18-2652

United States Court of Appeals for the Second Circuit

In Re: UNITED STATES DEPARTMENT OF COMMERCE, WILBUR L. ROSS, in his official capacity as Secretary of Commerce, UNITED STATES CENSUS BUREAU, an agency within the United States Department of Commerce, RON S. JARMIN, in his capacity as the Director of the U.S. Census Bureau.

UNITED STATES DEPARTMENT OF COMMERCE,

Petitioners,

v.

STATE OF NEW YORK,

Respondents.

(*caption continues inside front cover*)

On Petition for a Writ of Mandamus to the United States District Court for the Eastern District of New York

BRIEF AND ADDENDUM FOR GOVERNMENT RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS

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WILBUR L. ROSS, in his official capacity as Secretary of Commerce, UNITED STATES CENSUS BUREAU, an agency within the United States Department of Commerce, RON S. JARMIN, in his capacity as the Director of the U.S. Census Bureau,

Petitioners,

v.

STATE OF CONNECTICUT, STATE OF DELAWARE, DISTRICT OF COLUMBIA, STATE OF ILLINOIS, STATE OF IOWA, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF MINNESOTA, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF NORTH CAROLINA, STATE OF OREGON, COMMONWEALTH OF PENNSYLVANIA, STATE OF RHODE ISLAND, COMMONWEALTH OF VIRGINIA, STATE OF VERMONT, STATE OF WASHINGTON, CITY OF CHICAGO, ILLINOIS, CITY OF NEW YORK, CITY OF PHILADELPHIA, CITY OF PROVIDENCE, CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, UNITED STATES CONFERENCE OF MAYORS, CITY OF SEATTLE, WASHINGTON, CITY OF PITTSBURGH, COUNTY OF CAMERON, STATE OF COLORADO, CITY OF CENTRAL FALLS, CITY OF COLUMBUS, COUNTY OF EL PASO, COUNTY OF MONTEREY, COUNTY OF HIDALGO,

Respondents.

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PRELIMINARY STATEMENT

Defendants—the U.S. Department of Commerce (Commerce), Secretary of Commerce Wilbur Ross, Jr. (the Secretary), the Bureau of the Census (Bureau), and Ron Jarmin—filed this mandamus petition to halt discovery that has been ongoing for more than two months (and that will close in less than four weeks), and to prevent the deposition of a Department of Justice (DOJ) official who has unique knowledge about the administrative action challenged here. Because defendants fail to satisfy the stringent standards necessary for this Court to interfere with a district court's ongoing management of pretrial proceedings, this Court should deny mandamus relief.

Plaintiff States and localities brought one of the suits underlying this mandamus action to contest defendants' decision to modify the decennial census to include a question about citizenship status. This decision abruptly reversed defendants' decades-long policy against including such a question, which experts (including those currently in the Bureau) have overwhelmingly concluded will deter certain groups' responses to the census and therefore undermine the accuracy of the enumeration. As relevant here, plaintiffs alleged that defendants'

decision is arbitrary, capricious, and contrary to law, in violation of the Administrative Procedure Act (APA).

The United States District Court for the Southern District of New York (Furman, J.) ordered limited discovery on several grounds, including to complete the administrative record and to provide expert testimony. The court also ordered additional discovery due to defendants' bad faith, after several extraordinary events cast serious doubt on defendants' public justification for adding a citizenship question. Most prominently, the Secretary publicly reversed himself on the justification for this decision: first claiming that he was merely responding to a DOJ request for citizenship data to enforce the Voting Rights Act (VRA), but later admitting that he, not DOJ, had initiated the project to add a citizenship question many months before DOJ's request. Moreover, in pursuing this objective, the Secretary overrode the overwhelming opposition of the Bureau's expert staff, and abandoned the Bureau's procedures for altering the census.

The parties have conducted discovery for more than two months. Even though discovery is almost complete, defendants abruptly filed this petition seeking to halt all further discovery. Rather than identifying

specific objections to any remaining discovery, defendants principally attack the district court's threshold decision to order discovery at all.

The Court should deny the petition. The extraordinary relief of mandamus is inappropriate because defendants inexplicably delayed challenging the district court's original discovery order. Prematurely halting discovery now would prejudice plaintiffs and the court by forcing this case to proceed on defendants' selectively provided documents and witnesses rather than a complete record. These reasons are alone sufficient to deny mandamus relief.

In any event, defendants have not shown that the district court clearly abused its discretion in ordering discovery. Defendants do not challenge several of the independent bases on which the court ordered discovery—such as the need to complete the administrative record—and much of the remaining discovery fulfills these unchallenged orders. Moreover, ample evidence supports the court's finding of bad faith, including the Secretary's extraordinary reversal of his own version of the events that led to his decision to add the citizenship question.

Finally, the court did not clearly abuse its discretion in compelling the deposition of Acting Assistant Attorney General John Gore, of DOJ's

Civil Rights Division, who authored the DOJ request that the Secretary relied on his initial (untruthful) justification. Defendants delayed seeking this relief, and waived their argument that the case does not present "exceptional circumstances" warranting Gore's deposition. In any event, the "exceptional circumstances" standard is easily satisfied here because Gore was personally involved in the decision at issue, and the information he possesses cannot be obtained elsewhere.

This Court should deny mandamus relief.

STATEMENT OF THE CASE

A. Factual Background

1. The Constitution requires an "actual Enumeration" of the population once every ten years to count "the whole number of persons in each State." U.S. Const. art. I, § 2, cl. 3; *id.* amend. XIV, § 2. This enumeration indisputably must count all residents, regardless of citizenship status. *See Federation for Am. Immigration Reform v. Klutznick* ("*FAIR*"), 486 F. Supp. 564, 576 (D.D.C. 1980) (three-judge court).

The "decennial enumeration of the population is one of the most critical constitutional functions our Federal Government performs." Pub.

L. No. 105-119, § 209(a)(5), 111 Stat. 2440, 2481 (1997). The enumeration directly affects the apportionment of Representatives to Congress among the States, the allocation of electors to the Electoral College, the division of congressional electoral districts within each State, and the apportionment of state and local legislative seats. *See* U.S. Const. art. I, § 2, cl. 3; *Evenwel v. Abbott*, 136 S. Ct. 1120, 1127-29 (2016). (Second Am. Compl. ("Compl.") ¶¶ 152-56.[1]) The federal government also relies on the census's population count to distribute hundreds of billions of dollars of funding each year to States and localities, including for infrastructure projects, healthcare programs, and other critical services. (Compl. ¶¶ 139-150.)

Congress has assigned its constitutional duty to conduct the decennial enumeration to the Secretary of Commerce and Census Bureau. The Secretary's essential duty for the enumeration is to obtain a total-population count that is "as accurate as possible, consistent with the Constitution" and the law. Pub. L. 105-119, § 209(a)(6), 111 Stat. at 2481; *see Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996) (decisions

[1] The Second Amended Complaint appears at GRA 112-178.

must bear "a reasonable relationship to the accomplishment of an actual enumeration of the population").

The Bureau conducts the required decennial enumeration principally by sending a short questionnaire to every household in the country. (Compl. ¶ 33.) To ensure the accuracy of the total-population count, the Bureau uses detailed statutory, regulatory, and statistical standards to govern the development and testing of each census question. (*Id.* ¶¶ 56-69, 79.) For example, statistical standards require the Bureau to design questions to "achieve the highest rates of response" and "minimize respondent burden while maximizing data quality." *(Id.* ¶ 58.) And a rigorous, years-long testing process ensures that even minor changes to a census question will not undermine the accuracy of the enumeration. *(Id.* ¶¶ 60-62.)

2. The decennial census questionnaire sent to every household has not included any question related to citizenship status for more than sixty years. For nearly forty years, in both Republican and Democratic administrations, the Bureau has vigorously opposed adding any such question based on its concern that including a citizenship question would drive down response rates by certain groups, such as noncitizens and

immigrants, thereby undermining the accuracy of the person-by-person headcount.[2] *See New York v. Department of Commerce*, 315 F. Supp. 3d 766, 782-85 (S.D.N.Y. 2018). (Compl. ¶¶ 39-55, 84-91.)

For example, the Bureau has represented that questions "to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count" because such questions "are particularly sensitive in minority communities and would inevitably trigger hostility, resentment and refusal to cooperate." *FAIR*, 486 F. Supp. at 568. The Bureau repeatedly reaffirmed these warnings in congressional testimony, explaining that a census question about immigration status or citizenship "could seriously jeopardize the accuracy of the census."

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[2] Although the Bureau has requested citizenship information through other means aside from the decennial census questionnaire, its requests have gone only to a limited number of individuals. Until 2005, the Bureau requested such information through a "long-form" questionnaire, i.e., a list of questions sent to one of every six households. In 2005, the Bureau replaced the long-form questionnaire with the American Community Survey (ACS), which contains more than forty-five questions and is sent annually to one of every thirty-six households. The substantial differences between these more limited requests for information and the decennial census mean that testing used for the ACS or long-form questionnaire "cannot be directly applied to a decennial census environment." U.S. Census Bureau, Supporting Statement A, 2018 End-To-End Census Test – Peak Operations 22-23 (Jan. 23, 2018).

Census Equity Act: Hr'g Before the Subcomm. on Census & Population of the H. Comm. on Post Office & Civ. Serv., 101st Cong. 43-45 (1989). Bureau directors appointed by presidents of both political parties have agreed. (Compl. ¶¶ 43-47, 80.) Indeed, as recently as April 2018, during sworn congressional testimony, defendant Jarmin, the current Director of the Census Bureau, acknowledged that asking for citizenship status will have a deterrent effect on response rates that "would largely be felt in various sub-groups, in immigrant populations, [and] Hispanic populations." (*Id.* ¶ 80.)

3. In March 2018, Secretary Ross announced that he had decided to add a citizenship question to the 2020 census questionnaire sent to every household, in contravention of the Bureau's long-held view that such a question would undermine the accuracy of the enumeration. The Secretary issued this decision even though the Bureau did not conduct any research or testing on the effects that a citizenship question would have on the accuracy of the total-population count. (*Id.* ¶¶ 64-69.) And the Secretary added the citizenship question even though many experts, including the Bureau's Chief Scientist, had informed the Secretary that doing so would "harm the quality of the census count." (Gov't Resps.

Addendum (GRA) 25; GRA 37 ("inclusion of a citizenship question…is very likely to reduce the self-response rate"); GRA 95 (adding citizenship question is not a good idea).)

In a March 2018 memorandum announcing this decision, the Secretary claimed that he had "initiated" and "set out to take a hard look" at adding a citizenship question "[f]ollowing the receipt" of a DOJ letter, dated December 12, 2017, asserting that DOJ needed person-by-person citizenship data to enforce the VRA's prohibition against diluting the voting power of minority groups. (Add. 170, 179-181.) The Secretary reiterated in congressional testimony that DOJ had "initiated the request for inclusion of the citizenship question." *Hearing on Recent Trade Actions: Hr'g Before the H. Comm. on Ways & Means*, 115th Cong. p. 51 (Mar. 22, 2018), at 2018 WLNR 8951469.

The Secretary soon altered his version of events, however, making clear that his initial explanation of the reason for adding the citizenship question was false. Contrary to the Secretary's assertions in his March 2018 memorandum and congressional testimony, DOJ's letter *did not* initiate the Secretary's consideration of adding a citizenship question to the Census questionnaire. To the contrary, the Secretary began pushing

to add such a question many months before DOJ sent its letter; and it was the Secretary who actually approached DOJ about the issue first, not the other way around. (Add. 178.) As the Secretary admitted in a supplemental decision memorandum issued in June 2018, after this lawsuit had been filed, he began considering the citizenship question "[s]oon after [his] appointment as Secretary" in February 2017—almost a year before the DOJ letter. (Add. 178.) During this time, at the direction of then-White House Chief Strategist Stephen Bannon, the Secretary spoke with Kris Kobach, the Kansas Secretary of State, who urged the Secretary to add a citizenship question as an "essential" tool to resolve "the problem" of noncitizens being counted for purposes of congressional apportionment.[3] (GRA 1-3.) Kobach's email made no mention of the VRA.

After the Secretary decided to add a citizenship question to the 2020 census questionnaire, he sought to manufacture a rationale for that predetermined outcome—including by initiating contact with DOJ to

[3] There is no such problem. The Supreme Court expressly upheld the constitutional mandate to count all inhabitants, including noncitizens, for congressional apportionment in 1964, *see Wesberry v. Sanders*, 376 U.S. 1, 13 (1964), and unanimously reaffirmed the validity of that practice for state legislative redistricting in 2016, *see Evenwel*, 136 S. Ct. at 1128-29.

prompt that agency to request a citizenship question. As documents show, in May 2017, the Secretary told his staff member, Earl Comstock, that the Secretary was "mystified" as to why "nothing [has] been done in response to *my months old* request that we include the citizenship question." (GRA 4 (emphasis added).) Comstock replied that Commerce "will get that in place" and "will work with Justice to get them to request that citizenship be added" to the census questionnaire. (GRA 6.) Commerce officials then reached out to DOJ to craft a rationale for the Secretary's decision, without having even informed the Bureau about the citizenship-question issue. (GRA 96-99.)

In September 2017, Acting Assistant Attorney General John Gore became DOJ's point person to fulfill the Secretary's request for a rationale to justify his decision to include a citizenship question. The records already disclosed during discovery reveal the following communications: In September 2017, Gore personally contacted the Secretary's Chief of Staff, Wendy Teramoto, to discuss the citizenship question. (GRA 7-8.) Gore then put Teramoto in touch with Danielle Cutrona, an advisor to Attorney General Jeff Sessions. (GRA 9.) Cutrona then arranged a phone call between Attorney General Sessions and the

Secretary. (GRA 11, 13.) Cutrona also reassured the Secretary's Chief of Staff that, based on "what John told" her, DOJ "can do whatever you all need for us to do." (GRA 11.) Teramoto then contacted Gore again. (GRA 13.) And Gore then ghostwrote the DOJ letter, even though a different DOJ official signed the letter. (GRA 14-18; Add. 181.)

However, these records do not show what specifically was discussed between DOJ and Commerce leading up to DOJ's letter. The documents do not specify whether Gore conducted any analysis to support the claim that DOJ needs citizenship data for VRA purposes. The records also do not explain why Gore wrote the letter when (a) DOJ had previously declined to request citizenship data in its earlier requests for demographic information from the Bureau (GRA 100-110); and (b) adding a citizenship question would not provide DOJ with the accurate citizenship data they claimed to need (GRA 38 (citizenship question "would result in poorer citizenship data")).

B. This Lawsuit

1. Initial proceedings

Plaintiff States and local governments filed suit in April 2018, alleging that the Secretary's decision to add a citizenship question was arbitrary and capricious, in violation of the APA; contrary to law, in violation of the APA; and a violation of the Enumeration Clause. (Compl. ¶¶ 178-97.) In May 2018, defendants filed a motion to dismiss the complaint, which plaintiffs opposed.

In June 2018, defendants purported to file the complete administrative record of all materials considered by the Secretary in deciding to add the citizenship question. A few weeks later, on June 21, defendants supplemented the record to add the Secretary's supplemental decision memorandum, which admitted for the first time—and in conflict with his initial explanation—that he had pursued a citizenship question long before DOJ drafted or submitted its letter. (Add. 178.) The parties then filed letters to address the administrative record and discovery.

2. The district court's order allowing limited discovery on multiple grounds

After oral argument to address both the motion to dismiss and discovery, the district court authorized three categories of limited discovery. (Add. 80-81.)

First, the district court held that the administrative record was patently deficient and ordered defendants to complete the record during discovery. (Add. 82-85.) The court explained that defendants had failed to provide *any* documents predating DOJ's December 2017 letter—even though the Secretary had conceded that he began pursuing his objective of adding a citizenship question long before that date. (Add. 83.) The court also noted that "the current record expressly references documents that Secretary Ross claims to have considered but which are not themselves a part of the Administrative Record," including data and documents relied on by subordinates. (Add. 84.)

Second, the court authorized certain additional discovery based on the irregularity of the record produced by defendants and a strong showing of "bad faith or improper behavior." (Add. 85, 90-91.) The court identified several factors that, taken together, justified this additional discovery, including: (a) the Secretary's admission that he had already

been pursuing a citizenship question *before* DOJ submitted the December 2017 letter; (b) the Bureau's failure to conduct any of its normal testing procedures; (c) credible allegations that the Secretary had overruled the strong objections of the Bureau's professional staff, who warned that the question would "'harm the quality of the census count'"; and (d) plaintiffs' prima facie showing that the Secretary's stated rationale—to support DOJ's enforcement of the VRA—was pretextual. (Add. 85-86.)

The court strictly limited further discovery to that "necessary to effectuate the Court's" review." (Add. 88.) To that end, and mindful of "separation of powers principles" (Add. 88), the court authorized narrow discovery from Commerce and DOJ (Add. 89). The court prohibited any other discovery from third parties absent a request to the court, and limited all plaintiffs to ten fact-witness depositions. (Add. 89-90.) And the court allowed narrow expert discovery to aid the court in adjudicating complex issues. (Add. 90-91.)

The court also limited the duration of discovery, ordering that the parties complete all fact and expert discovery by October 12, and setting multiple intermediate deadlines to ensure that this deadline could be

met. (Add. 91-92.) As the court explained, "time is of the essence here given that the clock is running on census preparations." (Add. 80.)

3. The court's decision on the motion to dismiss

Shortly after issuing its discovery order, the court denied defendants' motion to dismiss in part and granted it in part. The court concluded that plaintiffs had plausibly alleged their standing, and that sufficient legal standards existed to review the Secretary's decision under the APA. (Add. 115-145.) The court thus authorized plaintiffs to move forward with their APA claims because defendants had not challenged the sufficiency of those allegations. (Add. 104.) The court dismissed plaintiffs' Enumeration Clause claim for failure to state a claim. (Add. 145-159.)

4. The current status of discovery

Defendants did not seek to certify an interlocutory appeal of the motion-to-dismiss order and did not immediately file a mandamus petition to challenge the discovery order. Rather, defendants elected to comply with these orders by producing documents from Commerce and DOJ. To date, defendants have supplemented their original record (which

consisted of only 190 documents totaling 1,320 pages) with more than 23,000 additional pages that have filled some of the gaps in their original record. Defendants also produced five witnesses from Commerce and the Bureau for depositions.

While substantial discovery has been completed, defendants have acknowledged collecting additional responsive documents that they have yet to disclose. Defendants have repeatedly represented that they are reviewing additional documents from Commerce and DOJ for further productions. (GRA 68-69.) And the parties have agreed to confer about plaintiffs' request for defendants to use appropriate search terms that will better locate all of the records relevant to the Secretary's decision. Status Report at 3 & Ex. 4, No. 18-cv-2921 (S.D.N.Y.), ECF# 318.

The district court has actively managed discovery, promptly resolving any disputes. And the court has both granted and denied various of plaintiffs' motions to compel. (Add. 3.) Order, No. 18-cv-2921 (S.D.N.Y. Aug. 14, 2018), ECF# 241; Order, No. 18-cv-2921 (S.D.N.Y. Sept. 6, 2018), ECF# 303 (denying motion to depose Kris Kobach)).

At least one discovery dispute remains pending before the district court. Plaintiffs recently moved to compel a deposition of Secretary Ross

(Pls. Letter Mot., ECF# 314)), and the district court has not yet resolved this dispute.

5. The court's order approving Gore's deposition

Among the witnesses that plaintiffs sought to depose was Acting Assistant Attorney General John Gore, who had written DOJ's December 2017 letter. Defendants initially committed to provide a date for Gore's deposition and failed to raise any objection to this deposition for more than three weeks. (GRA 39-55.) Defendants then suddenly refused to produce Gore, generically asserting that all of the information he possesses is "privileged or irrelevant." (GRA 50.) Defendants did not assert that Gore was a high-ranking official subject to any special protections against being deposed.

On August 17, 2018, the district court granted plaintiffs' motion to compel Gore's deposition. The court found that Gore had been centrally involved in the exchanges between Commerce and DOJ that led to the December 2017 DOJ letter that purportedly formed the principal basis for the Secretary's determination; as a result, Gore's testimony would bear directly on the reasonableness of the Secretary's decision. The court further determined that plaintiffs could not obtain the information

possessed by Gore from another source. The court found that sitting for a single deposition (on a single day) would not impose undue burdens on Gore or DOJ. Finally, the court declined to grant Gore a blanket exemption from being deposed based on generic privilege claims because it would protect any applicable privileges by addressing any objections to particular questions. (Add. 2-3.)

6. The court's denial of defendants' request for a stay of discovery

On August 31, defendants asked the district court for a complete stay of all discovery or a stay of Gore's deposition, pending the outcome of their mandamus petition. The district court declined to issue any stay.

First, the court concluded that the request to stay all further discovery was "frivolous" in light of defendants' inordinate delay in seeking such relief; the absence of any undue burdens on defendants; and defendants' failure to come "close to demonstrating a likelihood of success on the merits" of their mandamus petition in light of the ample evidence supporting the court's multiple grounds to order discovery. (Add. 186-189.)

Second, the district court declined to stay the Gore deposition. The court noted that defendants had again engaged in improper delay. (Add. 190.) The court also concluded that defendants would not suffer any irreparable burden from the deposition, particularly when the court had taken "steps to limit the scope of discovery and to protect any relevant privileges." (Add. 191.) Finally, the court concluded that defendants were unlikely to succeed in obtaining mandamus relief. (Add. 191-192.)

ARGUMENT

POINT I

DEFENDANTS DO NOT SATISFY THE STRINGENT STANDARDS TO OBTAIN THE EXTRAORDINARY RELIEF OF MANDAMUS TO HALT ALL FURTHER DISCOVERY

Mandamus is "a drastic and extraordinary remedy reserved for really extraordinary cases." *Balintulo v. Daimler AG*, 727 F.3d 174, 186 (2d Cir. 2013). To be entitled to such relief, defendants must show that (1) "the writ is appropriate under the circumstances"; (2) they have "no other adequate means to attain the relief" desired; and (3) the "right to issuance of the writ is clear and undisputable." *In re Roman Catholic Diocese of Albany, N.Y. Inc.*, 745 F.3d 30, 35 (2d Cir. 2014) (per curiam). Here, as the district court found in denying defendants' stay motion

below, defendants' request to halt "discovery altogether is frivolous," and this Court should deny it. (Add. 186.)

A. Halting All Further Discovery Is Inappropriate Given Defendants' Unexplained Delay in Seeking Relief and the Prejudice that Plaintiffs Would Suffer If Discovery Were Prematurely Terminated.

Defendants' mandamus petition argues that the district court clearly erred at the outset in ordering *any* discovery in this case, and seeks to halt further discovery based solely on that asserted threshold error. (Pet. 3.) But defendants' inexplicable delay in seeking to challenge the July 3 discovery order should preclude mandamus relief.

"[J]udicial discretion and equitable principles have traditionally governed petitions for mandamus relief." *Federal Ins. Co. v. United States*, 882 F.3d 348, 365 (2d Cir. 2018). Accordingly, delay in seeking mandamus weighs heavily against granting such extraordinary relief. *See id.*; *cf. Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) ("Significant delay in applying for injunctive relief…alone may justify denial of a preliminary injunction…"). Here, defendants failed to file this mandamus petition for more than *two months* after the district court's order, and the discovery contemplated by that order is scheduled to be

completed in less than four weeks. Defendants have already produced a substantial number of documents; five witnesses have been deposed; and the parties are in the middle of exchanging expert reports. Moreover, with the exception of the deposition of John Gore, defendants' mandamus petition fails to identify any specific concerns about the discovery that remains. In light of defendants' failure to seek relief from this Court promptly based on their threshold objections to discovery, the Court should deny mandamus as inappropriate under the circumstances. *See Cheney v. United States District Court*, 542 U.S. 367, 379 (2004); *Linde v. Arab Bank, PLC*, 706 F.3d 92, 119 (2d Cir. 2013).

Mandamus relief is also inappropriate because defendants' inexplicable delay would severely prejudice plaintiffs if this Court were to halt discovery now. For example, plaintiffs have already expended considerable resources to engage five expert witnesses and have already served those experts' reports. By the time the Court considers this petition, defendants should have disclosed their experts' reports. (Add. 91.) Halting discovery now would waste the public resources already expended on expert discovery and potentially deprive the district court of

the benefit of expert analysis that is "commonplace" in census disputes. (Add. 90 (citing *Cuomo v. Baldrige*, 674 F. Supp. 1089 (S.D.N.Y. 1987).)

Plaintiffs and the public would also be severely prejudiced if, as defendants request, the district court were required to adjudicate this dispute based on the incomplete record produced through discovery thus far. Prematurely terminating discovery would force the court and plaintiffs to proceed on defendants' selectively provided documents and witnesses, without the benefit of the complete administrative record that the district court's orderly discovery process is intended to uncover. *See* 5 U.S.C. § 706. This Court should not condone the use of the extraordinary relief of mandamus to allow defendants to leave the district court and plaintiffs in the dark about the full explanation behind the Secretary's decision to add a citizenship question.

B. The District Court's Active Management of Ongoing Discovery Weighs Against Mandamus Relief.

Defendants' sweeping request for mandamus relief to halt all further discovery is also improper when the district court remains available to adjudicate any specific objections defendants might have to providing particular documents or witnesses. *See Cheney*, 542 U.S. at 380

(mandamus improper when "other adequate means" of relief are available).

The district court's ongoing, active management of discovery weighs heavily against mandamus relief. The district court has promptly resolved discovery disputes, and defendants have not contended that it would be futile to allow the district court to resolve any future disputes. Yet defendants improperly ask this Court to prevent the district court from deciding the scope of further discovery—a decision that may narrow or obviate the mandamus relief that defendants seek.

Prematurely halting all discovery now would also prevent the parties from raising, and the district court from resolving, further discovery disputes that may raise issues distinct from those presented in defendants' petition. For example, plaintiffs recently moved to compel the deposition of Secretary Ross. That deposition, if authorized, will almost certainly raise distinct legal arguments not squarely presented by defendants' mandamus petition—a point that the district court recognized in its July 3 order by deferring any ruling on the Secretary's deposition. (Add. 89-90.) It would be inappropriate to terminate that additional discovery preemptively when the district court has not yet had

"the opportunity to consider" and resolve the parties' competing claims. *See In re Shalala*, 996 F.2d 962, 965 (8th Cir. 1993); *Abbey v. Sullivan*, 978 F.2d 37, 47 (2d Cir. 1992).

C. The District Court Did Not Clearly Abuse Its Discretion in Allowing Additional Discovery Here.

Defendants' mandamus petition should also be denied on the merits. Mandamus relief is available only if a movant proves that the district court's order "amount[ed] to a judicial usurpation of power or a clear abuse of discretion." *Range v. 480-486 Broadway, LLC*, 810 F.3d 108, 113 (2d Cir. 2015) (per curiam). Because defendants challenge a pretrial discovery order, they must satisfy an even higher bar: mandamus is available only where the "discovery question is of extraordinary significance or there is extreme need for reversal." *In re City of New York*, 607 F.3d 923, 939 (2d Cir. 2010) (quotation marks omitted). Defendants' petition does not present any such circumstances.

1. The district court acted well within its discretion in ordering discovery to aid in completing a patently deficient administrative record and to provide expert analysis.

In seeking to halt all discovery, defendants object only to the district court's finding of bad faith. But defendants ignore the district court's conclusion that discovery is separately warranted to (a) complete the patently deficient administrative record that defendants initially submitted and (b) provide expert testimony. Because these uncontested rulings authorize much of the remaining discovery, there is no "extreme need," *id.*, to overturn the July 3 order.

As this Court has recently confirmed, APA claims must be "judged against the record as a whole." *Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982); Order at 2, *In re Nielsen*, No. 17-3345 (2d Cir. Dec. 27, 2017), ECF# 171. When, as here, there is a strong suggestion that defendants failed to provide the whole record, a court must permit "'limited discovery to explore whether some portions of the full record were not supplied.'" Order at 2, *In re Nielsen* (quoting *Dopico*, 687 F.2d at 654).

The district court properly followed these established standards in ordering limited discovery to compile the "full administrative record that

was before the Secretary" when he decided to add the citizenship question. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). The record defendants initially provided was patently deficient because, among other failures, defendants did not provide any documents from before DOJ's December 2017 letter—even though the Secretary's decision-making process began many months before DOJ sent its letter. Based on these troubling deficiencies, the district court properly authorized discovery to ensure that defendants do not selectively omit parts of the record that are "unfavorable to [their] case." *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984).

The discovery materials that defendants have produced so far confirm the correctness of the district court's July 3 order. Defendants have produced many initially omitted documents containing critical information about the Secretary's decision. For example, newly provided documents appear to demonstrate that: (a) the idea to add a citizenship question originated in Commerce rather than DOJ; (b) the Secretary's decision-making process deviated significantly from standard procedures; (c) adding a citizenship question will harm the accuracy of the decennial enumeration; and (d) defendants' actual reason for adding

the citizenship question is to attempt to exclude noncitizens from the population counts used for apportionment and redistricting.

The district court's uncontested ruling to complete the administrative record precludes the sweeping mandamus relief that defendants seek because much of the outstanding discovery aims to ensure that defendants provide the whole record. For example, defendants have represented that they have compiled additional records from Commerce and DOJ for further productions. And the parties have agreed to confer about plaintiffs' request that defendants use more comprehensive search terms to better identify the full administrative record. Status Report, *supra*, at 3 & Ex. 4. Because defendants failed to raise any objection to this Court about completing the administrative record, there is no basis to excuse defendants from doing so.

Defendants' petition also fails to identify any specific objections to expert discovery. As the district court correctly noted, expert testimony is "commonplace" in census-related challenges to inform the court about the complex and technical issues raised in such cases. (Add. 90-91.) *See, e.g.*, *Baldrige*, 674 F. Supp. at 1093, 1097-1103. For example, plaintiffs' experts will discuss the standard procedures for altering statistical

instruments and the ways in which the Secretary deviated from those procedures here; the harms that a citizenship question will impose on plaintiffs; and the reasons that citizenship data are not necessary to enforce the VRA. Defendants have identified no basis to cut off this expert discovery.[4]

2. The district court acted well within its discretion in finding that the extraordinary facts of this case supported a finding of bad faith.

As defendants acknowledge (Pet. 17), well-settled precedent allows a district court to order discovery beyond that needed to complete the administrative record where "there has been a strong showing" of "bad faith or improper behavior" by agency decision-makers. *National Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997); *Overton Park*, 401 U.S. at 420. The district court did not clearly abuse its discretion in concluding that plaintiffs had provided the requisite strong showing of bad faith or improper behavior. (Add. 85-87.)

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[4] Defendants' objection to the finding of bad faith, even if sustained, would not be sufficient to halt expert discovery. The district court did not rely on its bad-faith finding in ordering expert discovery, although it noted that this finding provided additional grounds for such discovery. (Add. 90-91.)

Defendants assert that there is no indication of bad faith because agency decision-makers routinely "favor a particular outcome prior to full consideration of the issue" and "confer with other government officials" about supporting their "favored course of action." (Pet. 19.) It is far from clear that such a course of conduct is routine or even permissible. But the more fundamental error in defendants' argument is that it simply omits the most extraordinary fact about this case: namely, that the Secretary initially gave *a completely different version of events* to the public and to Congress before reversing course and adopting the explanation for his determination that he now tells to this Court.

As the district court explained, the Secretary initially stated that he began considering a citizenship question *after* receiving DOJ's December 2017 letter. In other words, the Secretary's initial explanation did not disclose that he "favor[ed] a particular outcome" or that he asked DOJ to support his "favored course of action." But as the Secretary's supplemental decision memorandum later revealed, his initial account of his determination was untrue. In fact, it was the Secretary, not DOJ, who initiated the decision-making process to add a citizenship question, well before December 2017; and it was the Secretary and his staff who then

worked with DOJ to obtain a letter that would make it appear—falsely—as though DOJ had independently initiated the request.

The Secretary's extraordinary reversal of his public explanation for deciding to add a citizenship question strongly supports the district court's finding of bad faith. The initially concealed revelation that the Secretary, not DOJ, initiated the decision-making process calls into serious question whether the Secretary's reliance on DOJ's December 2017 letter was pretextual—manufactured as a post hoc explanation for a decision that the Secretary had already made for other still-unacknowledged reasons.[5] *See Tummino v. von Eschenbach*, 427 F. Supp. 2d 212, 231-33 (E.D.N.Y. 2006) (officials "needed to find acceptable rationales"); *New York v. Salazar*, 701 F. Supp. 2d 224, 242 (N.D.N.Y. 2010) (agency took steps to conceal that official "prejudged and controlled" decision), *aff'd*, 2011 WL 1938232 (N.D.N.Y. 2011).

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[5] Discovery conducted so far has further undermined the genuineness of the Secretary's rationale. (GRA 22 (Director of Commerce's Policy Office testifying that he did not "need to know" the Secretary's rationale for wanting to add citizenship question because that rationale "may or may not" have a "legally-valid basis"); GRA 22 (his job was to "find a legal rationale").)

Even beyond this extraordinary reversal, the district court also identified additional factors that, "taken together" (Add. 188-189), provide further support for the court's finding of bad faith. *See Tummino*, 427 F. Supp. 2d at 230 (bad faith depends on "facts of a given case"). First, the Secretary decided to add a citizenship question without employing the rigorous process that the Bureau uses for even minor alterations of the decennial census—a drastic departure from the agency's well-established procedures. *See Tummino*, 427 F. Supp. 2d at 233; *Inforeliance Corp. v. United States*, 118 Fed. Cl. 744, 747-48 (2014).[6]

[6] Defendants assert (Pet. 19-20) that the Secretary's decision-making process adhered to normal procedures because the citizenship question underwent testing for inclusion on the ACS. But defendants do not dispute that the census questionnaire usually goes through its own distinct multiyear testing process—one that the citizenship question has not undergone. And because the ACS is different from the decennial census, the testing procedures used for the ACS are no substitute for the rigorous procedures used for the enumeration. Moreover, the Secretary's decision departed from established procedures in other significant ways. The Secretary and his subordinates worked with DOJ officials, including Gore, to manufacture a rationale for adding the citizenship question before officials at the Bureau were even informed of the Secretary's decision. And DOJ officials refused to meet with the Bureau's staff to discuss DOJ's request for citizenship data and whether such data is available through another source—even though the Bureau routinely conducts such meetings. (GRA 91-94.)

Second, the Secretary repudiated the Bureau's decades-long view that adding a citizenship question would harm the accuracy of the enumeration, and overruled or disregarded the strong objections of the Bureau's professional staff and other experts who concluded that adding a citizenship question would "harm the quality of the census count" (GRA 25). *See Tummino*, 427 F. Supp. 2d at 231-32; *Inforeliance*, 118 Fed. Cl. at 749.[7] Finally, the court noted that there were substantial reasons to question DOJ's rationale that the citizenship question was necessary to effectively enforce the VRA (Add. 86-87), since (a) neither DOJ nor civil-rights advocates had considered such data "helpful let alone necessary to litigating such claims" for the past fifty years (Add. 87); (b) as the Bureau's Chief Scientist has explained, adequate citizenship data already exists for purposes of VRA enforcement (GRA 25, 37-38; Compl.

[7] Defendants misplace their reliance (Pet. 19) on *Wisconsin v. City of New York*, in which the Court noted that the Secretary's disagreement with the Bureau Director about a statistical adjustment did not warrant overturning the Secretary's decision. 517 U.S. at 23-24. In *Wisconsin*, the Secretary made a reasonable choice "in an area where technical experts disagree," after those experts conducted considerable testing. *Id.* at 23. Here, by contrast, the technical experts agree that the citizenship question would harm the enumeration's accuracy. And the Secretary has acknowledged that "no empirical data" supports his contrary view. (Add. 172.)

¶ 98); and (c) deterring response rates by adding a citizenship question to the decennial census would render any resulting data less useful for DOJ's stated purpose (Compl. ¶ 101).

The district court did not clearly err in finding that these "several considerations…taken together" strongly indicated that the Secretary's decision was improperly predetermined or based on pretextual reasons, and warranted additional discovery to uncover the true basis for the Secretary's determination. (Add. 188.) This finding of bad faith refutes defendants' contention (Pet. 2, 17, 23) that completion of the official administrative record would be sufficient. Where, as here, defendants have acted in bad faith, extrarecord discovery is needed precisely because the official record is unlikely to contain important missing information, "such as evidence of bad faith, information relied upon but omitted from the paper record, or the content of conversations."[8] *Inforeliance*, 118 Fed. Cl. at 747; *see Salazar*, 701 F. Supp. 2d at 243.

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[8] In addition, remanding the matter to Commerce and DOJ for "additional investigation or explanation" (Pet. 2) would be less effective and more burdensome than requiring Gore's deposition. Despite two months of discovery, plaintiffs have been unable to obtain the information they need. And given that discovery is scheduled to close soon, a deposition—which allows for "immediate follow-up questions" and

Defendants are simply wrong to characterize this case as one where the Secretary engaged in ordinary consultation with officials in other agencies to evaluate whether a "favored course of action" would make sense. (Pet. 19.) Nothing about the process alleged in plaintiffs' complaint, found by the district court, and confirmed by discovery resembles such routine interagency consultation. Tellingly, defendants cite not a single example where a cabinet Secretary decided on his own to radically alter long-established agency policy, reached out to another agency to manufacture a post hoc rationale, disregarded the uniform opposition of his professional staff and outside experts, and then publicly misrepresented his decision-making process.

There is likewise no merit to defendants' assertion that the Secretary did not act in bad faith because he "ultimately believe[d] the rationale" on which he rested his decision (Pet. 3, 18) and because he had not "prejudged [the] issue" (Pet. 20). The factors identified by the district court suggest that the Secretary did *not* actually base his decision on the

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contemporaneous objections—is the quickest and most efficient way to fill in the gaps about Gore's involvement in the Secretary's decision. *Fish v. Kobach*, 320 F.R.D. 566, 579 (D. Kan. 2017) (written interrogatories are time-consuming and burdensome).

DOJ's purported need for citizenship data and did *not* ultimately believe this rationale. And there is a serious question about whether the Secretary prejudged the issue given that he reached out to DOJ *before* consulting with the Bureau's staff, and then disregarded the strong opposition to adding a citizenship question expressed by his own expert staff. At minimum, the deep uncertainty about when, how, and even whether the Secretary came to adopt his stated rationale supported the narrow additional discovery that the district court has been carefully managing for two months.

POINT II

DEFENDANTS DO NOT QUALIFY FOR MANDAMUS RELIEF TO QUASH THE DEPOSITION OF JOHN GORE

Defendants also seek mandamus relief to quash the deposition of John Gore. The Court should deny this aspect of the petition as well.

