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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 STATE OF NEW YORK, et al.,

4 Plaintiffs,

5 v.

18 Civ. 2921 (JMF)

6 UNITED STATES DEPARTMENT OF
7 COMMERCE, et al.,

Conference

8 Defendants.

9
10 -----x
11 NEW YORK IMMIGRATION
12 COALITION, et al.,

13 Plaintiffs,

14 v.

18 Civ. 5025 (JMF)

15 UNITED STATES DEPARTMENT OF
16 COMMERCE, et al.,

17 Defendants.

18 -----x
19
20 New York, N.Y.
October 24, 2018
2:35 p.m.

21 Before:

22 HON. JESSE M. FURMAN,

23 District Judge

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APPEARANCES

NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL
Attorneys for Plaintiffs

BY: MATTHEW COLANGELO
ELENA S. GOLDSTEIN

- and -

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- and -

AMERICAN CIVIL LIBERTIES UNION FOUNDATION(DC)

BY: DALE E. HO

UNITED STATES DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
Attorneys for Defendants

BY: KATE BAILEY
CARLOTTA A. WELLS
ALICE LACOUR

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1 (Case called)

2 THE COURT: Good afternoon. Sorry we're getting off
3 to a couple minutes late start. Just a reminder, I think we're
4 on Call Court, so please make sure you speak into the
5 microphone to make sure everybody, including all those in the
6 courtroom, can hear us.

7 I think the first order of business is probably the
8 government's application for a stay of trial and further
9 pretrial proceedings. I had a couple of thoughts or questions
10 that I wanted to pose on that front. The government's
11 application is based primarily on the Supreme Court's order of
12 the other night, but it seems to seek the precise relief that
13 the court rejected, that is to say, a stay of discovery,
14 including the Gore deposition.

15 I'm obviously mindful of Justice Gorsuch's words and
16 take those words seriously, but my obligation is to follow the
17 majority ruling, and I can't decline to do so because of what
18 is stated in a dissent on behalf of two justices. That is to
19 say, the Court lifted its stay on extra record discovery in the
20 Gore deposition, yet the government seems to be seeking and
21 asking me to grant that precise relief that they failed to get
22 from the Supreme Court.

23 So how is your request consistent with the Supreme
24 Court's order?

25 MS. BAILEY: Thank you for the opportunity to clarify,

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1 your Honor. Our stay application reiterated our position that
2 we think extra record discovery was not warranted, but the
3 relief we sought was just a stay of the pretrial and trial
4 proceedings until the Supreme Court rules on the ultimate
5 forthcoming petition. So the deposition of John Gore is
6 scheduled for, and he will be produced on Friday, as well as
7 the other fact witnesses, so what we initially sought was the
8 pretrial and trial proceedings.

9 THE COURT: I don't understand what you mean by
10 pretrial proceedings. You mean the pretrial submissions, the
11 filings that are due on Friday?

12 MS. BAILEY: Yes, your Honor.

13 THE COURT: I understand there's a fair amount of work
14 that would go into that, but I think that 97 percent of that
15 work has been completed since they're due in two days.

16 MS. BAILEY: We have certainly been working diligently
17 on those submissions. We think those submissions could change
18 dramatically depending on what the Court actually does. The
19 government will be filing a petition for mandamus that seeks
20 further review of all three orders as invited by the Supreme
21 Court, and so if the Court upholds --

22 THE COURT: I know you keep saying the word "invited,"
23 I think it's used about seven times in your letter. I don't
24 actually think it's an invitation. They said you're not
25 precluded from making arguments with respect to those two other

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1 orders. That's very different than an invitation. I just want
2 to point that out.

3 But be that as it may, what's the harm in filing your
4 pretrial submissions -- on top of which you have never made the
5 argument or you didn't make the argument, you didn't file a
6 summary judgment motion, you elected not to do so -- to make
7 the argument that my review should be limited to the
8 administrative record? That is to say you have effectively
9 agreed to, or at least implicitly conceded that a trial is
10 necessary to resolve the plaintiffs' claims. And on top of
11 that, I don't think you have given up the argument that my
12 decision should be based solely on the administrative record.

13 In other words, why not have a trial, you can make the
14 argument that I should consider only this portion of the record
15 and should ignore the rest, preserve that argument for appeal,
16 let the Supreme Court, if it ultimately decides to review the
17 case after a final judgment, consider that on appeal, but make
18 the record and have a ruling. I don't understand the harm in
19 letting the case proceed in the normal course.

20 MS. BAILEY: Two points, your Honor. Respectfully I
21 think that we did argue strongly in our letter submission after
22 the September 17 status conference that review should be
23 resolved in summary judgment on the administrative record, and
24 it is correct --

25 THE COURT: No, you made an argument for why I should

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1 entertain a summary judgment motion, and I explicitly granted
2 you permission to make a summary judgment motion, albeit noting
3 my skepticism of it. You said at the conference last week that
4 you were not filing a summary judgment motion. I have not
5 precluded you from making that argument. You had every right
6 in the world to make a motion saying that there is no need for
7 a trial in this case and that my decision should be based
8 solely on the administrative record, and I could have
9 considered that before trial and made a decision on that basis.
10 It is extraordinary to me that you would go running to a higher
11 court to make that argument when you have literally never
12 presented it to me.

13 MS. BAILEY: Your Honor, that is correct, that you
14 granted us the opportunity to file summary judgment. However,
15 we read the signals in your Honor's order that the summary
16 judgment -- that your Honor was very skeptical of a summary
17 judgment motion being capable of resolving this case.

18 THE COURT: But you didn't make one. So you're right,
19 I was skeptical of it, but I have been persuaded of things that
20 I have been skeptical of before, and you didn't make it. So I
21 don't know, given that, why you should run to a higher court
22 and say -- I don't even take you to be arguing that trial is
23 unnecessary in this case, it's just the scope of what I can
24 consider in any trial.

25 MS. BAILEY: We do believe that trial is unnecessary

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1 in this case, but we, perhaps mistakenly, but we read your
2 Honor's order to suggest that your Honor viewed trial as
3 necessary notwithstanding a summary judgment motion filed
4 shortly before the trial was set to begin.

5 THE COURT: All right. Lastly, I have been operating
6 since the beginning of this case on two assumptions, first,
7 that time is of the essence. And indeed, I think your stay
8 application underscores and reiterates that. You state
9 explicitly that there's an urgent need for final decision in
10 order to allow the Commerce Department adequate time to prepare
11 for the census.

12 Second, I have assumed, as I said I think at the
13 initial conference, and I think it's been more or less
14 confirmed this week that I'm unlikely to have the last word
15 here, and that whatever I decide is likely to be appealed to
16 the Second Circuit if not to the Supreme Court.

