

No. 18-557

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**In the Supreme Court of the United States**

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DEPARTMENT OF COMMERCE, ET AL., PETITIONERS

*v.*

UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK, ET AL.

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT*

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**JOINT APPENDIX**

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PETITION FOR A WRIT OF CERTIORARI FILED: OCT. 29, 2018  
CERTIORARI GRANTED: NOV. 16, 2018

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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Docket No. 18-2652

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, PETITIONERS

*v.*

NEW YORK STATE; 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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**DOCKET ENTRIES**

(1)



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<b>DATE</b>	<b>PROCEEDINGS</b>
9/7/18	ORIGINAL PROCEEDING, PETITION FOR WRIT OF MANDAMUS, on behalf of Petitioner Ron S. Jarmin, Wilbur L. Ross, United State Census Bureau and United States Department of Commerce, FILED. [2385086] [18-2652]  * * * * *
9/10/18	ORDER, dated 9/10/2018, that the deposition of the Acting Assistant Attorney General for Civil Rights is stayed pending determination of the petitions. Answers to the petitions must be filed by September 17, 2018, FILED. Before DJ [2385480] [18-2652]  * * * * *
9/17/18	BRIEF & APPENDIX, on behalf of Respondent City and County of San Francisco, California, City of Central Falls, City of Chicago, Illinois, City of Columbus, City of New York, City of Philadelphia, City of Providence, City of Seattle, Washington, El Paso, County of Hidalgo, County of Monterey, District of Columbia, State of Colorado, State of Connecticut, State of Delaware, State of Illinois, State of Iowa, State of Maryland, State of Minnesota, State of New Jersey, State of New Mexico, State of New York, State of North Carolina, State of Oregon, State of Rhode Island, State of Vermont, State of Washington and United States Conference of Mayors, FILED. Service date 09/17/2018 by CM/ECF. [2391082] [18-2652]

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**DATE      PROCEEDINGS**

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\* \* \* \* \*

9/21/18    REPLY BRIEF, on behalf of Petitioner Ron S. Jarmin, United States Department of Commerce, Wilbur L. Ross and United State Census Bureau FILED.    Service date 09/21/2018 by CM/ECF.    [2394102] [18-2652]

\* \* \* \* \*

9/25/18    ORDER, denying petition for writ of mandamus, by PNL, RSP, RCW, FILED.    [2396993] [18-2652]

\* \* \* \* \*

10/2/18    ORDER, dated 10/2/1018, denying the request for a stay of discovery, by PNL, RSP, RCW, FILED.    [2401677] [18-2652]

\* \* \* \* \*

10/5/18    LETTER, on behalf of Petitioner Ron S. Jarmin, Wilbur L. Ross, United State Census Bureau and United States Department of Commerce, regarding stay of depositions, RECEIVED.    Service date 10/05/2018 by CM/ECF.    [2405017] [18-2652]—[Edited 10/09/2018 by ML]

10/7/18    LETTER, on behalf of Respondent City and County of San Francisco, California, City of Central Falls, City of Chicago, Illinois, City of Columbus, City of New York, City of Philadelphia, City of Providence, City of Seattle, Washington, Commonwealth of Massachusetts,

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**DATE PROCEEDINGS**

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Commonwealth of Pennsylvania, Commonwealth of Virginia, County of Cameron, County of El Paso, County of Hidalgo, County of Monterey, District of Columbia, State of Colorado, State of Connecticut, State of Delaware, State of Illinois, State of Iowa, State of Maryland, State of Minnesota, State of New Jersey, State of New Mexico, State of New York, State of North Carolina, State of Oregon, State of Rhode Island, State of Vermont, State of Washington and United States Conference of Mayors, regarding stay of depositions, RECEIVED. Service date 10/07/2018 by CM/ECF. [2405029] [18-2652]—[Edited 10/09/2018 by ML]

10/9/18 ORDER, dated 10/09/2018, the request for a stay of documentary discovery is denied and the deposition is temporarily stayed, by PNL, RSP, RCW, FILED. [2406121] [18-2652]—[Edited 10/10/2018 by YL]

\* \* \* \* \*

10/30/18 ORDER, dated 10/30/2018, denying motion for a stay of pretrial and trial proceedings in two consolidated district court cases pending resolution of their forthcoming petition for a writ of mandamus or certiorari in the Supreme Court, filed by Movants United States Department of Commerce, United States Census Bureau, Wilbur L. Ross and Ron S.

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**DATE PROCEEDINGS**

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Jarmin, by PNL, RSP, RCW, FILED.  
[2421707] [18-2652]

\* \* \* \* \*

11/26/18 ORDER, dated 11/26/2018, denying motions in case numbers 18-2856 and 18-2857 for a stay of trial proceedings in two consolidated district court cases, pending the Supreme Court's resolution of In re Department of Commerce, No. 18-557, by PNL, RSP, RCW, FILED. [2441368] [18-2652]

11/26/18 ORDER, dated 11/26/2018, denying motions in case numbers 18-2856 and 18-2857 for a stay of trial proceedings in two consolidated district court cases, pending the Supreme Court's resolution of In re Department of Commerce, No. 18-557, by PNL, RSP, RCW, FILED. [2441389] [18-2652]

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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Docket No. 18-2659

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, PETITIONERS

*v.*

NEW YORK IMMIGRATION COALITION;  
CASA DE MARYLAND, INC.; AMERICAN-ARAB  
ANTI-DISCRIMINATION COMMITTEE;  
ADC RESEARCH INSTITUTE; MAKE THE ROAD  
NEW YORK, RESPONDENTS

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**DOCKET ENTRIES**

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<b>DATE</b>	<b>PROCEEDINGS</b>
9/7/18	ORIGINAL PROCEEDING, PETITION FOR WRIT OF MANDAMUS, on behalf of Petitioner Ron S. Jarmin, Wilbur L. Ross, United State Census Bureau and United States Department of Commerce, FILED. [2385153] [18-2659]
	* * * * *
9/10/18	ORDER, dated 9/10/2018, that the deposition of the Acting Assistant Attorney General for Civil Rights is stayed pending determination

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**DATE      PROCEEDINGS**


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of the petitions. Answers to the petitions must be filed by September 17, 2018, FILED. Before DJ [2385483] [18-2659]

\* \* \* \* \*

9/17/18 OPPOSITION TO WRIT,, on behalf of Respondent, ADC Research Institute, American-Arab Anti-Discrimination Committee, CASA de Maryland, Inc., Make the Road New York and New York Immigration Coalition, FILED. Service date 09/17/2018 by CM/ECF. [2391079] [18-2659]

\* \* \* \* \*

9/21/18 REPLY BRIEF, on behalf of Petitioner Ron S. Jarmin, Wilbur L. Ross, United State Census Bureau and United States Department of Commerce, FILED. Service date 09/21/2018 by CM/ECF. [2394109] [18-2659]

\* \* \* \* \*

9/25/18 ORDER, denying petition for writ of mandamus, by PNL, RSP, RCW, FILED. [2396989] [18-2659]

\* \* \* \* \*

10/2/18 ORDER, dated 10/02/2018, denying Petitioners' request for a stay of discovery in Nos. 18-2652 and 18-2659, by PNL, RSP, RCW, FILED. [2401685] [18-2659]

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**DATE PROCEEDINGS**

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10/5/18 LETTER, on behalf of Petitioners Ron S. Jarmin, Wilbur L. Ross, United State Census Bureau and United States Department of Commerce, to notify the Court of an order issued by Justice Ginsburg, RECEIVED. Service date 10/05/2018 by CM/ECF. [2405018] [18-2659]—[Edited 10/09/2018 by YL]

10/9/18 ORDER, dated 10/09/2018, the request for a stay of documentary discovery is denied and the deposition is temporarily stayed, by PNL, RSP, RCW, FILED. [2406122] [18-2659]—[Edited 10/10/2018 by YL]

\* \* \* \* \*

10/30/18 ORDER, dated 10/30/2018, denying motion for a stay of pretrial and trial proceedings in two consolidated district court cases pending resolution of their forthcoming petition for a writ of mandamus or certiorari in the Supreme Court, filed by Movants United States Department of Commerce, United States Census Bureau, Wilbur L. Ross and Ron S. Jarmin, by PNL, RSP, RCW, FILED. [2421707] [18-2659]

\* \* \* \* \*

11/26/18 ORDER, dated 11/26/2018, denying motions in case numbers 18-2856 and 18-2857 for a stay of trial proceedings in two consolidated district court cases pending the Supreme Court's resolution of In re Department of Commerce, No. 18-557, to the extent that they

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**DATE    PROCEEDINGS**

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relate to any of the relief movants previously sought in case numbers 18-2652 and 18-2659, by PNL, RSP, RCW, FILED. [2441435] [18-2659]



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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Docket No. 18-2856

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, PETITIONERS

*v.*

NEW YORK STATE; 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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**DOCKET ENTRIES**

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**DATE      PROCEEDINGS**


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9/27/18 ORIGINAL PROCEEDING, PETITION FOR WRIT OF MANDAMUS, on behalf of Petitioner Ron S. Jarmin, Wilbur L. Ross, United States Census Bureau and United States Department of Commerce, FILED. [2399277] [18-2856]

\* \* \* \* \*

9/28/18 ORDER, As part of its petitions for writ of mandamus, the Government seeks an administrative stay of the depositions of Secretary of Commerce Wilbur Ross and John Gore, the Acting Assistant Attorney General of the Department of Justice's Civil Rights Division. IT IS HEREBY ORDERED that the deposition of Secretary Ross is stayed pending determination of the petitions. Answers to the petitions must be filed by October 4, 2018 at noon. The petitions, as they pertain to Secretary Ross, are REFERRED to the motions panel sitting on Tuesday, October 9, 2018. To the extent the Government seeks a stay of Acting Attorney General Gore's deposition, that request is REFERRED to the panel that determined the petitions in docket numbers 18-2652 and 18-2659. dated 09/28/2018, by PWH, FILED. [23997511 [18-2856]—[Edited 09/28/2018 by RD]

\* \* \* \* \*

10/2/18 ORDER, Petitioners request a stay of discovery in Nos. 18-2652 and 18-2659, including the deposition of Acting Assistant Attorney

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**DATE      PROCEEDINGS**


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General Gore, pending review by the Supreme Court. We have considered the relevant factors and conclude that a stay in those cases is not warranted. See *U.S. S.E.C. v. Citigroup Glob. Mkts. Inc.*, 673 F.3d 158, 162 (2d Cir. 2012). Upon due consideration, it is hereby ORDERED that the request for a stay is DENIED. By PNL, RSP, RCW, FILED. [2401657] [18-2856]

\* \* \* \* \*

10/4/18 OPPOSITION TO WRIT, , on behalf of Respondent City and County of San Francisco, California, City of Central Falls, City of Chicago, Illinois, City of Columbus, City of New York, City of Philadelphia, City of Pittsburgh, City of Providence, City of Seattle, Washington, Commonwealth of Massachusetts, Commonwealth of Pennsylvania, Commonwealth of Virginia, County of Cameron, County of El Paso, County of Hidalgo, County of Monterey, District of Columbia, State of Colorado, State of Connecticut, State of Delaware, State of Illinois, State of Iowa, State of Maryland, State of Minnesota, State of New Jersey, State of New Mexico, State of New York, State of North Carolina, State of Oregon, State of Rhode Island, State of Vermont, State of Washington and United States Conference of Mayors, FILED. Service date 10/04/2018 by CM/ECF. [2403752] [18-2856]

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**DATE      PROCEEDINGS**


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\* \* \* \* \*

- 10/5/18    REPLY BRIEF, on behalf of Petitioner Ron S. Jarmin, Wilbur L. Ross, United States Census Bureau and United States Department of Commerce, FILED. Service date 10/05/2018 by CM/ECF. [2404868] [18-2856]
- 10/5/18    LETTER, on behalf of Petitioner Ron S. Jarmin, Wilbur L. Ross, United States Census Bureau and United States Department of Commerce, regarding order issued by Justice Ginsburg, denying stay, RECEIVED. Service date 10/05/2018 by CM/ECF. [2405015] [18-2856]—[Edited 10/09/2018 by RD]
- 10/6/18    LETTER, on behalf of Respondent State of New York, City and County of San Francisco, California, City of Central Falls, City of Chicago, Illinois, City of Columbus, City of New York, City of Philadelphia, City of Pittsburgh, City of Providence, Commonwealth of Massachusetts, Commonwealth of Pennsylvania, Commonwealth of Virginia, County of Cameron, County of El Paso, County of Hidalgo, County of Monterey, District of Columbia, State of Colorado, State of Connecticut, State of Delaware, State of Illinois, State of Iowa, State of Maryland, State of Minnesota, State of New Jersey, State of New Mexico, State of North Carolina, State of Rhode Island, State of Vermont, State of Washington and United States Conference of Mayors, regarding dep-

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**DATE      PROCEEDINGS**


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osition of Secretary of Commerce in a related lawsuit, RECEIVED. Service date 10/06/2018 by CM/ECF. [2405025] [18-2856]—[Edited 10/09/2018 by RD]

10/7/18 LETTER, on behalf of Respondent City and County of San Francisco, California, City of Central Falls, City of Chicago, Illinois, City of Columbus, City of New York, City of Philadelphia, City of Pittsburgh, City of Providence, City of Seattle, Washington, Commonwealth of Massachusetts, Commonwealth of Pennsylvania, Commonwealth of Virginia, County of Cameron, County of El Paso, County of Hidalgo, County of Monterey, District of Columbia, State of Colorado, State of Connecticut, State of Delaware, State of Illinois, State of Iowa, State of Maryland, State of Minnesota, State of New Jersey, State of New Mexico, State of New York, State of North Carolina, State of Oregon, State of Rhode Island, State of Vermont, State of Washington and United States Conference of Mayors, in response to petitioner's letter notifying this Court of Justice Ginsburg's order, RECEIVED. Service date 10/07/2018 by CM/ECF. [2405028] [18-2856]—[Edited 10/09/2018 by RD]

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**DATE PROCEEDINGS**

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10/9/18 ORDER, denying petition for writ of mandamus, by JMW, RJL, W.H. PAULEY III, FILED. [2405868] [18-2856]

\* \* \* \* \*

10/9/18 ORDER, dated 10/09/2018, the request for a stay of documentary discovery is denied and the deposition is temporarily stayed, by PNL, RSP, RCW, FILED. [2406123] [18-2856]—  
[Edited 10/10/2018 by YL]

\* \* \* \* \*

10/25/18 MOTION, to stay, on behalf of Petitioner Ron S. Jarmin, United States Department of Commerce, Wilbur L. Ross and United States Census Bureau, FILED. Service date 10/25/2018 by CM/ECF. [2418916] [18-2856]

10/26/18 LETTER, on behalf of Respondent City and County of San Francisco, California, City of Central Falls, City of Chicago, Illinois, City of Columbus, City of New York, City of Philadelphia, City of Pittsburgh, City of Providence, City of Seattle, Washington, Commonwealth of Massachusetts, Commonwealth of Pennsylvania, Commonwealth of Virginia, County of Cameron, County of El Paso, County of Hidalgo, County of Monterey, District of Columbia, State of Colorado, State of Connecticut, State of Delaware, State of Illinois, State of Iowa, State of Maryland, State of Minnesota, State of New Jersey, State of New Mexico, State of New York, State of

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DATE	PROCEEDINGS
	North Carolina, State of Oregon, State of Rhode Island, State of Vermont, State of Washington and United States Conference of Mayors, will submit an opposition to the motion for stay, RECEIVED. Service date 10/26/2018 by CM/ECF. [2419836] [18-2856]—[Edited 10/26/2018 by RO]
10/26/18	MOTION ORDER, denying motion for a stay of pretrial and trial proceedings in two consolidated district court cases pending resolution of their forthcoming petition for a writ of mandamus or certiorari in the Supreme Court filed by Petitioner United States Department of Commerce, United States Census Bureau, Wilbur L. Ross and Ron S. Jarmin, by JMW, RJL, W. PAULEY, FILED. [2419989] [74] [18-2856]
10/26/18	MOTION ORDER, denying motion for a stay of pretrial and trial proceedings in two consolidated district court cases pending resolution of their forthcoming petition for a writ of mandamus or certiorari in the Supreme Court filed by Movants United States Department of Commerce, United States Census Bureau, Wilbur L. Ross and Ron S. Jarmin, by JMW, RJL, W. PAULEY, FILED. [2420009] [18-2856]
10/30/18	ORDER, dated 10/30/2018, regarding docket Nos. 18-2652 & 18-2659, denying motion for a stay of pretrial and trial proceedings in two consolidated district court case pending resolution of their forthcoming petition for a writ

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**DATE      PROCEEDINGS**


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of mandamus or certiorari in the Supreme Court, filed by Movants United States Department of Commerce, United States Census Bureau, Wilbur L. Ross and Ron S. Jarmin, by PNL, RJP, RCW, FILED. [2437437] [18-2856]

\* \* \* \* \*

- 11/19/18 MOTION, to stay, on behalf of Petitioner Ron S. Jarmin, Wilbur L. Ross, United States Census Bureau and United States Department of Commerce, FILED. Service date 11/19/2018 by CM/ECF. [2436948] [18-2856]
- 11/20/18 MOTION ORDER, denying motion for stay filed by Movants, United States Department of Commerce, United States Census Bureau, Wilbur L. Ross and Ron S. Jarmin, as premature, without prejudice to renewal, by JMW, RJL, W. PAULEY, FILED. [2438569] [84] [18-2856]
- 11/20/18 LETTER, on behalf of Petitioner Ron S. Jarmin, Wilbur L. Ross, United States Census Bureau and United States Department of Commerce, advising the Court that the District Court denied federal government's request for a stay of further proceedings in light of the Supreme Court's grant of the government's petition for a writ of certiorari in In re Department of Commerce, No. 18-557 (U.S.), RECEIVED. Service date 11/20/2018



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<b>DATE</b>	<b>PROCEEDINGS</b>
	by CM/ECF. [2438959] [18-2856]—[Edited 11/21/2018 by YS]
11/21/18	LETTER, on behalf of Respondent City and County of San Francisco, California, City of Central Falls, City of Chicago, Illinois, City of Columbus, City of New York, City of Philadelphia, City of Pittsburgh, City of Providence, City of Seattle, Washington, Commonwealth of Massachusetts, Commonwealth of Pennsylvania, Commonwealth of Virginia, County of Cameron, County of El Paso, County of Hidalgo, County of Monterey, District of Columbia, State of Colorado, State of Connecticut, State of Delaware, State of Illinois, State of Iowa, State of Maryland, State of Minnesota, State of New Jersey, State of New Mexico, State of New York, State of North Carolina, State of Oregon, State of Rhode Island, State of Vermont, State of Washington and United States Conference of Mayors, advising the Court that the request for a stay filed by Petitioners should be denied, RECEIVED. Service date 11/21/2018 by CM/ECF. [2439731] [18-2856]—[Edited 11/21/2018 by YS]—[Edited 11/21/2018 by YS]
11/21/18	ORDER, dated 11/21/2018, denying Government's motions for stay and denying as moot Government's motion for an immediate administrative stay pending the resolution of its motion to stay proceeding, by JMW, RJL, W. PAULEY, FILED. [2440177] [18-2856]

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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Docket No. 18-2857

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, PETITIONERS

*v.*

NEW YORK IMMIGRATION COALITION;  
CASA DE MARYLAND, INC.; AMERICAN-ARAB  
ANTI-DISCRIMINATION COMMITTEE;  
ADC RESEARCH INSTITUTE; MAKE THE ROAD  
NEW YORK, RESPONDENTS

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**DOCKET ENTRIES**

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<b>DATE</b>	<b>PROCEEDINGS</b>
9/27/18	ORIGINAL PROCEEDING, PETITION FOR WRIT OF MANDAMUS, on behalf of Petitioner Ron S. Jarmin, Wilbur L. Ross, United State Census Bureau and United States Department of Commerce, FILED. [2399335] [18-2857]
	* * * * *
9/28/18	LETTER, on behalf of Petitioner United States Department of Commerce, informing that the case has noticed the deposition of

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**DATE      PROCEEDINGS**


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- Commerce Secretary Wilbur Ross for Thursday, October 11, 2018, requesting a decision on the motion for stay by 10/1/18, RECEIVED. Service date 09/28/2018 by CM/ECF. [2399562] [18-2857]—[Edited 09/28/2018 by RD]
- 9/28/18 ORDER, As part of its petitions for writ of mandamus, the Government seeks an administrative stay of the depositions of Secretary of Commerce Wilbur Ross and John Gore, the Acting Assistant Attorney General of the Department of Justice's Civil Rights Division. IT IS HEREBY ORDERED that the deposition of Secretary Ross is stayed pending determination of the petitions. Answers to the petitions must be filed by October 4, 2018 at noon. The petitions, as they pertain to Secretary Ross, are REFERRED to the motions panel sitting on Tuesday, October 9, 2018. To the extent the Government seeks a stay of Acting Attorney General Gore's deposition, that request is REFERRED to the panel that determined the petitions in docket numbers 18-2652 and 18-2659, by PWH, FILED. [2399745] [18-2857]—[Edited 09/28/2018 by RD]
- \* \* \* \* \*
- 10/2/18 ORDER, Petitioners request a stay of discovery in Nos. 18-2652 and 18-2659, including the deposition of Acting Assistant Attorney General Gore, pending review by the Supreme Court. We have considered the relevant factors and conclude that a stay in those cases

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**DATE PROCEEDINGS**

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is not warranted. See U.S. S.E.C. v. Citigroup Glob. Mkts. Inc., 673 F.3d 158, 162 (2d Cir. 2012). Upon due consideration, it is hereby ORDERED that the request for a stay is DENIED. By PNL, RSP, RCW, FILED. [2401667] [18-2857]

\* \* \* \* \*

10/4/18 OPPOSITION TO WRIT,, on behalf of Respondent ADC Research Institute, American-Arab Anti-Discrimination Committee, CASA de Maryland, Inc., Make the Road New York and New York Immigration Coalition, FILED. Service date 10/04/2018 by CM/ECF. [2403566] [18-2857]

\* \* \* \* \*

10/5/18 REPLY BRIEF, on behalf of Petitioner Ron S. Jarmin, Wilbur L. Ross, United States Census Bureau and United States Department of Commerce, FILED. Service date 10/05/2018 by CM/ECF. [2404881] [18-2857]

10/5/18 LETTER, on behalf of Petitioner Ron S. Jarmin, Wilbur L. Ross, United States Census Bureau and United States Department of Commerce, informing of an order issued by Justice Ginsburg RECEIVED. Service date 10/05/2018 by CM/ECF. [2405016] [18-2857]— [Edited 10/09/2018 by RD]

10/7/18 LETTER, on behalf of Respondent ADC Research Institute, American-Arab Anti-

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**DATE      PROCEEDINGS**


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Discrimination Committee, CASA de Maryland, Inc., Make the Road New York and New York Immigration Coalition, in response to petitioner's letter dated 10/5/18, regarding order issued by Justice Ginsburg RECEIVED. Service date 10/07/2018 by CM/ECF. [2405027] [18-2857]—[Edited 10/09/2018 by RD]

\* \* \* \* \*

10/9/18 ORDER, denying petition for writ of mandamus, by JMW, RJL, W.H. PAULEY III, FILED. [2405883] [18-2857]

\* \* \* \* \*

10/9/18 ORDER, dated 10/09/2018, the request for a stay of documentary discovery is denied and the deposition is temporarily stayed, by PNL, RSP, RCW, FILED. [2406124] [18-2857] —[Edited 10/10/2018 by YL]

\* \* \* \* \*

10/25/18 MOTION, to stay, on behalf of petitioner Ron S. Jarmin, Wilbur L. Ross, United States Census Bureau and United States Department of Commerce, FILED. Service date 10/25/2018 by CM/ECF. [2418919] [18-2857]

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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Docket No. 1:18-cv-2921

STATE OF NEW YORK; 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; CITY OF NEW YORK; CITY OF PHILADELPHIA; CITY OF PROVIDENCE; CITY AND COUNTY OF SAN FRANCISCO; UNITED STATES CONFERENCE OF MAYORS; CITY OF SEATTLE; CITY OF PITTSBURG; COUNTY OF CAMERON; STATE OF COLORADO; CITY OF CENTRAL FALLS; CITY OF COLUMBUS; COUNTY OF EL PASO; COUNTY OF MONTEREY; COUNTY OF HIDALGO,  
PLAINTIFFS

NEW YORK IMMIGRATION COALITION;  
MAKE THE ROAD—NEW YORK; ARAB-AMERICAN ANTI-DISCRIMINATION COMMITTEE; ADC RESEARCH INSTITUTE; CASA DE MARYLAND, CONSOLIDATED PLAINTIFFS

*v.*

UNITED STATES DEPARTMENT OF COMMERCE; BUREAU OF THE CENSUS, AN AGENCY WITHIN THE UNITED STATES DEPARTMENT OF COMMERCE; WILBUR L. ROSS, JR., IN HIS OFFICIAL CAPACITY AS SECRETARY OF COMMERCE; RON S. JARMIN, IN HIS CAPACITY AS PERFORMING THE NON-EXCLUSIVE FUNCTIONS AND DUTIES OF THE DIRECTOR OF THE U.S. CENSUS BUREAU, DEFENDANTS

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**DOCKET ENTRIES**

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
4/4/18	10	COMPLAINT against Bureau of the Census, Ron S. Jarmin, Wilbur L. Ross, Jr., United States Department of Commerce. Document filed by State of New Mexico, City of Philadelphia, State of Maryland, State of Vermont, State Of Connecticut, City of Providence, State Of New York, State of Washington, State of Oregon, Commonwealth of Virginia, City and County of San Francisco, City of Seattle, State of Iowa, State of Delaware, State of Minnesota, State of North Carolina, State of Rhode Island, City Of New York, Commonwealth of Pennsylvania, Commonwealth of Massachusetts, District of Columbia, United States Conference of Mayors, City of Chicago, State of New Jersey, State of Illinois. (Rosado, Lourdes) (Entered: 04/04/2018)
		* * * * *
4/30/18	85	FIRST AMENDED COMPLAINT amending 10 Complaint,, against Bureau of the

DATE	DOCKET NUMBER PROCEEDINGS
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Census, Ron S. Jarmin, Wilbur L. Ross, Jr., United States Department of Commerce. Document filed by City of Philadelphia, State of Maryland, State of Vermont, State of Connecticut, State Of New York, State of Washington, Commonwealth of Virginia, City of Seattle, City Of New York, Commonwealth of Pennsylvania, United States Conference of Mayors, State of New Jersey, State of New Mexico, City of Providence, City and County of San Francisco, State of Oregon, State of Iowa, State of Delaware, State of Minnesota, State of North Carolina, State of Rhode Island, Commonwealth of Massachusetts, District of Columbia, City of Chicago, State of Illinois, 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. Related document: 10 Complaint,, (Saini, Ajay) (Entered: 04/30/2018)

\* \* \* \* \*



<b>DATE</b>	<b>DOCKET NUMBER</b>	<b>PROCEEDINGS</b>
5/18/18	150	TRANSCRIPT of Proceedings re: CONFERENCE held on 5/9/2018 before Judge Jesse M. Furman. Court Reporter/Transcriber: Raquel Robles, (212) 805-0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/8/2018. Redacted Transcript Deadline set for 6/18/2018. Release of Transcript Restriction set for 8/16/2018. (McGuirk, Kelly) (Entered: 05/18/2018)
		* * * * *
5/25/18	154	MOTION to Dismiss. Document filed by Bureau of the Census, Ron S. Jarmin, Wilbur L. Ross, Jr., United States Department of Commerce. (Bailey, Kate) (Entered: 05/25/2018)
5/25/18	155	MEMORANDUM OF LAW in Support re: 154 MOTION to Dismiss . . . Document filed by

DATE	DOCKET NUMBER	PROCEEDINGS
		Bureau of the Census, Ron S. Jarmin, Wilbur L. Ross, Jr., United States Department of Commerce. (Bailey, Kate) (Entered: 05/25/2018)
		* * * * *
6/8/18	173	NOTICE of Filing Administrative Record Certification and Index. Document filed by Bureau of the Census, Ron S. Jarmin, Wilbur L. Ross, Jr., United States Department of Commerce. (Attachments: #1 Certification of Administrative Record, #2 Administrative Record Index) (Ehrlich, Stephen) (Entered: 06/08/2018)
		* * * * *
6/13/18	182	MEMORANDUM OF LAW in Opposition re: 154 MOTION to Dismiss . . Document filed by City Of New York, City and County of San Francisco, City of Central Falls, City of Chicago, City of Columbus, City of Philadelphia, City of Pittsburgh, City of Providence, City of Seattle, Commonwealth of Massachusetts, Commonwealth of Pennsylvania Commonwealth

DATE	DOCKET NUMBER	PROCEEDINGS
		Virginia, County of Cameron, County of El Paso, County of Hidalgo, County of Monterey, District of Columbia, State Of Connecticut, State Of New York, State of Colorado, State of Delaware, State of Illinois, State of Iowa, State of Maryland, State of Minnesota, State of New Jersey, State of New Mexico, State of North Carolina, State of Oregon, State of Rhode Island, State of Vermont, State of Washington, United States Conference of Mayors. (Goldstein, Elena) (Entered: 06/13/2018)
		* * * * *
6/22/18	190	REPLY MEMORANDUM OF LAW in Support re: 154 MOTION to Dismiss . . Document filed by Bureau of the Census, Ron S. Jarmin, Wilbur L. Ross, Jr., United States Department of Commerce. (Ehrlich, Stephen) (Entered: 06/22/2018)
		* * * * *
6/26/18	193	LETTER addressed to Judge Jesse M. Furman from Plain-

DATE	DOCKET NUMBER	PROCEEDINGS
6/26/18	194	<p>tiffs State of New York et al. dated 6/26/2018 re: discovery outside of the administrative record. Document filed by State Of New York. (Attachments: #1 Exhibit 1, #2 Exhibit 2) (Colangelo, Matthew) (Entered: 06/26/2018)</p> <p>LETTER addressed to Judge Jesse M. Furman from Dominika Tarczynska dated June 26, 2018 re: Opposing Discovery. Document filed by Bureau of the Census, Ron S. Jarmin, Wilbur L. Ross, Jr., United States Department of Commerce. (Attachments: #1 Exhibit A (Tarczynska, Dominika) (Entered: 06/26/2018)</p>
6/27/18	196	<p style="text-align: center;">* * * * *</p> <p>LETTER addressed to Judge Jesse M. Furman from Matthew Colangelo dated June 27, 2018 re: supplemental authority regarding discovery. Document filed by State Of New York. (Attachments: #1 Exhibit Order in Sierra Club v. Zinke, No. 17-cv-07187-WHO (N.D. Cal. June 26, 2018) (Co-</p>

DATE	DOCKET NUMBER	PROCEEDINGS
		langelo, Matthew) (Entered: 06/27/2018)
		* * * * *
7/3/18		Minute Entry for proceedings held before Judge Jesse M. Furman: Oral Argument held on 7/3/2018 re: (193 in 1:18-cv-02921-JMF) Letter, (154 in 1:18-cv-02921-JMF) MOTION to Dismiss, (194 in 1:18-cv-02921-JMF) Letter. Court reporter present.—See transcript. (ab) (Entered: 07/03/2018)
7/5/18	199	ORDER: For the reasons stated on the record at the conference held on July 3, 2018, Plaintiffs request for an order directing Defendants to complete the administrative record and authorizing extra-record discovery is GRANTED. As discussed, the following deadlines shall apply unless and until the Court says otherwise: Fact Discovery due by 10/12/2018. Expert Discovery due by 10/12/2018. Status Conference set for 9/14/2018 at 02:00 PM in Courtroom 1105, 40 Centre Street, New York, NY 10007 before Judge Jesse M. Furman.

