some approximation of what I may have said.

Your Honor, this isn't a case where including these two particular conversations in the record would be a foothold toward reconstructing after-the-fact every conversation the decision-maker ever had with anyone. These are two specific conversations about material factors that are extremely pertinent to the Secretary's decision and where the record itself disclosed certainly in the context of Ms. Pierce's

contributions that the record mischaracterized what she said.

Separately, your Honor, to Mr. Shumate's point about Ms. Pierce's after-the-fact trial testimony, if they were concerned about the reliability or credibility or accuracy of her testimony, they could have cross-examined her. She was prepared to get on a plane from Florida and testify live at this trial for cross-examination, and they elected not to.

Especially where her testimony is included in material respect the fact that she never sent the Commerce Department any data, and where that testimony is corroborated by the fact that they do not have any data from her, I think it is worth crediting her testimony and it would be unfair to characterize that testimony as something that was created simply for the trial.

THE COURT: All right. Anything else on the expert record issues?

MR. COLANGELO: Not unless the court has any more questions.

THE COURT: Why don't we take a brief break. It is 11:27. We'll pick up at 11:35 and turn to the merits of the APA claim at that time. Thank you.

(Recess)

THE COURT: You may be seated. All right.

As I said, I want to turn to the merits. We are proceeding slowly, but hopefully we can get through everything.

Let me start with plaintiffs and let me start with two statute-faced arguments, one based on Section 6 and the other based on Section 141, if you will.

MR. COLANGELO: Thank you, your Honor.

THE COURT: Let me start with Section 6.

Why should I consider that argument given that there is no citation to Section 6 in either of the plaintiffs' complaints, and I think until I raised it in an order at the conclusion of trial, it had not been raised or mentioned?

MR. COLANGELO: Your Honor, although the complaint does not specifically cite Section 6 of the Act, our complaint does broadly describe the obligation to minimize respondent burden and use alternative data.

Paragraph 6 of our second amended complaint, Docket 214, alleges that the decision fails to consider the availability of alternative data that effectively served the federal government's needs.

Paragraph 7 of our complaint alleges the decision exceeds and is contrary to defendants' statutory authority of limitations. Paragraph 36 of our complaint alleges the Census Bureau is required to minimize the burden questions may place on respondents. Paragraph 81 of our complaint alleges the Census Bureau recommends using administrative records.

The pleading requirement is not a magic-words requirement. It is clear here that the defendants were on

notice that we intended to allege violations, broadly speaking, of these obligations to use alternative data that better serve the federal government's needs and are less burdensome, to answer your direct question. That is precisely the language of the statute, even if we didn't put quotations marks around it.

THE COURT: How do you square that position with your argument defendants waived any response to your Section 141 arguments by not briefing them in the pretrial briefing?

Your argument is that you presented the Section 6 argument, albeit just without citing the actual statute?

MR. COLANGELO: Exactly, your Honor, and the defendants' waiver of the not-in-accordance-with-law argument and the waiver of their defense extended even to their post-trial briefing.

In their post-trial briefing, which opposes now our claim based on both Section 1141 and Section 6, it does not include any argument, at least not in that decision, of their proposed conclusions of law opposing that aspect of our APA claim that goes to their disregard for the OMB statistical policy directives and the Census Bureau standards even though those allegations were, in fact, cited chapter and verse in the complaint and have been pled at every stage of the litigation.

THE COURT: You're saying that they failed to respond in their post-trial briefing to the arguments that the decision was arbitrary and capricious for failing to failing to follow

the 0MB guidelines?

MR. COLANGELO: Yes, that is not in their conclusions of law.

THE COURT: Mr. Shumate argued in his opening that was not a basis to grant relief here because those standards are not binding on the secretary and cited a D.C. Circuit case I have somewhere. What is your response to that?

MR. COLANGELO: The case law is clear that -- two responses:

First of all, OMB statistical policy directives do bind agencies that conduct statistical activities, and that includes the Commerce Department. Those are promulgated under and pursuant to the OMB directives authority stemming from the Paperwork Reduction Act and make sure the entire federal statistical system has consistent procedures and minimizes burden and maximizes response, so we do think that they are binding on the defendants here.

As the court pointed out in denying the defendants' motion to dismiss, the Census Bureau statistical quality standards also require that everyone comply with those obligations the court could separately consider, and we will argue that the court -- we did argue the court should separately consider the Secretary's disregard for those sub-statutory obligations as one factor in concluding his decision was arbitrary and capricious, separate and apart from

where it was not in accordance with law under Section 7062 (c) of APA.

I think my point is that there is case law holding that an agency can't disregard binding obligations simply because they're not statutory obligations and that the decision can be set aside on that ground.

Your Honor, one other point on the Section 6(c) argument is that not only do we think it is adequately pled in the complaint, but the defendants were sufficiently on notice of this constraint. It was, in fact, litigated in the course of the case. Dr. Jarmin testified at his deposition about the obligation to comply with 6(c). Dr. Abowd volunteered on the stand, during his discussion with Mr. Hull, he was obligated to follow Section 6(c).

Where the defendants' own witnesses have been volunteering and pointing out their obligation to comply with the statutory directive, there can't be any argument for prejudice, certainly not against the backdrop of the pleading passages I just cited.

THE COURT: What is your view -- let's say I agree with you, but -- well, to the extent that they argue that you can't make the argument because it is not in the complaint, do you think there is an argument for allowing you to amend the complaint pursuant to Rule 15(b)?

MR. COLANGELO: Yes, your Honor, 15(b) allows the

complaint to be amended to conform to the evidence that was presented at trial, especially where there is no prejudice and are here, where the defendants I just mentioned were themselves the ones that volunteered that evidence into the trial record. I think amending the complaint to conform to the evidence under 15(b) would be appropriate, if necessary.

THE COURT: But you haven't asked me to do that.

MR. COLANGELO: Your Honor, I think that the argument regarding the failure to look at alternative data that effectively serves the government's needs suffices for the court to conclude that this was sufficiently pled.

If the court disagrees and believes it was not sufficiently pled, I move to amend the complaint to conform to the evidence presented at trial, to allege the defendants were required to comply with Section 6(c) of the Census Act.

THE COURT: And I should just deem it so amended or without you actually submitting an amended complaint?

MR. COLANGELO: We are happy to submit something that the court has suggested. There may be an opportunity for post-trial reply, which we would do extremely briefly, and we could include in the post-trial reply papers that the court authorizes in addition to 6(c) if the court considers it necessary.

THE COURT: Why don't you turn to 148(1), the cases cited by defendants in their post-trial briefing seem to stand

for the proposition that it is up to Congress to decide whether or not to take action in response to a failure to report or failure to provide an adequate report.

Why do those cases not support the conclusion that compliance with 141 is Congress's problem and not mine?

MR. COLANGELO: They don't support that conclusion because every case the defendant cited was a case about a ministerial reporting requirement where no legal consequences flowed from whether a report was or was not transmitted to Congress.

Here what we are pointing out and what the Census Act requires through the 1976 amendments is not only that the commerce secretary identify three years in advance the subjects to be inquired about, and two years in advance the questions to be asked about, but the Census Act also requires if he is going to change either of those determinations at any point, he must find there are new circumstances that necessitates such a change.

This isn't such a case. We are arguing the Secretary's decision was not in accordance with law because he failed to submit a piece of paper from which no legal consequences would flow. We are instead arguing the secretary never has identified as required by 141(f)(3) new circumstances which necessitate a change to the subjects he presented to Congress in March of 2017.

In fact, we argue he cannot identify new circumstances which necessitate a change to those subjects that he presented in March of 2017 for many reasons, including what Mr. Shumate mentioned earlier this morning, which is that they now agree that the DOJ request letter itself never says that better data are necessary for Voting Rights Act enforcement.

Unlike the cases the defendants cite where the challenge was to the failure to submit a report, we are arguing the decision is not in accordance with law because the Commerce Department had a substantive obligation to make a particular determination that they failed to make and can't make now.

THE COURT: And so I understand it, the substantive obligation -- is your argument tethered to the (f)(1) report or absence of (f)(3) report?

In other words, there was a report submitted under (f)(1), but your view is it wasn't adequate to support the addition of the citizenship question because it doesn't include citizenship among the subjects listed? I take it your argument is not tethered to that report, but rather the absence of any report under (f)(3)?

MR. COLANGELO: It is both. You have to consider them in comparison because what the legislative history of the 1976 amendments makes clear is that Congress was specifically amending the Census Act for the purpose of greater constraining the commerce secretary's concession.

One of those constraints, they wanted three-year notice and they wanted the public to have three-year notice of the subjects inquired about. A separate constraint, if they needed to change later, the secretary had to identify what necessitated that change.

THE COURT: And what is your support do you have for the proposition that that was intended to provide the public with three years of notice?

Certainly it required notice to Congress, but again I think the question is whether that is Congress's concern and problem to take any action with respect to or not as the case may be. What is your support that it went beyond simply reporting to Congress as the entity delegating its own power to conduct the census?

