IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF COMMERCE, *et al.*, Defendants.	No. 1:18-cv-2921 (JMF)

DEFENDANTS' OPPOSITION TO NYIC PLAINTIFFS' MOTION FOR SANCTIONS

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INTRODUCTION

As the Court well knows, the parties litigated this case extensively and Plaintiffs ultimately prevailed in a 5-4 decision by the Supreme Court of the United States. Not satisfied with that victory, some of the Plaintiffs now seek sanctions against the Government based on a web of speculation that is no more plausible, credible, or grounded in actual evidence than the theories they offered in their original sanctions motion several months ago. Far from advancing a clear case of Government misconduct, Plaintiffs' motion traffics in speculation and innuendo, accompanied by a series of mischaracterizations of what the record actually shows. The evidence before the Court at the time of Plaintiffs' filing made clear its lack of merit, while new testimony and evidence presented in this filing dispel any doubt. Plaintiffs' assertion of a broad inter-agency conspiracy—involving countless public officials in multiple components of different federal agencies—to withhold evidence, frustrate discovery, and mislead the Court in these proceedings, is baseless. Defendants vigorously contested Plaintiffs' claims during the course of the litigation, but they did so ethically and appropriately. Plaintiffs are wrong to suggest otherwise and their motion should be denied.

This Court should likewise deny Plaintiffs' request for discovery. Particularly given the new evidence filed today, the record gives no reason to expect that discovery would reveal any more genuine proof of misconduct than what Plaintiffs have sought to muster thus far. And examination of the particular subjects and methods of inquiry that Plaintiffs wish to pursue reveals less interest in ascertaining the scope of any supposed misconduct than in continuing to pursue evidence to support the theory of discriminatory motive that underlies Plaintiffs' Equal Protection claim. But Plaintiffs already have prevailed on their separate pretext claim, and obtained all the relief they sought when they brought this case—a permanent injunction barring addition of a citizenship question to the 2020 census questionnaire. There is no reason to continue litigating their other, moot claims.

LEGAL STANDARDS

Plaintiffs base their motion for sanctions on three sources of authority: (1) a court's "inherent power" to impose "appropriate sanction[s] for conduct which abuses the judicial process," *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991); (2) Federal Rule of Civil Procedure 26(g)(3)'s authorization to "impose an appropriate sanction" for improper certification of a discovery response; and (3) Rule 37(b)(2)'s authorization to "issue further just orders" when a party "fails to comply with a discovery order." NYIC Pls.' Mot. for Sanctions, at 20-21, ECF No. 635 ("Pls.' Mot."). Settled principles govern the exercise of the Court's power under each source of authority.

A. "Because of their very potency," as well as the fact that the court "may act as accuser, fact finder, and sentencing judge," a court's inherent powers "must be exercised with restraint and discretion." *Chambers*, 501 U.S. at 44; *Schlaifer Nance & Co., Inc. v. Estate of Warhol*, 194 F.3d 323, 334 (2d Cir. 1999). Chief among these restraints is the requirement that before exercising its inherent power to impose sanctions a court must find "that the challenged actions are *entirely without color*, and are taken for reasons of harassment or delay or for other improper purposes." *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 78 (2d Cir. 2000). Such "bad faith may be inferred only if actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay." *Enmon v. Prospect Capital Corp.*, 675 F.3d 138, 143 (2d Cir. 2012). In addition, the requisite findings of bad faith must be based on "clear evidence" and possess "a high degree of specificity." *Wilson v. Citigroup NA*, 702 F.3d 720, 724 (2d Cir. 2012); *Crown Awards, Inc. v. Trophy Depot, Inc.*, 2017 WL 564885 at *10 (S.D.N.Y. Feb. 13, 2017) ("clear and convincing evidence" required to impose inherent-power sanctions for a "fraud on the court").

B. Rule 26(g)(1) provides that "every discovery … response or objection must be signed by at least one attorney of record," constituting a certification "to the best of the [attorney's] knowledge, information, and belief formed after reasonable inquiry" that the discovery response or objection is consistent with the Federal Rules of Civil Procedure, justified under existing law, and "not

interposed for any improper purpose." Fed. R. Civ. P. 26(g)(1)(B). If a certification violates these requirements "without substantial justification," Rule 26(g)(3) requires that a court "impose an appropriate sanction." *Omega S.A. v. 375 Canal LLC*, 324 F.R.D. 47, 56 (S.D.N.Y. 2018).

As discussed herein, Defendants' discovery responses were appropriate and consistent with their obligations under the Federal Rules. Moreover, Plaintiffs take issue with a number of Defendants' "representations," *see* Pls.' Mot. at 20, that do not constitute discovery responses or objections governed by Rule 26(g). *See, e.g., Omega SA*, 324 F.R.D. at 56 (Rule 26(g) not applicable to allegedly false declarations). These include, for example, Defendants' representations concerning the completeness of the Administrative Record, the production of which is not a "discovery response," *see Comprehensive Cmty. Dev. Corp. v. Sebelius,* 890 F. Supp. 2d 305, 312 (S.D.N.Y. 2012) (in APA review of agency action, "the standard discovery tools of civil litigation … do not apply"), and Defendants' September 21, 2018, letter-brief opposing Plaintiffs' request for leave to depose third-party A. Mark Neuman, ECF No. 346.

C. Plaintiffs also invoke Rule 37(b)(2), which provides that if a party "fails to obey an order to provide or permit discovery," the court "may issue further just orders," including but not limited to those listed in Rule 37(b)(2)(A)(i)-(vii), but this invocation fails at the outset. Under Rule 37(b)(2), the court "must order" the payment of reasonable expenses and attorney's fees "caused by the failure," "unless the failure was substantially justified or other circumstances make an award of expenses unjust." As a pre-condition to imposing sanctions under Rule 37(b), there must be "a clearly articulated order of the court requiring specified discovery," *Daval Steel Prods. v. M/V Fakredine*, 951 F.2d 1357, 1363 (2d Cir. 1991), but Plaintiffs have identified no such order with which Defendants failed to comply. *See also Salahuddin v. Harris*, 782 F.2d 1127, 1131 (2d Cir. 1986) (sanctions under Rule 37(b) could not be based on an order "that did not specify what matters could or could not be inquired into at [plaintiff's] deposition").

Plaintiffs first point to the Court's Orders of July 5 and 23, 2018, ECF Nos. 99, 211, *see* Pls.' Mot. at 21, which directed Defendants to "produce the complete [administrative] record" by July 23, 2018, and then extended that deadline to July 26, 2018. But these were not "order[s] to provide or permit discovery" within the meaning of Rule 37(b)(2). As the Court recognized earlier in this litigation, "[p]roperly understood … an order directing completion of an administrative record is not the same thing as ordering 'discovery'…." *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 633 (S.D.N.Y.), *aff'd in part, rev'd in part* 139 S. Ct. 2551 (2019) Moreover, neither of the Court's orders "specified" particular documents or information that Defendants were required to include in the administrative record. *Daval*, 951 F.2d at 1363; *Salahuddin*, 782 F.2d at 1131. Absent the specificity that Rule 37(b)(2) requires, mere failure to satisfy Plaintiffs' notions of what a "complete" administrative record should include cannot form the basis for sanctions.

Plaintiffs also note that Defendants did not complete their production of documents under Rule 34 until October 23, 2018, eleven days after the Court's October 12, 2018, deadline. Pls.' Mot. at 21. But the Supreme Court had temporarily stayed all discovery under the Court's July 3, 2018, Order pending consideration of Defendants' petition for a writ of mandamus prohibiting Secretary Ross's deposition. *See* ECF No. 374. As a result of that temporary stay, the Court's Order requiring the production of documents on October 12, 2018, was not "in force," *Daval*, 951 F.2d at 1364, when that deadline arrived. And the day after the Supreme Court's stay was lifted, Defendants completed their production. Defs.' Ex. 1, Email from K. Bailey to J. Friedman (Oct. 23, 2018). Hence, there was no delay for which Rule 37 sanctions could be justified.

* * * * *

In short, and as detailed further below, Plaintiffs come nowhere close to showing that any form of further relief—sanctions or otherwise—is warranted under the legal principles that govern the exercise of the Court's authority under its inherent power, Rule 26(g)(3), or Rule 37(b)(2).

ARGUMENT

I. PLAINTIFFS' ALLEGATIONS ARE UNFOUNDED.

A. Gore Testified Truthfully at His Deposition and Withheld No Information Concerning the Preparation of the Gary Letter or the "Provenance" of the Neuman Letter.

Plaintiffs accuse then-Acting Assistant Attorney for the Department of Justice ("DOJ") Civil Rights Division, John Gore, of "help[ing] [to] hide from Plaintiffs and the Court critical evidence demonstrating a direct through-line" from Dr. Thomas Hofeller's unpublished 2015 study to the December 12, 2017, letter from the General Counsel of DOJ's Justice Management Division, Arthur Gary, to the Census Bureau (the "Gary Letter"), requesting the reinstatement of a citizenship question ("Gary Letter"). Pls.' Mot. at 11. The various allegations on which this charge is based, *see id.* at 9-11, rest on speculation and misrepresentations of the record—rather than actual evidence—and are now directly rebutted by the facts.

