The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*,

Plaintiffs,

v.

DONALD TRUMP, President of the United States, *et al.*,

Defendants.

No. 2:17-cv-00094-RAJ

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL STATISTICAL DATA UNDER FED. R. CIV. P. 37(a)(3)

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Ben Franklin Station, P.O. Box 878
Washington, D.C. 20044
(202) 616-4900

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INTRODUCTION

Nearly one year after document discovery closed, and following additional post-deadline discovery negotiated and completed by the parties for Plaintiffs' benefit on this very topic, Plaintiffs are making yet another backdoor attempt to circumvent the discovery cut-off. Their new request is made not because of any deficiency in Defendants' discovery responses, but because they are unhappy that USCIS's statistical data, produced in supplementation of Defendants' Initial Disclosures, does not support their preconceived case narrative. Accordingly, they seek ways to undermine it. The USCIS data reflects that 0.266% of the over 10.6 million naturalization and adjustment of status applications received between Fiscal Years 2013 and 2019 were referred for CARRP review, and over 80% of the applications adjudicated under CARRP were approved. Because these results severely undercut Plaintiffs' theory that CARRP is designed to delay and deny cases with national security concerns, Plaintiffs' belated discovery request is made to support their effort to obscure what the data clearly shows by attempting to redefine what constitutes a CARRP case nearly four years after this litigation began.

Plaintiffs' new request is based on internally conflicting and fundamentally confused reasoning. Moreover, the data Plaintiffs seek is not even germane to the issue for which they purport to seek it. While Plaintiffs contend that Defendants are obligated to produce this new category of information in supplementation of Defendants' initial disclosures, their argument is based on a misreading of Fed.R.C.P. 26(a). The initial disclosures rule requires a party to identify only the evidence on which it intends to rely in support of its case. Plaintiffs' new discovery request seeks to compel the production of evidence that Defendants have no intention or need to rely on. As Plaintiffs' motion seeks data they never sought in discovery and Defendants are not otherwise required to produce it, their motion should be denied.

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BACKGROUND

I. Plaintiffs Employed Broad Class Definitions to Maximize the Extent of Evidence Defendants Were Required to Produce.

Plaintiffs' class action alleges that CARRP targets naturalization and adjustment of status applicants who are Muslim or from Muslim majority countries by improperly labeling them as national security ("NS") concerns so that USCIS can delay the processing of their applications and, ultimately, deny the benefits sought. *See generally* Plaintiffs' Second Amended Complaint, Dkt. 47. Plaintiffs proposed two classes, which the Court certified. The classes include all persons "who have or will have" an application for naturalization or for adjustment of status "pending before USCIS . . . that is subject to CARRP . . . [and] that has not been or will not be adjudicated by USCIS within six months of being filed." Dkt. 69 at 8.

During the discovery period, Plaintiffs made sweeping requests for documents and data concerning class members. One such request was for any documents, such as class lists, identifying applicants for naturalization or adjustment "who are or have been subject to CARRP." *See* Plaintiffs' Sealed Exh. A (RFP Nos. 34 & 35). In litigating Plaintiffs' request for the class members' identities, Defendants explained the difficulties with querying its systems if required to produce information about class members and explained a potential way it may produce it. *See* Dkt. 94-6, at ¶¶ 7-22 (October 10, 2017 Declaration of James W. McCament). Specifically, USCIS noted that "[w]hen an individual's case raises national security concerns, pertinent information is recorded in an electronic system known as the Fraud Detection and National Security Data System ("FDNS-DS")." *Id.* at ¶ 10. USCIS advised that "FDNS-DS is not used to adjudicate applications" and thus "does not systematically record certain adjudicative information, including the date that [an] application was filed." *Id.* at ¶ 11. That information is maintained in other systems. *See id.* at ¶¶ 7-9. Thus, to identify members of Plaintiffs' classes,

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USCIS would have to query its adjudicative systems to identify naturalization and adjustment applications pending for six months or more. *Id.* at ¶¶ 16, 18. USCIS also would have to query FDNS-DS to determine if any of those applications was associated with a NS concern. *Id.* at ¶¶ 20. Pursuant to the Court's order to produce information to allow Plaintiffs to identify potential class members (Dkt. 98 at 2-4), Defendants have been producing class lists on a quarterly basis since May 16, 2018. *See* Exh. 1 (May 16, 2018 Email from Andrew Brinkman). Defendants explained to Plaintiffs that Defendants "understand[] that individuals remain in the class even after the national security concern is resolved . . . as long as the individual was subject to the CARRP policy at some point after the class was certified, and the case remains pending." Dkt. 126-1 (March 1, 2018 Emrich Declaration) ¶ 16. Plaintiffs cited to the fact that individuals with resolved NS concerns are class members in their own filings. Dkt. 127 at 10, n. 4.