MR. COLANGELO: I think the best support for that, your Honor, is -- and we cite in our conclusions of law both the Senate report on the 1976 amendments and the House report, and the Senate -- the House report, your Honor, on the 1976 amendments is at Page 90, Paragraph 396 of our post-trial conclusions of law, proposed conclusions of law, says that:

"In view of the increasing attention focused on the content of census questionnaires, the requirements of 141 were intended to allow Congress to assure that the statistical needs will be met and that the citizens will not be unfairly subject to questions invading their privacy."

This is not like Congress asking simply to be sufficiently appraised of developments so it had situational awareness of what was going on over at the Commerce Department. This is a case where certainly explicitly from the House report, Congress was interested in protecting the citizens or non-citizens, as the case may be, from questions that unfairly invade their privacy and don't otherwise assure the statistical needs are met.

THE COURT: Right, but it also says submitted to Congress for its review and recommendations. In other words, it is certainly to protect Congress's prerogatives and authority here as the entity that is constitutionally tasked with conducting the census.

So Congress now knows that the secretary intends to add the question by virtue of the (f)(2) report. If Congress thinks that is not adequate, can't Congress take action and, indeed, hasn't Congress taken some action at least in the form of holding hearings?

MR. COLANGELO: What Congress can't do is take any action based on the notice they were not given in March of 2017 that the secretary was already considering this question.

So, in other words, your Honor, the Congressional -- even assuming that the statutory change was intended only to put Congress in a position to take such action as Congress thought appropriate, the failure to identify new circumstances

necessitating a change and the failure to include this as a subject a year ago when the Commerce Department was already thinking about it, that has deprived Congress of some part of its opportunity to do whatever it is that Congress would have wanted to do about it.

Especially where the statutory obligation in (f)(3) is to identify those new circumstances and necessity for the change, and what Congress was saying was we want notice three years early of the subjects you plan to explore, and if you're going to change it, you have to show us why it is necessary. I think coming down the road a year later with no explanation of the necessity doesn't give even Congress the opportunity it needs to exercise its role.

THE COURT: I would certainly grant you that, but the question is whether that is Congress's responsibility to act or not as it decides to do. Does it matter that the statute doesn't say, for example, secretary may not add a question unless he first reports to Congress the subject of the question three years in advance and, second, reports the actual question two years in advance? Or do you read the statute effectively to mean that?

MR. COLANGELO: I read the statute to require identification of subjects three years in advance, questions two years in advance, and changes to be justified by a showing of necessity if they arise after that.

I think an informative case by way of analogy would be that *NRDC v. NHTSA, National Highway Traffic Safety Administration* case that the Second Circuit decided this summer, and the court decided this case in the motion to dismiss ruling for the traceability prong and standing analysis in *NRDC v. NHTSA*, Congress enacted the statute in 2015, in in 2015 that required agencies, that requires agencies to adjust on a particular timetable any civil penalties associated with any violations of the statutes that they enforced and to adjust those civil penalties for inflation.

In that case, *NHTSA* had adjusted civil penalties and then delayed them. The Second Circuit held where the delay was inconsistent with the statutory obligation which required action by a particular date, that the delay should be set aside as not in accordance with law.

That is exactly what has happened here. The secretary was required to do certain things by a particular date or explain why he could not, and he hasn't done that. Under *NRDC v. NHTSA*, the decision should be set aside.

THE COURT: Can you cite any cases holding that the failure to submit a report to Congress as required by statute is reviewable, let alone a basis to set aside agency action?

They have cited a handful that seem to suggest otherwise, including, for example, the D.C. Circuit's decision in *Hodel*, which itself states that what is remarkable in light

of the ubiquitous reporting requirements is petitioners have failed to provide a single pertinent authority that suggests, much less holds, these commonplace requirements are judicially reviewable. Do you have any authority that suggests otherwise?

MR. COLANGELO: The case we cited that would be most supportive is at Paragraph 410 of our proposed post-trial conclusions of law. This is the *Acemla v. Copyright Royalty Tribunal* case, a Second Circuit decision from 1985, and there the Copyright Royalty Tribunal was required to add a statutory -- had a statutory obligation to publish a statement of the reasons for its decisions regarding various royalty-related decisions for I think it was music publishing companies, and the Second Circuit concluded that the agency's order should be set aside where the agency had not stated its reasons in compliance with that statutory obligation. I think that is an instructive analogy.

THE COURT: All right. Thank you. Mr. Shumate, are you still up?

MR. SHUMATE: Yes.

THE COURT: First on Section 6, first of all, why were you not on adequate notice of the substance of the arguments even if they didn't cite the statute, and to the extent you argue we are not on sufficient notice, why wouldn't the proper remedy be here allowing them to amend their complaints pursuant to Rule 15(b)?

MR. SHUMATE: We withdraw our objection to the court's consideration of this in light of the paragraphs in the complaint they referred to and in light of the fact they did raise a contrary to law claim. It is something the court can consider. We withdraw that argument.

THE COURT: Thank you. Tell me why on the merits that argument doesn't prevail?

MR. SHUMATE: Section 6 of Title 13 does not prohibit the agency from asking demographic questions. If it did, it would doom all the other demographic questions on the census.

Instead it requires the secretary to use administrative records to the maximum extent reasonably consistent with the -- I forget exact language, but there is a broad exception, and the secretary adequately explained in his decision memo why administrative records were not the best solution to respond to the DOJ's response for citizenship data.

Really this ultimately dovetails with the merits inquiry about whether the secretary gave an adequate explanation for his decision to choose only option D over option C. Option D does combine the use of administrative records with the addition of the citizenship questions.

THE COURT: Let's postpone that issue for a few minutes then and turn to Section 141 and tell me, it seems to me that the cases that you cited are a little bit different in the sense that:

Number one, they at least -- *Hodel* and *Guerrero* -- seem to pertain to the adequacy of a report submitted to Congress. Here, I think part of the argument at least is the absence of a report altogether, namely, the (f)(3) report. Now, that strikes me as a more black and whitish, more capable of review by a court. Why is that not a basis, reviewable by me, by a court?

MR. SHUMATE: The case law we cited still supports the proposition that the plaintiffs don't have standing to complain about inadequate or failure to submit a report to Congress. That is something that Congress is well empowered to resolve for itself.

Congress is certainly aware of the addition of the citizenship question. They have had hearings on this issue. The purposes of Section 141(f) are clearly satisfied by the report that the secretary submitted notifying Congress the citizenship question would be added. Whether you call it the (f)(2) or (f)(3) report, Congress is well aware of the decision of --

THE COURT: Your argument is, in essence, the (f)(2) report satisfies the (f)(3) requirements as well.

MR. SHUMATE: Yes, because --

THE COURT: How can that be?

Doesn't that essentially read out of the statute the (f)(1) report altogether? In other words, if the (f)(2) report

always satisfies the (f)(1) requirements, then what work does (f)(1) do?

MR. SHUMATE: (f)(1) is supposed to give Congress notice three years in advance of the consensus.

THE COURT: You can see that wasn't done here.

MR. SHUMATE: It was done, but the citizenship question was not part of (f)(1).

THE COURT: In other words, no notice was given to Congress the subject of citizenship was proposed to be added to the census, correct?

MR. SHUMATE: In the three-year report, correct.

THE COURT: If your argument is that the report given two years in advance pursuant to (f)(2) sufficed to satisfy the (f)(1) requirements by way of (f)(3), doesn't that effectively mean there is no (f)(1) report required because the (f)(2) report can always satisfy that obligation separate and apart from (f)(1)?

MR. SHUMATE: I don't think. The (f(1) report adequately noticed Congress the subject of the 2020 census. The secretary decided to add a citizenship question consistent with (f)(2). He notified Congress of his decision to add that particular question.

THE COURT: Is there anything in that report that satisfies the requirements of (f)(3) it has to be necessary in new circumstances?

MR. SHUMATE: I don't think, I don't think the language of the statute actually says that. If the secretary finds new circumstances, he should sent an (f)(3) report to Congress. If the secretary found new circumstances warranted the --

THE COURT: Which is what?

MR. SHUMATE: DOJ request for better citizenship data to enforce the Voting Rights Act. That certainly satisfies (f)(3), and there is no requirement that the secretary explain his reasons to Congress about what the new circumstances are. It simply says if the secretary finds new circumstances. That is something that we would argue committed --

THE COURT: And the fact there is evidence in the record suggesting that Secretary Ross was responsible for generating that request means that, in other words, the new circumstances requirement is basically irrelevant because the secretary himself can create the new circumstances that allows him to then add something. Is that your argument?

MR. SHUMATE: No, your Honor.

Ultimately, DOJ sent the letter. They could have decided not to send the letter. In the face of a request from another agency to add the question, that is certainly permissible for him to conclude this is a change in circumstances that warranted adding the question.