1. Plaintiffs assert that Gore provided "false testimony" when he stated during his deposition that he wrote the first draft of the Gary Letter. *Id.* at 9. According to Plaintiffs, that testimony conflicts with Gore's transcribed interview with staff of the House of Representatives Committee on Oversight and Reform ("House Oversight Committee"), during which he acknowledged that at an October 2017 meeting Neuman provided him with a purported draft letter from DOJ to the Census Bureau requesting a citizenship question (the "Neuman Letter"). *Id.* at 10.

It is Plaintiffs' assertion that is false, not Gore's testimony. Plaintiffs' assertion relies entirely on their characterization of the Neuman Letter as a "first draft" of the Gary Letter. That characterization is belied by the documents on their face, as even a cursory comparison of the two reveals. *Compare* Defs.' Ex. 2 (Neuman Letter) *with* Defs.' Ex. 3 (Gary Letter). No reasonable reader could conclude that the Neuman Letter is a "first draft" of the Gary Letter, which is entirely different in substance, terminology, and form. The only thing the two have in common is that both purport to be letters from DOJ to the Census Bureau. Despite reciting their characterization of the Neuman

Letter as a first draft of the Gary Letter multiple times in multiple filings in this Court and the Supreme Court, Plaintiffs have yet to identify any basis for their characterization beyond their own *ipse dixit*. Plaintiffs have thus failed to provide any evidence—much less clear and convincing evidence—that Gore's testimony that he wrote the first draft of the Gary Letter was anything but truthful.

Indeed, Plaintiffs have had the Neuman Letter since last October, yet never asserted that it bore any similarity to the Gary Letter. Neuman himself testified that he "wasn't part of the drafting process of the [Gary] [L]etter," Defs.' Ex. 4, Neuman Dep. 114:19-20, and that the Neuman Letter was "very different" from the Gary Letter. *Id.* 280:23-24. If Plaintiffs seriously thought the two documents were related, they easily could have probed the (non-existent) connection between them at Gore's deposition. As soon as the Supreme Court lifted its stay of discovery, *see supra* at 4, Defendants produced the Neuman Letter to Plaintiffs. That production occurred on October 23, 2018, three days before Gore's deposition, and Defendants specifically identified the document as having been collected from Mr. Gore's files. *See* Defs.' Ex. 1.[1] Thus, Plaintiffs had timely notice that Gore possessed a copy of the Neuman Letter, and every opportunity to question Gore during his deposition about the document, including who gave it to him and whether he relied on it while drafting the Gary Letter. A deponent is not required to answer questions that are not asked, much less face sanctions for not doing so. Any information Plaintiffs feel they did not have about the Neuman Letter is attributable to their own deposition choices, not to any sanctionable misconduct by Gore.

[1] Plaintiffs misleadingly insist that Defendants "delayed release" of Gore's copy of the Neuman Letter, and buried it in a production of 92,000 pages of documents. Pls.' Mot. at 10. The Supreme Court issued its temporary administrative stay of discovery in this case on October 9, 2018. ECF No. 374. The day after the stay lifted on October 22, Defendants produced all outstanding documents, including the hard copy of the Neuman Letter from Gore's files. Defs.' Ex. 1. As Plaintiffs themselves note, this was "three days before [Mr.] Gore's deposition." Pls.' Mot. at 10. In addition, whereas the bulk of Defendants' production that day was sent by overnight delivery or courier on disk drives, Gore's copy of the Neuman Letter was one of 21 discrete documents that were separately produced as attachments to a transmittal e-mail, which specifically identified them as previously withheld materials "collected from John Gore," and for the sake of clarity referenced the Neuman Letter *both* by its new Bates number assigned for purposes of production, and the number used earlier to identify it on Defendants' privilege log. Defs.' Ex. 1 at 1-2. Thus, far from burying the document, Defendants called it to Plaintiffs' attention prior to Gore's deposition.

2. Plaintiffs next fault Gore because during his deposition he did not name Neuman or Hofeller as persons who provided him "input" on the Gary Letter. Pls.' Mot. at 9-10. That argument incorrectly assumes that Gore actually did receive input on the Gary Letter from Neuman and Hofeller. Plaintiffs provide no factual support for that assumption.

Besides the Neuman Letter, discussed above, Plaintiffs offer no reason to conclude that Gore received "input" on the Gary Letter from Neuman. And they offer no evidence at all that Gore ever read, received, or even knew about Hofeller's unpublished 2015 study. Instead, they offer only speculation that Gore must have seen the unpublished study because both the study and the Gary Letter discuss various shortcomings of citizenship data from the American Community Survey (ACS). *See* Pls.' Mot. at 11. But as the government already has explained, see ECF No. 601 at 2, those shortcomings were widely known and published, so any supposed similarities are hardly surprising.[2] There is thus no basis for Plaintiffs' speculation that Gore more likely relied on Hofeller's unpublished study rather than, for example, publicly available and well known briefs filed in *Evenwel* v. *Abbott*, 136 S. Ct. 1120 (2016)—a case the Gary Letter expressly cites— or speculation that Gore, Neuman, and Hofeller were engaged in a secret conspiracy to share this broadly available information.

3. Next, Plaintiffs accuse Gore of "caus[ing] Defendants to mislead" them because "even though he was well aware of the [Neuman Letter's] provenance," Gore "allowed" Defendants to represent, on their privilege log, and in subsequent exchanges between counsel, that they did not know the Neuman Letter's "author, recipient, date, or time." Pls.' Mot. at 10 (citing Pls.' Ex. 20). In the first place, Plaintiffs do not explain how a witness such as Mr. Gore can be held responsible for what

[2] The shortcomings of ACS citizenship data have been discussed in judicial decisions and academic literature. *See, e.g.*, *Mo. St. Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1030 (E.D. Mo. 2016); *Fabela v. City of Farmers Branch,* 2012 WL 3135545, at *7 (N.D. Tex. Aug. 2, 2012), *aff'd*, 894 F.3d 924 (8th Cir. 2018); *Benavidez* v. *Irving Indep. Sch. Dist., Tex.*, 690 F. Supp. 2d 451, 457-58 (N.D. Tex. 2010); Justin Levitt, *Democracy on the High Wire: Citizen Commission Implementation of the Voting Rights Act*, 46 U.C. Davis L. Rev. 1041, 1045 n.116 (2013); Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 Cardozo L. Rev. 755, 776-777 (2011).

is or is not stated in DOJ's privilege log. Moreover, they have mischaracterized Defendants' representations by misleadingly truncating the exchange they quote. In fact, Defendants told Plaintiffs the Neuman Letter was collected "in hard copy, and therefore *no metadata exists for* author, recipient, date, or time." Pls.' Ex. 20, at 1 (emphasis added). That was and is true. In any event, if Plaintiffs were interested in where Gore acquired the Neuman Letter, they simply could have asked him about it in his deposition. They did not. Again, a deponent cannot be sanctioned for failing to answer an unasked question, and Defendants were not obligated to conduct Plaintiffs' deposition for them.

4. Plaintiffs next claim that during his deposition, Gore failed to identify the Commerce Department's General Counsel, Peter Davidson, and Commerce Department Attorney James Uthmeier, as individuals who provided input to the Gary Letter, information he provided during his interview by House Oversight Committee staff. Pls.' Mot. at 10. They also treat as "new" information that "he discussed the citizenship question directly with the White House and [the Department of Homeland Security ("DHS")] in October 2017," a fact he also shared with the Committee staff. *Id.* But Plaintiffs neither explain what connection those discussions might have to their theory of a fraud on the court nor acknowledge relevant facts that belie their accusations.

Gore testified at his deposition that, in addition to various individuals in DOJ's Civil Rights Division, he "may have received input" from and "had various conversations with others at various times throughout [the] process" of drafting the Gary Letter, Defs.' Ex. 5, Deposition of John Gore ("Gore Dep.") 150:21-151:4, 151:16-20, including multiple conversations with legal staff at the Department of Commerce, *id.* 153:7-11. And Gore *did* testify in his deposition that at some point after November 2017 he had conversations with Davidson about the citizenship question, *id.* 137:13-21, as well as that he spoke about the citizenship question with a member of the White House Staff, John Zadrozny, in October 2017, *id.* 409:19-410:9. Unlike the House Oversight Committee, however, Plaintiffs never asked Gore with whom in the Commerce Department's General Counsel's Office he had discussions, or about the nature of those conversations. Gore did not hide that information from

Plaintiffs; they simply did not ask. At the risk of belaboring the point, it is not sanctionable conduct for Gore not to have volunteered information that Plaintiffs did not solicit. Indeed, Plaintiffs cannot even explain what relevance that information would have had to their claims in this case.