First, defendants improperly delayed seeking mandamus relief. Plaintiffs requested a date for Gore's deposition on July 12—days after the district court authorized discovery. (GRA 39.) Defendants raised no objection to the deposition—and indeed repeatedly represented that they would provide availability dates—until abruptly refusing on August 3 to

make Gore available. (GRA 41-55.) Although the district court granted plaintiffs' motion to compel Gore's deposition on August 17, defendants then waited nearly another three weeks, until September 7, to file their mandamus petition.

This unexplained delay warrants denial of mandamus relief. The district court ordered expedited discovery on an extremely short timeframe because of the Bureau's "need to prepare for the 2020 census." (Add. 189.) Defendants' delay in objecting to Gore's deposition and then seeking mandamus relief at the eleventh hour have disrupted the orderly discovery process and prejudiced plaintiffs' ability to finish discovery in the limited time remaining.

Second, defendants never raised below the objection to Gore's deposition that is the sole basis for their mandamus petition—namely, that this case does not present "exceptional circumstances" warranting Gore's deposition. (Pet. 22-23 (citing *Lederman v. New York City Dep't of Parks and Rec.*, 731 F.3d 199 (2d Cir. 2013).) Instead, defendants argued only that Gore's deposition testimony would be irrelevant or privileged under F.R.C.P. 45. (GRA 70-72.) Defendants never mentioned the "exceptional circumstances" test; never cited *Lederman*; and never

argued that Gore's status as a high-ranking official precluded his deposition. Mandamus is thus inappropriate because defendants never presented to the district court the only argument on which they now base their request for extraordinary relief. *See In re Catawba Indian Tribe of S.C.*, 973 F.2d 1133, 1135 (4th Cir. 1992). Put another way, defendants cannot demonstrate that the district court severely abused its discretion in failing to consider an argument that defendants never raised.

Third, even assuming that it is proper for defendants to raise the "exceptional circumstances" argument now, Gore's deposition easily satisfies that test. This case raises questions of exceptional importance affecting not only congressional and state apportionment but also billions of dollars in federal funding. And this case presents the truly extraordinary circumstance of an agency acting improperly or in bad faith in rendering a decision as important as adding the citizenship question, and then taking steps to conceal the truth about that decision. *See Salazar*, 701 F. Supp. 2d at 243 (deposition warranted based on bad faith); *Schaghticoke Tribal Nation v. Norton*, No. 06-cv-81, 2007 WL 867987, at *6-8 (D. Conn. Mar. 19, 2007) (same).

Moreover, Gore's deposition is specifically warranted because he has "unique first-hand knowledge," *Lederman*, 731 F.3d at 203, about one of the central issues in this case—namely, whether the Secretary's decision to add a citizenship question was based on a pretextual rationale or was otherwise arbitrary and capricious. For example, Gore will be able to testify about conversations between himself and the Secretary's Chief of Staff, in which they discussed Commerce's request for DOJ to become involved in the citizenship-question issue and DOJ's decision to "do whatever you all need for us to do." (GRA 11.) Because Gore was the author of the DOJ letter that the Secretary requested, his testimony will directly shed light on the Secretary's decision-making process.

Gore's testimony will also help the district court evaluate the legitimacy of DOJ's claim that it needs citizenship data to enforce the VRA. Defendants make the conclusory assertion that this rationale is reasonable (Pet. 24 n.7), but the lack of any support for this argument "underscore[s] the need to look beyond the Administrative Record" (Add. 87). Indeed, evidence obtained from discovery so far suggests that DOJ's rationale is unreasonable. For example, evidence shows that Gore bypassed DOJ's process for requesting information from the Bureau—a

process that had already resulted in DOJ requesting demographic information that did not include person-by-person citizenship data. And evidence shows that adding a citizenship question will not even provide DOJ with the accurate citizenship data it claims to seek.

The critical information that Gore possesses "cannot be obtained from another source." (Add. 192 (emphasis omitted).) Gore is the DOJ official who ghostwrote DOJ's letter—as defendants "have conspicuously not disputed." (*Id.*) Gore also personally engaged in multiple conversations about the citizenship question with the Secretary's Chief of Staff, but the record does not document the contents of those conversations. Indeed, during her deposition, the Chief of Staff could not recall the contents of these conversations or even having spoken to Gore. (GRA 74-89.) Plaintiffs have thus been unable to obtain the information they need about Gore's deep involvement in crafting the DOJ letter.

Defendants have also failed to establish that making Gore available for a single day of deposition testimony in Washington, D.C. would impose any undue burden on Gore or DOJ. Defendants have provided multiple dates on which Gore will be available, and the petition does not mention anything about Gore's schedule, workload, or responsibilities

that would preclude him from sitting for a deposition. Moreover, plaintiffs in all of the cases challenging the Secretary's decision have coordinated their efforts to ensure that "depositions of upper level officials…are definitely only going to happen once." (Add. 96.) Indeed, defendants have already made five "high-ranking Commerce and Census Bureau officials" available for depositions without any apparent overburden. (Add. 191.)

In light of these exceptional circumstances, the district court did not clearly abuse its discretion in ordering Gore's deposition.

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

Dated: New York, New York
September 17, 2018

Respectfully submitted,

BARBARA D. UNDERWOOD
Attorney General
State of New York

By: */s/ Judith N. Vale*
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Senior Assistant Solicitor General

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of Counsel

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 21 and 32 of the Federal Rules of Appellate Procedure, Oren L. Zeve, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this document, the document contains 7,775 words and complies with the typeface requirements and length limits of Rules 21 and 32(a)(5)-(6).

/s/ Oren L. Zeve

GOVERNMENT RESPONDENTS' ADDENDUM

To: hilary geary [redacted]
From: Alexander, Brooke (Federal)
Sent: Wed 4/5/2017 4:24:19 PM
Importance: Normal
Subject: tonight
Received: Wed 4/5/2017 4:24:00 PM

Mrs. Ross,

Do you have plans following the Newseum? I'm asking because Steve Bannon has asked that the Secretary talk to someone about the Census and around 7-7:30 pm is the available time. He could do it from the car on the way to a dinner ...

Brooke V Alexander

Executive Assistant to the Secretary

The U.S. Department of Commerce

Washington, D.C. 20230

balexander@doc.gov

202-482-[redacted] office

[redacted] cell

NOT RELEVANT

[redacted]

From: Kris Kobach [mailto[redacted]
Sent: Monday, July 24, 2017 2:43 PM
To: Teramoto, Wendy (Federal) <[redacted]
Cc: Alexander, Brooke (Federal) <[redacted]; Hernandez, Israel (Federal) <[redacted]
Subject: Re: Follow up on our phone call

Yes.

Sent from my iPhone

On Jul 24, 2017, at 1:39 PM, Teramoto, Wendy (Federal) <[redacted]> wrote:

Kris- can you do a call with the Secretary and Izzy tomorrow at 11 am? Thanks. Wendy

From: Kris Kobach [mailto:[redacted]
Sent: Monday, July 24, 2017 12:02 PM
To: Teramoto, Wendy (Federal) <[redacted]
Subject: Re: Follow up on our phone call

That works for me. What number should I call? Or would you like to call me?

On Mon, Jul 24, 2017 at 9:12 AM, Teramoto, Wendy (Federal) <[redacted]> wrote:

We can speak today at 230. Please let me know if that works. W

Sent from my iPhone

On Jul 21, 2017, at 4:34 PM, Kris Kobach <[redacted]> wrote:

Wendy,

Nice meeting you on the phone this afternoon. Below is the email that I sent to Secretary Ross. He and I had spoken briefly on the phone about this issue, at the direction of Steve Bannon, a few months earlier.

Let me know what time would work for you on Monday, if you would like to schedule a short call. The issue is pretty straightforward, and the text of the question to be added is in the email below.

Thanks.

Kris Kobach

[redacted]

---------- Forwarded message ----------
From: **Kris Kobach** <[redacted]>
Date: Fri, Jul 14, 2017 at 9:12 AM
Subject: Follow up on our phone call
To: [redacted]

Secretary Ross,

Kansas Secretary of State Kris Kobach here. I'm following up on our telephone discussion from a few months ago. As you may recall, we talked about the fact that the US census does not currently ask respondents their citizenship. This lack of information impairs the federal government's ability to do a number of things accurately. It also leads to the problem that aliens who do not actually "reside" in the United States are still counted for congressional apportionment purposes.

It is essential that one simple question be added to the upcoming 2020 census. That question already appears on the American Community Survey that is conducted by the Census Burear (question #8). A slight variation of that question needs to be added to the census. It should read as follows:

Is this person a citizen of the United States?

□Yes, born in the United States

□Yes, born in Puerto Rico, Guam, the U.S. Virgin Islands, or Northern Marianas

□Yes, born abroad of U.S. citizen parent or parents

□Yes, U.S. citizen by naturalization – Print year of naturalization _____

□No, not a U.S. citizen – this person is a lawful permanent resident (green card holder)

□No, not a U.S. citizen – this person citizen of another country who is not a green card holder (for example holds a temporary visa or falls into another category of non-citizens)

Please let me know if there is any assistance that I can provide to accomplish the addition of this question. You may reach me at this email address or on my cell phone at [redacted]

Yours,

000764

Kris Kobach

From: Wilbur Ross [redacted]
Sent: 5/2/2017 2:23:38 PM
To: Teramoto, Wendy (Federal) [redacted]
Subject: Re: Census

Let's try to stick him in there for a few days to fact find. W

Sent from my iPhone

On May 2, 2017, at 7:17 AM, Teramoto, Wendy (Federal) <[redacted]> wrote:
I continue to talk frequently with Marc Neumann and we often have dinner together. He will not leave les but is in love with the census and talks about it non stop. [redacted] Do you want me to set up another meeting? [redacted] Let me know if you want to have a drink or get together with him over the weekend.
Wendy

Sent from my iPhone

Begin forwarded message:
From: "Alexander, Brooke (Federal)" [redacted]
Date: May 2, 2017 at 7:10:21 AM PDT
To: "Teramoto, Wendy (Federal)" <[redacted]>
Subject: FW: Census

-----Original Message-----
From: Wilbur Ross [redacted]
Sent: Tuesday, May 02, 2017 10:04 AM
To: Comstock, Earl (Federal) <[redacted]>; Herbst, Ellen (Federal) <[redacted]>
Subject: Census

[redacted] Worst of all they emphasize that they have settled with congress on the questions to be asked. I am mystified why nothing have been done in response to my months old request that we include the citizenship question. Why not? [redacted]

From: Comstock, Earl (Federal) [redacted]
Sent: 5/2/2017 2:19:11 PM
To: Wilbur Ross [redacted]
CC: Herbst, Ellen (Federal) [redacted]
Subject: Re: Census

I agree Mr Secretary.

On the citizenship question we will get that in place. The broad topics were what were sent to Congress earlier this year as required. It is next March -- in 2018 -- when the final 2020 decennial Census questions are submitted to Congress. We need to work with Justice to get them to request that citizenship be added back as a census question, and we have the court cases to illustrate that DoJ has a legitimate need for the question to be included. I will arrange a meeting with DoJ staff this week to discuss.

Earl

Sent from my iPhone

> On May 2, 2017, at 10:04 AM, Wilbur Ross [redacted] wrote:
>
[redacted] Worst of all they emphasize that they have settled with congress on the questions to be asked. I am mystified why nothing have been done in response to my months old request that we include the citizenship question. Why not? [redacted]

> Sent from my iPhone

From: Gore, John (CRT) [redacted]
Sent: 9/13/2017 9:07:23 PM
To: Leach, Macie (Federal) [redacted]
Subject: RE: Call

Works for me. Will you send an invite? Thanks.

John M. Gore

Acting Assistant Attorney General

Civil Rights Division

U.S. Department of Justice

[redacted]

From: Leach, Macie (Federal) [redacted]
Sent: Wednesday, September 13, 2017 5:03 PM
To: Gore, John (CRT) [redacted]
Subject: RE: Call

John,

I'd be happy to find a time for you to speak with Wendy. How about Friday at 1pm?

Thanks,

Macie

Macie Leach

Policy Assistant, Office of the Secretary

U.S. Department of Commerce

Direct: (202)482-[redacted]

[redacted]

From: Teramoto, Wendy (Federal)
Sent: Wednesday, September 13, 2017 4:57 PM
To: Gore, John (CRT) [redacted]

Cc: Leach, Macie (Federal) [redacted]
Subject: Re: Call

Yes. CC'ing macie to set up. Look forward to connecting. W

Sent from my iPhone

On Sep 13, 2017, at 4:44 PM, Gore, John (CRT) <[redacted] wrote:

Wendy:

My name is John Gore, and I am an acting assistant attorney general in the Department of Justice. I would like to talk to you about a DOJ-DOC issue. Do you have any time on your schedule tomorrow (Thursday) or Friday for a call?

Thanks.

John M. Gore
Acting Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
[redacted]
[redacted]

From: Cutrona, Danielle (OAG) [redacted]
Sent: 9/16/2017 7:57:28 PM
To: Gore, John (CRT) [redacted]
CC: Teramoto, Wendy (Federal) [redacted]
Subject: Re: Call

Thanks John.

Hi Wendy,
Happy to talk any time, though I will be out of pocket this evening.
Thanks,
Danielle

Sent from my iPhone

On Sep 16, 2017, at 3:53 PM, Gore, John (CRT) <[redacted]> wrote:
Wendy:

By this email, I introduce you to Danielle Cutrona from DOJ. Danielle is the person to connect with about the issue we discussed earlier this afternoon.

Danielle:

Wendy's cell phone number is [redacted]

Thanks.

Sent from my iPhone

On Sep 13, 2017, at 4:57 PM, Teramoto, Wendy (Federal) <[redacted]> wrote:
Yes. CC'ing macie to set up. Look forward to connecting. W

Sent from my iPhone

On Sep 13, 2017, at 4:44 PM, Gore, John (CRT) [redacted] wrote:
Wendy:

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Thanks.

John M. Gore
Acting Assistant Attorney General
Civil Rights Division

U.S. Department of Justice
[redacted]

From: Cutrona, Danielle (OAG) [redacted]
Sent: 9/17/2017 4:08:19 PM
To: Teramoto, Wendy (Federal) [redacted]
Subject: Re: Call

Wendy,
The Attorney General is available on his cell. His number is [redacted]. He is in Seattle so he is 3 hours behind us. From what John told me, it sounds like we can do whatever you all need us to do and the delay was due to a miscommunication. The AG is eager to assist. Please let me know if you need anything else. You can reach me at [redacted]
Thanks,
Danielle
Sent from my iPhone

On Sep 17, 2017, at 10:08 AM, Cutrona, Danielle (OAG) [redacted] wrote:
Checking now. Will let you know as soon as I hear from him.

Sent from my iPhone

On Sep 16, 2017, at 6:29 PM, Teramoto, Wendy (Federal) [redacted] wrote:
Thanks. Danielle-pls let me know when the AG is available to speak to Secretary Ross. Thanks. Anytime on the weekend is fine too. W

Sent from my iPhone

On Sep 16, 2017, at 3:55 PM, Gore, John (CRT) [redacted] wrote:
Wendy:

By this email, I introduce you to Danielle Cutrona from DOJ. Danielle is the person to connect with about the issue we discussed earlier this afternoon.

Danielle:

Wendy's cell phone number is [redacted]

Thanks.

Sent from my iPhone

On Sep 13, 2017, at 4:57 PM, Teramoto, Wendy (Federal) [redacted] wrote:
Yes. CC'ing macie to set up. Look forward to connecting. W

Sent from my iPhone

On Sep 13, 2017, at 4:44 PM, Gore, John (CRT) [redacted] wrote:

Wendy:

My name is John Gore, and I am an acting assistant attorney general in the Department of Justice. I would like to talk to you about a DOJ-DOC issue. Do you have any time on your schedule tomorrow (Thursday) or Friday for a call?

Thanks.

John M. Gore
Acting Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
[redacted]

From: [redacted]@doc.gov [redacted]
Sent: 9/18/2017 3:10:02 PM
To: Gore, John (CRT) [redacted]
Subject: Re: Call

Hi. AG and Sec spoke. Pls let me know when you have a minute.

Sent from my iPhone

On Sep 16, 2017, at 3:55 PM, Gore, John (CRT) <[redacted] wrote:
Wendy:

By this email, I introduce you to Danielle Cutrona from DOJ. Danielle is the person to connect with about the issue we discussed earlier this afternoon.

Danielle:

Wendy's cell phone number is [redacted]

Thanks.

Sent from my iPhone

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Sent from my iPhone

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Wendy:

My name is John Gore, and I am an acting assistant attorney general in the Department of Justice. I would like to talk to you about a DOJ-DOC issue. Do you have any time on your schedule tomorrow (Thursday) or Friday for a call?

Thanks.

John M. Gore
Acting Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
[redacted]

From: Gary, Arthur (JMD)
To: Posner, Morton J (JMD)
Subject: FW: Close Hold: Draft Letter
Date: Friday, November 03, 2017 5:17:00 PM
Attachments: Letter (rev).docx

Here ya go!

From: Gore, John (CRT)
Sent: Friday, November 03, 2017 5:11 PM
To: Gary, Arthur (JMD) <agary@jmd.usdoj.gov>
Subject: Close Hold: Draft Letter

Art:

The draft letter that we discussed earlier this week is attached. Let's touch base early next week once you've had a chance to review it.

Thanks, and have a great weekend.

John M. Gore
Acting Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
[redacted]
john.gore@usdoj.gov

From: Gary, Arthur (JMD)
To: Gore, John (CRT)
Subject: FW: U. S. Census Bureau Dr. Jarmin (Revised Dec. 12th).pdf
Date: Tuesday, December 12, 2017 1:44:00 PM
Attachments: U. S. Census Bureau Dr. Jarmin (Revised Dec. 12th).pdf

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John – this is going out in the mail this afternoon.

Art

From: Allen, Michelle M (JMD)
Sent: Tuesday, December 12, 2017 1:38 PM
To: Gary, Arthur (JMD) <agary@jmd.usdoj.gov>
Subject: U. S. Census Bureau Dr. Jarmin (Revised Dec. 12th).pdf

Art,

As Requested.

Michelle

U.S. Department of Justice

Justice Management Division

Office of General Counsel

Washington, D.C. 20530

DEC 12 2017

VIA CERTIFIED RETURN RECEIPT
7014 2120 0000 8064 4964

Dr. Ron Jarmin
Performing the Non-Exclusive Functions and Duties of the Director
U.S. Census Bureau
United States Department of Commerce
Washington, D.C. 20233-0001

Re: Request To Reinstate Citizenship Question On 2020 Census Questionnaire

Dear Dr. Jarmin:

The Department of Justice is committed to robust and evenhanded enforcement of the Nation's civil rights laws and to free and fair elections for all Americans. In furtherance of that commitment, I write on behalf of the Department to formally request that the Census Bureau reinstate on the 2020 Census questionnaire a question regarding citizenship, formerly included in the so-called "long form" census. This data is critical to the Department's enforcement of Section 2 of the Voting Rights Act and its important protections against racial discrimination in voting. To fully enforce those requirements, the Department needs a reliable calculation of the citizen voting-age population in localities where voting rights violations are alleged or suspected. As demonstrated below, the decennial census questionnaire is the most appropriate vehicle for collecting that data, and reinstating a question on citizenship will best enable the Department to protect all American citizens' voting rights under Section 2.

The Supreme Court has held that Section 2 of the Voting Rights Act prohibits "vote dilution" by state and local jurisdictions engaged in redistricting, which can occur when a racial group is improperly deprived of a single-member district in which it could form a majority. See *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). Multiple federal courts of appeals have held that, where citizenship rates are at issue in a vote-dilution case, citizen voting-age population is the proper metric for determining whether a racial group could constitute a majority in a single-member district. See, e.g., *Reyes v. City of Farmers Branch*, 586 F.3d 1019, 1023–24 (5th Cir. 2009); *Barnett v. City of Chicago*, 141 F.3d 699, 704 (7th Cir. 1998); *Negrn v. City of Miami Beach*, 113 F.3d 1563, 1567-69 (11th Cir. 1997); *Romero v. City of Pomona*, 883 F.2d 1418, 1426 (9th Cir. 1989), *overruled in part on other grounds by Townsend v. Holman Consulting Corp.*, 914 F.2d 1136, 1141 (9th Cir. 1990); see also *LULAC v. Perry*, 548 U.S. 399, 423–442 (2006) (analyzing vote-dilution claim by reference to citizen voting-age population).

The purpose of Section 2's vote-dilution prohibition "is to facilitate participation … in our political process" by preventing unlawful dilution of the vote on the basis of race. *Campos v. City of Houston*, 113 F.3d 544, 548 (5th Cir. 1997). Importantly, "[t]he plain language of section 2 of the Voting Rights Act makes clear that its protections apply to United States citizens." *Id.* Indeed, courts have reasoned that "[t]he right to vote is one of the badges of citizenship" and that "[t]he dignity and very concept of citizenship are diluted if noncitizens are allowed to vote." *Barnett*, 141 F.3d at 704. Thus, it would be the wrong result for a legislature or a court to draw a single-member district in which a numerical racial minority group in a jurisdiction was a majority of the total voting-age population in that district but "continued to be defeated at the polls" because it was not a majority of the citizen voting-age population. *Campos*, 113 F.3d at 548.

These cases make clear that, in order to assess and enforce compliance with Section 2's protection against discrimination in voting, the Department needs to be able to obtain citizen voting-age population data for census blocks, block groups, counties, towns, and other locations where potential Section 2 violations are alleged or suspected. From 1970 to 2000, the Census Bureau included a citizenship question on the so-called "long form" questionnaire that it sent to approximately one in every six households during each decennial census. See, e.g., U.S. Census Bureau, *Summary File 3: 2000 Census of Population & Housing*—Appendix B at B-7 (July 2007), *available at* https://www.census.gov/prod/cen2000/doc/sf3.pdf (last visited Nov. 22, 2017); U.S. Census Bureau, Index of Questions, *available at* https://www.census.gov/history/www/through_the_decades/index_of_questions/ (last visited Nov. 22, 2017). For years, the Department used the data collected in response to that question in assessing compliance with Section 2 and in litigation to enforce Section 2's protections against racial discrimination in voting.

In the 2010 Census, however, no census questionnaire included a question regarding citizenship. Rather, following the 2000 Census, the Census Bureau discontinued the "long form" questionnaire and replaced it with the American Community Survey (ACS). The ACS is a sampling survey that is sent to only around one in every thirty-eight households each year and asks a variety of questions regarding demographic information, including citizenship. See U.S. Census Bureau, *American Community Survey Information Guide at* 6, *available at* https://www.census.gov/content/dam/Census/programs-surveys/acs/about/ACS Information Guide.pdf (last visited Nov. 22, 2017). The ACS is currently the Census Bureau's only survey that collects information regarding citizenship and estimates citizen voting-age population.

The 2010 redistricting cycle was the first cycle in which the ACS estimates provided the Census Bureau's only citizen voting-age population data. The Department and state and local jurisdictions therefore have used those ACS estimates for this redistricting cycle. The ACS, however, does not yield the ideal data for such purposes for several reasons:

- Jurisdictions conducting redistricting, and the Department in enforcing Section 2, already use the total population data from the census to determine compliance with the Constitution's one-person, one-vote requirement, see *Evenwel v. Abbott*, 136 S. Ct. 1120 (Apr. 4, 2016). As a result, using the ACS citizenship estimates means relying on two different data sets, the scope and level of detail of which vary quite significantly.

- Because the ACS estimates are rolling and aggregated into one-year, three-year, and five-year estimates, they do not align in time with the decennial census data. Citizenship data from the decennial census, by contrast, would align in time with the total and voting-age population data from the census that jurisdictions already use in redistricting.

- The ACS estimates are reported at a ninety percent confidence level, and the margin of error increases as the sample size—and, thus, the geographic area—decreases. See U.S. Census Bureau, *Glossary: Confidence interval (American Community Survey), available at* https://www.census.gov/glossary/#term_ConfidenceintervalAmericanCommunity Survey (last visited November 22, 2017). By contrast, decennial census data is a full count of the population.

- Census data is reported to the census block level, while the smallest unit reported in the ACS estimates is the census block group. See *American Community Survey Data* 3, 5, 10. Accordingly, redistricting jurisdictions and the Department are required to perform further estimates and to interject further uncertainty in order to approximate citizen voting-age population at the level of a census block, which is the fundamental building block of a redistricting plan. Having all of the relevant population and citizenship data available in one data set at the census block level would greatly assist the redistricting process.

For all of these reasons, the Department believes that decennial census questionnaire data regarding citizenship, if available, would be more appropriate for use in redistricting and in Section 2 litigation than the ACS citizenship estimates.

Accordingly, the Department formally requests that the Census Bureau reinstate into the 2020 Census a question regarding citizenship. We also request that the Census Bureau release this new data regarding citizenship at the same time as it releases the other redistricting data, by April 1 following the 2020 Census. At the same time, the Department requests that the Bureau also maintain the citizenship question on the ACS, since such question is necessary, *inter alia*, to yield information for the periodic determinations made by the Bureau under Section 203 of the Voting Rights Act, 52 U.S.C. § 10503.

Please let me know if you have any questions about this letter or wish to discuss this request. I can be reached at (202) 514-3452, or at Arthur.Gary@usdoj.gov.

Sincerely yours,

Arthur E. Gary

Arthur E. Gary
General Counsel
Justice Management Division

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

NEW YORK IMMIGRATION COALITION, ET AL.,

Plaintiffs,

vs. Case No. 1:18-CF-05025-JMF

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

Defendants.

Washington, D.C.

Thursday, August 30, 2018

Deposition of:

EARL COMSTOCK

called for oral examination by counsel for Plaintiffs, pursuant to notice, at the office of Arnold & Porter, 601 Massachusetts Avenue NW, Washington, D.C., before KAREN LYNN JORGENSON, RPR, CSR, CCR of Capital Reporting Company, beginning at 9:08 a.m., when were present on behalf of the respective parties:

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Q No one says the reason the Secretary wants to add a citizenship question is whatever the reason is, no one ever said anything like that?
A No.
MR. GARDNER: Objection to form.
THE WITNESS: Not to my recollection.
BY MR. GERSCH:
Q Okay. Did you ever have a discussion with people from the Office of General Counsel at Commerce about why the Secretary wanted to add a citizenship question?
A No.
Q And in your time there, did you never see a document analyzing why it was a good idea for Census to add a citizenship question?
A Again, you're -- we have a fundamental disagreement on the premises of your question. Your premise is that somehow a reason needs to be provided. The question before us is the Secretary has the legal authority to add questions to the census. Is there a governmental need? And if

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there is, then you're off to the races.
Q My question was a little different. My question was --
A I understand your question.
Q Sir, I'll repeat it for you.
My question is: In all the time you're there, did you never see a document spelling out the reasons why it would be a good idea to add a citizenship question? Why it would be good from Commerce's perspective?
MR. GARDNER: Objection. Form.
THE WITNESS: Again, that's not the question. Commerce --
BY MR. GERSCH:
Q Excuse me, sir. That is my question. Could you answer my question?
A Okay. No.
Q Not even a scrap of paper, right?
A Nope.
Q No memoranda, right?
A No.
Q No emails?

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A Not that I recall.
Q And I just want to be straight on my understanding. I think I got you correctly, but I just want to make sure and test that I'm right.
It couldn't possibly assist you in your work, in any way, to know why the Secretary wanted to add a citizenship question? Do I understand that correctly?
A It's not relevant to my analysis.
Q And so it couldn't possibly help you in any way in your work?
A I'm not going to agree with your statement that way, no.
Q Well, that's my question -- withdrawn.
Well, is there any way in which knowing what the Secretary's reason was for wanting to add a citizenship question, is there any way that could assist you in your work at Department of Commerce?
A Assist me on my work at the Department of Commerce, no.
Q Is there any way that it could help you

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help the Secretary add a citizenship question?
A If I had found it difficult or challenging, yes. Knowing more about why he wanted it would have been helpful, but I didn't say that there was an issue. It had been asked for hundreds of years, and it had been asked on the ACS. So, clearly, there's a need for it. And so, no, that was not a particularly troublesome aspect of the question I was being asked to look into.
Q When you said if I had found it difficult or challenging, what did you mean? What's the it?
A If -- if what I had been requested to do seemed to have significant legal obstacles to the ability to do that question or take that action, then I would probably inquire more fully to see if there's an alternative way to address what the Secretary is trying to get to. In this particular case, you have something that has been on the decennial census before that is currently being asked on the ACS. There's clear legal authority for him to add the question. So, frankly, the

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reasons that he wants to add it doesn't add anything to the analysis. There is a governmental need for this information. That's a question that's already established, so I don't need to inquire further as to what his personal beliefs regarding this question might be.

Q What's the governmental need for the question?

A Enforcement to the Voting Rights Act, determining how many undocumented citizens there are. You name it, there's a whole bunch of reasons. That's why every government in the world collects this information.

Q Well, correct me if I'm wrong, we're talking about at a period in the spring of 2017 when the Voting Rights Act hadn't come up, the Department of Justice hadn't made a request for it. What does the Voting Rights Act got to do with it in the spring of 2017?

A When you inquire as to what does the Department of Justice use the citizenship data on --

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Q That wasn't my question. My question is --

A I'm answering your --

Q -- why is it a good idea, why does the government need it back in the spring of 2017?

A Finished with your question?

Q That's my question.

A The answer is for the same reason they've been collecting it for the last 200-plus years.

Q What's the government need in the spring of 2017?

A I already answered that question. If they collect the data under the ACS for Voting Rights Act enforcement, that is one of the primary reasons they collect the data.

Q Okay. It's on the ACS. What's the need -- governmental need for it to be on the census?

MR. GARDNER: Objection. Asked and answered.

THE WITNESS: The governmental need is, again, if you're going to get more detailed

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information, then you need that information.

BY MR. GERSCH:

Q Who said in the spring of 2017 that the government needed more detailed information?

A Again, I'm presented with a request by the Secretary to say, can we add this question to the census? I inquire about that, and I looked at it. One of the reasons you would need it is voting rights. If you're going to do voting allocations on the basis of census allocations, that's the reason it's perfectly sufficient.

Q Who said that in the spring of 2017?

A That was -- that was determined after taking a quick look at the issue. I don't need more than that to continue to pursue the question.

Q Who told you that the government needed, in the spring of 2017, more detailed information about citizenship than was contained in the ACS?

A Nobody.

Q You came to that decision on your own; is that right?

A Correct.

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Q But you're not a voting rights lawyer, right?

A Irrelevant to the question.

Q That's not my question. You're not a voting rights lawyer, right?

A I've already said that.

Q So you decided on your own in the spring of 2017 that it would be a good idea for the government to have more information than was available from the ACS about citizenship to enforce the Voting Rights Act, even though you're not a voting rights lawyer?

A I don't agree with that characterization, at all. I decided that there was sufficient information for me to pursue the Secretary's request to consider placing a citizenship question on the decennial census and that there was sufficient potential reason to collect that information to warrant moving forward. If I'd come to an opposite conclusion that there was not sufficient potential reason or that there was some insurmountable legal bar, then I would have

reported back to the Secretary, I'm sorry, Mr. Secretary, it does not appear we can accomplish this objective.

Q Why did you need to come up with a reason for asking the question, separate and apart from whatever reason the Secretary had in his own head?

A Again, my job is to figure out how to carry out what my boss asks me to do. So you go forward and you find a legal rationale. Doesn't matter what his particular personal perspective is on it. It's not -- it's not going to be the basis on which a decision is made.

Q That's your understanding, that the way you should do it, is come up with a rationale that has nothing to do with what's in the Secretary's mind as to why he wants it; is that your understanding of how it's supposed to work?

A No. Again, you continue to characterize things in a way that you believe may be correct, but not the way I believe to be correct. My job, as a person who has been doing this for 30-plus years for clients and people in the government, is

if they would like to accomplish an objective, I see if there's a way to do that. And, again, if it's not legal, you tell them that. If it can't be done, you tell them that. If there's a way to do it, then you help them find the best rationale to do it. That's what a policy person does.

And so, again, if I came up with a rationale that the Secretary didn't agree with or didn't support, then he was going to tell me that. I have no doubt about that. But in the meantime, he doesn't -- I don't need to know what his rationale might be, because it may or may not be one that is -- that is something that's going to a legally-valid basis.

So, again, he's got -- he's asked, can we put -- can we put a question on? The job of a policy person is go out and find out how you do that. Whether that decision is going to be made ultimately to do it or not, that's up to the decision-maker.

Q Are you saying you're better off not knowing what the Secretary's own rationale is for

wanting the citizenship question?

A The Secretary, as you would point out, is not a voting rights lawyer, so I would not expect him to necessarily come up with a rationale. That's the job of the staff at work.

Q You certainly wouldn't expect the Secretary to have come up with the idea that the reason he should want the citizenship question is the Voting Rights Act; you wouldn't expect him to come up that on his own?

A I -- he might well. I don't know.

Q You have no reason to believe that he did, right?

MR. GARDNER: Objection. Calls for speculation.

THE WITNESS: I'm not going to speculate about what his rationale was. You'd have to --

BY MR. GERSCH:

Q Because --

A -- ask him.

Q -- because you have no idea what his rationale is?

A That's correct.

Q Counsel asked you about contact you made with the Department of Justice --

A Correct.

Q -- starting with a Ms. Haney [sic], I believe.

Do you recall that?

A Yes. I believe her name is Hankey, but --

Q Hankey. I apologize.

What was the full name? I can get it out if you don't know it offhand.

A Mary Blanche, but --

Q I'll find it in here.

A It's in one of these exhibits, the memo that I wrote. Here.

Q Mary Blanche --

A Yep.

Q -- Hankey; is that right?

A Yeah.

Q All right. So you went -- you called Mary Blanche Hankey --

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A Correct.
Q -- with regard to adding a citizenship question to the census, right?
A Correct.
Q And you wanted to see if the Department of Justice would sponsor the question?
A Correct.
Q And you had a phone call with her, and you had at least a meeting with her, right?
A Right.
Q So at least two contacts?
A Three, when she called me back with somebody else's name.
Q Fair enough.
Didn't -- didn't Ms. Hankey say, why do you want to have a citizenship question?
A No, she didn't.
Q Didn't come up, at all?
A Nope.
Q She referred you to a Mr. McHenry; is that right?
A Correct.

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Q And he's not a voting rights guy, right?
A I don't actually know what his background is.
Q Well, you went ahead, back and forth with him over about a month; is that right?
A I mean, we spoke on the phone probably three or four times, yeah.
Q Going from, I think, the period you mentioned was --
A Yeah. It was --
Q -- early May to early June, roughly?
A Approximately a month, yeah.
Q And didn't you learn in that time that he's not a voting rights guy?
A No.
Q Never came up?
A We didn't get into great detail on the rationale.
Q You did ask him would you sponsor a census question for -- I'm sorry. Withdrawn.
You did ask Mr. McHenry if he would be willing to sponsor a request for the addition of a

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citizenship question on the census, right?
A I didn't ask Mr. McHenry if he would. I asked if the Department of Justice would be inclined to send a letter asking us to add the citizenship question.
Q Fair enough.
And when you did that, you didn't explain to Mr. McHenry why the Secretary wanted a citizenship question?
A I would have no reason to.
Q And Mr. McHenry never asked, hey, you want me to do this? Why do you need it? He never asked you that?
A I think I explained at the outset that the department currently got a report from the ACS on citizenship level -- I mean, on census -- certain census size, Citizen Voting Age Population, and if they were to get it from the decennial, that would allow them a greater granularity and would that be useful to them, and he said he would inquire.
Q You asked Mr. McHenry if the

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Department of Justice would find it useful to have more granularity about citizenship?
A Correct.
Q But at no point did Mr. McHenry say, look, if we want it, we'll ask for it, but how come you want it? Didn't he ask you something like that?
A No.
Q When people call you and say, hey, will the Department of Commerce do this or do that, don't you say, why do you want that, why do you need that?
A I usually say is there a reason that you think the Department of Commerce would need that -- and if they have a reason, then I'll look into it. I don't say, hey, why does your boss want this? That's not part of lexicon.
Q No. No. If another agency calls and says --
A I don't --
Q Let me finish the question and you can answer any way you want.

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If another agency calls and says, will the Department of Commerce do such and such, whatever it is --
A Right.
Q -- don't you say to them in some form or another, why do you want this?
MR. GARDNER: Objection. Hypothetical.
BY MR. GERSCH:
Q Why does your agency need this?
MR. GARDNER: Objection. Hypothetical.
THE WITNESS: Again, I don't question why their boss might want it. I might say, what is it you think we can provide or why do you think the Department of Commerce is the right agency for this? But if they say we need this data because we're negotiating a trade agreement, whatever, that's fine. I don't question their basis.
BY MR. GERSCH:
Q Okay. But if I understood your last answer, you added something important, you said, if they call and say we need this for the trade ag- -- trade agreement, you say I don't question

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them. But if they don't give a reason, sir, don't you say to them, why do you want it?
MR. GARDNER: Objection. Calls for a hypothetical.
THE WITNESS: Again, I already provided the reason for Department of Justice. I said, would it be useful for you to have more granular voting data at the census lock level? He said he would inquire. That answers your question. I'd already provided the answer.
BY MR. GERSCH:
Q Mr. McHenry comes back at some point and he says he's not interested, right, in words or substance?
A He suggested that I contact the Department of Homeland Security.
Q But I take it he makes it clear to you in some fashion -- withdrawn.
Let's start with this. What did he say to you?
A He suggested I talk to the Department of Homeland Security.