17 Those two considerations, to me, mean that a trial
18 should happen sooner rather than later because whatever
19 decision I make -- and I want to stress, I haven't made any
20 decision -- there needs to be adequate time for whoever loses
21 here to appeal and ultimately potentially appeal to the Supreme
22 Court. I don't think I have ever been told a drop dead date by
23 which a final decision has to be made, but I know that the
24 acting director of the census bureau has said that a decision
25 should be made this fall, and that if it's not made by the

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1 spring it would be very difficult and very expensive to deal
2 with it.

3 I assume that you would need a decision certainly by
4 next summer. That's a tall order even if we go to trial in a
5 week and a half. I need time to make my decision, whoever
6 loses needs time to appeal to the Second Circuit, and in theory
7 whoever loses there needs time to seek cert before the Supreme
8 Court. In the normal case that doesn't happen in a matter of
9 months.

10 So I don't understand -- I mean, again, it seems to me
11 that why not go to trial and preserve all your arguments
12 concerning the scope of whatever I can consider in making a
13 decision. If I make a wrong decision on that score, you can
14 make that argument on appeal and you preserve whatever
15 arguments you want and there's a comprehensive record from
16 which everybody can make whatever arguments they want.

17 I don't get it.

18 MS. BAILEY: Your Honor, the stay that we request
19 wouldn't prejudice the ability to resolve this matter on the
20 timeline that you laid out.

21 As to your point about when --

22 THE COURT: How is that? Do you know when the Supreme
23 Court is going to make a decision? It took them 13 days to
24 make a decision on your stay application. If you file a cert
25 petition on Monday, presumably the plaintiffs will have an

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1 opportunity to respond to that. I don't know when it would be
2 conferenced. I don't know when it would be decided upon if
3 they grant. I don't know if they're going to have oral
4 argument. I don't know if they decide this case before next
5 June. I don't know how you can say that.

6 MS. BAILEY: I can represent that we intend to file
7 our mandamus petition quickly.

8 THE COURT: I assume you're filing it by Monday at
9 4:00 p.m., because if you don't then the stay is lifted and we
10 can agreed with the Ross deposition, but --

11 MS. BAILEY: Certainly by then. But the stay that
12 we're requesting would preserve judicial resource as well as
13 those of parties. On the pretrial submission, while you're
14 correct that we have been work diligently on that, it is an
15 extraordinary lift to prepare all that. And if the Supreme
16 Court were to grant relief and say that your Honor should not
17 have expanded the record beyond the administrative record and
18 should not have permitted discovery, that would dramatically
19 change what the parties are submitting.

20 So it's a very large waste of effort to brief all of
21 that when it is directly going to be pending before the Supreme
22 Court, the scope of this Court's review. It seems prudent to
23 wait and see what they determine as far as the scope of review.

24 THE COURT: And why are you not able to make that
25 argument after a final judgment, which is the normal course in

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1 litigation in federal court, that is to say, every time a party
2 makes an argument that fails to persuade a trial court that
3 would have obviated the need for a trial, if a higher court
4 agrees with that argument it means that the trial was a waste
5 of resources, judicial and otherwise. That's just inherent in
6 the final judgment rule, but there are powerful reasons for the
7 final judgment rule.

8 MS. BAILEY: Certainly, your Honor, but what is
9 unusual is having a trial in an APA case at all. In this case
10 in particular, as laid out in our stay motion, the number of
11 attorney hours, paralegal hours, and the resources of the
12 Department of Justice and Department of Commerce, there's a
13 very large expenditure here for a trial. We think if the
14 Supreme Court were to grant relief and hold that the decision
15 should be made on the administrative record without extra
16 record discovery, then that would negate the need for a trial
17 at all because the case would be properly resolved on summary
18 judgment.

19 THE COURT: All right. And once again, I think if
20 there were no press for time I might agree with you, that it
21 would make sense in what I think are slightly unusual
22 circumstances to hit the pause button and see if the Supreme
23 Court provides any guidance on that score. But I'm concerned
24 that hitting the pause button for what may be an indefinite or
25 at least lengthy period of time will then put us into jeopardy

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1 in terms of your getting a final resolution of the plaintiffs'
2 claims in this case.

3 So explain to me why that risk is not paramount here
4 and calls for erring on the side of caution, which is to go to
5 trial, create a comprehensive record that allows both sides to
6 make whatever arguments they want to me and to any higher court
7 thereafter, and we go from there.

8 Given the press for time, why is that not the way to
9 proceed?

10 MS. BAILEY: While we agree that there is a need for
11 the case to proceed somewhat expeditiously, we don't think the
12 press for time is quite so dire. I'm not aware of any need for
13 a decision to be this fall. The census bureau intends to print
14 the forms next June, and there may be some flexibility in that,
15 but to print the forms next June.

16 So we anticipate that while we don't know exactly how
17 quickly the Supreme Court would rule, we anticipate that this
18 would be briefed quickly. And we don't think that a short
19 delay of trial proceedings, given the resource expenditure
20 should trial proceed, would harm the ability to have final
21 resolution of the case in time for the census bureau to print
22 the forms next year.

23 In other words, should a stay be granted such that the
24 trial were postponed while a petition for certiorari were
25 brought to Supreme Court, we don't think that will stretch out

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1 to such a length that it would prejudice the ability to have a
2 final decision by June.

3 THE COURT: Well, except that you need to build into
4 that timeline the time it takes the Supreme Court to resolve
5 your petition, right, which may be a week, it may be six
6 months. You need to then build in time for me to render a
7 decision based on whatever I'm permitted to consider, whether
8 it's the administrative record or a record of trial. You need
9 to build in time for an appeal to the Second Circuit by
10 whichever side loses in that proceeding, and then you need to
11 build in time for whichever side loses there to petition the
12 Supreme Court for certiorari, and you're telling me that you
13 have confidence that all of that could occur before June.

14 It seems to me that the more sensible way to proceed
15 is to have a trial, let both sides make whatever arguments they
16 want to make and preserve all arguments for me, for the Second
17 Circuit, and, if necessary, for the Supreme Court, that there
18 is no harm that comes from that other than the attorney hours
19 that are spent on trial. That is inherent in any case that
20 goes to trial where the losing party preserves an argument for
21 appeal.

22 MS. BAILEY: That's correct, your Honor, but not every
23 case involves trial on an APA claim against an executive branch
24 agency. That's what is unique here. Yes, there's an
25 expenditure of attorney time in any case that proceeds to

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1 trial, but it is remarkable for a trial to proceed on an APA
2 case against --

3 THE COURT: So then the harm you're relying on is not
4 actually the attorney time, it's somehow the scrutiny that is
5 being brought to bear on an executive branch agency. Is that
6 what you're saying?

7 MS. BAILEY: The time and resources wasted by both the
8 attorneys at the Department of Justice and counsel and
9 officials at the Department of Commerce, not just the scrutiny
10 applied.

11 THE COURT: But that is true with any case that goes
12 to trial involving the Department of Justice. If you preserve
13 an argument for appeal, you lose in the trial court and you win
14 on appeal, the trial was a waste of time. Full stop. That's
15 just inherent in the final judgment rule.

