June 4, 2019

The Honorable Jesse M. Furman
United States District Court for the Southern District of New York
40 Centre Street, Room 2202
New York, NY 10007

RE: NYIC Plaintiffs' reply in support of motion for an order to show cause in *State of New York, et al. v. U.S. Dep't of Commerce, et al.*, 18-CV-2921 (JMF)

Dear Judge Furman:

Defendants' response does not deny that damning new evidence reveals hyper-partisan and racially discriminatory motives at the root of the citizenship question. Defendants do not deny that (1) Dr. Hofeller is *the person* who came up with the Voting Rights Act rationale for adding a citizenship question to the 2020 Census, that (2) Dr. Hofeller ghostwrote a letter from DOJ to Commerce setting forth the VRA rationale for adding a citizenship question, and that (3) Mark Neuman gave John Gore this draft DOJ letter at a meeting between Neuman and Gore that was arranged by the Commerce Department's General Counsel. Most astonishingly, even though it is undisputed that Dr. Hofeller was the one who suggested a citizenship question to Neuman and the Trump transition in the first place, Defendants do not say whether Commerce officials knew of Dr. Hofeller's conclusion that adding a citizenship question to the 2020 Census would benefit "Republicans and Non-Hispanic Whites" in redistricting. And it is the Commerce Department's decision to add the citizenship question that is at issue.

Faced with the new evidence, Defendants' position seems to be that, sure, maybe the Commerce Department co-opted the idea put forth by a partisan operative who believed that a citizenship question on the 2020 Census would entrench the political power of "Republicans and Non-Hispanic Whites." And, sure, maybe this same partisan operative was also the one who, acting through a Commerce Department emissary, supplied DOJ's VRA enforcement rationale that purports to advance the political power of Hispanics. But, Defendants say, none of this matters because John Gore, the DOJ official who executed the plan, was not fully read into its details, and because Secretary Ross purportedly "provided an objectively rational basis" for a decision that, we now know, had its origins in open racial discrimination. Gov't Br. 5. But the Administrative Procedure Act demands that federal agencies explain the *real* reasons for their actions. It does not permit federal agencies to lie to the public about why they act, so long as the employee tasking with implementing policy has plausible deniability.

In any event, the Justice Department's hands are not clean. DOJ failed to correct Neuman's false testimony that his October 2017 meeting with Gore was not about a draft DOJ letter and that Neuman "wasn't part of the drafting process of the [DOJ] letter." ECF 595 Ex. B at 114, 273. Defendants now seem to acknowledge that DOJ knew all along that this testimony was false. But they argue that all can be forgiven because DOJ produced Gore's copy of the Neuman letter—even though DOJ initially withheld the document and then produced it in a dump of *92,000* pages, with a *new* Bates number, *three* days before Gore's deposition, accompanied by a representation that DOJ was unable to provide *any* information about the document's "author, recipient, date, or time." Ex. 1, 1-C. Thus, when Defendants assert that

Plaintiffs have "*long known that Gore had the Neuman letter*," Gov't Br. 3, they omit that they successfully concealed the fact that Gore had received this letter *from Neuman*.

Defendants' misconduct is apparent. The Court can and should authorize targeted discovery to determine the full extent to which a fraud on the court has occurred and if "the very temple of justice has been defiled." *Universal Oil Prod. Co. v. Root Ref. Co.*, 328 U.S. 575, 580 (1946); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) (recognizing court's inherent power to investigate whether "it has been the victim of fraud"); *Sussman v. Bank of Israel*, 56 F.3d 450, 459 (2d Cir. 1995) (noting court's "inherent power" to "sanction counsel or a litigant for bad-faith conduct").