DATE	DOCKET NUMBER	PROCEEDINGS
		(Signed by Judge Jesse M. Furman on 7/5/2018) (ne) (Entered: 07/05/2018)
		* * * * *
7/20/18	205	TRANSCRIPT of Proceedings re: CORRECTED TRANSCRIPT held on 7/3/2018 before Judge Jesse M. Furman Court Reporter/Transcriber: Karen Gorlaski, (212) 805-0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 8/10/2018. Redacted Transcript Deadline set for 8/20/2018. Release of Transcript Restriction set for 10/18/2018. (McGuirk, Kelly) (Entered: 07/20/2018)
		* * * * *
7/25/18	214	SECOND AMENDED COMPLAINT amending 10 Complaint,, 85 Amended Complaint,, against Bureau of the Census, Ron S. Jarmin, Wilbur L. Ross, Jr., United States Department

DATE	DOCKET NUMBER	PROCEEDINGS
7/26/18	215	<p>of Commerce. Document filed by City of Central Falls, State of Washington, Commonwealth of Virginia, City of Columbus, City of New York, State of New Mexico, State of Rhode Island State Of Connecticut, State of Vermont, City of Phoenix, Commonwealth of Pennsylvania, United States Conference of Mayors, County of Monterey, City and County of San Francisco, Commonwealth of Massachusetts, State of Illinois, City of Philadelphia, State of Maryland, State of New Jersey, County of Cameron, State of North Carolina, County of Hidalgo, State of Colorado, City of Chicago, County of El Paso, State Of New York, City of Seattle, City of Pittsburgh, City of Providence, State of Oregon, State of Iowa, State of Delaware, State of Minnesota. District of Columbia. Related document: 10 Complaint,, 85 Amended Complaint,,. (Goldstein, Elena) (Entered: 07/25/2018)</p> <p>OPINION AND ORDER re: (38 in 1:18-cv-05025-JMF) MO-</p>

DATE	DOCKET NUMBER PROCEEDINGS
	<p>TION to Dismiss. filed by Wilbur L. Ross, United States Department of Commerce, Bureau of the Census, Ron S. Jarmin, (154 in 1:18-cv-02921-JMF)</p> <p>MOTION to Dismiss . filed by Wilbur L. Ross, Jr., United States Department of Commerce, Bureau of the Census, Ron S. Jarmin. Defendants' motions to dismiss are GRANTED in part and DENIED in part. First, the Court rejects Defendants' attempts to insulate Secretary Ross's decision to reinstate a question about citizenship on the 2020 census from judicial review. Granted, courts must give proper deference to the Secretary, but that does not mean that they lack authority to entertain claims like those pressed here. To the contrary, courts have a critical role to play in reviewing the conduct of the political branches to ensure that the census is conducted in a manner consistent with the Constitution and applicable law. Second, the Court concludes that Plaintiffs' claims under the</p>



DATE	DOCKET NUMBER PROCEEDINGS
	<p>Enumeration Clause which turn on whether Secretary Ross had the power to add a question about citizenship to the census and not on whether he exercised that power for impermissible reasons must be dismissed. Third, assuming the truth of their allegations and drawing all reasonable inferences in their favor, the Court finds that NGO Plaintiffs plausibly allege that Secretary Ross's decision to reinstate the citizenship question was motivated at least in part by discriminatory animus and will result in a discriminatory effect. Accordingly, their equal protection claim under the Due Process Clause (and Plaintiffs' APA claims, which Defendants did not substantively challenge) may proceed. None of that is to say that Plaintiffs will ultimately prevail in their challenge to Secretary Ross's decision to reinstate the citizenship question on the 2020 census. As noted, the Enumeration Clause and the Census Act grant him broad authority over</p>

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DATE	DOCKET NUMBER	PROCEEDINGS
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the census, and Plaintiffs may not ultimately be able to prove that he exercised that authority in an unlawful manner. Put another way, the question at this stage of the proceedings is not whether the evidence supports Plaintiffs' claims, but rather whether Plaintiffs may proceed with discovery and, ultimately, to summary judgment or trial on their claims. The Court concludes that they may as to their claims under the APA and the Due Process Clause and, to that extent, Defendants' motions are denied. Per the Court's Order entered on July 5, 2018 (Docket No. 199), the deadline for the completion of fact and expert discovery in these cases is October 12, 2018, and the parties shall appear for a pretrial conference on September 14, 2018. The parties are reminded that, no later than the Thursday prior to the pretrial conference, they are to file on ECF a joint letter addressing certain issues. (See *id.* at 2-3). In that letter, the parties should also give their

DATE	DOCKET NUMBER	PROCEEDINGS
		views with respect to whether the case should resolved by way of summary judgment or trial and whether the two cases should be consolidated for either of those purposes. The Clerk of Court is directed to terminate 18-CV-2921, Docket No. 154; and 18-CV-5025, Docket No. 38. SO ORDERED. (Signed by Judge Jesse M. Furman on 7/26/18) (yv) (Entered: 07/26/2018)
		* * * * *
8/10/18	236	LETTER MOTION to Compel Acting Assistant Attorney General for Civil Rights John Gore to appear for deposition addressed to Judge Jesse M. Furman from Matthew Colangelo dated August 10, 2018. Document filed by State Of New York. (Attachments: #1 Exhibit 1, #2 Exhibit 2, #3 Exhibit 3, #4 Exhibit 4, #5 Exhibit 5) (Colangelo, Matthew) (Entered: 08/10/2018)
		* * * * *
8/15/18	255	LETTER RESPONSE in opposition to Motion addressed to Judge Jesse M. Furman from

DATE	DOCKET NUMBER	PROCEEDINGS
		Kate Bailey dated 08/15/2018 re: 236 LETTER MOTION to Compel Acting Assistant Attorney General for Civil Rights John Gore to appear for deposition addressed to Judge Jesse M. Furman from Matthew Colangelo dated August 10, 2018. Document filed by Bureau of the Census, Ron S. Jarmin, Wilbur L. Ross, Jr., United States Department of Commerce. (Bailey, Kate) (Entered: 08/15/2018)
		* * * * *
8/17/18	261	ORDER granting 236 Letter Motion to Compel, denying 237 Letter Motion to Compel. For the foregoing reasons, Plaintiffs' letter motion of August 10th is GRANTED to the extent it seeks an order compelling Defendants to make AAG Gore available for a deposition, and their letter motion of August 13th is DENIED to the extent it seeks an order compelling Defendant to produce "materials erroneously withheld." The Clerk of Court is directed to terminate 18-CV-

DATE	DOCKET NUMBER	PROCEEDINGS
		2921, Docket Nos. 236 and 237, and 18-CV-5025, Docket Nos. 81 and 82. SO ORDERED. (Signed by Judge Jesse M. Furman on 8/17/2018) (ne) (Entered: 08/17/2018)
		* * * * *
8/31/18	292	LETTER MOTION to Stay Discovery Pending Petition for Writ of Mandamus addressed to Judge Jesse M. Furman from Carol Federighi dated August 31, 2018. Document filed by Bureau of the Census, Ron S. Jarmin, Wilbur L. Ross, Jr., United States Department of Commerce. (Federighi, Carol) (Entered: 08/31/2018)
		* * * * *
8/31/18	294	ANSWER to 214 Amended Complaint,,,,,. Document filed by Bureau of the Census, Ron S. Jarmin, Wilbur L. Ross, Jr., United States Department of Commerce. (Federighi, Carol) (Entered: 08/31/2018)
		* * * * *
9/4/18	297	ORDER with respect to 292 Letter Motion to Stay Discov-

DATE	DOCKET NUMBER PROCEEDINGS
9/6/18	<p data-bbox="740 352 1206 1129">ery Pending Petition for Writ of Mandamus. To the extent that Defendants seek “an administrative stay” (that is, a stay pending a decision on Defendants, motion for a stay), the request is DENIED. Plaintiffs in 18-CV-2921 and 18-CV-5025 shall file a single letter response to Defendants’ motion by Thursday, September 6, 2018; Defendants shall notify the Court by Friday, September 7, 2018, at noon, if they wish to file a reply and, if so, shall file the reply by Monday, September 10, 2018. (HEREBY ORDERED by Judge Jesse M. Furman) (Text Only Order) (Furman, Jesse) (Entered: 09/04/2018)</p> <p data-bbox="695 1157 911 1178">* * * * *</p> <p data-bbox="740 1205 1206 1535">LETTER RESPONSE in Opposition to Motion addressed to Judge Jesse M. Furman from Matthew Colangelo dated September 6, 2018 re: 292 LETTER MOTION to Stay Discovery Pending Petition for Writ of Mandamus addressed to Judge Jesse M. Furman from Carol</p>

DATE	DOCKET NUMBER	PROCEEDINGS
		Federighi dated August 31, 2018. . Document filed by State Of New York. (Attachments: #1 Exhibit 1, #2 Exhibit 2, #3 Exhibit 3, #4 Exhibit 4, #5 Exhibit 5, #6 Exhibit 6, #7 Exhibit 7) (Colangelo, Matthew) (Entered: 09/06/2018)
		* * * * *
9/7/18	306	ORDER re: 292 LETTER MOTION to Stay Discovery Pending Petition for Writ of Mandamus filed by Wilbur L. Ross, Jr., United States Department of Commerce, Bureau of the Census, Ron S. Jarmin. Because the deposition of John Gore is apparently scheduled for September 12, 2018 (a fact that was conspicuously omitted from the stay application that Defendants filed on the eve of Labor Day weekend) (Docket No. 304, at 3), and the Court is unavailable Monday and Tuesday on account of a Jewish holiday, Defendants shall file any reply to Plaintiffs' opposition by TODAY at noon—not by Monday, as the Court had indicated in its Order of September

DATE	DOCKET NUMBER	PROCEEDINGS
		4, 2018. SO ORDERED. (Signed by Judge Jesse M. Furman on 9/7/2018) (Text Only Order) (Furman, Jesse) (Entered: 09/07/2018)
		* * * * *
9/7/18	308	OPINION AND ORDER re: (292 in 1:18-cv-02921-JMF) LETTER MOTION to Stay Discovery Pending Petition for Writ of Mandamus addressed to Judge Jesse M. Furman from Carol Federighi dated August 31, 2018. filed by Wilbur L. Ross, Jr., United States Department of Commerce, Bureau of the Census, Ron S. Jarmin, (116 in 1:18-cv-05025-JMF) LETTER MOTION to Stay Discovery Pending Petition for Writ of Mandamus addressed to Judge Jesse M. Furman from Carol Federighi dated August 31, 2018. filed by Wilbur L. Ross, United States Department of Commerce, Bureau of the Census, Ron S. Jarmin. For the foregoing reasons, Defendants' motion for a stay of discovery is DENIED in its entirety. The Clerk of Court is di-



DATE	DOCKET NUMBER	PROCEEDINGS
		rected to terminate 18-CV-2921, Docket No. 292 and 18-CV-5025, Docket No. 116. (Signed by Judge Jesse M. Furman on 9/7/2018) (tro) (Entered: 09/07/2018)
		* * * * *
9/10/18	314	LETTER MOTION for Discovery requesting leave to depose Secretary of Commerce Wilbur L. Ross, Jr. addressed to Judge Jesse M. Furman from Matthew Colangelo dated September 10, 2018. Document filed by State Of New York. (Attachments: #1 Exhibit 1 (AR 2521, AR 2561, AR 763), #2 Exhibit 2 (AR 3699, AR 2482, AR 763), #3 Exhibit 3 (Defs. response to interrogatories), #4 Exhibit 4 (AR 2636), #5 Exhibit 5 (Defs. supplemental response to interrogatories), #6 Exhibit 6 (Teramoto Dep. Tr. (excerpts)), #7 Exhibit 7 (Kelley Dep. Tr. (excerpts)), #8 Exhibit 8 (Comstock Dep. Tr. (excerpts)), #9 Exhibit 9 (Email from Defs. counsel dated 9/7/18)) (Colangelo, Matthew) (Entered: 09/10/2018)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
9/13/18	320	LETTER RESPONSE in Opposition to Motion addressed to Judge Jesse M. Furman from Carol Federighi dated 09/13/2018 re: 314 LETTER MOTION for Discovery requesting leave to depose Secretary of Commerce Wilbur L. Ross, Jr. addressed to Judge Jesse M. Furman from Matthew Colangelo dated September 10, 2018. . Document filed by Bureau of the Census, Ron S. Jarmin, Wilbur L. Ross, Jr., United States Department of Commerce. (Attachments: #1 Exhibit 1: In re United States (Vilsack) Order, #2 Exhibit 2: Pls' RFAs to Commerce) (Federighi, Carol) (Entered: 09/13/2018)
		* * * * *
9/17/18	325	LETTER RESPONSE in Support of Motion addressed to Judge Jesse M. Furman from Matthew Colangelo dated September 17, 2018 re: 314 LETTER MOTION for Discovery requesting leave to depose

DATE	DOCKET NUMBER	PROCEEDINGS
		Secretary of Commerce Wilbur L. Ross, Jr. addressed to Judge Jesse M. Furman from Matthew Colangelo dated September 10, 2018. . Document filed by State Of New York. (Attachments: #1 Exhibit 1 (AR 12756), #2 Exhibit 2 (Abowd 30(b)(6) dep. tr. (excerpt)), #3 Exhibit 3 (AR 12476)) (Colangelo, Matthew) (Entered: 09/17/2018)
		* * * * *
9/18/18	333	LETTER addressed to Judge Jesse M. Furman from Kate Bailey dated 09/18/2018 re: Appropriateness of Summary Judgment to Resolve All Claims. Document filed by Wilbur L. Ross, Jr.. (Bailey, Kate) (Entered: 09/18/2018)
		* * * * *
9/20/18	341	LETTER addressed to Judge Jesse M. Furman from Elena Goldstein dated September 20, 2018 re: Defendants' request for summary judgment in lieu of trial. Document filed by State Of New York. (Attachments: #1 Exhibit 1 (select

DATE	DOCKET NUMBER	PROCEEDINGS
		documents from the Administrative Record)) (Goldstein, Elena) (Entered: 09/20/2018)
		* * * * *
9/21/18	345	<p>OPINION AND ORDER re: 314 LETTER MOTION for Discovery requesting leave to depose Secretary of Commerce Wilbur L. Ross, Jr. addressed to Judge Jesse M. Furman from Matthew Colangelo dated September 10, 2018 filed by State Of New York. In short, the public interest weighs heavily in favor of granting Plaintiffs' application for an order requiring Secretary Ross to sit for a deposition. That said, mindful of the burdens that a deposition will impose on Secretary Ross and the scope of the existing record (including the fact that Secretary Ross has already testified before Congress about his decision to add the citizenship question), the Court limits the deposition to four hours in length, see, e.g., <i>Arista Records LLC v. Lime Grp. LLC</i>, No. 06-CV-5936 (GEL), 2008 WL 1752254, at *1</p>

DATE	DOCKET NUMBER PROCEEDINGS
	<p>(S.D.N.Y. Apr. 16, 2008) (“A district court has broad discretion to set the length of depositions appropriate to the circumstances of the case.”), and mandates that it be conducted at the Department of Commerce or another location convenient for Secretary Ross. The Court, however, rejects Defendants’ contention that the deposition “should be held only after all other discovery is concluded,” (Defs.’ Letter 3), in no small part because the smaller the window, the harder it will undoubtedly be to schedule the deposition. Finally, the Court declines Defendants’ request to “stay its order for 14 days or until Defendants’ anticipated mandamus petition is resolved, whichever is later.” (Id.). Putting aside the fact that Defendants do not even attempt to establish that the circumstances warranting a stay are present, see New York, 2018 WL 4279467, at *1 (discussing the standards for a stay pending a mandamus petition), the October 12, 2018 discovery deadline</p>

DATE	DOCKET NUMBER	PROCEEDINGS
		<p>is rapidly approaching and Defendants themselves have acknowledged that time is of the essence, see <i>id.</i> at *3. Moreover, the deposition will not take place immediately; instead, Plaintiffs will need to notice it and counsel will presumably need to confer about scheduling and other logistics. In the meantime, Defendants will have ample time to seek mandamus review and a stay pending such review from the Circuit. The Clerk of Court is directed to terminate Docket No. 314. SO ORDERED. (Signed by Judge Jesse M. Furman on 9/21/2018) (ne) (Entered: 09/21/2018)</p>
		* * * * *
9/21/18	347	<p>ANSWER to 210 Amended Complaint,,,,. Document filed by Bureau of the Census, Ron S. Jarmin, Wilbur L. Ross, Jr., United States Department of Commerce. (Tomlinson, Martin) (Entered: 09/21/2018)</p>
		* * * * *
9/28/18	359	<p>LETTER MOTION to Stay Discovery Pending Supreme Court</p>

DATE	DOCKET NUMBER	PROCEEDINGS
		Review addressed to Judge Jesse M. Furman from Carol Federighi dated 09/28/2018. Document filed by United States Department of Commerce. (Federighi, Carol) (Entered: 09/28/2018)
		* * * * *
9/29/18	360	LETTER RESPONSE in Opposition to Motion addressed to Judge Jesse M. Furman from Matthew Colangelo dated September 29, 2018 re: 359 LETTER MOTION to Stay Discovery Pending Supreme Court Review addressed to Judge Jesse M. Furman from Carol Federighi dated 09/28/2018. . Document filed by State Of New York. (Attachments: #1 Exhibit 1 (Plaintiffs' letter of 9/25/18 regarding discovery), #2 Exhibit 2 (Defendants' emergency motion for immediate administrative stay), #3 Exhibit 3 (CA2 order of 9/28/18 regarding administrative stay motion)) (Colangelo, Matthew) (Entered: 09/29/2018)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
9/30/18	362	<p>MEMORANDUM OPINION AND ORDER re: 359 LETTER MOTION to Stay Discovery Pending Supreme Court Review addressed to Judge Jesse M. Furman from Carol Federighi dated 09/28/2018 filed by United States Dept of Commerce. Defendants' latest application for stay of discovery in these cases, including the depositions of Secretary Ross and Assistant Attorney General Gore, is DENIED. The application—which does not even bother to recite the requirements for a stay, let alone attempt to show that those requirements have been met—is hard to understand as anything more than a pro forma box-checking exercise for purposes of seeking relief in the Supreme Court. This Court has already rejected Defendants' requests for stays of discovery altogether, of the Assistant Attorney General Gore's deposition, and of Secretary Ross's deposition, (see Docket No. 308; Docket No. 345, at 12), and it adheres to its views on the merits of</p>



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DATE	DOCKET NUMBER PROCEEDINGS
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those requests. To the extent that Defendants request a stay of all discovery, their application is particularly frivolous—if not outrageous—given their inexplicable (and still unexplained) two-month delay in seeking that relief, see *New York v. U.S. Dept of Commerce*, No. 18-CV-2921 (JMF), 2018 WL 4279467, at \* 2 (S.D.N.Y. Sept. 7, 2018), and their representation to the Second Circuit only last week that they were not actually seeking a stay of all discovery, (see Docket No. 360, at 1-2). If anything, the notion that Defendants will suffer irreparable harm absent a stay of all discovery is even more far-fetched now than it was when first requested on August 31, 2018, as the parties are nearly three months into discovery and only days away from completing it. The Court will not permit (and doubt that either the Second Circuit or the Supreme Court would permit) Defendants to use their arguably timely challenges to the

DATE	DOCKET NUMBER PROCEEDINGS
	<p>Orders authorizing depositions of Assistant Attorney General Gore and Secretary Ross to bootstrap an untimely—and almost moot—challenge to the July 3rd Order authorizing extra-record discovery, particularly when only nine business days remain before the close of such discovery and much apparently remains to be done. (See Docket No. [360-1]). Unless and until this Court’s Orders are stayed by a higher court, Defendants shall comply with their discovery obligations completely and expeditiously; the Court will not look kindly on any delay, and—absent relief from a higher court—will not extend discovery beyond October 12th given the November 5th trial date. As for the deposition of Secretary Ross, which has been administratively stayed by the Court of Appeals (see Docket No. [360-3]), the Court takes Defendants at their word when they say that the deposition “can be conducted expeditiously should [the Second Circuit] deny the govern-</p>

DATE	DOCKET NUMBER PROCEEDINGS
	<p>ment's petition," (Pets. for Mandamus at 32, Nos. 18-2856 &amp; 18-2857 (2d Cir. Sept. 27, 2018)). In light of that representation, and the discovery deadline of October 12, 2018, Defendants should endeavor to ensure that Secretary Ross remains available for a deposition on October 11, 2018, so that the deposition may take place before discovery closes in the event that the administrative stay is lifted by that date and Defendants' efforts to obtain permanent relief fail. For the foregoing reasons, Defendants' latest applications for stay of discovery in these cases, "including" the depositions of Secretary Ross and Assistant Attorney General Gore is DENIED. The Clerk of Court is directed to terminate Docket No. 359. (Signed by Judge Jesse M. Furman on 9/30/2018) Filed In Associated Cases: 1:18-cv-02921-JMF, 1:18-cv-05025-JMF(ab) Modified on 9/30/2018 (ab). (Entered: 09/30/2018)</p>

DATE	DOCKET NUMBER	PROCEEDINGS
9/30/18	363	<p>ORDER regarding 333 and 341 Parties' Letters concerning the appropriateness of summary judgment. Upon review of the parties' letters, the Court remains firmly convinced that a trial will be necessary to resolve the claims in this case. First, the cases cited by Plaintiffs make clear that APA claims may properly be heard at trial where, as appears to be the case here, there is a need to make credibility determinations in connection with allegations of pretext or an improper government purpose, see, e.g., <i>Buffalo Cent. Terminal v. U.S.</i>, 886 F. Supp. 1031, 1037, 1047-48 (W.D.N.Y. 1995), or where there are disputes involving competing experts, see, e.g., <i>Cuomo v. Baldrige</i>, 674 F. Supp. 1089, 1093 (S.D.N.Y. 1987). (See Docket No. 341 at 1-4). Second, it seems quite clear from the existing record that there will be genuine disputes of material fact precluding entry of summary judgment. See Fed. R. Civ. P. 56(a). Given the foregoing, the Court believe that it</p>

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DATE	DOCKET NUMBER	PROCEEDINGS
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would be far more efficient—and more consistent with Defendants’ own interest in a speedy resolution of the claims in this case—to proceed directly to trial and that Defendants would be far better off devoting their time and resources to preparing their pre-trial materials than to preparing summary judgment papers. That said, the Court will not bar Defendants from making a motion for summary judgment if they wish to spend their time and resources preparing one. Any such motion shall be filed by October 19, 2018; any opposition to such a motion shall be filed by October 31, 2018; and no reply shall be filed without prior leave of Court. All other dates and deadlines—including the November 5th trial date—remain in effect. (See Docket No. 323). SO ORDERED. (Signed by Judge Jesse M. Furman on 9/30/2018) (Text Only Order) (Furman, Jesse) (Entered: 09/30/2018)

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<b>DATE</b>	<b>DOCKET NUMBER</b>	<b>PROCEEDINGS</b>
10/10/18	374	NOTICE of Of Stay. Document filed by Bureau of the Census (Bailey, Kate) (Entered: 10/10/2018)
		* * * * *
10/23/18	397	LETTER MOTION to Stay Trial and Pretrial Events addressed to Judge Jesse M. Furman from Martin M Tomlinson dated 10/23/2018. Document filed by Bureau of the Census Ron S. Jarmin, Wilbur L. Ross, Jr., United States Department of Commerce. (Attachments: #1 Exhibit Supreme Court Order Granting in Part and Denying in Part Application for Stay) (Tomlinson, Martin) (Entered: 10/23/2018)
		* * * * *
10/26/18	405	OPINION AND ORDER re: 397 LETTER MOTION to Stay Trial and Pretrial Events : For the reasons set forth in this Opinion, Defendants' motion for a stay of trial and associated deadlines is DENIED. The Clerk of Court is directed to terminate Docket No. 397. (Signed by Judge Jesse M.