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Q Did he also say, listen, I don't really need that information, or my guys don't need that information, or my department doesn't need that information or something like that?
MR. GARDNER: Objection to form.
THE WITNESS: Again, no, he did not indicate that they did not need the information. He simply suggested that they were rather busy and why don't I talk to the Department of Homeland Security.
BY MR. GERSCH:
Q It's your testimony that he said they were too busy to do it?
A Unfortunately, that's not an uncommon response from other agencies. They don't necessarily look for extra work.
Q Okay. So they were too busy to ask for it, that's what you understood them to say?
A Yeah. Their inclination was they weren't inclined to do the work, to ask for it, yeah.
Q Okay. Okay. So Mr. McHenry let's you know he's not inclined or the department is not

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inclined to do the work, to ask for it, and he refers you to Homeland Security, correct?
A Correct.
Q And you speak to a Mr. Hamilton, right?
A Right.
Q And Mr. Hamilton, he's not a VRA guy, right?
A I have no idea what his background is.
Q Certainly, it's your understanding that the Department of Homeland Security has nothing to do with enforcing the Voting Rights Act?
A It would not normally be something I would think they would do, no.
Q And you talked to Mr. Hamilton how many times?
A I don't know, three or four times.
Q Over what period?
A Again, two weeks. I don't know.
Q And don't you say to Mr. Hamilton, here's why we want the information, here's why we want you to ask for the citizenship question?
A Again, it was the same explanation as I

UNITED STATES DEPARTMENT OF COMMERCE
Economics and Statistics Administration
U.S. Census Bureau
Washington, DC 20233-0001

January 19, 2018

MEMORANDUM FOR: Wilbur L. Ross, Jr.
Secretary of Commerce

Through: Karen Dunn Kelley
Performing the Non-Exclusive Functions and Duties of the Deputy Secretary

Ron S. Jarmin
Performing the Non-Exclusive Functions and Duties of the Director

Enrique Lamas
Performing the Non-Exclusive Functions and Duties of the Deputy Director

From: John M. Abowd
Chief Scientist and Associate Director for Research and Methodology

Subject: Technical Review of the Department of Justice Request to Add Citizenship Question to the 2020 Census

The Department of Justice has requested block-level citizen voting-age population estimates by OMB-approved race and ethnicity categories from the 2020 Census of Population and Housing. These estimates are currently provided in two related data products: the PL94-171 redistricting data, produced by April 1st of the year following a decennial census under the authority of 13 U.S.C. Section 141, and the Citizen Voting Age Population by Race and Ethnicity (CVAP) tables produced every February from the most recent five-year American Community Survey data. The PL94-171 data are released at the census block level. The CVAP data are released at the census block group level.

We consider three alternatives in response to the request: (A) no change in data collection, (B) adding a citizenship question to the 2020 Census, and (C) obtaining citizenship status from administrative records for the whole 2020 Census population.

We recommend either Alternative A or C. Alternative C best meets DoJ's stated uses, is comparatively far less costly than Alternative B, does not increase response burden, and does not harm the quality of the census count. Alternative A is not very costly and also does not harm the quality of the census count. Alternative B better addresses DoJ's stated uses than Alternative A. However, Alternative B is very costly, harms the quality of the census count, and would use substantially less accurate citizenship status data than are available from administrative sources.

Summary of Alternatives			
	Alternative A	***Alternative B***	***Alternative C***
Description	No change in data collection	Add citizenship question to the 2020 Census (i.e., the DoJ request), all 2020 Census microdata remain within the Census Bureau	Leave 2020 Census questionnaire as designed and add citizenship from administrative records, all 2020 Census microdata and any linked citizenship data remain within the Census Bureau
Impact on 2020 Census	None	Major potential quality and cost disruptions	None
Quality of Citizen Voting-Age Population Data	Status quo	Block-level data improved, but with serious quality issues remaining	Best option for block-level citizenship data, quality much improved
Other Advantages	Lowest cost alternative	Direct measure of self-reported citizenship for the whole population	Administrative citizenship records more accurate than self-reports, incremental cost is very likely to be less than $2M, USCIS data would permit record linkage for many more legal resident noncitizens
Shortcomings	Citizen voting-age population data remain the same or are improved by using small-area modeling methods	Citizenship status is misreported at a very high rate for noncitizens, citizenship status is missing at a high rate for citizens and noncitizens due to reduced self-response and increased item nonresponse, nonresponse followup costs increase by at least $27.5M, erroneous enumerations increase, whole-person census imputations increase	Citizenship variable integrated into 2020 Census microdata outside the production system, Memorandum of Understanding with United States Citizen and Immigration Services required to acquire most up-to-date naturalization data

Approved: _____ Date: _____

John M. Abowd, Chief Scientist
and Associate Director for Research and Methodology

Detailed Analysis of Alternatives

The statistics in this memorandum have been released by the Census Bureau Disclosure Review Board with approval number CBDRB-2018-CDAR-014.

Alternative A: Make no changes

Under this alternative, we would not change the current 2020 Census questionnaire nor the planned publications from the 2020 Census and the American Community Survey (ACS). Under this alternative, the PL94-171 redistricting data and the citizen voting-age population (CVAP) data would be released on the current schedule and with the current specifications. The redistricting and CVAP data are used by the Department of Justice to enforce the Voting Rights Act. They are also used by state redistricting offices to draw congressional and legislative districts that conform to constitutional equal-population and Voting Rights Act nondiscrimination requirements. Because the block-group-level CVAP tables have associated margins of error, their use in combination with the much more precise block-level census counts in the redistricting data requires sophisticated modeling. For these purposes, most analysts and the DoJ use statistical modeling methods to produce the block-level eligible voter data that become one of the inputs to their processes.

If the DoJ requests the assistance of Census Bureau statistical experts in developing model-based statistical methods to better facilitate the DoJ's uses of these data in performing its Voting Rights Act duties, a small team of Census Bureau experts similar in size and capabilities to the teams used to provide the Voting Rights Act Section 203 language determinations would be deployed.

We estimate that this alternative would have no impact on the quality of the 2020 Census because there would be no change to any of the parameters underling the Secretary's revised life-cycle cost estimates. The estimated cost is about $350,000 because that is approximately the cost of resources that would be used to do the modeling for the DoJ.

Alternative B: Add the question on citizenship to the 2020 Census questionnaire

Under this alternative, we would add the ACS question on citizenship to the 2020 Census questionnaire and ISR instrument. We would then produce the block-level citizen voting-age population by race and ethnicity tables during the 2020 Census publication phase.

Since the question is already asked on the American Community Survey, we would accept the cognitive research and questionnaire testing from the ACS instead of independently retesting the citizenship question. This means that the cost of preparing the new question would be minimal. We did not prepare an estimate of the impact of adding the citizenship question on the cost of reprogramming the Internet Self-Response (ISR) instrument, revising the Census Questionnaire Assistance (CQA), or redesigning the printed questionnaire because those components will not be finalized until after the March 2018 submission of the final questions. Adding the citizenship question is similar in scope and cost to recasting the race and ethnicity questions again, should that become necessary, and would be done at the same time. After the 2020 Census ISR, CQA and printed questionnaire are in final form, adding the citizenship question would be much more expensive and would depend on exactly when the implementation decision was made during the production cycle.

For these reasons, we analyzed Alternative B in terms of its adverse impact on the rate of voluntary cooperation via self-response, the resulting increase in nonresponse followup (NRFU), and the consequent effects on the quality of the self-reported citizenship data. Three distinct analyses support the conclusion of an adverse impact on self-response and, as a result, on the accuracy and quality of the 2020 Census. We assess the costs of increased NRFU in light of the results of these analyses.

B.1. Quality of citizenship responses

We considered the quality of the citizenship responses on the ACS. In this analysis we estimated item nonresponse rates for the citizenship question on the ACS from 2013 through 2016. When item nonresponse occurs, the ACS edit and imputation modules are used to allocate an answer to replace the missing data item. This results in lower quality data because of the statistical errors in these allocation models. The analysis of the self-responses responses is done using ACS data from 2013-2016 because of operational changes in 2013, including the introduction of the ISR option and changes in the followup operations for mail-in questionnaires.

In the period from 2013 to 2016, item nonresponse rates for the citizenship question on the mail-in questionnaires for non-Hispanic whites (NHW) ranged from 6.0% to 6.3%, non-Hispanic blacks (NHB) ranged from 12.0% to 12.6%, and Hispanics ranged from 11.6 to 12.3%. In that same period, the ISR item nonresponse rates for citizenship were greater than those for mail-in questionnaires. In 2013, the item nonresponse rates for the citizenship variable on the ISR instrument were NHW: 6.2%, NHB: 12.3% and Hispanic: 13.0%. By 2016 the rates increased for NHB and especially Hispanics. They were NHW: 6.2%, NHB: 13.1%, and Hispanic: 15.5% (a 2.5 percentage point increase). Whether the response is by mail-in questionnaire or ISR instrument, item nonresponse rates for the citizenship question are much greater than the comparable rates for other demographic variables like sex, birthdate/age, and race/ethnicity (data not shown).

B.2. Self-response rate analyses

We directly compared the self-response rate in the 2000 Census for the short and long forms, separately for citizen and noncitizen households. In all cases, citizenship status of the individuals in the household was determined from administrative record sources, not from the response on the long form. A noncitizen household contains at least one noncitizen. Both citizen and noncitizen households have lower self-response rates on the long form compared to the short form; however, the decline in self-response for noncitizen households was 3.3 percentage points greater than the decline for citizen households. This analysis compared short and long form respondents, categories which were randomly assigned in the design of the 2000 Census.

We compared the self-response rates for the same household address on the 2010 Census and the 2010 American Community Survey, separately for citizen and noncitizen households. Again, all citizenship data were taken from administrative records, not the ACS, and noncitizen households contain at least one noncitizen resident. In this case, the randomization is over the selection of household addresses to receive the 2010 ACS. Because the ACS is an ongoing survey sampling fresh households each month, many of the residents of sampled households completed the 2010 ACS with the same reference address as they used for the 2010 Census. Once again, the self-response rates were lower in the ACS than in the 2010 Census for both citizen and noncitizen households. In this 2010 comparison, moreover, the decline in self-response was 5.1 percentage points greater for noncitizen households than for citizen households.

In both the 2000 and 2010 analyses, only the long-form or ACS questionnaire contained a citizenship question. Both the long form and the ACS questionnaires are more burdensome than the shortform. Survey methodologists consider burden to include both the direct time costs of responding and the indirect costs arising from nonresponse due to perceived sensitivity of the topic. There are, consequently, many explanations for the lower self-response rates among all household types on these longer questionnaires. However, the only difference between citizen and noncitizen households in our studies was the presence of at least one noncitizen in noncitizen households. It is therefore a reasonable inference that a question on citizenship would lead to some decline in overall self-response because it would make the 2020 Census modestly more burdensome in the direct sense, and potentially much more burdensome in the indirect sense that it would lead to a larger decline in self-response for noncitizen households.

B.3. Breakoff rate analysis

We examined the response breakoff paradata for the 2016 ACS. We looked at all breakoff screens on the ISR instrument, and specifically at the breakoffs that occurred on the screens with the citizenship and related questions like place of birth and year of entry to the U.S. Breakoff paradata isolate the point in answering the questionnaire where a respondent discontinues entering data—breaks off—rather than finishing. A breakoff is different from failure to self-respond. The respondent started the survey and was prepared to provide the data on the Internet Self-Response instrument, but changed his or her mind during the interview.

Hispanics and non-Hispanic non-whites (NHNW) have greater breakoff rates than non-Hispanic whites (NHW). In the 2016 ACS data, breakoffs were NHW: 9.5% of cases while NHNW: 14.1% and Hispanics: 17.6%. The paradata show the question on which the breakoff occurred. Only 0.04% of NHW broke off on the citizenship question, whereas NHNW broke off 0.27% and Hispanics broke off 0.36%. There are three related questions on immigrant status on the ACS: citizenship, place of birth, and year of entry to the United States. Considering all three questions Hispanics broke off on 1.6% of all ISR cases, NHNW: 1.2% and NHW: 0.5%. A breakoff on the ISR instrument can result in follow-up costs, imputation of missing data, or both. Because Hispanics and non-Hispanic non-whites breakoff much more often than non-Hispanic whites, especially on the citizenship-related questions, their survey response quality is differentially affected.

B.4. Cost analysis

Lower self-response rates would raise the cost of conducting the 2020 Census. We discuss those increased costs below. They also reduce the quality of the resulting data. Lower self-response rates degrade data quality because data obtained from NRFU have greater erroneous enumeration and whole-person imputation rates. An erroneous enumeration means a census person enumeration that should not have been counted for any of several reasons, such as, that the person (1) is a duplicate of a correct enumeration; (2) is inappropriate (e.g., the person died before Census Day); or (3) is enumerated in the wrong location for the relevant tabulation (https://www.census.gov/coverage_measurement/definitions/). A whole-person census imputation is a census microdata record for a person for which all characteristics are imputed.

Our analysis of the 2010 Census coverage errors (Census Coverage Measurement Estimation Report: Summary of Estimates of Coverage for Persons in the United States, Memo G-01) contains the relevant data. That study found that when the 2010 Census obtained a valid self-response (219 million persons),

the correct enumeration rate was 97.3%, erroneous enumerations were 2.5%, and whole-person census imputations were 0.3%. All erroneous enumeration and whole-person imputation rates are much greater for responses collected in NRFU. The vast majority of NRFU responses to the 2010 Census (59 million persons) were collected in May. During that month, the rate of correct enumerations was only 90.2%, the rate of incorrect enumeration was 4.8%, and the rate of whole-person census imputations was 5.0%. June NRFU accounted for 15 million persons, of whom only 84.6% were correctly enumerated, with erroneous enumerations of 5.7%, and whole-person census imputations of 9.6%. (See Table 19 of 2010 Census Memorandum G-01. That table does not provide statistics for all NRFU cases in aggregate.)

One reason that the erroneous enumeration and whole-person imputation rates are so much greater during NRFU is that the data are much more likely to be collected from a proxy rather than a household member, and, when they do come from a household member, that person has less accurate information than self-responders. The correct enumeration rate for NRFU household member interviews is 93.4% (see Table 21 of 2010 Census Memorandum G-01), compared to 97.3% for non-NRFU households (see Table 19). The information for 21.0% of the persons whose data were collected during NRFU is based on proxy responses. For these 16 million persons, the correct enumeration rate is only 70.1%. Among proxy responses, erroneous enumerations are 6.7% and whole-person census imputations are 23.1% (see Table 21).

Using these data, we can develop a cautious estimate of the data quality consequences of adding the citizenship question. We assume that citizens are unaffected by the change and that an additional 5.1% of households with at least one noncitizen go into NRFU because they do not self-respond. We expect about 126 million occupied households in the 2020 Census. From the 2016 ACS, we estimate that 9.8% of all households contain at least one noncitizen. Combining these assumptions implies an additional 630,000 households in NRFU. If the NRFU data for those households have the same quality as the average NRFU data in the 2010 Census, then the result would be 139,000 fewer correct enumerations, of which 46,000 are additional erroneous enumerations and 93,000 are additional whole-person census imputations. This analysis assumes that, during the NRFU operations, a cooperative member of the household supplies data 79.0% of the time and 21.0% receive proxy responses. If all of these new NRFU cases go to proxy responses instead, the result would be 432,000 fewer correct enumerations, of which 67,000 are erroneous enumerations and 365,000 are whole-person census imputations.

For Alternative B, our estimate of the incremental cost proceeds as follows. Using the analysis in the paragraph above, the estimated NRFU workload will increase by approximately 630,000 households, or approximately 0.5 percentage points. We currently estimate that for each percentage point increase in NRFU, the cost of the 2020 Census increases by approximately $55 million. Accordingly, the addition of a question on citizenship could increase the cost of the 2020 Census by at least $27.5 million. It is worth stressing that this cost estimate is a lower bound. Our estimate of $55 million for each percentage point increase in NRFU is based on an average of three visits per household. We expect that many more of these noncitizen households would receive six NRFU visits.

We believe that $27.5 million is a conservative estimate because the other evidence cited in this report suggests that the differences between citizen and noncitizen response rates and data quality will be amplified during the 2020 Census compared to historical levels. Hence, the decrease in self-response for citizen households in 2020 could be much greater than the 5.1 percentage points we observed during the 2010 Census.

Alternative C: Use administrative data on citizenship instead of add the question to the 2020 Census

Under this alternative, we would add the capability to link an accurate, edited citizenship variable from administrative records to the final 2020 Census microdata files. We would then produce block-level tables of citizen voting age population by race and ethnicity during the publication phase of the 2020 Census using the enhanced 2020 Census microdata.

The Census Bureau has conducted tests of its ability to link administrative data to supplement the decennial census and the ACS since the 1990s. Administrative record studies were performed for the 1990, 2000 and 2010 Censuses. We discuss some of the implications of the 2010 study below. We have used administrative data extensively in the production of the economic censuses for decades. Administrative business data from multiple sources are a key component of the production Business Register, which provides the frames for the economic censuses, annual, quarterly, and monthly business surveys. Administrative business data are also directly tabulated in many of our products.

In support of the 2020 Census, we moved the administrative data linking facility for households and individuals from research to production. This means that the ability to integrate administrative data at the record level is already part of the 2020 Census production environment. In addition, we began regularly ingesting and loading administrative data from the Social Security Administration, Internal Revenue Service and other federal and state sources into the 2020 Census data systems. In assessing the expected quality and cost of Alternative C, we assume the availability of these record linkage systems and the associated administrative data during the 2020 Census production cycle.

C.1. Quality of administrate record versus self-report citizenship status

We performed a detailed study of the responses to the citizenship question compared to the administrative record citizenship variable for the 2000 Census, 2010 ACS and 2016 ACS. These analyses confirm that the vast majority of citizens, as determined by reliable federal administrative records that require proof of citizenship, correctly report their status when asked a survey question. These analyses also demonstrate that when the administrative record source indicates an individual is not a citizen, the self-report is "citizen" for no less than 23.8% of the cases, and often more than 30%.

For all of these analyses, we linked the Census Bureau's enhanced version of the SSA Numident data using the production individual record linkage system to append an administrative citizenship variable to the relevant census and ACS microdata. The Numident data contain information on every person who has ever been issued a Social Security Number or an Individual Taxpayer Identification Number. Since 1972, SSA has required proof of citizenship or legal resident alien status from applicants. We use this verified citizenship status as our administrative citizenship variable. Because noncitizens must interact with SSA if they become naturalized citizens, these data reflect current citizenship status albeit with a lag for some noncitizens.

For our analysis of the 2000 Census long-form data, we linked the 2002 version of the Census Numident data, which is the version closest to the April 1, 2000 Census date. For 92.3% of the 2000 Census long-form respondents, we successfully linked the administrative citizenship variable. The 7.7% of persons for whom the administrative data are missing is comparable to the item non-response for self-responders in the mail-in pre-ISR-option ACS. When the administrative data indicated that the 2000 Census respondent was a citizen, the self-response was citizen: 98.8%. For this same group, the long-form response was

noncitizen: 0.9% and missing: 0.3%. By contrast, when the administrative data indicated that the respondent was not a citizen, the self-report was citizen: 29.9%, noncitizen: 66.4%, and missing: 3.7%.

In the same analysis of 2000 Census data, we consider three categories of individuals: the reference person (the individual who completed the census form for the household), relatives of the reference person, and individuals unrelated to the reference person. When the administrative data show that the individual is a citizen, the reference person, relatives of the reference person, and nonrelatives of the reference person have self-reported citizenship status of 98.7%, 98.9% and 97.2%, respectively. On the other hand, when the administrative data report that the individual was a noncitizen, the long-form response was citizen for 32.9% of the reference persons; that is, reference persons who are not citizens according to the administrative data self-report that they are not citizens in only 63.3% of the long-form responses. When they are reporting for a relative who is not a citizen according to the administrative data, reference persons list that individual as a citizen in 28.6% of the long-form responses. When they are reporting for a nonrelative who is not a citizen according to the administrative data, reference persons list that individual as a citizen in 20.4% of the long-form responses.

We analyzed the 2010 and 2016 ACS citizenship responses using the same methodology. The 2010 ACS respondents were linked to the 2010 version of the Census Numident. The 2016 ACS respondents were linked to the 2016 Census Numident. In 2010, 8.5% of the respondents could not be linked, or had missing citizenship status on the administrative data. In 2016, 10.9% could not be linked or had missing administrative data. We reached the same conclusions using 2010 and 2016 ACS data with the following exceptions. When the administrative data report that the individual is a citizen, the self-response is citizen on 96.9% of the 2010 ACS questionnaires and 93.8% of the 2016 questionnaires. These lower self-reported citizenship rates are due to missing responses on the ACS, not misclassification. As we noted above, the item nonresponse rate for the citizenship question has been increasing. These item nonresponse data show that some citizens are not reporting their status on the ACS at all. In 2010 and 2016, individuals for whom the administrative data indicate noncitizen respond citizen in 32.7% and 34.7% of the ACS questionnaires, respectively. The rates of missing ACS citizenship response are also greater for individuals who are noncitizens in the administrative data (2010: 4.1%, 2016: 7.7%). The analysis of reference persons, relatives, and nonrelatives is qualitatively identical to the 2000 Census analysis.

In all three analyses, the results for racial and ethnic groups and for voting age individuals are similar to the results for the whole population with one important exception. If the administrative data indicate that the person is a citizen, the self-report is citizen at a very high rate with the remainder being predominately missing self-reports for all groups. If the administrative data indicate noncitizen, the self-report is citizen at a very high rate (never less than 23.8% for any racial, ethnic or voting age group in any year we studied). The exception is the missing data rate for Hispanics, who are missing administrative data about twice as often as non-Hispanic blacks and three times as often as non-Hispanic whites.

C.2. Analysis of coverage differences between administrative and survey citizenship data

Our analysis suggests that the ACS and 2000 long form survey data have more complete coverage of citizenship than administrative record data, but the relative advantage of the survey data is diminishing. Citizenship status is missing for 10.9 percent of persons in the 2016 administrative records, and it is missing for 6.3 percent of persons in the 2016 ACS. This 4.6 percentage point gap between administrative and survey missing data rates is smaller than the gap in 2000 (6.9 percentage points) and 2010 (5.6

percentage points). Incomplete (through November) pre-production ACS data indicate that citizenship item nonresponse has again increased in 2017.

There is an important caveat to the conclusion that survey-based citizenship data are more complete than administrative records, albeit less so now than in 2000. The methods used to adjust the ACS weights for survey nonresponse and to allocate citizenship status for item nonresponse assume that the predicted answers of the sampled non-respondents are statistically the same as those of respondents. Our analysis casts serious doubt on this assumption, suggesting that those who do not respond to either the entire ACS or the citizenship question on the ACS are not statistically similar to those who do; in particular, their responses to the citizenship question would not be well-predicted by the answers of those who did respond.

The consequences of missing citizenship data in the administrative records are asymmetric. In the Census Numident, citizenship data may be missing for older citizens who obtained SSNs before the 1972 requirement to verify citizenship, naturalized citizens who have not confirmed their naturalization to SSA, and noncitizens who do not have an SSN or ITIN. All three of these shortcomings are addressed by adding data from the United States Citizen and Immigration Services (USCIS). Those data would complement the Census Numident data for older citizens and update those data for naturalized citizens. A less obvious, but equally important benefit, is that they would permit record linkage for legal resident aliens by allowing the construction of a supplementary record linkage master list for such people, who are only in scope for the Numident if they apply for and receive an SSN or ITIN. Consequently, the administrative records citizenship data would most likely have both more accurate citizen status and fewer missing individuals than would be the case for any survey-based collection method. Finally, having two sources of administrative citizenship data permits a detailed verification of the accuracy of those sources as well.

C.3. Cost of administrative record data production

For Alternative C, we estimate that the incremental cost, except for new MOUs, is $450,000. This cost estimate includes the time to develop an MOU with USCIS, estimated ingestion and curation costs for USCIS data, incremental costs of other administrative data already in use in the 2020 Census but for which continued acquisition is now a requirement, and staff time to do the required statistical work for integration of the administrative-data citizenship status onto the 2020 Census microdata. This cost estimate is necessarily incomplete because we have not had adequate time to develop a draft MOU with USCIS, which is a requirement for getting a firm delivery cost estimate from the agency. Acquisition costs for other administrative data acquired or proposed for the 2020 Census varied from zero to $1.5M. Thus the realistic range of cost estimates, including the cost of USCIS data, is between $500,000 and $2.0M

UNITED STATES DEPARTMENT OF COMMERCE
Economics and Statistics Administration
U.S. Census Bureau
Washington, DC 20233-0001

March 1, 2018

MEMORANDUM FOR: Wilbur L. Ross, Jr.
Secretary of Commerce

Through: Karen Dunn Kelley
Performing the Non-Exclusive Functions and Duties of the Deputy Secretary

Ron S. Jarmin
Performing the Non-Exclusive Functions and Duties of the Director

Enrique Lamas
Performing the Non-Exclusive Functions and Duties of the Deputy Director

From: John M. Abowd
Chief Scientist and Associate Director for Research and Methodology

Subject: Preliminary analysis of Alternative D (Combined Alternatives B and C)

See attached.

Approved: _____ Date: _____
John M. Abowd, Chief Scientist
and Associate Director for Research and Methodology

Preliminary Analysis of Alternative D

At the Secretary's request we performed a preliminary analysis of combining Alternative B (asking the citizenship question of every household on the 2020 Census) and Alternative C (do not ask the question, link reliable administrative data on citizenship status instead) in the January 19, 2018 draft memo to the Department of Commerce into a new Alternative D. Here we discuss Alternative D, the weaknesses in Alternative C on its own, whether and how survey data could address these weaknesses, implications of including a citizenship question for using administrative data, and methodological challenges.

Description of Alternative D: Administrative data from the Social Security Administration (SSA), Internal Revenue Service (IRS), U.S. Citizenship and Immigration Services (USCIS), and the State Department would be used to create a comprehensive statistical reference list of current U.S. citizens. Nevertheless, there will be some persons for whom no administrative data are available. To obtain citizenship information for this sub-population, a citizenship question would be added to the 2020 Census questionnaire. The combined administrative record and 2020 Census data would be used to produce baseline citizenship statistics by 2021. Any U.S. citizens appearing in administrative data after the version created for the 2020 Census would be added to the comprehensive statistical reference list. There would be no plan to include a citizenship question on future Decennial Censuses or American Community Surveys. The comprehensive statistical reference list, built from administrative records and augmented by the 2020 Census answers would be used instead. The comprehensive statistical reference list would be kept current, gradually replacing almost all respondent-provided data with verified citizenship status data.

What are the weaknesses in Alternative C?

In the 2017 Numident (the latest available), 6.6 million persons born outside the U.S. have blank citizenship among those born in 1920 or later with no year of death. The evidence suggests that citizenship is not missing at random. Of those with missing citizenship in the Numident, a much higher share appears to be U.S. citizens than compared to those for whom citizenship data are not missing. Nevertheless, some of the blanks may be noncitizens, and it would thus be useful to have other sources for them.

A second question about the Numident citizenship variable is how complete and timely its updates are for naturalizations. Naturalized citizens are instructed to immediately apply for a new SSN card. Those who wish to work have an incentive to do so quickly, since having an SSN card with U.S. citizenship will make it easier to pass the E-Verify process when applying for a job, and it will make them eligible for government programs. But we do not know what fraction of naturalized citizens actually notify the SSA, and how soon after being naturalized they do so.

A third potential weakness of Numident citizenship is that some people are not required to have a Social Security Number (SSN), whether they are a U.S. citizen or not. It would also be useful to have a data source on citizenship that did not depend on the SSN application and tracking process inside SSA. This is why we proposed the MOU with the USCIS for naturalizations, and why we have now begun pursuing an MOU with the State Department for data on all citizens with passports.

IRS Individual Taxpayer Identification Numbers (ITIN) partially fill the gap in Numident coverage of noncitizen U.S. residents. However, not all noncitizen residents without SSNs apply for ITINs. Only those making IRS tax filings apply for ITINs. Once again, it would be useful to have a data source that did not depend on the ITIN process. The USCIS and State Department MOUs would provide an alternative source in this context as well.

U.S. Citizenship and Immigration Services (USCIS) data on naturalizations, lawful permanent residents, and I-539 non-immigrant visa extensions can partially address the weaknesses of the Numident. The USCIS data provide up-to-date information since 2001 (and possibly back to 1988, but with incomplete records prior to 2001). This will fill gaps for naturalized citizens, lawful permanent residents, and persons with extended visa applications without SSNs, as well as naturalized citizens who did not inform SSA about their naturalization. The data do not cover naturalizations occurring before 1988, as well as not covering and some between 1988-2000. USCIS data do not always cover children under 18 at the time a parent became a naturalized U.S. citizen. Such children automatically become U.S. citizens under the Child Citizenship Act of 2000. The USCIS receives notification of some, but not all, of these child naturalizations. Others inform the U.S. government of their U.S. citizenship status by applying for U.S. passports, which are less expensive than the application to notify the USCIS. USCIS visa applications list people's children, but those data may not be in electronic form.

U.S. passport data, available from the State Department, can help plug the gaps for child naturalizations, blanks on the Numident, and out-of-date citizenship information on the Numident for persons naturalized prior to 2001. Since U.S. citizens are not required to have a passport, however, these data will also have gaps in coverage.

Remaining citizenship data gaps in Alternative C include the following categories:

1. U.S. citizens from birth with no SSN or U.S. passport. They will not be processed by the production record linkage system used for the 2020 Census because their personally identifiable information won't find a matching Protected Identification Key (PIK) in the Person Validation System (PVS).

2. U.S. citizens from birth born outside the U.S., who do not have a U.S. passport, and either applied for an SSN prior to 1974 and were 18 or older, or applied before the age of 18 prior to 1978. These people will be found in PVS, but none of the administrative sources discussed above will reliably generate a U.S. citizenship variable.

3. U.S. citizens who were naturalized prior to 2001 and did not inform SSA of their naturalization because they originally applied for an SSN after they were naturalized, and it was prior to when citizenship verification was required for those born outside the U.S. (1974). These people already had an SSN when they were naturalized and they didn't inform SSA about the naturalization, or they didn't apply for an SSN. The former group have inaccurate data on the Numident. The latter group will not be found in PVS.

4. U.S. citizens who were automatically naturalized if they were under the age of 18 when their parents became naturalized in 2000 or later, and did not inform USCIS or receive a U.S. passport. Note that such persons would not be able to get an SSN with U.S. citizenship on the card without either a U.S. passport or a certificate from USCIS. These people will also not be found in the PVS.

5. Lawful permanent residents (LPR) who received that status prior to 2001 and either do not have an SSN or applied for an SSN prior to when citizenship verification was required for those born outside the U.S. (1974). The former group will not be found in PVS. The latter group has inaccurate data in Numident.

6. Noncitizen, non-LPR, residents who do not have an SSN or ITIN and who did not apply for a visa extension. These persons will not be found in PVS.

7. Persons with citizenship information in administrative data, but the administrative and decennial census data cannot be linked due to missing or discrepant PII.

Can survey data address the gaps in Alternative C?

One might think that survey data could help fill the above gaps, either when their person record is not linked in the PVS, and thus they have no PIK, or when they have a PIK but the administrative data lack up-to-date citizenship information. Persons in Category 6, however, have a strong incentive to provide an incorrect answer, if they answer at all. A significant, but unknown, fraction of persons without PIKs are in Category 6. Distinguishing these people from the other categories of persons without PIKs is an inexact science because there is no feasible method of independently verifying their non-citizen status. Our comparison of ACS and Numident citizenship data suggests that a large fraction of LPRs provide incorrect survey responses. This suggests that survey-collected citizenship data may not be reliable for many of the people falling in the gaps in administrative data. This calls into question their ability to improve upon Alternative C.

With Alternative C, and no direct survey response, the Census Bureau's edit and imputation procedures would make an allocation based primarily on the high-quality administrative data. In the presence of a survey response, but without any linked administrative data for that person, the edit would only be triggered by blank citizenship. A survey response of "citizen" would be accepted as valid. There is no scientifically defensible method for rejecting a survey response in the absence of alternative data for that respondent.

How might inclusion of a citizenship question on the questionnaire affect the measurement of citizenship with administrative data? Absent an in-house administrative data census, measuring citizenship with administrative data requires that persons in the Decennial Census be linked to the administrative data at the person level. The PVS system engineered into the 2020 Census does this using a very reliable technology. However, inclusion of a citizenship question on the 2020 Census questionnaire is very likely to reduce the self-response rate, pushing more households into Nonresponse Followup (NRFU). Not only will this likely lead to more incorrect enumerations, but it is also expected to increase the number of persons who cannot be linked to the administrative data because the NRFU PII is lower quality than the self-response data. In the 2010 Decennial Census, the percentage of NRFU persons who could be linked to administrative data rate was 81.6 percent, compared to 96.7 percent for mail responses. Those refusing to self-respond due to the citizenship question are particularly likely to refuse to respond in NRFU as well, resulting in a proxy response. The NRFU linkage rates were far lower for proxy responses than self-responses (33.8 percent vs. 93.0 percent, respectively).

Although persons in Category 6 will not be linked regardless of response mode, it is common for households to include persons with a variety of citizenship statuses. If the whole household does not self-

respond to protect the members in Category 6, the record linkage problem will be further aggravated. Thus, not only are citizenship survey data of suspect quality for persons in the gaps for Alternative C, collecting these survey data would reduce the quality of the administrative records when used in Alternative D by lowering the record linkage rate for persons with administrative citizenship data.

What methodological challenges are involved when combining these sources?

Using the 2020 Census data only to fill in gaps for persons without administrative data on citizenship would raise questions about why 100 percent of respondents are being burdened by a citizenship question to obtain information for the two percent of respondents where it is missing.

Including a citizenship question in the 2020 Census does not solve the problem of incomplete person linkages when producing citizenship statistics after 2020. Both the 2020 decennial record and the record with the person's future location would need to be found in PVS to be used for future statistics.

In sum, Alternative D would result in poorer quality citizenship data than Alternative C. It would still have all the negative cost and quality implications of Alternative B outlined in the draft January 19, 2018 memo to the Department of Commerce.

From: Fre dma , John A.
Sent: Thursday, July 12, 2018 8:35 PM
To: 'Ehrlich, Stephen (CIV)'; 'Bailey, Kate (CIV)'; 'F derighi, Carol (CIV)'; 'Lara.Eshkenazi@usdoj.gov'; 'Tarczynska, Dominika (USANYS)'; 'Jeannette.Vargas@usdoj.gov'
Cc: 'Colangelo, Matthew'; 'Goldstein, Elena'; 'Saini, Ajay'; zzz.External.DHo@aclu.org; zzz.External.SBrannon@aclu.org; zzz.External.PGrossman@nyclu.org; Bauer, Andrew
Subject: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Deposition Scheduling

Counsel --

In advance of our meet and confer on Friday, and recognizing that many of the witnesses may have busy schedules or other commitments over the summer, we wanted to start the process of scheduling depositions.

For scheduling purposes, we have identified the first six witnesses whom we want to depose: John Abowd (Census), John Gore (DOJ), Christian Herren (DOJ), Ron Jarmin (Census), Wendy Teramoto (Commerce), and Michael Walsh (Commerce). Please provide all dates of availability when these witnesses might be deposed during the month of August.

In addition to these witnesses, we plan to issue a Rule 30(b)(6) notice to the Census Bureau. We expect to provide an preliminary list of topics next week, subject to amendment when the Government has completed production of the Administrative Record. For planning purposes, we expect that the 30(b)(6) topic will cover both custodial topics (e.g., the compilation and completeness of the administrative record and privilege log) and substantive topics related to specific documents in the Administrative Record (e.g., AR 1277-85, 1286-1303, 1304-05, 1308-12, 1313-1320, 1321, etc.).

Recognizing Judge Furman's comments regarding a potential deposition of Secretary Ross, we would also ask that you please provide dates of availability for Secretary Ross during August and first week of September after the dates for the six other witnesses, with sufficient time for Judge Furman to resolve the question whether his deposition may proceed.

Finally, in the interest of ensuring that each witness is only deposed once, we have had preliminary discussions with the plaintiffs in the California and Maryland cases about coordination of depositions. In order to reduce likelihood witnesses will need to be recalled or compelled to testify in other cases, we all believe that extending the length of deposition beyond the presumptive limit in Rule 30(d) is appropriate. Given the number of parties, we would ask the Government to consent to extend the length of each deposition to 12 hours.

We look forward to discussing these matters with you on Friday.

Best regards,

John

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Sent: Wednesday, July 18, 2018 7:51 PM
To: Goldstein, Elena; Federighi, Carol (CIV); Wells, Carlotta (CIV); Ehrlich, Stephen (CIV); Tarczynska, Dominika (USANYS)
Cc: Colangelo, Matthew; Saini, Ajay; Freedman, John A.; zzz.External.DHo@aclu.org; zzz.External.PGrossman@nyclu.org; zzz.External.SBrannon@aclu.org; Gersch, David P.
Subject: Re: New York v. Commerce: Touhy issue

Elena,
Thank you for summarizing the outstanding questions below and for your patience as we work through these and other issues this week.

1. ***Touhy Request to Commerce*:** Thank you for providing additional information in your June 10 letter regarding your request to proffer expert testimony from former Census Bureau Deputy Director Dr. Herman Habermann. Based on your representation that you expect Dr. Habermann's expert testimony to describe standard practices for new question design, content testing, and cognitive testing, in addition to your representation that his testimony will not implicate confidential, non-public, or privileged data, including data protected under 13 U.S.C. § 9 and restrictions under 18 U.S.C. § 207(a)(1), the Department of Commerce will not object to you calling Dr. Habermann as an expert witness on the matters you described.
   Please note that by not objecting to the proffer of Dr. Habermann's testimony as you have described, the Department of Commerce does not waive its right to object to Dr. Habermann testifying to additional factual matters not mentioned in your letter. Additionally, the United States Government reserves the right to call Dr. Habermann as a fact witness if the Government deems it necessary in the defense of its position in this case.
2. ***Deposition dates*:** Wendy Teramoto is available August 29, 30, or 31; John Abowd is available August 15, 16, 29, 30, or 31; Ron Jarmin is available August 15, 16, 20, 21, 27, 28, 29, 30, or 31. We're still working to confirm dates for some other individuals and will get back with you as quickly as we can.
3. ***Production of materials from DOJ*:** Because the Department of Justice is not a party to this case, a request for information from DOJ must comply with the Department's *Touhy* regulations, which can be found at 28 C.F.R. §§ 16.21 *et seq.* We think it would be most efficient for Plaintiffs to send us a written request, similar to the process followed for your request for information from Dr. Habermann. We will evaluate your request and respond promptly.
4. ***Discovery Issues*:** We will consent to disputes arising from the depositions noticed in the SDNY cases being resolved by Judge Furman, *provided* that non-New York Plaintiffs also will agree to abide by Judge Furman's rulings.