At bottom, the purposes of Section 141(f) are clearly

satisfied because Congress is aware of the addition of the question. With respect to the one case Mr. Colangelo cited, I didn't hear -- I am aware of the case -- I didn't hear him describe it as a case involved a notice to Congress. The cases we cited all involve cases where courts have said they don't have the ability to review sufficiency or require failure to -- requirement notify to Congress. The case I heard him describe was a case in which the agency failed to provide a sufficient explanation for its decision.

THE COURT: I understand your argument that the request from DOJ constitutes quote-unquote in circumstances. The language of the statute states:

"If the secretary finds new circumstances exist which necessitate that the subjects, types of information or questions contained the be modified," and so forth. Not only did there have to be new circumstances, but it has to a necessity additional question. You have conceded that the DOJ request does not render the question regarding citizenship on the census quote-unquote necessary. That word doesn't appear in the DOJ request, and I don't think Secretary Ross himself found it was quote/unquote necessary.

MR. SHUMATE: I want to be very clear.

The DOJ letter does not use the word, "necessary." It does not say it was necessary to add the citizenship question to obtain census block level data. Secretary Ross did conclude

in the last paragraph of his decision memo it is necessary to add the citizenship question to the census to respond to the DOJ request. He couldn't give DOJ what DOJ had asked for without adding the question. So he made the finding under Section 141(f), and the case law we have cited suggest it is not something that a court reviews, in any event.

THE COURT: All right. Very good. Let's turn then to the rest of the APA merits analysis.

MR. SHUMATE: I have one responsive point to what Mr. Colangelo said. We waived an argument --

THE COURT: Sure. I have one other question on this front I forgot. Go ahead.

MR. SHUMATE: I think Mr. Colangelo argued we waived any argument that the decision didn't comply with OMB quality standards. We did respond to that, Paragraphs 412 and 413 of our post-trial findings of fact.

THE COURT: All right. Two more questions actually on the 141 front. First, the DOJ request didn't require Secretary Ross to do anything, did it? There is no statutory requirement or constitutional requirement, for that matter, that he had to act in connection with that request. He could have ignored it, correct?

MR. SHUMATE: Correct.

THE COURT: So given that, in what way did that new circumstance, if that can qualify as a new circumstance,

necessitate the change to the census?

MR. SHUMATE: Secretary Ross explained that in his decision memo. In light of --

THE COURT: If he didn't actually need to respond to it, if he didn't need to act on it, it follows it is not necessary to change the census?

MR. SHUMATE: No, I don't think that is fair.

He made a finding at the last paragraph of his decision memo it was necessary to add the question to respond to DOJ's request.

THE COURT: Lastly, assume for the moment I agree with your argument on this score and I conclude that 141 is not a judicially reviewable section, I assume you would agree I can consider compliance with 141 or lack thereof in connection with analyzing the Arlington Heights factors and in connection with deciding whether there is evidence of bad faith or pretext or the like; that is to say, compliance with procedural requirements or the like is relevant to both those analyzes?

MR. SHUMATE: Your Honor, I think if you conclude that the decision is not arbitrary and capricious because the statute is not violated, I don't know what basis you have to rely on that.

THE COURT: The question is I may agree with you.

Let's say I agree with you that I don't think under the case law that compliance with that statute is judicially

reviewable, that is a determination for Congress to make. I assume I can nonetheless consider whether Secretary Ross complied with the requirements of the statute in evaluating, for example, whether he adhered to normal and statutory processes, procedures, requirements and the like, which goes to both the APA analysis of bad faith, pretext, analysis and the question of under Arlington Heights.

Do you agree?

MR. SHUMATE: I don't think you do. You would be reviewing the agency's failure to comply with the statute and holding it again against them. I don't think that would be appropriate.

THE COURT: Thank you. Anything else?

MR. SHUMATE: One other thing. The (f)(3) does say that the (f)(3) report should be submitted, "for the appropriate census date."

Even to the extent you find he didn't comply with Section (f)(1), (f)(3), there is certainly time for the secretary to submit another report to Congress, but to what end? That seems like overkill at this point. Congress is certainly aware of the question. They had hearings. I don't see what the point would be.

THE COURT: Does Mr. Gore's testimony that it is not necessary to enforce the Voting Rights Act to add the question not speak to whether the requirement could be met at this date?

MR. SHUMATE: No, we don't think that is reviewable. To the extent it is reviewable, I have given the best answer I can, the secretary did find it was necessary and appropriate to respond to DOJ's request by adding the citizenship question in light of their request.

THE COURT: Thank you. Let's continue on with APA.

Mr. Colangelo, are you still up?

MR. COLANGELO: Yes, your Honor.

THE COURT: I would be inclined to talk about the lack of pretesting, and in particular whether the testing in connection with the ACS questions are sufficient under the Census Bureau standards and the OMB guidelines and the like.

In the Abowd memo, the January 19th memo, if I remember correctly, it states -- and Mr. Shumate mentioned this in his opening -- that they would quote-unquote accept the cognitive research and questionnaire testing from ACS instead of independently retesting the citizenship question.

Why does that not support the Secretary's determination that there is no need to independently test the question here?

MR. COLANGELO: I think there are several reasons, your Honor. The first and I think clearest is that even without regard to that line in Dr. Abowd's memo, the OMB directives and the Census Bureau's own standards require pretesting not only of independent questions, but also of the

entire instrument; in other words, the statistical agencies consider those as two separate considerations:

One, how does the question perform; and

Two, how does the overall survey perform.

Does it matter where you put a question on a survey?

Does it matter whether somebody has been primed before answering it?

Even to the extent that we conclude that the Secretary's reliance on this reference in the Dr. Abowd's memo was reasonable, which we argue it was not, there is nothing at all either in Dr. Abowd's memo or in the Secretary's memo regarding testing of the instrument as a whole.

I think the second concern, your Honor, is that there is a disconnect between what the secretary concluded and what Dr. Abowd wrote in the memo. Dr. Abowd simply says because the question is already asked on the ACS, we would accept the cognitive research and questionnaire testing instead of independently retesting the citizenship question.

What the secretary concluded, at Page 2 of his memo, PX-26, is that the question has been, "well tested." In reaching the conclusion it has been well tested, he said nothing at all about how it was performing. In fact, when he -- the Abowd memo -- you can take that down, Matt. Thank you -- the Abowd memo specifically points to evidence that the ACS citizenship question led to inaccurate results

approximately 30 percent of the time.

For the secretary to look at a memo that says simply we will accept the cognitive research and questionnaire testing, and that also says, by the way, that question fails 3 times out of 10, and to convert those, that presentation with the conclusion the question has been well tested, we don't think that is supported by the record.

More broadly, your Honor, the administrative record standing alone establishes that testing for questions and testing for the entire survey are the norm. There are numerous references to it. Even if you disregard the obvious debate between the Commerce Department and the Census Bureau in the preparation of 35 questions about how to characterize the testing obligation and content review process, the memo that we referred to in this litigation is the Bloomer memo, PX-1, at 1168, this is a memo set out in 2016 what the content review process would be for adding subjects to the -- it was a review process important basically in complying with Section 141 obligations we have just been talking about. That memo describes the obligation to test the question and the questionnaire as a whole.

THE COURT: Is that binding on the secretary?

MR. COLANGELO: I think, your Honor, it is binding -- well, the question we are talking about here is whether the Secretary's decision was arbitrary or capricious. As, for

example, as Judge Garaufis pointed out in his decision vacating the DACA decision from earlier this year, the decision can be within the Secretary's authority to execute, but the secretary still has to execute that authority in a non-arbitrary and rational way.

So where the Census Bureau has long-standing procedures for testing and where the secretary has disregarded those cherry-picked one lines from Dr. Abowd's memo, it concludes he could forego all testing, I do think that supports a finding of arbitrary and capricious action.

The one other point is there is probably no subject more exhaustively considered in the correspondence that the secretary received before he made his decision and in the notes of the calls, the two dozen calls he made to stakeholders before he made his decision, in those 50 or 60 written submissions he received and two dozen calls that he made, there is probably no subject that comes up more often than the need to test both the question and the questionnaire.

The six former census directors mentioned, the head of American Statistical Association, Population Association mentioned it. His own advisory committees mentioned it. Even apart from whether the obligations are a binding one, to fail to give more of an explanation in his memo and simply to conclude the question has been well tested, I think separately, I think separately makes it arbitrary, especially where the

factors that the commenters were pointing out were factors that if any rational decision-maker should have thought about and explained. The last testing was in 2006. Everybody knows the macro-environment in the country is different today than it was in 2006.

THE COURT: Let me interrupt you there.

Dr. Abowd testified that it is not custom and practice for the Census Bureau to test questions that have been on past censuses in light of changes in the macro-environment. Now, does that not cut against that argument?

In other words, it could be in a question that is already on the census becomes, in the intervening decade, a highly sensitive question that would have an impact that it sounds like there is no standard or well-established practice that would necessitate or require that to be tested?