DATE	DOCKET NUMBER	PROCEEDINGS
		Furman on 10/26/2018) (ab) (Entered: 10/26/2018)
		* * * * *
10/26/18	410	PRETRIAL MEMORANDUM. Document filed by ADC Research Institute, Arab-American Anti-Discrimination Committee, CASA de Maryland, City Of New York, City and County of San Francisco, City of Central Falls, City of Chicago, City of Columbus, City of Philadelphia, City of Phoenix, City of Pittsburgh, City of Providence, City of Seattle, Commonwealth of Massachusetts, Commonwealth of Pennsylvania, Commonwealth of Virginia, County of Cameron, County of El Paso, County of Hidalgo, County of Monterey, District of Columbia, Make the Road—New York, New York Immigration Coalition, State Of Connecticut, State Of New York, State of Colorado, State of Delaware, State of Illinois, State of Iowa, State of Maryland, State of Minnesota, State of New Jersey, State of New Mexico, State of North Carolina, State of Oregon, State of

<b>DATE</b>	<b>DOCKET NUMBER</b>	<b>PROCEEDINGS</b>
		Rhode Island, State of Vermont, State of Washington, United States Conference of Mayors. (Colangelo Matthew) (Entered: 10/26/2018)
		* * * * *
10/26/18	412	PRETRIAL MEMORANDUM. Document filed by Bureau of the Census, Ron S. Jarmin, Wilbur L. Ross, Jr., United States Department of Commerce. (Bailey, Kate) (Entered: 10/26/2018)
		* * * * *
10/31/18	455	TRIAL BRIEF Plaintiffs' Pretrial Reply Memorandum of Law. Document filed by State Of New York. (Colangelo, Matthew) (Entered: 10/31/2018)
10/31/18	456	TRIAL BRIEF Defendants' Pretrial Reply Memorandum of Law. Document filed by Bureau of the Census, Ron S. Jarmin, Wilbur L. Ross, Jr., United States Department of Commerce. (Ehrlich, Stephen) (Entered: 10/31/2018)
		* * * * *



DATE	DOCKET NUMBER	PROCEEDINGS
11/1/18	461	<p>JOINT PRETRIAL ORDER: This case has been set for a two week bench trial to begin on November 5, 2018. The Court will not be in session on November 8 or 12, 2018. The parties believe that the trial can be completed in the allotted time. At least one party has not consented to trial by magistrate. The Court enters this Joint Pretrial Order as modified on the record at the Final Pretrial Conference held November 1, 2018. SO ORDERED. (Signed by Judge Jesse M. Furman on 11/1/2018) (ne) (Entered: 11/01/2018)</p>
		* * * * *
11/5/18	485	<p>AMENDED OPINION AND ORDER. Defendants' motion for a stay of trial and associated deadlines is DENIED. The Clerk of Court is directed to terminate Docket No. 397. SO ORDERED. (Signed by Judge Jesse M. Furman (Amended) on 11/5/2018) (rjm) (Entered: 11/05/2018)</p>
		* * * * *

DATE	DOCKET NUMBER PROCEEDINGS
11/5/18	Minute Entry for proceedings held before Judge Jesse M. Furman: Bench Trial begun on 11/5/2018. See transcript.— Trial continued to 11/6/2018 at 9:00 am. (ab) (Entered: 11/06/2018)
	* * * * *
11/6/18	Minute Entry for proceedings held before Judge Jesse M. Furman: Bench Trial held on 11/6/2018. See transcript.— Trial continued to 11/7/2018 at 9:00 am (ab) (Entered: 11/09/2018)
	* * * * *
11/7/18	Minute Entry for proceedings held before Judge Jesse M. Furman: Bench Trial held on 11/7/2018. See transcript.— Trial continued to 11/9/2018 at 9:00 am (ab) (Entered: 11/09/2018)
	* * * * *
11/9/18	Minute Entry for proceedings held before Judge Jesse M. Furman: Bench Trial held on 11/9/2018. See transcript.— Trial continued to 11/13/2018 at

DATE	DOCKET NUMBER	PROCEEDINGS
		9:00 am (ab) (Entered: 11/09/2018)
		* * * * *
11/13/18		Minute Entry for proceedings held before Judge Jesse M. Furman: Bench Trial held on 11/13/2018. See transcript.— Trial continued to 11/14/2018 at 9:00 am (ab) (Entered: 11/30/2018)
		* * * * *
11/14/18		* * * NOTICE TO ATTORNEY TO RE-FILE DOCUMENT—EVENT TYPE ERROR. Notice to Attorney Matthew Colangelo to RE-FILE Document 528 SECOND MOTION to Admit Trial Exhibits into Evidence. Use the event type Letter found under the event list Other Documents. (db) (Entered: 11/14/2018)
11/14/18		Minute Entry for proceedings held before Judge Jesse M. Furman: Bench Trial held on 11/14/2018. See transcript.— Trial continued to 11/15/2018 at 9:00 am (ab) (Entered: 11/30/2018)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
11/15/18		Minute Entry for proceedings held before Judge Jesse M. Furman: Bench Trial held on 11/15/2018. See transcript.— Trial continued to 11/27/2018 at 9:30 am. (ab) (Entered: 11/30/2018)
		* * * * *
11/18/18	540	LETTER MOTION to Stay Further Proceedings addressed to Judge Jesse M. Furman from Joshua E. Gardner dated November 18, 2018. Document filed by Bureau of the Census, Ron S. Jarmin, Wilbur L. Ross, Jr., United State Department of Commerce. (Attachments: #1 Exhibit grant of certiorari) (Gardner, Joshua) (Entered: 11/18/2018)
		* * * * *
11/20/18	543	LETTER RESPONSE in Opposition to Motion addressed to Judge Jesse M. Furman from Matthew Colangelo dated November 20, 2018 re: 540 LETTER MOTION to Stay Further Proceedings addressed to Judge

<b>DATE</b>	<b>DOCKET NUMBER</b>	<b>PROCEEDINGS</b>
11/20/18	544	Jesse M. Furman from Joshua E. Gardner dated November 18 2018. . Document filed by State Of New York. (Colangelo, Matthew) (Entered: 11/20/2018)  MEMORANDUM OPINION AND ORDER denying 540 Letter Motion to Stay: For the reasons set forth within, Defendants' latest motion to halt these proceedings is DENIED. Barring a stay from the Second Circuit of the Supreme Court, Defendants shall file their post-trial briefing by the Court-ordered deadline of tomorrow and appear for oral argument as directed on November 27, 2018. The Clerk of Court is directed to terminate Docket No. 540. (Signed by Judge Jesse M. Furman on 11/20/2018) (ab) (Entered: 11/20/2018)
11/21/18	545	PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW. Document filed by State Of New York. (Attachments: #1 Supplement Plaintiffs' Joint Proposed Post-Trial Conclusions of Law) (Colangelo, Matthew) (Entered: 11/21/2018)

<b>DATE</b>	<b>DOCKET NUMBER</b>	<b>PROCEEDINGS</b>
11/21/18	546	PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW. Document filed by Bureau of the Census, Ron S. Jarmin, Wilbur L. Ross, Jr., United States Department of Commerce. (Federighi, Carol) (Entered: 11/21/2018)
		* * * * *
11/27/18		Minute Entry for proceedings held before Judge Jesse M. Furman: Bench Trial completed on 11/27/2018. See transcript. (ab) (Entered: 11/30/2018)
		* * * * *
12/4/18	550	POST TRIAL MEMORANDUM. Document filed by State Of New York. (Colangelo, Matthew) (Entered: 12/04/2018)
12/4/18	551	POST TRIAL MEMORANDUM. Document filed by Bureau of the Census, Ron S. Jarmin, Wilbur L. Ross, Jr., United States Department of Commerce. (Ehrlich, Stephen) (Entered: 12/04/2018)

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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Docket No. 1:18-cv-5025

NEW YORK IMMIGRATION COALITION;  
CASA DE MARYLAND; AMERICAN-ARAB  
ANTI-DISCRIMINATION COMMITTEE; ADC RESEARCH  
INSTITUTE; MAKE THE ROAD-NEW YORK, PLAINTIFFS

*v.*

UNITED STATES DEPARTMENT OF COMMERCE;  
WILBUR L. ROSS, IN HIS OFFICIAL CAPACITY  
AS SECRETARY OF COMMERCE; BUREAU OF THE  
CENSUS, AN AGENCY WITHIN THE UNITED STATES  
DEPARTMENT OF COMMERCE; RON S. JARMIN,  
IN HIS CAPACITY AS PERFORMING THE  
NON-EXCLUSIVE FUNCTIONS AND DUTIES OF  
THE DIRECTOR OF THE U.S. CENSUS BUREAU,  
DEFENDANTS

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**DOCKET ENTRIES**

<b>DATE</b>	<b>DOCKET NUMBER</b>	<b>PROCEEDINGS</b>
6/6/18	1	COMPLAINT against Bureau of the Census, Ron S. Jarmin, Wilbur L. Ross, United States Department of Commerce. (Filing Fee \$400.00, Receipt Number 0208-15161122) Document filed by American-Arab Anti-Discrimination Committee, CASA de Maryland ADC Research Institute, The New York

DATE	DOCKET NUMBER	PROCEEDINGS
		Immigration Coalition, Make the Road-New York. (Freedman, John) (Entered: 06/06/2018)
		* * * * *
6/6/18	3	STATEMENT OF RELATEDNESS re: that this action be filed as related to 18 Civ. 2921 (JMF). Document filed by ADC Research Institute, American-Arab Anti-Discrimination Committee, CASA de Maryland, Make the Road-New York. The New York Immigration Coalition. (Freedman, John) (Entered: 06/06/2018)
		* * * * *
6/7/18		CASE REFERRED TO Judge Jesse M. Furman as possibly related to 18-cv-2921. (jgo) (Entered: 06/07/2018)
		* * * * *
6/8/18		CASE ACCEPTED AS RELATED. Create association to 1:18-cv-02921-JMF. Notice of Assignment to follow. (bcu) (Entered: 06/08/2018)
		* * * * *



DATE	DOCKET NUMBER	PROCEEDINGS
6/26/18	30	LETTER addressed to Judge Jesse M. Furman from John A. Freedman dated June 26, 2018 re: Discovery Beyond the Administrative Record. Document filed by ADC Research Institution, American-Arab Anti-Discrimination Committee, CASA de Maryland, Make the Road-New York, New York Immigration Coalition. (Attachments: #1 Exhibit 1, #2 Exhibit 2) (Freedman, John) (Entered: 06/26/2018)
		* * * * *
6/29/18	38	MOTION to Dismiss. Document filed by Bureau of the Census, Ron S. Jarmin, Wilbur L. Ross, United States Department of Commerce. (Ehrlich, Stephen) (Entered: 06/29/2018)
6/29/18	39	MEMORANDUM OF LAW in Support re: 38 MOTION to Dismiss . . . Document filed by Bureau of the Census, Ron S. Jarmin, Wilbur L. Ross, United States Department of Commerce. (Ehrlich, Stephen) (Entered: 06/29/2018)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
7/5/18	48	ORDER: For the reasons stated on the record at the conference held on July 3, 2018, Plaintiffs request for an order directing Defendants to complete the administrative record and authorizing extra-record discovery is GRANTED. As discussed, the following deadlines shall apply unless and until the Court says otherwise: Fact Discovery due by 10/12/2018. Expert Discovery due by 10/12/2018. Status Conference set for 9/14/2018 at 02:00 PM in Courtroom 1105, 40 Centre Street, New York, NY 10007 before Judge Jesse M. Furman. (Signed by Judge Jesse M. Furman on 7/5/2018) (ne) (Entered: 07/05/2018)
7/9/18	49	MEMORANDUM OF LAW in Opposition re: 38 MOTION to Dismiss . . . Document filed by ADC Research Institute, American-Arab Anti-Discrimination Committee, CASA de Maryland, Make the Road-New York, New York Immigration Coalition. (Attachments: #1 Ayoub Declaration, #2 Escobar Declara-

DATE	DOCKET NUMBER	PROCEEDINGS
		tion, #3 Valdes Declaration, #4 Plum Declaration) (Freedman, John) (Entered: 07/09/2018)
		* * * * *
7/13/18	58	REPLY MEMORANDUM OF LAW in Support re: 38 MOTION to Dismiss . . . Document filed by Bureau of the Census, Ron S. Jarmin, Wilbur L. Ross, United States Department of Commerce. (Federighi, Carol) (Entered: 07/13/2018)
		* * * * *
7/26/18	70	OPINION AND ORDER re: (38 in 1:18-cv-05025-JMF) MOTION to Dismiss . filed by Wilbur L. Ross, United States Department of Commerce, Bureau of the Census, Ron S. Jarmin, (154 in 1:18-cv-02921-JMF) MOTION to Dismiss . filed by Wilbur L. Ross, Jr., United States Department of Commerce, Bureau of the Census, Ron S. Jarmin, Defendants' motions to dismiss are GRANTED in part and DENIED in part. First, the Court rejects Defendants' attempts to insu-

DATE	DOCKET NUMBER PROCEEDINGS
	<p>late Secretary Ross’s decision to reinstate a question about citizenship on the 2020 census from judicial review. Granted, courts must give proper deference to the Secretary, but that does not mean that they lack authority to entertain claims like those pressed here. To the contrary, courts have a critical role to play in reviewing the conduct of the political branches to ensure that the census is conducted in a manner consistent with the Constitution and applicable law. Second, the Court concludes that Plaintiffs’ claims under the Enumeration Clause which turn on whether Secretary Ross had the power to add a question about citizenship to the census and not on whether he exercised that power for impermissible reasons must be dismissed. Third, assuming the truth of their allegations and drawing all reasonable inferences in their favor, the Court finds that NGO Plaintiffs plausibly allege that Secretary Ross’s decision to reinstate the citizenship ques-</p>

DATE	DOCKET NUMBER PROCEEDINGS
	<p>tion was motivated at least in part by discriminatory animus and will result in a discriminatory effect. Accordingly, their equal protection claim under the Due Process Clause (and Plaintiffs' APA claims, which Defendants did not substantively challenge) may proceed. None of that is to say that Plaintiffs will ultimately prevail in their challenge to Secretary Ross's decision to reinstate the citizenship question on the 2020 census. As noted, the Enumeration Clause and the Census Act grant him broad authority over the census, and Plaintiffs may not ultimately be able to prove that he exercised that authority in an unlawful manner. Put another way, the question at this stage of the proceedings is not whether the evidence supports Plaintiffs' claims, but rather whether Plaintiffs may proceed with discovery and, ultimately, to summary judgment or trial on their claims. The Court concludes that they may as to their claims under the APA and the Due</p>

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DATE	DOCKET NUMBER PROCEEDINGS
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Process Clause and, to that extent, Defendants' motions are denied. Per the Court's Order entered on July 5, 2018 (Docket No. 199), the deadline for the completion of fact and expert discovery in these cases is October 12, 2018, and the parties shall appear for a pretrial conference on September 14, 2018. The parties are reminded that, no later than the Thursday prior to the pretrial conference, they are to file on ECF a joint letter addressing certain issues. (See *id.* at 2-3). In that letter, the parties should also give their views with respect to whether the case should resolved by way of summary judgment or trial and whether the two cases should be consolidated for either of those purposes. The Clerk of Court is directed to terminate 18-CV-2921, Docket No. 154; and 18-CV-5025, Docket No. 38. SO ORDERED. (Signed by Judge Jesse M. Furman on 7/26/18) (yv) (Entered: 07/26/2018)

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DATE	DOCKET NUMBER	PROCEEDINGS
8/10/18	81	LETTER MOTION to Compel John M. Gore to Appear for Deposition Testimony addressed to Judge Jesse M. Furman from John A. Freedman dated August 10, 2018. Document filed by ADC Research Institute, American-Arab Anti-Discrimination Committee, CASA de Maryland, Make the Road-New York, New York Immigration Coalition. (Attachments: #1 Exhibit 1, #2 Exhibit 2, #3 Exhibit 3, #4 Exhibit 4, #5 Exhibit 5) (Freedman, John) (Entered: 08/10/2018)
		* * * * *
8/15/18	90	LETTER RESPONSE in Opposition to Motion addressed to Judge Jesse M. Furman from Kate Bailey dated 08/15/2018 re: 81 LETTER MOTION to Compel John M. Gore to Appear for Deposition Testimony addressed to Judge Jesse M. Furman from John A. Freedman dated August 10, 2018. . Document filed by Bureau of the Census, Ron S. Jarmin, Wilbur L. Ross, United States

DATE	DOCKET NUMBER	PROCEEDINGS
8/17/18	91	<p>Department of Commerce. (Bailey, Kate) (Entered: 08/15/2018)</p> <p>ORDER granting 81 Letter Motion to Compel; denying 82 Letter Motion to Compel. For the foregoing reasons, Plaintiffs' letter motion of Au- gust 10th is GRANTED to the extent it seeks an order com- pelling Defendants to make AAG Gore available for a depo- sition, and their letter motion of August 13th is DENIED to the extent it seeks an order com- pelling Defendants to produce "materials erroneously with- held." The Clerk of Court is directed to terminate 18-CV- 2921, Docket Nos. 236 and 237, and 18-CV-5025, Docket Nos. 81 and 82. SO ORDERED. (Signed by Judge Jesse M. Furman on 8/17/2018) (ne) (Entered: 08/17/2018)</p>
* * * * *		
8/22/18	98	<p>MOTION for Leave to File Amended Complaint. Docu- ment filed by ADC Research Institute, American-Arab Anti- Discrimination Committee, CASA</p>



DATE	DOCKET NUMBER	PROCEEDINGS
8/22/18	99	<p>de Maryland, Make the Road-New York, New York Immigration Coalition (Rosborough, Davin) (Entered: 08/22/2018)</p> <p>MEMORANDUM OF LAW in Support re: 98 MOTION for Leave to File Amended Complaint . . . Document filed by ADC Research Institute, American-Arab Anti-Discrimination Committee, CASA de Maryland, Make the Road-New York, New York Immigration Coalition. (Attachments: #1 Exhibit Proposed Amended Complaint) (Rosborough, Davin) (Entered: 08/22/2018)</p>
		* * * * *
8/28/18	108	<p>MEMORANDUM OF LAW in Opposition re: 98 MOTION for Leave to File Amended Complaint . . . Document filed by Bureau of the Census, Ron S. Jarmin, Wilbur L. Ross, United States Department of Commerce. (Coyle, Garrett) (Entered: 08/28/2018)</p>
		* * * * *
8/31/18	115	<p>REPLY MEMORANDUM OF LAW in Support re: 98 MO-</p>

DATE	DOCKET NUMBER	PROCEEDINGS
8/31/18	116	<p>TION for Leave to File Amended Complaint . . . Document filed by ADC Research Institute, American-Arab Anti-Discrimination Committee, CASA de Maryland, Make the Road-New York, New York Immigration Coalition. (Attachments: #1 Exhibit A—Deposition Excerpts, #2 Exhibit B—Freedman email to Defs Counsel) (Rosborough, Davin) (Entered: 08/31/2018)</p> <p>LETTER MOTION to Stay Discovery Pending Petition for Writ of Mandamus addressed to Judge Jesse M Furman from Carol Federighi dated August 31, 2018. Document filed by Bureau of the Census, Ron S. Jarmin, Wilbur L. Ross, United States Department of Commerce. (Federighi, Carol) (Entered: 08/31/2018)</p>
9/4/18	122	<p>* * * * *</p> <p>ORDER with respect to 116 Letter Motion to Stay Discovery Pending Petition for Writ of Mandamus. To the extent that Defendants see “an administrative stay” (that is, a stay pending a decision on Defendants’</p>

DATE	DOCKET NUMBER PROCEEDINGS
	<p data-bbox="737 352 1203 947">motion for a stay), the request is DENIED. Plaintiffs in 18-CV-2921 and 18-CV-5025 shall file a single letter response to Defendants' motion by Thursday, September 6, 2018; Defendants shall notify the Court by Friday, September 7, 2018, at noon, if they wish to file a reply and, if so, shall file the reply by Monday, September 10, 2018. (HEREBY ORDERED by Judge Jesse M. Furman) (Text Only Order) (Furman, Jesse) (Entered: 09/04/2018)</p> <p data-bbox="695 972 911 993">* * * * *</p>
9/6/18	<p data-bbox="626 1020 678 1052">128</p> <p data-bbox="737 1020 1203 1537">LETTER RESPONSE to Motion addressed to Judge Jesse M. Furman from John A. Freedman dated September 6, 2018 re: 116 LETTER MOTION to Stay Discovery Pending Petition for Writ of Mandamus addressed to Judge Jesse M. Furman from Carol Federighi dated August 31, 2018. . Document filed by ADC Research Institute, American-Arab Anti-Discrimination Committee,</p>

DATE	DOCKET NUMBER	PROCEEDINGS
9/6/18	129	<p>CASA de Maryland, Make the Road-New York, New York Immigration Coalition. (Attachments: #1 Exhibit 1, #2 Exhibit 2, #3 Exhibit 3, #4 Exhibit 4, #5 Exhibit 5, #6 Exhibit 6) (Freedman, John) (Entered: 09/06/2018)</p> <p>LETTER RESPONSE to Motion addressed to Judge Jesse M. Furman from John A. Freedman dated September 6, 2018 re: 116 LETTER MOTION to Stay Discovery Pending Petition for Writ of Mandamus addressed to Judge Jesse M. Furman from Carol Federighi dated August 31, 2018. (Corrected Version). Document filed by ADC Research Institute, American-Arab Anti-Discrimination Committee, CASA de Maryland, Make the Road-New York, New York Immigration Coalition. (Attachments: #1 Exhibit 1, #2 Exhibit 2, #3 Exhibit 3, #4 Exhibit 4, #5 Exhibit 5, #6 Exhibit 6, #7 Exhibit 7) (Freedman, John) (Entered: 09/06/2018)</p>

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DATE	DOCKET NUMBER	PROCEEDINGS
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9/7/18	131	<p>ORDER re: 116 LETTER MOTION to Stay Discovery Pending Petition for Writ of Mandamus filed by Wilbur L. Ross, United States Department of Commerce, Bureau of the Census, Ron S. Jarmin. Because the deposition of John Gore is apparently scheduled for September 12, 2018 (a fact that was conspicuously omitted from the stay application that Defendants filed on the eve of Labor Day weekend) (Docket No. 129, at 3), and the Court is unavailable Monday and Tuesday on account of a Jewish holiday, Defendants shall file any reply to Plaintiffs' opposition by TODAY at noon—not by Monday, as the Court had indicated in its Order of September 4, 2018. SO ORDERED. (Signed by Judge Jesse M. Furman on 9/7/2018) (Text Only Order) (Furman, Jesse) (Entered: 09/07/2018)</p>
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DATE	DOCKET NUMBER	PROCEEDINGS
9/7/18	133	<p>MEMORANDUM OPINION AND ORDER re: 98 MOTION for Leave to File Amended Complaint . filed by New York Immigration Coalition, American-Arab Anti-Discrimination Committee, Make the Road-New York, ADC Research Institute CASA de Maryland. Accordingly, Plaintiffs' motion to file an amended complaint is DENIED. Notably, that result may not have much practical impact on Plaintiffs' claims or how the Court ultimately resolves them. First, Plaintiffs seek the same relief in their original Complaint and the Proposed Amended Complaint namely, (1) a declaratory judgment that the reinstatement of the citizenship question is unconstitutional and a violation of the APA and (2) and injunction against the inclusion of the question (compare Orig. Compl. at 67, with Proposed Am. Compl. at 104)) relief that can be granted only by the existing Defendants. Second, DOJ's conduct is ultimately within the scope of the Court's review of</p>

DATE	DOCKET NUMBER	PROCEEDINGS
9/7/18	134	<p>Secretary Ross’s final decision, as the APA provides that “[a] preliminary, procedural, or intermediate agency action . . . is subject to review on the review of the final agency action.” 5 U.S.C. § 704; see also Serotte, Reich &amp; Wilson, LLP, 2009 WL 3055294, at *6. And third, in part because of ADC’s involvement in the case, the Court can presumably consider the impact of Defendants’ conduct on Florida and grant relief that would extend to Florida even in the absence of the proposed new Plaintiffs. But whether that is the case or not, there is no basis to add the DOJ Defendants as new defendants and the Family Action Network Movement and the Florida Immigration Coalition as new plaintiffs. The Clerk of Court is directed to terminate Docket No. 98. (Signed by Judge Jesse M. Furman on 9/7/2018) (tro) (Entered: 09/07/2018)</p> <p>OPINION AND ORDER re: (292 in 1:18-cv-02921-JMF) LETTER MOTION to Stay Discov-</p>

DATE	DOCKET NUMBER	PROCEEDINGS
		<p>ery Pending Petition for Writ of Mandamus addressed to Judge Jesse M. Furman from Carol Federighi dated August 31, 2018, filed by Wilbur L. Ross, Jr., United States Department of Commerce, Bureau of the Census, Ron S. Jarmin, (116 in 1:18-c-05025-JMF) LETTER MOTION to Stay Discovery Pending Petition for Writ of Mandamus addressed to Judge Jesse M. Furman from Carol Federighi dated August 31, 2018, filed by Wilbur L. Ross, United States Department of Commerce, Bureau of the Census, Ron S. Jarmin. For the foregoing reasons, Defendants' motion for a stay of discovery is DENIED in its entirety. The Clerk of Court is directed to terminate 18-CV-2921, Docket No. 292 and 18-CV-5025, Docket No. 116. (Signed by Judge Jesse M. Furman on 9/7/2018) (tro) Entered: 09/07/2018)</p> <p style="text-align: center;">* * * * *</p>
9/10/18	139	LETTER MOTION for Discovery requesting leave to depose Secretary of Commerce Wilbur



DATE	DOCKET NUMBER	PROCEEDINGS
		<p>L. Ross, Jr. addressed to Judge Jesse M. Furman from John A. Freedman dated September 10, 2018. Document filed by ADC Research Institute, American-Arab Anti-Discrimination Committee, CASA de Maryland, Make the Road-New York, New York Immigration Coalition. (Attachments: #1 Exhibit 1, #2 Exhibit 2, #3 Exhibit 3, #4 Exhibit 4, #5 Exhibit 5, #6 Exhibit 6, #7 Exhibit 7, #8 Exhibit 8, #9 Exhibit 9) (Freedman, John) (Entered: 09/10/2018)</p>
		* * * * *
9/13/18	144	<p>LETTER RESPONSE in Opposition to Motion addressed to Judge Jesse M. Furman from Carol Federighi dated 09/13/2018 re: 139 LETTER MOTION for Discovery requesting leave to depose Secretary of Commerce Wilbur L. Ross, Jr. addressed to Judge Jesse M. Furman from John A. Freedman dated September 10, 2018. . Document filed by Bureau of the Census, Ron S. Jarmin, Wilbur L. Ross, United States Department of</p>

DATE	DOCKET NUMBER	PROCEEDINGS
		Commerce. (Attachments: #1 Exhibit 1: In re United States (Vilsack) Order, #2 Exhibit 2: Pls' RFAs to Commerce) (Federighi, Carol) (Entered: 09/13/2018)
		* * * * *
9/14/18	146	ORDER: As stated on the record at the conference held on September 14, 2018, the parties agree that consolidation of these cases would be appropriate. In light of that, and because the actions involve common questions of law and fact, it is hereby ORDERED that, pursuant to Rule 42(a)(2) of the Federal Rules of Civil Procedure, the two cases are consolidated under the case number 18-CV-2921. The Clerk of Court is directed to Consolidated 18-CV-2921 and 18-CV-5025 under case number 18-CV-2921, and to close 18-CV-5025. SO ORDERED. (Signed by Judge Jesse M. Furman on 9/14/2018) Filed In Associated Cases: 1:18-cv-02921-JMF, 1:18-cv-05025-JMF (ne) (Entered: 09/14/2018)
		* * * * *



**U.S. Department of Justice**

Justice Management Division

*Office of the General Counsel*

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[JUN 25 2014]

*Washington, D.C. 20530*

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](mailto:Arthur.Gary@usdoj.gov).

Sincerely yours,

/s/ ARTHUR E. GARY  
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		Classifications	Classification	Uses	Lowest geography	ACS Characteristics	Frequency
42 U.S.C. 1973 et seq.; 28 C.F.R. Part 51; <i>Bartlett v. Strickland</i> , 556 U.S. 1 (2009); LULAC v. Perry, 548 U.S. 399 (2006); <i>Johnson v. DeGrandy</i> , 512 U.S. 997 (1994); <i>Thorburg v. Gingles</i> , 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); <i>Johnson v. DeGrandy</i> , 512 U.S. 997 (1994); <i>Thorburg v. Gingles</i> , 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							
42 U.S.C. 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
Voting Rights Act of 1965, Section 203							

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

Statutory Requirement	Title	Creations	Classification	Uses	Lowest geography	ACS Characteristics	Frequency
	The VI of Civil Rights Act of 1964 (Nondiscrimination in Federally assisted programs and activities)	42 USC 20004 to 20004-7; <i>Law v. Nichols</i> , 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, LAM, 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

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

Statutory Requirement	Citations	Classification	Uses	Lowest geography	ACS Characteristics	Frequency
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, JMC, WISLY	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 basis of sex in education programs and activities receiving federal financial assistance	Census block group	SEX	Annual



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

Statutory Requirement	Citations	Classification	Uses	Lowest geography	ACS Characteristics	Frequency
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.; <i>Wards Cove Packing Co. v. Antonio</i> , 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 the General Counsel*

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***Washington, D.C. 20530***

Nov. 4, 2016

John H. Thompson  
Director  
Economics and Statistics Administration  
U.S. Census Bureau  
United 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 pop-

ulations. 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](mailto:Arthur.Gary@usdoj.gov).

Sincerely yours,

/s/ ARTHUR E. GARY  
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		Classification	Uses	Lowest geography	Frequency
Title	Citations				
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 37956g(b)(5), 37956g(b)(19), 37956g-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 OVA.	Census block group	Annual
Title VII of the Civil Rights Act of 1964	42 USC 2000e et seq.; 42 USC 2000e-2(k); <i>Wards Cove Packing Co. v. Atonio</i> , 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

Title	Statutory Requirement Citations	Classification	Uses	Lowest geography	Frequency
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 3799d(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

Title	Statutory Requirement		Classification	Uses	Lowest geography	Frequency
	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

Title	Statutory Requirement Citations	Classification	Uses	Lowest geography	Frequency
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 1994	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

**To:** Wilbur Ross [REDACTED]  
**Cc:** Branstad, Eric (Federal)[EBranstad@doc.gov]  
**From:** Comstock, Earl (Federal)  
**Sent:** Fri 3/10/2017 8:31:29 PM  
**Importance:** Normal  
**Subject:** Your Question on the Census  
**Received:** Fri 3/10/2017 8:31:30 PM

I was not able to catch anyone at their desk when I called the numbers I have for the Census Bureau from their briefing. However, the

Census Bureau web page on apportionment is explicit and can be found at

<https://www.census.gov/population/apportionment/about/faq.html#Q16> It says:

***Are undocumented residents (aliens) in the 50 states included in the apportionment population counts?***

Yes, all people (citizens and noncitizens) with a usual residence in the 50 states are to be included in the census and thus in the apportionment counts.

Further, this WSJ blog post from 2010 confirms that neither the 2000 nor the 2010 Census asked about citizenship. <http://blogs.wsj.com/numbers/the-pitfalls-of-counting-illegal-immigrants-937/>

**THE NUMBERS**



## The Pitfalls of Counting Illegal Immigrants



By CARL BIALIK

May 7, 2010 7:05 pm ET

The debate over Arizona's immigration law has included several estimates of the state's illegal-immigrant population, at "almost half a million," "half a million" or "more than half a million." Arguing against the law, Homeland Security chief Janet Napolitano—who is the former governor of Arizona—pointed to decreasing illegal immigration in the state.

These estimates and claims rest on several annual efforts to count illegal immigrants in the U.S. The non-partisan Pew Hispanic Center estimated that in 2008 the nationwide population was 11.9 million, and half a million in Arizona. The federal Department of Homeland Security and the Center for Immigration Studies, a Washington, D.C., research group that opposes increased immigration, agree on a figure of 10.8 million for 2009, with DHS putting the Arizona population at 460,000, down from 560,000 a year earlier.

But as my print column notes this week, these estimates are limited by several factors that make it difficult for researchers to count this population. [REDACTED] Thus estimates of the number of illegal immigrants in the country are indirect and possibly far off from the correct count.

These studies rely on census surveys, and assume that about 10% of illegal immigrants aren't counted in these surveys. But that figure largely is based on a 2001 survey of Mexican-born people living in Los Angeles. "I do not advise use of my estimated undercounts for the 2000 census outside of L.A. county, nor for migrants from other nations," said study co-author Enrico Marcelli, assistant professor of sociology at San Diego State University. "However, demographers do not have any other empirical evidence at the moment with which to proceed."