Thank you again,
Kate Bailey

-------- Original message --------
From: "Goldstein, Elena" <Elena.Goldstein@ag.ny.gov>
Date: 7/18/18 2:27 PM (GMT-05:00)
To: "Federighi, Carol (CIV)" <CFederig@CIV.USDOJ.GOV>, "Bailey, Kate (CIV)" <katbaile@CIV.USDOJ.GOV>, "Wells, Carlotta (CIV)" <CWells@CIV.USDOJ.GOV>, "Ehrlich, Stephen (CIV)" <sehrlich@CIV.USDOJ.GOV>, "Tarczynska, Dominika (USANYS)" <Dominika.Tarczynska@usdoj.gov>
Cc: "Colangelo, Matthew" <Matthew.Colangelo@ag.ny.gov>, "Saini, Ajay" <Ajay.Saini@ag.ny.gov>, "Freedman, John A." <John.Freedman@arnoldporter.com>, "'Dale Ho (dho@aclu.org)'" <dho@aclu.org>, 'Perry Grossman' <PGrossman@nyclu.org>, SBrannon@aclu.org, "Gersch, David P." <David.Gersch@arnoldporter.com>

Subject: RE: New York v. Commerce: Touhy issue

Thank you for your reply, Carol. During our call on July 13, Defendants represented when they would be able to provide answers on various outstanding issues; we have been following up based on that timeline. Just to ensure that we are all on the same page (and adding the NYIC plaintiffs to this email, as this communication relates to that case as well), our list of outstanding matters from our recent conversation include:

1. Touhy issue
2. Deposition availability dates (Defendants agreed to advise mid-week)
3. Whether Defendants will object to producing materials from the Department of Justice (Defendants agreed to advise mid-week)
4. Consent to Judge Furman handling discovery issues arising out of depositions noticed/cross-noticed in the SDNY cases (Defendants agreed to advise "soon")

We look forward to speaking with you soon on these matters.
Best,
Elena

Elena Goldstein | Senior Trial Counsel
Civil Rights Bureau
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28 Liberty Street, 20th Floor | New York, New York 10005
Tel: (212) 416-6201 | Fax: (212) 416-6030 | elena.goldstein@ag.ny.gov | www.ag.ny.gov

---

From: Federighi, Carol (CIV) <Carol.Federighi@usdoj.gov>
Sent: Wednesday, July 18, 2018 12:33 PM
To: Goldstein, Elena <Elena.Goldstein@ag.ny.gov>; Bailey, Kate (CIV) <Kate.Bailey@usdoj.gov>; Wells, Carlotta (CIV) <Carlotta.Wells@usdoj.gov>; Ehrlich, Stephen (CIV) <Stephen.Ehrlich@usdoj.gov>; Eshkenazi, Lara (USANYS) <Lara.Eshkenazi@usdoj.gov>; Tarczynska, Dominika (USANYS) <Dominika.Tarczynska@usdoj.gov>
Cc: Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; Saini, Ajay <Ajay.Saini@ag.ny.gov>
Subject: RE: New York v. Commerce: Touhy issue

Elena – We will try to get back to you today. As you may know, we had a hearing in the Kravitz case in the District of Maryland today, so much of the first part of this week has been taken up preparing for that (as well as getting ready to produce the materials we are due to produce in the New York cases on July 23). C

Thanks for your patience!
Carol

Carol Federighi
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044
Phone: (202) 514-1903
Email: carol.federighi@usdoj.gov

From: Goldstein, Elena [mailto:Elena.Goldstein@ag.ny.gov]
Sent: Wednesday, July 18, 2018 11:12 AM
To: Bailey, Kate (CIV) <katbaile@CIV.USDOJ.GOV>; Wells, Carlotta (CIV) <CWells@CIV.USDOJ.GOV>; Ehrlich, Stephen (CIV) <sehrlich@CIV.USDOJ.GOV>; Eshkenazi, Lara (USANYS) <Lara.Eshkenazi@usdoj.gov>; Tarczynska, Dominika (USANYS) <Dominika.Tarczynska@usdoj.gov>; Federighi, Carol (CIV) <CFederig@CIV.USDOJ.GOV>
Cc: Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; Saini, Ajay <Ajay.Saini@ag.ny.gov>
Subject: RE: New York v. Commerce: Touhy issue

Counsel,

I write again to follow up on the *Touhy* issue. As requested below, kindly confirm that you will not object to Hermann Habermann's testimony on *Touhy* grounds. If we do not hear from you by the close of business today, Plaintiffs will be forced to seek relief from the court. Please do not hesitate to reach out to myself and Matthew with any questions. We hope to hear from you soon.

Best,
Elena

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From: Goldstein, Elena
Sent: Tuesday, July 17, 2018 3:06 PM
To: 'Bailey, Kate (CIV)' <Kate.Bailey@usdoj.gov>; Wells, Carlotta (CIV) <Carlotta.Wells@usdoj.gov>; Ehrlich, Stephen (CIV) <Stephen.Ehrlich@usdoj.gov>; Eshkenazi, Lara (USANYS) <Lara.Eshkenazi@usdoj.gov>; Tarczynska, Dominika (USANYS) <Dominika.Tarczynska@usdoj.gov>; Federighi, Carol (CIV) <Carol.Federighi@usdoj.gov>
Cc: Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; Saini, Ajay <Ajay.Saini@ag.ny.gov>
Subject: New York v. Commerce: Touhy issue

Counsel,
We had understood that we would hear from you yesterday regarding whether you anticipated objecting to Hermann Habermann's proposed testimony on *Touhy* grounds; kindly confirm that you do not object to his testimony, or please advise us as to the basis for continued objection. We look forward to hearing from you soon.
Best,
Elena

Elena Goldstein | Senior Trial Counsel
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From: Bailey, Kate (CIV) <Kate.Bailey@usdoj.gov>
Sent: Wednesday, August 01, 2018 7:01 PM
To: Freedman, John A.; Federighi, Carol (CIV); Ehrlich Stephen (CIV); Coyle, Garrett (CIV)
Cc: Colangelo, Matthew; 'Goldstein, Elena'; Saini, Ajay; 'dale.ho@aclu.org'; zzz.External.SBrannon@aclu.org; zzz.External.PGrossman@nyclu.org; Bauer, Andrew
Subject: RE: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet & Confer Follow Up
Attachments: T13 prohibition on disclosure.pdf; 2018_08_01_proposed coordination procedures.for circulation_usg_cmts.docx

Counsel—

Thank you for summarizing our discussion yesterday.

- Attached is a draft of the coordination procedures with our edits. Please let us know if you will not accept any of our edits. If you do accept all edits, feel free to file at your convenience.
- Also attached is a letter, as discussed, explaining the prohibitions on release of certain data covered by Title XIII.
- Regarding executive privilege, it is correct that we have not asserted executive privilege over any materials responsive to our supplemental production in response to Judge Furman's order. We do not waive executive privilege as to any materials not encompassed within our search in response to the judge's order.
- Thank you for sharing the list of privilege log entries which you contend are deficient. We are working to correct and update the log. We will provide you an updated privilege log as quickly as possible, and anticipate completing that by the end of the week. We believe the updated log will ameliorate the disagreement on this point.
- We will be responding to the DOJ subpoena no later than Friday, the deadline for lodging our objections.

Thank you,

Kate Bailey
Trial Attorney
United States Department of Justice
Civil Division – Federal Programs Branch
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Room 7214
Washington, D.C. 20530
202.514.9239 | kate.bailey@usdoj.gov

From: Freedman, John A. [mailto:John.Freedman@arnoldporter.com]
Sent: Tuesday, July 31, 2018 10:07 PM
To: Bailey, Kate (CIV) <katbaile@CIV.USDOJ.GOV>; Federighi, Carol (CIV) <CFederig@CIV.USDOJ.GOV>; Ehrlich, Stephen (CIV) <sehrlich@CIV.USDOJ.GOV>; Coyle, Garrett (CIV) <gcoyle@CIV.USDOJ.GOV>; Eshkenazi, Lara (USANYS) <Lara.Eshkenazi@usdoj.gov>; Vargas, Jeannette (USANYS) <Jeannette.Vargas@usdoj.gov>; Tarczynska, Dominika (USANYS) <Dominika.Tarczynska@usdoj.gov>
Cc: Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; 'Goldstein, Elena' <Elena.Goldstein@ag.ny.gov>; Saini, Ajay <Ajay.Saini@ag.ny.gov>; 'dale.ho@aclu.org' <dale.ho@aclu.org>; SBrannon@aclu.org; PGrossman@nyclu.org;

Bauer, Andrew <Andrew.Bauer@arnoldporter.com>
Subject: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet & Confer Follow Up

Counsel --

To summarize our discussion this afternoon:

1. We look forward to receiving the deposition dates for the remaining requested witnesses and the explanation of the basis for redaction and withholding Title 13 information tomorrow.

2. We also look forward to your answer on the DoJ subpoena, your answers to our questions about the productions from Secretary Ross, Ms. Teramoto, Ms. Alexander, and Messrs. Comstock, Branstad, Hernandez, and Uthmeier (including his August 11, 2017 memorandum), and the supplemental production (including the "swat" team's shared file, the Marc Neuman document misdesignated as privileged, and the other materials that were inadvertently omitted from the last production), and your proposal on the native file and encrypted documents by the end of the week.

3. This will also confirm your representation that the Government is not asserting executive privilege over any materials from Commerce or the Census Bureau, and has not withheld anything on the basis of executive privilege.

4. This will confirm our understanding that the Government continues to assert a deliberative privilege and work product over certain documents, as well as the sufficiency of the logs provided. We believe we are at impasse on these issues and will raise with the Court. We will evaluate your Title 13 explanation, but in the absence of a satisfactory explanation, we will also raise this with the Court.

5. As a follow up to our discussion, we have attached the relevant excerpts of the logs that we have identified that do not comply with Rule 26(b)(5) and S.D.N.Y. Local Rule 26.2(a)(2)(A). There may be additional entries that are not reflected in these charts. As we advised, under the Rules and governing law, the withholding party has the obligation to establish the applicability of the privilege, and in the absence of this information, there is no valid basis to withhold these documents.

Best regardsm

John

From: Freedman, John A.
Sent: Monday, July 30, 2018 6:40 PM
To: 'Bailey, Kate (CIV)'; Ehrlich, Stephen (CIV); Federighi, Carol (CIV); Eshkenazi, Lara (USANYS); Tarczynska, Dominika (USANYS); Vargas, Jeannette (USANYS); Coyle, Garrett (CIV)
Cc: zzz.External.DHo@aclu.org; zzz.External.SBrannon@aclu.org; zzz.External.PGrossman@nyclu.org; Bauer, Andrew; Colangelo, Matthew; Goldstein, Elena; Saini, Ajay
Subject: RE: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet & Confer Request

Counsel --

A number of us have re-arranged our schedules, and we are able to proceed at 3:30 tomorrow. We will send a calendar invite.

If you are able to address any of the technical issues in advance of the call, that will shorten the time necessary for the call. That said, in addition to the issues we have asked you to look into, we have serious concerns about the Government's compliance with the Court's orders -- there are significant gaps in the Administrative Record and a large number of documents (or information contained within the documents) have been withheld on highly questionable assertions of privilege. We will be prepared to discuss these issues with you in detail tomorrow.

Talk to you tomorrow.

John

From: Bailey, Kate (CIV) [mailto:Kate.Bailey@usdoj.gov]
Sent: Monday, July 30, 2018 5:05 PM
To: Freedman, John A.; Ehrlich, Stephen (CIV); Federighi, Carol (CIV); Eshkenazi, Lara (USANYS); Tarczynska, Dominika (USANYS); Vargas, Jeannette (USANYS); Coyle, Garrett (CIV)
Cc: zzz.External.DHo@aclu.org; zzz.External.SBrannon@aclu.org; zzz.External.PGrossman@nyclu.org; Bauer, Andrew; Colangelo, Matthew; Goldstein, Elena; Saini, Ajay
Subject: RE: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet & Confer Request

Counsel—

Thank you for your email. While we understand your desire to move these matters quickly, it would not be appropriate to submit a joint filing without receiving our edits or position. Please refrain from assuming our position without hearing from us. We are available tomorrow afternoon after 3:30 pm to meet and confer.

Regarding the coordination procedures in particular, certain aspects of your proposal exceed the substance of our discussion last week. We will send you edits representing our points of disagreement by the close of business tomorrow.

In addition, we anticipate providing you with additional deposition dates on our call tomorrow. Thank you for advising us that the deposition of Mr. Herren likely will not be needed.

We do not consent to your proposal to amend your complaint(s) to add the Department, AG Sessions, or Mr. Gore as official-capacity defendants.

Thank you,

Kate

Kate Bailey
Trial Attorney
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Civil Division – Federal Programs Branch
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202.514.9239 | kate.bailey@usdoj.gov

From: Freedman, John A. [mailto:John.Freedman@arnoldporter.com]
Sent: Monday, July 30, 2018 3:11 PM
To: Ehrlich, Stephen (CIV) <sehrlich@CIV.USDOJ.GOV>; Bailey, Kate (CIV) <katbaile@CIV.USDOJ.GOV>; Federighi, Carol (CIV) <CFederig@CIV.USDOJ.GOV>; Eshkenazi, Lara (USANYS) <Lara.Eshkenazi@usdoj.gov>; Tarczynska,

Dominika (USANYS) <Dominika.Tarczynska@usdoj.gov>; Vargas, Jeannette (USANYS) <Jeannette.Vargas@usdoj.gov>; Coyle, Garrett (CIV) <gcoyle@CIV.USDOJ.GOV>
Cc: DHo@aclu.org; SBrannon@aclu.org; PGrossman@nyclu.org; Bauer, Andrew <Andrew.Bauer@arnoldporter.com>; Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; Goldstein, Elena <Elena.Goldstein@ag.ny.gov>; Saini, Ajay <Ajay.Saini@ag.ny.gov>
Subject: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet & Confer Request

Counsel --

We wish to raise three matters:

1. This is the fourth email we are sending since last Wednesday to request a meet and confer regarding the Government's production of the supplemental administrative record. Counsel for both the State of New York and NYIC cases remain available to discuss this afternoon and tomorrow morning.

Judge Furman's practice requires disputes of this nature to be raised "promptly." In the event we do not hear from you shortly, we will assume the Government does not wish to confer about these matters and will proceed accordingly.

2. In advance of the meet and confer, we have identified several further issues we hope the Government will address to shorten our agenda:

a. Log Entries that Fail to Comply with Rule 26(b)(5) and S.D.N.Y. Local Rule 26.2(a)(2)(A): For many documents that appear to have been withheld in their entirety, the log fails to identify sufficient information to enable us to identify assess the privilege claim -- many log entries identify neither the date of the document, the author or custodian or any other recipients of the documents, e.g., 3902, 4054, 4349, 5418, etc. The Government should promptly produce a log that provides this information for every document withheld.

b. Census Bureau Team Folder: We have seen references in the production to Mr. Abowd's "swat" team having a team folder and/or a shared drive or intranet site. In a related context, we have also seen a reference to a site his team used called: SECURE_ADREC_2020, e.g., 7505, 9616, 11200. Have the contents of these folders been provided? If so, where are they in the record?

c. Native Files and Other Withheld Materials: There are documents we have seen where a slip sheet has been produced indicating the original document was not produced because it is a native file or encrypted, e.g., 7516, 9570, 9621, 9836, 9837. These are not a valid basis to withhold materials. These and any similar materials should be produced.

d. Work Product Assertions: With regard to the work product assertions, we have found a document (3888) asserting work product as early as May 24, 2017. So our questions regarding work product assertions should be addressed relative to that date.

To be clear, there are a number of other substantive points we plan to raise when we talk. But our hope is that you will be able to address these before our discussion.

3. We wanted to check whether you will have any changes to the coordination procedures letter that New York sent last Wednesday. We believe this reflects the agreements we reached when we met and conferred on July 13 and accurately reports the points of disagreement. We plan to submit to the Court tomorrow, so in the absence of receiving any edits from you, we will assume you still agree with the outlined procedures.

Thanks and best regards,

John

From: Freedman, John A.
Sent: Friday, July 27, 2018 3:54 PM
To: 'Ehrlich, Stephen (CIV)'; Bailey, Kate (CIV); Federighi, Carol (CIV); Lara.Eshkenazi@usdoj.gov; Tarczynska, Dominika (USANYS); Jeannette.Vargas@usdoj.gov
Cc: zzz.External.DHo@aclu.org; zzz.External.SBrannon@aclu.org; zzz.External.PGrossman@nyclu.org; Bauer, Andrew; Colangelo, Matthew; Goldstein, Elena; Saini, Ajay
Subject: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Department of Justice Discovery

Counsel --

This will acknowledge Garrett's email from 10:30 this morning. I have instructed the NYIC team in accordance with Rule 26(b)(5), and understand the State of New York team has as well.

We wanted to check in on a few things:

1. Attached please find deposition notices for Messrs. Abowd (for August 15) and Jarmin (for August 20). We should be able to lock in the date for Ms. Teramoto's testimony early next week.

2. Last week, we sent a copy of the Department of Justice subpoena (with a return date for testimony starting on August 13) and a draft Census Bureau Rule 30(b)(6) notice. As I advised when I sent the notice, we plan to revise the list of Census Bureau topics in light of the supplements to the Administrative Record, and send a final notice next week, with a notice date of August 14. That date was requested by counsel from the various California cases, who have asked that we try to cluster depositions because of travel considerations.

3. We are still waiting for dates from you for Messrs. Gore and Comstock and Ms. Dunn Kelley. Also -- we should advise that we believe the testimony called for in the Department of Justice Rule 30(b)(6) notice may be adequate to cover the testimony we requested from Mr. Herren.

4. We are still waiting on your position whether you will consent to the filing of an amended complaint naming DoJ, the Attorney General and Mr. Gore (in their official capacities) as Defendants.

5. Earlier this week, the State of New York sent a draft of proposed coordination procedures, which reflect the discussion from our last meet and confer, as well as the positions of the plaintiffs in the California and Maryland cases. Could you let us know whether the Government is OK with plaintiffs submitting this letter jointly?

6. We are still waiting for a response on the request we made earlier this week for a meet and confer on Monday afternoon or Tuesday morning regarding the supplement to the Administrative Record and the assertions of privilege reflected in the log, as well as depositions and the Department of Justice subpoena.

In advance of the meet and confer, we wanted to raise three issues regarding privilege assertions to see if we might be able to shorten the agenda by getting appropriate relief.

a. There are approximately 60 documents we have identified where materials have been improperly redacted, ostensibly because of Title 13. The relevant provisions of Title 13 are geared to ensure data privacy for individuals. Title 13 protects, at most, the identities of persons and arguably raw Census data reported by or on behalf of individuals. Based on the sample we have reviewed, the redactions we have seen all appear to be of summary statistical conclusions made about aggregated data, which in no way implicate any individuals' privacy. *See* AR 10509, 10742, 10849, 10975, 11003. We request that the improperly redacted documents be reproduced promptly.

b. We have seen assertions of attorney work product that significantly pre-date the onset of litigation in this matter, and accordingly do not appear to have been prepared in anticipation of litigation. For example, AR 3984 asserts work product over a document sent on August 10, 2017 and AR 2035 asserts work product over a document sent September 7, 2017. We do not see any indicia on the privilege log or production log that any litigation hold notice was ever sent, much less prior to these communications. Can you advise when the earliest litigation hold notice issued by the Department of Commerce was sent and point us to where it can be found in your production? Alternatively, if you conclude that work product was not properly asserted as to these documents, please reproduce the relevant documents.

c. We have seen at least one instance where there has been an attorney-client privilege assertion with regard to communications between a government lawyer and an individual we understand is not a government employee -- A. Mark Neuman. *See* AR 2051. The other privileges asserted over the document are questionable if Mr. Neuman was not a government employee. If you conclude that this document is not privileged, please reproduce the relevant document.

There are a number of other issues we plan to raise on the meet and confer. But if you are able to address these issues, that will shorten our agenda.

Thanks and best regards,

John

_____
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http://www.arnoldporter.com

Freedman, John A.

From: Bailey, Kate (CIV) <Kate.Bailey@usdoj.gov>
Sent: Friday, August 03, 2018 8:54 PM
To: Freedman, John A.; Federighi, Carol (CIV); Ehrlich, Stephen (CIV); Coyle, Garrett (CIV); Kopplin, Rebecca M. (CIV); Halainen, Daniel J. (CIV); Tomlinson, Martin M. (CIV)
Cc: Colangelo, Matthew; 'Goldstein, Elena'; Saini, Ajay; 'dale.ho@aclu.org'; zzz.External.SBrannon@aclu.org; zzz.External.PGrossman@nyclu.org; Bauer, Andrew
Subject: RE: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet & Confer Follow Up
Attachments: Corrected privilege log (2018.07.25).pdf; Corrected supplemental privilege log (2018.07.27) (Final).pdf; R45 Objections and Responses.pdf; R45 Production Letter.pdf; 08.03.18 Supplemental Production Priv Log.pdf

Counsel,

Following up on our discussion Tuesday afternoon:

- A supplemental production including the documents inadvertently omitted from last week's productions, along with the Neuman email no longer designated as privileged, is being uploaded to the DOC FOIA reading room this evening. No new link is required; the additional documents will go live on the link provided to you last Thursday.

- Attached is a Production Letter, along with our Objections and Responses to your Rule 45 subpoena issued to the Department of Justice. As indicated in the Letter, a disc containing the first document production in response to the subpoena was sent via FedEx tonight. The Password for that disc is [redacted]

- Regarding depositions, Karen Dunn Kelley is available August 28; Earl Comstock is available August 30; and Wendy Teramoto is available September 7 in New York. We realize that we'd previously provided you a different date for Ms. Teramoto, but unfortunately, she no longer is available on that date. We have also confirmed the availability of Dr. Abowd on August 15 and Dr. Jarmin on August 20. We will follow up about the Census 30(b)(6) deposition shortly. As for deposition dates for John Gore, consistent with our objections to Plaintiffs' third-party subpoena to the Department of Justice (attached), the information possessed by Mr. Gore is either privileged or irrelevant to Plaintiffs' APA and equal protection claims. Accordingly, we will not provide deposition dates for Mr. Gore at this time.

- Regarding the legal memo prepared by Mr. Uthmeier, Esq., I inadvertently misspoke during our call Tuesday. That memo was among the documents mistakenly omitted from last week's production. It is included within the attached "08.03.18 Supplemental Production Priv Log," which encompasses all privileged materials within today's supplemental production.

- Although we continue to disagree about the sufficiency of the privilege logs we have provided, corrected versions of our previous logs are attached. We have reviewed each of the entries included in your attachment to your email below, and we have updated the log to include "To," "From," and/or "Date" where such information is apparent from the face of the document. Although the log now contains information for many of the entries you have challenged, we intend also to collect metadata, where available, from the underlying files and use that information to further supplement the log, in the interest of transparency. Early next week we will send you final, updated versions of the privilege log to include additional details obtainable from metadata.

Thank you,

Kate Bailey
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From: Freedman, John A. [mailto:John.Freedman@arnoldporter.com]
Sent: Tuesday, July 31, 2018 10:07 PM
To: Bailey, Kate (CIV) <katbaile@CIV.USDOJ.GOV>; Federighi, Carol (CIV) <CFederig@CIV.USDOJ.GOV>; Ehrlich, Stephen (CIV) <sehrlich@CIV.USDOJ.GOV>; Coyle, Garrett (CIV) <gcoyle@CIV.USDOJ.GOV>; Eshkenazi, Lara (USANYS) <Lara.Eshkenazi@usdoj.gov>; Vargas, Jeannette (USANYS) <Jeannette.Vargas@usdoj.gov>; Tarczynska, Dominika (USANYS) <Dominika.Tarczynska@usdoj.gov>
Cc: Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; 'Goldstein, Elena' <Elena.Goldstein@ag.ny.gov>; Saini, Ajay <Ajay.Saini@ag.ny.gov>; 'dale.ho@aclu.org' <dale.ho@aclu.org>; SBrannon@aclu.org; PGrossman@nyclu.org; Bauer, Andrew <Andrew.Bauer@arnoldporter.com>
Subject: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet & Confer Follow Up

Counsel --

To summarize our discussion this afternoon:

1. We look forward to receiving the deposition dates for the remaining requested witnesses and the explanation of the basis for redaction and withholding Title 13 information tomorrow.

2. We also look forward to your answer on the DoJ subpoena, your answers to our questions about the productions from Secretary Ross, Ms. Teramoto, Ms. Alexander, and Messrs. Comstock, Branstad, Hernandez, and Uthmeier (including his August 11, 2017 memorandum), and the supplemental production (including the "swat" team's shared file, the Marc Neuman document misdesignated as privileged, and the other materials that were inadvertently omitted from the last production), and your proposal on the native file and encrypted documents by the end of the week.

3. This will also confirm your representation that the Government is not asserting executive privilege over any materials from Commerce or the Census Bureau, and has not withheld anything on the basis of executive privilege.

4. This will confirm our understanding that the Government continues to assert a deliberative privilege and work product over certain documents, as well as the sufficiency of the logs provided. We believe we are at impasse on these issues and will raise with the Court. We will evaluate your Title 13 explanation, but in the absence of a satisfactory explanation, we will also raise this with the Court.

5. As a follow up to our discussion, we have attached the relevant excerpts of the logs that we have identified that do not comply with Rule 26(b)(5) and S.D.N.Y. Local Rule 26.2(a)(2)(A). There may be additional entries that are not reflected in these charts. As we advised, under the Rules and governing law, the withholding party has the obligation to establish the applicability of the privilege, and in the absence of this information, there is no valid basis to withhold these documents.

Best regardsm

John

From: Freedman, John A.
Sent: Monday, July 30, 2018 6:40 PM
To: 'Bailey, Kate (CIV)'; Ehrlich, Stephen (CIV); Federighi, Carol (CIV); Eshkenazi, Lara (USANYS); Tarczynska, Dominika (USANYS); Vargas, Jeannette (USANYS); Coyle, Garrett (CIV)
Cc: zzz.External.DHo@aclu.org; zzz.External.SBrannon@aclu.org; zzz.External.PGrossman@nyclu.org; Bauer, Andrew; Colangelo, Matthew; Goldstein, Elena; Saini, Ajay
Subject: RE: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet & Confer Request

Counsel --

A number of us have re-arranged our schedules, and we are able to proceed at 3:30 tomorrow. We will send a calendar invite.

If you are able to address any of the technical issues in advance of the call, that will shorten the time necessary for the call. That said, in addition to the issues we have asked you to look into, we have serious concerns about the Government's compliance with the Court's orders -- there are significant gaps in the Administrative Record and a large number of documents (or information contained within the documents) have been withheld on highly questionable assertions of privilege. We will be prepared to discuss these issues with you in detail tomorrow.

Talk to you tomorrow.

John

From: Bailey, Kate (CIV) [mailto:Kate.Bailey@usdoj.gov]
Sent: Monday, July 30, 2018 5:05 PM
To: Freedman, John A.; Ehrlich, Stephen (CIV); Federighi, Carol (CIV); Eshkenazi, Lara (USANYS); Tarczynska, Dominika (USANYS); Vargas, Jeannette (USANYS); Coyle, Garrett (CIV)
Cc: zzz.External.DHo@aclu.org; zzz.External.SBrannon@aclu.org; zzz.External.PGrossman@nyclu.org; Bauer, Andrew; Colangelo, Matthew; Goldstein, Elena; Saini, Ajay
Subject: RE: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet & Confer Request

Counsel—

Thank you for your email. While we understand your desire to move these matters quickly, it would not be appropriate to submit a joint filing without receiving our edits or position. Please refrain from assuming our position without hearing from us. We are available tomorrow afternoon after 3:30 pm to meet and confer.

Regarding the coordination procedures in particular, certain aspects of your proposal exceed the substance of our discussion last week. We will send you edits representing our points of disagreement by the close of business tomorrow.

In addition, we anticipate providing you with additional deposition dates on our call tomorrow. Thank you for advising us that the deposition of Mr. Herren likely will not be needed.

We do not consent to your proposal to amend your complaint(s) to add the Department, AG Sessions, or Mr. Gore as official-capacity defendants.

Thank you,

Kate

Kate Bailey
Trial Attorney
United States Department of Justice
Civil Division – Federal Programs Branch
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Washington, D.C. 20530
202.514.9239 | kate.bailey@usdoj.gov

From: Freedman, John A. [mailto:John.Freedman@arnoldporter.com]
Sent: Monday, July 30, 2018 3:11 PM
To: Ehrlich, Stephen (CIV) <sehrlich@CIV.USDOJ.GOV>; Bailey, Kate (CIV) <katbaile@CIV.USDOJ.GOV>; Federighi, Carol (CIV) <CFederig@CIV.USDOJ.GOV>; Eshkenazi, Lara (USANYS) <Lara.Eshkenazi@usdoj.gov>; Tarczynska, Dominika (USANYS) <Dominika.Tarczynska@usdoj.gov>; Vargas, Jeannette (USANYS) <Jeannette.Vargas@usdoj.gov>; Coyle, Garrett (CIV) <gcoyle@CIV.USDOJ.GOV>
Cc: DHo@aclu.org; SBrannon@aclu.org; PGrossman@nyclu.org; Bauer, Andrew <Andrew.Bauer@arnoldporter.com>; Colangelo, Matthew <Matthew.Colangelo@ag.ny.gov>; Goldstein, Elena <Elena.Goldstein@ag.ny.gov>; Saini, Ajay <Ajay.Saini@ag.ny.gov>
Subject: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet & Confer Request

Counsel --

We wish to raise three matters:

1. This is the fourth email we are sending since last Wednesday to request a meet and confer regarding the Government's production of the supplemental administrative record. Counsel for both the State of New York and NYIC cases remain available to discuss this afternoon and tomorrow morning.

Judge Furman's practice requires disputes of this nature to be raised "promptly." In the event we do not hear from you shortly, we will assume the Government does not wish to confer about these matters and will proceed accordingly.

2. In advance of the meet and confer, we have identified several further issues we hope the Government will address to shorten our agenda:

a. Log Entries that Fail to Comply with Rule 26(b)(5) and S.D.N.Y. Local Rule 26.2(a)(2)(A): For many documents that appear to have been withheld in their entirety, the log fails to identify sufficient information to enable us to identify assess the privilege claim -- many log entries identify neither the date of the document, the author or custodian or any other recipients of the documents, e.g., 3902, 4054, 4349, 5418, etc. The Government should promptly produce a log that provides this information for every document withheld.

b. Census Bureau Team Folder: We have seen references in the production to Mr. Abowd's "swat" team having a team folder and/or a shared drive or intranet site. In a related context, we have also seen a reference to a site his team used called: SECURE_ADREC_2020, e.g., 7505, 9616, 11200. Have the contents of these folders been provided? If so, where are they in the record?

c. Native Files and Other Withheld Materials: There are documents we have seen where a slip sheet has been produced indicating the original document was not produced because it is a native file or encrypted, e.g., 7516, 9570, 9621, 9836, 9837. These are not a valid basis to withhold materials. These and any similar materials should be produced.

d. Work Product Assertions: With regard to the work product assertions, we have found a document (3888) asserting work product as early as May 24, 2017. So our questions regarding work product assertions should be addressed relative to that date.

To be clear, there are a number of other substantive points we plan to raise when we talk. But our hope is that you will be able to address these before our discussion.

3. We wanted to check whether you will have any changes to the coordination procedures letter that New York sent last Wednesday. We believe this reflects the agreements we reached when we met and conferred on July 13 and accurately reports the points of disagreement. We plan to submit to the Court tomorrow, so in the absence of receiving any edits from you, we will assume you still agree with the outlined procedures.

Thanks and best regards,

John

From: Freedman, John A.
Sent: Friday, July 27, 2018 3:54 PM
To: 'Ehrlich, Stephen (CIV)'; Bailey, Kate (CIV); Federighi, Carol (CIV); Lara.Eshkenazi@usdoj.gov; Tarczynska, Dominika (USANYS); Jeannette.Vargas@usdoj.gov
Cc: zzz.External.DHo@aclu.org; zzz.External.SBrannon@aclu.org; zzz.External.PGrossman@nyclu.org; Bauer, Andrew; Colangelo, Matthew; Goldstein, Elena; Saini, Ajay
Subject: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Department of Justice Discovery

Counsel --

This will acknowledge Garrett's email from 10:30 this morning. I have instructed the NYIC team in accordance with Rule 26(b)(5), and understand the State of New York team has as well.

We wanted to check in on a few things:

1. Attached please find deposition notices for Messrs. Abowd (for August 15) and Jarmin (for August 20). We should be able to lock in the date for Ms. Teramoto's testimony early next week.

2. Last week, we sent a copy of the Department of Justice subpoena (with a return date for testimony starting on August 13) and a draft Census Bureau Rule 30(b)(6) notice. As I advised when I sent the notice, we plan to revise the list of Census Bureau topics in light of the supplements to the Administrative Record, and send a final notice next week, with a notice date of August 14. That date was requested by counsel from the various California cases, who have asked that we try to cluster depositions because of travel considerations.

3. We are still waiting for dates from you for Messrs. Gore and Comstock and Ms. Dunn Kelley. Also -- we should advise that we believe the testimony called for in the Department of Justice Rule 30(b)(6) notice may be adequate to cover the testimony we requested from Mr. Herren.

4. We are still waiting on your position whether you will consent to the filing of an amended complaint naming DoJ, the Attorney General and Mr. Gore (in their official capacities) as Defendants.

5. Earlier this week, the State of New York sent a draft of proposed coordination procedures, which reflect the discussion from our last meet and confer, as well as the positions of the plaintiffs in the California and Maryland cases. Could you let us know whether the Government is OK with plaintiffs submitting this letter jointly?

6. We are still waiting for a response on the request we made earlier this week for a meet and confer on Monday afternoon or Tuesday morning regarding the supplement to the Administrative Record and the assertions of privilege reflected in the log, as well as depositions and the Department of Justice subpoena.

In advance of the meet and confer, we wanted to raise three issues regarding privilege assertions to see if we might be able to shorten the agenda by getting appropriate relief.

a. There are approximately 60 documents we have identified where materials have been improperly redacted, ostensibly because of Title 13. The relevant provisions of Title 13 are geared to ensure data privacy for individuals. Title 13 protects, at most, the identities of persons and arguably raw Census data reported by or on behalf of individuals. Based on the sample we have reviewed, the redactions we have seen all appear to be of summary statistical conclusions made about aggregated data, which in no way implicate any individuals' privacy. *See* AR 10509, 10742, 10849, 10975, 11003. We request that the improperly redacted documents be reproduced promptly.

b. We have seen assertions of attorney work product that significantly pre-date the onset of litigation in this matter, and accordingly do not appear to have been prepared in anticipation of litigation. For example, AR 3984 asserts work product over a document sent on August 10, 2017 and AR 2035 asserts work product over a document sent September 7, 2017. We do not see any indicia on the privilege log or production log that any litigation hold notice was ever sent, much less prior to these communications. Can you advise when the earliest litigation hold notice issued by the Department of Commerce was sent and point us to where it can be found in your production? Alternatively, if you conclude that work product was not properly asserted as to these documents, please reproduce the relevant documents.

c. We have seen at least one instance where there has been an attorney-client privilege assertion with regard to communications between a government lawyer and an individual we understand is not a government employee -- A. Mark Neuman. *See* AR 2051. The other privileges asserted over the document are questionable if Mr. Neuman was not a government employee. If you conclude that this document is not privileged, please reproduce the relevant document.

There are a number of other issues we plan to raise on the meet and confer. But if you are able to address these issues, that will shorten our agenda.

Thanks and best regards,

John

_____

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http://www.arnoldporter.com

Goldstein, Elena

From: Dale Ho <dho@aclu.org>
Sent: Tuesday, August 28, 2018 1:47 PM
To: Bailey, Kate (CIV); Freedman, John A.; Coyle, Garrett (CIV); Federighi, Carol (CIV); Kopplin, Rebecca M. (CIV); Halainen, Daniel J. (CIV); Tomlinson, Martin M. (CIV); Ehrlich, Stephen (CIV)
Cc: Colangelo, Matthew; Goldstein, Elena; Saini, Ajay; Sarah Brannon; Perry Grossman; Bauer, Andrew; Gersch, David P.; Grossi, Peter T.; Weiner, David J.; Young, Dylan Scot; Kelly, Caroline
Subject: Re: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Various Matters

Counsel,

Thank you for your email. Our responses on various items are below -

Item 2 (Gore deposition and DOJ documents). We will review your proposed clawback agreement and get back to you. We note that you still have not provided dates for Mr. Gore's availability for the weeks of 9/3 and 9/10.

Item 3(2) (Title 13 review). Thank you for your response regarding Title 13 review. Given that Title 13 review was completed last week for the first tranche of documents, we do not understand why these documents have not yet been produced, particularly in light of the 30(b)(6) deposition tomorrow. Please produce these documents immediately.

Item 3(3) (Abowd documents). We have not received an explanation as to why these documents have not been produced. Please produce these documents immediately in light of the 30(b)(6) deposition tomorrow.

In addition to the materials we have previously requested, counsel from one of the other actions has asked that the Government also identify or produce the following:

- The analysis that estimates a 5.8 percentage point differential decrease in self-response caused by the citizenship question, and all related documents and data. (Abowd Tr. 202-03.)
- Documents concerning field instructions for how hard to press for proxies. (Abowd Tr. 216.)
- Documents concerning the relationship between self-response rate and net undercount. (Abowd Tr. 228-29.)
- Documents concerning procedures for whole-person imputation for the 2020 census. (Abowd Tr. 233.)
- Documents concerning the use of administrative records for imputation for the 2020 census. (Abowd Tr. 233.)

Item 3(4)(a) (Interrogatories). Please confirm that you will respond to our modified interrogatories and by what date.

Items 3(4)(b)-(c) (completeness of the record). We understand your position that the AR is complete and that you will not perform searches of additional custodians or search terms beyond the ones that you have already conducted.

Last, we write to request your consent for limited third-party discovery, in the form of a Rule 45 request for production of documents from, and deposition of, Kris Kobach. As you know, the Administrative Record reveals that Mr. Kobach was intimately involved in Secretary Ross's decision to add a citizenship question to the 2020 Census. See AR 763, 764. The AR includes an email exchange between Mr. Kobach and Wendy Teramoto, and references to at least one conversation between the two of them.

At her deposition on Friday, however, Ms. Teramoto testified that she "ha[s] no idea" who Mr. Kobach is. In response to the question, "[d]o you recall speaking with Kris Kobach," Ms. Teramoto replied, "[n]ot at all." She also testified "I have no recollection of ever speaking to him," and that she "had no idea" who Mr. Kobach was at the time of their interactions. In response to the question "why did you set up a call with him [and] the Secretary," she responded "I don't remember." She further testified that she "ha[s] no idea" whether there are any notes of Secretary Ross's subsequent conversation with Mr. Kobach.

In light of Mr. Kobach's apparent role in the Secretary's decision to add the citizenship question, and Ms. Teramoto's inability to testify about her interactions Mr. Kobach—including those interactions with Mr. Kobach to which she was the only Commerce Department official who was a party—we intend to seek leave of the Court to take discovery from Mr. Kobach. Please confirm whether you will oppose or consent to this request.