In addition, Plaintiffs sought information detailing, among other things, the number of naturalization and adjustment applications referred to CARRP for FY 2015 – 2018, the number denied during that period, and average CARRP processing times, all broken down by nationality, country of birth, religion and KST status. *See* Plaintiffs' Sealed Exh. C (Interrogatory 3). In producing the voluminous responsive data, USCIS advised Plaintiffs that because it had to query and combine data from multiple systems, the information provided in response to Interrogatory 3 was limited by the data that is available in its systems. Plaintiffs' Sealed Exh. D at 22-3, ¶ h. In particular, USCIS explained that the Interrogatory 3 data included NS concerns that may have been opened before the relevant application was filed, or that were resolved and closed even though the application remained pending.[1] *Id.*

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[1] Separately, Defendants also produced a multitude of other evidence indicating that an application may be referred to CARRP in the absence of an articulable link to a NS concern, if there are indicators of such a link that require further vetting. *See, e.g.*, Certified Administrative Record at 781("In the field, all the vetting is the same for both

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1 **II. Defendants Supplemented Their Initial Disclosures With Statistical Data.**

2 On July 26, 2019, as a part of Defendants' First Set of Supplemental Initial Disclosures,
3 Defendants produced USCIS data concerning all naturalization and adjustment of status
4 applications received during FY 2013 through the first half of FY 2019 ("Defendants' Statistical
5 Data"). *See* Exh. 3 (July 26, 2019 Email from Michelle Slack). Defendants' statistical data
6 showed CARRP referral rates, and compared the approval/denial rates and average processing
7 times for naturalization and adjustment of status applications processed in CARRP against those
8 not processed in CARRP. *See* Plaintiffs' Sealed Exh. E at II.g. The production also broke down
9 the data by the applicant's country of birth and citizenship. *See id.* On November 29, 2019,
10 Defendants produced updated data that included applications received during the remaining half
11 of FY 2019. *See* Exh. 4 (Nov. 29, 2019 Email from Michelle Slack).

12 On February 7, 2020, Plaintiffs emailed questions to Defendants' counsel regarding
13 perceived "discrepancies or unexplained aspects of some of the data," primarily application
14 counts. *See* Exh. 5 (Feb. 7, 2020 Email from Hugh Handyside). Plaintiffs made no inquiries
15 regarding the criteria used for determining whether an application had been subject to CARRP.
16 *See id.* In response, on February 14, 2020, Defendants provided a third, superseding version of
17 the data to address the questions Plaintiffs raised. *See* Plaintiffs' Sealed Exh. G.

18 On February 28, 2020, the parties' statistical experts served their initial expert reports
19 analyzing the February 14, 2020 version of the data. While Plaintiffs' expert compared the
20 referral and processing of CARRP and non-CARRP applications, he included no comments or
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23 Confirmed and non Confirmed Non-KSTs."); Exh. 2 Filed Under Seal, January 31, 2020 Kevin Quinn Deposition Excerpt at 70 (indicating that cases with the sub-status "National security concern – Not Confirmed" are processed under Stage 1 of CARRP).