One concern is that the nearly two in five households who didn't respond to the 2001 survey may have included a disproportionately large number who also didn't respond to census interviewers. Marcelli said further study would be needed to test that possibility, but he noted the extent of the efforts to select a representative sample and to put respondents at ease in order to elicit honest answers.

"As far as I know, there has not been a new, serious attempt to estimate the undercount of illegal immigrants in the census," said Steven Camarota, director of research for the Center for Immigration Studies.

In 2005, Robert Justich, then a portfolio manager for Bear Stearns, co-authored [a report](#) suggesting the population of illegal immigrants "may be as high as 20 million people." Jeffrey Passel, senior demographer for the Pew Hispanic Center, disputed that finding. For one thing, other data sources, such as U.S. birth rates and Mexico's own census, don't corroborate such a large number. If there were really so many more immigrants, than there would be more women of child-bearing age, and more births. And if instead the miss-

ing millions are mostly Mexican men working in the U.S. and sending money home, the flip side of that influx would be reflected as a gap in the Mexican census numbers.

“Definitely the number is not as high as 20 million,” said Manuel Orozco, senior associate of the Inter-American Dialogue, a Washington, D.C., policy-analysis group.

Justich, who now owns a music and film production firm, countered that immigrants from countries other than Mexico may make up the rest. However, he added that the number is no longer as high as 20 million.

Larger estimates also sometimes are based on border-patrol counts of apprehensions, which are far from reliable proxies. No one is sure of how many people are missed for each one who is caught trying to cross into the U.S. illegally. Many of those who do get through may return quickly, or cross back and forth. Also, some people are caught more than once, inflating the count. “It seems like we’re not missing that many bodies in the United States,” said Camarata, referring to the gap between the 20 million figure and his own.

The immigrant counters generally have seen a decline in the illegal-immigration population. “Economic drivers are very, very powerful” in lowering the illegal-immigrant population, said Hans Johnson, associate director of the Public Policy Institute of California. Others point to stepped-up enforcement efforts.

However, because of all the assumptions baked into these numbers, such drops come with so much statistical uncertainty that they may not be statistically sig-

nificant. “The methodology for doing these estimates is not really designed to measure year-to-year change,” Passel said.

One key difference between his count and the federal agency’s: Homeland Security uses the Census Bureau’s American Community Survey, which has a much larger sample size than the Current Population Survey, which Passel used. “I developed all of my methodology and all of the things that go with it when there wasn’t an ACS,” Passel said, “and I haven’t gotten around to shifting to the new survey.”

The ACS was introduced after the 2000 census, and may help overcome a problem with census numbers exposed in the last decennial census. [REDACTED] Census officials think these estimates have improved since 2000 thanks to the annual ACS surveys of three million households. “That’s the source we’re using to estimate the movement” of the foreign-born population, said Howard Hogan, the Census Bureau’s associate director for demographic programs. “It’s a huge improvement over anything we had available in the ’90s.”

Still, the Census Bureau doesn’t ask people about their immigration status, in part because such questions may drive down overall response rates. Robert M. Groves, director of the Census Bureau, said he’d like to test that hypothesis. “We’re sort of data geeks here,” Groves said. “What we’d like to do to answer that question is an experiment.”

That doesn’t mean that census interviewers don’t try to find and enumerate illegal immigrants. Groves compares counting that group to efforts to track another population that is hard to count, though not necessarily

because of willful avoidance: people who are homeless. Census interviewers spend three days visiting soup kitchens, shelters and outdoor gathering spots such as under certain highway overpasses in Los Angeles. “You don’t have to look at that operation very long to realize that though it’s a heroic effort, there are all sorts of holes in it,” Groves said. As a result, the Census Bureau includes anyone counted in that effort in the overall population, but doesn’t break out a separate estimate of homeless people.

“We would like to do estimates that have the smallest number of assumptions we can’t test,” Groves said. When it comes to counting illegal immigrants, “there are a set of assumptions that we know we can’t test. When we find ourselves in that situation, then we’re uncomfortable giving a Census Bureau estimate that is subject to all of those debates.”

Further reading: Passel outlined methods for counting the illegal-immigrant population, while this paper analyzed some difficulties with the estimates. Earlier the Christian Science Monitor and I have examined these numbers. Immigration statistics have become a subject of debate in the U.K., as well.

**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

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**From:** Alexander, Brooke (Federal) [REDACTED]  
**Sent:** 4/20/2017 11:49:32 PM  
**To:** Comstock, Earl (Federal) [REDACTED]  
**CC:** Teramoto, Wendy (Federal) [REDACTED]  
**Subject:** Ok. . . . I have tried 3 times to send from SWLR's email but can't for some reason and he's in his office so I can't use his computer so I'm just sending this note from my email. . . . but it's from him. . . .

Earl:

Census Director has on April 29 a meeting of the National Advisory Committee on Racial, Ethnic and Other Populations. We must get our issue resolved before this!

---

**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 Phone

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 Phone

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

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**From:** Comstock, Earl (Federal) [REDACTED]  
**Sent:** 5/4/2017 12:27:32 AM  
**To:** Branstad, Eric (Federal) [EBranstad@doc.gov]  
**Subject:** Re: DOJ contact

Thanks Eric! Earl

Sent from my Phone

On May 3, 2017, at 8:10 PM, Branstad, Eric (Federal) [REDACTED] wrote:

Eric D Branstad  
Senior White House Advisor  
Department of Commerce  
[REDACTED]  
(202) 531-1620

Begin forwarded message:

**From:** "Flynn, Matthew J. EOP/WHO" [REDACTED]  
**Date:** May 3, 2017 at 7:15:56 PM EDT  
**To:** "Branstad, Eric (Federal)" [REDACTED]  
**Subject: RE: DOJ contact**  
DOJ Mary Blanche Hankey [REDACTED] [REDACTED]

-----Original Message-----

**From:** Branstad, Eric (Federal)  
**Sent:** Wednesday, May 3, 2017 3:41 PM  
**To:** Flynn, Matthew J. EOP/WHO [REDACTED]  
**Subject:** DOJ contact

Who is best counterpart to reach out to at DOJ—  
Regarding Census and Legislative issue?

Thanks  
Eric

Branstad, Eric (Federal)  
Senior White House Advisor  
Department of Commerce  
(202) 531-1620  
[REDACTED]

**To:** Comstock, Earl (Federal) PII Herbst,  
Ellen (Federal)[EHerbst@doc.gov]  
**From:** Langdon, David (Federal)  
**Sent:** Wed 5/24/2017 9:38:29 PM  
**Importance:** High  
**Subject:** Counting of illegal immigrants  
**Received:** Wed 5/24/2017 9:38:30 PM  
**Crawford Letter & DOJ Memo.pdf**

Earl and Ellen,

Long story short is that the counting of illegal immigrants (or of the larger group of non-citizens) has a solid and fairly long legal history.

The most recent case was Louisiana v. Bryson. In a lawsuit filed directly in the Supreme Court, without prior action in lower courts, the state contended that it has been denied one potential seat in the House because illegal immigrants are counted in census totals, putting Louisiana at a disadvantage in House apportionment. The motion for leave to file was denied.

A second piece of interest in a Bush 41 era DOJ opinion that proposed legislation to exclude illegal aliens from the decennial census was illegal.

Let me know if you need additional background on the legal arguments.

Dave

[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 Bureau (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,

Kris Kobach



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**From:** Wilbur Ross [REDACTED] PII  
**Sent:** 8/10/2017 7:38:25 PM  
**To:** Comstock, Earl (Federal) [REDACTED] PII  
**Subject:** Re: Census Matter

I would like to be briefed on Friday by phone. I probably will need an hour or so to study the memo first. We should be very careful, about everything, whether or not it is likely to end up in the SC. WLR

Sent from my iPad

> On Aug 9, 2017, at 10:24 AM, Comstock, Earl (Federal) [REDACTED] PII wrote:

>

> PREDECISIONAL AND ATTORNEY-CLIENT PRIVILEGED

>

> Mr. Secretary—we are preparing a memo and full briefing for you on the citizenship question. The memo will be ready by Friday, and we can do the briefing whenever you are back in the office. Since this issue will go to the Supreme Court we need to be diligent in preparing the administrative record.

>

> Earl

>

> On 8/8/17, 1:20 PM, "Wilbur Ross" PII  
wrote:

> Not Responsive / Deliberative

Not Responsive / Deliberative Were you on the call this morning about Census? They seem dig in about not sling the citizenship question and that raises the question of where is the DoJ in their analysis ? If they still have not come to a conclusion please let me know your contact person and I will call the AG.

Wilbur Ross

>

> Sent from my iPhone

>

>> On Aug 8, 2017, at 10:52 AM, Comstock, Earl (Federal) PII wrote:

>> Not Responsive / Deliberative

>>

>

>

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**From:** Comstock, Earl (Federal) [REDACTED]  
[REDACTED]@doc.gov]  
**Sent:** 8/16/2017 8:44:41 PM  
**To:** Teramoto, Wendy (Federal) [[REDACTED]  
[REDACTED]@doc.gov]  
**CC:** Wilbur Ross [REDACTED]  
**Subject:** Re: Memo on Census Question

Thanks Wendy. That works for me. Earl

**From:** Wendy Teramoto <[REDACTED]@doc.gov>  
**Date:** Wednesday, August 16, 2017 at 4:24 PM  
**To:** "Comstock, Earl (Federal)" [REDACTED]  
[REDACTED]@doc.gov>  
**Cc:** Wilbur Ross <[REDACTED]>  
**Subject:** Re: Memo on Census Question

Peter Davidson and Karen Dunn Kelly will both be here Monday. Let's spend 15 min together and sort this out. W

Sent from my Phone

On Aug 11, 2017, at 4:12 PM, Comstock, Earl (Federal) [REDACTED]@doc.gov> wrote:

Mr. Secretary—

Per your request, here is a draft memo on the citizenship question that James Uthmeier in the Office of General Counsel prepared and reviewed. Once you have a chance to review we should discuss so that we can refine the memo to better address any issues.

Before making any decisions about proceeding I would also like to bring in Peter Davidson and Census counsel to ensure we have a comprehensive analysis of all angles.

Thanks. Earl

<Census Memo Draft2 Aug 11 2017.docx>

---

**From:** Park-Su, Sahra [REDACTED]  
**Sent:** 8/29/2017 5:25:52 PM  
**To:** Comstock, Earl (Federal) [REDACTED]  
**CC:** Neuhaus, Chelsey [REDACTED] Leach, Macie (Federal) [REDACTED] Hernandez, Israel (Federal) [REDACTED] Dorsey, Cameron [REDACTED] Bedan, Morgan (Federal) [REDACTED]  
**Subject:** Re: Census

Chelsey,

Please add me to the list of attendees. Thank you.

Sahra Park-Su

Sent from my Phone

On Aug 29, 2017, at 1:23 PM, Comstock, Earl (Federal) <[REDACTED]> wrote:

Yes. That is the list as far as I know. Earl

**From:** "Neuhaus, Chelsey" [REDACTED]  
**Date:** Tuesday, August 29, 2017 at 1:18 PM  
**To:** Macie Leach [REDACTED] "Park-Su, Sahra" [REDACTED] "Hernandez, Israel (Federal)" [REDACTED] "Dorsey, Cameron" [REDACTED] "Comstock, Earl (Federal)" <[REDACTED]>  
**Cc:** "Bedan, Morgan (Federal)" [REDACTED]  
**Subject:** FW: Census

Hi All—Would one of you be able to confirm that these are the only attendees that should be included in next Wednesday's census briefing RE: legal questions:

Wendy Teramoto (Feder[REDACTED])

Israel Hernandez (Feder[REDACTED])  
Earl Comstock (Federal) [REDACTED]  
James Uthmeier (Federa[REDACTED])  
Davidson, Peter (Federal[REDACTED])  
Kelley, Karen (Federal) <[REDACTED]>

Thanks!

Chelsey Neuhaus  
Scheduler | Office of the Secretary  
United States Department of Commerce  
[REDACTED]

**From:** Kelley, Karen (Federal)  
**Sent:** Tuesday August 29, 2017 1:11 PM  
**To:** Teramoto, Wendy (Federal) [REDACTED]  
**Cc:** Davidson, Peter (Federal) [REDACTED]; Hernandez, Israel [REDACTED] Comstock, Earl (Federal [REDACTED]); Uthmeier, James (Federal) <[REDACTED]>; Neuhaus, Chelsey [REDACTED]; Bedan, Morgan (Federal) <[REDACTED]>  
**Subject:** Re: Census

Good with me..

Sent from my Phone

On Aug 29, 2017, at 12:36 PM, Teramoto, Wendy (Federal) <[REDACTED]> wrote:

Yes—how about next wed at 10 am—ccing KDK.

**From:** Davidson, Peter (Federal)  
**Sent:** Tuesday August 29, 2017 12:07 PM  
**To:** Hernandez, Israel (Federal) [REDACTED]; Comstock, Earl (Federal) [REDACTED]; Uthmeier, James (Federal) <[REDACTED]>  
**Cc:** Teramoto, Wendy (Federal) <[REDACTED]>  
**Subject:** Census

The Secretary asked to set up a briefing on some of the key legal questions he is concerned about. Can we get something on the books for next week when Izzy returns? I can't find Karen in the directory . . . but she should be included as well. Izzy, I know you and James have been working on this for a while . . . so I will hand off to you to coordinate.

---

**From:** Comstock, Earl (Federal) [REDACTED]  
**Sent:** 9/1/2017 3:21:06 AM  
**To:** Wilbur Ross [REDACTED]  
**CC:** Teramoto, Wendy (Federal) [REDACTED]  
**Subject:** Re: ITA Request for [REDACTED]

Understood. Wendy and I are working on it.

On census, I have a meeting tomorrow morning with Ellen and Karen where they are supposed to have definitive numbers. I will send you a report on the meeting and the numbers as soon as that finishes. I will ask Karen to report to you on any candidates and thoughts.

[REDACTED]

Earl

on 8/31/17, 11:12 PM, "Wilbur Ross" <[REDACTED]> wrote:

I have received no update, nor has there been an update on [REDACTED] nor the issue of the census question, nor whether KDB thinks we have our arms around the census cost data nor another candidate. To run census, [REDACTED]

Sent from my iPad

> On Aug 31, 2017, at 6:29 AM, Comstock, Earl (Federal) <[REDACTED]@doc.gov> wrote:

> [REDACTED]

> Earl



> On 8/30/17, 10:37 PM, “Wilbur Ross” [REDACTED] wrote:

[REDACTED]

>

> Sent from my iPad

>> On Aug 30, 2017, at 5:47 PM, Comstock, Earl (Federal) [REDACTED]@doc.gov> wrote:

[REDACTED]

>> From: “Comstock, Earl (Federal)” [REDACTED]@doc.gov>

>> Date: Wednesday, August 30, 2017 at 5:44 PM

>> To: “Ross, Wilbur (Federal)” [REDACTED]

>> Cc: Wendy Teramoto [REDACTED]@doc.gov>

>> Subject: ITA Request for [REDACTED]

>>

>> Mr. Secretary —

>>

[REDACTED]

>> Thank you.

>>

>> Earl

>>

>> [cid:image001.png@01D321B8.05B678E0]

>> [cid:image002.png@01D321B8.05B678E0]

>> [FU ScanSnap Manager #iX500]

>>

>>

>>

>> <image001.png>

>> <image002.png>

>> <image003.png>

>

>

**From:** JUthmeier@doc.gov [PII]  
**Sent:** 9/7/2017 8:58:18 PM  
**To:** Comstock, Earl (Federal) [PII]  
**CC:** Davidson, Peter (Federal) [PII]  
**Subject:** Re: Census Matter follow-Up

Hi Earl—

[REDACTED]

James

On Sep 7, 2017, at 4:53 PM, Comstock, Earl (Federal)  
< [PII] > wrote:

Hi Peter and James—

As I discussed with James a little while ago, the Secretary would like an update on progress since the discussion yesterday regarding the citizenship question.

If we could get a short email or memo today that would be great.

Thanks. Earl

---

**From:** Uthmeier, James (Federal) [/O=EXCHANGE-LABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A95855921544F58C573600E973E87F-JAMES UTHME]  
**Sent:** 9/4/2017 11:36:33 PM  
**To:** Davidson, Peter (Federal) [PII] Kel-  
 ley, Karen (Federal) [PII]  
 Hernandez, Israel (Federal) [PII]  
 Dorsey, Cameron [PII]  
**Subject:** Prep for Wed Census meeting with Sec

Hi Everyone—

I hope you're having a wonderful weekend. Due to some unexpected meetings tomorrow morning, we are going to hold this meeting at 5 pm. Please let me know if any issues and we can find a new time.

Thanks,  
 James

**Prep for Wed Census meeting with Sec**

Scheduled: Tuesday, Sep 5, 2017 from 10:00 AM to 10:30 AM

Location: Room 5870

Invitees: Davidson, Peter (Federal), Kelley, Karen (Federal), Hernandez, Israel (Federal), Dorsey, Cameron

Sent from my iPad

**To:** Comstock, Earl (Federal) [REDACTED]  
**From:** Uthmeier, James (Federal)  
**Sent:** Thur 9/7/2017 10:39:29 PM  
**Importance:** Normal  
**Subject:** Re: Census Matter Follow-Up  
**Received:** Thur 9/7/2017 10:39:30 PM  
[nihms-497406.pdf](#)

Earl- I touched base with Peter, [REDACTED] He spoke with Kassinger this evening. [REDACTED]

[REDACTED]

[REDACTED]

**From:** Comstock, Earl (Federal)  
**Sent:** Thursday, September 07, 2017 6:13 PM  
**To:** Davidson, Peter (Federal) [REDACTED] Uthmeier, James (Federal) <[REDACTED]>  
**Cc:** Teramoto, Wendy (Federal) [REDACTED]  
**Subject:** Re: Census Matter Follow-up

I suggest setting up a call for tomorrow. The Secretary is asking for progress on this. Earl

**From:** "Davidson, Peter (Federal)" <[REDACTED]>  
**Date:** Thursday, September 7, 2017 at 5:30 PM  
**To:** "Uthmeier, James Federal" <[REDACTED]>, "Comstock, Earl (Federal)" [REDACTED]  
**Cc:** Wendy Teramoto [REDACTED]  
**Subject:** RE: Census Matter Follow-Up

[REDACTED]

**From:** Uthmeier, James (Federal)  
**Sent:** Thursday, September 07, 2017 4:58 PM  
**To:** Comstock, Earl (Federal) <[REDACTED]>  
**Cc:** Davidson, Peter (Federal) [REDACTED]  
**Subject:** Re: Census Matter Follow-Up

Hi Earl—

[REDACTED]

[REDACTED]

[REDACTED]

James

On Sep 7, 2017, at 4:53 PM, Comstock, Earl (Federal) [REDACTED] wrote:

Hi Peter and James—

[REDACTED]

[REDACTED]

Thanks. Earl

September 8, 2017

To: Secretary Wilbur Ross

Fr: Earl Comstock

Re: Census Discussions with DoJ

In early May Eric Branstad put me in touch with Mary Blanche Hankey as the White House liaison in the Department of Justice. Mary Blanche worked for AG Sessions in his Senate office, and came with him to the Department of Justice. We met in person to discuss the citizenship question. She said she would locate someone at the Department who could address the issue. A few days later she directed me to James McHenry in the Department of Justice.

I spoke several times with James McHenry by phone, and after considering the matter further James said that Justice staff did not want to raise the question given the difficulties Justice was encountering in the press at the time (the whole Comey matter). James directed me to Gene Hamilton at the Department of Homeland Security.

Gene and I had several phone calls to discuss the matter, and then Gene relayed that after discussion DHS really felt that it was best handled by the Department of Justice.

At that point the conversation ceased and I asked James Uthmeier, who had by then joined the Department of Commerce Office of General Counsel, to look into the legal issues and how Commerce could add the question to the Census itself.

---

**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]  
[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 Phone

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]

**To:** Teramoto, Wendy (Federal) [REDACTED]  
ED]@doc.gov]  
**From:** Comstock, Earl (Federal)  
**Sent:** Sat 9/16/2017 11:33:38 AM  
**Importance:** Normal  
**Subject:** Calls with DoJ  
**Received:** Sat 9/16/2017 11 :33:38 AM

Morning Wendy—

Here is the memo I gave SWLR regarding my discussions with DoJ.

Earl

\* \* \*

September 8, 2017

**To:** Secretary Wilbur Ross  
**Fr:** Earl Comstock  
**Re:** Census Discussions with DoJ

In early May Eric Branstad put me in touch with Mary Blanche Hankey as the White House liaison in the Department of Justice. Mary Blanche worked for AG Sessions in his Senate office, and came with him to the Department of Justice. We met in person to discuss the citizenship question. She said she would locate someone at the Department who could address the issue. A few days later she directed me to James McHenry in the Department of Justice.

I spoke several times with James McHenry by phone, and after considering the matter further James said that Justice staff did not want to raise the question given the difficulties Justice was encountering in the

press at the time (the whole Comey matter). James directed me to Gene Hamilton at the Department of Homeland Security.

Gene and I had several phone calls to discuss the matter, and then Gene relayed that after discussion DHS really felt that it was best handled by the Department of Justice.

At that point the conversation ceased and I asked James Uthmeier, who had by then joined the Department of Commerce Office of General Counsel, to look into the legal issues and how Commerce could add the question to the Census itself.

---

**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 Phone

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 Phone

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 Phone

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:** 9/17/2017 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 Phone

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 Phone

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 Phone

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 Phone

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:** [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 Phone

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 Phone

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 Phone

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:** Wilbur Ross [/O=EXCHANGELABS/OU  
=EXCHANGE ADMINISTRATIVE  
GROUP  
(FYDIBOHF23SPDLT)/CN=RECIPIENTS  
/CN=6EA444C1E0EB42CF8DC621A7B6D  
014B4-WLR]  
**Sent:** 9/19/2017 3:02:32 PM  
**To:** Davidson, Peter (Federal) [REDACTED]  
@doc.gov]  
**Subject:** Census

Wendy and I spoke with the AG yesterday. Please follow up so we can resolve this issue today. WLR

Sent from my iPhone

Internal Document—Not for Public Release

Sept. 20, 2017

MEMORANDUM FOR Associate Directorate for  
Research and Methodology (ADRM)

From: Center for Survey Measurement (CSM)

Subject: Respondent Confidentiality Concerns

CSM researchers have noticed a recent increase in respondents spontaneously expressing concerns about confidentiality in some of our pretesting studies conducted in 2017. We recommend systematically collecting data on this phenomenon, and development and pretesting of new messages to avoid increases in non-response among hard-to-count populations for the 2020 Census as well as other surveys like the American Community Survey (ACS).

Below is a preview of findings relating to respondent confidentiality concerns from recent CSM projects, followed by a more detailed recommendation from CSM. These findings are drawn from usability interviews with English- and Spanish-speaking respondents (N=[REDACTED]), cognitive interviews with Spanish-speaking respondents (N=[REDACTED]), four focus groups with Spanish-speaking Field Representatives (FRs) (N=[REDACTED]), five focus groups with Field Supervisors (FSs) and Field Representatives (N=[REDACTED]), and [REDACTED] focus groups with respondents (N[REDACTED]). These interviews and focus groups were conducted in different regions of the country in English, Spanish, Chinese, Korean, Vietnamese, Russian, and Arabic since January of 2017. All projects were small, qualitative studies and as such, unrepresentative of the population as a whole, and none

of them were specifically designed to examine confidentiality concerns. However, respondents and field representatives spontaneously brought up these concerns at a much higher rate than CSM researchers have seen in previous pretesting projects, and as such, this information may have implications for nonresponse on U.S. Census Bureau studies and surveys.

In particular, CSM researchers heard respondents express new concerns about topics like the “Muslim ban,” discomfort “registering” other household members by reporting their demographic characteristics, the dissolution of the “DACA” (Deferred Action for Childhood Arrival) program, repeated references to Immigration and Customs Enforcement (ICE), etc. FRs and FSSs emphasized facing a “new phenomenon” in the field and reported that respondents’ fears, particularly among immigrant respondents, have increased markedly this year. Respondents reported being told by community leaders not to open the door without a warrant signed by a judge, and CSM researchers observed respondents falsifying names, dates of birth, and other information on household rosters. FRs requested additional training to help them overcome respondents’ fears regarding confidentiality and data sharing with other agencies like ICE, as well as materials they could share with respondents to reassure them about these concerns.

**Usability Findings (2017 PEGA Internet Self-Response Instrument; N =[REDACTED]**

Overall, [REDACTED] respondents who participated in usability interviews in the DC-metro area to pretest the 2017 PEGA internet self-response (ISR) instrument in English and Spanish intentionally provided

incomplete or incorrect information about household members due to concerns regarding confidentiality, particularly relating to perceived negative attitudes toward immigrants.

One Spanish-speaking respondent said she was uncomfortable “registering” other household members and tried to exit the survey at the dashboard when she realized she would have to provide information on others who live with her. She mentioned being afraid because of the current political climate and news reports about changing immigration policy. The researcher had to help the respondent delete the other household members from the roster to avoid a break-off; she only provided her own information.

A second Spanish-speaking respondent filled out information about herself and three family members but intentionally left three or four roomers off the roster because, “This frightens me, given how the situation is now” and mentioned being worried because of their “[immigration] status.” Both Spanish-speaking respondents stated that they would not complete the survey at home.

A third Spanish-speaking respondent, who the researcher had reason to believe was not concerned about whether his data would be shared with other federal agencies because of his status as legal resident in the country, commented: “Particularly with our current political climate, the Latino community will not sign up because they will think that Census will pass their information on and people can come looking for them.” This theme came up repeatedly even for those without concerns about the immigration status of members of their household.

One English-speaking respondent entered false names and some incorrect dates of birth for his roommates because he was not comfortable providing their information without their consent due to data sharing concerns.

A second English-speaking respondent did not report five unrelated household members (some of whom were immigrants) because she does not report their rental income to the IRS and because of what she referred to as the “Muslim ban.”

It should be noted that this level of deliberate falsification of the household roster, and spontaneous mention of concerns regarding negative attitudes toward immigrants, is largely unprecedented in the usability interviews that CSM has been conducting since 2014 in preparation for the 2020 Census. In general, we assume that pretesting respondents are in fact more willing to fill out the survey than most respondents would be during the 2020 Census, given that they are being paid a cash incentive for their participation and being interviewed by a researcher with whom they have established rapport. As such, these concerns might be even more pronounced during a production survey than researchers observed during pretesting.

**Cognitive Findings (CBAMS Paper Testing; N [REDACTED])**

Spanish-speaking respondents who participated in paper testing of the CBAMS (Census Barriers, Attitudes, and Motivators Survey) expressed concern about whether their answers might be shared with other government agencies. One respondent said, “The possibility that the Census could give my information to

internal security and immigration could come and arrest me for not having documents terrifies me.” Later she commented that she was worried that her information could be used against her if she answered that she is not satisfied with the government here. She thought someone could say, ‘If you’re not satisfied, why are you here?’ and this could be used against her to expel her from the country.

Respondent concerns on this survey were eye-opening for CSM researchers because some of the respondents who participated in cognitive interviews had previously taken part in CSM pretesting projects. Despite having participated in the past, they seemed visibly nervous and reticent and required extensive explanations regarding how their data would be used and their personal identifying information would be redacted. This behavior was in contrast to their demeanor during prior CSM pretesting projects.

**Multilingual Focus Groups on Doorstep Messages for the 2020 Census (N =[REDACTED])**

Respondents also raised concerns in [REDACTED] focus groups conducted this spring in order to test doorstep messages that enumerators can use to overcome reluctance in the 2020 Census. These focus groups were conducted in English, Spanish, Chinese, Korean, Vietnamese, Russian, and Arabic, and the topic of confidentiality concerns came up in several groups.

For example, Spanish-speakers brought up immigration raids, fear of government, and fear of deportation. Respondents talked about having received advice not to open the door if they fear a visit from Immigration and



Customs Enforcement (ICE) and that they could instead ask that warrants be slipped under the door. They suggested that the Census Bureau have something in writing that enumerators could slip under the door to indicate why an enumerator is at a respondent's home. They felt that the most important message to encourage participation was confidentiality and the greatest barriers to Latino participation are fear and mistrust.

Several Chinese-speaking focus group respondents stated that the Chinese community's main fear or concern was immigration status and how the data are used. They also expressed concern about opening the door to a government official and not wanting to be "investigated."

Arabic-speakers reported that they had concerns about their perception of the current environment as unwelcoming to Arabic-speaking immigrants and said that they feared deportation. One respondent said, "The immigrant is not going to trust the Census employee when they are continuously hearing a contradicting message from the media everyday threatening to deport immigrants." Respondents wanted to have more assurance about how the data would be used before providing personal information.

English-speakers expressed similar reservations when discussing the current "environment." In one English focus group, respondents spontaneously expressed concerns that their personal information would be shared with other agencies, and mentioned in particular that data could be shared with Immigration and Customs Enforcement and the Department of Homeland Security. One participant recommended that Census ma-

terials should explicitly explain that personal information is not shared with these agencies.

Overall, concerns about the confidentiality of data, including between agencies, negative perceptions of immigrants, and deportation emerged across languages in this project.