* * * * *

Plaintiffs' failure to offer any evidence, much less clear and convincing evidence, to support their allegations that Gore provided untruthful testimony is sufficient to defeat their request for sanctions. Nevertheless, in an abundance of caution, Gore has provided a sworn declaration in response to Plaintiffs' motion. Gore's declaration makes clear that the Neuman Letter was not a first draft of the Gary Letter, that Gore did not rely on the Neuman Letter in drafting the Gary Letter, that neither Neuman nor Hofeller had any input into the Gary Letter, and that Gore did not rely on anything he heard from Davidson, Uthmeier, Zadrozny, or anyone else at the Commerce Department, the White House, or DHS, in drafting the Gary Letter. *See generally* Defs.' Ex. 6. [3]

As Gore explains, "[t]he Neuman Letter was not a draft of the Gary Letter." Defs.' Ex. 6 ¶ 7. After receiving the Neuman Letter on the one occasion when the two men met (after which Gore had no further communication with Neuman), Gore reviewed the letter once, placed it in a file folder, and "did not consult, refer to, or rely upon the Neuman Letter, or any other information provided to [him] by Mr. Neuman, in drafting the Gary Letter." *Id.* ¶¶ 8-9; *see also id.* ¶ 6 (stating that he "had no further oral or written communications with Mr. Neuman after receiving the Neuman Letter from him"). Gore was thus entirely truthful when he stated that he prepared the first draft of the Gary Letter before it was sent to the Commerce Department. *See id.* ¶¶ 2, 12; Defs.' Ex. 5, Gore Dep. 150:9-155:8.[4] Gore also never met or communicated with the late Hofeller, much less relied on the

[3] Gore's discussions with Davidson and Uthmeier concerning a citizenship question were oral and are not reflected in written communications. *See* Defs.' Ex. 6, Declaration of John Gore, at ¶ 14. Accordingly, Plaintiffs' suggestion that these conversations should have been included in the Administrative Record, Pls.' Mot. at 2, 6, are without merit.

[4] As Mr. Gore attests in his declaration, he has no knowledge regarding the Neuman Letter's author, recipients (other than himself), or when it was drafted. Defs.' Ex. 6 ¶ 10. Mr. Gore cannot

unpublished 2015 study that Gore did not even know existed until he reviewed Plaintiffs' May 30, 2019, motion for an order to show cause. Defs.' Ex. 6, Gore Decl. ¶ 5. Finally, as Gore explains, he did not rely upon anything communicated to him by Davidson, Uthmeier, Zadrozny, or anyone else at the Commerce Department, the White House, or DHS, in drafting the Gary Letter. *Id.* ¶¶ 11-16.

In short, "[a]t no time, including during [his] deposition, did [Gore] withhold, direct anyone to withhold, or become aware that anyone had withheld [non-privileged] documents or information required to be produced" in this case. Gore Decl. ¶ 17. Nothing Gore did, or failed to do, during the litigation of this case provides any justification for imposing sanctions.

B. The Administrative Record Is Complete

Plaintiffs next claim that Defendants omitted information that should have been part of the Administrative Record, and misrepresented the completeness of the record, to "conceal[ ] the genesis and purpose of the citizenship question." Pls.' Mot. at 11, 15. In particular, Plaintiffs contend that "senior Commerce officials (including Uthmeier, Jones, Comstock, and Davidson) appear to have withheld documents relating to contacts with the White House, contacts with Hofeller, and work on the draft DOJ request letter which Neuman provided to Gore." *Id.* at 13. They also contend that emails from the personal accounts of Uthmeier and Census Bureau Chief of Staff Christa Jones, *see id.* at 16, and certain communications with Gore, *id.* at 6, were improperly withheld. Plaintiffs, however, do not identify any actual documents that were omitted. They simply speculate about the existence of the supposedly withheld documents, and based on that speculation assert that the Administrative Record is incomplete and that Defendants have misled the Court. Plaintiffs' speculative arguments are again contradicted by the facts.

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be faulted, as Plaintiffs attempt, Pls.' Mot. at 8, for failing to provide Defendants with information that he himself lacks. Nor can Defendants be faulted for failing to describe this document on the Justice Department's privilege log in the absence of this information. Plaintiffs point to the fact that Mr. Gore now recalls that he received the Neuman Letter from Mr. Neuman, *see* Pls.' Mot. at 10 (citing Pls.' Ex. 13 at 22 (transcript of House Oversight Committee interview)), but who authored the Neuman Letter, and who gave it to Mr. Gore, are entirely different pieces of information.

1. No pertinent records of Uthmeier's work on the citizenship question have been withheld from the Administrative Record.

Citing Uthmeier's interview by House Oversight Committee staff, Plaintiffs claim that he is responsible for misleading the Court about the existence of four categories of documents that should have been included in the Administrative Record, thereby rendering it incomplete. Pls.' Mot. at 13-14. None of Plaintiffs' contentions withstands scrutiny.

First, Plaintiffs assert that although Uthmeier told the Committee staff that he spoke to multiple individuals from the White House about the citizenship question, the Administrative Record reflects his contact with only a single White House official, John Zadrozny. *Id.* at 13. That is incorrect. The Administrative Record reflects that Uthmeier likely had communications with other members of the White House staff, including James Sherk and Theo Wold. *See, e.g.,* Defs.' Ex. 7, Email from J. Zadrozny to B. Lenihan (Feb. 21, 2018); Defs.' Ex. 8, Email from J. Uthmeier to J. Zadrozny (Jan. 31, 2018). In addition, a document produced in discovery that post-dated the Secretary's decisional memo reflects that Uthmeier communicated by e-mail with staffperson George Doty. *See* Defs.' Ex. 9, Email from J. Uthmeier to G. Dory (Mar. 28, 2018).

Second, Plaintiffs contend that although Uthmeier told Committee staff that Secretary Ross asked him to look into adding the citizenship question in "the spring of 2017, likely March or April," the record does not contain documents reflecting work by him on the citizenship question before June 2017. Pls.' Mot. at 13. That, too, is incorrect. Documentation of Uthmeier's work on the citizenship question as early as April 2017 was produced in discovery (documentation Plaintiffs never sought to add to the Administrative Record). *See* Defs.' Ex. 10, Email from B. Robinson to J. Uthmeier (Apr. 20, 2017). And Plaintiffs provide no basis to question Defendants' wide-ranging document searches during discovery confirming the absence of additional relevant pre-June 2017 documents in the Commerce Departments custody. *See generally* Defs.' Ex. 12, Cannon Decl.

Third, Plaintiffs complain that Uthmeier's conversations about the citizenship question with Professor John Baker, as documented in his interview with House Oversight Committee staff, are not reflected in the Administrative Record. Pls.' Mot. at 14. But those conversations would appear in the Administrative Record only if they were in writing or otherwise memorialized in writing. Plaintiffs provide no basis for their speculation that those conversations were anything but purely oral.

Finally, again citing Uthmeier's interview with the Committee staff, Plaintiffs argue that the Administrative Record should include emails from his personal Gmail account that he sent and received in the course of performing official Government business related to the census. Pls.' Mot. at 14. According to Plaintiffs, Uthmeier "acknowledged that he 'likely' used his Gmail account for work related to [the] census," *see id.* But Plaintiffs have misconstrued Uthmeier's testimony. Uthmeier did not state that he used a private e-mail account to conduct official business while an employee of the Commerce Department. Rather, he told the Committee staff that he "likely" used his Gmail account to conduct business as a member of the President's transition team, before the President's inauguration. Pls.' Ex. 14 at 14. He did not state that he used his Gmail account after the transition for purposes of work-related issues; and, he explained that he did not work on the census or the citizenship question during the transition. *Id.* at 7-8. Plaintiffs thus have no basis for their assertion that the Administrative Record should contain Uthmeier's personal emails.

* * * * *

As with the baseless allegations against Gore, Plaintiffs' allegations related to Uthmeier are unsupported by any evidence, much less clear and convincing evidence; that is sufficient on its own to deny their motion. Nevertheless, in an abundance of caution, Uthmeier has provided a sworn declaration in response to Plaintiffs' motion. That declaration makes clear that Uthmeier did not withhold communications with White House personnel; did not withhold any pre-June 2017 documents related to his work on the citizenship question, followed all Commerce Department policies regarding use of personal email for government business once he joined the Department

shortly after the inauguration, and did not have any written notes memorializing his conversations with Professor Baker. *See* Defs.' Ex. 11, Declaration of James Uthmeier, at ¶¶ 3-5. As Uthmeier states, when he first started working on the citizenship question in the spring of 2017, he spent the first several months participating in a number of in-person briefings and discussions concerning this issue and several other topics related to the Department, and that beyond the documents that comprise the Administrative Record, there are no additional notes or materials that were taken or received that were not produced. Defs.' Ex. 11 ¶ 4. He does not recall speaking to White House personnel about a citizenship question during this time. *Id.* 12.

Defendants' wide-ranging document searches—both those performed initially and those Defendants recently conducted for purposes of responding to Plaintiffs' motion, confirm the absence of such documents. These searches were calculated to identify, among other things, any documents or communications reflecting work that Uthmeier would have performed on a citizenship question before late June 2017—but they found none that were not otherwise already reflected in the Administrative Record. *See generally* Defs.' Ex. 12, Declaration of Michael Cannon; Defs.' Ex. 13, Supplemental Declaration of Michael Cannon; Defs.' Ex. 14, Declaration of Jean McKenzie; Defs.' Ex. 15, Declaration of Terri Ware.[5]

As Uthmeier also explains, his conversations with Baker were conducted over the phone and in person, and he did not take notes during these conversations. Defs.' Ex. 11 ¶ 5. Moreover, Defendants have conducted additional searches of Uthmeier's files for documents constituting or

[5] As discussed in the supplemental Cannon declaration, three of the recent searches performed by Defendants returned documents within the specified parameters. Defs.' Ex. 14, Cannon Supp. Decl. ¶¶ 2-4. The first was a search for communications about or including Hofeller, which identified a single email that made no mention of a citizenship question, redistricting, or apportionment, and was not related to the Secretary's decisionmaking process. *Id.* ¶ 2. The second was a search for communications about or including Neuman, which revealed no communications except those already identified by earlier searches in this litigation and already produced or logged. *Id.* ¶ 3. The last search that returned documents within the parameters specified was a search for relevant communications with or about Baker, but none of the communications identified were communications to, from, or about Professor John S. Baker. *Id.* ¶ 4. Therefore, the supplemental searches performed by Defendants yielded no new relevant documents.

reflecting communications with Baker, and found none. Defs.' Ex. 13 ¶ 4. Hence, there is no basis for Plaintiffs to claim that Defendants overlooked, much less deliberately withheld, documents concerning communications between Uthmeier and Baker.[6]

Finally, Uthmeier has confirmed that once he officially joined the Department of Commerce in mid-February 2017, he exclusively used his Commerce Department email account to conduct official Government business. Defs.' Ex. 11 ¶ 3. Thus, the record contains no support for an allegation that official emails Uthmeier sent or received using his personal account are missing from the Administrative Record. And to the extent that Plaintiffs contend the record should include transition-team e-mails *predating* Uthmeier's—and, for that matter, Secretary Ross's—tenure at the Department of Commerce, Plaintiffs provide no legal or factual basis to support such a claim.