MR. COLANGELO: Your Honor, my recollection of his testimony was that there is a custom and practice to retest a question when they become aware of new information that gives them some reason to believe that the question is not, in fact, performing. He did separately testify, I confess I can't remember if it is in the trial record through the 30 (b)(6) deposition designations or live trial testimony, but he testified he does not believe the question is performing well right now and, in fact, they're reconsidering what and whether they should do about the citizenship question.

THE COURT: He testified to that effect in court. I certainly recall that.

MR. COLANGELO: One other point to answer that question more directly. The Census Bureau, setting aside Dr. Abowd's testimony about changed circumstances and how that affects a particular question, the Census Bureau does, in fact, conduct a year's long process of testing the entire questionnaire, and the administrative record shows all of the steps in that process. We pled them all in our original complaint dating back to the tests starting in 2014.

So there is a process for testing the entire questionnaire which was not done here regardless of the citizenship question.

THE COURT: I think I want to keep you up there. I ask you to turn to option D versus option C or alternative C versus alternative D question. So Secretary Ross did provide reasons for choosing option D or option C, correct?

MR. COLANGELO: Yes.

THE COURT: Tell me why those reasons are wrong.

I gather he says, number one, the use of administrative records is still evolving and that the Bureau doesn't yet have a complete set of records for the entire population, so using administrative records alone would provide a, quote-unquote, incomplete picture and require imputation of up to 10 or 15 percent of the population, some 25 million

people. Why is that wrong?

MR. COLANGELO: I think it is wrong for two reasons, but they both fall under the heading of it's wrong because it is contrary to all of the other evidence and certainly all of the empirical evidence in the record, and he had no empirical evidence of his own to countermand the convincing empirical case that the Census Bureau made through Dr. Abowd and his technical team.

To your question regarding incomplete picture, your Honor, I think Dr. Abowd explained in the March 1st memo that Alternative D was, in fact, the worst option because it makes all of the data worse. So, in other words, taking as a given, which the Census Bureau certainly conceded, adding a citizenship question will cause an initial self-response decline, we knew that decline at the time the decision was 5.1 percent conservatively. Brown, et al. estimates it to be conservatively between 5.8 and 11.9 percent.

If you start from the premise that adding the question leads to a self-response decline of 5.1 percent, then what Dr. Abowd explained in his March 1 memo, which is PX-25, is that everything that happens after that is less effective because you are pushing more people into NRFU, and nobody disagrees that NRFU is worse. Doctor Salvo testified the responses came, and Dr. Abowd's explanation in PX-25 explains when you push more people into NRFU as an initial matter, more people have to

be interviewed and can be enumerated and they are considered the same people who don't answer a question are unlikely to respond to enumerators.

You go to administrator records and proxies and they pointed out because the PII quality diminishes so significantly with self-response and NRFU steps, you're dramatically reducing the number of people and the linkages you can make, I don't remember the statistics specifically, but the linkage rate was 93 percent for self-response and 33 percent for people who have to be enumerated by proxy.

So it does not give a more complete picture. In fact, it gives a less complete picture and there was literally no empirical evidence to refute that.

(Continued on next page)

MR. COLANGELO: On the secretary's question or observation about needing to impute more people, Dr. Abowd explained that because the quality, because the inaccuracy rate is so high in self-responses, or certainly for households with at least one noncitizen, that he would rather, he would get better data through imputing than through adding a citizenship question. I think both of the secretary's conclusions are unjustified, but your Honor, there's an even more obvious law in this particular part of the secretary's decision, which we haven't talked about, which is that the secretary didn't just say, "I would like you to pursue the approach of both adding a question and looking to the administrative records."

He anchored that decision on the determination or the prediction that the Census Bureau would "use the two years remaining until the 2020 decennial census to further enhance its protocols and models." But the administrative record is totally silent on what further enhancements he had in mind, what protocols and models he was even referring to, setting aside that adopting the plainly inferior course is itself arbitrary and capricious, to make an agency decision based on the sort of magic-wand theory that I can say "make better in the future" and that the agency, the Census Bureau, will then be able to make better in the future. That alone is arbitrary.

We cited cases to the effect that relying on some unspecified future change and pronouncing that it shall

mitigate the shortcomings in the decision, that's arbitrary decision-making, your Honor, and that's another reason why selecting alternative B or alternative C is contrary to the evidence.

THE COURT: All right. Thank you.

Mr. Shumate. You both have done some heavy lifting today. Thank you.

Let me start with the question of pretesting, or testing, with you. Am I correct that the Census Bureau's standards normally require pretesting before any question is added to any survey? Is that correct?

MR. SHUMATE: I think that's correct, but the record does show that there is no standard policy for adding a question to the decennial census.

THE COURT: But the decennial census is a survey, correct?

MR. SHUMATE: It's unique among surveys, but I suppose it is a survey, yes.

THE COURT: All right, so presumably, it falls within the scope of the standards that govern the question of surveys generally. Would you agree with that?

MR. SHUMATE: I think Dr. Abowd would agree with that, yes.

THE COURT: And am I correct that those require either pretesting or a waiver of the pretesting requirement or

allowing that a question taken from another survey that's performing adequately are the three routes, if you will, to adding a question to the survey?

MR. SHUMATE: I think that's correct.

THE COURT: All right. Let's go through them. There was no pretesting done here with respect to the decennial census, correct, the addition of a citizenship question on the decennial census?

MR. SHUMATE: Not for the 2020, but of course, there's Dr. Abowd's testimony that it has been well tested on the ACS.

THE COURT: A different survey.

MR. SHUMATE: Correct. Same question, different survey.

THE COURT: There has to be a difference between the third option; namely, taking it from a different survey and putting it on the survey we're talking about in the pretesting requirement. The pretesting requirement requires testing of that question on the survey that is at issue. Do you agree?

MR. SHUMATE: I don't agree it requires, because from my argument earlier, the secretary's not bound by the guidelines policy of the Census Bureau.

THE COURT: Let me deviate from my path and ask you about that. I take it, as I understand Mr. Colangelo to argue, that may be true with respect to whether the decision was contrary to law because it didn't comply with the OMB

guidelines and the Census Bureau's standards, but I can consider compliance with those in determining whether it was arbitrary and capricious. Do you agree with that?

MR. SHUMATE: I think you can evaluate the reasons that he provided and the record supporting those conclusions to decide whether it was arbitrary and capricious or not, and here, the record absolutely supports his explanation.

THE COURT: Fine, but I can consider his compliance, or lack thereof, with the Census Bureau's own statistical standards in determining whether it was arbitrary and capricious.

MR. SHUMATE: No.

THE COURT: Yes or no?

MR. SHUMATE: No, it's not the fact of compliance. It's the explanation for why.

THE COURT: Does he anywhere admit in one of those statements that he is disregarding those statistical standards because he disagrees with them?

MR. SHUMATE: No, he does not.

THE COURT: So he purports to be compliant, correct? Yes or no.

MR. SHUMATE: He did not address that in the memo. He relied on Dr. Abowd.

THE COURT: If he didn't address it, then how can I evaluate his reasons for not complying with it?

MR. SHUMATE: Because his reasons are supported by Dr. Abowd's memo and his testimony that the question had been well tested. It had been tested on the ACS. It had been tested and used on prior decennial censuses. That is more than an adequate explanation.

THE COURT: Except that, again, let's go through the standards themselves, so let me go back to the path that I was on. The first option is pretesting of the question on the survey at issue, correct, under the standards, putting aside whether he's bound by those standards?

MR. SHUMATE: That's correct.

THE COURT: Do you agree?

MR. SHUMATE: Correct.

THE COURT: And that was not done here because there was no pretesting done of this question on the census specifically, correct?

MR. SHUMATE: Correct.

THE COURT: OK. Second is the waiver, and no waiver was sought let alone received here, correct?

MR. SHUMATE: Correct.

THE COURT: The third option is taking it from another survey instrument if it's performing adequately on that survey instrument, correct?

MR. SHUMATE: Correct.

THE COURT: And what is the evidence here that the

citizenship question was performing adequately on the ACS?

Dr. Abowd testified that there was a 30 percent disagreement rate of an error rate on the ACS question. How can you possibly or how can Sec'y Ross possibly say that that is adequate performance? And indeed, Sec'y Ross cites that statistic himself in the memo itself.

MR. SHUMATE: He does, and it helps our case, because it shows that he was aware of the evidence that Dr. Abowd then testified about or relied on for his conclusion that the question is not performing well.

THE COURT: It shows that he's aware, but it doesn't show that he made any attempt to explain how that question was performing adequately on the ACS and therefore the testing of that question toward the ACS would suffice to put it on the census.

MR. SHUMATE: He did rely on Dr. Abowd's memo and his conclusion that they would accept the other testing. Dr. Abowd, according to the record, I don't think ever told Sec'y Ross it's not performing adequately. He made him aware, and Sec'y Ross was aware of the evidence that the question had a -- 30 percent of respondents don't answer the ACS accurately compared to the administrative records, but he addressed that evidence. He explained why it didn't change his decision.