**Focus Groups with Spanish-speaking Field Representatives (N =[REDACTED])**

CSM conducted four focus groups from July to September with Spanish-speaking Census Bureau Field Representatives who work in different states regarding the Spanish translation of a health survey. Many of the FRs spontaneously brought up the topic of an upsurge in respondent confidentiality concerns.

Many FRs stated that before they can begin an interview, they have to spend several minutes calming respondents and gaining their trust due to the current “political state.” [REDACTED] said, “The politics have changed everything. Recently.” Another mentioned that this is especially relevant given that the DACA (Deferred Action for Childhood Arrival) program is “on the chopping block.” FRs reported that some respondents worry about giving out legitimate names or completing the roster; they often do not feel comfortable giving out information about other people in the household. [REDACTED] said, “This may just be a sign of the times, but in the recent several months before anything begins, I’m being asked times over, does it make a difference if I’m not a citizen?” FRs reported that many Spanish-speaking respondents distrust the statement on confidentiality in the survey mailing materials, even when they understand it.

Many respondents believe that “the less information they give out, the better. The safer they are.”

[REDACTED] said that in June she was doing a Census Bureau survey interview with questions about citizenship status. A Spanish-speaking respondent answered that he was not a citizen, and then appeared to lie about his country of origin. When [REDACTED] started asking about his year of entry into the U.S., he “shut down” and stopped responding to her questions. He then walked out and left her alone in the apartment, which had never happened to her during an interview before.

[REDACTED] commented that she had seen this scenario many times while administering the ACS, although this was the first time she had heard of a respondent actually leaving the [REDACTED] alone in his or her home. She suggested that respondents might have concerns about confidentiality given “the current political climate.”

A [REDACTED] added that she had observed Hispanic members of a household move out of a mobile home after she tried to interview them. She said, “There was a cluster of mobile homes, all Hispanic. I went to one and I left the information on the door. I could hear them inside. I did two more interviews, and when I came back, they were moving. . . . It’s because they were afraid of being deported.”

FRs reported using various strategies to overcome respondents’ fears. They are often asked if they work for other federal agencies, and reassure respondents that this information is not reported to other federal agencies; their information is not shared with “immi-

gration or taxes.” They explain that the respondent’s immigration status does not matter. The FRs reported that sometimes they encourage respondents to do the interview anonymously with fake names, when it seems like the respondent is about to refuse.

The FRs recommended that ad campaigns be used to reduce the mistrust the public has toward completing our surveys. They also requested “an immigration letter” like one used on the NHANES (National Health and Nutrition Examination Survey) that mentioned “la migra” (a slang term for ICE) that was very effective. The FRs could use it selectively when it was needed. It clearly said that the Census Bureau was not in any way related with “la migra”.

FRs were asked to share the most important change that they wanted to see made to the Spanish translation of the survey materials. In [REDACTED] focus group, the [REDACTED] FRs agreed unanimously that they would like an “immigration statement” to appear on mailing materials because of current “political issues.” They reported that immigration concerns are the “topic of the day” and that they always have to allay fears about immigration by saying, “We do not share information with other agencies.” They suggested that the statement should convey that while the Census Bureau is part of the federal government, it is a statistical agency, and that the respondent’s legal status in the country does not matter at all.

**Focus Groups with Field Supervisors and Field Representatives (N =[REDACTED])**

CSM conducted five focus groups in September with Field Supervisors and Field Representatives to collect

feedback on FR training, the availability of printed materials in various languages, and the usage of printed materials during a recent housing survey operation. The topic of respondent concerns regarding confidentiality came up repeatedly in these focus groups.

In [REDACTED] focus group of Field Supervisors, [REDACTED] reported having a respondent produce papers proving US citizenship of household members during an interview. [REDACTED] reported that each time she spoke to a Spanish-speaking respondent, her focus was on convincing the respondent of the confidentiality of their answers “given the political temperature these days.” One FS said, “we have to let [respondents] know where this information is going. That’s their biggest fear.” When asked if the training the FRs had received was adequate, [REDACTED] commented that more training was needed on respondent confidentiality concerns, but that “this climate didn’t exist before [when training was designed last time], when you did the study three years ago, so of course it wasn’t planned in there.” FSs reiterated that the main issue they saw was privacy concerns of Latino respondents, and that FRs should do more practice interviews where someone models those concerns and concerns about immigration so that the FRs are more prepared to respond adequately in the field.

FRs who spoke a language other than Spanish or English (e.g., Cantonese) reported that completing interviews for the survey in question this year was much harder than the last time the survey was fielded: “Three years ago was so much easier to get respondents compared to now because of the government changes . . . and trust factors [and] also because of

what happened here [in the United States]. . . . Three years ago I didn't have problems with the immigration questions." [REDACTED] commented, "There will always be political situations that are out of our control . . . . Sometimes I just come right out and say, this isn't for immigration."

Even FRs who only speak English reported needing additional training for encountering households where respondents are especially fearful. [REDACTED] reported that respondents have been confusing him with someone from Immigration and Customs Enforcement (ICE, formerly known as INS). He reported that respondents that identified him as working for the government were hesitant to answer any questions, and it was difficult to gain their trust. [REDACTED] agreed that most incompletes were due to a distrust of the government. When asked whether their training adequately prepared them, [REDACTED] mentioned that training regarding concerns about ICE could not have been included in the training they received because it was a new phenomenon. The FRs in this focus group emphasized that they were having to reorder the questions in this housing survey to collect demographics last in order to avoid breakoffs.

Spanish bilingual FRs shared many of the same concerns as the Field Supervisors, speakers of languages other than English or Spanish, and the monolingual English-speaking FRs. They emphasized that when completing interviews with Spanish-speaking households, immigration concerns were challenging and that respondents seemed fearful. They requested more training focusing on respondent fears, particularly immigrant respondents' fears. They mentioned respon-

dents giving out false names and reordering survey questions to collect demographics last.

### **Recommendation**

Overall, these findings, in various languages from respondents, Field Representatives, and Field Supervisors across the country who have participated in recent projects are raising concerns within CSM regarding potential barriers to respondent participation in the 2020 Census, as well as other Census Bureau surveys. The findings listed above are a sampling of what CSM researchers have observed on recent projects, and these concerns were all expressed spontaneously to researchers during the course of pretesting various survey materials. These findings are particularly troubling given that they impact hard-to-count populations disproportionately, and have implications for data quality and nonresponse.

A systematic pretesting study evaluating respondent confidentiality concerns, both from the perspective of respondents as well as Field Representatives, would shed light on the nature and prevalence of these concerns, particularly for Limited English Proficient (LEP) or immigrant populations in the U.S. Quantitative analysis could also be done to examine any changes in response rates, mode of administration, item non-response, or number of contact attempts for surveys such as the ACS among non-English speakers and hard-to-count, immigrant respondents. Similarly, we could review whether the number of residents reported or the number of unrelated household members within households has declined in recent months.

In addition to gathering data on any uptick in confidentiality concerns that may exist, we recommend designing and pretesting wording that could address these concerns in mailing materials, the Decennial Internet Self Response instrument, FAQs provided to enumerators, etc. This text could inform respondents that the Census Bureau does not collect information on immigration status or religion (similar to the language stating that we do not collect social security numbers), or that we do not share data with agencies like ICE. Pretesting with respondents from a variety of backgrounds would be vital given that such a message could be reassuring to some respondents but may have other effects for different populations. Care should be taken in crafting new messages. CSM also recommends that additional training be provided to FRs across surveys regarding allaying respondents' confidentiality concerns.



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**From:** Wilbur Ross [/O=EXCHANGELABS/OU  
=EXCHANGE ADMINISTRATIVE GROUP  
(FYDIBOHF23SPDLT)/CN=RECIPIENTS  
/CN=6EA444C1E0EB42CF8DC621A7B6D  
014B4-WLR]  
**Sent:** 10/8/2017 6:56:23 PM  
**To:** Davidson, Peter (Federal) [REDACTED]  
@doc.gov]  
**Subject:** Letter from DoJ.

What is its status? WLR

Sent from my iPad

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**From:** [REDACTED]@doc.gov [REDACTED]@doc.gov  
**Sent:** 10/8/2017 10:54:41 PM  
**To:** Wilbur Ross [REDACTED]  
**Subject:** Re: Letter from DoJ.

Will do . . . wrapping up my call now.

sent from my iPhone

> On Oct 8, 2017, at 6:51 PM, Wilbur Ross [REDACTED] wrote:

>

> Please call me at [REDACTED] WLR

>

> Sent from my iPad

>

>> On Oct 8, 2017, at 6:47 PM, Davidson, Peter (Federal) [REDACTED]doc.gov> wrote:

>> I'm on the phone with Mark Neumann right now . . . he is giving me a readout of his meeting last week. I can give you an update via phone if you'd like . . .

>>

>> Sent from my iPhone

>>

>>> On Oct 8, 2017, at 2:56 PM, Wilbur Ross [REDACTED] wrote:

>>>

>>> What is its status? WLR

>>>

>>> sent from my iPad

**To:** Kelley, Karen (Federal) PII  
**From:** Willard, Aaron (Federal)  
**Sent:** Mon 10/9/2017 9:03:50 PM  
**Importance:** Normal  
**Subject:** Notes from drive  
**Received:** Mon 10/9/2017 9:03:52 PM

- 1) must come from DOJ
- 2) court cases you can hang your hat on
- 3) every Census since 1880, except 2000

Sent from my iPhone

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**From:** Gore, John (CRT)  
**Sent:** Friday, November 3, 2017 5:11 PM  
**To:** Gary, Arthur (JMD)  
**Subject:** Close Hold: Draft Letter  
**Attachments:** Letter (rev).docx

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

**PII**

---

**From:** Aguiñaga, Ben (CRT)  
**Sent:** Friday, November 3, 2017 2:04 PM  
**To:** Pickett, Bethany (CRT)  
**Subject:** FW: Confidential & Close Hold:  
Draft Letter  
**Attachments:** Letter.docx

**J. Benjamin Aguiñaga (AH-gheen-YAH-gah)**  
Chief of Staff and Counsel  
Office of the Assistant Attorney General  
Civil Rights Division  
U.S. Department of Justice

**PII**

**From:** Gore, John (CRT)  
**Sent:** Wednesday, November 1, 2017 6:32 PM  
**To:** Herren, Chris (CRT) **PII**  
**Cc:** Aguiñaga, Ben (CRT)  
**Subject:** Confidential & Close Hold: Draft Letter

Chris:

Attached is the draft letter we discussed yesterday. I would appreciate your comments and edits no later than Friday. As we discussed, this is confidential and close hold.

Thanks.

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

**PII**

**To:** Davidson, Peter (Federal) [REDACTED]  
**From:** Murnane, Barbara (Federal)  
**Sent:** Mon 11/27/2017 5:27:47 PM  
**Importance:** Normal  
**Subject:** John Gore from DOJ called—his number is: [REDACTED]  
**Received:** Mon 11/27/2017 5:27:48 PM

**To:** Wilbur Ross [REDACTED]  
**From:** Davidson, Peter (Federal)  
**Sent:** Tue 11/28/2017 12:53:51 AM  
**Importance:** Normal  
**Subject:** Re: Census. Questions  
**Received:** Tue 11/28/2017 12:53:52 AM

I can brief you tomorrow . . . no need for you to call.  
I should have mentioned it this afternoon when we spoke.

Sent from my iPhone

On Nov 27, 2017, at 7:23 PM, Wilbur Ross <[REDACTED]> wrote:

Census is about to begin translating the questions into multiple languages and has let the printing contact.

We are out of time. Please set up a call for me tomorrow with whoever is the responsible person at Justice.

We must have this resolved. WLR

Sent from my iPhone

**From:** Gary Arthur (JMD)  
**To:** Gore, John (CRT)  
**Subject:** FW: U.S. Census Bureau Dr. Jarmin  
(Revised Dec. 12).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 the General Counsel*

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*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 calcula-

tion 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/](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 Sec-

tion 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/ACSInformationGuide.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\\_ConfidenceintervalAmericanCommunitySurvey](https://www.census.gov/glossary/#term_ConfidenceintervalAmericanCommunitySurvey) (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 citizen-

ship, 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](mailto:Arthur.Gary@usdoj.gov).

Sincerely yours,

/s/ ARTHUR E. GARY  
ARTHUR E. GARY  
General Counsel  
Justice Management Division

---

**From:** Page, Ben J. EOP/OMB [REDACTED]  
**Sent:** 12/20/2017 3:56:57 PM  
**To:** Ron S Jarmin (CENSUS/ADEP FED)  
[Ron.S.Jrmin@census.gov]  
**CC:** [REDACTED] (CENSUS/OTHER)  
[REDACTED]; Snyderman, Rachel B.  
EOP/OMB [REDACTED] Enrique La-  
mas (CENSUS/ADDP FED) [Enrique.  
Lamas@census.gov]  
**Subject:** RE: Census Question Request

Ron,

Just a reminder—can you please send the incoming letter from DOJ?

Thanks,  
Ben

On Dec 19, 2017, at 9:35 PM, Ron S Jarmin (CENSUS/ADEP FED)

<Ron.S.Jarmin@census.gov <mailto:Ron.S.Jarmin@census.gov>> wrote:

Hi Ben,

I can get on a call before 8:30 or 10:30-11.

Thanks  
Ron

Sent from my iPhone

On Dec 19, 2017, at 5:54 PM, Page, Ben J. EOP/OMB [REDACTED] wrote:

Ron,

I apologize for putting you on the hook, but this issue came across my desk and based on the readout Nancy gave me I wanted to put down a marker for you guys to engage with DOJ before we got locked into a policy position. I'd like to convene a quick call tomorrow morning so I can give some additional context.

Ben

From: Page, Ben J. EOP/OMB

Sent: Tuesday, December 19, 2017 5:52 PM

To: 'Simms, Cindy B. EOP/WHO' [REDACTED]  
Lenihan, Brian (Federal) [REDACTED] Anderson,  
Jessica C. EOP/OMB [REDACTED]

CC: Platt, Mike (Federal) [REDACTED] Lai, Joseph  
G. EOP/WHO [REDACTED]; Swonger, Amy H.  
EOP/WHO [REDACTED] Zadrozny, John A. EOP/WHO  
[REDACTED] Flynn, Matthew J. EOP/WHO [RE-  
DACTED] Kraninger, Kathleen L. EOP/OMB [RE-  
DACTED] Enger, Michelle A. EOP/OMB [REDACTED]  
Marten, Lexi N. EOP/OMB [REDACTED]

Subject: Re: Census Question Request

+ others from OMB

[REDACTED]



From: Simms, Cindy B. EOP/WHO [REDACTED]  
Sent: Tuesday, December 19, 2017 5:44 PM  
To: Lenihan, Brian (Federal) [REDACTED] Page, Ben J. EOP/OMB [REDACTED] Anderson, Jessica C. EOP/OMB [REDACTED]  
CC: Platt, Mike (Federal) [REDACTED] Lai, Joseph G. EOP/WHO [REDACTED] Swonger, Amy H. EOP/WHO [REDACTED] Zadrozny, John A. EOP/WHO [REDACTED] Flynn, Matthew J. EOP/WHO [REDACTED]  
Subject: RE: Census Question Request

Adding Ben Page and Jessica Anderson from OMB.

From: Lenihan, Brian (Federal) [REDACTED]  
Sent: Tuesday, December 19, 2017 5:10 PM  
To: Simms, Cindy B. EOP/WHO [REDACTED]  
CC: Platt, Mike (Federal) [REDACTED]; Lai, Joseph G. EOP/WHO [REDACTED]; Swonger, Amy H. EOP/WHO [REDACTED] Zadrozny, John A. EOP/WHO [REDACTED]; Flynn, Matthew J. EOP/WHO [REDACTED]  
Subject: Re : Census Question Request

I believe we have a reprieve but we should still visit on this matter.

Brian J. Lenihan  
Commerce O/S  
[REDACTED]

On Dec 19, 2017 at 4:56 PM, Simms Cindy B. EOP/WHO [REDACTED] wrote:

John Zadrozny from our DPC team is going to reach out to you. Not sure we'd be able to clear an official position that quickly but I know John will follow up.

From: Lenihan, Brian (Federal) [REDACTED]  
Sent: Tuesday, December 19, 2017 3:39 PM  
To: Platt, Mike (Federal) [REDACTED] Simms, Cindy B. EOP/WHO [REDACTED]  
CC: Lai, Joseph G. EOP/WHO [REDACTED]  
Swonger, Amy H. EOP/WHO [REDACTED]  
Subject: RE: Census Question Request

This is a short fuse before COB, we need to advise the Secretary of the WH view on notifying Congress on the DOJ request and how that would affect the agenda for the remainder of the week.

From: Platt, Mike (Federal)  
Sent: Tuesday, December 19, 2017 3:36 PM  
To: Simms, Cindy B. EOP/WHO [REDACTED]  
cc: Lenihan, Brian (Federal) [REDACTED]; Amy H. EOP/WHO Swonger [REDACTED]  
Subject: RE: Census Question Request

Any feedback on this.

On Dec 19, 2017, at 10:29 AM, Simms, Cindy B. EOP/WHO [REDACTED] wrote:

Thanks, Brian. Let me do some internal outreach before I put everyone on an email. Will be in touch.

From: Lenihan, Brian (Federal) [REDACTED]  
Sent: Tuesday, December 19, 2017 10:14 AM  
To: Simm, Cindy B. EOP/WHO [REDACTED] Lai, Joseph G. EOP/WHO [REDACTED]  
cc: Platt, Mike (Federal) [REDACTED]  
Subject: Census Question Request  
Cindy/Joe—

The Census Bureau has received a request from DOJ to reinstate the citizenship question on the 2020 Decennial. Can you assist with looping in the policy and legal staff that can assist with addressing this matter.

Regards,

Brian

Brian J. Lenihan  
Deputy Assistant Secretary  
Office of Legislative and Intergovernmental Affairs  
U.S. Department of Commerce  
D: 202.482. [REDACTED] [REDACTED]

---

**From:** Ron S Jarmin (CENSUS/ADEP FED)  
[Ron.S.Jarmin@census.gov]  
**Sent:** 1/3/2018 6:45:55 PM  
**To:** Gary, Arthur (JMD) [REDACTED]  
**CC:** Enrique Lamas (CENSUS/ADDP  
FED) [Enrique.Lamas@census.gov]  
**Subject:** RE: Request to Reinstate Citizenship  
Question On 2020 Census Questionnaire

Gary,

I'm bringing technical, program and legal folks. It would be good if some technical folks on the DOJ side were there so we can ensure we understand and can meet your requirements. Thursday and Friday are the most open for us, but we're flexible and can shuffle to meet earlier in the week if that's preferable.

Thanks

**Ron Jarmin, PhD.**

Associate Director for Economic Programs, and  
Performing the Non-Exclusive Functions and Duties of  
the Director

U.S. Census Bureau

Office 301.763.1858, Ron.S.Jarmin@census.gov

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**From:** Gary, Arthur (JMD) [REDACTED]  
**Sent:** Tuesday January 2, 2018 2:21:05 PM  
**To:** Ron S Jarmin (CENSUS/ADEP FED)  
**Cc:** Enrique Lamas (CENSUS/ADDP FED)  
**Subject:** RE: Request to Reinstate Citizenship  
Question On 2020 Census Questionnaire

It should work fine—let me get back to you.

Best wishes to you for 2018 as well.

Thanks.

Art

Arthur E. Gary  
General Counsel  
Justice Management Division  
U.S. Department of Justice  
Two Constitution Square, Suite 8E.500  
145 N. Street, NE  
Washington, DC 20530  
202-514-3452 (OGC main line)

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**From:** Ron S Jarmin (CENSUS/ADEP FED) [mailto:Ron.SJarmin@census.gov]  
**Sent:** Tuesday January 02, 2018 1:59 PM  
**To:** Gary, Arthur (JMD) [REDACTED]  
**Cc:** Enrique Lamas (CENSUS/ADDP FED) <Enrique.Lamas@census.gov>  
**Subject:** Re: Request to Reinstate Citizenship Question On 2020 Census Questionnaire

Arthur,

Happy New Year! Would the late next week work for a meeting?

Best

**Ron Jarmin, PhD.**

Associate Director for Economic Programs, and  
Performing the Non-Exclusive Functions and Duties of  
the Director

U.S. Census Bureau

Office 301.763.1858, [Ron.S.Jarmin@census.gov](mailto:Ron.S.Jarmin@census.gov)

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**From:** Gary, Arthur (JMD) [REDACTED]  
**Sent:** Friday, December 22, 2017 4:16:35 PM  
**To:** Ron S Jarmin (CENSUS/ADEP FED)  
**Cc:** Enrique Lamas (CENSUS/ADDP FED)  
**Subject:** RE: Request to Reinstate Citizenship Question On 2020 Census Questionnaire

Dr. Jarmin—thank you for your response. We look forward to meeting with you and your team in early January.

Best regards

Arthur E. Gary  
General Counsel  
Justice Management Division  
U.S. Department of Justice  
Two Constitution Square, Suite 8E.500  
145 N. Street, NE  
Washington, DC 20530  
202-514-3452 (OGC main line)

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**From:** Ron S Jarmin (CENSUS/ADEP FED)  
[mailto:Ron.SJarmin@census.gov]  
**Sent:** Friday, December 22, 2017 3:32 PM  
**To:** Gary, Arthur (JMD) <[REDACTED]>  
**Cc:** Enrique Lamas (CENSUS/ADDP FED)  
<Enrique.Lamas@census.gov>  
**Subject:** Request to Reinstate Citizenship Question  
On 2020 Census Questionnaire

Arthur,

Thank you for your letter dated 12/12/2017 regarding improving the quality of citizenship information for DOJ enforcement of the Voting Rights Act. Let me

start by saying the Bureau is fully supportive of providing DOJ with the highest quality statistical information possible. To that end, I directed staff to review all possible ways to address the needs expressed in the letter. They have now briefed me and their findings suggest that the best way to provide PL94 block-level data with citizen voting population by race and ethnicity would be through utilizing a linked file of administrative and survey data the Census Bureau already possesses. This would result in higher quality data produced at lower cost.

I suggest we schedule a meeting of Census and DOJ technical experts to discuss the details of this proposal. We look forward to working with you on this important statistical matter.

Happy Holidays

**Ron Jarmin, PhD.**

Associate Director for Economic Programs, and  
Performing the Non-Exclusive Functions and Duties of  
the Director

U.S. Census Bureau

Office 301.763.1858, [Ron.S.Jarmin@census.gov](mailto:Ron.S.Jarmin@census.gov)

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**To:** Davidson, Peter (Federal) [REDACTED]  
**From:** Murnane, Barbara (Federal)  
**Sent:** Wed 1/3/2018 6:58:52 PM  
**Importance:** Normal  
**Subject:** John Gore from DOJ returned your call—  
[REDACTED]  
**Received:** Wed 1/3/2018 6:58:53 PM

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**From:** Murnane, Barbara (Federal) [[REDACTED]  
@doc.gov]  
**Sent:** 1/10/2018 7:21:26 PM  
**To:** Davidson, Peter (Federal) [[REDACT-  
ED]@doc.gov]  
**Subject:** Messages

John Gore —DOJ—[[REDACTED]  
[[REDACTED]



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

Jan. 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.

<i>Summary of Alternatives</i>			
	<i>Alternative A</i>	<i>Alternative B</i>	<i>Alternative C</i>
<b>Description</b>	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
<b>Impact on 2020 Census</b>	None	Major potential quality and cost disruptions	None
<b>Quality of Citizen Voting-Age Population Data</b>	Status quo	Block-level data improved, but with serious quality issues remaining	Best option for block-level citizenship data, quality much improved
<b>Other Advantages</b>	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
<b>Shortcomings</b>	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/](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 oth-

er 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 administrative 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%, non-citizen: 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 non-citizen, 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 non-relatives 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 sur-

vey 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

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**From:** [REDACTED] **PII/Earl Comstock**  
**Sent:** 1/3/2018 1:53:17 PM  
**To:** Langdon, David (Federal) [REDACTED] **PII**  
@doc.gov]  
**CC:** Uthmeier, James (Federal) [REDACTED] **PII**  
@doc.gov]; Willard, Aaron  
(Federal) [REDACTED] **PII** @ doc.gov]; Park-Su,  
Sahra (Federal) doc.gov]; [REDACTED] **PII** Da-  
vidson, Peter  
(Federal) [REDACTED] **PII** doc.gov]  
**Subject:** Re: questions re: draft census memo

Thanks David. I Amy have some additional questions to add. I will check with you when I get in. Earl

Sent from my iPhone

On Jan 30, 2018, at 8:50 AM, Langdon, David (Federal) < [REDACTED] **PII** @doc.gov > wrote:

I am glad to take the pen as soon as I get in.

Dave

On Jan 30, 2018, at 8:18 AM, Comstock, Earl (Federal) < [REDACTED] **PII** @doc.gov > wrote:

Thanks James. An edited version of the questions is attached. Note several comments—I think there are some questions that are more appropriately directed to DoJ. We may also want to restructure the list into questions on Alternative A, Alternative B and Alternative C to make sure we have covered all three.

Earl

**From:** "Uthmeier, James (Federal)" [PII]  
<[James.Uthmeier@doc.gov](mailto:James.Uthmeier@doc.gov)>  
**Date:** Tuesday, January 30, 2018 at 7:51AM  
**To:** "Willard, Aaron (Federal)"  
<[AWillard@doc.gov](mailto:AWillard@doc.gov)>, "Park-Su, Sahra (Federal)" [PII]  
<[SParkSu@doc.gov](mailto:SParkSu@doc.gov)>, "Davidson, Peter (Federal)" [PII]  
<[Davidson.Peter@doc.gov](mailto:Davidson.Peter@doc.gov)>, David Langdon [PII]  
<[DLangdon@doc.gov](mailto:DLangdon@doc.gov)>  
**Cc:** "Comstock, Earl (Federal)" [PII]  
<[Earl.Comstock@doc.gov](mailto:Earl.Comstock@doc.gov)>  
**Subject:** questions re: draft census memo

All—

Please find attached a list of Earl's and my combined questions, as well as those we did not cover from the list circulated last week. There was quite a bit of overlap so I attempted to consolidate. Please take a look and let me know if you have additional questions. David, I believe you had some numbers-focused questions that we should include. We need to get these over to Census this morning so that they can provide an updated draft asap.

Thanks,  
James

**Questions on the Jan 19 Draft Census Memo on the DoJ  
Citizenship Question Reinstatement Request**

1. **With respect to Alternatives B and C, what is the difference, if any, between the time when the data collected under each alternative would be available to the public?**

Since the collection of this data, whether from administrative records or from an enumerated question, occurs prior to the creation of the Microdata Detail File (MDF) from which all tabulations will be performed, there is no difference in the timing of when the data collected under either alternative B or C could be made available to the public. The exact date for completion of the MDF is still being determined as the 2020 Census schedule is matured. However, the 2020 Census is working towards publishing the first post-apportionment tabulation data products as early as the first week of February 2021.

2. **What is the “2020 Census publication phase” (page 1 of the Detailed Analysis for Alternative B) versus Alternative C? Would there be any difference?**

The 2020 Census publication phase is a broad window stretching from the release of the apportionment counts by December 31, 2020 through the last data product or report published in FY 2023, the final year of decennial funding for the 2020 Census. However, as stated in the answer to question 1, these data could be made available to the public on the same schedule as any other post-apportionment tabulated data product regardless of whether alternative B or C is used in its collection.



**3. What is the non-response rate for: (A) each question on the 2000 and 2010 Decennial Census short form and (B) each question on the 2010 ACS and most recent ACS?**

The table below shows the item non-response (INR) rate for each question on the 2000 and 2010 Decennial Census short form. This is the percentage of respondents who did not provide an answer to an item.

**Item Nonresponse Rates for 2000 and 2010 Short Form Person Questions**

	Relationship	Sex	Age	Hispanic Origin	Race	Tenure
2010	1.5	1.5	3.5	3.9	3.3	4.5
2000	1.3	1.1	3.7	3.1	2.9	4.1

Source: Rothhaas, Lestina and Hill (2012) Tables

**Notes and Soucre:**

Rothhaas, C., Lestina, F. and Hill, J. (2012) “2010 Decennial Census Item Nonresponse and Imputation Assessment Report” 2010 Census Program for Evaluations and Experiments, January 24, 2012.

**From report:**

The INR rate is essentially the proportion of missing responses before pre-editing or imputation procedures for a given item (i.e., the respondent did not provide an answer to the item). For INR, missing values are included in the rates, but inconsistent responses (i.e., incompatible with other responses) are considered non-missing responses.

Online link to 2010 report that has 2000 information as well.

[https://www.census.gov/2010census/pdf/2010\\_Census\\_INR\\_Imputation\\_Assessment.pdf](https://www.census.gov/2010census/pdf/2010_Census_INR_Imputation_Assessment.pdf)

See attached spreadsheet for the item allocation rates by questions for the ACS for 2010, 2013, and 2016.

4. **What was the total survey response rate (i.e., percentage of complete questionnaires) for the 2000 long form and the 2000 short form? Of the incomplete long forms, what percentage left the citizenship question blank? Of the completed long forms, what percentage (if known) contained incorrect responses to the citizenship question?**

We do not have measures of total survey response rates from the 2000 long form and 2000 short form available at this time. The mail response rate in 2000 was 66.4 percent for short forms and 53.9 percent for long forms. No analysis that we were aware of was conducted on the incomplete long forms that left the citizenship question blank. The Census 2000 Content Reinterview Survey showed low inconsistency of the responses to the citizenship question. Only 1.8 percent of the respondents changed answers in the reinterview.