2. No evidence supports the claim that relevant communications of Christa Jones are absent from the administrative record.

Relying on materials in Hofeller's files, Plaintiffs next contend that Christa Jones, a career Census Bureau employee, "failed to turn over relevant materials" that should have been included in the Administrative Record. Pls.' Mot. at 14. They speculate that "emails between Jones and Hofeller … may have reflected a direct connection between Hofeller and Secretary Ross's ultimate decision." *Id.* That claim, too, is both unsupported and belied by the record.

Although Plaintiffs allege that Hofeller "regularly" corresponded with Jones through private email, and that "many" of her emails discussed redistricting, *id.*, Plaintiffs identify only five emails exchanged between Hofeller and Jones—three from 2010, two from 2015—some of them including multiple recipients. *See* Pls.' Ex. 26. Those five emails hardly support a conclusion that Jones "regularly" corresponded with Hofeller at all, let alone on redistricting. The first and third, for example, have nothing to do with a citizenship question or redistricting, *id.* (Pls.' Ex. 26 at A-18; A-

[6] Defendants had no obligation to undertake the precarious task of attempting, long after the fact, to memorialize these oral conversations. *See S. Forest Watch, Inc. v. Jewell*, 817 F.3d 965, 977 (6th Cir. 2016) (administrative record properly excluded oral communications absent documentation).

20), and the fifth concerns dinner plans, *id.* (A-22). The second, *id.* (A-19), appears to be a January 2010 email chain circulated among a large number of individuals, under the subject line "Redistricting Article," that includes no content. And aside from that, Plaintiffs do not explain how an email sent during the last administration in any way suggests the absence of relevant information regarding the Secretary's March 16, 2018, decision—over eight years later—regarding the citizenship question.[7] Finally, the fourth email, from January 2015, simply contains a suggestion from Jones to Hofeller that a recent Federal Register notice inviting public comment about the Census Bureau's 2015 Content Test—which tests the wording and placement of census questions—might present "an opportunity to mention citizenship." Pls.' Ex. 26 at A-21. Plaintiffs do not even attempt to explain how that single personal communication more than three years before Secretary Ross's decision (indeed, nearly two years before President Trump's election), suggests that Jones—a career employee of the Census Bureau who advised against reinstatement of a citizenship question, *see* ECF No. 545 at ¶ 495—conducted official business using her personal email account, or that any of her emails involved would have reflected a "direct connection" between Hofeller and the Secretary's decision.

* * * * *

Because Plaintiffs' claims for sanctions based on Jones are unsupported by any evidence, let along clear and convincing evidence, their motion should be denied. Nevertheless, in an abundance of caution, Jones has provided a sworn declaration in response to Plaintiffs' motion. That declaration makes clear that Jones had several telephone conversations with Hofeller since January 2017 concerning personal matters, but that they did not discuss the reinstatement of a citizenship question during their conversations, and that she did not exchange any written communications with him during that time. Defs.' Ex. 16, Declaration of Christa Jones ¶ 2. Jones also explains that she

[7] Citing this email, Plaintiffs also claim that Jones was "one of six individuals (the others of whom are senior Republican operatives and lawyers) whom Dr. Hofeller regularly briefed on redistricting strategy." Pls.' Mot. at 5-6. The email obviously supports no such claim.

had never seen or heard about Hofeller's unpublished 2015 study prior to press reports earlier this year, and that she never discussed the contents of that study with Hofeller or anyone else in connection with Secretary Ross's decision to include a citizenship question on the 2020 census. *Id.* ¶ 3. Similarly, prior to this litigation, Jones had never seen a copy of the Neuman Letter or the one-paragraph document allegedly created in 2017 that was retrieved from Hofeller's computer, and whose text appears in that letter. *Id.* ¶ 4. And contrary to Plaintiffs' suggestion, Pls' Mot. at 14, Jones was neither a primary drafter nor contributor of comments to the Secretary's March 2018 decision memorandum, and did not play a central role in preparing that memorandum. *Id.* ¶ 5.

3. Defendants did not misrepresent their efforts to obtain pertinent communications from custodians' personal email accounts.

Plaintiffs contend that Defendants' representations about their efforts to determine whether Commerce Department employees conducted official business using their personal email accounts were "inaccurate, misleading or false." Pls.' Mot. at 15-16. That baseless contention simply reprises the same unfounded allegations that Uthmeier and Jones withheld emails sent and received on their personal accounts to conduct official business regarding a citizenship question. See *id.* at 16. As explained above, those allegations are false. Moreover, the Commerce Department already "conducted searches for all pertinent documents to create the Administrative Record for this case," searches "designed to identify and produce documentary evidence that was considered during the [Secretary's] decision-making process." ECF No. 254, at ¶ 3. In the course of conducting those searches, Defendants individually verified with all relevant custodians "that they 'confirmed that they are aware of and adhere to the Department's policy that government business be conducted over government email.'" *See* Pls.' Mot. at 15 (quoting Pls.' Ex. 29, email from K. Bailey). Plaintiffs provide no basis for their accusation that those representations and document searches "were inaccurate, misleading, or false."

4. Defendants have not withheld drafts of the Neuman Letter.

Finally, Plaintiffs claim that the Administrative Record wrongfully omitted drafts of the Neuman Letter. Pls.' Mot. at 14-15. According to Plaintiffs, Neuman testified during his deposition that he had seen multiple draft versions of the Neuman Letter; that he believed individuals in the Commerce Department also had versions of this document and had reviewed and commented on it; and that he believed he provided comments on the letter to Uthmeier. *Id.* at 14. As an initial matter, Plaintiffs easily could have raised this argument before the close of discovery or trial, as it is based on deposition testimony that Neuman gave when they deposed him on October 28, 2018. If Plaintiffs believed the Administrative Record was incomplete because it did not contain drafts of the Neuman Letter, it was incumbent on them to raise the issue at that time. They did not.

In any event, Plaintiffs overstate Neuman's testimony. He did not testify that Commerce Department employees in fact had copies, or were reviewing drafts, of the Neuman Letter. Rather, he could only speculate that "there [were] people within the Secretary's office who *could* have had a version" of the letter, Defs.' Ex. 4, Neuman Dep. 281:10-19 (emphasis added); and "seem[ed] to recall" that others at the Commerce Department were reviewing and offering thoughts on draft versions of the letter, *id.* 283:12-24. Based on that equivocal testimony, Plaintiffs leap to the conclusion that there must be "significant omissions" of documents from the Administrative Record because it does not include (nor do Defendants' privilege logs identify) copies of the draft Neuman Letter that Neuman "seem[ed] to recall." Pls.' Mot. at 14-15. But Defendants have twice conducted comprehensive searches for pertinent electronic and hard-copy documents in this case—first when originally assembling the Administrative Record, and most recently for purposes of addressing Plaintiffs' motion. *See generally* Defs.' Exs. 12-15. Those searches, which included relevant custodians such as Davidson, Uthmeier, and former Commerce Department Director of Policy Earl Comstock, were designed to locate any documents pertaining to the census, a citizenship question, or the Justice Department, all matters addressed in the Neuman Letter. *See generally* Defs.' Ex. 5. No such

documents were found, either in the first instance or now. *Id.*; *see generally* Defs.' Ex. 13; Defs.' Ex. 14 ¶ 4; Defs.' Ex. 15 ¶¶ 5, 7. Neuman's speculation and equivocal recollection of a draft Neuman Letter circulating within the Commerce Department has now been twice tested against the documentary record, and both times found wanting.

Neuman's uncertain recollection is also questionable given the testimony of Uthmeier, who confirmed to House Oversight Committee staff that Neuman never provided him with the Neuman Letter, or any other draft letter concerning a citizenship question, and that Neuman never provided him with draft language that could be included in such a letter. Defs.' Ex. 17, Interview of J. Uthmeier, Comm. on Oversight & Reform, U.S. House of Reps. (June 11, 2019) ("Uthmeier House Tr.") 99-100; 121. Uthmeier further informed the Committee staff that he had never seen any documents from Neuman, including language contained in the 2017 paragraph allegedly retrieved from Hofeller's files, and which appears in the Neuman Letter. *Id.* at 120-21. Uthmeier's declaration confirms these statements, as do the declarations of Davison and Comstock. *See* Defs.' Ex. 11 ¶ 6; Defs.' Ex. 26, Declaration of Peter Davidson, ¶¶ 5-6; Defs.' Ex. 27, Declaration of Earl Comstock, ¶ 3. And Uthmeier is likewise unaware of anyone at the Department of Commerce who possessed, worked on, or received from Neuman any draft letter (or language for inclusion in a letter) requesting reinstatement of a citizenship question. Defs.' Ex. 11 ¶ 8.