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1 caveats regarding the criteria used for classifying an application as a "CARRP case." *See*
2 *generally* February 28, 2020 Expert Report of Sean Kruskol.
3 On May 15, 2020, Defendants alerted Plaintiffs to an error in the previously disclosed
4 statistical data upon learning USCIS had incorrectly "categorized some CARRP cases as non-
5 CARRP cases." Plaintiffs' Sealed Exh. I. Defendants advised they were assessing the issue and
6 would update Plaintiffs as they learned more. *Id.* On May 18, 2020, Defendants informed
7 Plaintiffs that in pulling information from FDNS-DS, the system tracking CARRP cases, USCIS
8 had inadvertently excluded from its CARRP-flagged cases any CARRP cases completed before
9 June 21, 2017. Plaintiffs' Sealed Exh. I. Consequently, CARRP cases that were closed before
10 June 21, 2017, and not reopened, were erroneously identified as non-CARRP. *Id.*
11 USCIS subsequently re-ran its FDNS-DS query without the erroneous class date filter
12 and produced a final, superseding version of Defendants' Statistical Data on June 12, 2020. *See*
13 Plaintiffs' Sealed Exh. J. Additionally, Defendants produced an anonymized version of the
14 underlying data identifying whether the CARRP categorization had changed. *See id.* The
15 updated data indicated that 0.266% of naturalization and adjustment of status applications
16 received during FY 2013 – 2019 had been subject to CARRP, that 1.27% of applicants from
17 majority Muslim countries had applications processed under CARRP, and that after a CARRP
18 referral, there is no relationship between being from a Muslim majority country and processing
19 times or application approval rates. Exh. 6 Filed Under Seal (July 17, 2020 Siskin Expert
20 Report) at 3-5.
21 On July 17, 2020, the parties' statistical experts submitted supplemental reports analyzing
22 the June 2020 data. While Plaintiffs' statistical expert, Mr. Kruskol, noted in his report that it
23 was unclear to him "how the National security concern designation for an application relates to

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1 the designation of CARRP vs. Not-CARRP," Plaintiffs had not sought clarification of this point
2 from Defendants before or within the six weeks after Mr. Kruskol rendered his supplemental
3 report. *See* Exh. 7 Filed Under Seal (July 17, 2020 Kruskol Supplemental Report) at ¶20.
4 On August 31, 2020, Plaintiffs conducted a Rule 30(b)(6) deposition regarding the FY
5 2013 – 2019 data sets produced to Plaintiffs. Kevin Shinaberry, a USCIS data analyst who was
6 involved in compiling the Statistical Data, testified as USCIS' Rule 30(b)(6) witness on this
7 topic. *See* Exh. 8 (Excerpts from Shinaberry Dep.); Plaintiffs' Sealed Exh. L. To identify
8 naturalization and adjustment applications that were subject to CARRP during FY 2013 – 2019,
9 USCIS queried its adjudicative information systems for application receipts for those years, and
10 matched those receipts with data from FDNS. Plaintiffs' Sealed Exh. L at 98-103; Exh. 8 at 22-
11 23. To confirm that the resulting applications had been subject to CARRP, USCIS created an
12 algorithm that simply identified applications where a NS concern was open during the
13 application's pendency. Plaintiffs' Sealed Exh. L at 103. USCIS' data did not include fields for
14 NS concern type or sub-status fields, because they are not relevant to determining whether an
15 application has been subject to CARRP. *Id.* at 148-49, 155-56.
16 Following the 30(b)(6) deposition, Plaintiffs asserted for the first time that USCIS'
17 definition of a "CARRP case" was overbroad because "it includes cases where the USCIS officer
18 cannot confirm that the individual has a nexus to national security, as well as cases where any
19 alleged national security concern was resolved prior to adjudication." Plaintiffs' Sealed Exh. R
20 (Sept. 2, 2020 Email from Sameer Ahmed). Defendants declined Plaintiffs' request to remedy
21 this so-called "error" by adding data fields that would enable Plaintiffs to filter data by concern
22 type and sub-status, explaining that such information was not responsive to any of Plaintiffs'
23 discovery requests and that Defendants had no obligation to compile and produce data in a form

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that does not already exist. *See id.* (Sept. 8 & Oct. 7, 2020 Emails from Leon Taranto). Finally, Defendants also explained that they were not obligated to produce the requested data as a supplement to Defendants' Initial Disclosures because an applicant's concern type and sub-status are not determinative of whether a case has been subject to CARRP; thus there was no reason to include such information in Defendants' Supplemental Initial Disclosures. *See id.* The parties met and conferred regarding Plaintiffs' request for supplemental data on October 5 and 15, 2020. Declining Defendants' proposed compromise resolution, Plaintiffs filed the motion to compel.