1. Beyond their failure to deny the previously undisclosed facts above, Defendants' response raises far more questions than it answers. Defendants carefully deny that "DOJ or Gore had the Hofeller study and based the Gary Letter on its contents." Gov't Br. 2. But Defendants make no attempt to explain:

- Did anyone at Commerce (including Neuman) have Dr. Hofeller's 2015 study?
- Did anyone at Commerce (including Neuman) know that Dr. Hofeller—before suggesting a citizenship question to the transition—had concluded that adding a citizenship question would enable redistricting advantageous to "Republicans and Non-Hispanic Whites"?
- Even if they did not have a copy of Dr. Hofeller's 2015 study, did anyone at Commerce (including Neuman) appreciate that adding a citizenship question would enable redistricting advantageous to "Republicans and Non-Hispanic Whites"?
- Did anyone at DOJ appreciate that adding a citizenship question would enable redistricting advantageous to "Republicans and Non-Hispanic Whites"?
- Who asked Dr. Hofeller to ghostwrite the VRA rationale that appears in the draft DOJ letter that Neuman gave Gore? Someone must have asked Dr. Hofeller to draft it.
- How did Dr. Hofeller's ghostwritten VRA rationale reach Neuman? Did Commerce officials relay it? Did Hofeller give it to Neuman directly?
- Why didn't Gore identify Neuman at deposition when he provided a list of other people who provided input in drafting the DOJ letter? *See* ECF 595 Ex. E at 150:9-151:20.
- Why didn't DOJ disclose on its privilege log that the draft DOJ letter came from Neuman?
- Why didn't DOJ correct Neuman's materially false testimony that his October 2017 meeting with Gore was *not* about a draft DOJ letter requesting a citizenship question on the 2020 Census, that Neuman gave Gore only a *different* document at that meeting, and that Neuman was not involved in the drafting process for the DOJ letter at all?
- Are Defendants now asserting that Gore's motivation and guide for requesting a citizenship question was the *Evenwel* case about potential use of citizenship data in redistricting, as opposed to VRA enforcement? Are Defendants asserting that Gore relied on *amicus* briefs from *Evenwel* which concluded that ACS data was sufficient for VRA enforcement and that adding a citizenship question to the Census would depress turnout and reduce accuracy?

2. Defendants spend a page of their brief asserting that Gore, in describing the shortcomings of ACS data, relied on an *amicus* brief from former Census Directors in *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016). But there is no declaration from Gore saying that is what he did, and Defendants cite nothing supporting their assertion. Importantly, the Census Directors

reached the *opposite* conclusion that Gore did: they concluded that ACS citizenship data *are sufficient* for VRA enforcement purposes, that it is *not* possible to obtain accurate CVAP data through a citizenship question on the census, and that adding a citizenship question to the census is "not a solution." Gov't Ex. D at 5, 22-24. The other briefs cited by Defendants agreed. *See* Br. of Nathaniel Persily et al. at 27 ("ACS CVAP data" are "the best and only information on citizenship rates," and are "indispensable … in section 2 challenges");[1] Br. of Democratic Nat'l Comm. at 19 n.5; Br. for United States at 24. All four briefs did, however, argue that ACS citizenship data are insufficiently precise for the purpose of switching to citizen voting-age population as the redistricting population base—which was the goal of the *Evenwel* plaintiffs, 136 S. Ct. at 1126, and the very reason that Dr. Hofeller advocated adding a citizenship question to the 2020 Census, ECF 595 Ex. D at 7-9. Thus, if Gore relied on the *Evenwel* briefs, it only *supports* an inference that the true purpose of adding a citizenship question was *not* VRA enforcement, but rather to facilitate a redistricting strategy that would "advantage[] … Non-Hispanic Whites," at the expense of "the major minority groups in the nation." *Id.*

Moreover, we still do not know whether and to what extent James Uthmeier, Peter Davidson, or anyone else at Commerce who relayed the VRA rationale to Gore was relying on Dr. Hofeller or his 2015 study.