C. Defendants' Supplemental Response to Plaintiffs' Interrogatory No. 1 Is Complete and Accurate.

Plaintiffs contend that Defendants failed to conduct a reasonable inquiry in response to Plaintiffs' much-litigated Interrogatory No. 1, which sought identification of the "senior Administration officials" and "other government officials" referred to in Secretary Ross's June 21, 2018 supplemental memorandum. Pls.' Mot. at 16-17. As the Court is aware, on June 21, 2018, Secretary Ross issued a supplemental memorandum that was "intended to provide further background and context regarding [his] March 26, 2018, memorandum concerning the reinstatement of a

citizenship question to the decennial census." Defs.' Ex. 18, AR 1321. As relevant here, that supplemental memorandum explained that, at or about the time of his appointment, "other senior Administration officials" had already raised the issue of reinstating a citizenship question on the census, and, thinking that reinstatement of a citizenship question could be warranted, Secretary Ross and his staff "had various discussions with other government officials" about the matter. *Id.*.

After the Secretary issued his supplemental memorandum, Plaintiffs served their Interrogatory No. 1, seeking the identities of "the 'senior Administration officials" who had raised, and the "other government officials" with whom the Secretary and his staff "had discussed the possible reinstatement of a citizenship question."' Defs.' Ex. 19 (Rog. Resq.) at 9. On October 11, 2018, Defendants provided a supplemental response to Plaintiffs' interrogatory, identifying "the individuals within the executive branch but outside the Department of Commerce who, before the December 12, 2017 Department of Justice letter … either (a) discussed the citizenship question with Secretary Ross, (b) had raised or discussed whether to reinstate a citizenship question, or (c) were consulted by Secretary Ross or his staff regarding whether the Department of Justice … would request, inclusion of a citizenship question …." Defs.' Ex. 20 (2d Supp Rog Resp.) at 2. Plaintiffs now contend that Defendants "failed to provide all information available about the other government officials" involved for two reasons. Pls.' Mot. at 17. Neither has merit.

1. Plaintiffs first contend that because Uthmeier told the House Oversight Committee staff he began working on the citizenship question "likely in March or April" of 2017, Defendants improperly failed to identify individuals from the White House with whom Uthmeier communicated about it. *Id.* Evidently Plaintiffs' contention is based on the unfounded assumption that because Uthmeier began working on the citizenship question in March or April 2017, he must have communicated with White House officials at that time as well. Uthmeier's transcribed interview does not support that assumption. Instead, Uthmeier indicated that his conversations with the White House occurred after September 2017, and in fact likely after the DOJ sent its December 2017 Gary

Letter to the Census Bureau. *See* Defs.' Ex. 17, Uthmeier House Tr. at 90 (testifying that he "would have provided updates to individuals at the White House" at some point after September 2017). Uthmeier explained that "[w]hen the DOJ letter was leaked" in December 2017, he and other Commerce Department personnel answered questions and provided briefings to the White House. *Id.* at 137. And he further testified that he spoke to someone from the White House around February 2018. *Id.* at 141-42.[8] Accordingly, nothing in Uthmeier's transcribed interview suggests that Defendants' interrogatory response was inaccurate or incomplete.

Defendants explained in their responses that they construed Plaintiffs' interrogatory to inquire about conversations concerning the citizenship question that predated the Department of Justice's December 12, 2017, letter. Defs.' Ex. 20 at 2. Plaintiffs did not challenge that construction of the interrogatory's date scope. Uthmeier's interview undermines Plaintiffs' speculation that he had discussions with the White House before that date.[9] And Uthmeier has now confirmed in his declaration that he does not recall any conversations with the White House concerning the citizenship question until after DOJ sent its letter in December 2017. Defs.' Ex. 11 ¶ 13.

2. Plaintiffs also attempt to resurrect an argument that this Court already rejected at an October 24, 2018 hearing—namely, that Defendants failed to engage in a reasonable inquiry within DOJ itself for information about the identities of the officials with whom the Commerce Department consulted in 2017. Pls.' Mot at 18. That argument relies entirely on the assumption that Defendants "failed to collect information known to senior DOJ Justice [sic] lawyers from their work on the June 212 supplemental memo," *id.*, an assumption for which they offer no supporting evidence. As

[8] Uthmeier also explained that the White House did not play a role in the decision to add a citizenship question, Defs.' Ex. 17, Uthmeier House Tr. at 92-93, a statement that Plaintiffs overlook in their motion.

[9] In a footnote, Plaintiffs also contend, without any elaboration or factual support, that Defendants should have identified Baker, Neuman, and Hofeller in their response to Plaintiffs' Interrogatory No. 1. Pls.' Mot. at 18, n.8. These individuals are neither "senior Administration officials" nor "other government officials," so any disclosure of consultations with them about the citizenship question was not called for by the plain language of Plaintiffs' interrogatory.

Defendants explained at the time, "[w]e have provided all facts known at the Department of Justice on this matter, period," Defs.' Ex. 21, Oct. 24, 2018 Hr'g Tr. 38:20-21; accordingly, the Court concluded that, "on the basis of those representations, I don't think there's anything further that I can or should order," *id.* at 38:22-24. Plaintiffs provide no basis to reopen that ruling other than to assert that "Hofeller's extensive relationships with senior Republican operatives and lawyers (some of whom work in the Administration)" somehow implies that Defendants "obscured [Hofeller's] role" in the Secretary's decision. Pls.' Mot. 18. That accusation of guilt-by-association—Hofeller knew many Republican lawyers, therefore DOJ lawyers in this case acted to obscure his role—is irresponsible and not a valid ground for the Court to revisit its earlier ruling.

D. Plaintiffs Identify No Evidence that Neuman Provided False Testimony or Withheld Evidence.

Plaintiffs further contend that Neuman gave "false testimony" going to "the very heart of Plaintiffs' claims" that "obscured evidence of racially discriminatory intent." Pls.' Mot. at 8. Neuman, of course, was not and is not a Government employee, and the Government does not represent him in this litigation. Neuman retained private counsel and in his deposition he routinely disregarded the Government's instructions not to answer certain questions on the basis of executive privilege. *See* Defs.' Ex. 4, Neuman Dep. 124:15–126:23, 273:18–274:5. In any event, Plaintiffs identify no evidence showing that Defendants knew, or had any reason to believe, that Neuman's testimony was anything but truthful, and cite no authority for the proposition that Defendants could be held responsible for testimony given by this third party.

1. Plaintiffs' claims of false testimony are unsupported.

Plaintiffs cite five supposed falsehoods in Neuman's testimony, in essence contending that he testified falsely about his interactions with Gore and Hofeller's role in Secretary Ross's decisionmaking. Pls.' Mot. at 7–9. But Plaintiffs' theory is viable only if one *assumes* their unsupported

assertions about Hofeller and Gore. When those unfounded assumptions are set aside, Neuman's sworn testimony is fully consistent with the record and does not even suggest misinformation.[10]

a. First, Plaintiffs take issue with Neuman's description of his meeting with Gore. According to Plaintiffs, "Neuman testified that his meeting with Gore was about 'how Census interacts with the Justice Department' and denied meeting with Gore about a 'letter from DOJ regarding the citizenship question.'" Pls.' Mot. 7. But Plaintiffs selectively quote Neuman's response to one question concerning what his meeting with Gore was "about." *See* Defs.' Ex. 4, Neuman Dep. 273:10-21. In fact, Neuman discussed his meeting with Gore at several points during his deposition, making clear that he discussed a citizenship question (and a Justice Department letter to the Census Bureau) with Gore. *See, e.g.*, *id.* at 110:5-8, 114:15-23, 123:20-124:3. This was no secret; Gore himself testified that he met with Neuman "about having a citizenship question on the census," Defs.' Ex. 5, Gore Dep. 437:20–438:13, and Plaintiffs cited this testimony in their post-trial brief, Pls.' Post-Trial Br. ¶ 453, ECF No. 545 ("Mr. Gore also discussed a citizenship question with Mr. Neuman with the understanding that he was advising the Department of Commerce and Census Bureau on the issue.").

b. Second, Plaintiffs fault Neuman for not volunteering that he provided the Neuman Letter to Gore. Pls.' Mot. at 7. When asked what he gave to Gore, Neuman testified: "Mainly the—mainly a copy of the—of the letter from the Obama Administration, Justice Department, to the Census Bureau on the issue of adding a question on the ACS." Defs.' Ex. 4, Neuman Dep. 123:25–124:3. After asking some follow-up questions about that document, *id.* at 124:4–126:16, counsel