Regards,

Dale Ho
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American Civil Liberties Union
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From: Bailey, Kate (CIV) <Kate.Bailey@usdoj.gov>
Sent: Monday, August 27, 2018 11:42:35 PM
To: Dale Ho; Freedman, John A.; Coyle, Garrett (CIV); Federighi, Carol (CIV); Kopplin, Rebecca M. (CIV); Halainen, Daniel J. (CIV); Tomlinson, Martin M. (CIV); Ehrlich, Stephen (CIV)
Cc: 'Colangelo, Matthew'; 'Goldstein, Elena (Elena.Goldstein@ag.ny.gov) (Elena.Goldstein@ag.ny.gov)'; 'Saini, Ajay'; Sarah Brannon; Perry Grossman; Bauer, Andrew; Gersch, David P.; Grossi, Peter T.; Weiner, David J.; Young, Dylan Scot; Kelly, Caroline
Subject: RE: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Various Matters

Counsel—

The depositions of Karen Dunn Kelley and Earl Comstock will be attended by myself, Josh Gardner, David Dewhirst, and Mike Walsh. The Census Bureau 30(b)(6) deposition will be attended by Dr. Abowd, Stephen Ehrlich, Carlotta Wells, and Michael Cannon.

We are ready to produce to you another batch of documents from DOJ and an accompanying privilege log, but we need to first secure a clawback agreement. Attached to this email is a proposed agreement and joint motion. Please review and let us know if you have any concerns; we'd like to get this on file ASAP so we may promptly overnight you additional responsive documents.

Regarding the points below, your email contains several misstatements of the positions we took in our August 21 meet and confer. For example, I represented on that call our position that we have searched the appropriate custodians based on each individuals' involvement (or lack thereof) in the process. I also represented our position that the search terms selected were designed to capture responsive documents in a manner proportional to the needs of the case, and that the search terms you proposed would be overbroad and would likely pull in a large number of materials unrelated to the issues presented in this litigation.

In response to your questions and your representation that you believed, based on the materials we have produced, that some individuals had more-substantial involvement, we agreed to confirm with the agency the role of a smaller group of "priority" individuals and to *consider* whether those individuals are likely to have responsive and relevant information the production of which would be proportional to the needs of this case. But **we did not agree to perform new searches either on additional custodians or using additional search terms for those custodians whose materials we've already searched.** I would also point out that the fact that a particular individual "was . . . involved in Dr. Abowd's analysis," or "is on roughly 50 emails already in the record" does not, by itself, indicate that a particular individual should be included as a custodian. Both Dr. Abowd's and Dr. Jarmin's files and emails were searched, as well as those of Secretary Ross's advisors within Commerce, and any relevant information provided by your proposed custodians to those individuals already has been produced. Consistent with my representation last week, we will consult with the agency on the level of involvement of the individuals you've identified, but we do not at this time agree to add additional custodians.

Furthermore, we do not agree to search all custodians for "concepts" such as "aliens," "illegals," and "undocumented." The decision at issue concerns a question on citizenship, not legal status, and including such terms would be irrelevant and disproportionate to the case. We similarly believe that the sparse references to Steve Bannon, James McHenry, Gene Hamilton, and Marc Neumann within the record do not justify re-searching all custodians to search for these names. These individuals may interact with the Department on matters unconnected to citizenship and the census. And any responsive materials would also contain the terms we have used, including "citizenship" and "census," and have been produced. In particular, we disagree with your contention that "Mr. Bannon played a large role in precipitating the addition of the question." Also inaccurate is your assertion that "Mr. Comstock wrote in his September 8th memo that he had discussions with Mr. McHenry about the possibility of EOIR requesting addition of the question"; **the memo in question did not mention EOIR, and it is not clear that Mr. McHenry even worked in that office during the relevant timeframe.**

Additionally, I confirmed that the names Kris Kobach, Jeff Sessions, and John Gore have been searched. **I did not make any representations regarding "variants" of those names, nor did I agree to "run such terms for new custodians."**

Regarding the documents submitted for Title XIII review, the DRB has completed its review for one tranche of 22 documents, and review of the remaining documents is pending. We expect to provide an update on the first tranche shortly, including providing updated versions of the documents as appropriate, and we anticipate having a better understanding of the timing for the remaining documents later this week.

Kate Bailey

Trial Attorney

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From: Dale Ho [mailto:dho@aclu.org]
Sent: Monday, August 27, 2018 5:44 PM
To: Bailey, Kate (CIV) <katbaile@CIV.USDOJ.GOV>; Freedman, John A. <John.Freedman@arnoldporter.com>; Coyle, Garrett (CIV) <gcoyle@CIV.USDOJ.GOV>; Federighi, Carol (CIV) <CFederig@CIV.USDOJ.GOV>; Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>; Halainen, Daniel J. (CIV) <dhalaine@CIV.USDOJ.GOV>; Tomlinson, Martin M. (CIV) <mtomlins@CIV.USDOJ.GOV>; Ehrlich, Stephen (CIV) <sehrlich@CIV.USDOJ.GOV>
Cc: 'Colangelo, Matthew' <Matthew.Colangelo@ag.ny.gov>; 'Goldstein, Elena (Elena.Goldstein@ag.ny.gov) (Elena.Goldstein@ag.ny.gov)' <Elena.Goldstein@ag.ny.gov>; 'Saini, Ajay' <Ajay.Saini@ag.ny.gov>; Sarah Brannon <sbrannon@aclu.org>; Perry Grossman <PGrossman@nyclu.org>; Bauer, Andrew <Andrew.Bauer@arnoldporter.com>; Gersch, David P. <David.Gersch@arnoldporter.com>; Grossi, Peter T. <Peter.Grossi@arnoldporter.com>; Weiner, David J. <David.Weiner@arnoldporter.com>; Young, Dylan Scot <Dylan.Young@arnoldporter.com>; Kelly, Caroline <Caroline.Kelly@arnoldporter.com>
Subject: Re: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Various Matters

Counsel,

We write to address three topics.

First, can you provide the names of attendees for each of the depositions this week?

Second, can you provide dates of availability for Mr. Gore and timing on production of his documents, including a privilege log? It has now been 10 days since the court's order compelling Mr. Gore's deposition.

Third, we are writing to follow up on our August 21 meet and confer.

1. This will serve to confirm your representation that the Government has produced all records from the "secured share drive" referenced in Mr. Cannon's declaration and did not limit the production from that folder to specific search terms. Please let us know immediately if that understanding is inaccurate.

2. We had understood that from the discussion on August 21 that the Disclosure Review Board was expected to review the Title 13 assertions on August 23 or 24, and the Government was going to provide an update on August 23 on status. We did not receive this update. Please advise on the status of the review, and when we should expect to receive the additional materials.

3. We have previously noted that we have been unable to find certain materials referenced by Dr. Abowd during his deposition. These are the open issues:

- We understand that the longer version of the white paper referenced by Dr. Abowd on pages 89-90 of the final transcript (pages 83-84 in the rough draft) is included in the documents that you are reviewing and plan to produce. We have not yet received those documents.
- At page 166-167 (formerly 159-161), Dr. Abowd mentioned that he believed that the Census Bureau had done analysis referenced in Secretary Ross' March 26 memo in tables showing the differential response rates for other ACS questions. We do not believe this analysis has been produced.
- At page 179 (formerly page 173), Dr. Abowd testified about his review of drafts of the March 26 memo that does not appear to be privileged. We do not believe these drafts have been produced.
- At page 206-207, Dr. Abowd testified about the August 3 report. We do not believe this has been produced. You agreed to look into this at the meet and confer.
- On additional document that we have not previously raised is the spreadsheet Dr. Abowd testified about at page 315. We do not believe this has been produced.

Each of these documents should be identified in the record or produced immediately, i.e., before the Census Bureau 30(b)(6) deposition.

4. As we agreed to, we have conferred about our concerns about the completeness of the administrative record, we have conferred internally about prioritization of additional custodians and search terms, as well as modifications to Interrogatories 1.d and 1.e.

a. With respect to the interrogatories, we will make the following modifications to 1.d and 1.e to address the issues you raised at the meet and confer.

> 1.d. the date on which the "senior Administration officials" who "previously raised" reinstating the citizenship question first raised this subject with SECRETARY ROSS or with COMMERCE;
>
> 1.e. all PERSONS with whom, to the knowledge of COMMERCE and SECRETARY ROSS, the "senior Administration officials had previously raised" reinstating the citizenship question.

Please confirm that the Department of Commerce and Secretary Ross will now respond to the interrogatories under these modified requests, and please also provide a date by which you will provide your responses.

b. With respect to additional custodians to search, we ask that you prioritize the following custodians:

- Victoria Velkoff: She was heavily involved in the analysis performed by Dr. Abowd's team.
- David Raglin: Like Ms. Velkoff, he was heavily involved in Dr. Abowd's analysis.
- Eric Branstad: He served as a point person in communicating with DOJ about the addition of the citizenship question. He was also on the email where Mr. Comstock informed Secretary Ross that "illegal aliens" are counted for purposes of redistricting.
- David Langdon: He plays an active role in a number of early emails about adding the citizenship question (including AR 3685, 3686, 3702, 3888).
- Sahra Park-Su: She is on roughly 100 emails already in the record about adding the question, and participated at the August 29 meeting with Comstock.
- Brian Lenihan: He is on roughly 50 emails already in the record about adding the question.
- Aaron Willard: He is on roughly 50 emails already in the record about adding the question.

> At the present time, we are willing to postpone requesting the addition of Fotnenot, Treat, Dinwiddle, Whitehorne, Herbst, and Semsar as custodians, reserving all rights as we obtain additional discovery.

Please confirm that you will search the additional custodians requested above, and please also provide a date by which you will produce responsive materials from these additional custodians.

c. With respect to search terms:

1. All custodians should be searched for concepts referencing immigrants such as "aliens," "illegals," and "undocumented";

2. All custodians should be searched for the following names:

- Steve Bannon (and variants of his name): It is clear that Mr. Bannon played a large role in precipitating the addition of the question, and certainly as large a role as Kris Kobach, who you have already included as a search term.
- James McHenry (and variants of his name): Mr. Comstock wrote in his September 8th memo that he had discussions with Mr. McHenry about the possibility of EOIR requesting addition of the question.
- Eugene (Gene) Hamilton (and variants of his name): Mr. Comstock wrote in his September 8th memo that he had discussions with Mr. Hamilton about the possibility of DHS requesting addition of the question.
- Marc Neuman (and variants of his name): The records demonstrates that he was involved in ongoing discussions with senior Commerce leadership about adding the question.

For now, we are willing to forego adding Mary Blanche Hankey and Danielle Cutrona as search terms, reserving all rights as we obtain additional discovery.

3. This will confirm that you represented that the Government has previously searched variants of Kris Kobach, Jeff Sessions, and John Gore for previously searched custodians, and will run such terms for new custodians.

Please confirm that you will add the additional search terms requested above, and please also provide a date by which you will produce responsive materials.

Regards,

Dale Ho

Director, Voting Rights Project

American Civil Liberties Union

125 Broad St., 18th Floor

New York, NY 10004

(212) 549-2693

dale.ho@aclu.org

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From: Bailey, Kate (CIV) <Kate.Bailey@usdoj.gov>
Sent: Sunday, August 19, 2018 3:39:56 PM
To: Freedman, John A.; Coyle, Garrett (CIV); Federighi, Carol (CIV); Kopplin, Rebecca M. (CIV); Halainen, Daniel J. (CIV); Tomlinson, Martin M. (CIV); Ehrlich, Stephen (CIV)
Cc: 'Colangelo, Matthew'; 'Goldstein, Elena (Elena.Goldstein@ag.ny.gov) (Elena.Goldstein@ag.ny.gov)'; 'Saini, Ajay'; Dale Ho; Sarah Brannon; Perry Grossman; Bauer, Andrew; Gersch, David P.; Grossi, Peter T.; Weiner, David J.; Young, Dylan Scot; Kelly, Caroline
Subject: Re: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Various Matters

Thank you, John, for the thorough and prompt response. As an initial matter, we agree that this at least substantially narrows the parties' disagreement as to the proper scope of the 30(b)(6) deposition.

We will share and discuss this with our client as soon as possible, but it will not be possible to do so before the 9am start to Dr. Jarmin's deposition tomorrow, which means we will not be able to meet and confer during the lunch break. We intend to have a response quickly thereafter.

Kate

Sent from my Verizon, Samsung Galaxy smartphone

-------- Original message --------

From: "Freedman, John A." <John.Freedman@arnoldporter.com>

Date: 8/19/18 1:03 PM (GMT-05:00)

To: "Bailey, Kate (CIV)" <katbaile@CIV.USDOJ.GOV>, "Coyle, Garrett (CIV)" <gcoyle@CIV.USDOJ.GOV>, "Federighi, Carol (CIV)" <CFederig@CIV.USDOJ.GOV>, "Kopplin, Rebecca M. (CIV)" <rkopplin@CIV.USDOJ.GOV>, "Halainen, Daniel J. (CIV)" <dhalaine@CIV.USDOJ.GOV>, "Tomlinson, Martin M. (CIV)" <mtomlins@CIV.USDOJ.GOV>, "Ehrlich, Stephen (CIV)" <sehrlich@CIV.USDOJ.GOV>

Cc: "'Colangelo, Matthew'" <Matthew.Colangelo@ag.ny.gov>, "'Goldstein, Elena (Elena.Goldstein@ag.ny.gov) (Elena.Goldstein@ag.ny.gov)'" <Elena.Goldstein@ag.ny.gov>, "'Saini, Ajay'" <Ajay.Saini@ag.ny.gov>, DHo@aclu.org, SBrannon@aclu.org, PGrossman@nyclu.org, "Bauer, Andrew" <Andrew.Bauer@arnoldporter.com>, "Gersch, David P." <David.Gersch@arnoldporter.com>, "Grossi, Peter T." <Peter.Grossi@arnoldporter.com>, "Weiner, David J." <David.Weiner@arnoldporter.com>, "Young, Dylan Scot" <Dylan.Young@arnoldporter.com>, "Kelly, Caroline" <Caroline.Kelly@arnoldporter.com>

Subject: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Various Matters

Counsel --

Per my email on August 17, these are responses to the objections to the Census Bureau Rule 30(b)(6) topics identified in the Defendants' August 15 letter.

1. Per Defendants' objections to topic 5 that the list includes Commerce Department documents, Plaintiffs withdraw topics 5.f & 5.g. If there are other documents that are not Census Bureau documents, please identify them. The remaining documents all appear to be Census Bureau documents, and Dr. Abowd testified about many of them during his August 15 deposition.

2. Per Defendants' objections to topics 11 & 12, Plaintiffs withdraw topics 11 and 12.a and 12.b. Topics 12.c-12.f concern the Census Bureau's adherence to the relevant agency directives, guidelines and policies during its consideration of adding the citizenship question to the Decennial Census. The witness will not be asked for legal interpretations of these standards.

3. With regard to Defendants' objections to topic 13, we understand the Census Bureau is prepared to provide a witness to discuss the designated topic for the 2000, 2010 and 2020 Census. At the meet and confer, please be prepared to discuss whether or not there is a current Census Bureau employee who can testify regarding this topic for the 1990 Census.

4. With respect to Defendants' objections to topic 15, we will reformulate and narrow the request to be "The current estimate of the Census Bureau's Population Estimates Program for the population of the United States at present and its projection for United States population at the time the apportionment calculation will be conducted, including breakdown of this information by metropolitan and micropolitan statistical areas, counties, cities, and towns. And general information about the process by what these numbers are calculated." To facilitate the Census Bureau's ability to provide this information, Plaintiffs would be willing to accept a proposed stipulation with the data as to the numbers themselves.

5. With respect to Defendants' Title 13 objections to topics 17 and 20, we are prepared to discuss the specific Title 13 concerns. We note that significant ACS data has been publicly released, and additional data for the

2017 ACS is scheduled to be released in early September. We would also suggest that any Title 13 covered information should be submitted immediately to the DRP for review.

6. With respect to Defendants' objections to topic 18, Plaintiffs agree to narrow the scope of discussion about the CPS as follows: "Current Population Survey results since January 1, 2015, including any analysis of unit and item non-response rates, with breakdowns by demographic group and geography." Dr. Abowd knowledgeably discussed the CPS during the August 15 deposition. In the event he is not able to discuss in detail, the Census Bureau should produce a witness with sufficient knowledge.

7. With respect to Defendants' objections to topic 20, Plaintiffs agree to reformulate the topic to "Census Barriers, Attitudes and Motivators Surveys (CBAMS) in preparation of the 2010 Decennial Census and in preparation for the 2020 Decennial Census." Given the Census Bureau's reliance on data from the 2010 census in analyzing the potential addition of a citizenship question, we think that the information from CBAMS for 2010 census is relevant to matters at issue in this case.

As for the current CBAMS, Dr. Abowd already mentioned an August 3, 2018 report about this work and also there have been several public presentations (in Nov. 2017 and May 2018) about the results from focus group work that the Census Bureau has been conducting in relation to the 2020 Decennial Census. To the extent Dr. Abowd is not able to discuss this topic, the Census Bureau should produce a witness with sufficient knowledge.

8. Plaintiffs withdraw topics 1, 2, 3 & 4.

We trust these positions address the overwhelming majority of issues Defendants have raised and have significantly narrow the remaining issues. As we indicated on Friday, all counsel who need to participate from the Plaintiffs' side will be available to meet and confer about the full agenda we have proposed during the lunch break on Monday.

Best regards,

John

John A. Freedman

Arnold & Porter

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Goldstein, Elena

From: Freedman, John A. <John.Freedman@arnoldporter.com>
Sent: Sunday, September 16, 2018 5:28 PM
To: 'Bailey, Kate (CIV)'; DHo@aclu.org; Federighi, Carol (CIV); Coyle, Garrett (CIV); Kopplin, Rebecca M. (CIV); Halainen, Daniel J. (CIV); Tomlinson, Martin M. (CIV); Ehrlich, Stephen (CIV)
Cc: SBrannon@aclu.org; PGrossman@nyclu.org; Colangelo, Matthew; Bauer, Andrew; Gersch, David P.; Grossi, Peter T.; Weiner, David J.; Young, Dylan Scot; Kelly, Caroline; Saini, Ajay; Goldstein, Elena
Subject: RE: State of New York v. Department of Commerce, S.D.N.Y 18-CV-2921; NYIC v. Department of Commerce, S.D.N.Y. 18-CV-5025: Meet & Confer Follow Up & Other Items

Counsel --

We wanted to touch base on a couple of things and request a meet-and -confer on any points on which we don't have agreement:

1. Meet and confer follow up; To recap points we discussed Friday after the conference yesterday, (i) we are scheduled to discuss the Rule 45 subpoenas to non-party members of certain *NYIC* plaintiffs with Garrett and Stephen on Monday at 1, (ii) you will let us know about timing on the resumption of the Abowd deposition and our request for three hours, (iii) we should expect production of the materials previously withheld by the DRB on the basis of Title 13 pending the September 13 public release of the 2017 ACS data, and (iv) you will report back on our questions about the privilege assertions over the Park-Su Q31 email (9190) and the Uthmeier August 11 memo (11363, attachment to 2461).

With regard to the Uthmeier memo, for the sake of clarity, we also want to know your position on the other places it is reflected in the log (11342, 11346 ,11349, 11352, and 12462). Also -- we would like to know your position on the related documents generated by/exchanges involving Leonard Shambon (11301-306, 11312, 11333-335, 11353, 11355) -- many of which do not appear to meet the elements to establish a privilege.

2. In addition to these matters, we intend to seek leave to issue a Rule 45 document and testimonial subpoena to Mark Neuman. Could you please advise on your position on this request?

3. In conjunction with the September 11 Commerce Department supplemental productions of materials previously withheld on basis of deliberative privilege, there is a note in ECF 315-1 that materials similar to AR 3907 will be released in full upon request. We would like the other similar stakeholder call materials.

4. DOJ Productions. Per Martin and Daniel's Friday night emails, thank you for the next installment of DOJ materials and responses on the privilege assertions we have questioned. Notwithstanding the production of a few documents, there are three categories of documents being withheld which should be produced.

First, seventeen (17) of the documents post-date the December 12 Gary letter, in which DOJ publicly announced its decision to request that a citizenship question to the Census. Post-decisional documents cannot be withheld or redacted on the basis of deliberative privilege; moreover, discussions over how to a present a decision that has already been made do not fall within the ambit of deliberative process

privilege. Thus, Documents DOJ 2924, DOJ 2925, DOJ 2926, DOJ 2927, DOJ 2951, DOJ 2967, DOJ 3094, DOJ 3098, DOJ 3101, DOJ 3103, DOJ 3105, DOJ 3356 (only partially unredacted), DOJ 3357, DOJ 3365, DOJ 3367, DOJ 3371, DOJ 3374 should be produced in unredacted form.

Second, with respect to four (4) other documents, the privilege log contains only boilerplate conclusory assertions that the documents contain "deliberative" material. The descriptions do not establish these documents are in fact "deliberative" in nature or even that they are in fact pre-decisional. Thus, Documents DOJ 2722, DOJ 2736, DOJ 2739, DOJ 2786 should be produced in unredacted form.

Third, eleven (11) documents identified in the Friday DOJ production cannot be withheld or redacted on the basis of deliberative process privilege for the same reason as the documents in the first category above: they are post-decisional (DOJ 4455, 4456, 4457, 4459, 7685, 7687, 13555, 13556, 13557, 13561, and 13562). Several of these concern efforts to explain the decision to Congress (4456, 4457, 13555, 13556), which are not deliberative. DOJ has also asserted work product over seven of these document (4455, 4459, 7685, 7687, 13557, 13561, 13562) -- we do not understand the basis for these assertions. The log indicates that these documents were prepared "by CRT attorneys" who are not counsel in this matter. These assertions also seem incongruous with various representations that have been made to the Court regarding the role of CRT and Mr. Gore.

Relatedly, can you confirm that 4465 was the litigation hold issued to CRT, and that no prior hold was issued?

Finally, we note that the latest production contains very little material concerning Mr. Gore (and nothing from his non-governmental accounts) -- we had asked that be prioritized, and would appreciate a status update on when we should expect to see these materials.

Thank you for your attention to these requests.

Also -- with regard to expert depositions, this is to advise that we will make Dr. Hillygus available on October 9.

Best regards,

John

_____

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U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, DC 20530

By ECF

August 15, 2018

The Honorable Jesse M. Furman
United States District Judge
Southern District of New York
Thurgood Marshall Courthouse
40 Foley Square
New York, New York 10007

Re: *State of New York, et al., v. U.S. Department of Commerce, et al.*, 18-cv-2921 (JMF)
N.Y. Immigration Coalition v. U.S. Dep't of Commerce, 18-cv-5025 (JMF)

Dear Judge Furman:

Pursuant to Local Rule 37.2 and Individual Practice 2.C, the Department of Justice (DOJ) opposes Plaintiffs' letter requesting a conference or an order compelling DOJ to produce for deposition Acting Assistant Attorney General (AAG) for Civil Rights John Gore. DOJ further requests that the Court issue a protective order precluding such a deposition.

DOJ is not a party to this lawsuit, and Plaintiffs must therefore "take reasonable steps to avoid imposing undue burden or expense" in serving Rule 45 subpoenas on DOJ. *In re Fitch, Inc.*, 330 F.3d 104, 108 (2d Cir. 2003) (quoting Fed. R. Civ. P. 45(d)(a)). Plaintiffs nonetheless seek to depose AAG Gore, apparently in large part to probe *DOJ's* intent in sending the December 12, 2017 letter to Ron Jarmin (the "Gary Letter"). Plaintiffs make this request despite the low likelihood of AAG Gore's testimony resulting in any relevant evidence concerning *Secretary Ross's* decision or intent, and despite the burden such a deposition would place on DOJ. A court evaluating a Rule 45 subpoena must "balance the interests served by demanding compliance with the subpoena against the interests furthered by quashing it." *Hermitage Glob. Partners LP v. Prevezon Holdings Ltd.*, No. 13-CV-6326, 2015 WL 728463, at *3 (S.D.N.Y. Feb. 19, 2015). Here, few interests would be served by compliance because AAG Gore's testimony would be irrelevant and privileged; moreover, compliance would unduly burden DOJ by requiring the preparation and deposition of a high-level official in a case in which DOJ is not even a party and did not issue the decision being challenged.

I. A Deposition of AAG Gore Is Unlikely to Produce Information Relevant to Secretary Ross's Decision.

Plaintiffs' claims center on Secretary Ross's decision to reinstate a citizenship question on the 2020 Census, which they claim was arbitrary and capricious (or motivated by discriminatory animus). As this Court has held, although discovery normally is precluded in an APA case, limited discovery may be permitted under certain circumstances. *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997). But as the Court recognized, a plaintiff in this scenario is not entitled to "all the liberal discovery available under the federal rules. Rather, the Court must permit only that discovery necessary to effectuate the Court's judicial review; i.e., review the decision of the agency

under Section 706." Transcript at 85:11-14, Hearing of July 3, 2018 [hereinafter, "Tr."] (citation and internal quotation marks omitted). The Court has explained that the limited discovery may encompass "materials from the Department of Justice" to the extent that they "shed light on the motivations for Secretary Ross's decision." Tr. at 86:11-13. Consistent with that directive, DOJ has already begun producing non-privileged, non-burdensome, responsive documents in accordance with Plaintiffs' Rule 45 subpoena. But Plaintiffs have not demonstrated a need to take the much more significant, indeed extraordinary, step of taking deposition discovery of DOJ, which is not the agency that issued the decision being challenged here.

This Court has given no indication that Plaintiffs are permitted, under the limited scope of discovery, to take DOJ depositions at all, much less without meeting the standards of reasonableness and undue burden that govern Rule 45 subpoenas. Plaintiffs have already overreached the bounds of this Court's limited authorization by seeking extensive discovery from DOJ as if DOJ were a party to an ordinary civil case, including requesting that DOJ prepare a Rule 30(b)(6) deponent on numerous burdensome topics and serving extremely broad document discovery into irrelevant and privileged topics (including all documents relating to DOJ's enforcement of the Voting Rights Act). The Court should not permit Plaintiffs to expand discovery even further by taking the extraordinary step of deposing the Acting Assistant Attorney General.

Plaintiffs suggest that AAG Gore's testimony could be relevant to "pretext," ECF No. 236 at 2, but they are wrong. The relevant question here (in light of the Court's ruling at the July 3 hearing) is whether *Commerce's* stated reasons for reinstating the citizenship question were pre-textual, not whether DOJ's reasons for sending the Gary Letter were pre-textual. Commerce was the decision-maker, not DOJ. Under the Court's July 3 Order, therefore, Commerce's intent is at issue not DOJ's.[1] And in any event, the Gary Letter states DOJ's request and rationale, so there is no basis to probe DOJ's "intent" behind that letter.[2]

II. In Addition to Its Irrelevance, Nearly All Testimony by AAG Gore Would Be Privileged.

Plaintiffs further have not shown that they could elicit any non-privileged information in a deposition of AAG Gore. The deliberative process privilege would apply to AAG Gore's involvement in the DOJ process resulting in the Gary Letter, *see Tigue v. U.S. Dep't of Justice*,

[1] Although not necessary to demonstrate that a deposition of AAG Gore is uncalled for, Defendants reiterate the Government's position that this case should be decided based on the administrative record compiled by the Department of Commerce. Furthermore, although the Court's July 3 ruling necessarily raises the issue of *Commerce's* intent, under a pretext theory, the relevant question is not whether Commerce had additional motives for adopting the policy in question beyond the reasons set forth in its final decision. The sole inquiry should be whether Commerce actually believed the articulated basis for adopting the policy.

[2] In any event, Plaintiffs provided no basis to believe that the reasons stated in the Gary Letter were not DOJ's actual reasons (under the counterfactual assumption that DOJ's intent is relevant). DOJ uses citizenship data in a variety of ways, including in its own redistricting cases and in its role as amicus in Voting Rights Act cases before the Supreme Court. *Cf. Benavidez v. Irving Indep. Sch. Dist.*, 690 F. Supp. 2d 451 (N.D. Tex. 2010) (rejecting a plaintiff's attempt to support his Section 2 Voting Rights Act claim with only ACS statistics for citizen voting age population).

312 F.3d 70, 80 (2d Cir. 2002), whether or not he was "the primary point of contact for communications with senior Commerce Department political appointees," ECF No. 236 at 1. The deliberative process privilege also likely encompasses any information that AAG Gore could offer about his oral communications with Commerce (as part of Commerce's deliberative process) and DOJ's enforcement of the Voting Rights Act (an area where several other privileges may also apply), contrary to Plaintiffs' suggestion that a privilege log *from Commerce* is somehow salient to the privileges applicable to AAG Gore's deposition testimony, ECF No. 236 at 2. Plaintiffs further argue that Defendants have not "cited . . . authority," ECF No. 236 at 2, for a court's power to quash a deposition based on privilege, but it is well established that evaluating a Rule 45 subpoena requires balancing the interests favoring compliance with the burden, *Hermitage Glob. Partners*, No. 13-CV-6326, at *3 (quoting Wright & Miller, Fed. Practice & Proc. § 2463.1 (3d ed. 2008)), and here the interests served by compliance are accordingly lessened because Plaintiffs are unlikely to elicit much, if any, non-privileged material. It would be a waste of time and resources for AAG Gore to prepare for a deposition in which he could not provide any non-privileged information relevant to Plaintiffs' claims.

III. A Deposition of AAG Gore Would Unduly Burden DOJ.

Finally, a deposition of AAG Gore would unduly burden DOJ, a non-party to this litigation. AAG Gore leads the Civil Rights Division of DOJ, a law enforcement agency comprised of 590 employees that enforces critical civil rights guarantees. A deposition would hinder AAG Gore from performing his numerous important duties as a high-ranking DOJ official, and further sap DOJ resources in preparation. *See Anwar v. Fairfield Greenwich Ltd.*, 297 F.R.D. 223, 228 (S.D.N.Y. 2013) (denying a motion to compel Rule 45 testimony of SEC officials based in part on the undue burden from preparation). Indeed, "courts analyzing . . . a third party subpoena . . . may take into account not only the direct burdens caused by the testimony, but also 'the government's serious and legitimate concern that its employee resources not be commandeered into service by private litigants to the detriment of the smooth functioning of government operations.'" *Id.* (quoting *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 779 (9th Cir. 1994)). Plaintiffs cite no precedent authorizing the deposition of a high-ranking DOJ official in a case where DOJ merely provided input to another agency, which then issued the decision being challenged. Permitting such a deposition would impose unnecessary burdens on DOJ, threaten privileges—including the attorney-client privilege—and chill DOJ's (and other agencies') willingness to assist other agencies in their policy deliberations by consulting and providing information.

In sum, the Court should deny Plaintiffs' request to compel deposition testimony from AAG Gore because the burden imposed on DOJ by such a deposition outweighs the minimal value of AAG Gore's testimony, which would be irrelevant to the case and largely privileged. It should also clarify that discovery of DOJ is limited to non-privileged, non-burdensome document discovery. Alternatively, the Court could revisit AAG Gore's proposed deposition after Plaintiffs review DOJ's document productions, complete their discovery on Commerce, and make a persuasive showing of need. *See Solomon v. Nassau Cty.*, 274 F.R.D. 455, 461 (E.D.N.Y. 2011) ("In weighing the undue burden against the necessity of the testimony, the Court may also consider under Rule 26(b)(2)(C)(i) if the discovery can be 'obtained from some other source that is more convenient' or 'less burdensome.'").

Dated: August 15, 2018

Respectfully submitted,

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Acting Assistant Attorney General

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Director, Federal Programs Branch

CARLOTTA P. WELLS
Assistant Branch Director

/s/ Kate Bailey
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Counsel for Defendants

CC:

All Counsel of Record (by ECF)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Case No. 1:18-CF-05025-JMF
----------x
NEW YORK IMMIGRATION COALITION, ET AL.,

Plaintiffs,

- against -

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

Defendants.
----------x

August 24, 2018
9:07 a.m.

Videotaped Deposition of WENDY TERAMOTO, taken by Plaintiffs, pursuant to Notice, held at the offices of Arnold & Porter Kaye Scholer LLP, 250 West 55th Street, New York, New York, before Todd DeSimone, a Registered Professional Reporter and Notary Public of the State of New York.

VERITEXT LEGAL SOLUTIONS
MID-ATLANTIC REGION
1250 Eye Street NW - Suite 350
Washington, D.C. 20005

A. Am I --

Q. Are you refusing to answer my questions about the documents you reviewed based on the advice or instructions of your counsel? You will want to answer that yes.

A. Yes, sir. Thank you for the help.

Q. All right. Let's turn to Teramoto Exhibit No. 8.

A. Okay.

Q. All right. This is an e-mail thread with five lines of substantive text.

Fair to say this is an introduction from John Gore, he is introducing himself and asking if you have time for a call, and you say yes?

(Witness perusing document.)

A. I'm sorry, sir, I don't know if that's a question.

Q. Yes. Did I summarize that fairly, John Gore writes you an e-mail introducing himself, he wants to speak with you and set up a call with you, and you say yes?

A. Yes, sir.

Q. Is this the first time you spoke to someone from the Department of Justice?

MS. WELLS: I object to the form.

A. I don't know. The only other person that I would have -- when is this -- September -- the Cabinet Affairs Director generally holds a chief of staff meeting either every other week or weekly, so I may have met somebody who works at Department of Justice at that meeting, but -- should I wait for you?

Q. No.

A. I may have met somebody from the Justice Department, but it would have been -- the only time I can think of would have been at the chief of staff meeting, but I don't remember a name.

Q. This call that you had -- withdrawn.

You did have a call with Mr. Gore, didn't you?

MS. WELLS: I object to the form.

A. I believe so, but I don't remember.

Q. And the call was about the citizenship question, wasn't it?

MS. WELLS: I object to form.

A. I don't remember.

Q. Let's have this marked as Exhibit 9.

(Teramoto Exhibit 9 marked for identification.)

Q. For the record, Exhibit 9 is a two-page exhibit Bates stamped 2651 and 52, the top of which is headed with an e-mail from Danielle Cutrona to Wendy Teramoto, "Re: Call."

A. Would you like me to read it, sir?

Q. Let me ask you a question and then you can read whatever you need to to answer it.

Ms. Teramoto, you will see at the beginning of this e-mail, at the bottom of 2652, is Mr. Gore's e-mail introducing you, and then at the very bottom -- and there is an e-mail thread.

At the very bottom of 2651, he says to you "By this e-mail, I introduce you to Danielle Cutrona from DOJ. Danielle is the person to connect with about the issue we discussed earlier this afternoon."

Take a look at the e-mail. The question I have for you is, I take it you spoke with Acting Assistant Attorney General Gore?

MS. WELLS: I'm going to object to the form.

(Witness perusing document.)

A. Okay. I'm sorry, sir, what was your question?

Q. My question was, I take it you spoke to Assistant Attorney General Gore?

MS. WELLS: Objection to form.

A. I don't remember speaking to him.

The e-mail that he sent to me said Danielle is the person to connect with about the issue we discussed earlier this afternoon. So I have no reason to believe that I did not talk to him, but I don't remember speaking to him.

Q. Understood. And the issue that you spoke with Assistant Attorney General Gore about, that was about the citizenship issue; is that correct?

MS. WELLS: I object to the form.

A. Again, I don't remember -- I don't remember speaking to John Gore.

Q. Higher up on the page, September 17, 2017 at 12:10, Ms. Cutrona e-mails you that "the Attorney General is available on his cell," and then she goes on to say "the AG is eager to assist."

Wasn't that in connection with the citizenship question?

MS. WELLS: I object to the form, lack of foundation.

A. I mean, I didn't -- I didn't write the e-mail. You would have to ask Danielle Cutrona.

Q. You were the recipient of the e-mail; is that correct?

A. Well, it says to me. Again, I can't see how these e-mails are sent to, but I have no reason to believe I didn't

I don't remember being on the call with the AG.

Q. Do you have any reason to believe Mr. Ross would make up the fact that you were on the call with him and the Attorney General on or about September 18th, 2017?

MS. WELLS: I object to form.

A. You would have to ask him. Again, I don't remember being on the call with the AG.

Q. "Him" being Secretary Ross?

MS. WELLS: I object to the form.

A. I don't remember being on a call with the AG.

Q. You said you will have to ask him. By "him," you meant Secretary Ross, correct?

A. Yes, sir.

Q. Okay. Regardless of whether you remember being on the call, isn't it true that this call had to do with adding a citizenship question to the census?

MS. WELLS: Objection to the

form. Asked and answered.

A. Sir, I don't remember being on the call, so I can't tell you what was discussed.

Q. Let's go back to Exhibit, I think 9. This one. Let's go back to Exhibit 9.

A. Okay.

Q. Going back to the e-mail from Ms. Cutrona, toward the top of the page, September 17, 2017 at 12:10, Ms. Cutrona says, again, this is in the e-mail to you, the one that begins "Wendy, from what John told me, it sounds like we can do whatever you all need us to do."

So John, I take it, must be John Gore, because he is the one who introduces Ms. Cutrona to you, and this is following up on a call that Mr. Gore had with you.

So when Ms. Cutrona says "It sounds to me like we can do whatever you all need us to do," what did you need for the Department of Justice to do?

MS. WELLS: I object to form.

A. Again, I wasn't -- I'm not John and I'm not Danielle, so I don't -- I don't know what their conversation was.

Q. Well, I'm asking about a conversation that you had with Mr. Gore. Presumably she is referencing that conversation.

Didn't you have a discussion with Mr. Gore about what you at Commerce needed them at DOJ to do?

MS. WELLS: I object to form.

Q. Wasn't that the purpose of the call with Mr. Gore?

MS. WELLS: I object to the form.

A. I think what I testified earlier is I don't remember talking to John Gore, and I still don't remember talking to John Gore.

Q. Let's have this marked Teramoto Exhibit 11.

(Teramoto Exhibit 11 marked for identification.)

Q. All right. For the record, this is a three-page exhibit. It is 2636

through 2638. It includes much of the e-mail chain between Mr. Gore, Ms. Teramoto, and Ms. Cutrona that we have seen before.

My question is going to have to do with the e-mail at the very top of this chain in which someone who the government tells me is you e-mails Mr. Gore and says "Hi. AG and Sec spoke. Please let me know when you have a minute."

You understand that you are the sender of this e-mail, correct?