THE COURT: All right. In your opening you cited the 30 percent error rate for the ACS as a reason to justify the

secretary's use of the decennial census to gather the data. Is there any evidence, in the administrative record or otherwise, that suggests that the question on the census would perform better than it does on the ACS?

MR. SHUMATE: Yes. The Sec'y Ross did explain in the memo that the census has a higher response rate than the ACS.

THE COURT: That's not my question. My question pertains to the disagreement rate, not the response rate. The disagreement rate is where somebody provides an answer but that answer is inconsistent with the answer that is provided by the administrative records, and Dr. Abowd testified that administrative records are more reliable on that front. My question is, is there any evidence in the record, administrative or otherwise, that supports the conclusion that the question on the census would perform better than it does on the ACS?

MR. SHUMATE: I heard Mr. Colangelo reference all the evidence that supported a self-responses that can, and those were his words. So Sec'y Ross reasonably concluded, in light of that evidence, that it's better to have a complete survey compilation, that it would be better to ask everyone in America to answer the question than to rely on the ACS or to rely on administrative records alone.

THE COURT: I think what Mr. Colangelo was referring to was testimony that, in the context of the census

procedures -- so self-response in the NRFU operation -- self-response yields better data and certainly there's support for that conclusion, and your witness and their witnesses all agreed on that. But that's separate from whether it is better to obtain citizenship data by of asking a question on the ACS, the census, or otherwise versus getting it from administrative records.

Is there any support in the record for the proposition that asking the question on the census would result in more accurate data, fewer disagreements, than are on the ACS? Because you cited that as a reason that justified the use of the census as opposed to relying on the existing data from ACS.

MR. SHUMATE: Evidence in the record that I'm aware of studied the disagreement rate between the 2010 census and the 2010 ACS and looked at the ACS compared to the administrative records. That's the evidence before the secretary that I'm aware of. And all the secretary is required to do, under the APA, is give a reasoned explanation. He doesn't have to choose the best option. He just has to give a reasoned explanation for the option he chose, and on the issue of testing, the evidence in the record certainly supports his conclusion.

Dr. Abowd's testimony and his memo support the conclusion and the reasons that he provided, so the fact that the Census Bureau's guidelines may have suggested it would have been better to have more testing or the experts think it would

have been better to have more testing is really beside the point, because the Court is not here to decide what is the best option or whether it should have had more testing. The only question before the Court is whether he gave a reasoned explanation to accept Dr. Abowd's conclusion that the question had been well tested and had been used on prior surveys.

THE COURT: All right. That provides a good segue to the option C versus option D question. I think I read Sec'y Ross's memo, and I take your argument to be, that he reasonably decided that option D was better than option C; that he made a reasonable policy decision that that option was superior to option C.

MR. SHUMATE: Correct.

THE COURT: On what dimensions, on what grounds did he make that determination?

MR. SHUMATE: I think he mentioned a couple of times in his memo that he had weighed the evidence. He made a policy judgment. He took into account DOJ's request for better citizenship data. He took into account Dr. Abowd's concerns about drop in self-response. He took into account the fact that people have a legal obligation to answer the question. He took into account the evidence that administrative records are not the best solution, and he took into account the fact that the ACS survey didn't have a great response rate to the question.

He took all of that evidence into account and ultimately made a policy judgment that it was better to add the question to provide the data to DOJ compared to the cost of making that decision.

THE COURT: All right. And if I were to conclude and make a finding that on no dimension -- cost, burden, accuracy, completeness, on no dimension that he cites in his memo or otherwise -- that option D is superior to option C, would that not support a finding of arbitrary and capriciousness?

MR. SHUMATE: No, because the Court's job is not to evaluate whether the secretary made the best choice or the correct choice.

THE COURT: No, but in other words, if he says on these grounds option D is superior to option C and I find that that's not rational, that it does not withstand scrutiny, because it's inconsistent with the evidence in the record or fails to consider evidence in the record, is that not the definition of arbitrary and capricious?

MR. SHUMATE: Not at al, your Honor. That would be the definition of substituting the Court's judgment or the experts' judgment for the secretary's.

Again, he doesn't have to choose the best option. The APA standard is did he entirely fail to consider an important factor? Of course not. He considered all the factors that plaintiffs have identified. He simply disagreed with how he

weighed the evidence and the conclusion he came to, so the fact that the Court may think this is not the best option for DOJ to obtain citizenship data, it would be better for DOJ to stick with ACS, and you agreed with Dr. Handley on that and you agreed with all the experts, that would be a classic example of the Court substituting its judgment for the decision-maker's.

The only task for the Court is evaluating the decision-making process and whether he provided a rational reason for the decision. And he clearly did.

THE COURT: One of the justifications for his preference of option D over option C was that it "may eliminate the need for the Census Bureau to have to impute an answer for millions of people." You would agree that it does not avoid the need to impute the answer to millions of people, correct; that an imputation is going to occur whether the data is obtained by way of the census or by way of administrative records?

MR. SHUMATE: I think Sec'y Ross's preference is that every individual in America be given the opportunity to answer the question.

THE COURT: That's not my question. He says that it may avoid the need to impute, but it is quite clear that whether the question is on the census or whether the data is derived from the administrative records, both approaches involved some degree of imputation, correct? Yes or no.

MR. SHUMATE: Yes, some degree of imputation.

THE COURT: All right. Thank you.

MR. SHUMATE: Sec'y Ross --

THE COURT: That's all I need to know.

Let's turn to bad faith and pretext, and let me go back to plaintiffs on that.

MR. COLANGELO: Your Honor, one cite to the transcript regarding an exchange that the Court just had, Dr. Abowd testified at trial not only that he had no reason to think that responses on the citizenship question on the census would be more accurate than on the ACS but that, in fact, he agreed that the citizenship question would perform worse on the census. That's at 956 to '57 of the trial transcript.

THE COURT: Thank you.

I want to try and wrap up by 1, but we still have the bad faith, pretext, due process and remedies issues that I want to cover, and that doesn't give us a whole lot of time, so I'm going to keep you a little bit short.

One question on bad faith and pretext is you've relied on the refusal of the Department of Justice's technical team to meet with individuals from the Census Bureau. Is there any evidence that Sec'y Ross was aware of that refusal or had any role in it? And in that regard, what role do you think it plays in my evaluation of whether he proceeded in bad faith?

MR. COLANGELO: Your Honor, I know that the record

shows that Dr. Jarmin told the undersecretary, Karen Dunn Kelley, when the Justice Department refused to meet. I don't know the answer to the question as to whether the secretary knew, and we're happy to find an answer to that question. We'll take a look at the evidence and let the Court know whether there's evidence that the secretary directly knew, but I know that the administrative record shows the email communications between Dr. Jarmin and Karen Dunn Kelley, communicating to her when Art Gary, the general counsel at the justice management division, wrote back and said no, we're not going to meet with you.

In any event, I think it is not dispositive by any stretch of the question on pretext whether the secretary had personal knowledge of DOJ's unwillingness to meet because, more broadly, it was part of a pattern of departures from typical practice, and those departures from typical practice are evidence of pretext for the same reason that the NYIC plaintiffs will argue that they relate to the *Arlington Heights* considerations.

I think, second, bear in mind that the secretary's decision memo said that he was taking a hard look at the question. One would assume that in taking a hard look at the question, he would have inquired about whether typical procedures were followed, including meeting with the requesting agency to determine whether their needs had been met.

And then we separately know that the secretary repeatedly spoke with the attorney general about the citizenship question, and we know from Mr. Gore's deposition that it was the attorney general who personally instructed the Justice Department not to meet with the commerce department, so it's certainly a reasonable inference if the Court did conclude that personal knowledge was needed, it's certainly a reasonable inference that the secretary was aware that the Justice Department was unwilling to meet with his team.

As your Honor pointed out, though, or if you didn't, I will point out, there are half a dozen indicia of pretext here and departures from typical practice, and that is one of them.

THE COURT: Do you agree that irreversible prejudgment is the requisite standard on that front?

MR. COLANGELO: Your Honor, the language that the D.C. Circuit has used is -- sorry. Let me back up for a second.

We have briefed, in our posttrial proposed conclusions of law, two distinct arguments and I do think they are separate. The first is that the secretary's reason was pretextual and should be set aside under the APA for that reason, independent of prejudgment. In other words, the cases that typically look at pretext look at it in terms of whether the secretary relied on factors, which Congress did not intend him to consider, and it is intuitive that giving a reason that is false or not the real reason is the fact that Congress did

not intend the secretary to consider it.

THE COURT: All right. Let me press you on that for a second. Let's hypothesize, and I want to be clear I'm not suggesting that I'm making a finding on this. Let's hypothesize and make it a hypothetical secretary. Let's hypothesize that a hypothetical secretary, in a Democratic administration, just to make it further afield, says, I want to add this question because I think it will systematically, basically, favor blue states, Democratic-leaning states and therefore benefit the Democrats. Improper purpose, do you agree?