[10] Plaintiffs also wrongly contend that Neuman's testimony "obscured evidence of racially discriminatory intent." Pls.' Mot. at 8. As Plaintiffs admit, the 2015 unpublished Hofeller study simply recognized that "a switch to the use of citizen voting age population [CVAP] as the … population base for redistricting would be advantageous to Republicans and Non-Hispanic Whites," and that "[u]se of CVAP would clearly be a disadvantage for the Democrats." Pls.' Mot. at 4–5 (quoting Pls.' Ex. 6). Those statements are merely empirical observations about the likely political impact of using CVAP for redistricting. The fact that CVAP redistricting could have a disparate effect on persons of Latino origin does not mean that any Federal official taking action that could be used to facilitate CVAP redistricting did so "'because of,' not merely in 'spite of,'" that possibility. *See Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).

moved on to another topic, *see id.* at 126:19–20. Plaintiffs never asked *what else*, if anything, Neuman gave Gore beyond the Obama-era document. That is particularly striking because by that time Plaintiffs (a) knew the Neuman Letter was "collected from John Gore" "in hard copy," Defs.' Ex. 1, at 3, and (b) in fact used the Neuman Letter as an exhibit *in Neuman's deposition* and asked other questions about it, Defs.' Ex. 4, Neuman Dep. 278:23-280:24. Neuman's failure to inform Plaintiffs that he gave Gore a copy of the Neuman Letter is thus traceable directly to questions they declined to ask, not false testimony. *See Martal Cosmetics, Ltd. v. Int'l Beauty Exch.*, 2007 WL 2126091, at *6–7 (E.D.N.Y. July 24, 2007) (party that fails to ask certain questions "cannot . . . be heard to complain about the consequences of their indolence").

c. Third, Plaintiffs highlight Neuman's testimony that he "wasn't part of the drafting process of the [Gary] letter," even though he gave Gore a copy of the Neuman letter. Pls.' Mot. at 7. As discussed above, that statement is completely accurate. After their first and only meeting, Gore had no further written or oral communications with Neuman, and did not rely on the Neuman Letter, or any other information he received from Neuman, in drafting the Gary letter. Defs.' Ex. 6 ¶¶ 6-9. Nor did he share any draft of the Gary Letter with anyone at the Department of Commerce, *id.* ¶ 12, Defs.' Ex. 11 ¶¶ 7-8; Defs.' Ex. 26 ¶ 8; Defs.' Ex. 27 ¶ 4, thus foreclosing any possibility that Neuman may have indirectly participated in the drafting process in his role as a Commerce Department advisor.

The sole supposedly contrary evidence to which Plaintiffs point is Gore's testimony that Neuman gave him the Neuman Letter, which Plaintiffs refer to in their motion as "the draft DOJ letter," Pls.' Mot. at 7—thus once more blurring the critical distinction between the separate Neuman and Gary Letters. But the record is clear that neither the Neuman Letter nor Neuman himself in any way played a role in Gore's drafting of the Gary Letter, just as Neuman testified.

d. Fourth, Plaintiffs quibble with Neuman's testimony about the "substance" of his conversations with Hofeller, his disclaimed reliance on Hofeller's "expertise," and his testimony that he does not know who authored the "first template" of the Neuman Letter, all because Hofeller

supposedly "drafted the excerpt concerning the VRA rationale … that was subsequently incorporated into the draft letter Neuman provided Mr. Gore." Pls.' Mot. at 8. Plaintiffs do not explain how any of that testimony is relevant here; whether or not Hofeller "helped ghostwrite" the Neuman Letter, *see id.*, Gore placed no reliance whatsoever on the Neuman Letter as source material for the Gary Letter. Defs. Ex. 6 ¶¶ 6-9. And as explained above, the Neuman letter bears no resemblance to the Gary Letter.

Moreover, if Plaintiffs did not receive the information they now claim was withheld, it was not for lack of opportunity. Neuman testified at length about Hofeller and their discussions regarding redistricting and the census. *See*, *e.g.*, Defs.' Ex. 4, Neuman Dep. at 33:2–10, 36:19–45:14, 51:7–53:3, 55:9–59:6, 64:18–67:14, 89:11–90:13, 100:18–101:7, 136:17–139:3, 143:13–144:6. Yet Plaintiffs never asked him whether Hofeller was involved in composing the Neuman Letter, despite Neuman's repeated references to Hofeller and an extended discussion of the draft. *See id.* (Hofeller discussions); *id.* at 278:23-280:24 (discussing the Neuman Letter). Indeed, Neuman was discussing the Neuman Letter's authorship when Plaintiffs' counsel cut him off: "I don't—I don't want—I don't—I'm not asking you to tell me about who the original author was or anything." *Id.* at 281:23–25. It is remarkable for Plaintiffs now to complain that Neuman did not reveal something that during the deposition they instructed him not to tell them, much less blame him for failing to answer questions they did not ask.

e. Fifth, Plaintiffs try to make something suspicious out of alleged testimony by Neuman that "Hofeller told him that adding the citizenship question would 'maximize[ ]' representation for the 'Latino community,'" even though "Hofeller had concluded the opposite in his 2015 study." Pls.' Mot. at 8 (quoting Pls.' Ex. 6). That, too, is a makeweight argument based on purported testimony having no discernible bearing on this case. Again, Gore neither relied on Hofeller's unpublished 2015 study nor was even aware of it when drafting the Gary Letter. Defs.' Ex. 6, Gore Decl. ¶¶ 4-5. Moreover, Plaintiffs have mischaracterized the testimony. Neuman did not testify that Hofeller had told him that reinstating a citizenship question would maximize Latino representation. Rather,

Neuman made clear that "maximizing" representation for the "Latino community" was *his* goal, not anything he gleaned from Hofeller. *See* Defs.' Ex. 4, Neuman Dep. at 142:3–23 ("My point about maximization is my word. I want Latino representation to be maximized.").

2. Plaintiffs' claims that Neuman withheld evidence are unsupported.

Plaintiffs also accuse Neuman of "with[o]ld[ing] critical evidence" prior to his deposition, specifically, "documents reflecting his communications with Dr. Hofeller, Gore, [and] Commerce Department employees." Pls.' Mot. at 8. Defendants have no firsthand knowledge with which to assess the completeness of Neuman's response to Plaintiffs' subpoena, particularly insofar as his communications with Hofeller, if any, are concerned. Neuman's private counsel collected Neuman's documents, reviewed them for responsiveness, and determined the scope of production. *See* Pls.' Ex. 22 (correspondence from Neuman's attorney asserting objections to Plaintiffs' document requests). Accordingly, even if there were evidence that Neuman's production was incomplete, that would not provide a basis for sanctions against Defendants.

That said, two things are clear from the record. *First*, Plaintiffs do not and cannot point to evidence that Neuman withheld communications he had with Gore, because following their one-time meeting in October 2017, they had none. Defs.' Ex. 6 ¶ 6. *Second*, although Neuman "recall[ed] that others at the Department of Commerce were reviewing and offering thoughts on draft versions of" the Neuman Letter, *see* Defs.' Ex. 4, Neuman Dep. 283:12-284:10,[11] Plaintiffs never asked him if he ever received, or still had possession of, those drafts. And Defendants previously conducted hard-copy and electronic searches broadly formulated to capture records concerning the citizenship question. *See generally* Defs.' Ex. 12. They located none.

[11] Neuman did not testify, however, that "he *worked with* Messrs. Davidson, Comstock, Uthmeier and others at the Commerce Department on versions of the draft DOJ letter." Pls.' Mot at 8 (emphasis added).

In an abundance of caution, for purposes of responding to Plaintiffs' motion, Defendants now have conducted additional searches targeted at discovering communications of this nature. Defs.' Exs. 13-15. The searches turned up nothing. *Id.* Consistent with those search results, Uthmeier, the Commerce Department attorney who was tasked with evaluating the possible reinstatement of a citizenship question on the census, never received a draft letter from Neuman requesting reinstatement of a citizenship question, nor language for inclusion in such a letter. Defs.' Ex. 11 ¶ 6. Nor to the best of his knowledge did anyone else with whom he worked on matters involving the census and the citizenship question, including Davidson and Comstock. *Id.* ¶ 8; Defs.' Ex. 26 ¶¶ 5-6; Defs.' Ex. 27 ¶ 3. There is simply no evidence in the record of communications, much less critical communications, that Neuman improperly withheld.

Not satisfied with their baseless accusations that Neuman suppressed evidence, Plaintiffs insinuate that Defendants themselves did so, remarking that Neuman's "failure to produce" documents reflecting communications with Hofeller, Gore, or Commerce Department employees "happened only after Defendants interceded in Mr. Neuman's document production." Pls.' Mot. at 8. But as Defendants have previously explained, they simply reviewed Neuman's intended document production, after his counsel had assembled it, to determine whether any governmental privileges were implicated. *See* ECF No. 604-1, Ex. 2-E (identifying seven privileged documents, six of which appeared on prior privilege logs). They did not remove, nor ask Neuman's counsel to remove, any documents from this production except the seven privileged documents that were appropriately identified and logged. Plaintiffs provide no evidence to support their insinuations to the contrary.