ARGUMENT

I. Legal Standard

Rule 26(a)(1)(A)(ii) requires a disclosing party to provide "a copy--or a description by category and location--of all documents [and] electronically stored information . . . that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses . . ." A party need only supplement a Rule 26(a) disclosure if it learns that the disclosure was incorrect or incomplete "in some material way." Fed. R. Civ. P. 26(e)(1)(A). A party's disclosure obligations under Rule 26(a) are narrow and do not require disclosure of information that the party does not intend to use to support its position. *See* Fed.R.Civ.P. 26 Advisory Committee Notes; *see also Gilmore v. Ford Motor Company*, 2012 WL 12895056, *3 (W.D. Penn. Dec. 4, 2012) (citing FRCP 26(a)(1)(A)(ii)); *Smith v. JP Morgan Chase Bank*, 2013 WL 12334855, *5 (D. Nev. Mar. 22, 2013). And, "[w]hile Rule 26(a) requires a party to identify and describe supporting documents, it does not require production. If a party chooses to identify but not produce the documents, other parties desiring copies may seek them through either informal requests or formal requests for production of documents[.]" *Jake's Fireworks, Inc. v. Sky Thunder, LLC*, 2017 WL 4037705, at *2 (D. Kan. Sept. 13, 2017).

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II. Defendants Properly Compiled The Statistical Data.

At the heart of the dispute is Plaintiffs' sudden questioning of the meaning of the phrase "subject to CARRP." Plaintiffs assert that the USCIS statistical data improperly includes two categories of cases: those in which (1) an articulable link to a NS concern has not yet been confirmed, and (2) the NS concern has been vetted and resolved. *See* Dkt. 424 at 10. They argue that neither category encompasses individuals with an articulable link to a NS concern and therefore should not be deemed "subject to CARRP," a distinction Plaintiffs never made when defining their classes. *Id.* Plaintiffs themselves did not believe this until recently, given that they argued in a March 2019 filing "these class members" with resolved NS concerns should be notified that their "applications were subjected to CARRP." Dkt. 127 10, n.4. Plaintiffs' assertions are spurious and inconsistent with past positions in order to compel production of yet more data. It is notable that rather than requesting Defendants remove the cases Plaintiffs suggest are not CARRP cases from the data, they are instead asking for detailed information about those cases. *See* Dkt. 127, at 9, 11. And, they do not ask that cases they claim are not CARRP be removed from class lists. Plaintiffs' request should be seen for what it is—a late discovery request for information they wish they had sought long ago—and should be denied.

A. Defendants' Statistical Data Is Correct and Complete.

At the outset of this case, Plaintiffs defined their classes expansively to encompass any applicant for naturalization or adjustment of status whose application has been pending for at least six months and is "subject to CARRP." June 21, 2017 Order (Dkt. No. 69) at 8. These broad class definitions afforded Plaintiffs the flexibility to test their theory of the case by issuing far-reaching discovery requests for any information and data potentially relating to members of either class. *See, e.g.*, Plaintiffs' Sealed Exh. A (RFPs 34 & 35 requesting all documents that

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identify individuals whose applications are or have been subject to CARRP); Plaintiffs' Sealed Exh. C (Interrogatory 3 seeking average processing times and denial rates for each stage of CARRP). Indeed, Defendants compiled and produced reams of data two years ago in response to Interrogatory 3 alone, in addition to more than two years' worth of quarterly class lists in response to RFPs 34 and 35. At no time did Plaintiffs indicate their class definitions and claims exclude applications associated with the concern types or sub-statuses they now suggest provide a basis for negating that certain CARRP-referred applications were ever processed in CARRP.

USCIS systems are not designed to put out information in the manner Plaintiffs have requested. Defendants have advised Plaintiffs of this repeatedly.[2] *See* McCament Declaration, Dkt. 94-6, at ¶¶ 7-22; Plaintiffs' Sealed Exh. D (Response to Interrogatory 3) at 22-23, ¶ h; Plaintiffs' Sealed Exh. L at 108. Thus, to respond to Plaintiffs' various data requests, USCIS queried multiple systems and then analyzed and combined the data. In the USCIS statistical data, given the breadth of Plaintiffs' class definitions and discovery requests, USCIS reasonably interpreted "subject to CARRP" to mean any application processed under CARRP at some point during its pendency. *See id.* at 47-48; Plaintiffs' Sealed Exh. L at 98-103 (explaining that USCIS deemed any applications for which a NS concern was open in FDNS-DS between the time it received the application and the time was adjudicated was subject to CARRP).