MR. COLANGELO: Yes.

THE COURT: OK. Now let's say he knows that and says, But I can't articulate that that's my reason so I need to come up with a legal rationale that would withstand scrutiny by the courts and Congress, so I'm going to go to another agency and say, Hey, can you think of any legal rationale, or would you like me to ask this question, and if so why? And then they say: Actually, you know what? Here's a reason we would like you to, or it would be helpful to us. And he says, That's actually a good reason, and there's no evidence that he doesn't disagree with the other agency's request. And let's assume or hypothesize that that request is not inconsistent with the statute, with the Constitution, or what have you.

Now, I take it that the defendants' argument is that

it is irrelevant, the original reason that motivated the request; that so long as he agrees with the legitimate request, even if it's a *post hoc* one, that is the end of the analysis.

Do you agree or disagree?

MR. COLANGELO: I disagree that it is irrelevant and I disagree that it is dispositive of the pretext inquiry.

I think if those were the only facts, it might be a different case, but here we have a range of other facts that include not only the evidence of an impermissible motive that was then reverse engineered to reach a desired outcome but the subsequent series of misleading assertions regarding that process entirely. So no, I don't agree that that would be dispositive.

To answer your Honor's question about the legal standard for prejudgment, I think the case that we would cite is *Air Transport Association*, the D.C. Circuit case from 2011, 663 F.3d 476. The D.C. Circuit uses the language "unalterably closed mind" and then describes unalterably closed mind to mean unwilling or unable to rationally consider arguments. I think that under that standard, where closed mind means unwilling or unable to rationally consider arguments, this record does show prejudgment.

It has all the hallmarks of predetermination, including the secretary's March 2017 inquiry to Mr. Comstock that Mr. Comstock then responded to by pointing out the

problems with counting illegal immigrants. It includes the May 2017 email, where the secretary asked, I'm mystified why nothing has been done in response to my months-old request that we add the citizenship question, to which Mr. Comstock responded not by saying "we'll look into it"; he responded by saying "we will get that done", and then the series of events that followed which I don't need to belabor.

Your Honor, I think those facts, combined with all of the other arbitrary aspects of the decision, do show in this case that the secretary had an unalterably closed mind to the extent that he was unable or unwilling to rationally consider alternatives.

THE COURT: Last question for you on this front. What do I make on that score of Dr. Abowd's testimony concerning the February 12 meeting, where he didn't seemed to be of the view that Sec'y Ross had already made up his mind? Granted, there were a lot of facts regarding Sec'y Ross's conduct and his staff's conduct of which Dr. Abowd was unaware, but what do I make of that testimony?

MR. COLANGELO: I think the most helpful way to think about that, your Honor, is to recall the email exchange that's in the administrative record between Mr. Comstock and the secretary, where Mr. Comstock said because this case will go to the Supreme Court, we need to be extremely careful in preparing a record, and the secretary responded by saying we need to be

extremely careful about everything. I think that where you have evidence in the record of an agreement to, at minimum, be mindful of what the record is going to look like on subsequent review, the fact that the secretary may have appeared open-minded in a conversation with Dr. Abowd does not at all undermine the conclusion that he prejudged the outcome.

To be honest, your Honor, I think that Dr. Abowd's testimony could just as well support the conclusion that what the secretary was doing was paying extremely close attention to Dr. Abowd in that meeting so that he could find the best argument to include in his memo to explain why he already knew he was going to come to the outcome that was different than what the Census Bureau was recommending, so I don't think that his observation on the stand undermines at all the prejudgment analysis here.

THE COURT: All right, and let me ask you one last question, just so we can move things along, which is with respect to the need for the question to assist in Voting Rights Act enforcement, I think there's agreement that it's not necessary. It's not actually needed for that and in that regard some of the testimony from Dr. Handley and others may be irrelevant, but I guess the question I have is DOJ says we could use this, it could be helpful. No. 1, do you dispute that? It seems that census block CVAP data could certainly be helpful in litigation of voting rights cases. And No. 2, isn't

that something to which DOJ is entitled some degree of deference?

MR. COLANGELO: To your first question, we don't disagree that in litigating some Section 2 cases the plaintiffs may need Hispanic CVAP data in order to prove the first *Gingles* factor, but I think the fact that there was no evidence that they needed better Hispanic CVAP data than they already had, is what's controlling here.

THE COURT: The Gary letter purports to provide reasons why they need better data, correct? And wasn't Sec'y Ross, who is not a voting rights expert or a lawyer, as I understand it, entitled to take that at face value and rely on that in reaching the conclusion that DOJ really needed that data, and then the question is what the best route to get it is? That's a separate question.

MR. COLANGELO: I think the answer to that question is no, your Honor, for a couple of reasons.

One is that, and we cited cases to this effect in our posttrial conclusions of law, but an agency is not allowed to rely uncritically on another agency's assertion in exercising its own separate authority. The Census Act, as the defendants have pointed out, assigns responsibility for designing a census questionnaire to the commerce secretary, not to the acting assistant attorney general for civil rights and not to acting general counsel of the justice management division of the

Department of Justice. The secretary had an obligation, in exercising his own authority, to make sure that the reason that was being presented to him was a reasonable one.

Separately, in the decision memo, he pointed out that he was taking a hard look. The record reflects literally no look at all at the reasons that DOJ gave.

And then, separately, there are sort of aspects of the Gary letter that any review, even an uncritical one, would make clear don't make sense on their face. For example, if the Voting Rights Act has been around since 1965 and nobody has had a question on citizenship on the census since 1965, why would you need it? If every case cited -- if the letter itself never identified a case they wanted to bring but couldn't because of the lack of better data or a case they brought but failed to succeed on because of the lack of better data or a case that private parties brought but lost because of the lack of adequate data, the absence of any of those factors in the letter, I think, is probative.

The testimony that Dr. Handley gave, which the Court can consider for the purposes of understanding this area of the secretary's decision-making process was that the reasons that the DOJ letter listed as reasons why existing data were not good enough don't make sense on their own. One of the factors was that you would have to combine different databases. She testified, first of all, that it takes her less than an hour to

do, and in any event, she has to look at sources of data from multiple different sources in order to reach a determination on whether the *Gingles* factors are met. She has to look at not just *Gingles I*, which is geographically compact, but also *Gingles II* and *Gingles III*, which are the racially polarized voting assessments of whether minorities officially vote as a block and the white majority is sufficiently cohesive convincingly or predictably to defeat their preferred candidate of choice.

None of those inquiries are even touched by making this change, so I think the shorter answer to your Honor's question is no, the secretary isn't entitled to blindly rely on other agencies' assertions. He needs to make at least some critical assessment of his own, and barest of critical assessments here would have revealed the problems in this letter.

THE COURT: All right. My inclination would be to turn to due process before hearing from Mr. Shumate, since there's some overlap here. Is that Mr. Ho's ilk or someone else?

Mr. Freedman.

Let me ask you on this front, in my ruling on the motion to dismiss, I relied on allegations in the complaint regarding statements by the president and the nexus between those statements, and the decision was a campaign

communication, as I understand it, that indicated that President Trump sufficiently mandated quote/unquote the addition of the question. If I'm not mistaken, that did not actually come into evidence at trial. Correct?

MR. FREEDMAN: That's correct, your Honor.

THE COURT: Is there any evidence that connects the president or any other member of his administration with Sec'y Ross's consideration of the decision to add the question such that I can consider statements by other officials in the analysis?

MR. FREEDMAN: Looking at this, your Honor, this is one of the five factors needed to bring statements. We did put in our findings of fact and conclusions of law Sec'y Ross's statements to the extent we have them.

THE COURT: There's no dispute, I would assume, and maybe I shouldn't assume that in this case anymore, but there's no dispute that I could consider Sec'y Ross's contemporary statements in making the *Arlington Heights* analysis. *Arlington Heights* talks about contemporary statements of the decision-maker, so there's no question there. My question is to what extent I can impute, if you will, statements or policy decisions by other officials, whether it's the president or members of the White House or the secretary of the state of Kansas, for example, to Sec'y Ross. You rely on their views of matters, but there's a critical step missing; namely,

connecting their views with the decision that Sec'y Ross ultimately makes.

MR. FREEDMAN: I think certainly Sec'y Kobach's statements are in the record. They were in the record and there were references to discussions about them in critical meetings that we otherwise don't know much about.

THE COURT: But Sec'y Kobach's communication, as I understand it, was we should ask this question because I think that the census is improperly counting aliens who don't actually reside here.

MR. FREEDMAN: That's right.

THE COURT: How is that evidence of racial animus that would support a due process clause claim, assuming the separate question of whether I can attribute that to Sec'y Ross?

MR. FREEDMAN: Sec'y Kobach's views, which he's articulated in that email and in internal discussions -- taking a step back. His concern is immigrant communities of color. That is the point. All these discussions about immigrants that we cite in our complaint that we have gotten, pursuant to our requests for admissions, are referring to immigrant communities of color. It's not simply that we're not counting people who don't live here. It's that the focus of this is the political power in trying to exclude people from apportionment, in my mind, is because they are communities of color.