16 So why is this case any different? I understand that
17 there are sensitivities involved in scrutiny of the executive
18 branch decision making, but you can preserve those arguments
19 for appeal and make them on appeal.

20 MS. BAILEY: I think because it's highly remarkable
21 and unusual to have a trial in a case brought under the
22 Administrative Procedure Act. That's what is so unusual here.
23 And the time required to hold a trial, the attorney time and
24 the time of the counsel and officials at the Department of
25 Commerce is remarkable.

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1 In fact, plaintiffs now have pending a motion seeking
2 to redepose or present live trial testimony from three very
3 high ranking Department of Commerce officials. Plaintiffs
4 continue to bring more and more discovery disputes, although we
5 have turned over well over a hundred thousand pages of
6 documents. The resource, time, and time here, between the high
7 ranking Commerce officials and individuals with the census
8 bureau, who should be focused on other non-litigation related
9 matters, really is extraordinary. And we think, were the
10 Supreme Court to agree with us that that case should be
11 resolved based on the administrative record, then thousands of
12 attorney and official hours over the next month or so would be
13 for waste.

14 THE COURT: And am I wrong there are other cases that
15 have gone to trial on review of APA claims, correct? There
16 were several of those cited in the plaintiffs' letter
17 concerning whether summary judgment should proceed or not.

18 MS. BAILEY: I believe there are some.

19 THE COURT: Did the government seek mandamus in those
20 cases when the court put those down for trial?

21 MS. BAILEY: I'm not aware of any mandamus being
22 sought in any cases brought by plaintiffs.

23 THE COURT: Thank you. You can have a seat.

24 Can I hear from anyone at the front table who wishes
25 to be heard on this?

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1 MS. GOLDSTEIN: Thank you, your Honor.

2 Plaintiffs agree that time is of the essence in this
3 case, and we are concerned, as the Court is, that a speculative
4 delay of an uncertain period of time would compromise
5 plaintiff's ability to obtain relief that could ultimately be
6 effectuated in this case, namely the removal of the citizenship
7 question from the census.

8 As the Court has noted, trial in this case is
9 necessary in any event. The parties dispute standing. The
10 parties have technical experts regarding census procedures,
11 *Carey v. Klutznick, Baldrige, the City of New York* cases. As
12 we discussed before, these are trial cases that arose in this
13 jurisdiction, APA claims involving census decision making.

14 Now with respect to defendant's arguments about
15 irreparable harm involving resources, involving staying at
16 hotels. Setting aside that those matters do not rise to the
17 level of irreparable harm, with respect to hotel stays, docket
18 227 in which the local U.S. Attorney's Office withdrew from
19 this case, local counsel who would not need to stay at hotels,
20 presumably, they represented that there would be no undue
21 disruption. Now that is not just disruption, that is
22 irreparable harm packaged in defendants' application.

23 But to the extent that defendants are concerned that
24 the ultimate presentation of trial testimony with respect to
25 extra record discovery is excessive or wasteful or will confuse

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1 the matter, plaintiffs can parse out in their post-trial
2 briefing what findings of fact and conclusions of law stem from
3 the extra record discovery and what stems simply from what we
4 understand to be the complete administrative record, so that to
5 the extent in the intervening time period a decision comes down
6 with respect to that matter, the Court can make that
7 determination based on the relevant record.

8 THE COURT: Can I interrupt? I think, assuming we
9 proceed, and obviously that is the question, I think that the
10 parties should proceed along those lines regardless. I mean
11 whether we get guidance from the Supreme Court in the next week
12 or two, I think it would make abundant sense for the parties to
13 parse their arguments and say to the extent the Court's review
14 is limited to the administrative record, here are the reasons
15 we should win, X, Y and Z, and to the extent that the Court can
16 consider the extra record discovery, here are the reasons and
17 so forth.

18 I think the preeminent concern here should be, A,
19 getting a decision sooner rather than later, and B, not having
20 to do this again. It strikes me that the worst case scenario
21 is for me make a decision based on material that a later court
22 determines I'm not allowed to consider, and a remand to figure
23 out what the outcome should be here.

24 I think having a comprehensive record, arguments made
25 comprehensively and me being able to consider all of those and

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1 make a record for whatever later court to review, is probably
2 sensible no matter what, if we proceed.

3 Go ahead.

4 MS. GOLDSTEIN: Yes, your Honor.

5 I am hard pressed to understand why defendants, in
6 their seventh application for a stay on the same grounds that
7 now 14 judges have rejected, who offer no new grounds for this
8 stay, should be permitted to disrupt our trial proceedings on
9 the eve of trial. As the Court has noted, time is of the
10 essence and we should proceed to trial.

11 THE COURT: All right. Ms. Bailey, I will give you a
12 brief last word, and then --

13 MR. HO: Your Honor, may I make one point briefly?

14 THE COURT: I will give you a brief intermediate word.

15 MR. HO: Thank you, your Honor.

16 I think, from our perspective, trial is inevitable in
17 this case, regardless of what the Supreme Court ultimately
18 rules about the appropriateness of considering extra record
19 discovery materials with respect to the merits of the claim.
20 Because one of principal issues in dispute between the parties
21 is the standing of the plaintiffs.

22 Now that requires a consideration of extra record
23 materials with respect to the effect of the citizenship
24 question on plaintiff jurisdictions and on plaintiff
25 non-governmental organizations. That's not something that can

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1 be discerned from the administrative record. The defendants
2 have never taken the position that discovery with respect to
3 standing is inappropriate in this case. There were definitely
4 factual disputes between the parties about that that could not
5 be resolved on summary judgment. In fact, the bulk of the
6 evidence that the plaintiffs seek to adduce at trial goes to
7 the effect of this question on the organizations, on their
8 resources, on their members, on the distribution of federal
9 resources and apportionment of political power. These are
10 things that are going to be disputed amongst the parties
11 regardless of how the Supreme Court rules on the propriety of
12 considering extra record discovery materials.

13 THE COURT: All right. Ms. Bailey?

14 MS. BAILEY: Your Honor, just two quick points, if I
15 may. I'm able to represent that the government would seek
16 expedition of any petition for certiorari in the Supreme Court,
17 so we would seek to have that move as quickly as possible.

18 And second, when plaintiffs talk about how many times
19 defendants have requested a stay and how many judges have
20 denied that, I think that is somewhat missing the point because
21 we're not seeking a stay of discovery, which we previously had
22 sought. We are just pointing out that if the Supreme Court
23 were to grant relief as far as the record, then that would
24 negate the need for a trial on some the issues that your Honor
25 indicated you want a trial on. So this isn't a repetition of

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1 the same stay we requested previously.

2 THE COURT: Thank you for clarifying that.

3 I'm going to reserve decision, as potentially
4 unsatisfying as that may be at the moment. I think these are
5 important issues and it's important to get them right. And for
6 that reason, while I recognize that there is some urgency to
7 decide the stay application, particularly with respect to the
8 pretrial submissions, which are obviously due imminently, I'm
9 going to reserve judgment and rule on the matter by way of
10 written order.