The Court can get to the bottom of this. Since Defendants have now squarely put Gore's process of drafting the letter in issue, they have waived deliberative-process privilege over any documents related to Gore's drafting process. *See e.g.*, *Allstate Ins. Co. v. Serio*, No. 97-cv-0670, 2000 WL 554221, at *11 (S.D.N.Y. May 30, 2002) (deliberative process "cannot be used as both a shield and a sword"); *Conte v. Cty. of Nassau*, No. 06-cv-4746, 2009 WL 1362784, at *3-*4 (E.D.N.Y. May 15, 2009) (noting "deliberative process privilege is a sub species of the work-product privilege," separately noting "'work product privilege cannot at once be used as a shield and a sword'" (quoting *Kidder, Peabody & Co., Inc. v. IAG Int't Acceptance Grp., N.V.*, 1997 WL 272405 (S.D.N.Y. May 21, 1997))). The Court should order production of all such documents, including all 18 drafts and the records of the 10 participants beyond Gore who participated in drafting the letter, as well as Mr. Uthmeier's memo and cover note. These materials are identified on Exhibit 3.

Waiver aside, Defendants' prior claims of deliberative-process privilege should now be overcome. Deliberative-process privilege "disappears altogether when there is any reason to believe government misconduct occurred." *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997); *see also Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995) (similar). And even if this privilege did still apply, disclosure is warranted under the relevant balancing test. *In re Delphi Corp.*, 276 F.R.D. 81, 85 (S.D.N.Y. 2011). This evidence is directly relevant to the propriety of sanctions and other appropriate relief.

3. With respect to Neuman, Defendants' "I hardly knew the guy" defense is stunning. Defendants now insist that "Neuman is not a governmental employee" and that "[h]is acts or omissions are thus not attributable to the government." Gov't Br. 4. But Defendants previously asserted in this very lawsuit—in successfully invoking deliberative-process privilege over

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[1] Dr. Persily wrote today that he is "outraged that my work is being misrepresented by the DOJ in its most recent filing in the census case before the SDNY." *See* https://twitter.com/persily/status/1135973410117341184.

communications with Neuman—that Neuman "functioned as a trusted adviser and consultant to" Commerce, "*act[ed] analogously to an agency employee*," and that "he and Commerce were engaged in a *common enterprise* of seeking to improve the 2020 Census." ECF 451 at 3 (emphases added); *see also* ECF 451-2 (Uthmeier declaration explaining importance of Neuman's role). Having characterized Neuman in this manner to conceal his communications, Defendants cannot cut Neuman loose now that the true extent of his role has come to light. And they cannot contend that Neuman's motivations in working with Secretary Ross to achieve the "common enterprise" of adding a citizenship question to the 2020 Census—or Neuman's discussions with Dr. Hofeller—are irrelevant to whether Commerce's decision was the product of "discriminatory animus." Gov't Br. 5.

As for his testimony, Neuman represented that he "wasn't part of the drafting process of the [DOJ] letter," specifically denied that his October 2017 meeting with Gore was about a "letter from DOJ regarding the citizenship question," and failed to disclose that he provided the draft letter to Gore, testifying instead that he provided another document. ECF 595 Ex. B at 114:15-21, 123:20-124:24, 273:10-21. Neuman denied, moreover, that "Hofeller was one of the people [Neuman] relied on for expertise on the Voting Rights Act." *Id.* at 143:25-144:6. All of that testimony was false, or, at a minimum, remarkably misleading. Defendants deny that Neuman testified that he "only" gave one document to Gore, Gov't Br. 4, but they do not deny that he falsely testified that the meeting was not about the citizenship question. There was no reason to ask Neuman whether he gave the ghostwritten DOJ letter to Gore after he denied that the meeting even concerned the DOJ letter. Defendants also say that Neuman failed to inform Plaintiffs of Dr. Hofeller's role in drafting the VRA rationale solely because the questioner told Neuman, "I'm not asking you to tell me about who the original author was." Gov't Br. 4. Defendants are playing games. A few questions earlier, Neuman had already testified, "I'm not sure who the original author is." ECF 595 Ex. B at 280:12-13. Then, in response to a *different* question about the draft letter, Neuman repeated, non-responsively, that he couldn't "figure out who [the] original author is." *Id.* at 281:10-6. The questioner was simply advising Neuman that he had switched to an entirely different question.