3. Defendants neither made, nor acquiesced in, misrepresentations concerning Neuman's involvement with the Gary Letter.

Plaintiffs further accuse Defendants of misrepresenting matters when they "denied that 'Mr. Neuman provided any particularly significant consultations on the citizenship question.'" Pls.' Mot. at 9 (quoting Defendants' letter brief opposing leave to depose Neuman, ECF No. 346, at 2); *see also*

id. at 21-22. Plaintiffs, however, quote only a portion of the statement with which they take issue. In support of the position that Neuman should not be deposed in this action, Defendants' letter-brief stated, in full, that Neuman did not provide "any particularly significant consultations on the citizenship question issue *during his conversations with Commerce officials in 2017*." ECF No. 346 at 2 (emphasis added). And Defendants provided a full account of Neuman's role, including his March 22, 2018, meeting with the Secretary, the PowerPoint presentation Neuman gave to the Secretary, and Neuman's communications with Commerce Department attorney Uthmeier. *See id.* at 2–3. Moreover, Defendants previously had produced documentation of each event. *See* Defs.' Ex. 22, AR 8371 (meeting memo); Defs.' Ex. 23, AR 10237 (presentation); Defs.' Ex. 24, AR 11329 (email to Uthmeier). Defendants' letter-brief therefore accurately characterized the record evidence in support of their argument. *See* ECF No. 346 at 1–2.

If Plaintiffs mean instead to suggest that Defendants misrepresented "significant consultations on the citizenship question" that Neuman allegedly had *with Gore* their claim is doubly wrong. First, Gore is not a "Commerce official," and so Defendants' representation is accurate. Second, as discussed above, the record is clear that Gore's one meeting with Neuman had no significant impact (indeed, any impact) on the drafting of the Gary Letter. At all events, Defendants *lost* the dispute at issue in that letter brief, so Plaintiffs could not have suffered any prejudice from representations made in that brief; Neuman was deposed, and Plaintiffs had a full opportunity to ask him about all of those (and any other) communications or "consultations" he might have had with the Commerce Department.

Plaintiffs' related suggestion that Uthmeier, failed to correct allegedly false testimony given by Neuman at his deposition, *see* Pls.' Mot at 9 & n.4, fares no better. This claim rests on the premise that Neuman testified falsely by failing to identify the Neuman Letter as a document that he had provided to Gore. *Id.* As discussed, Neuman did not inform Plaintiffs that he had provided the Neuman Letter to Gore because they did not ask him that question. Defendants' counsel had no

obligation to make their opposing counsel aware of the gaps in their questioning of Neuman. Furthermore, at least prior to this litigation, Uthmeier never received or reviewed any documents purportedly drafted or handled by Neuman, Defs.' Ex. 11, Uthmeier Decl. ¶ 6, and so there is no reason to expect that he would know whether or not Neuman had given the Neuman Letter to Gore.

* * * * *

Finally, Plaintiffs insinuate that Defendants proffered an artificially tight timetable for printing census forms and "insisted on expedited proceedings" in this litigation solely "to get away with … pervasive misconduct," Pls.' Mot. at 3, but that is manifestly not the case. Defendants' consistent position throughout this litigation has been that "the government must finalize the decennial census questionnaire for printing by the end of June 2019," Pet. for Writ of Cert. Before J. (Cert. Pet.) at 13-14, *Dep't of Commerce v. New York* (No. 18-966), because "changes to the paper questionnaire after June of 2019 would impair the Census Bureau's ability to timely administer the 2020 census." Petr's Opp. to NYIC Resp'ts' Mot. for Remand (Remand Opp.) at 19, *Dep't of Commerce v. New York* (No. 18-966)) (brackets, citations, and ellipses omitted). As the attached Census Bureau declaration explains, "due to the printer's resource and timing constraints and the terms of the contract, the latest possible date to finalize the printed decennial questionnaire without … jeopardizing the operational feasibility of the census, was the end of June. That was true then, and remains true now." Defs.' Ex. 25, Declaration of Albert E. Fontenot, Jr. ¶ 12.

II. PLAINTIFFS' REQUEST FOR DISCOVERY SHOULD BE DENIED.

Although maintaining that Defendants' misconduct is already "apparent," Plaintiffs seek to take extraordinary post-judgment discovery for the stated purpose of "determin[ing] the scope of potentially sanctionable conduct and the identities of the culpable parties." Pls.' Mot. at 25. Plaintiffs have not provided any genuine reason to question Defendants' conduct or good faith. And even if they had, any such question is dispelled by the additional evidence that Defendants have now provided to the Court. Discovery is therefore unwarranted, particularly because the contemplated discovery is

not actually calibrated to determine the scope of sanctionable conduct or the identities of responsible parties. Rather, its evident purpose is to allow Plaintiffs to continue litigating their claim that the decision to place a citizenship question on the 2020 census was motivated by racial animus. But the Supreme Court has already ruled in their favor on their pretext claim, Plaintiffs have already been awarded a permanent injunction barring the inclusion of a citizenship question on the 2020 decennial census, and Defendants already have begun to print the decennial census forms without that question. Plaintiffs can obtain no further relief by continuing to litigate allegations underlying their Equal Protection claim. There is thus no basis for continued discovery in support of that claim.

A. The Discovery Plaintiffs Seek Is Neither Directed Toward Nor Justified by Their Allegations of Misconduct.

The 16 bulleted subjects of inquiry that Plaintiffs refer to as "[k]ey questions" for further discovery, *see* Pls.' Mot. at 25-27, reveal the true nature of the inquiry they seek. Nearly half (bullets 1-3, 5-8) concern whether anyone at the Departments of Commerce or Justice had copies of Hofeller's 2015 study, received other information from him, or were aware of its conclusion concerning the potential impact of a citizenship question on redistricting. None of that has anything to do with the truthfulness of the witnesses who testified in this proceeding or the completeness of the Administrative Record, but everything to do with Plaintiffs' continued pursuit of an Equal Protection claim mooted by their victory on their pretext theory.

Otherwise, Plaintiffs seek to restart the engines of discovery to pursue lines of inquiry that would serve no purpose. For example, another five of their "[k]ey questions" (bullets 9-13), *see* Pls.' Mot. at 25-27, pursue inquiries about the Neuman Letter to which we already have the answers. For instance, "Why weren't [other versions of the Neuman Letter] included in the Administrative Record or identified on a privilege log?" *Id.* at 26. Because, as discussed above, repeated searches for such documents have revealed that there are none. "Why didn't DOJ disclose on its privilege log that the draft DOJ letter came from Neuman?" Pls.' Mot. at 26. Because, as also discussed, the Neuman

Letter was neither a draft of the Gary Letter nor used in any way to prepare the Gary Letter. And why didn't Defendants identify Neuman, Hofeller, or Baker in their responses to Plaintiffs' Interrogatory No. 1? *See* Pls.' Mot. at 26 (bullet 15). Because, as addressed earlier, these individuals were not "senior Administration officials" or "other government officials" that Plaintiffs asked Defendants to identify.

The specific categories of discovery that Plaintiffs seek also make stark the reality that additional discovery would largely be pointless except to continue litigation over their moot Equal Protection claim. Plaintiffs seek, for example, to re-depose Neuman and Gore, and to depose Davidson and Uthmeier, to ascertain whether they were "conduit[s] of Hofeller's views to Gore's request or [Secretary] Ross's memo." Pls.' Mot. at 27-28.[12] They seek to conduct further third-party discovery against Dale Oldham (whom they describe as Hofeller's "associate") and another, unidentified person, to fish for "additional Hofeller communications" that they believe Hofeller may have exchanged with Neuman after October 2016. *Id.* at 27. Such requests are aimed solely at unearthing hoped-for evidence concerning Hofeller's "role," to support the theory of racial animus underlying their (mooted) Equal Protection claim.

Plaintiffs also seek documents "not produced in response to their earlier requests, in particular (i) Neuman's communications with "Davidson, Uthmeier, Jones, Gore, or other Administration personnel," (ii) "communications between [Mr.] Gore and Commerce or White House officials," and (iii) pertinent e-mails sent or received using personal accounts. Pls.' Mot. at. 27. But the testimonial

[12] Plaintiffs' request to depose Davidson and Uthmeier is particularly problematic, as both acted as counsel for Defendants in connection with the decision to reinstate the citizenship question as well as the litigation of this case. "[D]epositions of opposing counsel are disfavored," *United States v. Yonkers Bd. of Educ.*, 946 F.2d 180, 185 (2d Cir. 1991), and Plaintiffs have not made the requisite showing of need to depose either of these individuals, who, as the evidence shows, have no connection with Hofeller and his 2015 study, *see In re Subpoena Issued to Dennis Freidman*, 350 F.3d 65, 72 (2d Cir. 2003) (enumerating considerations as to whether an attorney should be deposed).

evidence and search results that Defendants have presented to the Court already reveal that there are no such additional communications to be produced. *See supra* at 11-18.

In addition, Plaintiffs seek to compel the production of a slew of documents and information that Defendants have withheld on grounds of privilege, which they sort into four major categories. Pls.' Mot. at 28. The first and fourth categories are expressly targeted at the process, in Plaintiffs' words, of "contriving" and "furthering" the "VRA 'distraction.'" *Id.* The third category similarly seeks numerous privileged communications to which Jones was a party, a request that Plaintiffs consider justified by her "long association" with Hofeller. *Id.* at 28 & Pls.' Ex. 47. The evident point of these requests, like others, is to cast about for evidence of a "role" that Plaintiffs surmise Hofeller must have played in the Secretary's decision-making process, which Plaintiffs consider evidence of discriminatory motive. But Plaintiffs' curiosity about that process is not a basis for further discovery, as they have already prevailed on their claim that the VRA-enforcement rationale for reinstating the citizenship question was a pretext. Finally, the second category of privileged materials seeks drafts of the Gary Letter, *id.*, but this Court already has reviewed certain of those drafts *in camera*, and upheld Defendants' assertion of privilege over these documents. *See* ECF No. 364. Plaintiffs offer no justification for revisiting that decision now. Although they claim that the drafts of the Gary Letter should be produced because Defendants have denied that Hofeller or Neuman contributed to the letter, Pls.' Mot. at 28, Gore has confirmed they did not so contribute, *see supra* at 9-10. Plaintiffs' unsubstantiated (and now disproven) suspicions to the contrary are not a basis for overturning Defendants' legitimate claim of privilege.