11 I will do that as quickly as I can, but in the
12 meantime, of course, there is no stay, except the Supreme
13 Court's potentially temporary but potentially permanent stay of
14 the Ross deposition. So everything will continue as previously
15 ordered. So that is to say, unless and until I say otherwise,
16 or if some other court says otherwise, your pretrial
17 submissions will remain due on Friday.

18 Per my order of October 18, fact discovery is
19 currently set to close tomorrow. I'm going to keep that
20 deadline in place but will grant a limited extension until
21 Sunday to permit the depositions of Mr. Gore, Mr. Langdon and
22 Mr. Neuman to proceed, as I understand they have been scheduled
23 by your status letters of this morning.

24 I think there are a couple of pending disputes or
25 motions, one of when which is fully submitted, namely the

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1 plaintiff's motion to call as live witnesses or present live
2 direct testimony of several witnesses. That's docket number
3 386. Recognizing that if I grant the stay of trial there's no
4 need to resolve this right now, I will nonetheless do so just
5 to keep things moving in the meantime. Both sides effectively
6 concede, I think, that the matter is entirely within my
7 discretion. In that regard, I think that my decision on this
8 front should be driven by what would be most helpful to me in
9 making a decision and understanding the issues in this case.

10 Applying that standard, I'm going to and do deny the
11 plaintiffs' application with respect to the two pure fact
12 witnesses, as I understand it, I think the organizational
13 witnesses. I don't see any reason to think that hearing their
14 direct testimony live would be particularly helpful, given the
15 nature of their testimony, given that they will be presumably
16 cross-examined live and subject to redirect examination live as
17 well.

18 I will, however, grant the application with respect to
19 plaintiffs' expert witnesses and defendants' corresponding
20 request to allow Dr. Abowd to testify as a live witness on
21 direct examination, too. I think, given the technical nature
22 of the subject matter, I think it might be potentially helpful
23 for me to hear their direct testimony live. So there's no need
24 to submit written affidavits with respect to those witnesses'
25 direct testimonies, but there is with respect to the others, as

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1 previously ordered. So that motion is granted in part and
2 denied in part.

3 Plaintiffs have filed a motion to take the de bene
4 esse depositions of several witnesses. That motion will be
5 fully submitted tomorrow, and I will try to decide it promptly
6 thereafter unless it's mooted by my ruling on the stay
7 application.

8 And then there's the motion to limit the testimony of
9 Dr. Abowd, docket number 387. Per my order of October 22nd,
10 defendants have until Friday to file any opposition to that
11 motion, and plaintiffs have until Monday at 5:00 p.m. to file
12 any reply, again barring any stay being granted.

13 From your status letters I have identified I think
14 four potentially open issues or disputes. Let me go through
15 those and then we can talk about whether they are in fact
16 issues and disputes, and if so, how to proceed.

17 First I think is a remaining dispute with respect to
18 defendants' response to interrogatory number one, namely those
19 with whom Secretary Ross I think consulted or spoke with after
20 taking office about the issues in this case. Second is whether
21 the October 16 production should be deemed part of the
22 administrative record. That certainly seems like an important
23 thing to resolve given the issues that we have been discussing.
24 Third is the apparent dispute regarding two documents on the
25 government's privilege log with respect to the October 3rd

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1 production. And fourth is the issue pertaining to the
2 transcripts of the focus groups that were convened as part of
3 the Census Barriers, Attitudes and Motivators study.

4 Let me say a word on that particular issue since it
5 may have some bearing on how we proceed. Plaintiffs I think
6 suggest that I previously ruled that those transcripts had to
7 be produced, and that's true to a point, but I think somewhat
8 misleading. At the September 14 conference I overruled the
9 defendants' responsiveness objections but I specifically said
10 that defendants couldn't assert more specific objections, which
11 would presumably include privilege or privacy-type claims and
12 claims of redactions of the sort that they're I think now
13 making.

14 My understanding is that in the wake of that ruling on
15 September 20, defendants notified plaintiffs that they would be
16 producing summaries only, given the privacy interest of the
17 focus group participants. And I don't think plaintiffs have
18 disputed that, but for reasons that I don't quite understand,
19 plaintiffs didn't raise it with defendants until October 12,
20 and didn't raise it with me until this morning. The delay
21 obviously between the 12th and now could conceivably be related
22 to Justice Ginsberg's stay order, but I don't recall the
23 plaintiffs even flagged this issue at our last conference, and
24 regardless, it doesn't explain their delay between September 20
25 and the date of Justice Ginsberg's order.

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1 So given the delay, given what I think is the marginal
2 value of the transcripts relative to the summaries that
3 plaintiffs do have, and given the focus group participants'
4 privacy interests and confidentiality interests that may or may
5 not be protected by law, but in either cases I think would
6 require consideration, to put it mildly, I am quite skeptical
7 the plaintiffs' requests for the unredacted transcripts. In
8 light of that, it's not clear to me that it is worth briefing
9 the transcript issue, although, as I said to Ms. Bailey a few
10 minutes ago, sometimes people can overcome my skepticism. But
11 I think unless the plaintiffs think that they have compelling
12 arguments that I haven't considered that could overcome my
13 skepticism, I suspect that their resources may be better spent
14 elsewhere. So that's number one.

15 Number two, it's not clear to me that it's necessary
16 to brief the second and third issues that I mentioned, the
17 administrative record and log issues. I would like to think
18 that the parties could resolve their disagreements on that, and
19 maybe they already have, so I would like to hear from you on
20 that. And if there is a need to brief it, I would think that
21 we should, again barring stay, set a relatively quick briefing
22 schedule so that we have those issues resolved along with the
23 open issues remaining with respect to interrogatory number one.

24 So folks at the front table, do you want to take those
25 on?

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1 MR. HO: Sure, your Honor. It's still not clear to us
2 why the documents that were produced were not produced as part
3 of the administrative record when they were part --

4 THE COURT: Which documents are we talking about?

5 MR. HO: Sorry, the pre-December 2017 documents which
6 your Honor referenced as point two of the four issues to
7 discuss.

8 THE COURT: This is the October 16 production?

9 MR. HO: Yes, your Honor. Sorry.

10 So it's still not clear to us why those documents were
11 not produced as part of the supplement to the administrative
12 record but were instead produced as extra record materials.
13 They are within the possession of the Commerce Department, they
14 relate to the consideration of the -- or the decision to add
15 the citizenship question to the census. We tried to meet and
16 confer with the defendants on this. We're happy to continue to
17 talk with them about this, but from our perspective we're not
18 clear as for the basis why they were not designated as part of
19 the AR.

20 THE COURT: Let's take the issues one at a time,
21 Ms. Bailey, on that one.

22 MS. BAILEY: Your Honor, I think that the assertion
23 that it's unclear why these materials weren't part of the
24 original record supplementation in response to Court's orders
25 is disingenuous.