Defense counsel present at Neuman's deposition (including Uthmeier) apparently knew that Neuman had given the draft DOJ letter to Gore at the October 2017 meeting, but never corrected the record. And Defendants told this Court that "[t]he record does not indicate that Mr. Neuman provided any particularly significant consultations on the citizenship question … during his conversations with Commerce officials in 2017." ECF 346 at 2.

Discovery is warranted into communications between Defendants and defense counsel and Neuman and his counsel, as well as the extent to which Defendants knew the falsity of Neuman's testimony.

4. Gore testified he "drafted *the initial draft* of the letter to request the citizenship question sometime around the end of October or early November 2017." ECF 595 Ex. E at 150:9-151:20 (emphasis added). But Gore subsequently told congressional investigators that Neuman provided a draft letter to him during a meeting earlier in the month of October after Commerce General Counsel Peter Davidson asked Neuman and Gore to meet. ECF 595 Ex. G. As discussed above, Gore also conspicuously omitted Neuman from the long list of individuals internal and external to DOJ whom were consulted about the DOJ request. Even more

perplexing, on the same page of the same response letter, Defendants simultaneously state that "Gore disclosed that he talked to Neuman while drafting the Gary Letter," Gov't Br. 3 (citing testimony where Gore did not mention the Gary Letter and invoked the deliberative process privilege), and that "the reason Gore did not identify Neuman or Hofeller as people who provided input on the Gary Letter is that neither Neuman nor Hofeller provided any input on the Gary Letter." *Id.* Which is it?

Defendants stress that DOJ produced its copy of the draft letter that Neuman gave Gore. But they fail to disclose that this document was withheld from DOJ's production on October 3 and was logged with none of the identifying information required under Rule 26(b)(5) or Local Rule 26.2(a)(2)(A). Ex 1-A entry 15199. And after Plaintiffs promptly challenged this entry, Ex. 1-B, Defendants delayed release of DOJ's copy of the document *until three days before Gore's deposition*, when it was relabeled as a different Bates number (DOJ 129991) and produced with nearly 92,000 pages of additional production, Ex. 1-C. Even then, Defendants failed to disclose that Neuman gave Gore the document, instead representing that they were unable to provide information regarding "author, recipient, date, or time." *Id.* Indeed, until their response yesterday, Defendants never acknowledged that the document in Gore's possession was from Neuman. The fact is that Plaintiffs did not know, and had no way of knowing until recently, that Neuman gave Gore that draft letter. The Court should permit discovery into Defendants' handling of this document.

5. In addition to the sanction-related discovery described above, the Court should authorize the following additional limited discovery relevant to sanctions:

- Neuman should be ordered, pursuant to the subpoena Plaintiffs previously issued, promptly to produce all of his communications with Dr. Hofeller, Dale Oldham, Gore, Uthmeier, and/or other Administration personnel.
- A subpoena to Dale Oldham, Dr. Hofeller's former business partner, who we understand took Dr. Hofeller's work computer(s) (as opposed to external electronic storage devices).
- Further depositions of Neuman and Gore on these topics, as well as a deposition of Uthmeier. In the alternative, these individuals should be called to a hearing for cross-examination.

* * *

Defendants take Plantiffs to task for failing to discover earlier a handful of documents relevant to this case that appeared on external electronic storage devices produced to Plaintiffs' counsel in a separate litigation in North Carolina. Plaintiffs' counsel brought the newly discovered evidence at issue here to this Court's attention within one week after discovering it. It is Defendants—not Plaintiffs—who have known the truth this entire time. Had Defendants not actively concealed Dr. Hofeller's role in orchestrating the addition of the citizenship question through discovery misconduct in this case, Plaintiffs would have made this material a central part of their case in chief. Defendants should not now be heard to say that it is too late.

Respectfully submitted,

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