I think that the *Arlington Heights*, and I could walk

you through the factors, I think we've got evidence of impact on Hispanics. I think we've got procedural irregularities, which Mr. Colangelo referred to.

THE COURT: I don't need you to walk me through the factors, but ultimately, the inquiry gets to the question of whether it was pretext for discrimination because of, not in spite of, race, national origin, or the like. Correct?

MR. FREEDMAN: That's right.

THE COURT: OK. Now, at the close of the trial, I posed the question of whether discrimination against immigrants generally -- that is, non-Americans -- would give rise to equal protection violation. I think Mr. Ho indicated that your view was that it would. Can you just spell that out for a moment.

MR. FREEDMAN: Sure. To be clear, we believe that we've got evidence of discrimination and, in particular, impact just to Hispanics, but there can be discrimination of the Fifth Amendment against immigrants, in the words of *Filer v. Doe*, individuals whose presence in the country is unlawful. The Fifth Amendment protects everyone in the United States regardless of whether they are a citizen or not, *Matthew v. Diaz*.

It's important to note that the government has considerable latitude to make distinctions on the basis of immigration, particularly where they're invoking national security determinations or immigration determinations, but

that's not the governmental interest at issue here. Here, we're talking about the census clause, and the government has an obligation under the census clause to count everyone -- immigrant, citizen, noncitizen -- and to make apportionment decisions based on all individuals residing in the states. There is a more deferential review, under the Fifth Amendment, when the government is making these classifications on the basis of citizen versus noncitizen. We don't dispute that, but the Fifth Amendment does not permit intentional discrimination on arbitrary exclusions of noncitizens in a way that does not promote legitimate federal governmental interests. For example, the *Hampton v. Mow Sun Wong* case struck down a ban on employment of noncitizens in the civil service, finding that it did not serve a legitimate governmental interest.

For the reasons that we spell out in our papers that you were just discussing with Mr. Colangelo, simply deciding that they don't want to count noncitizens for apportionment purposes is not a legitimate governmental interest. Looking at the totality of the circumstances, the evidence of pretext that the articulated reason is not the real reason they did this, even if they had been up front and said our reason for doing this is we want to exclude, we want disempower communities of color --

THE COURT: Is it, here, your argument that there is support in the record for a conclusion or finding that the

purpose of adding the question was precisely to get noncitizens to not be counted in the census?

MR. FREEDMAN: Absolutely, your Honor. I can walk you through it, but I would cite the Court to PX-55, which is the earliest communication involving Sec'y Ross where he responds to this question of Mr. Comstock, sends him the Wall Street Journal article about the pitfalls of counting illegal immigrants.

I would cite Mr. Kobach's summary of his conversation with Sec'y Ross, which is PX-19.

I would cite PX-607, which is Mr. Uthmeier's note to Mr. Comstock, where he's forwarding a drafting memo and says, Our hook is ultimately we do not make decisions on how the citizenship data will be used for apportionment. That's August 11.

I would cite PX-614. That's the summary, heavily redacted summary, of the senior staff meeting on September 6, another meeting which we otherwise have no evidence in the record, which no witness recalled, but making clear that Sec'y Ross at that meeting had discussed Mr. Kobach and his views.

THE COURT: All right. Anything else you want to list on that front?

MR. FREEDMAN: I can walk the Court through the evidence that Hispanics are really the victims here. I can talk about procedural irregularities.

THE COURT: That's fine. Thank you.

Let me hear from Mr. Shumate, and then, we're not ending by 1 at this point, but I want to turn to remedies and then we will wrap up.

Mr. Shumate.

MR. SHUMATE: Thank you, your Honor.

On the question of bad faith and pretext, I just wanted to start with what Mr. Colangelo brought up about the email exchange between Sec'y Ross and Earl Comstock, where Mr. Comstock advised the secretary, We need to be careful, this case might go to the Supreme Court. And Sec'y Ross's response was, We should always be careful. That is not a nefarious response. That is a response that indicates we should always be careful in everything we do, not that we need to whitewash the record.

THE COURT: What about the May 2 email, in which he says, Nothing's happened on my months-old request to add the citizenship question; why is that not evidence of prejudgment, if not irreversible prejudgment?

MR. SHUMATE: I think it's evidence that he had a policy preference that this is something he wanted to do. He was advised that he couldn't do it unless he got a request from another agency. I think that was Mr. Comstock's testimony, so he says, Where are you? He was lighting a fire under his staff to get things done, so Mr. Comstock said to him, Reach out to

DOJ.

THE COURT: To make them make the request.

MR. SHUMATE: I don't know how the Department of Commerce can make DOJ do anything. It only explains there was a conversation between DOJ and the Department of Commerce.

THE COURT: But we're not privy to that conversation because Sec'y Ross wasn't deposed.

MR. SHUMATE: That's correct.

THE COURT: OK.

MR. SHUMATE: And where is the evidence in the record that Sec'y Ross would have plowed ahead with this decision had DOJ not submitted the letter? They had to.

THE COURT: In part, because Sec'y Ross was not deposed, but that's not here nor there at this point.

Turn to the due process clause analysis, please.

MR. SHUMATE: Sure.

Let's not forget the citizenship question is facially neutral. It does not classify anyone. It does not discriminate against anyone. It is a question that goes to every person in the United States, and there are no legal consequences that flow from answering the question truthfully, so disparate impact alone is clearly not enough to state a claim under the equal protection clause. There's no evidence that Sec'y Ross acted for any discriminatory purpose. The only evidence in the record that demonstrates why he made this

decision was because of the DOJ request.

The plaintiffs ask the Court to draw an inference of discriminatory purpose simply based on the decision-making process. If the decision-making process was arbitrary and capricious, then it should be set aside as arbitrary and capricious. If it's not arbitrary and capricious, that's not a basis to wholesale import a failed APA claim into the equal protection analysis.

THE COURT: But the *Arlington Heights* analysis certainly overlaps to some extent, right? Departures from the regular process, contemporaneous statement, substantive irregularities are all things that are cognizable under the APA, although I agree with you that ultimately the burden on due process is higher, that you have to show it's not just pretext but pretext for discrimination. Surely there's an overlap.

MR. SHUMATE: Sure, but *Arlington Heights* is not an APA case because there's not an APA claim in that case. If the argument is the decision-making process was flawed, then that's a basis to set aside the APA. It doesn't mean it meets the arbitrary and capricious standard, but if they haven't made out claims under the APA, I don't think it's appropriate for the Court to say there were all these unusual factors in the decision-making process that render this a violation of the equal protection clause if the decision was ultimately not

arbitrary and capricious.

I want to respond to the argument that the Court should infer animus to Sec'y Ross simply because he spoke to Secretary of State Kobach. The evidence shows, as you pointed out, that Mr. Kobach was pressing a different question. He wanted the secretary to ask about legal status, and Sec'y Ross did not accept that alternative. He rejected it. He added the citizenship question that had been asked in prior decennial censuses, and if that's their only link to any animus, then that breaks the chain.

I'm happy to address any other points the Court had questions about, but I think they've utterly failed to state a claim.

THE COURT: One is Sec'y Ross doesn't live under a rock or in a vacuum. He serves at the pleasure of the president. Why doesn't that make statements by the president, policies of the president relevant to the *Arlington Heights* analysis on the theory that one can assume that Sec'y Ross is trying to advance the interests and policy preferences of the president?

MR. SHUMATE: The decision-maker here was Sec'y Ross. I don't think they've claimed otherwise. There's no evidence that the president mandated this decision. As you said, the campaign email was not part of the evidence. There's evidence that I'm aware of that the president has ever commented on this

very issue. The fact that Sec'y Ross issued a press release supporting the president's immigration agenda shows nothing. It simply shows that the secretary of commerce supports what the administration is doing. That doesn't make the decision that he made here in any way suspect.

THE COURT: All right. And you would agree that it's Sec'y Ross's individual intents that matter for purposes of the *Arlington Heights* due process inquiry; in other words, he's the decision-maker whose intent is relevant to that question, correct?

MR. SHUMATE: Correct. The decision-maker's, yes.

THE COURT: So it doesn't matter, for example, if the president or Secretary Kobach or anyone else involved in the chain had some invidious motive in thinking that the question should be added. Whether they did or not is a separate question, but that doesn't matter if Sec'y Ross didn't share that motive, and the plaintiffs lose. Correct?

MR. SHUMATE: Correct.

THE COURT: How can they carry their burden on that question without deposing Sec'y Ross?

MR. SHUMATE: Deposing cabinet secretaries, as I believe we've pointed out, is not something that should be the norm or ever is the norm in any case.