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1 THE COURT: Slow down, please.

2 MS. BAILEY: We think that's disingenuous. The search
3 terms that we negotiated and agreed upon with plaintiffs in
4 order to resolve their fifth motion to compel included terms
5 that would never have been within any agency's construction of
6 an administrative record. For instance, we negotiated with
7 plaintiffs and we included as search terms terms that
8 plaintiffs thought might produce evidence of discriminatory
9 animus.

10 I don't believe they did, but we ended up using search
11 terms such as "illegals" and "immigrants" that would never have
12 been in an administrative record. We also included as search
13 terms individuals who had come up in our previous productions.
14 So we included searches for terms such as "Steve Bannon," for
15 several DOJ officials, for a Department of Homeland Security
16 official. There's no way that the Department of Commerce would
17 have included those individuals' names as a search terms in
18 compiling an administrative record. That would not have been a
19 part of the original record or the record supplementation
20 ordered by your Honor. We went back and included search terms
21 that plaintiffs came up with after they had seen the materials
22 that we produced in response to your July 3rd order.

23 THE COURT: That seems a little bit non-responsive to
24 me. And I hear your point, and it may be that if something
25 was -- if there's a hit with respect to a search term that

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1 would not normally be within the scope of the administrative
2 record -- Steve Bannon, let's say -- fine, but presumably -- I
3 mean the mere fact that you found documents by running certain
4 searches doesn't necessarily mean that the documents that you
5 then produced should not have been part of the administrative
6 record in the first instance. I think that's a separate
7 determination from how you found them.

8 In other words, conducting searches using search terms
9 is just a shorthand convenient way of trying to identify
10 documents that are responsive and should have been perhaps part
11 of the record in the first place. I would think that whether
12 they are or aren't is not a function of how they're found.

13 Am I missing something?

14 MS. BAILEY: So the documents that were produced on
15 October 16 were -- not all, but a lot of it was cumulative
16 material that had already been collected. So a lot of the
17 particular documents had been produced from multiple
18 custodians. So it's not clear to me exactly how much of that
19 was genuinely new material, but the way we went about producing
20 the material on October 16 was from negotiating with plaintiffs
21 on particular search terms. So we treated that like a
22 discovery endeavor. That's why I'm referencing search terms.
23 We negotiated with them on what we would search and from whom.

24 So we added to the universe of terms. And so there
25 were documents that came up that had already been produced,

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1 documents that had not been produced. But it's not clear to me
2 why those materials would be part of the record. So I can't
3 represent that there might not be individual documents that
4 perhaps -- in other words, that our record supplementation was
5 completely flawless, but we think it was diligent. And we
6 think that the October 16 material, a lot of what was there
7 came up under search terms that never would have been part of
8 record and wouldn't have been included as part of the record.

9 THE COURT: All right. So back to you, Mr. Ho, and
10 let me ask you this: Is this something that we need to resolve
11 before a trial if we are proceeding to a trial?

12 Obviously if either I or the Supreme Court were to
13 decide that I could only consider administrative review
14 records, we need to nail this down. But assuming that we
15 proceed to trial -- and along the lines of what I said,
16 everybody preserves every argument that they could possibly
17 want to make under the sun -- doesn't it make sense to
18 basically -- number one, you can confer and hopefully reach
19 agreement perhaps with respect to specific documents, if you
20 think that some should have been included in the record and are
21 important, given the potential importance of that distinction;
22 and number two, if you can't agree in the course of your
23 briefing in connection with my decision, you can make arguments
24 as to why certain documents should be deemed part of the
25 administrative record.

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1 Does that not make more sense?

2 MR. HO: I think you're right, your Honor, that this
3 isn't something that needs to be decided en masse before trial.
4 Provisionally I think we can agreed agree that the best way to
5 handle this is on a document-by-document basis. If there's a
6 dispute over something that the defendants believe was not the
7 record but was produced in discovery, we could argue that it
8 should have been made part of the administrative record. If
9 that proves to be a voluminous number of documents, perhaps it
10 makes sense at some point to brief that issue, but it doesn't
11 seem to be something that necessarily needs to be resolved in
12 the next few days.

13 THE COURT: Great. Let's not resolve it in the next
14 few days. Barring a stay, you have plenty of other work to be
15 doing, and so do I.

16 Ms. Bailey?

17 MS. BAILEY: May I seek clarification on that? I
18 think as far as plaintiffs were to identify any documents from
19 the October 16 production that they think should have been
20 excluded in the AR and they would like to rely on them, I think
21 we should meet and confer on those documents. But what I don't
22 think should happen is for plaintiffs go back to all the
23 materials produced in discovery and try to pick and choose
24 documents that they think should have been part of the record
25 and try to classify them differently at this stage. So I think

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1 the conferring process on materials that they think should be
2 included in the record should be limited to the October 16
3 production.

4 THE COURT: I thought that's what we were talking
5 about.

6 MS. BAILEY: I just wanted to be clear because Mr. Ho
7 said if there are documents in discovery that defendants
8 thought should be discovery, not record, I just want to be
9 clear that we're talking only about the October 16 and not
10 discovery generally.

11 THE COURT: Well, listen, I mean if the plaintiffs
12 identify a document that they got on some other date other than
13 October 16 that they think legitimately should have been part
14 of the administrative record and was unjustifiably excluded
15 from the record, I don't think see why they shouldn't have an
16 opportunity to raise that with you, and barring agreement,
17 bring it to my attention. I certainly hope there wouldn't be
18 anything if only because you conducted a diligent if not
19 flawless search, but I don't see why I should bar them from
20 making that argument if they come across something that they
21 think was improperly excluded.

22 Am I missing something?

23 MS. BAILEY: I take your point, your Honor.

24 THE COURT: Very good. So why don't you all keep this
25 in mind as you proceed, and that is to say I think the burden

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1 should be on plaintiffs if you come across a document that is
2 not currently part of the administrative record that you have
3 reason to believe should be part of the administrative record,
4 I think in the first instance you should confer with
5 defendants. And barring agreement, if you think it's
6 important, recognizing, again, that this may ultimately be a
7 critical distinction, then you should raise it with me and we
8 can discuss at that point when and how the best way to do that
9 is; if that should be done as part of any post-trial briefing,
10 that we proceed, or if should be done separately.

11 MR. HO: Thank you, your Honor.

12 THE COURT: So I will assume there's no issues on that
13 front unless you tell me otherwise.

14 Next let's talk about the October 3rd privilege log
15 disputes. I understand there are only two documents at issue
16 there. Is that a remaining dispute?

17 MR. HO: That's right, your Honor. There are two
18 documents on the October 3rd privilege log from the Department
19 of Justice's production. These are documents that which were
20 shared with Mr. Gore. They are being withheld on the basis of,
21 among other things, attorney-client privilege.