B. Plaintiffs' Claims of Wrongdoing Do Not Overcome Defendants' Privileges.

Plaintiffs maintain that they have "overcome" Defendants' assertions of privilege over the foregoing categories of documents, Pls.' Mot. at 29-31, but their arguments are meritless.

First, Plaintiffs argue that Defendants have put their deliberative process "directly at issue" by "falsely contending" that the "sole stated reason" for adding the citizenship question was to promote

VRA enforcement and by denying that Hofeller and Neuman played any role in the process. Pls.' Mot. at 29. But the relevant question is not whether the VRA-enforcement rationale was a pretext—that issue has been decided; and it cannot be said that Defendants engaged in "misconduct" simply because they defended a decision that a closely divided Supreme Court held was "pretextual." *U.S. Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2574-76 (2019). Rather, the question is whether Defendants have improperly concealed evidence of a "role" played by Hofeller or his 2015 study in the decision to reinstate a citizenship question. Plaintiffs have made no showing, nor could they, that Defendants have attempted to use the deliberative process privilege "as both a shield and a sword" on that issue. *Id.* (quoting *Allstate Ins. Co. v. Serio*, 2000 WL 554221, at *11 (S.D.N.Y. May 5, 2000)).

The same flaw underlies Plaintiffs' second argument, that the deliberative process privilege is inapplicable when "government misconduct has occurred." Pls.' Mot. at 29 (quoting *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997) (dicta)). The alleged misconduct Plaintiffs are supposedly seeking to prove now concerns Defendants' "process" of defending this case rather than the process by which the Commerce Department decided to reinstate a citizenship question. None of the documents over which Defendants have asserted the deliberative process privilege concerns the process by which Defendants reached litigation decisions in this case. Nor have Plaintiffs given "any reason to believe government misconduct [has] occurred" in that process. *In re Sealed Case*, 121 F.3d at 746.

Third, Plaintiffs assert that they need Defendants' fact work product because it "may demonstrate the extent to which senior officials at the Commerce and Justice Departments orchestrated or abetted the Commerce Department's perpetuation of a false rationale" for the citizenship question. Pls.' Mot. at 30. Such speculation does not constitute the "highly persuasive showing of need," *In re Gen. Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521, 532, n.6 (S.D.N.Y. 2015), required to overcome the work product protection, particularly where Plaintiffs no longer have any need of evidence to support their claim of pretext, and have made no showing (nor could they) that Defendants' work product contains evidence of sanctionable misconduct.

Finally, Plaintiffs mistakenly claim that Defendants' attorney-client privilege and work product assertions are overcome by the fraud exception. Pls.' Mot. at 30-31. To establish that materials are subject to the crime-fraud exception, Plaintiffs must establish on a document-by-document basis that: (1) "the client communication or attorney work product in question was *itself* in furtherance of the crime or fraud;" and (2) there is "probable cause to believe that the particular communication with counsel or attorney work product was *intended* in some way to facilitate or to conceal the criminal activity." *In re Richard Roe, Inc.*, 168 F.3d 69, 71 (2d Cir. 1999) (emphasis in original). Plaintiffs make no serious effort to carry this burden, however, beyond their blunderbuss argument that the relevant documents "were all in furtherance of a fraud—the 'contriv[ing] of the 'distraction' of the false VRA rationale." Pls.' Mot. at 30. That is insufficient. *See Conservation Force v. Jewell*, 66 F. Supp. 3d 46, 64 (D.D.C. 2014) (agency's refusal to disclose the alleged true reasons for its decision do not constitute a fraud that vitiates the privilege), *aff'd*, 2015 WL 9309920 (D.C. Cir. Dec. 4, 2015).

III. THE SANCTIONS PLAINTIFFS PROPOSE ARE UNWARRANTED

Like their discovery requests, Plaintiffs' desired "sanctions" betray their true interest in continuing to litigate their Equal Protection claim, rather than remedying alleged litigation misconduct.

A. First, Plaintiffs ask this Court to make "findings" to provide "a full accounting of what happened," Pls.' Mot. at 32, but never explain what remedial purpose this would serve. Regardless of any new "findings" by this Court, the Supreme Court has already held that Plaintiffs have established pretext, and they have obtained all the relief they were seeking in the form of a permanent injunction prohibiting inclusion of a citizenship question on the 2020 decennial census questionnaire. If Plaintiffs envision that this "full accounting" will result in findings by this Court that Government officials involved in the decision to reinstate a citizenship question were motivated by discriminatory animus (as their intended discovery plan suggests), those findings likewise would not change the fact that Plaintiffs have prevailed in this litigation and received all of the relief they sought. They would amount to no more than an advisory opinion. *In re Motors Liquidation Co.*, 829 F.3d 135, 167-68 (2d Cir. 2016)

(""The oldest and most consistent thread in the federal law of justiciability is that federal courts will not give advisory opinions.'")(citation omitted). Indeed, Plaintiffs have not identified a single case in which a federal court issued findings as a "sanction" in and of themselves rather than as the predicate to taking some other remedial or punitive action against an offending party.

B. Next, Plaintiffs indicate that they intend to seek "waiver of privilege" as a sanction, Pls.' Mot. at 32-33—a proposal even more novel than their request for "findings." Even setting aside that this argument lacks factual support, Plaintiffs are not seeking to overrule Defendants' claims of privilege as a means of achieving some other remedial objective. Rather, Plaintiffs seek the disclosure of these documents—and the exposure of Defendants' confidential attorney-client and internal deliberative communications—as an end in itself, to reveal additional evidence they believe will support a pretext claim on which they have already prevailed. In this respect, Plaintiffs' request for "waiver of privilege" is little different than their request for "findings," and no more justifiable.[13]

Finally, Plaintiffs indicate that they seek "monetary sanctions and awards of attorney's fees and costs." Pls.' Mot. at 33-34. There are at least three problems with this request. First, sovereign immunity bars awards of attorney's fees against the Government, unless authorized by an express Congressional waiver of sovereign immunity. *See, e.g.*, *United States v. Stein*, 435 F. Supp. 2d 330, 374-75 (S.D.N.Y. 2006) (absent an express legislative waiver, sovereign immunity barred exercise of court's supervisory powers to order Government to pay defendant's attorney's fees and costs as a sanction

[13] Plaintiffs cite to only two cases as purported support for a "waiver" sanction: *In re Fannie Mae Sec. Litig.*, 552 F.3d 814 (D.C. Cir. 2009), and *United States v. Phillip Morris Inc.*, 347 F.3d 951 (D.C. Cir. 2003). Neither of these cases support Plaintiffs' argument. In *In re Fannie Mae*, the D.C. Circuit affirmed the district court's sanction requiring a litigant that had not submitted a timely privilege log to produce certain documents withheld on the basis of privilege to opposing counsel, as a means of "mov[ing] the [d]iscovery process forward," while allowing for recovery of any documents found to be privileged. 552 F.3d at 823. *Phillip Morris* is even less apt. There, the issue was whether the defendant had waived the attorney-client privilege over a document it had failed to identify on a privilege log. 347 F.3d at 954. The D.C. Circuit remanded to allow the district court to determine whether any of defendant's scope objections covered the document; whether waiver was an appropriate sanction if not; and whether, if an objection did apply, it should be overruled and defendant should be given the opportunity to identify the document on a privilege log. *Id.* at 955.

for prosecutorial misconduct), *aff'd*, 541 F.3d 130 (2d Cir. 2008); *see also United States v. Droganes*, 728 F.3d 580, 590 (6th Cir. 2013); *United States v. Horn*, 29 F.3d 754, 764-67 (1st Cir. 1994); *United States v. Callanan*, 582 F. Supp. 2d 1125, 1139 (N.D. Iowa 2008); *Alexander v. FBI*, 541 F. Supp. 2d 274, 300-02 (D.D.C. 2008). Second, the NYIC Plaintiffs and Defendants have reached a settlement resolving "[Plaintiffs'] claims for any fees, cost, and expenses relating to this action," *see* ECF No. 647, thus bringing to a close the final remaining issue related to the merits of this case. Plaintiffs should not be awarded, as a sanction, a double recovery of fees and costs for the same work that is the subject of the parties' fees settlement. *See United States v. Gavilan Joint Community Coll. Dist.*, 849 F.2d 1246 (9th Cir. 1988) (holding, under Rule 11, that no attorney's fees should be awarded as a sanction because EAJA provided a mechanism through which the injured party could seek attorney's fees). Finally, for all the reasons explained herein, Plaintiffs have come nowhere close to making the clear showing of misconduct required to authorize an award of attorney's fees and costs.

CONCLUSION

Plaintiffs' motion for sanctions should be denied.

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Respectfully submitted,

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