Plaintiffs took no issue with Defendants' method for identifying CARRP cases when it generated masses of data in response to Plaintiffs' production requests and Interrogatory 3. To the contrary, Plaintiffs themselves cast class definitions just as broadly when seeking class

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[2] Plaintiffs' motion notes on more than one occasion that Defendants used an algorithm "created solely for purposes of this litigation," as if to suggest something unusual or even nefarious. But as Plaintiffs' know, in order to determine which applications were "subject to CARRP," as the class definitions necessitate, USCIS had to query, pull, and combine distinct fields residing in multiple discrete USCIS databases.

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member-related documents from Defendants. *See* Plaintiffs' Sealed Exh. A (RFPs 34 & 35 requesting "All Documents sufficient to identify members of" the Naturalization and Adjustment Classes, "including, but not limited to, any list that might exist identifying *those who are or have been subject to CARRP* . . . .") (emphasis added). It was only when Defendants used similar criteria to compile statistical data in its defense, and the resulting data did not conform to Plaintiffs' theory, that Plaintiffs questioned the validity of how USCIS identifies CARRP cases.

Plaintiffs claim that Defendants have defined "CARRP case" more narrowly elsewhere by excluding cases that do not have an articulable link to a NS concern. Their argument is a red herring. What matters is how the classes have actually been certified by the Court, and whether Plaintiffs can marshal the evidence necessary to show that CARRP has harmed members of those classes. Plaintiffs' request is also inconsistent and nonsensical. Although they claim certain cases are not CARRP cases, Plaintiffs are not requesting that USCIS produce new data reclassifying them as non-CARRP. Rather, they are requesting the data include breakdowns with the concern type and sub-statuses they claim are non-CARRP. Dkt. 424 at 9, 11. If Plaintiffs truly do not think these are CARRP cases, they should be excluded. Moreover, Plaintiffs do not acknowledge these concern types and sub-statuses are fluid and may change as an application moves through the CARRP process. *See* Dkt. 126-1, ¶¶ 13-17. *See* Dkt. 126-1, ¶¶ 13-17; CAR 780 ("If you start out as a non-KST NS not confirmed, as you move through the stages of CARRP, you can find more information that . . . allows you to change to Confirmed.").

Plaintiffs also argue that a case should not be deemed "subject to CARRP" if the NS concern has been resolved prior to adjudication. Yet that narrow reading flies in the face of Plaintiffs' own interpretation of whom their class definitions include and, by extension, the extent of discovery to which they claimed an entitlement. *See* Plaintiffs' Sealed Exh. A (RFPs

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34 & 35 requesting documents relating to those "who are or have been subject to CARRP"). Indeed, Plaintiffs' expert, Mr. Kruskol, concedes that knowing the concern types or sub-status would not enable him to determine that a case was not processed in CARRP – the very reason for Plaintiffs' instant motion. *See* Exh. 10 Filed Under Seal (October 20, 2020 Kruskol Deposition) at 86-91 (rough transcript). Plaintiffs' argument is also confounding because it undermines a fundamental aspect of their lawsuit – namely, that mere referral to CARRP harms their class members because it unduly delays the processing of their applications. *See* Plaintiffs' Second Amended Complaint, Dkt. 47, ¶¶ 7, 247, 264, 278, 282, 288, 293. If the Court were to accept Plaintiffs' contention that any individuals with unconfirmed or resolved NS concerns are not CARRP applications, they should not be entitled to new data about them. Plaintiffs should also be foreclosed from proffering evidence relating to such individuals.[3] Plaintiffs should also be required to affirm that they will not seek any relief for individuals without an open and confirmed NS concern in FDNS-DS since, under Plaintiffs' newly narrowed class definitions, those individuals are not class members.

Plaintiffs may be dissatisfied that the USCIS statistical data undercuts their claim that CARRP is a discriminatory policy. But the data speaks for itself, and Plaintiffs' attacks on its validity are as baseless as they are contrived. Plaintiffs have not shown that the data is incorrect or incomplete, and Defendants are under no obligation to "correct or supplement" evidence identified in their own Supplemental Initial Disclosures to suit Plaintiffs' inconsistent case theories of what constitutes a CARRP case or class member. *See* Fed. R. Civ. P. 26(e)(1)(A).