22 And that I think is confusing to us, your Honor, given
23 that Mr. Gore is not a party in the lawsuit, he's not counsel
24 in the lawsuit, he's being treated like a third party. All the
25 discovery related to Mr. Gor has been conducted under Rule 45.

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1 This is not a document that appears to have been either created
2 or shared with Mr. Gore after litigation commenced, it seems
3 like it was a document that was shared with him earlier. And
4 there doesn't seem to be a basis for withholding it on the
5 basis of attorney-client privilege. And this is obviously an
6 important matter given Mr. Gore's deposition on Friday.

7 THE COURT: All right. Ms. Bailey.

8 MS. BAILEY: Your Honor, the document to which Mr. Ho
9 refers is that Uthmeier memo, it's a legal memo that your Honor
10 already upheld our claim of privilege on. It's a legal memo
11 written within the Department of Commerce, it was shared with
12 Mr. Gore, and we don't think it's unusual or remarkable that
13 legal analysis was shared between agencies. We view this as
14 working on a joint defense agreement and regard it as
15 attorney-client. It's a document you have already seen and
16 ruled on, and a note attached to it, which I believe was
17 handwritten, but I'm not a hundred percent sure on that.

18 THE COURT: All right.

19 MS. BAILEY: I think it was a Post-it note attached to
20 it as the second document.

21 THE COURT: I certainly did review the memo. I recall
22 that. I don't recall the precise issue of it being shared with
23 Mr. Gore being raised in connection with that. So I guess it
24 seems like that's the critical issue here and whether that
25 makes any difference in the analysis.

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1 Yes, Ms. Bailey.

2 MS. BAILEY: That wasn't part of the previous
3 briefing. It turned up in the search of DOJ documents and was
4 logged appropriately as a document that was provided to
5 Mr. Gore. So that wasn't part of the previous briefing, but we
6 think that the analysis and the privilege claim still applies
7 the same.

8 THE COURT: All right. So that seems to be the heart
9 of the matter.

10 Mr. Ho, do you have any authority for the proposition
11 that sharing it with a lawyer at a different agency would waive
12 the privilege?

13 MR. HO: Well, we didn't have an opportunity to brief
14 this yet, your Honor, but it seems like the defendants want to
15 have it both ways here by treating Mr. Gore as a non-party, as
16 someone who is obviously not a defendant in this lawsuit, he's
17 not counsel. He's never been represented or held out as
18 counsel or consultant for counsel. He's not a DOJ lawyer in
19 the way that Ms. Bailey is who is representing the Department
20 of Commerce and Secretary Ross, he's just another person in the
21 Department of Justice. And it doesn't seem like sharing that
22 document with him would be within the umbrella of
23 attorney-client privilege, but we would be happy to brief that,
24 your Honor.

25 THE COURT: All right. Well, let's give you an

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1 opportunity to do that, but mindful that you don't have a lot
2 of time, since my understanding is that the deposition is
3 proceeding on Friday.

4 MR. HO: That's right, your Honor.

5 MS. BAILEY: Your Honor, I emphasize that we asserted
6 not only attorney-client but also deliberate process privilege
7 over that memo, and that would certainly qualify as well, and
8 there is no issue of waiver between the two departments.

9 THE COURT: All right. Mr. Ho, your response to that?

10 MR. HO: My understanding is that Mr. Gore was not a
11 decision within the Department of Commerce who is involved in
12 the decision to add a citizenship question to the census, and
13 doesn't seem like the deliberate process privilege would apply
14 to him.

15 Your Honor has granted our motion to compel his
16 testimony on the grounds that his participation in drafting the
17 Gary letter to request the citizenship question be added to the
18 census was a proper topic for discovery. So to the extent that
19 Mr. Gore has any information about the process that led to the
20 decision to request a citizenship question from -- or be
21 included in the census to the census bureau, I think that's
22 implicit in your Honor's order granting the motion to compel
23 that Mr. Gore's knowledge of that is a proper subject of
24 discovery.

25 THE COURT: Well, I think the issue isn't -- I don't

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1 think the memo here was written by him, and I don't know
2 whether the handwritten note was or not, but I think the issue
3 is whether sharing it with him somehow vitiates the
4 deliberative process privilege that I do think at least applies
5 in the first instance to the document. Again, I think that's
6 the critical question for both privileges. So the fact that
7 he's not a decision maker within the Commerce Department is
8 neither here nor there in that regard, it's just a question of
9 what the consequence of sharing it with him, if any, is.

10 So how do you guys propose we proceed? I recognize
11 you need a swift ruling here. I mean you could submit
12 simultaneous letters, plaintiffs could submit a letter and if I
13 think a response is necessary, because I'm skeptical the
14 plaintiff's argument here -- again, skepticism doesn't mean a
15 ruling -- you could submit a letter tomorrow with the
16 understanding that if I did direct a response it would be
17 within a couple of hours.

18 How would you propose to proceed?

19 MR. HO: Why don't I confer with my co-counsel on
20 that, your Honor, but tentatively perhaps we could submit -- if
21 we decide to move forward on this issue, noting your Honor's
22 skepticism about it, we could tentatively commit to submitting
23 something at noon tomorrow.

24 THE COURT: Why don't you tentatively commit to
25 submitting something by 10:00 a.m. tomorrow. And assuming that

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1 a reply is necessary, I will have it filed by 4:00 p.m.
2 tomorrow, and then I will decide it at some point later
3 tomorrow.

4 MR. HO: Thank you, your Honor.

5 MS. BAILEY: Thank you.

6 THE COURT: Interrogatory number one.

7 MR. GERSCH: Yes, your Honor. So interrogatory number
8 one is a matter we raised in our October 15 status report to
9 the Court. We were unable to move with respect to that because
10 of the stay that had been issued. But just to review, this was
11 an interrogatory we served trying to understand who the various
12 federal officials were who were identified in the supplemental
13 memorandum.

14 THE COURT: I recall it well. What has changed at the
15 September conference, if I recall, defendants made a
16 representation that they had exhausted their efforts to
17 determine the identities of those people. I commented
18 something along the lines of you can't draw blood from a stone,
19 and I recognized that thereafter defendants did disclose some
20 additional information that someone happened to remember, but
21 what remains to be done? I would think that we're still in the
22 same stone not drawing blood territory.

23 MR. GERSCH: Yes, your Honor. I think the fact that
24 the secretary was able to remember that had in fact spoken to
25 Mr. Bannon after the lawyers represented that there was nothing

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1 more available suggests that there is more available.

2 And by way of background, we learned in discovery that
3 the supplemental memorandum was in fact drafted by the
4 Department of Justice. It drafted by the Department of
5 Justice, they sent it to the Department of Commerce and they
6 advised the secretary to sign it. That was the testimony.
7 Earl Comstock. He said he edited the memo, that Mr. Rothmayer
8 edited the memo, but it came from the Department of Justice.