THE COURT: No one said it's the norm, but this case is unusual in the degree to which it, in this particular claim,

turns on the intent of a specific person, and it strikes me that, for example, the origins of his interest in adding a question, which date back to February or March of 2017, are at the heart of that. His communications with Mr. Comstock in that period are at the heart of that. His communications with Attorney General Sessions throughout 2017, and certainly in September of 2017, which seem to have triggered a more earnest effort on the Department of Justice's part to request the question, all go to the heart of that.

The plaintiffs are not privy to what happened in any of those things. How can they carry their burden if they don't have that?

MR. SHUMATE: They can't. Exactly right. They can't carry their burden. They decided to proceed to final judgment in the presence of a stay from the Supreme Court of Sec'y Ross's deposition, so we are where we are. The fact that we have evidence that's lacking that they want doesn't fault us. That is a failure of them to prove their own claim.

THE COURT: All right.

Since I have you up, let's turn to remedies and I'll start with you.

I don't quite understand the theory behind -- I understand national injunctions; that that's a controversial issue these days, but I don't understand the theory here if I were to grant relief under the APA or the due process clause

how the result couldn't be an injunction that prevents the secretary from adding the question to the census. It can't be that the question can be given to certain states or certain areas of the country and not to others. That would defeat the entire point of the census.

MR. SHUMATE: I think you raise a very good question, your Honor, but ultimately, I think it is a practical question, a policy question, about what Sec'y Ross would do in the presence of an injunction that would be limited to plaintiffs in the case?

THE COURT: But would it not be arbitrary and capricious for him to decide to proceed with the question for some portion of the country and not all?

MR. SHUMATE: I don't know. We're not there yet, and that would be premature to decide.

THE COURT: But by your own admissions, there wouldn't be time to litigate that question now if he reconsiders it if I were to order that.

MR. SHUMATE: He may very well decide that it would not be appropriate to have different census forms sent throughout the country, but that's not a reason why the Court should award reasons broader than necessary to remedy any injury from the particular plaintiffs in this case who have standing.

THE COURT: All right. And your argument with respect

to remand but without vacatur, can you explain how that is consistent with the language of the APA that provides that a court "shall hold lawful and set aside" agency action that violates a statute.

MR. SHUMATE: Sure. I know there's debate of the case law about whether courts "shall" set aside and vacate the decision, but there's also a lot of authority, especially from the D.C. Circuit. The *Allied-Signal* is the most prominent example, where the D.C. Circuit at least has said courts have the discretion to decide whether to vacate a decision or remand it, and courts consider two factors when making that -- I don't need to rehash it.

THE COURT: Is there any authority from the Supreme Court or Second Circuit that speaks to that?

MR. SHUMATE: I'm not aware of anything besides what we've cited in our briefs, your Honor.

THE COURT: All right. I think that covers it for your purposes.

Can I hear from the plaintiffs on the issue of remedy, and then we'll talk about whether there's a need to brief any additional issues.

MR. COLANGELO: Thank you, your Honor.

The language of the APA is clear that if the decision is arbitrary and capricious or otherwise not in the court's province, it shall be set aside.

THE COURT: How do you square that with the *Allied-Signal* line of cases?

MR. COLANGELO: *Allied-Signal* held that vacatur was not necessary where the agency could substantiate its decision on remand, and listed a range of considerations that the agency would be able to do to substantiate its decision.

The record here, we think, shows pretty clearly that there is nothing the secretary could do to substantiate his decision on remand. This is not an APA claim that is based on the failure to follow the appropriate steps in the appropriate order. It's an APA claim based on the argument that, fundamentally, and in two dozen different ways, the secretary's decision is unsupported and arbitrary. The extremely limited circumstances where remand without vacatur makes sense don't apply here.

I should say the other circumstance where it may apply is, say, you were challenging an environmental rule on the ground that it was insufficiently protective but to vacate that rule would leave no protections in place during remand. You might leave an insufficiently protective rule in place while the agency develops a better one.

THE COURT: How do you square that or the *Allied-Signal* line of cases, for that matter, with the language of the APA?

MR. COLANGELO: Your Honor, you mean the statutory

language of the APA?

I think the courts in those cases have concluded that the interests of the statute are not served in vacating illegal action bringing about the very harm that the complaint was intended to deter. Here, I think in order to avoid the harm, you would have to vacate the secretary's decision. I don't think there's any other way to get there.

THE COURT: Can you respond to the argument, with respect to an injunction, that at most it would run to any plaintiffs that have standing but not nationwide?

MR. COLANGELO: I have three responses, your Honor.

First, in the Supreme Court's case regarding statistical sampling, the Supreme Court didn't just vacate as to particular jurisdictions. They enjoined the decision nationally.

Second, as the *DACA* cases make clear, for example, on issues where there's a national policy at stake, it would be nonsensical to vacate or enjoin a decision only as to plaintiff jurisdictions.

And third, in this case, the 35 or the three dozen-some-odd state and local government jurisdictions that are plaintiffs here are present in 11 out of 12 judicial circuits, and the nonprofit plaintiffs have members in every single state in the country. Even if the Court concluded that it should only set aside the decision as to plaintiff

jurisdictions, the plaintiffs here capture the entire country.

I should say that the final factor is, as a practical matter, there is no evidence that the Census Bureau could accomplish what Mr. Shumate's suggesting, running two different censuses or multiple different censuses in multiple different parts of the country. There's no evidence in the record to support that that's a viable option.

THE COURT: Thank you.

That wraps up the questions that I wanted to ask but brings us to the final question of whether there's any additional briefing that would be helpful to me. I'd be inclined to invite briefing but not require it for fear that defendants would run to the Supreme Court and claim that that's some form of irreparable harm, but I'd like briefing on both the 141 issue -- I don't think plaintiffs have really responded to defendants' arguments based on *Guerrero*, *Hodel* and that line of cases -- and also on the question of whether the traceability argument that defendants put forth in their motion to dismiss is a purely legal question as opposed to an issue of fact that turns, in part, on evidence at trial.

I'm open to suggestions. If you think there was an argument made by the other side that you feel that you have something that might be helpful to me, I'm certainly open to hearing your suggestions. I will tell you that having received, if you were to double space defendants' brief, in

excess of 650 pages of briefing already, I think you've probably covered the waterfront, and there's not a whole lot else that I need to get to, but if you think there are any disputed issues, I'm certainly open to hearing them.

Mr. Colangelo.

MR. COLANGELO: The only other question, in addition to the two you mentioned, your Honor, is the question of ripeness, which was not raised until defendants' posttrial brief, and even then it was briefed only as a prudential ripeness, not a jurisdictional ripeness, question. To the extent the Court is concerned about subject matter jurisdiction, which we don't believe the Court should be, we would want an opportunity to brief in writing our opposition to the ripeness question.

THE COURT: Mr. Shumate, any topics that you would add?

MR. SHUMATE: No, your Honor. We don't see a need for supplemental briefing.

On the traceability issue, we're prepared to accept the Court's opinion on the motion to dismiss as law of the case on the issue of the specific argument that we made in that case, that because they're violating a legal duty, it's not traceable to third parties. To the extent you wanted additional briefing on that specific issue you've already ruled on, I don't think the Court wants to rehash what it has already

decided in the motion to dismiss opinion.

THE COURT: I certainly don't intend to rehash what's now case law of the case, I agree, but I think question is ultimately whether the traceability prong of the standing analysis is, in this case, a purely legal question or if it does turn on factual issues.

I will allow briefing on those three issues; namely, Section 141, traceability and ripeness. I'm inclined to think that this case is ripe for my decision for any number of reasons. I know that it would be gravely unjust to dismiss it on that ground, but since it's a nonwaivable, or may be a nonwaivable, issue I think it would make sense to make as comprehensible a record on it as possible.

I would say no more than 15 pages each side on those issues, and let's say by next Tuesday. Is that feasible? If you have an objection, this is your moment to tell me.

MR. COLANGELO: No objection, your Honor. I think we could do it with fewer pages and faster, if the Court preferred.

THE COURT: I would invite you to do it with fewer pages and faster. I will give you up to 15 pages and until next Tuesday, but if you choose to do it in fewer pages and give it to me sooner, all the better. I also want to be clear you don't have to submit a brief, so I'm not requiring you to, I'm not ordering you to, I'm not burdening you with the task of

doing it. In that regard, I don't imagine that either side will seek relief from me or any other tribunal in connection with this. If you want to provide additional briefing to me, you may, but you are not required to do so.

Anything else?

MR. SHUMATE: No, your Honor. Thank you very much for your time.

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

THE COURT: I want to reiterate, No. 1, I did find your briefing extremely, extremely impressive, particularly given the amount of time you were given to do it, and No. 2, I found the arguments extremely helpful and impressive. It was well argued by both sides. It was well tried by both sides, as I said at the close of trial.

I do know that there is a request or a suggestion to the Supreme Court to reconsider its denial of the stay. If they do reconsider and the matter is stayed, then you will not hear from me, but barring that, I will try to get you a decision as soon as I can, hopefully in the next few weeks. Otherwise, I will reserve decision.

Thank you very much, and have a pleasant day.

(Adjourned)