A. I mean, I can't see the address either.

Q. The government has represented that you are the sender.

A. Okay. Then okay.

Q. Do you accept their representation?

A. Sure.

Q. So when you write "Hi. AG and Sec" -- first of all, Sec means Secretary Ross, right?

A. Sure.

Q. So "the Attorney General and

Secretary spoke. Please let me know when you have a minute."

So certainly you know that the Attorney General Sessions and Secretary Ross had a conversation because you are reporting that, correct?

MS. WELLS: I object to the form. But go ahead.

A. My e-mail said the AG and Secretary spoke, so I must have known that they spoke.

Q. And then you say "Please let me know when you have a minute."

Did you call -- didn't you call Assistant Attorney General John Gore?

A. Again, to this day, again, I don't ever remember speaking to him on the phone.

Q. All right. But certainly as the author of this e-mail, you would read this that way, that, in other words, you would read this e-mail as saying you want a call with Assistant Attorney General Gore?

MS. WELLS: Objection to form.

A. Again, this is, you know, an

e-mail from a year ago that I'm reading to you that I must have written saying "Hi. AG and Sec spoke. Please let me know when you have a minute."

Q. Right. My question to you is, don't you understand that to be a request for Mr. Gore to speak with you further or request by you saying you would like to speak with him further?

MS. WELLS: I object to form.

A. When I read this, it would be, you know, let me know when you have a minute.

Q. So that you can speak with him, right?

MS. WELLS: I object to form.

A. Sure.

Q. And what did you speak with him about?

A. Again, I don't ever remember speaking to John Gore.

Q. You get that adding the citizenship question to the census is an important matter, don't you, Ms. Teramoto?

MS. WELLS: I object to the

form of the question.

A. I'm not sure, when you say important, are you asking me?

Q. Yeah.

A. If I -- look, I mean, I can understand why there is a discussion about it.

Q. Do you agree that it is an important matter?

A. Sure.

Q. It's not a surprise to you that there are all these lawsuits around the country about adding a citizenship question to the census, is it?

MS. WELLS: I object to form.

A. I'm always surprised actually how many lawsuits there are about everything in this country.

Q. You're not surprised that it is a matter of controversy, of national controversy, the Secretary deciding to add a citizenship question to the census?

MS. WELLS: I object to form.

Q. Are you?

MS. WELLS: I object to the

form.

A. I am not surprised that there is this amount of litigation, because there is a lot of litigation in this country.

Q. All right. Being that the citizenship question is, certainly, even according to you, a matter of importance, is there a reason you don't remember being involved in calls with Secretary Ross, the Attorney General, Assistant Attorney General Gore, Ms. Cutrona of the Department of Justice, is there a reason you don't recall being involved in these calls about adding the citizenship question to the census?

A. Sure.

MS. WELLS: I object to form. Go ahead.

Q. What's the reason?

A. I guess, you know, do you have an understanding of what Commerce does and how big Commerce is and all the issues that Commerce deals with? I think if one does, one would understand that there are a lot of things that are important that Commerce

does.

This is just one, you know, census is very important, but it is just one department, one area, that, again, I was not involved in because of the scientific and technical nature of it, I'm not the best person to be involved in the day-to-day workings on census.

Q. Since you're not the best person to be involved, why are you involved? Why is it that Secretary Ross thinks you are in a phone conversation between him and the Assistant -- I'm sorry, between him and the Attorney General of the United States, why are you talking to Assistant -- Acting Assistant Attorney General Gore, why are you talking to Danielle Cutrona, and why are you talking to them about the census and the citizenship question?

MS. WELLS: I object to form.

A. Can you please read them back one at a time so I can answer them?

Q. I will withdraw the question.

You say you weren't the best

person to be involved with census issues.

A. And I'm still not.

Q. I hear you on that, which is why I'm asking, so if you're not the best person to be involved, why is it that the documents make it seem like you were involved in speaking to the Assistant Attorney General of the United States about this, the Acting Assistant Attorney General, and the Attorney General of the United States?

MS. WELLS: I object to form.

A. You are asking me. I think you have to ask John Gore why he reached out to me. I can't answer why John Gore reached out to Wendy Teramoto.

Q. Was someone in the Department of Commerce the Secretary's point person on the citizenship question in this period?

A. I wouldn't characterize it like that. There was Karen Dunn Kelley, where census falls under her group, so she would have been the point for the census issues.

Q. Do you have an understanding as to why these calls don't go to Karen Dunn

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK IMMIGRATION COALITION, ET AL.,

Plaintiffs,

vs. Case No. 1:18-CF-05025-JMF

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

Defendants.

Washington, D.C.
Wednesday, August 29, 2018

Deposition of:

DR. JOHN ABOWD

called for oral examination by counsel for Plaintiffs, pursuant to notice, at the office of Arnold & Porter, 601 Massachusetts Avenue NW, Washington, D.C., before KAREN LYNN JORGENSON, RPR, CSR, CCR of Capital Reporting Company, beginning at 9:06 a.m., when were present on behalf of the respective parties:

Veritext Legal Solutions
Mid-Atlantic Region
1250 Eye Street NW - Suite 350
Washington, D.C. 20005

NUMIDENT?

A That's correct.

Q The last sentence of Exhibit 9, Dr. Jarmin's email says, "I suggest we schedule a meeting of Census and DOJ technical experts to discuss the details of this proposal."

That meeting did not take place, did it, Dr. Abowd?

A That's correct.

Q You anticipated having such a meeting in January of 2018, right?

A I wouldn't say that the Census Bureau anticipated having such a meeting. I would say that we offered DOJ the opportunity to meet with us and hoped that they would.

Q I'm going to show you a document. We'll mark it as 10.

(Plaintiffs' Exhibit 10, Email, was marked.)

BY MR. HO:

Q This is an email thread, the top email is from Misty Heggeness to you dated January 2, 2018

with Bates number AR6623. The second email on the thread, you write on January 2, 2018 at 1:16 p.m., "Don't worry about missing the DOJ follow-up meeting. I don't expect many technical questions. It's mostly about messaging."

You wrote that, right?

A I did, yes.

Q Misty Heggeness is the senior advisor for evaluations and experiment at the Census Bureau, right?

A Yes, she is.

Q Why did you tell her not to worry about missing the DOJ follow-up meeting?

A So I believe what's going on in this email, I'm using a very shortened sentence for the response to the DOJ request follow-up meeting.

Q Okay.

A We never had a DOJ meeting scheduled. I'm sure I'm referring to shorthand of we're working on a technical response to the DOJ's request and there were follow-up meetings from that.

Q When you say the meeting would be mostly about messaging, what did you mean by that?

A To be honest, I'm not sure. I believe that on the 2nd of January, we were discussing the wording of a short summary memorandum that I was working on for the acting director, summarizing the state of the research through the end of December.

Q You testified a moment ago that DOJ declined to take the meeting that was referenced in Dr. Abowd -- Dr. Jarmin's email; is that right?

A That's correct.

Q Do you know why?

A I believe it's in the administrative record, the reply to this email. I'll summarize. Again, if you say this is the author of the letter, I believe you, but names haven't stuck.

Said that the basis for our request is adequately documented in the letter and we decline to further meet.

Q In your experience, is it unusual to receive a data request from an agency to the

Census Bureau and then for the agency to refuse to meet to discuss the technical aspect of that data request?

A My experience in my current position is only two years old. I will answer on behalf of the agency. Yes.

MR. HO: We've been going for about an hour 50, 55 or so. Would now be an okay time for a bathroom break?

MR. EHRLICH: It's okay with me.

VIDEOGRAPHER: This concludes Media Unit Number 1. The time on the video is 10:55 a.m. We are off the record.

(Off the record.)

VIDEOGRAPHER: This begins Media Unit Number 2. The time on the video is 11:19 a.m. We are on the record.

MR. EHRLICH: Just to clarify something we were discussing earlier on the record when we were talking about you had received documents yesterday evening that you wanted to talk to Dr. Abowd about. We wanted to clarify that you

citizenship question?

Reingold spelled R-E-I-N-G-O-L-D.

A I do not know whether Reingold is a subcontractor in the integrated communication contract. If they are, then the answer could be yes. I'm not aware of another contract, but I will check during a break.

Q Okay. Does the Census Bureau think that adding a citizenship question to the 2020 enumeration questionnaire is a good idea?

A No.

MR. HO: Can we go off the record for a second?

VIDEOGRAPHER: We're going off the record. The time on the video is 12:07 p.m.

(Off the record.)

VIDEOGRAPHER: This begins Media Unit Number 3. The time on the video is 1:03 p.m. We are on the record.

BY MR. HO:

Q Dr. Abowd, I don't have any other questions for you at this time, but I know you

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK IMMIGRATION COALITION, ET AL.,

Plaintiffs,

vs. Case No. 1:18-CF-05025-JMF

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

Defendants.

Washington, D.C.
Monday, August 20, 2018

Deposition of:

DR. RON JARMIN

called for oral examination by counsel for Plaintiffs, pursuant to notice, at the office of Arnold & Porter, 601 Massachusetts Avenue NW, Washington, D.C., before KAREN LYNN JORGENSON, RPR, CSR, CCR of Capital Reporting Company, beginning at 9:03 a.m., when were present on behalf of the respective parties:

Veritext Legal Solutions
Mid-Atlantic Region
1250 Eye Street NW - Suite 350
Washington, D.C. 20005

marked.)
BY MS. GOLDSTEIN:
Q I'm showing you what's been marked as Plaintiffs' Exhibit 1 in this deposition. Do you recognize this document?
A I do not.
Q Okay. This is Bates-stamped 311. It is a letter from -- letter from Arthur Gary -- let's just focus on the first page -- to John Thompson dated November 4, 2016.
A Uh-huh.
Q And if you see in the first sentence of this letter, it references a July 1, 2016 letter in which Mr. Gary advised that at that time, the Department of Justice had no needs to amend the current content or uses or to request new content in the American Community Survey for the 2020 census; is that right?
A That's what it says, yes.
Q And so prior to the date of this letter, do you know if a letter had gone out or an information request had gone out to agencies

soliciting information?
A So I don't recall when the last ACS content review was, but, you know, that's when that would have occurred, so.
Q But as of July 1, 2016, are you aware that DOJ had any needs for new information on the census or ACS?
A You know, July of 2016 I was not involved in this particular scope of Census Bureau activities, so I had no direct knowledge of that.
Q When did you become the acting director?
A So July of 2017.
Q And what were your responsibilities in the year prior to that?
A I was the associate director for economic program.
Q And what does that mean?
A So I ran all of the business surveys at the Census Bureau.
Q What are the business surveys?
A So, for example, the economic census, which, you know, goes out to all the -- every

employer, business in the country. A number of current economic indicator surveys, monthly retail trade, wholesale trade, those sorts of things.
Q Okay. I'll take that back.
When did you first learn of the possibility of adding a citizenship question to the census?
A So I think around the time that John Thompson was retiring, I had -- I had heard -- I think from John, but I'm not exactly sure -- that there was interest in a citizenship question, which is, you know, not a necessarily new thing. There was interest in the citizenship question in 2010, as well. So that's -- that's -- but other than a vague notion that there may be folks asking for a citizenship question, that was the extent of my knowledge of that.
Q And when was that conversation with Mr. -- Dr. Thompson?
A So that would have been May, June-ish of 2017.
Q And what do you recall Dr. Thompson

telling you about the citizenship question?
A Basically what I just -- that there may be interest putting it on there. It was not a particularly detailed conversation.
Q Do you remember asking him questions about that?
A No.
Q Do you remember anything else about that conversation?
A No. It was a conversation about, you know, him leaving, and Enrique and I sort of taking over. So it was, you know, all the fun stuff that was in store for us.
Q I'm sure that's a big list.
A It was a big list.
Q Sure.
When was the next time you heard about the possibility of a citizenship question being added to the census?
A Probably shortly before the -- the letter came from Art Gary.
Q Tell me how you learned about this.

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A Folks at the department were asking if -- were saying that a letter was forthcoming --
Q And when you --
A -- and that we should be looking out for it.
Q And when you say "the Department," what do you mean?
A Department of Commerce.
Q And who told you this, that you should be looking out for this?
A I don't recall exactly who told me. But I think, you know -- I think there was multiple people that expressed, so, you know, I think Earl Comstock and Karen Dunn Kelley had both expressed, but I think I actually learned it from somebody else before that, so.
Q Do you remember who you learned it from?
A I don't.
Q What were your conversations with Comstock?
A Well, there were no --
MS. BAILEY: Objection. Vague.

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THE WITNESS: So there were no conversations. It was -- it was information transfer. I was told to keep an eye out for a letter. We didn't have any conversations.
BY MS. GOLDSTEIN:
Q So how were you told to keep an eye out for a letter?
A We're expecting a letter from the Department of Justice, you know, keep an eye out for.
Q Was that an oral conversation or email --
A Yes. It was oral.
Q And what did -- did you have communications with Karen Dunn Kelley prior to receiving the letter?
A Yeah. It would have been the same nature. Nothing in detail.
Q Did you have any conversations with Secretary Ross about adding a citizenship question prior to receiving the Gary letter?
A No.

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Q With Wendy Teramoto?
A No.
Q Any other communications with anyone from the Department of Commerce about the citizenship question --
A No.
Q -- before you received --
A No.
Q -- the letter?
A No.
Q And I'm just going to ask just for the record --
A That's fine.
Q -- I know that my questions are often going to be really predictable, and that's really just for the Court and for the transcript, if I can finish first and then you answer.
A Go ahead.
Q Thank you.
So how many days prior to receiving the Gary letter did you hear about the possibility of a citizenship question?

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A I don't recall for sure. I would say not much more than a couple weeks.
Q And after you learned a couple weeks before receiving this Gary letter that this request was coming, what did you do?
A We didn't do anything in particular.
Q What did you do in general?
A I mean, nothing. Kept an eye out for the letter.
Q Did you tell anyone in Census to also keep an eye out for this letter?
A So, yeah. You know, my assistant, folks in -- in our correspondence office, you know.
Q Anyone else?
A I don't think so, no.
Q Did you speak to Dr. Abowd about it?
A I don't recall having a particular conversation about the citizenship letter or anything, but, you know, with anyone, other than front office staff before the -- so.
Q Did you start any preparations for that letter prior to receiving it?

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A No.
Q How did you receive the letter?
A I got a copy via fax. That's how I first saw it.
Q From where?
A From the Department, actually. They had a copy of it.
Q And when you say the Department --
A The Department of Commerce. Right. Yeah. If I talk about another department, I'll name it exclusively.
Q So going forward, Department means Department of Commerce, right?
A Yeah.
Q And do you remember when that was?
A In like early December.
Q So when you heard about the citizenship question prior to receiving the Gary letter, did you hear that DOJ wanted a citizenship question or wanted citizenship information or something else?
MS. BAILEY: Objection. Compound.
THE WITNESS: So I believe I heard it as

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they wanted a question.
BY MS. GOLDSTEIN:
Q Do you remember any other details?
A Of -- prior to the letter?
Q Exactly.
A No.
Q Okay.
(Plaintiffs' Exhibit 2, Email, was marked.)
BY MS. GOLDSTEIN:
Q I'm showing you what's been marked as Plaintiffs' Exhibit 2. Is there a difference between wanting a question and wanting citizenship information?
MS. BAILEY: Objection. Vague.
THE WITNESS: So there -- there is. There's the need for the data, and then there's how you source the data to fulfill that need.
BY MS. GOLDSTEIN:
Q Can you explain a little bit more to me?
A So there's often multiple sources of information that could be used to either fully or

Page 28

partially meet a particular measurement objective. And so the Census Bureau often explores whether there's a nonsurvey source that we could use rather than putting a burden on the public through a survey question.
Q So is it fair to say that a citizenship question is one way to get that data?
A Yes.
Q And there are other ways, as well?
A In this case, yes.
Q Okay. So let's look at this Exhibit 2. It is Bates number 1332. Do you recognize this document?
A Yeah, I guess.
Q What is it?
A An email.
Q This is an email from Aaron Willard dated 12/15/2007 [sic] to you, correct?
A Uh-huh.
Q I'm sorry. You need yes or no.
A Yes.
Q Thank you.

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And does this -- this email refers to a letter from DOJ, correct?
A Yes.
Q What letter is that?
A I believe that would be the Art Gary letter.
Q And when we're talking --
A I'm assuming that's the only letter I know of.
Q And when we're talking about the Gary letter, we're referring to the letter from Art Gary requesting a citizenship question?
A Yes.
Q How did you learn that Karen got a call from the Secretary and has an update for you-all?
A Via this email.
Q Was there any other way you learned this before this?
A I don't think so.
Q Okay.
(Plaintiffs' Exhibit 3, Email, was marked.)

U.S. Department of Justice

Justice Management Division

Office of General Counsel

Washington, D.C. 20530

JUN 25 2014

Mr. Kelly R. Welsh
General Counsel
U.S. Department of Commerce
Office of the General Counsel
1401 Constitution Ave., NW
Washington, DC 20230

Re: Legal Authority for American Community Survey Questions

Dear Mr. Welsh:

I have been asked to respond to your letter of May 9, 2014, to Attorney General Holder, in which you requested a review of the questions asked in the American Community Survey (ACS) on behalf of the Department of Justice (DOJ), as well as an affirmation that the questions remain relevant and the legal authorities supporting DOJ's use of the information are accurate and complete. I apologize for the delay in providing this response, which was due to the decentralization of DOJ's relevant programs. We sincerely appreciate your office's flexibility with respect to the timing of this response.

In undertaking this review, working through DOJ's point of contact for this ACS review, Mr. William Sabol, we asked DOJ component organizations to identify whether they rely on ACS information, and to provide the requested assurances. Ultimately, only two DOJ components indicated that they use ACS information: the Civil Rights Division (CRT) and the Office of Justice Programs (OJP). Within OJP, only the Bureau of Justice Statistics (BJS) uses ACS information. Both CRT and OJP/BJS have described their current needs for relevant ACS information and have provided assurances that the authorities for such uses remain current. I have attached a document describing CRT's numerous uses of ACS information and the relevant current statutory authorities.

With respect to OJP/BJS, that organization has advised me that it is authorized under 42 U.S.C. § 3732 to collect a wide range of data relating to crime and the criminal justice system, and is specifically directed to collect victimization statistics regarding individuals with developmental disabilities under the Crime Victims with Disabilities Awareness Act of 1998, Pub. L. 105-301, Oct. 27 1998; 112 Stat. 2838 as amended; *see* 42 U.S.C. § 3732 (Note). Further, while there is no specific statute directly referencing use of the ACS, BJS is authorized under 42 U.S.C. § 3732(d) to enter agreements with any federal agency for assistance in data collection and analysis necessary to perform its multi-faceted mission.

Accordingly, please accept this letter as DOJ's affirmation that it continues to need relevant information as described above and in the attachment, and that the legal authorities for the use of such information are accurate, current and complete. Mr. Sabol has transmitted the information about the legal authorities to the ACS Content Review staff at Census.

Please let me know if you have any questions about this letter. I can be reached at (202) 514-3452, or at Arthur.Gary@usdoj.gov.

Sincerely yours,

Arthur E. Gary
General Counsel

Attachment

Cc: Jocelyn Samuels, CRT
Lee Lofthus, JMD
Karol Mason, OJP
Ben Mizer, OAG
William Sabol, BJS

DEPARTMENT OF JUSTICE, CIVIL RIGHT DIVISION
REQUIREMENTS FOR AMERICAN COMMUNITY SURVEY DATA

Statutory Requirement		Classification	Uses	Lowest geography	ACS Characteristics	Frequency
Title	Citations					
Voting Rights Act of 1965	42 U.S.C. 1973 *et seq* .; 28 C.F.R. Part 51; *Bartlett* v. *Strickland* , 556 U.S. 1 (2009); LULAC v. Perry, 548 U.S. 399 (2006); *Johnson* v. *DeGrandy* , 512 U.S. 997 (1994); *Thornburg* v. *Gingles,* 478 U.S. 30 (1986)	R	Used in the enforcement responsibilities under the Voting Rights Act to determine eligible voting populations for analysis and for presentation in federal litigation	Census block group	AGE, RACE, HISP, CIT	Annual
Voting Rights Act of 1965	42 U.S.C. 1973 *et seq* .; 28 C.F.R. Part 51; *LULAC* v. *Perry,* 548 U.S. 399 (2006); *Johnson* v. *DeGrandy* , 512 U.S. 997 (1994); *Thornburg* v. *Gingles,* 478 U.S. 30 (1986)	R	Used in the enforcement responsibilities under the Voting Rights Act to determine disparities in voter participation rates for analysis and for presentation in federal litigation	Census block group American Indian/ Alaskan Native area	AGE, RACE, HISP, CIT, INC, ATT, LAN, AUTO, PHONE, TEN	Annual
Voting Rights Act of 1965, Section 203	42 U.SC. 1973aa-1a; 28 C.F.R. Part 55	M	Used in the enforcement responsibilities under the Voting Rights Act's bilingual requirements	Census tract American Indian/ Alaskan Native area	AGE, RACE, HISP, CIT, ATT, LAN,	Annual

GRA102

DEPARTMENT OF JUSTICE, CIVIL RIGHT DIVISION
REQUIREMENTS FOR AMERICAN COMMUNITY SURVEY DATA

Statutory Requirement		Classification	Uses	Lowest geography	ACS Characteristics	Frequency
Title	Citations					
Title VI of Civil Rights Act of 1964 (Nondiscrimination in federally assisted programs and activities)	42 USC 2000d to 2000d-7; *Lau* v. *Nichols*, 414 U.S. 563 (1974), 28 CFR 42.101 to 42.112; 28 CFR 42.401 to 42.415; 28 CFR 50.3; 67 Fed. Reg. 41,555 (June 18, 2002)	R	Used by the Department of Justice, other federal agencies that offer federal financial assistance, and recipients of federal financial assistance to comply with and enforce the prohibition against discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance.	Census block group	RACE, ANC, LAN, INC, AGE, HIS	Annual
Executive Order 13166: Improving Access to Services for Persons with Limited English Proficiency	65 Fed. Reg. 50,121 (August 16, 2000)	R	Used by federal agencies and recipients of federal financial assistance to provide, identify any need for services to those with limited English proficiency (LEP) in order to comply with the prohibition against national origin discrimination programs and activities receiving federal financial assistance and federally-conducted programs and activities.	Census block group	ANC, LAN, INC, AGE, HIS	Annual
Fair Housing Act of 1968	42 U.S.C. 3601 *et seq.*; 24 C.F.R. 100.500	P	Used in enforcement efforts to eliminate and remedy unlawful discrimination in housing.	Census block group	SEX, HISP, RACE, ANC, DIS, INC, HHREL, STRUC, YRBUILT, TEN, VAL, RENT	Annual
Equal Credit Opportunity Act	15 U.S.C. 1691 *et seq*.	P	Used in enforcement efforts to eliminate and remedy unlawful discrimination in lending.	Census block group	SEX, AGE, HISP, RACE, VAL, ANC, MS, INC,TEN	Annual

GRA103

DEPARTMENT OF JUSTICE, CIVIL RIGHT DIVISION
REQUIREMENTS FOR AMERICAN COMMUNITY SURVEY DATA

Statutory Requirement		Classification	Uses	Lowest geography	ACS Characteristics	Frequency
Title	Citations					
Americans with Disabilities Act of 1990 (ADA)	Titles II and III; 42 U.S.C. 12131-12189; 28 C.F.R. Parts 35 and 36	P	Used to assist generally with ADA enforcement responsibilities (including evaluating the impact of discriminatory policies and practices on affected populations of persons with disabilities) and to evaluate the impact of proposed regulatory changes to implement the requirements of titles II and III of the ADA.	Census tract	AGE,SEX, RACE, HISP, ATT, DIS, COW, LF, POW, JTW, OCC, IND, INC, WSLY.	Annual
Civil Rights Act of 1964 (Rights to Public Education and Equal Educational Entitlement)	42 U.S.C. 2000c *et seq*.	R	Used in the enforcement of nondiscrimination in education by state and local governments, including monitoring desegregation	Place	AGE, SEX, RACE, ANC, HISP, ATT ENR,	Annual
Equal Educational Opportunities Act of 1974	20 U.S.C.1701 *et seq*.; *Castaneda* v. *Pickard*, 648 F.2d 989 (1981)	R	Used in the enforcement of nondiscrimination in education by state and local governments, including ensuring appropriate action to assist English language learners in overcoming language barriers	Place	AGE, SEX, RACE, ANC, HISP, ATT ENR, LAN	Annual
Title IX of the Education Amendments of 1972	20 U.S.C. 1701 et seq.	R	Used to enforce the prohibition against discrimination on the bias of sex in education programs and activities receiving federal financial assistance	Census block group	SEX	Annual

GRA104

DEPARTMENT OF JUSTICE, CIVIL RIGHT DIVISION
REQUIREMENTS FOR AMERICAN COMMUNITY SURVEY DATA

Statutory Requirement		Classification	Uses	Lowest geography	ACS Characteristics	Frequency
Title	Citations					
Title VII of the Civil Rights Act of 1964	42 U.S.C. 2000e *et seq*.	R	Used to determine compliance with consent decrees entered by federal courts in pattern or practice employment discrimination lawsuits	Place	SEX, AGE, HISP, RACE, CIT, ATT, VET, LF, POW, JTW, IND, OCC	Annual
Title VII of the Civil Rights Act of 1964	42 U.S.C. 2000e *et seq*.	R	Used to determine whether group is underrepresented in employer's workforce	Place	SEX, AGE, HISP, RACE, CIT, ATT, VET, LF, POW, JTW, IND, OCC	Annual
Section 707 of Title VII of the Civil Rights Act of 1964	42 U.S.C. 2000e-6	P	Used to plan enforcement of prohibition against pattern or practice employment discrimination	Place	SEX, AGE, HISP, RACE, CIT, ATT, VET, LF, POW, JTW, IND, OCC	Annual
Title VII of the Civil Rights Act of 1964	42 U.S.C. 2000e *et seq*.; *Wards Cove Packing Co.* v. *Atonio,* 490 U.S. 642 (1989)	R	Used, in conjunction with other data, to demonstrate prima facie case of employment discrimination	Place	SEX, AGE, HISP, RACE, CIT, ATT, VET, LF, POW, JTW, IND, OCC	Annual
Title VII of the Civil Rights Act of 1964	42 U.S.C. 2000e-5(g)(1)	P	Used to calculate classwide wages lost due to pattern or practice of employment discrimination.	Place	SEX, AGE, HISP, RACE, ATT, LF, YRLW, WSLY, IND, OCC, INC	Annual

U.S. Department of Justice

Justice Management Division

Office of General Counsel

Washington, D.C. 20530

November 4, 2016

John H. Thompson
Director
Economics and Statistics Administration
U.S. Census Bureau
Unites States Department of Commerce
Washington, D.C. 20233-0001

Re: Legal Authority for American Community Survey Questions

Dear Mr. Thompson:

This letter supplements my letter of July 1, 2016, in which I advised that, at that time, the Department of Justice had no needs to amend the current content and uses or to request new content in the American Community Survey (ACS) for the 2020 Census. In 2014, the Department affirmed its continuing needs and legal justification for existing subjects and questions in the ACS. I understand your office recently has been in communication with Department officials regarding new uses sought by the Department relating to LGBT populations. Consistent with those communications, this letter formally requests that the Census Bureau consider a new topic in the ACS relating to LGBT populations. The attached spreadsheet accurately reflects the legal authority supporting the necessity for the collection of this information.

Please let me know if you have any questions about this letter or wish to discuss this request. I can be reached at (202) 514-3452, or at Arthur.Gary@usdoj.gov.

Sincerely yours,

Arthur E. Gary
General Counsel

Attachment

Cc: Civil Rights Division
Office of the Deputy Attorney General

DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION
REQUIREMENTS FOR AMERICAN COMMUNITY SURVEY DATA

The following statutes enforced by the Department bar discrimination on the basis of sexual orientation, gender identity, or both.					
Statutory Requirement					
Title	Citations	Classification	Uses	Lowest geography	Frequency
Violence Against Women Reauthorization Act of 2013	42 USC 13925(b)(13)	R	Would be used to enforce prohibitions against discrimination in programs or activities receiving financial assistance administered by the Office on Violence Against Women.	Place	Annual
Violence Against Women Act of 1994, as amended, Victims of Trafficking and Violence Protection Act of 2000, Violence Against Women and Department of Justice Reauthorization Act of 2005, Violence Against Women Reauthorization Act of 2013	42 USC 3796gg(b)(5), 3796gg(b)(19), 3796gg-7(d), 10420(c)(1)(B), 13925(a)(39), 13971(b), 13971(d)(4), 13975(a), 13975(g)(3)(C)(ii), 14041(b)(1), 14041(b)(4), 14045(a)(1), 14045(c)-(d), 14045b(b)(10).	P	Would be used to help administer grants, and plan education about and enforcement of prohibitions against discrimination in programs or activities receiving financial assistance administered by OVW.	Census block group	Annual
Title VII of the Civil Rights Act of 1964	42 USC 2000e et seq.; 42 USC 2000e-2(k); *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989)	R	Would be used to enforce the prohibition against unlawful employment discrimination.	Place	Annual
Title VII of the Civil Rights Act of 1964	42 USC 2000e et seq.	P	Would be used to help plan education and enforcement efforts concerning the prohibition against unlawful employment discrimination.	Census block group	Annual
Title IX of the Education Amendments of 1972	20 USC 1701 et seq.; 34 CFR 106.21(b)(2), 106.23(b), 106.37(b)(1), 106.51(a)(3)-(4), 106.52, 106.53	R	Would be used to enforce the prohibition against unlawful discrimination in education programs and activities receiving federal financial assistance.	Place	Annual

DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION
REQUIREMENTS FOR AMERICAN COMMUNITY SURVEY DATA

Statutory Requirement		Classification	Uses	Lowest geography	Frequency
Title	Citations				
Title IX of the Education Amendments of 1972	20 USC 1701 et seq.	P	Would be used to help plan education and enforcement efforts concerning the prohibition against unlawful discrimination in education programs and activities receiving federal financial assistance.	Census block group	Annual
Fair Housing Act of 1968	42 USC 3601 *et seq.* ; 24 CFR 100.500; Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507 (2015).	R	Would be used to enforce the prohibition against unlawful discrimination in housing.	Place	Annual
Fair Housing Act of 1968	42 USC 3601 *et seq.*; 24 CFR 100.500.	P	Would be used to help plan education, testing and enforcement efforts to eliminate unlawful discrimination in housing.	Census block group	Annual
Equal Credit Opportunity Act	15 USC 1691 *et seq*.; 12 CFR 202.6 n.2	R	Would be used to enforce the prohibition against unlawful discrimination in lending.	Place	Annual
Equal Credit Opportunity Act	15 USC 1691 *et seq*.	P	Would be used to help plan education and enforcement efforts to eliminate unlawful discrimination in lending.	Census block group	Annual
Omnibus Crime Control and Safe Streets Act of 1968	42 USC 3789d(c); 28 CFR 42.203(c), (e)	R	Would be used to enforce the prohibition against unlawful discrimination in criminal justice programs receiving federal financial assistance.	Place	Annual

DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION
REQUIREMENTS FOR AMERICAN COMMUNITY SURVEY DATA

Statutory Requirement		Classification	Uses	Lowest geography	Frequency
Title	Citations				
Omnibus Crime Control and Safe Streets Act of 1968	42 USC 3789d(c)	P	Would be used to help plan education and enforcement efforts to eliminate unlawful discrimination in criminal justice programs receiving federal financial assistance.	Census block group	Annual
Juvenile Justice and Delinquency Prevention Act of 1974	42 USC 5672(b)	R	Would be used to enforce the prohibition against unlawful discrimination in juvenile justice programs receiving federal financial assistance.	Place	Annual
Juvenile Justice and Delinquency Prevention Act of 1974	42 USC 5672(b)	P	Would be used to help plan education and enforcement efforts to eliminate unlawful discrimination in juvenile justice programs receiving federal financial assistance.	Census block group	Annual
Civil Rights of Institutionalized Persons Act	42 USC 1997 et seq.	R	Would be used to enforce the prohibition against egregious or flagrant violations of law for persons residing in or confined to covered institutions.	Census block group	Annual
Civil Rights of Institutionalized Persons Act	42 USC 1997 et seq.	P	Would be used to help plan education and enforcement efforts to eliminate egregious or flagrant violations of law for persons residing in or confined to covered institutions.	Census block group	Annual

DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION
REQUIREMENTS FOR AMERICAN COMMUNITY SURVEY DATA

Statutory Requirement		Classification	Uses	Lowest geography	Frequency
Title	Citations				
Violent Crime Control and Law Enforcement Act of 1994	42 USC 14141	R	Would be used to enforce the prohibition against patterns or practices of unlawful conduct by law enforcement or by officials in the juvenile justice system.	Place	Annual
Violent Crime Control and Law Enforcement Act of 1994	42 USC 14141	P	Would be used to help plan education and enforcement efforts to eliminate patterns or practices of unlawful conduct by law enforcement or by officials in the juvenile justice system.	Census block group	Annual
Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009	18 USC 249	P	Would be used to help plan education and enforcement efforts to prosecute and deter covered hate crimes against LGBT individuals.	Census block group	Annual
Victims of Crime Act of 1984	42 USC 10604(e)	P	Would be used to help plan education and enforcement efforts to eliminate unlawful discrimination in crime victim compensation programs receiving federal financial assistance.	Census block group	Annual

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATES OF NEW YORK, COLORADO, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, MARYLAND, MINNESOTA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, and WASHINGTON; COMMONWEALTHS OF MASSACHUSETTS, PENNSYLVANIA, and VIRGINIA; DISTRICT OF COLUMBIA; CITIES OF CENTRAL FALLS, CHICAGO, COLUMBUS, NEW YORK, PHILADELPHIA, PHOENIX, PITTSBURGH, PROVIDENCE, and SEATTLE; CITY and COUNTY of SAN FRANCISCO; COUNTIES OF CAMERON, EL PASO, HIDALGO, and MONTEREY; and the UNITED STATES CONFERENCE OF MAYORS,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF COMMERCE; and WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce,

and

BUREAU OF THE CENSUS, an agency within the United States Department of Commerce; and RON S. JARMIN, in his capacity as performing the non-exclusive functions and duties of the Director of the U.S. Census Bureau,

Defendants.

CIVIL ACTION NO. 1:18-cv-2921 (JMF)

SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This case is brought to enforce the federal government's constitutional obligation to conduct an "actual Enumeration" of the national population every ten years, by determining the "whole number of persons" in the United States. U.S. Const. art. I, § 2, cl. 3; *id.* amend. XIV, § 2. Plaintiffs challenge Defendants' unconstitutional and arbitrary decision to add a citizenship demand to the 2020 Census questionnaire, which will fatally undermine the accuracy of the population count and cause tremendous harms to Plaintiffs and their residents.

2. The "decennial enumeration of the population is one of the most critical constitutional functions our federal government performs."[1] The decennial census directly determines the apportionment of Representatives to Congress among the states, the allocation of electors to the Electoral College, and the distribution of hundreds of billions of dollars in federal funds to states, local governments, and other grantees.

3. On March 26, 2018, the Secretary of the United States Department of Commerce, Wilbur Ross, directed the United States Bureau of the Census ("Census Bureau") to use the 2020 Census to demand information on the citizenship status of every resident in the country, despite acknowledging that "[t]he Department of Commerce is not able to determine definitively how inclusion of a citizenship question on the decennial census will impact responsiveness."[2] Secretary Ross disregarded recommendations from Census Bureau officials to pursue alternative less invasive means for collecting citizenship information. As required by the Census Act, on

[1] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 209(a)(5), 111 Stat. 2440, 2481 (1997).

[2] Memorandum from Sec'y of Commerce Wilbur Ross to Under Sec'y of Commerce for Econ. Affairs Karen Dunn Kelley, *Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire* 7 (Mar. 26, 2018), https://www.commerce.gov/sites/commerce.gov/files/2018-03-26_2.pdf (hereafter "Ross Memo").

March 29, 2018, Defendants transmitted the Secretary of Commerce's final determination of the "questions that will be asked on the 2020 Census" to Congress.[3]

4. The Census Bureau has not sought citizenship information on the decennial census form that goes to every household in the country since 1950. In departing from nearly seven decades of settled practice, Defendants also departed from their long-standing and well-established processes for revising the decennial census questionnaire. Decisions to change questions on the decennial census typically take several years to test, evaluate, and implement; but Defendants' decision here was compressed into a hasty and unprecedented period of less than four months.

5. As Defendants' own research shows, this decision will "inevitably jeopardize the overall accuracy of the population count" by significantly deterring participation in immigrant communities, because of concerns about how the federal government will use citizenship information. *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 568 (D.D.C. 1980) (three-judge court). These concerns have been amplified by the anti-immigrant policies, actions, and rhetoric targeting immigrant communities of President Trump and this Administration.

6. By deterring participation in immigrant communities, Defendants will not only fatally undermine the accuracy of the 2020 Census, but will jeopardize critical federal funding needed by states and localities to provide services and support for millions of residents. Further, it will deprive historically marginalized immigrant communities of critical public and private resources over the next ten years. Defendants' decision is inconsistent with their constitutional

[3] U.S. Census Bureau, *Questions Planned for the 2020 Census and American Community Survey* 1 (Mar. 2018); *see also* 13 U.S.C. § 141(f)(2) (hereafter "Final Questions Report").

and statutory obligations; is unsupported by the stated justification; departs from decades of settled practice without reasoned explanation; and fails to consider the availability of alternative data that effectively serve the federal government's needs.

7. Plaintiffs the States of New York, Colorado, Connecticut, Delaware, Illinois, Iowa, Maryland, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, and Washington; the Commonwealths of Massachusetts, Pennsylvania, and Virginia; the District of Columbia; the Cities of Central Falls RI, Chicago IL, Columbus OH, New York City NY, Pittsburgh PA, Philadelphia PA, Phoenix AZ, Providence RI, and Seattle WA; the City and County of San Francisco CA; Counties of Cameron TX, El Paso TX, Hidalgo TX, and Monterey CA; and the United States Conference of Mayors, therefore bring this action to enjoin Defendants' decision because it violates the constitutional mandate to conduct an "actual Enumeration," U.S. Const. art. I, § 2, cl. 3; exceeds and is contrary to Defendants' statutory jurisdiction, authority, and limitations in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(C); is contrary to constitutional right, 5 U.S.C. § 706(2)(B); is without observance of procedure required by law, 5 U.S.C. § 706(2)(D); and is arbitrary, capricious, and an abuse of discretion under the APA, 5 U.S.C. § 706(2)(A).