Source for 2000 mail response rates:

<https://www.census.gov/pred/www/rpts/A.7.a.pdf>

Source for 2000 Content Reinterview Survey. Page 32 source.

[https://www.census.gov/pred/www/rpts/B.5FR\\_RI.PDF](https://www.census.gov/pred/www/rpts/B.5FR_RI.PDF)

5. **For the 2000 long and short forms, what was the percentage unanswered (left blank) for each question (i.e., what percentage of the responses for each question (sex, race, ethnicity, income, citizenship, etc.) were left blank)?**

For the 2000 shortform, the table in question 3a provides the percentage unanswered for each question.

For the 2000 longform, Griffin, Love and Obenski (2003) summarized the Census 2000 longform responses. Allocation rates for individual items in Census 2000 were computed, but because of the magnitude of these data, summary allocation measures were derived. These rates summarize completeness across all data items for occupied units (households) and are the ratio of all population and housing items that had values allocated to the total number of population and housing items required to have a response. These composite measures provide a summary picture of the completeness of all data. Fifty-four population items and 29 housing items are included in these summary measures. The analysis showed that 9.9 percent of the population question items and 12.5 percent of the housing unit question items required allocation. Allocation involves using statistical procedures, such as within-household or nearest neighbor matrices, to impute missing values.

<https://ww2.amstat.org/sections/srms/Proceedings/y2003/Files/JSM2003-000596.pdf>

6. **What was the incorrect response rate for the citizenship question that was asked on the Long Form during the 2000 Decennial Census? Does the response rate on the 2000 Long Form differ from the incorrect response rate on the citizenship question for the ACS?**

In the 2000 long form, 2.3 percent of persons have inconsistent answers, 89.4 percent have consistent answers, and 8.2 percent have missing citizenship data in the SSA Numident and/or the 2000 long form. Among persons with non missing citizenship data in the SSA Numident and/or the 2000 long form, 2.6 percent have inconsistent answers and 97.4 percent have consistent answers.

In the 2010 ACS, 3.1 percent of persons have inconsistent answers, 86.0 percent have consistent answers, and 10.8 percent have missing citizenship data in the SSA Numident and/or the 2010 ACS. Among persons with nonmissing citizenship data in the SSA Numident and/or the 2010 ACS, 3.6 percent have inconsistent answers and 96.4 percent have consistent answers.

In the 2016 ACS, 2.9 percent of persons have inconsistent answers, 81.2 percent have consistent answers, and 15.9 percent have missing citizenship data in the SSA Numident and/or the 2016 ACS. Among persons with nonmissing citizenship data in the SSA Numident and/or the 2016 ACS, 3.5 percent have inconsistent answers and 96.5 percent have consistent answers.

These ACS and 2000 Census long form rates are based on weighted data.

This shows that inconsistent response rates are higher in the 2010 and 2016 ACS than in the 2000 long form.

7. **What is the incorrect response rate on other Decennial or ACS questions for which Census has administrative records available (for example, age, sex or income)?**

Table 7a shows the agreement rates between the 2010 Census response and the SSA Numident for persons who could be linked and had nonmissing values, and Table 7b shows the agreement rates between the 2010 ACS and the SSA Numident. Gender has low disagreement (0.4-0.5 percent), and white alone (0.9 percent), black alone (1.7-2 percent), and age (2.1 percent) also have low disagreement rates. Disagreement rates are greater for other races (e.g., 46.4-48.6 percent for American Indian or Alaska Native alone). Hispanic origin is not well measured in the Numident, because it contains a single race response, one of which is Hispanic.

Table 7a. Demographic Variable Agreement Rates Between the 2010 Census and the SSA Numident

2010 Census Response	Percent Agreement with SSA Numident
Hispanic	54.2
Not Hispanic	99.7
White Alone	99.1
Black Alone	98.3
American Indian or Alaska Native Alone	51.4
Asian Alone	84.3
Native Hawaiian or Other Pacific Islander Alone	74.4
Some Other Race Alone	17.7
Age	97.9
Gender	99.4

Source: Rastogi, Sonya, and Amy O'Hara, 2012, "2010 Census Match Study," 2010 Census Planning Memoranda Series No. 247.

Table 7b. Demographic Variable Agreement Rates Between the 2010 Census and the SSA Numident

2010 ACS Response	Percent Agreement with SSA Numident
White Alone	99.1
Black Alone	98.0
American Indian or Alaska Native Alone	53.6
Asian Alone	82.9
Native Hawaiian or Other Pacific Islander Alone	72.9
Some Other Race Alone	17.2
Age 0-2 Date of Birth	95.2
Age 3-17 Date of Birth	95.6
Age 18-24 Date of Birth	95.2
Age 25-44 Date of Birth	95.8
Age 45-64 Date of Birth	95.9
Age 65-74 Date of Birth	96.5
Age 75 and older Date of Birth	92.7
Male	99.5
Female	99.5

Source: Bhaskar, Renuka, Adela Luque, Sonya Rastogi, and James Noon, 2014, "Coverage and Agreement of Administrative Records and 2010

American Community Survey Demographic Data,” CARRA Working Paper #2014-14.

Abowd and Stinson (2013) find correlations of 0.75-0.89 between Survey of Income and Program Participation (SIPP) and SSA Detailed Earnings Record annual earnings between 1990-1999.<sup>1</sup>

8. **How does the Census presently handle responses on the (A) Decennial Census and (B) the ACS when administrative records available to the Census confirm that the response on the Decennial Census or ACS is incorrect? Is the present Census approach to incorrect responses based on practice/policy or law (statute or regulation)?**

We have always based the short form Decennial Census and the ACS on self-response, and while we have procedures in place to address duplicate or fraudulent responses, we do not check the accuracy of the answers provided to the specific questions on the Census questionnaire. This is a long established practice at the Census Bureau that has been thoroughly tested and in place since 1970, when the Census Bureau moved to a mailout/respond approach to the Decennial Census. Title 13 of the U.S. Code allows the Census Bureau to use alternative data sources, like administrative records, for a variety of purposes, and we are using data in new ways in the 2020 Census. While this includes the use of administrative records data to fill in ar-

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<sup>1</sup> Abowd, John M., and Martha H. Stinson, 2013, “Estimating Measurement Error in Annual Job Earnings: A Comparison of Survey and Administrative Data,” *Review of Economics and Statistics*, Vol. 95(55), pp. 1451-1467.

eas where a respondent does not provide an answer, we have not explored the possibility of checking or changing responses that a responding household has provided in response to the questionnaire.

9. **Please explain the differences between the self-response rate analysis and the breakoff rate analysis. The range of breakoff rates between groups was far smaller than the range of self-response rates between groups.**

Self-response means that a household responded to the survey by mailing back a questionnaire or by internet, and a sufficient number of core questions were answered so that an additional field interview was not required.

A breakoff occurs when an internet respondent stops answering questions prior to the end of the questionnaire. In most cases the respondent answers the core questions before breaking off, and additional fieldwork is not required. The breakoff rates are calculated separately by which question screen was the last one reached before the respondent stopped answering altogether.

The share of Hispanic respondents who broke off at some point before the end of the questionnaire (17.6 percent) is much higher than for non-Hispanic whites (9.5 percent).

Spreading the overall breakoff rates over 134 screens in the questionnaire works out to quite small rates per screen. It works out to an average breakoff rate of 0.131 percent per screen for



Hispanics and 0.066 percent for non-Hispanic whites.

10. **The NRFU numbers are comparatively small—approximately one additional household for NRFU per Census enumerator. Is this really a significant source of concern?**

Yes, this is a significant concern. First, it gives rise to incremental NRFU cost of at least \$27.5 million. This is a lower bound because it assumes the households that do not self-respond because we added a question on citizenship have the same follow-up costs as an average U.S. household. They won't because these households overwhelmingly contain at least one noncitizen, and that is one of our acknowledged hard-to-count subpopulations.

11. **Given that the breakoff rate difference was approximately 1 percent, why did Census choose to use the 5.1 percent number for assessing the cost of Alternative B?**

If a household breaks off an internet response at the citizenship, place of birth, or year of entry screens, this means it would have already responded to the core questions. This would not trigger follow-up fieldwork and thus would not involve additional fieldwork costs. In contrast, if a household does not mail back a questionnaire or give an internet response, fieldwork will be necessary and additional costs will be incurred. Thus, the 5.1 percent number for differential self-response is more appropriate for estimating the additional fieldwork cost of adding a citizenship question.

- 12. Alternative C states that Census would use administrative data from the Social Security Administration, Internal Revenue Service, and “other federal and state sources.” What are the other sources?**

In addition to continuing the acquisition of the Social Security Administration and Internal Revenue Service data, the Census Bureau is in discussion with the U.S. Citizen and Immigration Services (USCIS) staff to acquire additional citizenship data.

- 13. Is Census confident that administrative data will be able to be used to determine citizenship for all persons (e.g., not all citizens have social security numbers)?**

We are confident that Alternative C is viable and that we have already ingested enough high-quality citizenship administrative data from SSA and IRS. The USCIS data are not required. They would, however, make the citizenship voting age tabulations better, but the administrative data we’ve got are very good and better than the data from the 2000 Census and current ACS. The type of activities required for Alternative C already occur daily and routinely at the Census Bureau. We have been doing this for business data products, including the Economic Censuses, for decades. We designed the 2020 Census to use this technology too.

- 14. For Alternative C, the memo says, “we assume the availability of these record linkage systems and associated administrative data”—does Census already have in place access to this data or would this need to be negotiated? If negotiated, for which data sets specifically?**

The Census Bureau has longstanding contractual relationships with the Social Security Administration and the Internal Revenue Service that authorize the use of data for this project. For new data acquired for this project (i.e., USCIS) we would estimate a six-month development period to put a data acquisition agreement in place. That agreement would also include terms specifying the authorized use of data for this project.

- 15. Are there any privacy issues/sensitive information prohibitions that might prevent other agencies from providing such data?**

There are no new privacy or sensitivity issues associated with other agencies providing citizenship data. We have received such information in the past from USCIS. We are currently authorized to receive and use the data from SSA and IRS that are discussed in Alternative C.

- 16. How long would Census expect any negotiation for access to data take? How likely is it that negotiations would be successful? Are MOA’s needed/required?**

Current data available to the Census Bureau provide the quality and authority to use that are required to support this project. Additional information potentially available from USCIS would

serve to supplement/validate those existing data. We are in early discussions with USCIS to develop a data acquisition agreement and at this time have no indications that this acquisition would not be successful.

**17. What limitations would exist in working with other agencies like IRS, Homeland Security, etc. to share data?**

The context for sharing of data for this project is for a one-way sharing of data from these agencies to the Census Bureau. Secure file transfer protocols are in-place to ingest these data into our Title 13 protected systems. For those data already in-place at the Census Bureau to support this project, provisions for sharing included in the inter-agency agreement restrict the Census Bureau from sharing person-level microdata outside the Census Bureau's Title 13 protections. Aggregates that have been processed through the Bureau's disclosure avoidance procedures can be released for public use.

**18. If Alternative C is selected, what is Census's backup plan if the administrative data cannot be completely collected and utilized as proposed?**

The backup plan is to use all of the administrative data that we currently have, which is the same set that the analyses of Alternative C used. We have verified that this use is consistent with the existing MOUs. We would then use estimation and modeling techniques similar to those used for the Small Area Income and Poverty Estimates (SAIPE) to impute missing citizenship status for those persons

for whom we do not have administrative records. These models would also include estimates of naturalizations that occurred since the administrative data were ingested.

- 19. Does Census have any reason to believe that access to existing data sets would be curtailed if Alternative C is pursued?**

No we do not believe that any access to existing data sets would be curtailed if we pursue Alternative C.

- 20. Has the proposed Alternative C approach ever been tried before on other data collection projects, or is this an experimental approach? If this has been done before, what was the result and what were lessons learned?**

The approach in Alternative C has been routinely used in processing the economic censuses for several decades. The Bureau's Business Register was specifically redesigned for the 2002 Economic Census in order to enhance the ingestion and use of administrative records from the IRS and other sources. The data in these administrative records are used to substitute for direct responses in the economic censuses for the unsampled entities. They are also used as part of the review, edit, and imputation systems for economic censuses and surveys. On the household side, the approach in Alternative C was used extensively to build the residential characteristics for On The Map and OnTheMap for Emergency Management.

**21. Is using sample data and administrative records sufficient for DOJ's request?**

The 2020 Census data combined with Alternative Care sufficient to meet DoJ's request. We do not anticipate using any ACS data under Alternative C.

**22. Under Alternative C, If Census is able to secure interagency agreements to provide needed data sets, do we know how long it would take to receive the data transmission from other agencies and the length of time to integrate all that data, or is that unknown?**

With the exception of the USCIS data, the data used for this project are already integrated into the 2020 Census production schema. In mid-to late 2018, we plan to acquire the USCIS data and with those data and our existing data begin to develop models and business rules to select citizenship status from the composite of sources and attach that characteristic to each U.S. person. We expect the development and refinement of this process to continue into 2019 and to be completed by third quarter calendar year 2019.

**23. Cross referencing Census decennial responses with numerous governmental data sets stored in various databases with differing formats and storage qualities sounds like it could be complicated. Does Census have an algorithm in place to efficiently combine and cross reference such large quantities of data coming from many different sources? What cost is associated with Alternative C, and what technology/plan does Census have in place to execute?**

Yes, the 2018 Census End-to-End test will be implementing processing steps to be able to match Census responses to administrative record information from numerous governmental data sets. The Census Bureau has in place the Person Identification Validation System to assign Protected Identification Keys to 2020 Census responses. The required technology for linking in the administrative records is therefore part of the 2020 Census technology. This incremental cost factored into the estimate for Alternative C is for integrating the citizenship variable specifically, since that variable is not currently part of the 2020 Census design. No changes are required to the production Person Identification Validation system to integrate the administrative citizenship data.

- 24. For section C-1 of the memo, when did Census do the analyses of the incorrect response rates for non-citizen answers to the long form and ACS citizenship question? Were any of the analyses published?**

The comparisons of ACS, 2000 Decennial Census longform and SSA Numident citizenship were conducted in January 2018. This analysis has not been published.

- 25. Has Census corrected the incorrect responses it found when examining non-citizen responses? If not, why not?**

In the American Community Survey (ACS), and the short form Decennial Census, we do not change self-reported answers. The Decennial Census and the ACS are based on self-response and we accept the responses provided by households as they are

given. While we have procedures in place to address duplicate or fraudulent responses, we do not check the accuracy of the answers provided to the specific questions on the Census questionnaires. This is a long established process at the Census Bureau that has been thoroughly tested and in place since 1970, when the Census Bureau moved to a mail-out/respond approach to the Decennial Census.

- 26. Has the Department of Justice ever been made aware of inaccurate reporting of ACS data on citizenship, so that they may take this into consideration when using the data?**

Not exactly. The Census Bureau is in close, regular contact with the Department of Justice (DOJ) regarding their data requirements. Our counterparts at DOJ have a solid understanding of survey methodology and the quality of survey data, and they are aware of the public documentation on sampling and accuracy surrounding the ACS. However, the specific rate of accuracy regarding responses to the ACS question on citizenship has never been discussed.

- 27. Why has the number of persons who cannot be linked increased from 2010 to 2016?**

The linkage between the ACS and administrative data from the SSA Numident and IRS ITIN tax filings depends on two factors: (a) the quality of the personally identifiable information (PII) on the ACS response and (b) whether the ACS respondent is in the SSN/ITIN universe.



With respect to the quality of the PII on the ACS, there may be insufficient information on the ACS due to item nonresponse or proxy response for the person to allow a successful match using the production record linkage system. There may also be more than one record in the Numident or ITIN IRS tax filings that matches the person's PII. Finally, there may be a discrepancy between the PII provided to the ACS and the PII in the administrative records.

Alternatively, the person may not be in the Numident or ITIN IRS tax filing databases because they are out of the universe for those administrative systems. This happens when the person is a citizen without an SSN, or when the person is a noncitizen who has not obtained an SSN or ITIN.

Very few of the unlinked cases are due to insufficient PII in the ACS or multiple matches with administrative records. The vast majority of unlinked ACS persons have sufficient PII, but fail to match any administrative records sufficiently closely. This means that most of the nonmatches are because the ACS respondent is not in the administrative record universe.

The incidence of ACS persons with sufficient PII but no match with administrative records increased between 2010 and 2016. One contributing factor is that the number of persons linked to ITIN IRS tax filings in 2016 was only 39 percent as large as in 2010, suggesting that either fewer of the noncitizens in the 2016 ACS had ITINs, or more of them provided PII in the ACS that was inconsistent with their PII in IRS records.

- 28. Independent of this memo, what action does Census plan to take in response to the analyses showing that non-citizens have been incorrectly responding to the citizenship question?**

The Census Bureau does not have plans to make any changes to procedures in the ACS. However, we will continue to conduct thorough evaluations and review of census and survey data. The ACS is focusing our research on the potential use of administrative records in the survey. For instance, we are exploring whether we can use IRS data on income to reduce the burden of asking questions on income on the ACS. We are concentrating initially on questions that are high burden, e.g., questions that are difficult to answer or questions that are seen as intrusive.

- 29. Did Census make recommendations the last time a question was added?**

Since the short form Decennial Census was established in 2010, the only requests for new questions we have received have been for the ACS. And, in fact, requests for questions prior to 2010 were usually related to the Decennial Census Long Form. We always work collaboratively with Federal agencies that request a new question or a change to a question. The first step is to review the data needs and the legal justification for the new question or requested changes. If, through this process, we determine that the request is justified, we work with the other agencies to test the question (cognitive testing and field testing). We also work collaboratively on the analysis of the results from the test which inform the final recommendation

about whether or not to make changes or add the question.

**30. Does not answering truthfully have a separate data standard than not participating at all?**

We're not sure what you're asking here. Please clarify the question.

**31. What was the process that was used in the past to get questions added to the decennial Census or do we have something similar where a precedent was established?**

The Census Bureau follows a well-established process when adding or changing content on the census or ACS to ensure the data fulfill legal and regulatory requirements established by Congress. Adding a question or making a change to the Decennial Census or the ACS involves extensive testing, review, and evaluation. This process ensures the change is necessary and will produce quality, useful information for the nation.

The Census Bureau and the Office of Management and Budget (OMB) have laid out a formal process for making content changes.

- First, federal agencies evaluate their data needs and propose additions or changes to current questions through OMB.
- In order to be included, proposals must demonstrate a clear statutory or regulatory need for data at small geographies or for small populations.

- Final proposed questions result from extensive cognitive and field testing to ensure they result in the proper data, with an integrity that meets the Census Bureau's high standards.
- This process includes several opportunities for public comment.
- The final decision is made in consultation with OMB.
- If approved, the Census Bureau implements the change.

**32. Has another agency ever requested that a question be asked of the entire population in order to get block or individual level data?**

Not to our knowledge. However, it is worth pointing out that prior to 1980 the short form of the Decennial Census included more than just the 10 questions that have been on the short form since 1990.

**33. Would Census linking of its internal data sets, with other data sets from places like IRS and Homeland Security, have an impact on participation as well (i.e., privacy concerns)?**

The potential that concerns about the use of administrative records could have an impact on participation has always been a concern of ours, and it's a risk that we're managing on our risk register. We've worked closely with the privacy community throughout the decade, and we established a working group on our National Advisory Committee to explore this issue. We've also regularly briefed

the Congress about our plans. At this stage in the decade there does not appear to be extensive concerns among the general public about our approach to using administrative records in the Nonresponse Operation or otherwise. We will continue to monitor this issue.

- 34. Would Alternative C require any legislation? If so, what is the estimated time frame for approval of such legislation?**

No.

- 35. Census publications and old decennial surveys available on the Census website show that citizenship questions were frequently asked of the entire population in the past. Citizenship is also a question on the ACS. What was the justification provided for citizenship questions on the (A) short form, (B) long form, and (C) ACS?**

In 1940, the Census Bureau introduced the use of a short form to collect basic characteristics from all respondents, and a long form to collect more detailed questions from only a sample of respondents. Prior to 1940, census questions were asked of everyone, though in some cases only for those with certain characteristics. For example, in 1870, a citizenship question was asked, but only for respondents who were male and over the age of 21.

Beginning in 2005, all the long-form questions—including a question on citizenship—were moved to the ACS. 2010 was the first time we conducted a short-form only census. The citizenship question is included in the ACS to fulfill the data requirements of the Department of Justice, as well as many

other agencies including the Equal Employment Opportunities Commission, the Department of Health and Human Services, and the Social Security Administration.

**Kelly, Karen (Federal)**

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**From:** Comstock, Earl (Federal)  
**Sent:** Tuesday, January 30, 2018 8:59 PM  
**To:** Lamas, Enrique  
**Cc:** Jarmin, Ron S; Kelley, Karen (Federal); Willard, Aaron (Federal); Uthmeier, James (Federal); Davidson, Peter (Federal)  
**Subject:** Re: Questions on the January 19 Alternatives Memo

Thanks Enrique. Much appreciated! Earl

Sent from my iPhone

On Jan 30, 2018, at 8:24 PM, Enrique Lamas (CENSUS/ADDP FED) <Enrique.Lamas@census.gov> wrote:

Earl,

We will prepare responses with priority on questions 24-26. We will get you what we have by tomorrow at 10:30.

Enrique Lamas  
Associate Director for Demographic Programs,  
Performing the Non-Exclusive Functions and Duties of the Deputy Director  
US Census Bureau  
301 763 2160

On Jan 30, 2018, at 6:52 PM, Comstock, Earl (Federal) PII <[@doc.gov](mailto:Earl.Comstock@doc.gov)> wrote:

Hi Ron and Enrique—

Thank you for a good start on the draft memo for the Secretary on the citizenship question. As

you know, with Karen's absence [PII] [PII]  
I have been working with Aaron, James and David to review draft. Attached are questions that are raised by the memo. The answers will provide additional information to inform the Secretary that should be included in a revised memo.

Please answer as many of the questions as possible by 10:30 am tomorrow. In particular, if you could provide a response to questions 24, 25, and 26 by 10:30 am tomorrow (Wednesday, Jan. 31) that would be greatly appreciated.

If you have questions you can reach [PII] me at or contact Karen.

Thanks again!

Earl

<Questions on the 19 Jan Draft Census Memo  
01302017.docx>



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**From:** Enrique Lamas (CENSUS/ADDP FED)  
[Enrique.Lamas@census.gov]  
**Sent:** 1/31/2018 3:15:24 PM  
**To:** Ron S Jarmin (CENSUS/ADEP FED)  
[Ron.S.Jarmin@census.gov]  
**Subject:** Barry Robinson

Gave me a call. He got a question from Peter about [REDACTED] Barry said the secretary is talking to DOJ at 10:30.

Enrique Lamas  
Associate Director for Demographic Programs,  
Performing the Non-Exclusive Functions and Duties of  
the Deputy Director  
US Census Bureau  
301 763 2160

---

**From:** Ron S Jarmin (CENSUS/ADEP FED)  
[Ron.S.Jarmin@census.gov]  
**Sent:** 2/6/2018 8:42:03 PM  
**To:** Kelley, Karen (Federal) [REDACTED]  
**CC:** Lamas, Enrique [enrique.lamas@census.gov]  
**Subject:** DOJ

Karen,

I spoke with Art Gary. He has spoken with DOJ leadership. They believe the letter requesting citizenship be added to the 2020 Census fully describes their request. They do not want to meet.

Thanks

Ron

Sent from my iPhone

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**From:** Ron S Jarmin (CENSUS/ADEP FED)  
[Ron.S.Jarmin@census.gov]  
**Sent:** 2/13/2018 10:46:45 PM  
**To:** John Maron Abowd (CENSUS/ADRM FED)  
[john.maron.abowd@census.gov]  
**CC:** Michael A Berning (CENSUS/ERD FED)  
[Michael.A.Berning@census.gov]  
**Subject:** Re: SSA

Do we need to mod the SSA MOU? If so, how quickly can we do that?

Sent from my Phone

On Feb 13, 2018, at 4:52 PM, John Maron Abowd (CENSUS/ADRM FED) <[john.maron.abowd@census.gov](mailto:john.maron.abowd@census.gov)> wrote:

Let me add that the Secretary needs to be told that USCIS identified the State Department as the appropriate source for some of the data that we are requesting from USCIS, and we need to initiate an MOU with them as well.

Thanks,  
John

**John M. Abowd, PhD**  
**Associate Director and Chief Scientist**  
**Research and Methodology**  
**U.S Census Bureau**

**Office 301.763.5880 (simulring on cell) Room 8H120**  
**[john.maron.abowd@census.gov](mailto:john.maron.abowd@census.gov)**

[census.gov](http://census.gov)

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**From:** Michael A Berning (CENSUS/ERD FED)  
**Sent:** Tuesday February 13, 2018 4:43:13 PM  
**To:** Ron S Jarmin (CENSUS/ADEP FED)  
**Cc:** John Maron Abowd (CENSUS/ADRM FED)  
**Subject:** Re: SSA

Hi Ron,

SSA (Paul Davis) has been very responsive to some of our follow-up questions re the Numident citizenship but no other developments on the SSA front.

We had an initial teleconference with USCIS [**RE-DACTED**] I did sent them some follow-up questions yesterday when they came up in a meeting we had with John A and USCIS responded to those today. [**RE-DACTED**]

In our initial call USCIS told us that we might need to go the state department to get some of the info the might be useful re non-citizens so I'm planning to setup a call with our state department contact.

Mike Berning  
Assistant Division Chief for Data Acquisition and Curaticn  
Economic Reimbursable Surveys Division  
U.S. Census Bureau  
Washington D.C. 20233  
Phone 301-763-2028  
E-mail: [michael.a.berning@census.gov](mailto:michael.a.berning@census.gov)

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**From:** Ron S Jarmin (CENSUS/ADEP FED)  
**Sent:** Tuesday February 13, 2018 4:30 PM  
**To:** Michael A Berning (CENSUS/ERD FED)  
**Cc:** John Maron Abowd (CENSUS/ADRM FED)  
**Subject:** SSA

Mike,

The Secretary is supportive of adrec for citizenship measurement. Before I ping John Phillips, any developments I should know?

Sent from my Phone

**To:** Christa Jones [REDACTED]  
**From:** Ron.S.Jarmin@census.gov  
**Sent:** Wed 2/14/2018 3:40:51 PM  
**Importance:** Normal  
**Subject:** Re: Question  
**Received:** Wed 2/14/2018 3:40:52 PM

Good suggestions

Sent from my iPhone

On Feb 14, 2018, at 10:16 AM, Christa Jones <[REDACTED]> wrote:

Yes. Fascinating. (I would still think they really should know that AEI would not look favorably at the proposal—AEI is important to other administration priorities.). People in favor are Mark Krikorian and Steve Camorrota. There is also likely someone at Heritage. I can check.

Sent from my iPhone

On Feb 14, 2018, at 9:26 AM, Ron S Jarmin (CENSUS/ADEP FED) <[Ron.S.Jannin@census.gov](mailto:Ron.S.Jannin@census.gov)> wrote:

Fascinating. ...

Sent from my iPhone

Begin forwarded message:

**From:** “Ron S Jarmin (CENSUS/ADEP  
FED)” <[Ron.S.Jarmin@census.gov](mailto:Ron.S.Jarmin@census.gov)>  
**Date:** February 13, 2018 at 3:46:46 PM  
EST  
**To:** “Michael R. Strain” <[REDACT-  
ED][AEI.org](mailto:AEI.org)>  
**Subject:** **Re: Question**

Thanks Michael. We are trying to find someone who can give a professional expression of support for the proposal in contrast to the many folks we can find to give professional statements against the proposal. Interesting, but perhaps not so surprising, that no one at AEI is willing to do that.

Thanks for your help.

**Ron Jarmin, PhD.**

Associate Director for Economic Programs,  
and

Performing the Non-Exclusive Functions and  
Duties of the Director

U.S. Census Bureau

Office 301.763.1858, [Ron.S.Jarmin@census.gov](mailto:Ron.S.Jarmin@census.gov)

[census.gov](http://census.gov) Connect with us on [Social Media](#)

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**From:** Michael R. Strain [REDACTED]@AEI.org>  
**Sent:** Tuesday, February 13, 2018 3:31:38 PM  
**To:** Ron S Jarmin (CENSUS/ADEP FED)  
**Subject:** RE: Question

Hi Ron,

Great to hear from you. I hope you are well.

None of my colleagues at AEI would speak favorably about the proposal. Is it important that the person actually be in favor of the proposal?

All the best,

Michael

**From:** Ron S Jarmin (CENSUS/ADEP FED) [mailto:[Ron.S.Jarmin@census.gov](mailto:Ron.S.Jarmin@census.gov)]  
**Sent:** Tuesday, February 13, 2018 1:48 PM  
**To:** Michael R. Strain <[REDACTED]@AEI.org>  
**Subject:** Question

Hi Michael,

Hope all is well. We are trying to set up some meetings for Secretary Ross to discuss the proposed citizenship question on the 2020 Census with interested stakeholders. Most stakeholders will speak against the proposal. We're looking to find someone thoughtful who can speak to the pros of adding such a question or perhaps addressing the fundamental



data need some other way (e.g., admin records).

Do you know of anyone at AEI, or elsewhere, that could do this sometime over the next couple weeks?