B. The Statistical Data Is Not Responsive To Any Of Plaintiffs' RFPs.

[3] This includes evidence, if any exists, concerning the notice responders or any named or unnamed plaintiffs whose national security concerns were not confirmed or were resolved prior to adjudication, and all portions of their experts' reports discussing "not confirmed" national security concerns in CARRP.

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Plaintiffs erroneously assert that Defendants are obligated to produce the data with NS concern type and sub-status fields because such information is responsive to their prior RFPs. Dkt. 424 at 9-10. To the contrary, none of the production requests Plaintiffs cite supports their assertion.[4] The particular type of NS concern an individual is classified as in FDNS-DS, and any corresponding concern type sub-status he may be assigned, is not determinative of whether his application was referred to CARRP. *See* Plaintiffs' Sealed Exh. L at 148-49, 155-56. Thus, such information does not refer or relate to "the number of Immigration Benefit Applications subject to CARRP" (RFP 27). Nor does it bear on the "demographics of Immigration Benefit Applicants. . . subjected to CARRP" (RFP 28), or the processing times and denial rates of applications reviewed under CARRP (Interrogatory 3, RFP 50, RFP 51). Finally, as Defendants have no intention of relying on concern type or sub-status information in defense of Plaintiffs' claims, such information also is not responsive to Plaintiffs' request for documents supporting Defendants' affirmative defenses (RFP 33).

Regardless, a party's obligation to produce documents under Rule 26(a) extends only to documents in a form they already exist. *See Jayne v. Bosenko*, 2010 WL 4924933, *2 (E.D. Cal. Nov. 29, 2010). The data Plaintiffs seek does not exist in the form sought. Plaintiffs were repeatedly advised of Defendants' method for collecting information from USCIS systems and, during the lengthy period in which discovery was permitted, they were free to request data for concern type and sub-status. Plaintiffs did not do so. Thus, Defendants have no obligation to supplement the data with such information in response to any of Plaintiffs' discovery requests.

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[4] Interrogatory 3 sought cumulative data for the numbers of KSTs and non-KSTs for FY 2015-2018, which Defendants provided in October 2018, but no other data that Plaintiffs now seek.

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Ben Franklin Station, P.O. Box 878
Washington, D.C. 20044
(202) 616-4900

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion to Compel.

JEFFREY B. CLARK
Acting Assistant Attorney General
Civil Division
U.S. Department of Justice

AUGUST FLENTJE
Special Counsel
Civil Division

ETHAN B. KANTER
Chief, National Security Unit
Office of Immigration Litigation
Civil Division

BRIAN T. MORAN
United States Attorney

BRIAN C. KIPNIS
Assistant United States Attorney
Western District of Washington

LEON B. TARANTO
Trial Attorney
Torts Branch

ANTONIA KONKOLY
Trial Attorney
Federal Programs Branch

ANDREW C. BRINKMAN
Senior Counsel for National Security
Office of Immigration Litigation

/s/ Lindsay M. Murphy
LINDSAY M. MURPHY
Senior Counsel for National Security
Office of Immigration Litigation

W. MANNING EVANS
Senior Litigation Counsel
Office of Immigration Litigation

BRENDAN T. MOORE
Trial Attorney
Office of Immigration Litigation

JESSE L. BUSEN
Trial Attorney
Office of Immigration Litigation

MICHELLE R. SLACK
Trial Attorney
Office of Immigration Litigation

VICTORIA M. BRAGA
Trial Attorney
Office of Immigration Litigation

Counsel for Defendants

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on October 26, 2020, I electronically served the foregoing with the
3 Clerk of the Court using the CM/ECF system, which will send notification of such filing to all
4 counsel of record.

5

6 */s/ Lindsay M. Murphy*
LINDSAY M. MURPHY
7 Senior Counsel for National Security
United States Department of Justice
8 Civil Division
Office of Immigration Litigation
9 PO Box 878, Ben Franklin Station
Washington, DC 20044
10 (202) 616-4018

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