JURISDICTION AND VENUE

8. The Court has subject-matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2201(a). Jurisdiction is also proper under the judicial review provisions of the APA, 5 U.S.C. § 702.

9. Declaratory and injunctive relief is sought as authorized in 28 U.S.C. §§ 2201 and 2202.

10. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b)(2) and (e)(1). Defendants are United States agencies or officers sued in their official capacities. Plaintiffs State of New York and City of New York are residents of this judicial district, and the other Plaintiffs consent to adjudication of these issues in this district.

11. Plaintiffs bring this action to redress harms to their proprietary and sovereign interests, and Plaintiff States and the District of Columbia as to their interests as *parens patriae*.

PARTIES

12. Plaintiffs States of New York, Colorado, Connecticut, Delaware, Illinois, Iowa, Maryland, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, and Washington, Commonwealths of Massachusetts, Pennsylvania, and Virginia, represented by and through their Attorneys General,[4] are sovereign states of the United States of America.

13. Plaintiff District of Columbia is a municipal corporation organized under the Constitution of the United States. It is empowered to sue and be sued, and it is the local government for the territory constituting the permanent seat of the federal government. The District is represented by and through its chief legal officer, the Attorney General for the District of Columbia.

14. Plaintiff City of Chicago is a municipal corporation and home rule unit organized and existing under the constitution and laws of the State of Illinois.

[4] Colorado is represented by and through Governor John W. Hickenlooper's Chief Legal Counsel, who has been designated Special Assistant Attorney General for purposes of representing Colorado in this matter.

15. Plaintiff City of Columbus is a municipal corporation and home rule unit organized and existing under the constitution and laws of the State of Ohio and the City's Home Rule Charter.

16. Plaintiff New York City is a municipal corporation organized pursuant to the laws of the State of New York. The City is a political subdivision of the State and derives its powers through the State Constitution, State laws, and the New York City Charter.

17. Plaintiffs Cities of Philadelphia and Pittsburgh are municipal corporations organized pursuant to the laws of the Commonwealth of Pennsylvania. The Cities are political subdivisions of the Commonwealth with powers derived from the Pennsylvania Constitution, Commonwealth law, and the Cities' Home Rule Charters.

18. Plaintiff City of Phoenix is a municipal corporation organized pursuant to the laws of the State of Arizona.

19. Plaintiffs Cities of Providence and Central Falls are municipal corporations organized pursuant to the laws of the State of Rhode Island.

20. Plaintiff City and County of San Francisco, represented by and through its City Attorney, is a municipal corporation organized and existing under and by virtue of the laws of the State of California, and is a charter city and county.

21. Plaintiff City of Seattle is a first-class charter city, incorporated under the laws of the State of Washington, empowered to sue and be sued, and represented by and through its elected City Attorney, Peter S. Holmes.

22. Plaintiffs Cameron County, El Paso County, and Hidalgo County, Texas are political subdivisions of the State of Texas.

23. Plaintiff County of Monterey is a political subdivision of the State of California.

24. Plaintiff United States Conference of Mayors ("USCM") is the official nonpartisan organization of cities with populations of 30,000 or more. There are nearly 1,400 such cities in the country today, and each member city is represented in the Conference by its chief elected official, the mayor.

25. Plaintiffs are aggrieved by Defendants' actions and have standing to bring this action because the decision to add a person-by-person demand for citizenship information to the 2020 Census has already damaged Plaintiffs' sovereign, quasi-sovereign, and proprietary interests and will continue to cause injury unless and until the decision is enjoined.

26. Defendant United States Department of Commerce is a cabinet agency within the executive branch of the United States Government, and is an agency within the meaning of 5 U.S.C. § 552(f). The Commerce Department is responsible for planning, designing, and implementing the 2020 Census. 13 U.S.C. § 4.

27. Defendant Wilbur L. Ross, Jr. is the Secretary of Commerce. He is responsible for conducting decennial censuses of the population, and overseeing the Census Bureau. He is sued in his official capacity.

28. Defendant Census Bureau is an agency within, and under the jurisdiction of, the Department of Commerce. 13 U.S.C. § 2. The Census Bureau is the agency responsible for planning and administering the decennial census.

29. Defendant Ron S. Jarmin is currently performing the non-exclusive functions and duties of the Director of the Census Bureau ("Defendant Jarmin"). He is sued in his official capacity.

ALLEGATIONS

I. Defendants have a constitutional obligation to conduct an accurate enumeration of the population.

30. The Constitution provides that Representatives "shall be apportioned among the several States . . . according to their respective Numbers," U.S. Const. art. I, cl. 2, § 3; which requires "counting the whole number of persons in each State," *id.* amend. XIV, § 2. To ensure fair representation among the states, the Constitution requires that this count be an "actual Enumeration" conducted every ten years.

31. Congress has assigned the responsibility of making this enumeration to the Secretary of Commerce, and the Secretary may delegate authority for establishing procedures to conduct the census to the Census Bureau. 13 U.S.C. §§ 2, 4, 141. The central constitutional purpose of the Census Bureau in taking the decennial census is to conduct an accurate enumeration of the population.

32. In addition, the population data tabulated as a result of the census are used for other governmental purposes, including to permit compliance with the Fourteenth Amendment's one-person, one-vote requirement when drawing district lines for state and local government elected bodies; and to allocate federal funds authorized by hundreds of critical Congressional programs.

33. To enable a person-by-person count, the Census Bureau sends a questionnaire to every household in the United States. The questionnaires are directed to every resident in the United States and, under 13 U.S.C. § 221, residents are legally required to respond. The Census Bureau then counts responses from every household to determine the population count in the various states.

34. Some demographic groups have proven more difficult to count than others. Minority and immigrant populations have historically been some of the hardest groups to count accurately in the decennial census, due to issues such as language barriers and distrust of government. For example, the 2010 Census failed to count more than 1.5 million minorities. Indeed, Census Bureau analyses show the fast-growing Hispanic population was undercounted by 1.54% in 2010, by 0.71% in 2000, and by 4.99% in 1990.[5]

35. Recognizing that these barriers undermine its constitutional mandate to pursue an accurate enumeration of the population, the Census Bureau has previously taken affirmative steps to reach these hard-to-count populations. One such measure includes hiring census workers to serve as "enumerators," to conduct in-person follow-up with any person who fails to respond.[6] In addition, during the 2000 and 2010 censuses, the Census Bureau designed and implemented a public advertising campaign to reach hard-to-count immigrant communities. The Census Bureau used paid media in over a dozen different languages to improve responsiveness in immigrant communities. For the 2010 Census, the Census Bureau adopted a plan to partner with local businesses, faith-based groups, community organizations, elected officials, and ethnic organizations to reach these communities and improve the accuracy of the count.

36. The Census Bureau's constitutional obligation to pursue an accurate enumeration requires that the Census Bureau avoid unnecessarily deterring participation in the decennial census. U.S. Const. art. 1, § 2, cl. 3. To that end, the Census Bureau must minimize the burden

[5] *See* Memorandum from Patrick J. Cantwell to David C. Whitford, *2010 Census Coverage Measurement Estimation Report: Summary of Estimates of Coverage for Persons in the United States* 2 (May 22, 2012), https://www.census.gov/coverage_measurement/pdfs/g01.pdf.

[6] U.S. Census Bureau, *2010 Census Non-Response Followup Enumerator Manual* 1–6 (2009), https://www.census.gov/history/pdf/2010nrfu.pdf; U.S. Census Bureau, *Non-Response Followup Enumerator Manual* 1–2 (1999), https://www.census.gov/history/pdf/2000nrfu.pdf; U.S. Census Bureau, *Census Instructions-History*, https://www.census.gov/history/www/through_the_decades/census_instructions/.

questions may place on respondents. According to the Census Bureau's own standards, it must also test its survey questions to ensure that they do not increase non-responsiveness by touching on sensitivities or anxieties respondents have about privacy and governmental overreach.

II. Defendants' decision to include a citizenship demand on the 2020 Census will deter participation.

37. Federal law required the Secretary of Commerce to advise Congress by no later than March 31, 2018, of the Secretary's determination of the questions to be included on the 2020 Census. 13 U.S.C. § 141(f)(2). Consistent with this obligation, Defendants transmitted a report to Congress on March 29, 2018, advising Congress of the questions to be included on the 2020 Census. This report included the Secretary's determination that the decennial census will include, for the first time since 1950, a demand for information regarding the citizenship status of every person in the country.

38. In the March 26, 2018, memo announcing Defendants' decision to demand citizenship status for every resident in the country, Secretary Ross stated that "the Department [of Commerce]'s review found that limited empirical evidence exists about whether adding a citizenship question would decrease response rates materially."[7] However, almost forty years of Census Bureau statements and data reflect the opposite to be true.

A. Defendants have acknowledged for decades that a citizenship demand would deter census participation and undermine the decennial population count.

39. Since at least 1980, the Census Bureau has expressed the public position that inquiries regarding citizenship are particularly sensitive in immigrant communities, and that demanding citizenship or immigration status on the decennial census would drive down response rates and seriously impair the accuracy of the decennial population count.

[7] Ross Memo at 5.

40. In 1980, in response to a lawsuit seeking to compel the Census Bureau to demand all Americans disclose their immigration status, the Bureau argued in litigation that "any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count." *Fed'n for Am. Immigration Reform*, 486 F. Supp. at 568. The Bureau explained that "[o]btaining the cooperation of a suspicious and fearful population would be impossible if the group being counted perceived any possibility of the information being used against them. Questions as to citizenship are particularly sensitive in minority communities and would inevitably trigger hostility, resentment and refusal to cooperate." *Id.*

41. The Census Bureau repeated these concerns in 1988 and 1989, in congressional testimony opposing proposed legislation that would have directed the Census Bureau to exclude from its count any immigrant who was not a lawful permanent resident.

42. The Bureau testified that inquiring into immigration status "could seriously jeopardize the accuracy of the census," because "[p]eople who are undocumented immigrants may either avoid the census altogether or deliberately misreport themselves as legal residents," and legal residents "may misunderstand or mistrust the census and fail or refuse to respond."[8] The Bureau concluded that a citizenship demand would suffer from "the same problems."[9]

43. The Census Bureau also declined to include a person-by-person demand regarding citizenship status on the 2000 Census. The former Director of the Census Bureau who oversaw the 2000 Census later testified that a citizenship demand "will lead to a less complete and less

[8] *See Census Equity Act: Hearings Before the Subcomm. on Census & Population of the H. Comm. on Post Office & Civ. Serv.*, 101st Cong. 43–45 (1989) (statement of C. Louis Kincannon, Deputy Director, Census Bureau); *Exclude Undocumented Residents from Census Counts Used for Apportionment: Hearing Before the Subcomm. on Census & Population of the H. Comm. on Post Office & Civil Serv.*, 100th Cong. 50–51 (1988) (testimony of John Keane, Director, Census Bureau).

[9] *Id.*

accurate census," explaining that the "question will be treated with suspicion" and "[a] significant number of noncitizens will not respond," because "it is foolish to expect that census-taking is immune from anxieties that surround such issues as undocumented aliens, immigration enforcement, and so forth."[10]

44. In 2009, all eight former Census Bureau directors dating back to 1979, and appointed by presidents of both political parties, objected to an ultimately failed congressional proposal to add demands for information regarding citizenship and immigration status to the 2010 Census. They argued that the Census Bureau would not have enough time to determine "[t]he effect on data quality" and "the consequences for participation among all immigrants, regardless of their legal status," including the concern that enumerators might encounter "problems during door-to-door visits to unresponsive households, when a legalized 'head of household' would avoid enumerators because one or more other household members are present unlawfully."[11]

45. In 2010, the Census Bureau again declined to include a person-by-person citizenship demand on the census questionnaire. Then-Director of the Census Bureau, Robert Groves, explained that "we don't ask citizenship or documentation status, all of the things that may make people uncomfortable are gone from [the census] form."[12]

46. Subsequently, in 2016, four former Directors of the Census Bureau, also appointed by presidents of both political parties, argued in a brief filed with the U.S. Supreme

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[10] *Counting the Vote: Should Only U.S. Citizens Be Included in Apportioning Our Elected Representatives?: Hearing Before the Subcomm. on Federalism & the Census of the H. Comm. on Gov't Reform*, 109th Cong. 73 (2005) (statement of Kenneth Prewitt).

[11] *Statement of Former Census Directors on Adding a New Question to the 2010 Census* (Oct. 16, 2009), http://reformimmigrationforamerica.org/wp-content/uploads/2009/10/thecensusproject.org_letters_cp-formerdirs-16oct2009.pdf.

[12] *Video of Robert Groves*, C-SPAN (Mar. 26, 2010), https://www.c-span.org/video/?292743-6/2010-us-census&start=1902.

Court that "a [person-by-person] citizenship inquiry would invariably lead to a lower response rate to the Census in general," and would "seriously frustrate the Census Bureau's ability to conduct the only count the Constitution expressly requires: determining the whole number of persons in each state in order to apportion House seats among the states." Brief of Former Directors of the U.S. Census Bureau as Amici Curiae Supporting Appellees at 25, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940).

47. The former Directors also noted that "[r]ecent experience demonstrates lowered participation in the Census and increased suspicion of government collection of information in general," and that "[p]articular anxiety exists among non-citizens." *Id*. at 5. In this context, the former Directors concluded, "[t]here would be little incentive for non-citizens to offer to the government their actual status," and the "result would be a reduced rate of response overall and an increase in inaccurate responses." *Id.*

B. The Trump Administration's anti-immigrant policies, actions, and rhetoric will amplify the negative impact on census participation rates of Defendants' demand for citizenship status.

48. The well-documented risks of adding a person-by-person citizenship demand to the decennial census are heightened in the current political climate because of President Trump's anti-immigrant rhetoric and this Administration's pattern of policies and actions that target immigrant communities. These actions and policies include the rescission of the Deferred Action for Childhood Arrivals program; the ban on travel from several majority-Muslim countries; the suspension on refugee admissions to the United States; the termination of special protections from removal for migrants from nations experiencing war and natural disasters; increased roundups of undocumented migrants; efforts to suspend or terminate federal funding to localities that elect to limit their participation in federal immigration enforcement efforts; and efforts to build a physical wall along the Mexico-U.S. border, among other actions.

49. The Trump Administration has also made a number of threatening statements about deporting undocumented immigrants. On June 13, 2017, the Acting Director of U.S. Immigration and Customs Enforcement, Thomas Homan, testified before Congress that "every immigrant in the country without papers . . . should be uncomfortable. You should look over your shoulder. And you need to be worried."[13]

50. This anti-immigrant climate has led to significant public distrust and fear of providing information to the federal government. During recent pretests in preparation for the 2020 Census, Census Bureau researchers found that immigrant respondents are already increasingly concerned about confidentiality and data sharing in light of the current anti-immigrant rhetoric.

51. Census Bureau officials have noted that in routine pretests conducted from February 2017 to September 2017, "fears, particularly among immigrant respondents, have increased markedly this year."[14] The Census Bureau's researchers recounted repeated instances of respondents spontaneously raising concerns about data confidentiality and the government's negative attitudes toward immigrants. The researchers also noted that some respondents, acting on these same concerns, intentionally provided incomplete or inaccurate information, or sought to break off interviews.

52. The Census Bureau has recognized that these anxieties are already likely to present a barrier to participation in the 2020 Census, and that "[t]hese findings are particularly

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[13] *Immigration and Customs Enforcement and Customs and Border Patrol Fiscal Year 2018 Budget Request: Hearing Before the Subcomm. on Homeland Sec. of the H. Comm. on Appropriations*, 115th Cong. (2017) (statement of Thomas D. Homan, Acting Director, Immigration and Customs Enforcement).

[14] Memorandum from the U.S. Census Bureau, Ctr. for Survey Measurement to Assoc. Directorate for Research and Methodology, *Respondent Confidentiality Concerns* 1 (Sept. 20, 2017), https://www2.census.gov/cac/nac/meetings/2017-11/Memo-Regarding-Respondent-Confidentiality-Concerns.pdf.

troubling given that they impact hard-to-count populations disproportionately, and have implications for data quality and nonresponse."[15]

53. Defendants' decision to add a citizenship demand to the 2020 Census questionnaire will add to this unprecedented level of anxiety in immigrant communities. It will lead to nonresponse and lower participation by many immigrants who are citizens and legal residents and live in mixed immigration status households, as well as by undocumented immigrants, all of whom may seek to protect their own privacy or the privacy of their household. This exacerbated deterrent effect began on March 26, 2018, when immigrant communities learned that Secretary Ross directed the Census Bureau to add a citizenship demand to the 2020 Census.

54. Further, the Census Bureau will have to expend significant additional resources due to the lowered participation of immigrant communities, including hiring more census enumerators for in-person follow-up. However, enumerators are unlikely to succeed in meaningfully addressing nonresponses to the census where individuals decline to participate due to fear or mistrust of the federal government.

55. While Defendants recognize the detrimental impact that the addition of a citizenship demand will cause to the accuracy of the 2020 Census, they nevertheless decided to demand citizenship status from every individual resident in the country through the 2020 Census questionnaire.

[15] *Id.* at 7.

C. Defendants ignored their own standards for ensuring the accuracy of the decennial census.

56. In adding a citizenship demand to the 2020 Census, Defendants departed from statistical standards that promote the accuracy of information collected and disseminated by Defendants.

57. For each decennial census, the Census Bureau meticulously develops and tests the content, specific language, order, and layout of the questionnaire to improve the accuracy of the enumeration. In addition to fulfilling the Census Bureau's constitutional duty, this development process involves multiple steps that ensure the accuracy, reliability, and objectivity of the final data, as consistent with prior Census Bureau practice and as required by the Information Quality Act ("IQA"). Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763 (Dec. 21, 2000).

58. Government-wide statistical standards adopted under the IQA require the Commerce Department and the Census Bureau to carefully design the census questionnaire to "minimize respondent burden while maximizing data quality" and to "achieve the highest rates of response."[16] The standards also require testing each component of the questionnaire to ensure that it operates as intended.

59. The questionnaire development process and the evaluation of changes to individual inquiries take several years to complete.

60. Indeed, the Census Bureau has spent almost ten years developing and testing the content, specific language, and layout of just one proposed change to the question regarding race and ethnicity on the 2020 questionnaire. From 2008 through 2012, the Census Bureau conducted

[16] Office of Mgmt. & Budget, *Statistical Policy Directive No. 2: Standards and Guidelines for Statistical Surveys,* Sections 1.3, 1.4, 2.3.1 (2006).

comprehensive research into the possibility of combining race and ethnicity into one question on the 2020 Census. The research focused on whether this proposed change would improve respondent understanding of the question, as well as improve the accuracy of the race and ethnicity data collected.

61. The Census Bureau then spent several years designing and conducting tests on the proposed change to explore different alternatives for the language, layout, and instructions regarding a revised question. The testing was designed to assess the accuracy and reliability of alternative forms of asking the proposed question. In 2016, the Census Bureau conducted outreach to federal agencies and to the public to obtain feedback on the proposed change.

62. The Bureau concluded its process at the end of 2017, after nine years of evaluation and testing, because it "needed to make a decision on the design of the race and ethnicity questions by December 31, 2017 in order to prepare for the 2020 Census systems, and deliver the final 2020 Census question wording to Congress by March 31, 2018."[17]

63. In contrast, Defendants added a demand for citizenship information to the 2020 questionnaire after less than four months of consideration, conducted almost entirely after the Bureau's internal December 31, 2017 deadline for adding questions to the 2020 Census. Defendants did not conduct any research into the potential performance of the citizenship demand or test the impact of adding a citizenship demand on data accuracy. Nevertheless, Secretary Ross directed the Census Bureau to add a citizenship demand to the 2020 Census questionnaire, overruling Census Bureau officials and the Bureau's own expert advisory committee.

[17] Memorandum, U.S. Census Bureau, *2020 Census Program Memorandum Series: 2018.02, Using Two Separate Questions for Race and Ethnicity in 2018 End-to-End Census Test and 2020 Census* (Jan. 26, 2018), https://www2.census.gov/programs-surveys/decennial/2020/program-management/memo-series/2020-memo-2018_02.pdf.

(1) Defendants failed to adequately test the inclusion of a citizenship demand on the 2020 Census.

64. Defendants added a citizenship demand to the 2020 Census without following required standards for testing the content, specific language, and layout of new inquiries. Specifically, Defendants ignored IQA standards that require testing of each inquiry to "ensure that all components of a survey function as intended," and require incorporation of testing results into the final design of the questionnaire.[18] These testing standards promote the accuracy of the decennial census, which is Defendants' primary constitutional obligation.

65. Major testing of proposed changes to the 2020 Census questionnaire began with the 2014 Census Test. At that time, the Census Bureau assessed wording changes to the race and Hispanic origin question, as well as new potential response categories for married and unmarried relationships. The 2014 test did not assess the content, wording, or layout of a demand for citizenship information.

66. For the 2020 Census, the 2015 National Content Test was the opportunity for the U.S. Census Bureau to "compare different versions of questions prior to making final decisions."[19]

67. The Census Bureau designed and conducted the National Content Test in 2015. While the Census Bureau tested the changes to questions related to race and ethnicity, the Bureau did not design tests of language, layout, or instructions for a potential citizenship demand. The Census Bureau announced the results of this test in early March 2017, none of which related to citizenship.

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[18] Office of Mgmt. & Budget, *Statistical Policy Directive No. 2: Standards and Guidelines for Statistical Surveys* Section 1.4 (2006).

[19] U.S. Census Bureau, *Information Collection Request: 2015 National Content Test*, 80 Fed. Reg. 29,609, 29,610 (May 22, 2015).

68. The Census Bureau had other opportunities during the major tests in 2016 and April 2017 to test its questionnaire for the 2020 Census. However, the questionnaires assessed in these tests did not include a question regarding citizenship. In fact, the Census Bureau did not begin considering whether to add a demand for citizenship information to the 2020 Census until approximately eight months after it began conducting major testing in 2017.

69. The last major test before the 2020 Census—the 2018 end-to-end test—began on April 1, 2018. The end-to-end test is a dress rehearsal for the upcoming census, in which the Bureau tests and validates all major components, including operations, procedures, systems, and infrastructure. The 2018 end-to-end test does not include any request for citizenship information on the questionnaire provided to households. As a result, none of the major tests for the 2020 Census will have assessed the content, language, layout, or order of the citizenship demand on the questionnaire or the impact that the demand for person-by-person citizenship status would have on response rates and accuracy.

70. Defendants acknowledge that they are unable "to determine definitively how inclusion of a citizenship question on the decennial census will impact responsiveness,"[20] but they added a citizenship question without conducting the necessary testing to determine the impact of this decision on the 2020 Census.

71. To date, the Census Bureau has not tested the language or layout of the newly added demand for person-by-person citizenship information. Indeed, the purpose of testing is to promote accuracy by ensuring that the components of the census function as intended. Yet, the Bureau has failed to conduct any testing to assess the accuracy and reliability of "different ways

[20] Ross Memo at 7.

to ask the question" before adding it to the questionnaire.[21] The Census Bureau also failed to test the content and order of the citizenship demand on the proposed census questionnaire with actual respondents as required by its own standards. Such testing could have allowed the Bureau to identify potential problems, including adverse impact of the citizenship demand on response rates and accuracy.

72. The Census Bureau's failure to test its demand for citizenship information before deciding to include it on the 2020 Census questionnaire is unprecedented in the modern administration of the decennial census. For each decennial census since 1970, "the Census Bureau has conducted content tests to research and improve the design and function of different questions."[22] The Census Bureau spent three to four years thoroughly testing proposed changes to topics and question wording "to ensure census questionnaires are easily understood and reflect the population accurately."[23] This thorough vetting process included testing of the language of specific questions in decennial National Content Tests in 1976, 1986, 1996, 2005, and 2015, as well as testing the performance of proposed topics and specific questions in the field with actual respondents.

73. In sharp contrast to these extensive testing practices, the Bureau failed to conduct any tests to determine the performance of its new demand for citizenship status on the 2020 questionnaire. Instead the Census Bureau simply transferred the citizenship demand from the existing American Community Survey ("ACS") to the 2020 Census questionnaire.

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[21] U.S. Census Bureau, *How a Question Becomes a Part of the American Communities Survey* (2017) https://www.census.gov/content/dam/Census/library/visualizations/2017/comm/acs-questions.pdf.

[22] U.S. Census Bureau, *Content Research* (Jan. 11, 2017), https://www.census.gov/programs-surveys/decennial-census/2020-census/research-testing/content-research.html.

[23] *Id.*

74. While the Census Bureau currently inquires into citizenship status on the annual ACS, it cannot simply transfer the demand from the ACS to the decennial census without testing. The ACS is a sample survey sent to 3.5 million households annually, rather than a complete enumeration of every household in the United States.

75. Moreover, the testing the Census Bureau has conducted on the citizenship demand in the ACS was done to refine the question in the context of the ACS questionnaire. The citizenship demand's specific language, layout, order, and instructions remain untested in the context of the decennial census questionnaire.

76. For instance, the Census Bureau developed the language of the citizenship demand on the ACS to fulfill various purposes, including the "evaluation of immigration policies."[24] As a result, the citizenship demand on the ACS requires citizens to disclose whether they were born in "United States territories," whether they were born "abroad" to U.S. parents, or if and when they were "naturalized."[25] This information is entirely irrelevant to the sole stated purpose for adding the citizenship demand to the 2020 Census questionnaire: to provide the Department of Justice with data it claims to need to enforce Section 2 of the Voting Rights Act.[26] The Census Bureau has not tested either how these components of the citizenship demand will perform on a person-by-person questionnaire or whether the language can be refined to minimize respondent burden.

77. Finally, the demand for information regarding the citizenship status of every individual in the United States has not been tested in the contemporary environment of high immigrant anxiety and concerns over privacy. Secretary Ross ignored these requirements when

[24] Final Questions Report at 59.

[25] *Id.* at 7.

[26] Ross Memo at 1, 8.

he asserted that the demand for citizenship status had been adequately tested by virtue of its inclusion on the so-called "long-form census" that was sent to a random sample of households from 1960 to 2000 and on the ACS since 2005. As the Census Bureau's Scientific Advisory Committee publicly asserted on March 30, 2018, Secretary Ross's reliance on these prior surveys is based on "data collected in a different data collection context, in a different political climate, before anti-immigrant attitudes were as salient and consequential" as they are at present.[27]

78. Indeed, during general testing from February through September 2017, the Census Bureau found that unprecedented anxiety in immigrant communities—even without the inclusion of a demand for citizenship status—could increase non-response rates and adversely affect data quality for the 2020 Census. Defendants did not incorporate these findings into the final design of the 2020 Census questionnaire. Instead, Defendants incorporated a demand for citizenship status that will exacerbate anxiety in immigrant communities and further diminish the accuracy of the 2020 Census.

(2) Defendants disregarded respondent burden on potential response rates.

79. The IQA standards require Defendants to design questionnaires "in a manner that achieves the best balance between maximizing data quality . . . while minimizing respondent burden and cost," and "achieves the highest practical rates of response."[28] Further, under agency-specific IQA standards adopted by the Census Bureau, the Bureau committed to verify that questions are not "unduly sensitive" and "do not cause undue burden."[29]

[27] Michael Wines, *Census Bureau's Own Expert Panel Rebukes Decision to Add Citizenship Question*, New York Times (Mar. 30, 2018).

[28] Office of Mgmt. & Budget, *Statistical Policy Directive No. 2*, § 2.3 at 11.

[29] U.S. Census Bureau, *Statistical Quality Standards* ii, 7–8 reqs. A2-3 & A2-3.3 (Jul. 2013).

80. Defendants failed to follow these directives, despite acknowledging that the citizenship question will have a negative impact on response rates. During sworn congressional testimony on April 18, 2018, Defendant Jarmin acknowledged that the Census Bureau provided Secretary Ross with an estimate of potential non-response resulting from inclusion of a citizenship demand on the 2020 Census. Defendant Jarmin noted that the impact "might be important" in some communities,[30] and that he expected the negative impact of the citizenship demand on response rates "would be largely felt in various sub-groups, in immigrant populations, [and] Hispanic populations."[31]

81. Rather than adding a person-by-person citizenship demand on the 2020 Census questionnaire, Defendant Jarmin and the Census Bureau recommended that the best approach "would be to use administrative records" to calculate citizenship data.[32]

82. Secretary Ross disregarded the Census Bureau's recommendation and directed the Census Bureau to include a citizenship demand on the 2020 Census questionnaire. While Secretary Ross recognized the potential for higher rates of non-response, he concluded that the value of more complete citizenship data outweighed concerns regarding non-response.[33]

83. Abandoning the goal of higher response rates and overall accuracy runs contrary to Defendants' constitutional mandate to pursue an accurate enumeration of the population, and violates the IQA standards that the Census Bureau must follow.

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[30] *House Appropriations Committee, Commerce, Justice, Science and Related Agencies Subcommittee Hearing on Bureau of the Census*, 115th Cong. 20 (April 18, 2018).

[31] *Id.* at 23.

[32] *Id.* at 13.

[33] Ross Memo at 7.

(3) Defendants disregarded stakeholder concerns.

84. A number of affected stakeholders have expressed concern to Defendants regarding the inclusion of a demand for citizenship status on the 2020 Census.

85. On January 8, 2018, the American Statistical Association ("ASA") urged the Census Bureau not to collect citizenship information because of the "very strong potential the quality of the census will be undermined."[34] In addition, the ASA raised concerns that the addition of a citizenship demand this late in the preparation process "would likely increase distrust or suspicion of the government among immigrants, many of whom are already anxious about government inquiries and activities."[35] Moreover, the timing of the Census Bureau's consideration "[did] not allow time for adequate testing to incorporate new questions, particularly if the testing reveals substantial problems."[36]

86. The National League of Cities also flagged concerns that the addition of a citizenship demand at such a late stage in the census planning process was "reckless and disruptive," and would "spike fears about data confidentiality."[37]

87. Plaintiff USCM also sent Secretary Ross a letter signed by 161 Republican and Democratic mayors, expressing concerns about the addition of a citizenship demand to the 2020 Census questionnaire. The USCM noted that adding a demand for citizenship status late in the 2020 Census development process would nullify years of careful planning by the Census Bureau,

[34] Letter from Lisa LaVange to Sec'y of Commerce Wilbur Ross (Jan. 8, 2018), http://www.amstat.org/asa/files/pdfs/POL-CitzenshipQuestion.pdf.

[35] *Id.*

[36] *Id.*

[37] Letter from Clarence Anthony to Sec'y of Commerce Wilbur Ross (Feb. 8, 2018), http://www.nlc.org/sites/default/files/users/user125/Ross%20Letter%20on%20Citizenship%20Question.pdf.

and would require staffing beyond currently planned levels to address higher rates of non-response in light of the anticipated chilling effect.

88. On February 12, 2018, nineteen state Attorneys General and the Governor of Colorado urged Secretary Ross not to collect citizenship information on the 2020 Census. In addition to the issues highlighted above, the states explained in detail that the collection of citizenship data is "unnecessary to enforce the vote-dilution prohibition in Section 2 of the Voting Rights Act," and that "[c]ollecting citizenship data would undermine the goal of fair and effective representation for all communities, which the Voting Rights Act was enacted to protect."[38]

89. Several former directors of the Census Bureau voiced similar concerns after Defendants began considering this change. The Census Bureau Director from 2013 to 2017 explained, "[t]here are great risks that including that question, particularly in the atmosphere that we're in today, will result in an undercount, not just of non-citizen populations but other populations that are concerned with what could happen to them."[39] While Secretary Ross acknowledged receipt of some of these letters in his March 26, 2018 memorandum, he disregarded the serious concerns raised in these letters and directed the Census Bureau to demand the citizenship status of all respondents to the 2020 Census.

90. In his memorandum, Secretary Ross supported his decision by citing to several conversations with interested parties. One interested party, the former Deputy Director and Chief Operating Officer of the Census Bureau under President George W. Bush, subsequently

[38] Letter from Eric Schneiderman *et al.* to Sec'y of Commerce Wilbur Ross (Feb. 12, 2018), https://ag.ny.gov/sites/default/files/multi-state_letter_2020_census.pdf.

[39] Kriston Capps, *Ex-Census Director: Citizenship Question is 'a Tremendous Risk'*, CityLab (Feb. 27, 2018), https://www.citylab.com/equity/2018/02/former-census-director-citizenship-question-is-a-tremendous-risk/554372/.

stated "there's a high burden of proof that must be met about its value . . . and I told [Secretary Ross] that I don't think the case has been made that [the citizenship question] is so important that it's worth endangering this fragile instrument."[40]

91. Secretary Ross also cited discussions with a representative from Nielsen, a private survey company, as support for his conclusion that sensitive questions from the ACS caused no appreciable decrease in response rates. Nielsen took issue with this characterization of their representative's discussion with the Secretary, and subsequently, issued a statement clarifying that it did not support Defendants' inclusion of a citizenship question on the 2020 Census because it would lead to "inaccuracies in the underlying data."[41]

(4) Defendants failed to justify their changes to the subjects to be included on the 2020 Census.

92. Finally, Defendants failed to comply with their statutory obligations to advise Congress of the subjects to be included on the decennial census, and of any "new circumstances" that "necessitate" changes to those subjects. The Census Act required the Commerce Secretary, not later than three years before the decennial census date (that is, before April 1, 2017), to transmit to Congress "a report containing the Secretary's determination of the subjects proposed to be included" in the census. 13 U.S.C. § 141(f)(1). The report of subjects that Defendants submitted in March 2017 included the same subjects as the 2010 Census, and did not indicate any change to include citizenship information.

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[40] Jeffrey Mervis, *Trump officials claim they can avoid 2020 census problems caused by controversial citizenship question. Experts are very skeptical.* Science (April 13, 2018), http://www.sciencemag.org/news/2018/04/trump-officials-claim-they-can-avoid-2020-census-problems-caused-controversial?utm_campaign=news_daily_2018-04-16&et_rid=272854805&et_cid=1976256best.

[41] *Id.*

93. In reversing course just a year later, Defendants failed to identify and explain any "new circumstances" that "necessitate" this modification to the subjects they submitted in 2017, as required by statute. 13 U.S.C. § 141(f)(3).

III. Defendants' decision to include a citizenship demand on the 2020 Census is not supported by the stated justification.

94. Defendants assert that they included a citizenship demand on the 2020 Census in response to a request from the United States Department of Justice ("DOJ") dated December 12, 2017 (the "DOJ Letter").

95. The DOJ Letter asserted that person-by-person information on the citizenship status of every individual in the country was necessary to enforce Section 2 of the Voting Rights Act. Specifically, DOJ claimed that it needs a "reliable calculation of citizen voting-age population" in order to determine whether a minority group can constitute a majority in a single-member district, the first element in a vote dilution case.[42]

96. Collecting citizenship information from every person in the United States is not necessary to achieve the goal of effective Section 2 enforcement. The Supreme Court has never held that citizen voting-age population ("CVAP") is the proper measure for examining whether a minority group can constitute a majority in a single-member district.

97. Congress could not have intended for effective Section 2 enforcement to depend on the availability of person-by-person citizenship data, because such data has never been available at any point since Section 2 was enacted in 1965. Data collected through the decennial census would not provide a "reliable calculation" of CVAP in any event, because citizenship

[42] Letter from Arthur E. Gary, General Counsel, Justice Management Division, U.S. Dep't of Justice, to Ron Jarmin, Performing the Non-Exclusive Functions and Duties of the Director, U.S. Bureau of the Census, U.S. Dep't of Commerce (Dec. 12, 2017).

information collected decennially will quickly become outdated and less reliable over the course of the subsequent decade.

98. Further, the ACS already provides a reliable calculation of annually updated citizenship information that is collected through less invasive methods. In fact, DOJ and voting rights advocates have long used data from the ACS or a functionally equivalent survey to effectively enforce the law, and have never relied on the decennial census for this purpose.[43]

99. Even if demanding citizenship status from every person residing in the United States were necessary to enforce Section 2 of the Voting Rights Act — which it is not — Defendants' decision would impermissibly sacrifice the accuracy of the constitutionally-mandated census for non-constitutional purposes.

100. Defendants added a citizenship demand to the 2020 Census questionnaire knowing that it would likely lead to increased non-response and decreased accuracy in the 2020 Census. Nevertheless, Secretary Ross concluded that the accuracy of the citizenship data requested by the DOJ was "of greater importance" than the adverse effect resulting from higher levels of non-response.[44] In making this conclusion, Secretary Ross weighed a purported statutory purpose as having greater importance than the only constitutional requirement for the census: pursuing an accurate enumeration of the whole number of persons in the United States.

101. Demanding citizenship status on the 2020 Census will undermine, not advance, the goals of the Voting Rights Act. A person-by-person citizenship demand that leads to a

[43] Section 2 of the VRA was enacted in 1965, and no citizenship question has been included on the decennial census since 1950. From 1970 to 2000, a citizenship question was included only on the "long form" questionnaire, which was distributed to a sample of about one in six households in lieu of the decennial census questionnaire. Following the 2000 Census, the Census Bureau discontinued the "long form" questionnaire and replaced it with the American Community Survey, which is now sent to about one in every 38 households each year.

[44] Ross Memo at 7.

systematic undercount of minority populations across the United States will impair fair representation of those groups and the states in which they live.

102. It is clear that DOJ's stated rationale for demanding information on the citizenship status of every resident in the country is contrary to the evidence, and was not, in fact, the true reason DOJ sought this change in practice from the Census Bureau. On March 19, 2018, President Trump's reelection campaign sent a fundraising email stating, "The President wants the 2020 United States Census to ask people whether or not they are citizens . . . The President wants to know if you're on his side."[45] There was no assertion that the President sought this information to strengthen enforcement of the Voting Rights Act.[46] On March 28, 2018 — the day before the Census Bureau sent a report to Congress indicating that the 2020 Census would include a citizenship demand — President Trump's reelection campaign sent another fundraising email declaring that the President "officially mandated" that a citizenship demand be included on the 2020 Census. Again, the email had no mention of Voting Rights Act enforcement.[47]

103. Further, the assertion that President Trump compelled the addition of a demand for citizenship information undermines Secretary Ross's claims that Defendants made an informed decision to add this question based on a comprehensive review process. Therefore, Defendants' unfounded and conflicting rationales indicate that the stated reason for demanding citizenship information is pretext.

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[45] Tara Bahrampour, *Trump's Reelection Campaign Calls For Adding Citizenship Question To 2020 Census Amid Criticism That He Is Politicizing The Count*, Washington Post (Mar. 20, 2018), https://www.washingtonpost.com/local/social-issues/trump-campaign-calls-for-adding-citizenship-question-to-2020-census-amid-accusations-that-the-president-is-politicizing-the-annual-count/2018/03/20/dd5929fe-2c62-11e8-b0b0-f706877db618_story.html.