9 When we were last in court, in going over the
10 transcript I note Ms. Bailey said very clearly we looked
11 throughout Commerce. What we would like to have happen now,
12 and we think they should look at Commerce again to see if
13 there's more information, but we think they should identify who
14 in the Department of Justice actually drafted this, who is
15 responsible for the reference to the senior administration
16 officials who had raised this matter previous to the secretary
17 considering it, and find out what the basis was for them
18 putting that in the memo. And I think all those facts should
19 be disclosed.

20 And your Honor, given the timing of this, we don't
21 think it would be too much to ask that the person who drafted
22 that language appear in court and be able to answer questions
23 about it rather than us continuing to go back and forth trying
24 to draw blood from a stone.

25 THE COURT: All right. Well, this is part of why I

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1 think the deposition of Secretary Ross would have been nice,
2 but it remains to be seen whether that will happen.

3 Ms. Bailey.

4 MS. BAILEY: Your Honor, first of all, this is the
5 first time we have ever heard that plaintiffs would like
6 defendants to disclose who among individuals in the Department
7 of Justice participated in drafting a supplemental memo. That
8 is core attorney-client material, and we have had no warning
9 that they were seeking the names of individuals within the
10 Department of Justice who participated in that, and we don't
11 think there would be any basis to disclose that.

12 However, the fact that we supplemented our response to
13 interrogatory one shows that we have been diligent in providing
14 all information that we reasonably can obtain from the
15 Department of Commerce. So when we filed -- when we
16 supplemented the response to interrogatory number one the first
17 time we provided all information that we were able to obtain
18 after a reasonable search. And when additional information
19 came to light through this process, we provided that very
20 promptly to plaintiffs. We have simply have done all that we
21 can do. There's no additional information that we can obtain
22 within the Department of Commerce, and there's no ground to
23 inquire as to who among the Department of Justice participated
24 in drafting that memo.

25 THE COURT: Mr. Gersch?

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1 MR. GERSCH: Yes, your Honor. I don't believe the
2 identity of the lawyers is attorney-client privilege, and I
3 don't believe that you can make facts disappear under the
4 attorney-client privilege by telling them to a lawyer. I think
5 it's fairly evident someone drafted this. The idea that senior
6 administration officials raised this before the secretary
7 considered it is not some trivial detail. The notion that that
8 might have been accidentally dropped into the memorandum -- which
9 no one claims, by the way -- I think would not be credible at
10 all.

11 Someone drafted this, they drafted it because they
12 were told by someone that senior administration officials
13 raised this, and all we want, your Honor, since there's no
14 other way to find out, is to have the persons who are
15 responsible for that language identified and to have them
16 identify or disclose the basis for saying that. It's clear
17 they were told that by someone.

18 MS. BAILEY: Your Honor, it is correct that you can't
19 obscure facts by telling them to an attorney, but that's not
20 what we are seeking to do. We have provided all facts known at
21 the Department of Justice on this matter, period.

22 THE COURT: I think on the basis of those
23 representations, I don't think there's anything further that I
24 can or should order. I agree that the identity of the person
25 who drafted it is not necessarily privileged information, but

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1 nor do I think it's relevant information. What is relevant is
2 the substance. The government has supplemented its disclosures
3 when it has come across additional information, for which I
4 credit them. I have no basis to doubt the government's
5 representation that it has exhausted its efforts on that front,
6 it is, to repeat, another reason that I think a deposition of
7 the secretary would be appropriate here, but that is not for me
8 to decide at this point.

9 All right. And then the last item that I identified
10 is the transcript issue. In light of my comments, I don't know
11 if plaintiffs want to proceed with that or give that issue up,
12 but what's your pleasure?

13 MR. HO: In light of your comments, your Honor, I
14 think we'll confer internally and notify the Court very quickly
15 if we decide that we think that some sort of motion on that is
16 appropriate before trial.

17 THE COURT: All right. Fine. So unless I hear from
18 you, I will assume that that issue is resolved.

19 MR. HO: I think that's fair, your Honor.

20 THE COURT: All right. Are there other issues that I
21 overlooked in the letters? I know that plaintiffs noted that
22 they may seek leave to supplement -- again, assuming that I
23 deny the motion for a stay or don't rule on it before Friday,
24 that they may seek leave to supplement the exhibit list. In
25 light of the production of 92,000 new documents yesterday, I

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1 would say in principal that sounds reasonable to me. I don't
2 entirely understand why that many documents were produced only
3 yesterday, but that's neither here nor there.

4 Plaintiff should do their best to present a
5 comprehensive exhibit list, but if there's good cause to
6 supplement it, and the need to review 92,000 documents may well
7 provide it, then you should seek appropriate relief. I think
8 the first step will be conferring with defense counsel, and
9 perhaps they would agree, and I assume they would be reasonable
10 on this front, but if they don't, then you could seek relief
11 from me.

12 Anything else that was raised or not raised, as the
13 case may be?

14 MS. GOLDSTEIN: Yes, your Honor. With respect to
15 plaintiffs' motion for live testimony, one of the expert
16 witnesses identified by plaintiffs is Dr. Joseph Salvo.
17 Dr. Salvo is prepared to offer both expert testimony as well as
18 fact testimony. Would the Court prefer unified live testimony
19 or should we prepare one fact declaration or affidavit and then
20 have him testify solely as to matters within his expert
21 purview?

22 THE COURT: Can you estimate what percentage of his
23 testimony would be fact based and what percent would be expert
24 based? My instinct was to include him among the live witnesses
25 on the theory that it would be sort of artificial and silly to

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1 sort of bifurcate it, have part written, part oral, but maybe
2 I --

3 MS. GOLDSTEIN: Plaintiffs agree, your Honor. We
4 estimate his fact testimony would be ten percent of his
5 testimony, at most.

6 THE COURT: So you can proceed live.

7 MS. GOLDSTEIN: Thank you, your Honor.

8 THE COURT: Ms. Bailey?

9 MS. BAILEY: Two quick matters, your Honor. As far as
10 the production yesterday, I wanted to make clear that of the
11 92,000 that were served, the very vast majority of that were
12 materials from within the Department of Justice that aren't
13 directly relevant to this case. It was a very broad subpoena.
14 So it's very little remaining material from the Department of
15 Commerce, although there were some.

16 But more importantly, yesterday, last evening, the
17 parties exchanged their preliminary exhibit lists, so we thank
18 plaintiffs for providing that, but they provided us the draft
19 exhibit list of 523 proposed exhibits, and it would be very
20 difficult for us to prepare our objections to those in just a
21 few days' time. So we have not yet had an opportunity to raise
22 this with plaintiffs since we got it about 7:00 p.m. last
23 night, but we would like some additional time to launch
24 objections or prepare an objection list for the 523 proposed
25 exhibits.

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1 THE COURT: Do you want to submit them by noon on
2 Monday?