Thanks

**Ron Jarmin, PhD.**

Associate Director for Economic Programs, and  
Performing the Non-Exclusive Functions and  
Duties of the Director

U.S. Census Bureau

Office 301.763.1858, [Ron.S.Jarmin@census.gov](mailto:Ron.S.Jarmin@census.gov)

[census.gov](http://census.gov) Connect with us on [Social Media](#)

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**From:** Ron.S.Jarmin@census.gov  
[[Ron.S.Jarmin@census.gov](mailto:Ron.S.Jarmin@census.gov)]  
**Sent:** 2/15/2018 4:37:28 PM  
**To:** BRobinson@doc.gov; Melissa L Creech  
(CENSUS/PCO FED) [[Melissa.L.Creech@census.gov](mailto:Melissa.L.Creech@census.gov)]; Enrique lamas (CENSUS/ADDP  
FED) ([Enrique.Lamas@census.gov](mailto:Enrique.Lamas@census.gov))  
**Subject:** Fwd: DOJ

FYI

Sent from my Phone

Begin forwarded message:

**From:** [Ron.S.Jarmin@census.gov](mailto:Ron.S.Jarmin@census.gov)  
**Date:** February 6, 2018 at 3:42:02 PM EST  
**To:** Karen Kelley [REDACTED]  
**Cc:** Enrique Lamas <[enrique.lamas@census.gov](mailto:enrique.lamas@census.gov)>  
**Subject:** DOJ

Karen,

I spoke with Art Gary. He has spoken with DOJ leadership. They believe the letter requesting citizenship be added to the 2020 Census fully describes their request. They do not want to meet.

Thanks

Ron

Sent from my Phone



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

Mar. 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 Al-  
ternative D (Combined Al-  
ternatives B and C)

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 natu-

ralized 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 admin-

istrative 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 Non-response 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.

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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No. 18-CV-2921 (JMF)

STATE OF NEW YORK, ET AL., PLAINTIFF

*v.*

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
DEFENDANTS

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No. 18-CV-5025 (JMF)

NEW YORK IMMIGRATION COALITION, ET AL.,  
PLAINTIFF

*v.*

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
DEFENDANTS

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Filed: Sept. 7, 2018

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**OPINION AND ORDER**

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JESSE M. FURMAN, United States District Judge:

In these cases, familiarity with which is assumed, Plaintiffs bring claims under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 *et seq.*, and the Due Process Clause of the Fifth Amendment challenging the decision of Secretary of Commerce Wilbur L. Ross, Jr. to reinstate a question concerning citizenship status on the 2020 census questionnaire. *See generally New York v. U.S. Dep’t of Commerce*, 315 F. Supp.

3d 766 (S.D.N.Y. 2018). In an oral decision on July 3, 2018, the Court granted Plaintiffs’ application for discovery beyond the administrative record, finding—among other things—that Plaintiffs had “made a strong preliminary or *prima facie* showing that they will find material beyond the Administrative Record indicative of bad faith.” (Docket No. 205 (“July 3 Oral Arg. Tr.”), at 85).<sup>1</sup> In the two succeeding months, the parties have conducted substantial discovery (*see* Docket No. 305, at 1-2 (summarizing the discovery to date)), and have briefed (or are in the midst of briefing) a slew of discovery disputes, (*see, e.g.*, Docket Nos. 236, 237, 293, 299). One of those disputes concerned Plaintiffs’ request to depose Acting Assistant Attorney General for Civil Rights John Gore (“AAG Gore”), who allegedly “ghostwrote” a letter from the Department of Justice (“DOJ”) to Secretary Ross requesting the citizenship question that lies at the heart of the parties’ disputes. (Docket No. 236, at 1; *see also* Docket No. 255). In an Order entered on August 17, 2018, the Court granted Plaintiffs’ request. (Docket No. 261 (“AAG Gore Order”)). The deposition of Gore is apparently scheduled for September 12, 2018. (Docket No. 304 (“Pls.’ Opp’n”), at 3).

On the eve of Labor Day weekend—Friday, August 31, 2018, at approximately 6 p.m.—Defendants filed a letter motion to stay discovery pending resolution of a “forthcoming petition for a writ of mandamus in the U.S. Court of Appeals for the Second Circuit.” (Docket No. 292 (“Defs.’ Ltr.”), at 1 ). Defendants seek a stay of *all* discovery, or, at a minimum, “further discovery of the Department of Justice . . . particu-

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<sup>1</sup> Unless otherwise noted, docket references are to 18-CV-2921.

larly the deposition of Acting Assistant Attorney General . . . John Gore.” (*Id.*). In their motion, Defendants also sought an “administrative stay while the Court considers this stay request.” (*Id.*). On September 4, 2018, the Court summarily denied the latter request and set an expedited briefing schedule (later modified), with Plaintiffs’ opposition due on September 6, 2018, and any reply due today at noon. (Docket Nos. 297, 306). Thereafter, on September 5, 2018, Defendants filed a Petition for a Writ of Mandamus and an Emergency Motion for Immediate Administrative Stay Pending Resolution of the Government’s Petition for Writ of Mandamus with the Second Circuit. To the Court’s knowledge, the Second Circuit has not yet acted on that application.

In determining whether to grant a stay pending mandamus, district courts must consider the following four factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *U.S. S.E.C. v. Citigroup Glob. Mkts. Inc.*, 673 F.3d 158, 162 (2d Cir. 2012) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The “‘most critical’ factors” are whether “the stay movant has demonstrated (1) a strong showing of the likelihood of success and (2) that it will suffer irreparable harm.” *In re Revel AC, Inc.*, 802 F.3d 558, 568 (3d Cir. 2015) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)); *cf. Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (“A showing of irreparable harm is the single most important prerequisite for the issuance of a pre-

liminary injunction.” (internal quotation marks omitted)). Critically, to satisfy the likelihood-of-success requirement here, Defendants must not only demonstrate that this Court erred in its decisions, but also that the Second Circuit is likely to grant mandamus. See, e.g., *Emp’rs Ins. of Wausau v. News Corp.*, No. 06-CV-1602 (SAS), 2008 WL 4560687, at \*1 (S.D.N.Y. Oct. 6, 2008) (denying motion to stay pending mandamus where “plaintiffs have made no showing that their mandamus petition has a likely chance of success”). That is a very high burden. Indeed, to succeed in their mandamus petition, Defendants must overcome the “expressed reluctance” of the Second Circuit “to overturn discovery rulings” by demonstrating that the issue here “is of extraordinary significance or there is extreme need for reversal of the district court’s mandate before the case goes to judgment.” *In re the City of New York*, 607 F.3d 923, 939 (2d Cir. 2010). If Defendants meet *those* requirements, they must *also* show that their “right to issuance of the writ is clear and indisputable,” *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 381 (2004) (internal quotation marks omitted); see also *In re the City of New York*, 607 F.3d at 943 (“Because a writ of mandamus is a ‘drastic and extraordinary remedy reserved for really extraordinary causes,’ we issue the writ only in ‘exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion.’” (quoting *Cheney*, 542 U.S. at 380)).

The Court turns, first, to Defendants’ request for a stay of discovery altogether and, then, to their request for a stay of the AAG Gore deposition scheduled for September 12th.

**STAY OF DISCOVERY ALTOGETHER**

In light of the standards above, Defendants' motion to stay discovery altogether is frivolous. First, a court "must consider a plaintiff's delay in seeking relief when analyzing whether the plaintiff will suffer irreparable harm in the absence of relief." *Ingber v. N.Y.C. Dep't of Educ.*, No. 14-CV-3942 (JMF), 2014 WL 2575780, at \*2 (S.D.N.Y. June 9, 2014) (citing *Tom Doherty Assocs. v. Saban Entm't, Inc.*, 60 F.3d 27, 39 (2d Cir. 1995)). That is because "inexcusable delay in filing" a motion to stay "severely undermines the . . . argument that absent a stay irreparable harm would result." *Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 39 (2d Cir. 1993); see, e.g., *S.E.C. v. WorldCom, Inc.*, 452 F. Supp. 2d 531, 531-32 (S.D.N.Y. 2006) (denying a stay on the ground that the defendant's delay in requesting it was "dilatory in the extreme but also patently prejudicial"); cf., e.g., *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) (holding that "significant delay in applying for injunctive relief . . . alone may justify denial" of preliminary relief). Here, the Court authorized extra-record discovery on July 3, 2018, and set a tight discovery schedule in light of the parties' agreement that Plaintiffs' claims in these cases should be resolved quickly to allow Defendants to prepare for the 2020 census. (July 3 Oral Arg. Tr. 87-89, 91). Nevertheless, Defendants waited *nearly two full months* to seek a stay of the Court's ruling (and even then filed their motion at 6 p.m. on the eve of a three-day weekend)—during which time the parties conducted substantial discovery. That delay, in itself, belies Defendants' conclusory assertions of irreparable harm.



That is enough to defeat Defendants' claim of irreparable harm, but their claim—that, “[w]ithout a stay, Defendants will be required to expend significant time and resources to collect, review, and produce additional discovery materials,” (Defs.’ Ltr. 3)—does not withstand scrutiny for two independent reasons. First, “[t]he prospect of burdensome or expensive discovery alone is not sufficient to demonstrate ‘irreparable injury.’” *M.D. v. Perry*, No. C-11-84 (JGJ), 2011 WL 7047039, at \*2 (S.D. Tex. July 21, 2011); *see, e.g., Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 24 (1974) (“Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.”); *see also, e.g., Linden v. X2 Biosystems, Inc.*, No. C17-966 (RSM), 2018 WL 1603387, at \*3 (W.D. Wash. Apr. 3, 2018); *In re Cobalt Int’l Energy, Inc. Sec. Litig.*, No. H-14-3428, 2017 WL 3620590, at \*4 (S.D. Tex. Aug. 23, 2017); *In re: BP P.L.C. Sec. Litig.*, No. 4:10-CV-4214, 2016 WL 164109, at \*2 (S.D. Tex. Jan. 14, 2016); *DL v. District of Columbia*, 6 F. Supp. 3d 133, 135 (D.D.C. 2014). Second, and in any event, Secretary Ross’s decision to add the citizenship question is the subject of parallel litigation in the Northern District of California and the District of Maryland. (*See* Docket Nos. 221, 224, 287). The judges presiding over those cases have also—and independently—allowed extra-record discovery, and to date Defendants have not sought a stay of either of those rulings. Thus, granting a stay here would not even provide Defendants with the relief they seek. *Cf., e.g., V.S. v. Muhammad*, No. 07-CV-1281 (DLI) (JO), 2009 WL 936711, at \*1 (E.D.N.Y. Apr. 3, 2009) (finding a claim of irreparable harm suspect because the party claiming harm “will be subject to discovery, including giving deposi-

tion testimony and providing documents” regardless of the relief sought).

The Court could deny Defendants’ motion for a stay of discovery altogether on that basis alone, but the other factors to be considered compel the same conclusion. First, Defendants do not come close to demonstrating a likelihood of success on the merits. They contend that the Court failed to apply the correct legal standard and erred in inferring bad faith “primarily from” the timing of Secretary Ross’s decision relative to the DOJ letter (*see* Defs.’ Ltr. 2), but Defendants are wrong on both counts. First, in its July 3rd oral decision, the Court indisputably articulated and applied the correct legal standard, to wit that “a court may allow discovery beyond the record where ‘there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decision-makers.’” (July 3 Oral Arg. Tr. 82 (quoting *Nat’l Audubon Soc’y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997))). In fact, it is Defendants who get the legal standard wrong, insisting that the Court could not authorize extra-record discovery without “a strong demonstration that Secretary Ross did not actually believe his stated rationale for reinstating a citizenship question.” (Defs.’ Ltr. 2). Notably, however, the only authority Defendants cite for that proposition is *National Security Archive v. CIA*, 752 F.3d 460, 462 (D.C. Cir. 2014)—a non-binding decision regarding the Freedom of Information Act and the deliberative-process privi-

lege that has literally nothing to do with the issue here.<sup>2</sup>

Second and in any event, Defendants badly mischaracterize the basis for the Court's finding of potential bad faith. The Court did not rely "primarily" on the relationship in time between Secretary Ross's decision and the DOJ letter. Instead, the Court relied on several considerations that, taken together, provided a "strong showing . . . of bad faith." (July 3 Oral Arg. Tr. 82 (quoting *Nat'l Audubon Soc'y*, 132 F.3d at 14)). Those considerations included: (1) Secretary Ross's June 21, 2018 supplemental memorandum (Docket No. 189-1), in which he suggested that he had "already decided to add the citizenship question before he reached out to the Justice Department"; (2) allegations that Secretary Ross "overruled senior Census Bureau career staff, who had concluded . . . that reinstating the citizenship question would be very costly and harm the quality of the census count"; (3) claims that the Census Bureau "deviated significantly from standard operating procedures in adding the citizenship question"; and (4) Plaintiffs' *prima facie* showing that Secretary Ross's stated justification was pre-textual. (July 3 Oral Arg. Tr. 82-83 (internal quotation marks and brackets omitted)). Taken together, those considerations provided the Court with a solid basis to conclude that Plaintiffs had made a sufficient showing of bad faith to warrant extra-record discovery. *See, e.g., Tummino v. von Eschenbach*, 427 F. Supp. 2d 212, 231, 233 (E.D.N.Y. 2006) (authorizing extra-record

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<sup>2</sup> Defendants implicitly concede the inaptness of the D.C. Circuit's decision by citing it using the "*cf.*" signal, but even that understates the case's irrelevance to the matter at hand.

discovery where there was evidence that the agency decisionmakers had made a decision and, only then, took steps “to find acceptable rationales for the decision”; where “senior level personnel . . . overruled the professional staff”; and where the decisionmaking process was “unusual” in various respects). If anything, the basis for that conclusion appears even stronger today. (*See* Pls.’ Opp’n 2 n.1).

Finally, given the importance of the census and the need for a timely resolution of Plaintiffs’ claims, staying discovery altogether will substantially injure both Plaintiffs and the public interest. As noted, Defendants themselves agree that there is a strong interest in resolving Plaintiffs’ claims quickly given the need to prepare for the 2020 census. (*See* Docket No. 103, at 4-5 (noting that “the Census Bureau has indicated in its public planning documents that it intends to start printing the physical 2020 Census questionnaire by May 2019” and that Ron Jarmin, Acting Director of the Census Bureau and a Defendant here, “testified under oath before Congress . . . that the Census Bureau would like to ‘have everything settled for the questionnaire this fall’ and ‘wants to resolve this issue ‘very quickly’”). Staying discovery altogether would plainly make it difficult, if not impossible, to meet that goal. More broadly, there is a strong interest in ensuring that the census proceeds in an orderly, transparent, and fair manner—and, relatedly, that it is conducted in a manner that “bolsters public confidence in the integrity of the process and helps strengthen this mainstay of our democracy.” *Franklin v. Massachusetts*, 505 U.S. 788, 818 (1992) (Stevens, J., concurring in part and concurring in the judgment); *see id.* (“The open nature of the census enterprise and the public dis-

semination of the information collected are closely connected with our commitment to a democratic form of government.”). Those interests weigh heavily against any delay and in favor of discovery to ensure an adequate record for the Court to review Defendants’ decision to add the citizenship question.

#### **STAY OF THE AAG GORE ORDER**

Although Defendants’ motion for a stay of the AAG Gore Order arguably presents a closer question, it too falls short. First, for the reasons discussed above, Plaintiffs and the public have a strong interest in ensuring that this case proceeds without unnecessary delay and that there is an adequate record for the Court to evaluate the lawfulness of Defendants’ decision to add the citizenship question to the census questionnaire. Second, once again, Defendants inexplicably delayed in seeking relief. The Court entered the Order compelling the deposition of AAG Gore on August 17, 2018, yet Defendants waited two full weeks, until August 31, 2018, to file their motion for a stay. Even then, they filed their motion at 6 p.m. on the eve of a three-day weekend, with only six business days—two of which are religious holidays during which the Court is unavailable—before the AAG Gore deposition. To the extent that Defendants claim allowing the deposition to proceed would result in irreparable harm, therefore, “the irreparability is a product of [their] own delay. This is a delaying tactic that is inequitable to the [Plaintiffs] and to the courts as well.” *Hirschfeld*, 984 F.2d at 39 (internal quotation marks omitted). On top of all that, Defendants’ claim that a deposition of AAG Gore would be uniquely and irreparably burdensome is belied by the fact that, as Defendants them-

selves point out, “Plaintiffs have [already] deposed six high-ranking Commerce and Census Bureau officials.” (Defs.’ Ltr. 3). More broadly, the burdens of discovery, including depositions of government officials, are not inherently irreparable—particularly where, as here, the Court has taken various steps to limit the scope of discovery and to protect any relevant privileges. *See, e.g., Citizens for Responsibility & Ethics in Washington v. Cheney*, 580 F. Supp. 2d 168, 180-81 (D.D.C. 2008).

Finally, and in any event, Defendants fail to show a likelihood of success on the merits of their mandamus petition. Quoting *Lederman v. New York City Department of Parks and Recreation*, 731 F.3d 199 (2d Cir. 2013), for the proposition that “judicial orders compelling testimony of high-ranking officials are highly disfavored and are justified only under ‘exceptional circumstances,’” Defendants contend that the Court erred in concluding that there was a need to compel AAG Gore’s testimony. (Defs.’ Ltr. 3). Significantly, however, in opposing Plaintiffs’ motion to compel AAG Gore’s testimony, Defendants did not make that argument, let alone cite *Lederman*; instead, they relied exclusively on the standard set forth in Rule 45 of the Federal Rules of Civil Procedure. (*See* Docket No. 255). That may well constitute a formal waiver, but it *certainly* weighs against the likelihood of mandamus. *See, e.g., In re Catawba Indian Tribe of S.C.*, 973 F.2d 1133, 1135 (4th Cir. 1992) (“[F]ailure to raise [an] issue . . . in the face of the [petitioner’s] admitted knowledge of the importance of the question to its case, can only weigh against its present petition for the extraordinary writ of mandamus.”). And in any event, the Court’s decision was consistent with, if not compelled

by, *Lederman*. Notably, the *Lederman* Court provided two *alternative* examples of showings that would satisfy that standard: “that the official has unique first-hand knowledge related to the litigated claims *or* that the necessary information cannot be obtained through other, less burdensome or intrusive means.” *Id.* (emphasis added). Consistent with those examples, the Court found that a deposition of AAG Gore was appropriate. “Given the combination of AAG Gore’s apparent role in drafting the Department of Justice’s December 12, 2017 letter requesting that a citizenship question be added to the decennial census and the Court’s prior rulings,” the Court explained, “his testimony is plainly ‘relevant,’ within the broad definition of that term for purposes of discovery.” (Gore Order 1). And “given Plaintiffs’ claim that AAG Gore ‘ghostwrote DOJ’s December 12, 2017 letter requesting addition of the citizenship question,’”—a claim that Defendants have conspicuously not disputed—he “possesses relevant information that cannot be obtained from another source.” (*Id.* at 1 (citing *Marisol A. v. Giuliani*, No. 95-CV-10533 (R.J.W.), 1998 WL 132810, at \*2 (S.D.N.Y. Mar. 23, 1998))).

In challenging the Court’s decision, Defendants suggest that the Court was required to consider whether there were “less burdensome means” to obtain the information in AAG Gore’s possession. (Defs.’ Ltr. 3). As *Lederman* makes clear, however, where a court finds that the relevant government official “has unique first-hand knowledge related to the litigated claims,” it need not make a separate finding “that the necessary information cannot be obtained through other, less burdensome or intrusive means.” 731 F.3d at 202. In any event, the Court did make the latter finding here, as it expressly concluded that “AAG Gore pos-

sesses relevant information *that cannot be obtained from another source.*” (Gore Order 2 (emphasis added)). More broadly, although Defendants are correct that “[t]he decision Plaintiffs challenge” in these cases “was made by the Secretary of Commerce, not the Department of Justice,” it does not follow—as Defendants contend—that the information possessed by AAG Gore is “irrelevant to assessing the Commerce Secretary’s reasons for adopting a citizenship question.” (Defs.’ Ltr. 3). Among other things, AAG Gore’s testimony is plainly relevant to whether Secretary Ross “made a decision and, only thereafter took steps ‘to find acceptable rationales for the decision.’” (July 3 Oral Arg. Tr. 82 (quoting *Tummino*, 427 F. Supp. 2d at 233)). It is also relevant to whether Secretary Ross’s stated rationale—that reinstating the citizenship question was necessary to enforce the Voting Rights Act—was pre-textual. After all, Defendants themselves concede that “any requests for citizenship data with a Voting Rights Act enforcement rationale would naturally come from the head of the Civil Rights Division,” (Docket No. 236, Ex. 5, at 50), and Secretary Ross has disclosed that it was he who “inquired whether the Department of Justice . . . would support, and if so would request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act,” (Docket No. 189). Put simply, a deposition of the person who apparently wrote the memorandum that Secretary Ross himself requested and then later relied on to justify his decision to add the citizenship question is highly relevant “to assessing the Commerce Secretary’s reasons.” (Defs.’ Ltr. 3).



**CONCLUSION**

For the foregoing reasons, Defendants' motion for a stay of discovery is DENIED in its entirety. The Clerk of Court is directed to terminate 18-CV-2921, Docket No. 292 and 18-CV-5025, Docket No. 116.

SO ORDERED.

Dated: Sept. 7, 2018  
New York, New York

/s/ JESSE M. FURMAN  
JESSE M. FURMAN  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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18-CV-2921 (JMF)

STATE OF NEW YORK, ET AL., PLAINTIFFS

*v.*

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
DEFENDANTS

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Filed: Sept. 30, 2018

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**MEMORANDUM OPINION AND ORDER**

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JESSE M. FURMAN, United States District Judge:

On September 28, 2018, Defendants filed yet another application for a stay of discovery in these cases, “including” but not limited to the depositions of Secretary of Commerce Wilbur L. Ross, Jr., and John M. Gore, Acting Assistant Attorney General for the Civil Rights Division—this time “pending Supreme Court review.” (Docket No. 359). The application—which does not even bother to recite the requirements for a stay, let alone attempt to show that those requirements have been met—is hard to understand as anything more than a pro forma box-checking exercise for purposes of seeking relief in the Supreme Court. This Court has already rejected Defendants’ requests for stays of discovery altogether, of the Assistant Attorney General Gore’s deposition, and of Secretary Ross’s deposition, (*see* Docket No. 308; Docket No. 345, at 12),

and it adheres to its views on the merits of those requests.

To the extent that Defendants request a stay of all discovery, their application is particularly frivolous—if not outrageous—given their inexplicable (and still unexplained) two-month delay in seeking that relief, *see New York v. U.S. Dep't of Commerce*, No. 18-CV- 2921 (JMF), 2018 WL 4279467, at \*2 (S.D.N.Y. Sept. 7, 2018), and their representation to the Second Circuit only last week that they were *not* actually seeking a stay of all discovery, (*see* Docket No. 360, at 1-2). If anything, the notion that Defendants will suffer irreparable harm absent a stay of all discovery is even more far-fetched now than it was when first requested on August 31, 2018, as the parties are nearly three months into discovery and only days away from completing it. The Court will not permit (and doubts that either the Second Circuit or the Supreme Court would permit) Defendants to use their arguably timely challenges to the Orders authorizing depositions of Assistant Attorney General Gore and Secretary Ross to bootstrap an untimely—and almost moot—challenge to the July 3rd Order authorizing extra-record discovery, particularly when only nine business days remain before the close of such discovery and much apparently remains to be done. (*See* Docket No. 360-1 ).

Unless and until this Court's Orders are stayed by a higher court, Defendants shall comply with their discovery obligations completely *and* expeditiously; the Court will not look kindly on any delay, and—absent relief from a higher court—will not extend discovery beyond October 12th given the November 5th trial date. As for the deposition of Secretary Ross, which

has been administratively stayed by the Court of Appeals (*see* Docket No. 360-3), the Court takes Defendants at their word when they say that the deposition “can be conducted expeditiously should [the Second Circuit] deny the government’s petition,” (Pets. for Mandamus at 32, Nos. 18-2856 & 18-2857 (2d Cir. Sept. 27, 2018)). In light of that representation, and the discovery deadline of October 12, 2018, Defendants should endeavor to ensure that Secretary Ross remains available for a deposition on October 11, 2018, so that the deposition may take place before discovery closes in the event that the administrative stay is lifted by that date and Defendants’ efforts to obtain permanent relief fail.

For the foregoing reasons, Defendants’ latest application for stay of discovery in these cases, “including” the depositions of Secretary Ross and Assistant Attorney General Gore, is DENIED. The Clerk of Court is directed to terminate Docket No. 359.

SO ORDERED.

Dated: Sept. 30, 2018  
New York, New York

/s/ JESSE M. FURMAN  
JESSE M. FURMAN  
United States District Judge

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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Nos. 18-2652, 18-2659, 18-2856 and 18-2857

IN RE: UNITED STATES DEPARTMENT OF COMMERCE,  
WILBUR L. ROSS, IN HIS OFFICIAL CAPACITY AS SECRE-  
TARY 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

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Filed: Oct. 9, 2018

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Present: PIERRE N. LEVAL, ROSEMARY S. POOLER,  
RICHARD C. WESLEY, *Circuit Judges.*

Petitioners have renewed their request for a stay of discovery in Nos. 18-2652 and 18-2659, including the deposition of Acting Assistant Attorney General Gore, in light of the October 5, 2018 order of the United States Supreme Court denying their application for a stay. That order denied Petitioners' application "without prejudice, provided that the Court of Appeals will afford sufficient time for either party to seek relief in this Court before the depositions in question are taken." *In re Department of Commerce*, Sup. Ct. No. 18A350 (Oct. 5, 2018) (order of Ginsburg, *J.*). In light of the Supreme Court's order, the deposition of Acting Assistant Attorney General Gore is hereby temporarily stayed for thirty-six hours from the filing of this order.

Petitioners also seek a stay of documentary discovery and of the deposition of Commerce Secretary Wilbur Ross. The request for a stay of documentary discovery

—relief which was not sought in Petitioners’ initial mandamus petition—is denied. We make no adjudication on the request for a stay of Secretary Ross’s deposition, which is before another panel of this Court.

FOR THE COURT:

Catherine O’Hagan Wolfe, Clerk of Court



STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

BARBARA D. UNDERWOOD  
ATTORNEY GENERAL

DIVISION OF APPEALS & OPINIONS  
NEW YORK CITY BUREAU

Oct. 6, 2018

Catherine O'Hagan Wolfe  
Clerk of Court, United States Court of Appeals for the  
Second Circuit  
40 Foley Square  
New York, NY 10007

Re: *In re United States Department of Commerce*,  
Nos. 18-2856, 18-2659

Dear Ms. Wolfe:

I write on behalf of plaintiffs-respondents in the above-captioned matters. In the course of our ongoing work in this litigation, we recently learned that the Secretary of Commerce was deposed during an earlier census-related lawsuit, *Carey v. Klutznick*, in which New York State and New York City challenged an alleged undercount by the Census Bureau. While this deposition is not referenced in any published decisions, see *Carey v. Klutznick*, 508 F. Supp. 416 (S.D.N.Y.),

*aff'd*, 637 F.2d 834 (2d Cir. 1980); *Carey v. Klutznick*, 508 F. Supp. 420 (S.D.N.Y. 1980), *rev'd*, 653 F.2d 732 (2d Cir. 1981), contemporaneous press accounts (attached) confirm that the plaintiffs deposed the Secretary in that litigation. That this deposition took place provides additional confirmation that, contrary to defendants' suggestion, a deposition of Secretary Ross would not be unprecedented.

Respectfully submitted,

BARBARA D. UNDERWOOD  
Attorney General of the State of New York

By: /s/ STEVEN C. WU  
STEVEN C. WU  
Deputy Solicitor General  
28 Liberty Street  
New York, NY 10005  
*Attorney for Government*  
*Plaintiffs*

cc (via CM/ECF):

All counsel of record



**COMMERCE SECRETARY IS TOLD TO  
TESTIFY ON CENSUS COUNT**

The New York Times

November 13, 1980, Thursday, Late City Final Edition

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**Section:** Section B; Page 3, Column 5; Metropolitan Desk

**Length:** 776 words

**Byline:** By ROBERT McG. THOMAS Jr.

**Body**

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A Federal judge in Manhattan yesterday ordered the Secretary of Commerce to come to New York to complete a legal deposition in the city-state census litigation. He said that if the Secretary did not come voluntarily, he would "send a marshal to pick him up."

The action by the judge, Henry F. Werker of District Court, came as he opened a trial in a lawsuit filed against the Census Bureau by New York City and New York State. They are seeking a mathematical adjustment to make up for an alleged undercount of a million or more city and state residents. Federal Judge Henry Werker orders Commerce Secretary to testify in suit brought against Census Bureau by New York City and New York State

"The Government has been obstructive, and I don't think it was by chance," declared Judge Werker, who ordered the Secretary, Philip M. Klutznick, to complete a deposition. The taking of the deposition was suspended in Washington last Friday after an assistant

United States attorney repeatedly protested that questions being put to the Secretary by a lawyer representing the city and state went beyond the scope of a prior agreement approved by Judge Werker.

#### Testimony 'Without Restriction'

Judge Werker, denying that he had limited the scope of the deposition, said that he was directing Mr. Klutznick "to appear for examination in New York without restriction" and that it be done "most expeditiously." The judge did not set a specific day.

A spokesman for Mr. Klutznick said later that the Commerce Department's general counsel was "making arrangements for a continuation of the deposition," but he could not say when it might take place.