[46] Ross Memo at 1, 8.

[47] Tal Kopan, *Trump Campaign Rallies Supporters on Census Citizenship Question*, CNN (Mar. 28, 2018), https://www.cnn.com/2018/03/28/politics/trump-census-citizenship/index.html.

IV. Plaintiffs will be injured by Defendants' actions.

A. Plaintiffs are vulnerable to an undercount of their hard-to-count immigrant communities.

104. Plaintiffs are home to some of the hardest-to-count communities in the nation, including significant populations of authorized and undocumented immigrants. Many of these immigrants live in mixed-status families, with U.S. citizen children, siblings, or spouses. As a result, Defendants' decision increases the risk of undercounting both the citizens and noncitizens in these populations.

105. For instance, in New York State, 24.2% of households are "hard-to-count," meaning they did not mail back their 2010 Census questionnaire, which required the Census Bureau to conduct in-person follow-up. Approximately 36% of New York State's overall population and over one-half of its Hispanic population live in hard-to-count neighborhoods. Among these hard-to-count communities are New York's large immigrant population. Over one in five residents of New York State is foreign-born, the second highest proportion of foreign-born residents in the United States. In addition, in 2014, New York State had the fourth largest population of undocumented residents in the nation. New York's immigrants often reside in mixed-status households. Approximately 1.2 million New Yorkers, including 410,525 born in the United States, lived with at least one undocumented family member between 2010 and 2014.

106. In Colorado, 20.9% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 9.8% of Colorado's population, and in 2014 about 200,000 immigrants in Colorado were undocumented. Over 275,000 Colorado residents, including 127,582 born in the United States, lived with at least one undocumented family member between 2010 and 2014.

107. In Connecticut, 20.9% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Approximately 22% of the population currently lives in hard-to-count neighborhoods. Immigrants account for 14.4% of Connecticut's population, and in 2014, nearly one in every four immigrants in Connecticut was undocumented. Nearly 144,000 Connecticut residents, including 47,220 born in the United States, lived with at least one undocumented family member between 2010 and 2014.

108. In Delaware, 20% of households did not mail back their 2010 census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 9.4% of Delaware's population, and in 2014, approximately 31% of Delaware's immigrant population was undocumented. Nearly 30,000 Delaware residents, including 12,939 born in the United States, lived with at least one undocumented family member between 2010 and 2014.

109. In the District of Columbia, 21.7% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 13.3% of D.C.'s population, and in 2014, over one in four immigrants in D.C. was undocumented. Nearly 24,000 D.C. residents, including 8,912 born in the United States, lived with at least one undocumented family member between 2010 and 2014.

110. In Illinois, 19.3% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 13.9% of Illinois's population, and in 2014, approximately 24% of Illinois's immigrant population was undocumented. Between 2010 and 2014, approximately 344,000 U.S.-born Illinoisans lived with at least one undocumented family member.

111. In Iowa, 16.7% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 5.1% of Iowa's population, and in 2014, over one in four immigrants in Iowa was undocumented. Nearly 58,959 Iowa residents, including 23,639 born in the United States, lived with at least one undocumented family member between 2010 and 2014.

112. In Maryland, 19.7% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Moreover, Hispanic children in Maryland between the ages of 0 and 4 were undercounted by an estimated 9%. Immigrants account for 15.2% of Maryland's population, and in 2014, over one in four immigrants in Maryland was undocumented. Nearly 300,000 Maryland residents, including 99,846 born in the United States, lived with at least one undocumented family member between 2010 and 2014

113. In Massachusetts, 21.1% of households did not mail back their 2010 Census questionnaire, which required the Census Bureau to conduct in-person follow-up, and approximately 23% of the population currently lives in hard-to-count neighborhoods. Immigrants account for 16.5% of Massachusetts's total population, and in 2014, nearly one in five immigrants in Massachusetts was undocumented. In Massachusetts, 28.5% of all child residents have at least one immigrant parent, and 80% of the children of immigrants under 18 are U.S. born.

114. In Minnesota, 14.4% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 8.2% of Minnesota's population, and in 2014, nearly one in four immigrants in Minnesota was undocumented. Nearly 140,000 Minnesota residents, including

54,857 born in the United States, lived with at least one undocumented family member between 2010 and 2014.

115. In New Jersey, 21.9% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Approximately 22% of the population currently lives in hard-to-count neighborhoods. Immigrants account for 22.5% of New Jersey's population, and in 2014, nearly one in four immigrants in New Jersey was undocumented. Over 600,000 New Jersey residents, including 204,946 born in the United States, lived with at least one undocumented family member between 2010 and 2014.

116. In New Mexico, 26.2% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Approximately 43% of the overall population and over 50% of New Mexico's Hispanic population lives in hard-to-count neighborhoods. Immigrants account for 9.5% of New Mexico's population, and in 2014, approximately 37% of immigrants in New Mexico were undocumented. Over 115,000 New Mexico residents, including 54,068 born in the United States, lived with at least one undocumented family member between 2010 and 2014.

117. In North Carolina, 19.3% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 7.8% of North Carolina's population, and in 2014, approximately 43% of immigrants in North Carolina were undocumented. Nearly 430,000 North Carolina residents, including 186,930 born in the United States, lived with at least one undocumented family member between 2010 and 2014.

118. In Oregon, 20.2% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for nearly 10% of Oregon's population. Additionally, in 2016, over 12% of Oregon's population were native born Americans who had at least one immigrant parent. In 2014, approximately 32% of immigrants in Oregon were undocumented, and children of undocumented immigrants accounted for 8.6% of Oregon's K-12 population.

119. In Pennsylvania, 17.7% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 6.8% of Pennsylvania's population, and in 2014, over one in five immigrants in Pennsylvania was undocumented. Nearly 195,000 Pennsylvania residents, including 66,576 born in the United States, lived with at least one undocumented family member between 2010 and 2014.

120. In Rhode Island, 22.3% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 13.5% of Rhode Island's population, and in 2014, nearly one in five immigrants in Rhode Island was undocumented. Nearly 38,000 Rhode Island residents, including 14,507 born in the United States, lived with at least one undocumented family member between 2010 and 2014.

121. In Vermont, 20.3% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 4.5% of Vermont's population, and in 2014, approximately 8% of Vermont's immigrant population was undocumented.

122. In Virginia, 19.2% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 12.3% of Virginia's population, and in 2014, approximately 28% of Virginia's immigrant population was undocumented. Over 325,000 Virginia residents, including 113,072 born in the United States, lived with at least one undocumented family member between 2010 and 2014.

123. In Washington, more than 20% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Roughly one in seven Washington residents is an immigrant, and one in eight native-born U.S. citizens in Washington lives with at least one immigrant parent. Over 170,000 U.S. citizens in Washington live with at least one family member who is undocumented. Between 2010 and 2014, over 351,000 people in Washington, including 151,209 born in the United States, lived with at least one undocumented family member.

124. In Chicago, 34% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Approximately 48% of Chicago's population lives in hard-to-count neighborhoods. Immigrants account for 20.8% of Chicago's population, and in 2014, an estimated 425,000 undocumented immigrants lived in the Chicago metro area.

125. In Columbus, 29% of households did not mail back their 2010 census questionnaire, requiring the Census Bureau to conduct in-person follow-up interviews. Over 60% of Columbus's Hispanic population live in hard-to-count neighborhoods. Immigrants account for 11.6% of the City's population and in 2014, approximately 22% of Columbus's immigrant population was undocumented.

126. In New York City, 29% of households did not mail back the 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. New York City is home to 3.4 million foreign-born residents, and approximately 46% of foreign-born residents are non-citizens. Immigrants and the children of immigrants account for 60% of New York City's population. The New York metropolitan area is also home to an estimated 1.15 million undocumented immigrants.

127. In Philadelphia, 26.9% of households did not mail back the 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 13.1% of Philadelphia's population, and in 2014, an estimated 50,000 undocumented immigrants lived in the City of Philadelphia.

128. In Maricopa County, where the City of Phoenix is located, 22.4% of households did not mail back the 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 19.8% of Phoenix's population, and in 2014, an estimated 250,000 undocumented immigrants lived in the Phoenix metro area.

129. In Allegheny County, where the City of Pittsburgh is located, 17.5% of households did not mail back their 2010 census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for approximately 8.5% of Pittsburgh's population, and in 2014, approximately 18% of Pittsburgh's immigrant population was undocumented.

130. In Providence County, Rhode Island, where Providence and Central Falls are located, 24.8% of households did not mail back the 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Approximately 37% of Providence County's current population lives in hard-to-count neighborhoods. Immigrants account for

nearly 30% of Providence's population, and over 38% of the population in Central Falls. Providence and Central Falls are both taking part in the 2018 Census End-to-End Test.

131. In the City and County of San Francisco, 22.6% of households did not mail back the 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 34.9% of San Francisco's population, and an estimated 44,000 immigrant residents are undocumented. San Francisco is also home to thousands of mixed-status families, and over 8,000 undocumented residents reside with at least one United States citizen.

132. In Seattle, Washington, 20.7% of households did not mail back their 2010 census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 16.9% of Seattle's population. Between 2000 and 2014, Seattle's immigrant population grew 20% compared to 14% for the overall population, and in 2014, approximately 4% of Seattle's immigrant population was undocumented.

133. In Cameron County, Texas, located on the border with Mexico, 26.5% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Approximately 47% of Cameron County's overall population, and over 80% of its Hispanic population lives in hard-to-count neighborhoods. Nearly one-fourth of Cameron County's population is foreign born, and, in 2014, approximately 9% of the county's residents were undocumented.

134. In El Paso County, Texas, located on the border with Mexico, 22.9% of households did not mail back their 2010 census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Approximately 26% of El Paso County's overall

population lives in hard-to-count neighborhoods. Over 25% of El Paso's population is foreign born, and in 2014, 50,000 undocumented immigrants lived in El Paso.

135. In Hidalgo County, Texas, located on the border with Mexico, 29.3% of households did not mail back their 2010 census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Approximately 58% of Hidalgo County's overall population, and over 90% of the County's Hispanic population, lives in hard-to-count census tracts. Nearly 28% of Hidalgo County's population is foreign born, and in 2014, over 10% of residents were undocumented.

136. In Monterey County, California, 24.2% of households did not mail back their 2010 census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Approximately 35% of Monterey's population lives in hard-to-count neighborhoods. Also, 30% of Monterey County's population is foreign born. In 2014, approximately 10.2% of the immigrant population in Salinas, by far the largest city in Monterey County, was undocumented, and 50,000 undocumented immigrants lived in the Salinas metro area.

137. The members of the USCM are home to the majority of immigrants in the United States. In 2014, 104 metro areas, including many USCM members, accounted for over 86% of the immigrant population of the United States. Moreover, 61% of the nation's undocumented population live in the 20 largest metro areas in the United States, all of which contain cities that are USCM members.

138. Given the prevalence of Plaintiffs' hard-to-count populations, Plaintiffs are particularly susceptible to an undercount. Defendants' decision to add a person-by-person citizenship demand to the 2020 Census questionnaire will disproportionately impact Plaintiffs'

hard-to-count immigrant populations. The resulting undercounts in these communities will harm Plaintiffs' interests in full federal funding, accurate redistricting, and fair representation.

B. Defendants' conduct harms Plaintiffs' funding interests.

139. Many federal programs rely on the population figures collected in the decennial census to distribute federal funds among states and local governments. A total of approximately $700 billion is distributed annually to nearly 300 different census-guided federal grant and funding programs. These programs support essential services for Plaintiffs, including healthcare, public education, social services, and infrastructure development. Inaccurate population counts resulting from Defendants' decision to add a citizenship demand to the 2020 Census will harm Plaintiffs by depriving them of their statutory fair share of federal funding, and removing crucial resources for important government services.

(1) Defendants' decision will deprive Plaintiffs of necessary infrastructure funding.

140. Many federal funding programs provide crucial support for the planning, construction, maintenance, and operation of essential infrastructure projects. Several of these federal programs, including the Highway Trust Fund program, the Urbanized Area Formula Funding program, the Metropolitan Planning program, and the Community Highway Safety Grant program distribute funds based, at least in part, on population figures collected through the decennial census. 23 U.S.C. § 104(d)(3); 49 U.S.C. §§ 5305, 5307, 5340; 23 U.S.C. § 402. Plaintiffs rely on these programs to meet their infrastructure needs. For instance:

a. In fiscal year 2015, New York received $1.66 billion from the Highway Trust Fund, and over $645 million in Urbanized Area Formula grants.

b. In fiscal year 2015, Colorado received over $520 million from the Highway Trust Fund, and over $72 million in Urbanized Area Formula grants.

c. In fiscal year 2015, Connecticut received over $470 million from the Highway Trust Fund, and nearly $94 million in Urbanized Area Formula grants.

d. In fiscal year 2015, Delaware received nearly $182 million from the Highway Trust Fund, and over $19 million in Urbanized Area Formula grants.

e. In fiscal year 2015, the District of Columbia received over $185 million from the Highway Trust Fund, and over $20 million in Urbanized Area Formula grants.

f. In fiscal year 2015, Iowa received over $506 million from the Highway Trust Fund, and over $20 million in Urbanized Area Formula grants.

g. In fiscal year 2015, Maryland received about $597 million from the Highway Trust Fund, and over $154 million in Urbanized Area Formula grants.

h. In fiscal year 2015, Massachusetts received nearly $614 million from the Highway Trust Fund, and over $194 million in Urbanized Area Formula grants.

i. In fiscal year 2015, Minnesota received over $673 million from the Highway Trust Fund, and over $59 million in Urbanized Area Formula grants.

j. In fiscal year 2015, New Jersey received over $839 million from the Highway Trust Fund, and over $390 million in Urbanized Area Formula grants.

k. In fiscal year 2015, New Mexico received nearly $361 million from the Highway Trust Fund, and over $23 million in Urbanized Area Formula grants.

l. In fiscal year 2015, North Carolina received over $237 million from the Highway Trust Fund, and over $66 million in Urbanized Area Formula grants.

m. In fiscal year 2015, Oregon received nearly $431 million from the Highway Trust Fund, and over $51 million in Urbanized Area Formula grants.

n. In fiscal year 2015, Pennsylvania received over $1.67 billion from the Highway Trust Fund, and over $177 million in Urbanized Area Formula grants.

o. In fiscal year 2015, Rhode Island received nearly $217 million from the Highway Trust Fund, and over $27 million in Urbanized Area Formula grants.

p. In fiscal year 2015, Vermont received over $206 million from the Highway Trust Fund, and over $2 million in Urbanized Area Formula grants.

q. In fiscal year 2015, Virginia received over $953 million from the Highway Trust Fund, and over $123 million in Urbanized Area Formula grants.

r. In fiscal year 2015, Washington received over $663 million from the Highway Trust Fund, and over $140 million in Urbanized Area Formula grants.

s. In fiscal year 2015, New York City received $34 million in Urbanized Area Formula grants.

t. During Philadelphia's fiscal year 2016, Philadelphia received over $41 million from the Highway Trust Fund.

u. In fiscal year 2017, Illinois received over $1.46 billion from the Highway Trust Fund, and over $235 million in Urbanized Area Formula grants.

v. In fiscal year 2017, Columbus received $11 million from the Highway Trust Fund, and over $11 million in Community Highway Safety grants.

w. In fiscal year 2017, San Francisco received over $73 million in Urbanized Area Formula grants.

x. In fiscal year 2017, Monterey County received $2.6 million in pass through funds from the Highway Trust Fund.

141. Defendants' decision will lead to an undercount in the decennial census that will deprive Plaintiffs of crucial federal funds for infrastructure provided under these and other programs.

(2) Defendants' decision will deprive Plaintiffs of funding necessary to support public education.

142. Federal funding programs are also essential for supporting public education, especially for low-income children and families. Undercounts in the decennial census can impact allocations under many of these programs, including Special Education grants, and the Title I funding program. For instance, the United States Department of Education allocates Title I funding based on the number and percentage of children living in families with incomes below the poverty line, which it obtains through the Census Bureau's Small Area Income and Poverty Estimates (SAIPE) program. 20 U.S.C. §§ 6333-6335. The SAIPE program incorporates ACS estimates, which are calculated using the results of the decennial census count. As a result, any undercount in the decennial census will carry over into ACS estimates and the SAIPE, and will ultimately decrease funding under Title I.

143. Plaintiffs rely on federal funding programs to meet their public education needs. In fiscal year 2017, the United States Department of Education appropriated:

a. Approximately $1.2 billion in Title I funds to school districts in New York, including $779 million for New York City. In addition, New York received $781 million in Special Education grants.

b. Over $152 million in Title I funds to school districts in Colorado, and nearly $164 million to Colorado in Special Education grants.

c. Nearly $130 million in Title I funds to school districts in Connecticut, and nearly $137 million to Connecticut in Special Education grants.

d. Nearly $51 million in Title I funds to school districts in Delaware, and nearly $37 million to Delaware in Special Education grants.

e. Over $47 million in Title I funds to school districts in the District of Columbia, and nearly $19 million to the District of Columbia in Special Education grants.

f. Over $678 million in Title I funds to school districts in Illinois, including over $283 million for Chicago. In addition, Illinois received nearly $518 million in Special Education grants.

g. Over $97 million in Title I funds to school districts in Iowa, and nearly $126 million to Iowa in Special Education grants.

h. Over $230 million in Title I funds to school districts in Maryland, and nearly $206 million to Maryland in Special Education grants.

i. Over $226 million in Title I funds to school districts in Massachusetts, and over $292 million to Massachusetts in Special Education grants.

j. Over $163 million in Title I funds to school districts in Minnesota, and over $195 million to Minnesota in Special Education grants.

k. Nearly $365 million in Title I funds to school districts in New Jersey, and over $372 million to New Jersey in Special Education grants.

l. Nearly $120 million in Title I funds to school districts in New Mexico, and nearly $94 million to New Mexico in Special Education grants.

m. Nearly $451 million in Title I funds to school districts in North Carolina, and over $346 million to North Carolina in Special Education grants.

n. Over $152 million in Title I funds to school districts in Oregon and over $132 million to Oregon in Special Education grants.

o. Over $621 million in Title I funds to school districts in Pennsylvania, including nearly $220 million for Philadelphia and $18 million for Pittsburgh. In addition, Pennsylvania received over $438 million in Special Education grants.

p. Over $53 million in Title I funds to school districts in Rhode Island, including $21 million for Providence, and $3 million for Central Falls. In addition, Rhode Island received over $45 million in Special Education grants.

q. Over $35 million in Title I funds to school districts in Vermont, and $29 million to Vermont in Special Education grants.

r. Over $265 million in Title I funds to school districts in Virginia, and nearly $300 million to Virginia in Special Education grants.

s. Over $228 million in Title I funds to school districts in Washington, including $10 million for Seattle. In addition, Washington received $227 million in Special Education grants.

t. Over $30 million in Title I funds to the Brownsville Independent School District in Cameron County.

u. Over $23 million in Title I funds to the El Paso Independent School District in El Paso County.

v. Over $11 million in Title I funds to the McAllen Independent School District and over $17 million in Title 1 funds to the Edinburg Consolidated Independent School District, both in Hidalgo County.

144. Defendants' decision will lead to an undercount in the decennial census that will deprive Plaintiffs and their residents of crucial federal funds for public education provided under these and other programs.

(3) Defendants' decision will deprive Plaintiffs of funding necessary for critical social services.

145. Federal funding programs also provide increased access to healthcare, child care, affordable housing, and nutrition. For instance, the Medical Assistance Program ("Medicaid") provides financial assistance for payment of medical expenses on behalf of certain eligible groups, including low-income families, children, and pregnant women. Medicaid relies on "per-capita income" information calculated with decennial census data to determine the amount to reimburse each state for medical assistance payments on behalf of low-income individuals. 42 U.S.C. §§ 1301, 1396d. Several Plaintiffs will lose millions of dollars in reimbursement as a result of even a 1% undercount. In fiscal year 2015:

a. Colorado received $3.4 billion in reimbursement under the Medicaid program, and an additional 1% undercount on the 2010 Census would have resulted in losses of over $63 million in federal funding.

b. Delaware received $771 million in reimbursement under the Medicaid program, and an additional 1% undercount on the 2010 Census would have resulted in losses of over $14 million in federal funding.

c. Illinois received $7.19 billion in reimbursement under the Medicaid program, and an additional 1% undercount on the 2010 Census would have resulted in losses of over $122 million in federal funding.

d. Iowa received $2.14 billion in reimbursement under the Medicaid program, and an additional 1% undercount on the 2010 Census would have resulted in losses of over $38 million in federal funding.

e. New Mexico received $2.49 billion in reimbursement under the Medicaid program, and an additional 1% undercount on the 2010 Census would have resulted in losses of over $23 million in federal funding.

f. North Carolina received $8.43 billion in reimbursement under the Medicaid program, and an additional 1% undercount on the 2010 Census would have resulted in losses of over $94 million in federal funding.

g. Oregon received $3.64 billion in reimbursement under the Medicaid program, and an additional 1% undercount on the 2010 Census would have resulted in losses of over $44 million in federal funding.

h. Pennsylvania received $11.2 billion in reimbursement under the Medicaid program, and an additional 1% undercount on the 2010 Census would have resulted in losses of nearly $222 million in federal funding.

i. Vermont received $774 million under the Medicaid program, and an additional 1% undercount on the 2010 Census would have resulted in losses of over $14 million in federal funding.

j. Washington received $3.92 billion under the Medicaid program, and an additional 1% undercount on the 2010 Census would have resulted in losses of over $2 million in federal funding.

146. In addition, in fiscal year 2017, the City of Columbus received $69.7 million under the Medicaid program and an undercount of its population would lead to a loss of crucial Medicaid funds.

147. The Child Care and Development Fund ("CCDF"), a program that helps low-income families obtain child care so that family members can work, also allocates funds on the

basis of population data collected through the decennial census. 45 C.F.R. § 98.63. In fiscal year 2015:

a. New York received over $198 million in CCDF grants.

b. Colorado received over $38 million in CCDF grants.

c. Connecticut received over $36 million in CCDF grants.

d. Delaware received nearly $9.9 million in CCDF grants.

e. The District of Columbia received over $7.2 million in CCDF grants.

f. Illinois received over $126 million in CCDF grants.

g. Iowa received over $25 million in CCDF grants.

h. Maryland received nearly $54 million in CCDF grants.

i. Massachusetts received over $76 million in CCDF grants.

j. Minnesota received over $52 million in CCDF grants.

k. New Jersey received nearly $72 million in CCDF grants.

l. New Mexico received over $20 million in CCDF grants.

m. North Carolina received over $122 million in CCDF grants.

n. Oregon received nearly $39 million in CCDF grants.

o. Pennsylvania received over $116 million in CCDF grants.

p. Rhode Island received over $11 million in CCDF grants.

q. Vermont received nearly $6.7 million in CCDF grants.

r. Virginia received nearly $64 million in CCDF grants.

s. Washington received nearly $78 million in CCDF grants.

148. The Community Development Block Grant ("CDBG") program provides annual grants to qualifying jurisdictions for the purpose of undertaking development activities directed

toward housing and housing-related facilities and services, such as neighborhood revitalization, economic development, and community facilities. Grantees must spend at least 70% of CDBG funds on activities that benefit low- and moderate-income persons. Funding allocation under the CDBG program is determined on the basis, at least in part, of information collected by the Census Bureau. 42 U.S.C. §§ 5302, 5306; 24 C.F.R §§ 570.3-4. Plaintiffs receive annual CDBG funds. For example, Chicago received over $80 million under the CDBG program in fiscal year 2018, Phoenix was allocated over $16 million in fiscal year 2018, Columbus received nearly $7.7 million in fiscal year 2017, Pittsburgh received approximately $10.3 million in fiscal year 2016, and Philadelphia received nearly $46 million during the city's 2016 fiscal year.

149. Several federal programs improve nutrition for low-income families, including the School Breakfast and National School Lunch programs, as well as the Supplemental Nutrition Assistance Program ("SNAP"). Funding allocations for these programs are often determined on the basis of information collected by the Census Bureau. Plaintiffs receive annual funds under the School Breakfast and National School Lunch Program. For example, in fiscal year 2017, Virginia received nearly $90 million under the School Breakfast program, and over $250 million under the National School Lunch Program. Plaintiffs also receive significant annual funding under SNAP. For instance, in fiscal year 2015, Delaware received $228 million under SNAP, New Mexico received $685 million, and Oregon received $1.15 billion, and in fiscal year 2017 Monterey County received $12.8 million.

150. Defendants' decision will lead to an undercount in the decennial census that will deprive Plaintiffs of crucial federal funds that provide increased access to social services under these and other programs.

151. An undercount of Plaintiffs' populations as a result of the demand for person-by-person citizenship status of every resident in the country will also lead to losses of funding for Plaintiffs in many other federally-funded programs that tie allocations to data collected during the decennial census. Losses of funding for these programs will significantly harm Plaintiffs, who will either need to procure additional resources to meet these shortfalls in funding, or their resource needs will be unmet.

C. Defendants' conduct harms Plaintiffs' interests in accurate redistricting and compliance with the Constitution's one-person, one-vote mandate.

152. Defendants' decision to demand person-by-person citizenship information on the 2020 Census questionnaire also harms Plaintiffs' interests in obtaining accurate population figures for redistricting purposes.

153. Plaintiff States rely on tabulations of the population produced by the Census Bureau from the decennial census to draw statewide redistricting plans for their congressional and state legislative districts.

154. When drawing these districts, Plaintiff States must adhere to the U.S. Constitution's one-person, one-vote requirement, which requires that congressional and state legislative districts must be "as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 559, 577 (1964); *see Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964); *Karcher v. Daggett*, 462 U.S. 725, 734 (1983); *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983). The drawing of congressional districts is subject to a strict constitutional standard, and even small population deviations, if avoidable, are unconstitutional. Moreover, at least for congressional districts, the Constitution requires apportionment "based on total population," not citizen voting age population. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1128-29 (2015).

155. Defendants' decision will create avoidable errors in the data provided to Plaintiff States for congressional redistricting, and districts drawn on that data will impair the right to equal representation for residents of over-populated districts.

156. Plaintiff the District of Columbia relies on tabulations of the population produced by the Census Bureau to redistrict for local elections within the District, setting boundaries for wards that elect members to the local legislative body, the Council of the District of Columbia, as well as boundaries for Advisory Neighborhood Commissions, Single Member Districts, and voting precincts. Similarly, most Plaintiff Cities and Counties also rely on population tabulations produced by the Census Bureau in order to reapportion their legislative districts. Like all U.S. States, the District of Columbia, and the Cities of Central Falls, Chicago, Columbus, New York, Philadelphia, Phoenix, Providence, and Seattle, the City and County of San Francisco, the Counties of Cameron, El Paso, Hidalgo and Monterey, and the members of the USCM are also bound by the U.S. Constitution's one-person, one-vote requirement.

157. By causing disproportionate undercounts of citizens and noncitizens in communities with immigrant populations, the addition of a citizenship demand to the 2020 Census will jeopardize the ability of Plaintiffs to comply with the one-person, one-vote requirement. Undercounts of citizens and noncitizens in these communities will create avoidable distributional inaccuracies in the data on which Plaintiffs rely to draw district lines. Districts drawn on the basis of inaccurate data may systemically dilute the voting power of persons living in communities with immigrant populations, and impair their right to equal representation in congressional, state, and local legislative districts.

158. As a result, Defendants' decision will harm Plaintiffs' interest in complying with the constitutional equal population principle in redistricting.

D. Defendants' conduct harms Plaintiffs' representational interests.

159. Defendants' decision to demand person-by-person citizenship information on the 2020 Census questionnaire will harm Plaintiffs' interest in fair representation in Congress by depressing participation in the decennial census within Plaintiffs' diverse naturalized, documented, and undocumented immigrant populations, leading to inaccurate responses and a significant undercount of Plaintiffs' residents.

160. For instance, an undercount resulting from Defendants' decision to add a citizenship demand will lead to loss of representation in Rhode Island. As a result of the 2010 Census, Rhode Island was allocated two seats to the United States House of Representatives in accordance with U.S. Const. art. I, § 2. Rhode Island has maintained two seats to the United States House of Representatives for over 200 years. According to the Census Bureau estimates for 2017, the population of Rhode Island is 1,059,639. Based on these 2017 estimates of its population, if 157 persons that reside in Rhode Island are not counted in the 2020 Census, Rhode Island will lose one of its two seats in the United States House of Representatives.

161. In addition, the undercount resulting from Defendants' decision will threaten additional Plaintiffs with losses in representation.

162. For example, New York is projected to lose one representative as a result of the 2020 Census, and is on the cusp of losing a second. Illinois also risks losing additional representation in Congress. An undercount of immigrant communities in these states will result in losses of these seats, and harm these states' interest in fair representation in Congress and in the Electoral College.

163. Moreover, Defendants' decision will also harm representational interests within their states. Plaintiff Cities, Counties, and the members of Plaintiff USCM are home to larger immigrant populations than other areas within their states. For instance:

a. The foreign-born population of Central Falls is 38%, and Providence is 30%, compared to 13.5% for the State of Rhode Island.

b. The foreign-born population of Chicago is approximately 20.8% of the total population, compared to 13.9% for the State of Illinois.

c. The foreign-born population of Columbus is 11.6%, compared to 4.4% for the State of Ohio.

d. The foreign-born population of San Francisco is 34.9%, and Monterey County is 30%, compared to 27% for the State of California.

e. The foreign-born population of Philadelphia is 13.1% and Pittsburgh is 8.5%, compared to 6.5% for the State of Pennsylvania.

f. The foreign-born population of Phoenix is 19.8%, compared to 13.4% for the State of Arizona.

g. The foreign-born population of Cameron County is 24%, El Paso County is 25%, and Hidalgo County is 28%, compared to 17% for the State of Texas.

164. Defendants' decision to include a citizenship demand on the 2020 Census questionnaire will lead to undercounts in immigrant communities, and, as a result, will disproportionately affect areas with larger immigrant communities. Redistricting on the basis of these inaccurate numbers will harm these areas, including Plaintiff Cities, Counties, and the members of Plaintiff USCM, vis-a-vis other areas within their states with smaller immigrant communities.

E. Plaintiffs will expend significant resources to mitigate the harm from Defendants' decision.

165. Plaintiffs already devote considerable resources every ten years to ensuring that they receive an accurate count of their populations on the census. For instance, Colorado

devoted resources to train and educate local partners and update address lists. Massachusetts funded community outreach grants in 2000 and 2010 focused on increasing immigrant participation in the decennial census. Minnesota expended resources during the 2010 Census on efforts to coordinate with local governments, promote the Census at community events, and engage community leaders and organizations. Similarly, San Francisco expended resources in connection with the 2010 Census, creating a Complete Count Committee, conducting a citywide campaign, and supporting multilingual outreach to immigrant and historically undercounted populations.

166. Plaintiffs also devoted significant employee time to outreach efforts. For the 2010 Census, the District of Columbia devoted an employee to reach out to the District's Hispanic community, hosted a training of Hispanic Census workers, and educated parents, English as a Second Language teachers, and counselors on the importance of a complete count. Chicago and its sister agencies devoted over 1600 staff hours to programs encouraging residents to participate, including door-to-door distribution of flyers and information, sending Census messages on student report cards, and installing posters at bus shelters. Oregon similarly devoted significant employee time to community outreach efforts.

167. Several Plaintiffs have started making efforts encourage participation for the 2020 Census. For instance, Illinois has enacted a Complete Count Commission to develop a census outreach strategy. 20 Ill. Comp. Stat. 5100/15. New Mexico has spent $300,000 to identify housing units for the Census Bureau's address list, and expects to spend additional funds on a proposed Complete Count Committee and other efforts to encourage participation. Maryland allocated $5 million to assist local governments and nonprofits in obtaining an accurate count. New York City has budgeted $4 million to hire staff and develop programs to address the

unprecedented challenges New York City anticipates. Many of these efforts did not, however, account for additional levels of non-response resulting from Defendants' decision to add a person-by-person citizenship demand to the 2020 Census questionnaire.

168. Plaintiffs will have to expend additional funding to combat the undercount that the addition of a citizenship demand will cause, such as expending resources on greater public outreach to encourage anxious residents, particularly in immigrant communities, to respond to the 2020 Census.

F. Defendants' conduct harms the health of Plaintiffs' residents.

169. Many federal health agencies and public health organizations rely on the decennial census for accurate demographic statistics of the population of the United States.

170. These statistics help healthcare providers and policymakers contain and prevent the spread of disease by efficiently allocating funding and limited resources for targeted interventions. For example, census statistics help reduce the incidence of asthma and other preventative diseases by using demographic data to model neighborhoods before initiating preventative programs.

171. An inaccurate census would not just result in worse health outcomes for undercounted communities, but for the nation as a whole. An undercount in the 2020 Census would undermine efforts to prevent disease and cost millions of dollars in long-term treatment.

G. Defendants' conduct harms Plaintiffs' economies and residents who are beneficiaries of private funding.

172. An accurate census is essential for both public and private actors to identify and help meet community and business needs.

173. The Department of Commerce estimates that census data guide trillions of dollars in private sector investment and create $221 billion in private sector revenue.

174. Non-profit organizations use census data to decide where to provide critical aid such as health care and natural disaster relief and where to conduct fundraising and advocacy drives.

175. Academics and researchers from Plaintiffs' universities rely on census data to conduct research on a wide variety of issues relating to race and ethnicity, population mobility, and other areas.

176. An undercount on the 2020 Census, caused by Defendants' demand for citizenship information from every respondent, will ultimately deprive historically marginalized communities of vital private resources over the next decade.

177. Plaintiffs will need to expend additional funds to compensate for the loss of vital aid from private actors to their residents.

FIRST CLAIM FOR RELIEF
(U.S. Constitution article I, section 2, clause 3;
U.S. Constitution amend. XIV, sec. 2)

178. Plaintiffs reallege and incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

179. The Constitution requires that Defendants conduct an "actual Enumeration" of the "whole number of persons" in the United States, so that Members of the U.S. House of Representatives may be "apportioned among the several States . . . according to their respective Numbers." U.S. Const. art. I, § 2, cl. 3; *id.* amend. XIV, § 2; *see* 13 U.S.C. §§ 4, 141.

180. Defendants' decision to add a citizenship demand to the 2020 Census questionnaire will deter participation in the decennial census and cause an undercount that impedes the "actual Enumeration" required by the Constitution.

181. Defendants' conduct poses a significant risk that Plaintiffs' number of U.S. Representatives and representation in the Electoral College will not reflect their actual population.

182. Defendants' violation causes ongoing harm to Plaintiffs and their residents.

SECOND CLAIM FOR RELIEF
(Administrative Procedure Act – not in accordance with law, contrary to constitutional right, beyond statutory authority, and without observance of procedure required by law)

183. Plaintiffs reallege and incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

184. Under the Administrative Procedure Act, courts must "hold unlawful and set aside" agency action that is "not in accordance with law," "contrary to constitutional right," in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or that is "without observance of procedure required by law." 5 U.S.C. § 706(2)(A)-(D).

185. Defendants' decision to add a citizenship demand to the 2020 Census questionnaire is inconsistent with and contrary to the constitutional mandate to conduct an "actual Enumeration" of "the whole number of persons" in the United States. U.S. Const. art. I, § 2, cl. 3; *id.* amend. XIV, § 2.

186. Defendants' decision is also inconsistent with the data quality requirements of the Information Quality Act and the guidelines implementing the IQA adopted by the Census Bureau. Pub. L. No. 106-554, § 515. The data quality requirements and testing standards developed pursuant to law and practice are designed to ensure accuracy, reliability, and objectivity in the final data, to minimize respondent burden and maximize data quality, and to achieve the highest rates of response. Defendants have failed to act in a manner consistent with these requirements and mandated procedures by failing to adequately test the citizenship

demand, minimize the burden that such a demand imposes on respondents, maximize data quality, or ensure the highest rates of response.

187. Defendants' decision to add a citizenship demand to the 2020 Census is therefore not in accordance with law; beyond statutory authority; and without observance of procedure required by law, in violation of the Administrative Procedure Act. 5 U.S.C. § 706(2).

188. Defendants' violation causes ongoing harm to Plaintiffs and their residents.

THIRD CLAIM FOR RELIEF
(Administrative Procedure Act – arbitrary and capricious)

189. Plaintiffs reallege and incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

190. The Administrative Procedure Act provides that courts must "hold unlawful and set aside" agency action that is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A).

191. Defendants' decision to add a citizenship demand to the 2020 Census is arbitrary and capricious and an abuse of discretion for multiple reasons. First, there is no support for the Department of Justice's claim that effective enforcement of Section 2 of the Voting Rights Act requires person-by-person citizenship data; to the contrary, requesting citizenship data would undermine the purposes of the Voting Rights Act and weaken voting rights enforcement; and sufficient data for Voting Rights Act purposes is already available to the Department of Justice.

192. Second, Defendants' decision to add a citizenship demand is arbitrary and capricious because it reverses nearly seven decades of settled and well-considered practice without reasoned explanation, in contradiction to factual findings that underlay the Census Bureau's previous practice.

193. Third, Defendants' decision is arbitrary and capricious because Defendants entirely failed to consider important aspects of the problem, including the risk of inaccurate results and the availability of alternative data that serves the federal government's needs no less well.

194. Fourth, Defendants' decision is arbitrary and capricious because it was reached without complying with Defendants' own data quality requirements and testing standards.

195. Fifth, Defendants' unfounded and conflicting rationales indicate that the stated reason for adding the question is pretext.

196. Defendants' decision to add a citizenship demand to the 2020 Census is therefore "arbitrary, capricious, [or] an abuse of discretion" in violation of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A).

197. Defendants' violation causes ongoing harm to Plaintiffs and their residents.

PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully request that this Court:

1. Declare that Defendants' decision to add a citizenship demand to the questionnaire for the 2020 Census is unauthorized by and contrary to the Constitution and laws of the United States;

2. Declare that Defendants' decision to add a citizenship demand to the 2020 Census is not in accordance with law, is beyond statutory authority, and is arbitrary and capricious, in violation of the Administrative Procedure Act, 5 U.S.C. § 706;

3. Enjoin Defendants and all those acting on their behalf from adding a citizenship demand to the 2020 Census;

4. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys' fees, pursuant to 28 U.S.C. § 2412; and

5. Award such additional relief as the interests of justice may require.

DATED: April 30, 2018

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