3 MS. BAILEY: Yes, your Honor, thank you.

4 THE COURT: Both sides could submit objections to
5 exhibits by noon on Monday.

6 Anything else?

7 MR. HO: Yes, your Honor. If I could follow up on the
8 issue of live testimony. One of the witnesses that you
9 identified as that you would be granting a motion to present
10 live testimony from was Dr. Abowd, the defense witness. We
11 haven't obviously produced our witness lists yet, but Dr. Abowd
12 was also a witness we had intended on calling. And with the
13 Court's permission, given that Dr. Abowd will be appearing
14 live, we would seek to adduce our testimony from him live as
15 well.

16 THE COURT: I think that would make abundant sense.
17 He's a representative of one of the defendants, so I think that
18 probably would have been appropriate regardless, but sounds
19 good to me.

20 MR. HO: Okay, thank you, your Honor.

21 Your Honor, there are a few questions that we have
22 seeking clarification as to the pretrial filings due on Friday.
23 Very briefly, and I apologize if I was dense in reading your
24 Honor's pretrial order, but some questions with respect to the
25 deposition designation. We know those are due on Friday, but

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1 it was, to our eyes anyway, unclear whether or not objections
2 and counter designations were also due on Friday, whether the
3 transcripts of those depositions were also due to the Court on
4 Friday, or simply the pages and line numbers, and whether or
5 not if the transcripts are in fact due to the Court -- or
6 whenever they're due, if the Court prefers to get full copies
7 of those transcripts with the designated portions highlighted
8 or simply excerpts.

9 THE COURT: So in the normal course the pretrial order
10 would contain the designations and any relevant objections and
11 any relevant counter designations. I don't know if you are all
12 prepared to do that on Friday. I'm seeing Ms. Bailey shaking
13 her head no, and I infer from what you just said you might not
14 be. So perhaps we can modify that schedule.

15 In answer to your last question, it certainly I think
16 would be most helpful to me if you submitted full transcripts
17 with highlighted portions indicating designations, counter
18 designations and objections, and differentiating which side was
19 objecting to what, and ideally even annotating in the margins
20 of those what the basis for the objection is, even if that is
21 contained in some corresponding chart of some sort as well.

22 But let's go back to the first point, which is sounds
23 like you're all not prepared to designate and have objections
24 in the pretrial order on Friday.

25 MR. HO: Well, it's not clear to us if the defendants

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1 are actually designating any depositions. We had set an
2 informal deadline yesterday of exchanging pretrial material.
3 We sent our designations over to them but we haven't received
4 any from them, so we may not have anything to counter designate
5 or object to. But I will let Ms. Bailey speak for the
6 department on that and whether will they will be ready on
7 Friday to object and counter designate.

8 THE COURT: All right.

9 MS. BAILEY: We intend to file counter objections, but
10 we aren't designating from the deposition for our case in
11 chief, so we didn't provide any to plaintiffs yesterday, but we
12 intend to counter designate from what they shared with us.

13 THE COURT: When do you plan to do that?

14 MS. BAILEY: We could do that by Friday, but it would
15 be quite a big lift and we would prefer additional time.

16 THE COURT: Why don't you guys talk amongst yourselves
17 about this, and I'm okay -- this is not a jury trial, assuming
18 that there is any trial. And in that regard, I don't think
19 there's as much urgency in including this in a pretrial order
20 as there might be, that is to say I don't need to resolve most
21 of these issues before trial, I could take them under
22 advisement.

23 On that score, I note, both with respect to exhibits
24 and with respect to designations, and frankly with respect to
25 testimony in court, I would keep your relevance-type objections

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1 to a minimum, because if evidence is relevant I will consider
2 it, if it's not relevant I won't consider it. In that score,
3 you're better off finding about other things.

4 But why don't you talk and figure out if there's a
5 sensible timeline and procedure with respect to these
6 designations and counter designations. I frankly don't
7 anticipate looking at them until close to the end of next week
8 at the earliest, so in that regard it's fine with me if you
9 want to take another few days, again assuming that this is not
10 all mooted by my ruling on the stay application.

11 MR. HO: Thank you, your Honor. If I may, one other
12 question about depositions and then one other question about
13 witnesses.

14 Obviously there's some depositions that are still
15 ongoing, and we will not be able to designate, if we choose to
16 designate from those depositions, by Friday. Is there a date
17 by which the depositions that will be happening this week and
18 this weekend your Honor would like us to have our designations
19 in for?

20 THE COURT: Why don't you include that in the same
21 conversation, and I think as long as you come up with something
22 reasonable and present it to me I probably will bless it, but
23 see if you can agree first.

24 MR. HO: Thank you, your Honor. One final question
25 with respect to witness declarations. The pretrial order says

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1 we are to serve those on Friday. Our interpretation of that
2 was that we had to share those with the opposing party by
3 Friday, but we were unclear as to when affirmative witness
4 declarations should be submitted to the Court and in what
5 format.

6 THE COURT: I think my rules say they are to be
7 submitted but not filed on Friday, meaning you should email to
8 the chamber's email address and serve them on defense counsel.
9 If it's not clear, I will revisit that, but that is what you
10 should to.

11 MR. HO: Thank you, your Honor, I appreciate your
12 guidance.

13 THE COURT: Any other questions, issues? Anything?

14 MS. BAILEY: Not for defendants, your Honor.

15 MS. GOLDSTEIN: Not for the governmental plaintiffs,
16 your Honor.

17 MR. HO: Not from us, your Honor.

18 THE COURT: I did have one housekeeping note in case
19 anybody needs to plan accordingly. I think I noted in my order
20 of some recent date that assuming trial proceeds that it will
21 be held in Courtroom 110. My inclination is to think, given
22 that's a sizable courtroom, there's no need for an overflow
23 courtroom. But if you guys have any reason to think otherwise,
24 you have a better sense than I whether there are going to be a
25 lot of people coming for any portion of the proceedings, you

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1 should let me know. The sooner you can let me know, the
2 better; certainly no later than the final pretrial conference,
3 if we proceed with that, on November 1st.

4 And the answer doesn't have to be yes as to the whole
5 trial. If you think there is some portions of it that for some
6 reason that you know that I don't that are likely to be of
7 greater public interest and an overflow would be appropriate,
8 you can let me know. I can't promise that I can find one.
9 Because of renovations going on in the courthouse, space is a
10 little bit at a premium, but the bottom line is we can't do
11 anything unless we have the relevant information. So right now
12 I'm not going arrange for an overflow courtroom. I have the
13 oversized courtroom instead, but if you think I should do
14 otherwise, please let me know as soon as possible.

15 Second and relatedly, so folks can plan accordingly if
16 they want to, I do not use Court Call for trials. I am
17 prepared to use it for the final pretrial conference if we
18 proceed with that on November 1st, but assuming that the case
19 does go to trial, it will not be carried live on Court Call.
20 So anyone who wishes to listen to it will have to be present in
21 the courtroom, or if there's an overflow, in the overflow, but
22 I wanted to make sure everybody was aware of that.

23 That's it. All right. Thank you very much. I will
24 reserve decision on the stay application. In the meantime,
25 everything will proceed, and we are adjourned. Thank you.