Lawyers for the city and state asserted that Mr. Klutznick's refusal to continue the deposition last Friday was the latest in a series of defiant actions by the Government. Judge Werker had previously declared Mr. Klutznick and other defendants in the case, including President Carter and the director of the Census Bureau, Vincent P. Barabba, in contempt of court for defying an order requiring them to provide city and state lawyers with master address registers and lists of vacant buildings.

In light of that defiance, Judge Werker issued a so-called preclusion order, in effect requiring the Government to concede many of the factual claims made by the city and state, including their contention that there had been a substantial local undercount and that a mathematical adjustment would be required to make up for it.

City-State Victory Seen

As a result of that order, city and state officials have said they are virtually assured of winning the case at the district level. The Census Bureau has already lost a similar suit in Detroit, and the ultimate determination of whether, and to what extent, the bureau will be required to use a mathematical adjustment to make up for alleged undercounts seems certain to be resolved by the Supreme Court.

One area not covered by the preclusion order is the feasibility of designing and implementing an adjustment formula, and Gaines Gwathmey, the assistant United States attorney who made the Government's opening statement, said he would present expert testimony that there was no way to devise "a rational or valid methodology for an adjustment."

"You can change the numbers and make them bigger," Mr. Gwathmey said, "but you can't make them more accurate." The opening statement for the city and state was presented by Frederick A. O. Schwarz Jr., a partner of Cravath, Swaine & Moore, which is representing the city without fee.

#### Witnesses Point to Flaws

He accused the Government of "changing its tune" in recent weeks. Previously, he said, the Government conceded that there had been an undercount, particularly among minority groups. Now, he said, the Government position is that there has been no undercount.

The three witnesses called by Mr. Schwarz yesterday gave testimony designed to show that mismanagement of the local enumeration effort had led to a large undercount.

One, Steven P. Glusman, a former enumerator and crew chief in Harlem, told of occupied buildings misclassified as vacant and of “curbstoning,” the practice of filling out forms without conducting the required interviews.

Another witness, Sister Mary T. Higgins, a Roman Catholic nun, said that she had repeatedly called the Census Bureau to get it to count 45 nuns living in a church retirement home in the Riverdale section of the Bronx, but that no forms had ever been received and no enumerators had been sent to the home.

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***Judge Summons Commerce Secretary  
to Give Deposition***

The Associated Press

November 12, 1980, Wednesday, AM cycle

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**Section:** Domestic News

**Length:** 186 words

**Dateline:** NEW YORK

**Body**

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A federal judge Wednesday ordered U.S. Commerce Secretary Philip N. Klutznick to come to New York to finish a deposition in a lawsuit over a census undercount and threatened "to send a marshal" after Klutznick if he failed to appear.

U.S. District Judge Henry F. Werker, who is hearing the suit filed by the city and state of New York, said Klutznick's failure to complete the deposition in Washington, D.C., last week was "obstructive."

"If necessary, I'll send a marshal to bring him here," he said.

Klutznick, who has jurisdiction over the federal Census Bureau, originally was asked to come to New York to give the deposition. But Werker allowed him to stay in Washington because his attorneys said he was too busy to travel. Klutznick gave the deposition for about an hour last week but then interrupted the session and failed to resume it.

The city and state filed a joint suit last August in an effort to obtain an adjustment in census figures. They charged the Census Bureau with mismanagement and claimed the official counters missed about 800,000 city residents and 200,000 residents upstate.

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UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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No. 1:18-cv-5025 (JMF)

NEW YORK IMMIGRATION COALITION, ET AL.,  
PLAINTIFFS

*v.*

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
DEFENDANTS

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[Oct. 11, 2018]

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**DEFENDANTS' OBJECTIONS AND RESPONSES  
TO PLAINTIFFS' FIRST SET OF REQUESTS FOR  
EXPEDITED PRODUCTION OF DOCUMENTS  
AND FIRST SET OF INTERROGATORIES TO  
DEFENDANTS UNITED STATES DEPARTMENT  
OF COMMERCE AND WILBUR ROSS**

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Pursuant to Federal Rules of Civil Procedure 26, 33, and 34, Defendants United States Department of Commerce and Wilbur Ross submit these initial objections and responses to Plaintiffs' First Set of Requests for Expedited Production of Documents and First Set of Interrogatories to Defendants United States Department of Commerce and Wilbur Ross.

**OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS**

1. Defendants object to Instructions 4, 5, and 6 to the extent they imply any obligation outside of the scope of Federal Rules of Civil Procedure 26(b)(5) or 34 and the corresponding Local Civil Rules, and on the

ground that they are unduly burdensome. In particular, Defendants will not “identify each PERSON or organization having knowledge of the factual basis, if any, upon which the objection, privilege, or other ground is asserted,” because such a request has no basis in Rules 26(b)(5) or 34. Concerning privileged material, Defendants reserve the right to create a categorical privilege log as contemplated by Local Civil Rule 26.2(c) and the associated Committee Note. Additionally, documents created by or communications sent to or from litigation counsel (including

**Request for Production No. 9.** All DOCUMENTS and COMMUNICATIONS that Defendants plan to introduce into evidence at trial.

**Objections:** Defendants object to this request on the ground that it is premature at this stage of the case, while discovery is still ongoing.

**Response:** Subject to and without waiving the above objection, Defendants refer Plaintiffs to the complete administrative record upon which the Secretary of Commerce based his decision to reinstate a question concerning citizenship on the 2020 Decennial Census, filed on June 8, 2018, *see* ECF No. 173, *New York v. U.S. Dep’t of Commerce*, No. 18-cv-2921 (JMF), and the supplement to the administrative record, filed on June 21, 2018, *see* ECF No. 189, *New York v. U.S. Dep’t of Commerce*, No. 18-cv-2921 (JMF).



**OBJECTIONS AND RESPONSES  
TO INTERROGATORIES**

**Interrogatory No. 1.** With regard to the document found in the Administrative Record at 1321, please IDENTIFY:

- a. the “senior Administration officials” who “previously raised” reinstating the citizenship question;
- b. the “various discussions with other government officials about reinstating a citizenship question to the Census”;
- c. the consultations Secretary and his staff participated in when they “consulted with Federal governmental components”;
- d. the date on which the “senior Administration officials” who “previously raised” reinstating the citizenship question first raised this subject; and
- e. all PERSONS with whom the “senior Administration officials had previously raised” reinstating the citizenship question.

**Objections:** Defendants object to this interrogatory because it has five discrete subparts. This interrogatory therefore constitutes five interrogatories for purposes of the limit of 25 interrogatories. *See* Fed. R. Civ. P. 33(a)(1).

Defendants further object to subparts b., c., and d. of this interrogatory insofar as they exceed the scope of information a party may seek at this stage of the litigation pursuant to Local Civil Rule 33.3(a). Consistent with this Local Civil Rule 33.3(a), Defendants construe subparts b. and c. as requesting only the identities of individuals, and Defendants object to subpart d. as

requesting information outside the scope of Local Civil Rule 33.3(a).

Defendants further object to this interrogatory to the extent that it seeks (a) communications or information protected by the attorney-client privilege or (b) communications or information protected by the deliberative process privilege.

Defendants further object to this interrogatory as vague and overbroad to the extent it seeks information about meetings or conversations with government officials and other persons whose identities are immaterial to the claims in this litigation, and because the burden of responding is disproportionate to the needs of this case. Specifically, Defendants object to subpart e. as overbroad and vague, as it sweeps in private conversations with any individual, without scope, that “senior Administration officials had previously raised” reinstating the citizenship question.

Defendants further object to the interrogatory to the extent that it purports to require the identification of the date, location, participants, and subject of any meetings involving the Executive Office of the President. *See Cheney v. U.S. District Court*, 542 U.S. 367, 388 (2004).

**Response:**

Subject to and without waiving these objections, Defendants state that the following individuals are responsive to this interrogatory:

- 1.a. Defendants have not to date been able to identify individuals responsive to subpart a. Defendants’ investigation is continuing, and De-

defendants will supplement this response as appropriate.

- 1.b. Subject to and without waiving the above objections: Mary Blanche Hanky, James McHenry, Gene Hamilton, John Gore, Danielle Cutrona, Jefferson Sessions, Kris Kobach, Steve Bannon, and Wilbur Ross.
- 1.c. Subject to and without waiving the above objections: Mary Blanche Hanky, James McHenry, Gene Hamilton, John Gore, Danielle Cutrona, Jefferson Sessions, Kris Kobach, Steve Bannon, and Wilbur Ross.

Defendants reserve the right to supplement this response with any additional relevant, responsive, non-privileged information that is within its possession, custody, or control and capable of being ascertained with reasonable diligence.

**Interrogatory No. 2.** Please IDENTIFY all persons involved in drafting, commenting on, or approving ROSS' March 26, 2018 memorandum.

**Objections:** Defendants object to this interrogatory to the extent that it seeks (a) communications or information protected by the attorney-client privilege or (b) communications or information protected by the deliberative process privilege.

Defendants further object to this interrogatory as vague and ambiguous with respect to the term "approving," as the Secretary alone approved the decision and memorandum. Defendants further object to this interrogatory as vague and ambiguous with respect to the term "commenting on."

**Response:**

Subject to and without waiving these objections, Defendants state that the following individuals are responsive to this interrogatory: John Abowd, Earl Comstock, Peter Davidson, Jessica Freitas, Ron Jarmin, Christa Jones, Karen Dunn Kelley, Enrique Lamas, James Uthmeier, Victoria Velkoff, Michael Walsh, and Attorneys at the Department of Justice.

Defendants reserve the right to supplement this response with any additional relevant, responsive, non-privileged information that is within its possession, custody, or control and capable of being ascertained with reasonable diligence.

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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No. 1:18-cv-5025 (JMF)

NEW YORK IMMIGRATION COALITION, ET AL.,  
PLAINTIFFS

*v.*

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
DEFENDANTS

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[Filed: Aug. 30, 2018]

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**DEFENDANTS' SUPPLEMENTAL RESPONSES TO  
PLAINTIFFS' FIRST SET OF INTERROGATORIES  
TO DEFENDANTS UNITED STATES DEPARTMENT  
OF COMMERCE AND WILBUR ROSS**

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Pursuant to Federal Rules of Civil Procedure 26, 33, and 34, Defendants United States Department of Commerce and Wilbur Ross submit these supplemental objections and responses to Plaintiffs' First Set of Interrogatories to Defendants United States Department of Commerce and Wilbur Ross, as modified by Plaintiffs' counsel by email dated August 27, 2018.

**OBJECTIONS AND RESPONSES  
TO INTERROGATORIES**

**Interrogatory No. 1.** With regard to the document found in the Administrative Record at 1321, please IDENTIFY:

- a. the "senior Administration officials" who "previously raised" reinstating the citizenship question;

- b. the “various discussions with other government officials about reinstating a citizenship question to the Census”;
- c. the consultations Secretary and his staff participated in when they “consulted with Federal governmental components”;
- 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; and
- e. all PERSONS with whom, to the knowledge of COMMERCE and SECRETARY ROSS, the “senior Administration officials had previously raised” reinstating the citizenship question.

**Objections:**

Defendants object to this interrogatory to the extent that it seeks (a) communications or information protected by the attorney-client privilege or (b) communications or information protected by the deliberative-process privilege.

Defendants further object to this interrogatory as vague and overbroad to the extent it seeks information about meetings or conversations with government officials and other persons whose identities are immaterial to the claims in this litigation, and because the burden of responding is disproportionate to the needs of this case.

**Response:**

After conducting a diligent search, Defendants do not distinguish among the terms used synonymously in the Secretary’s Supplemental Memorandum: “senior

Administration officials,” “other government officials,” and officials at other “Federal governmental components”. In order to respond as fully as possible to this interrogatory, Defendants therefore will construe subparts a, b, and c, as coextensive and will identify, as a single group, the individuals within the executive branch but outside the Department of Commerce who, before the December 12, 2017 Department of Justice letter, and as referenced in the Secretary’s Supplemental Memorandum, either (a) discussed the citizenship question with Secretary Ross, (b) had raised or discussed whether to reinstate a citizenship question, or (c) were consulted by Secretary Ross or his staff regarding whether the Department of Justice would support, and if so would request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act. In accordance with that interpretation, and subject to and without waiving the above objections, Defendants identify the following individuals:

Mary Blanche Hankey, James McHenry, Gene Hamilton, Danielle Cutrona, John Gore and Jefferson Sessions. Although Kris Kobach is not a “government official” within the meaning of the Supplemental Memorandum, the Defendants identify him nonetheless for the sake of completeness. Lastly, the Defendants cannot confirm that the Secretary spoke to Steve Bannon regarding the Citizenship Question. However, since the current Administrative Record indicates that Mr. Bannon was attempting to put Mr. Kobach in touch with the Secretary, the Defendants are also listing Mr. Bannon for the sake of completeness.

With respect to Interrogatory 1, subparagraphs a, d, and e, as reflected in the Administrative Record, Secretary Ross discussed the possible reinstatement of a citizenship question on the 2020 decennial census with Attorney General Sessions in August 2017. In addition, it is possible that the two had an additional discussion concerning this issue, and although the date of that conversation is unknown, Defendants believe it took place earlier in 2017.

As to Interrogatories, see Verification page *infra*.



As to objections:

Dated: Aug. 30, 2018

JOSEPH H. HUNT  
Assistant Attorney General

BRETT A. SHUMATE  
Deputy Assistant Attorney General

JOHN R. GRIFFITHS  
Director, Federal Programs Branch

CARLOTTA P. WELLS  
Assistant Director, Federal Programs Branch

/s/ KATE BAILEY  
KATE BAILEY  
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*Counsel for Defendants*

**CERTIFICATION OF EARL COMSTOCK**

I certify under penalty of perjury that the foregoing supplemental response to Plaintiffs' Interrogatory No. 1 is true and correct to the best of my knowledge, information, belief, understanding, or recollection, with the understanding that the Department of Commerce is continuing to research its responses to Plaintiffs' interrogatories and reserves the right to further supplement its responses.

Dated: Sept. 5, 2018

/s/ EARL COMSTOCK  
EARL COMSTOCK

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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No. 1:18-cv-5025 (JMF)

NEW YORK IMMIGRATION COALITION, ET AL.,  
PLAINTIFFS

*v.*

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
DEFENDANTS

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Oct. 11, 2018

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**DEFENDANTS' SECOND SUPPLEMENTAL  
RESPONSES TO PLAINTIFFS' FIRST SET OF  
INTERROGATORIES TO DEFENDANTS UNITED  
STATES DEPARTMENT OF COMMERCE AND  
WILBUR ROSS**

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Pursuant to Federal Rules of Civil Procedure 26, 33, and 34, Defendants United States Department of Commerce and Wilbur Ross submit these second supplemental objections and responses to Plaintiffs' First Set of Interrogatories to Defendants United States Department of Commerce and Wilbur Ross, as modified by Plaintiffs' counsel by email dated August 27, 2018.

**OBJECTIONS AND RESPONSES  
TO INTERROGATORIES**

**Interrogatory No. 1.** With regard to the document found in the Administrative Record at 1321, please IDENTIFY:

- a. the “senior Administration officials” who “previously raised” reinstating the citizenship question;
- b. the “various discussions with other government officials about reinstating a citizenship question to the Census”;
- c. the consultations Secretary and his staff participated in when they “consulted with Federal governmental components”;
- d. the date on which the “senior Administration officials” who “previously raised” reinstating the citizenship question first raised this subject; and
- e. all PERSONS with whom the “senior Administration officials had previously raised” reinstating the citizenship question.

**Objections:**

Defendants object to this interrogatory to the extent that it seeks (a) communications or information protected by the attorney-client privilege or (b) communications or information protected by the deliberative-process privilege.

Defendants further object to this interrogatory as vague and overbroad to the extent it seeks information about meetings or conversations with government officials and other persons whose identities are immaterial to the claims in this litigation, and because the burden of responding is disproportionate to the needs of this case.

**Response:**

After conducting a diligent search, Defendants do not distinguish among the terms used synonymously in

the Secretary's Supplemental Memorandum: "senior Administration officials," "other government officials," and officials at other "Federal governmental components." In order to respond as fully as possible to this interrogatory, Defendants therefore will construe subparts a, b, and c, as coextensive and will identify, as a single group, the individuals within the executive branch but outside the Department of Commerce who, before the December 12, 2017 Department of Justice letter, and as referenced in the Secretary's Supplemental Memorandum, either (a) discussed the citizenship question with Secretary Ross, (b) had raised or discussed whether to reinstate a citizenship question, or (c) were consulted by Secretary Ross or his staff regarding whether the Department of Justice would support, and if so would request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act. In accordance with that interpretation, and subject to and without waiving the above objections, Defendants identify the following individuals.

Mary Blanche Hankey, James McHenry, Gene Hamilton, Danielle Cutrona, John Gore, and Jefferson Sessions. Although Kris Kobach is not a "government official" within the meaning of the Supplemental Memorandum, the Defendants identify him nonetheless for the sake of completeness. Secretary Ross recalls that Steven Bannon called Secretary Ross in the Spring of 2017 to ask Secretary Ross if he would be willing to speak to then-Kansas Secretary of State Kris Kobach about Secretary Kobach's ideas about a possible citizenship question on the decennial census. The Defendants therefore are also listing Mr. Bannon for the sake of com-

pleteness. In addition, Secretary Ross discussed the possible reinstatement of a citizenship question on the 2020 decennial census with Attorney General Sessions in the Spring of 2017 and at subsequent times.

As to Interrogatories, see Verification page *infra*.

As to objections:

Dated: Oct. 11, 2018

Respectfully submitted,

JOSEPH H. HUNT  
Assistant Attorney General

BRETT A. SHUMATE  
Deputy Assistant Attorney General

JOHN R. GRIFFITHS  
Director, Federal Programs Branch

CARLOTTA P. WELLS  
Assistant Director, Federal Programs Branch

/s/ STEPHEN EHRLICH  
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*Counsel for Defendants*

**CERTIFICATION OF EARL COMSTOCK**

I certify under penalty of perjury that the foregoing second supplemental response to Plaintiffs' Interrogatory No. 1 is true and correct to the best of my knowledge, information, belief, understanding, or recollection, with the understanding that the Department of Commerce is continuing to research its responses to Plaintiffs' interrogatories and reserves the right to further supplement its responses.

Dated: Oct 11, 2018

/s/ EARL COMSTOCK  
EARL COMSTOCK



UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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No. 18-CV-2921 (JMF)

STATE OF NEW YORK, ET AL., PLAINTIFFS

*v.*

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
DEFENDANTS

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Filed: Nov. 5, 2018

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**AMENDED OPINION AND ORDER**

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JESSE M. FURMAN, United States District Judge:

In these consolidated cases, Plaintiffs bring claims under the Administrative Procedure Act (“APA”) and the Due Process Clause of the Fifth Amendment challenging the decision of Secretary of Commerce Wilbur L. Ross, Jr. to reinstate a question concerning citizenship status on the 2020 census questionnaire. *See generally New York v. U.S. Dep’t of Commerce*, 315 F. Supp. 3d 766 (S.D.N.Y. 2018). In an oral ruling on July 3, 2018, the Court found that Plaintiffs had made a “strong showing” of pretext or bad faith on the part of agency decision-makers and, applying well-established precedent, thus authorized discovery beyond the administrative record. (Docket No. 207 (“July 3rd Tr.”), at 76-89). Significantly, however, the Court did not rule, and has not yet ruled, on whether or to what extent any such extra-record materials can or should be considered in making a final ruling on Plaintiffs’ claims.

That is largely because the parties have not yet asked the Court to do so. Defendants were given the opportunity to file a summary judgment motion arguing that the Court's review should be limited to the administrative record and that trial was therefore unnecessary. (*See* Docket No. 363). But they elected not to file such a motion—thereby conceding, as a procedural matter, that a trial is appropriate. That trial is scheduled to begin in six business days, on November 5, 2018—a date that the Court set, in no small part, because Defendants themselves insist that resolution of Plaintiffs' claims “is a matter of some urgency” given the need to finalize the census preparations. (Docket No. 397 (“Gov't Stay Mot.”), at 4).

Remarkably, despite the foregoing, Defendants now seek a stay of the trial and related pre-trial submissions (most of which are due today and therefore presumably done already) pending resolution of a forthcoming petition to the Supreme Court for writs of mandamus and certiorari. (*See id.*). Even more remarkably, although they filed their motion for a stay only three nights ago and this Court made clear less than two days ago that it would issue a written ruling in short order (Oct. 24, 2018 Pretrial Conf. Tr. (“Oct. 24th Tr.”) 19), Defendants are already seeking the very same relief from the Second Circuit. (Docket No. 402). Their request is based primarily on an October 22, 2018 Order from the Supreme Court, denying Defendants' application to stay two of this Court's prior Orders (namely, its July 3, 2018 Order authorizing extra-record discovery, (*see* July 3rd Tr. 76-89) and its August 17, 2018 Order authorizing a deposition of Acting Assistant Attorney General John Gore (*see* Docket No. 261)) and staying, at least temporarily, a third

Order (namely, the Court’s September 21, 2018 Order authorizing a deposition of Secretary Ross, *see New York v. United States Dep’t of Commerce*, — F. Supp. 3d —, No. 18-CV-2921 (JMF), 2018 WL 4539659 (S.D.N.Y. Sept. 21, 2018)). *See In re Dep’t of Commerce*, No. 18A375, 2018 WL 5259090 (U.S. Oct. 22, 2018). “Any order granting the government’s petition,” Defendants argue, “would substantially affect the further proceedings in this Court, including whether extra-record discovery would be permissible or whether review would take place on the administrative record.” (Gov’t Stay Mot. 2).

In other circumstances, the Court might well agree—albeit, only as an exercise of its discretion over case management—that the Supreme Court’s Order warrants hitting the pause button and postponing trial, as the Supreme Court’s resolution of Defendants’ forthcoming petition could bear on this Court’s analysis of the merits. But Defendants’ own “urgen[t]” need for finality calls for sticking with the trial date. (Gov’t Stay Mot. 4). And, in light of the all-too-familiar factors relevant to the question whether a stay should be granted pending mandamus, *see New York v. United States Dep’t of Commerce*, — F. Supp. 3d —, No. 18-CV-2921 (JMF), 2018 WL 4279467, at \*1 (S.D.N.Y. Sept. 7, 2018), Defendants are certainly not entitled to a stay.

#### **A. Defendants Fail to Show the Likelihood of Irreparable Harm**

First and foremost, Defendants fall far short of establishing a “likelihood that irreparable harm will result from the denial of a stay.” *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). Signifi-

cantly, Defendants do not claim harm here from the Court's decision to allow extra-record discovery, and for good reason: Putting aside the possible deposition of Secretary Ross, discovery will end before Defendants file their petition with the Supreme Court. (Docket No. 401).<sup>1</sup> Nor do they claim that, absent a stay, the argument they seek to press before the Supreme Court—that Plaintiffs' claims should be resolved on the administrative record alone—would become moot. That too is for good reason, as Defendants remain free to argue at trial that the Court should disregard all evidence outside the administrative record and, if unsuccessful, can argue on appeal that the Court erred in considering extra-record evidence. Moreover, the Court has directed the parties to differentiate in their pre- and post-trial briefing between arguments based solely on the administrative record and arguments based on materials outside the record. (Oct. 24th Tr. 16). The Court anticipates differentiating along similar lines in any findings of fact and conclusions of law that it enters. It follows that, if the Court rules against Defendants on the basis of extra-record materials and a higher court holds that the Court should not have considered those materials, Defendants would be able to get complete relief. Put simply, a stay is not necessary “to protect” Supreme Court review. *In re Dep't of Commerce*, 2018 WL 5259090 at \*2 (Gorsuch, J., concurring in part and dissenting in part). The Supreme

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<sup>1</sup> Defendants clarified on the record at the conference held on October 24, 2018, that—despite language in their letter motion to the contrary (*see* Gov't Stay Mot. 2 (asking the Court to “stay all extra-record discovery”))—they are *not* actually seeking a stay of extra-record discovery. (Oct. 24th Tr. 18-19).

Court can conduct that review, as in the usual case, after final judgment.

So what do Defendants cite as their irreparable harm in the absence of a stay? They complain that, without a stay, they “will be forced to expend enormous resources engaging in pretrial and trial activities that may ultimately prove to be unnecessary.” (Gov’t Stay Mot. 3).<sup>2</sup> But it is black-letter law that “[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.” *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 24 (1974); see *New York*, 2018 WL 4279467, at \*2 (collecting cases). Throughout the nation, litigants in federal district courts understand that, with certain well-established and narrow exceptions not applicable here, see, e.g., *Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 905 n.5 (2015) (discussing the “narrow scope” of the collateral-order doctrine), everything that happens in those courts—up to and including trial—“retains its interlocutory character as simply a step along the route

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<sup>2</sup> Defendants complain that one of the costs of going to trial is “the substantial monetary expenditure on travel and hotel stays for approximately twelve attorneys and professional staff for a two-week trial in New York City.” (Gov’t Stay Mot. 4). That is an extraordinary complaint separate and apart from the fact that such costs do not constitute irreparable harm for the reasons discussed in the text. There are dozens of highly qualified lawyers and professional staff in the Civil Division of the United States Attorney’s Office for the Southern District of New York—the office that normally represents the Government in this District. The Court can only speculate why the lawyers from that Office withdrew from their representation of Defendants in these cases. (See Docket Nos. 227, 233). Whatever the reasons for that withdrawal, however, a party should not be heard to complain about harms of its own creation.

to final judgment,” *Ortiz v. Jordan*, 562 U.S. 180, 184 (2011) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). In other words, spending resources on trial first and seeking appellate review later is the overwhelming norm, not the exception—“even though the entry of an erroneous order may require additional expense and effort on the part of both litigants and the district court.” *Parkinson v. Apr. Indus., Inc.*, 520 F.2d 650, 654 n.3 (2d Cir. 1975). Far from a nationwide epidemic of irreparable harm, that is precisely how the federal court system is supposed to work. See, e.g., *Cunningham v. Hamilton Cty.*, 527 U.S. 198, 203-04 (1999) (describing the “several salutatory purposes” of the “final judgment rule”).<sup>3</sup>

When pressed on that point at oral argument, Defendants asserted a new theory of harm not advanced in their written motion: some sort of dignitary harm flowing from the Court’s “scrutiny” of “an executive branch agency.” (Oct. 24th Tr. 12-14). But that novel theory of harm fails for several reasons. First, the decisions of executive branch agencies are not immune from scrutiny by the federal courts; indeed, the APA expressly invites such scrutiny. See 5 U.S.C §§ 702, 705; *Sackett v. EPA*, 566 U.S. 120, 128 (2012); see also, e.g., *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (discussing the “‘strong presumption’

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<sup>3</sup> Defendants also cite the prospect of three current or former “high-level agency officials” being called as witnesses at trial as a form of potentially irreparable harm. (Gov’t Stay Mot. 4). That argument is moot, however, as the witnesses are not subject to subpoena, and the Court yesterday denied Plaintiffs’ motion seeking leave to present their testimony by live video transmission or to conduct *de bene esse* depositions. (Docket No. 403).

favoring judicial review of administrative action” and collecting cases); *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 28-29 (1835) (Marshall, C.J.) (“It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process . . . leaving to [the citizen] no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist. . . .”). Second, whether these cases proceed to trial or not, there is no dispute that Defendants’ decision to add a citizenship question to the 2020 census will be subject to “scrutiny” by this Court and others; the only disputes between the parties concern the scope of evidence the Court may consider in applying that scrutiny and the degree of deference owed by the Court to Defendants’ decision.

And third, although trials in APA cases are—as Defendants emphasize—“unusual” (Oct. 24th Tr. 13), they are far from unprecedented. Courts have subjected executive agencies to trials in APA cases where, as here, there are colorable claims of bad faith or pretext, *see, e.g., Buffalo Cent. Terminal v. United States*, 886 F. Supp. 1031, 1045-48 (W.D.N.Y. 1995), or competing expert testimony, *see, e.g., Cuomo v. Baldrige*, 674 F. Supp. 1089, 1090, 1093 (S.D.N.Y. 1987). In fact, it is not even unprecedented for courts to hold trials to resolve APA challenges to the administration of the census! *See, e.g., City of New York v. U.S. Dep’t of Commerce*, 822 F. Supp. 906, 917 (E.D.N.Y. 1993), *vacated*, 34 F.3d 1114 (2d Cir. 1994), *rev’d sub nom. Wisconsin v. City of New York*, 517 U.S. 1 (1996);

*Cuomo*, 674 F. Supp. at 1091; *Carey v. Klutznick*, 508 F. Supp. 420 (S.D.N.Y. 1980), *rev'd and remanded for a new trial*, 653 F.2d 732 (2d Cir. 1981). Notably, Defendants cannot cite a single other instance in which the Government has sought the writ of mandamus, a form of extraordinary relief, to halt such “scrutiny.” (Oct. 24th Tr. 13-14). It is the Government’s conduct in this case, not the Court’s review, that is “highly unusual, to say the least.” *In re Dep’t of Commerce*, 2018 WL 5259090, at \*1 (Gorsuch, J., concurring in part and dissenting in part).

**B. Defendants Fail to Show a Likelihood of Success on the Merits of Any Question that Would Justify a Stay of Trial**

Defendants’ failure to show the likelihood of irreparable harm is, by itself, fatal to their stay application, but they also fail to show that a likelihood of success on the merits warrants a stay of trial. *See Hollingsworth*, 558 U.S. at 190. To be sure, the Supreme Court’s October 22, 2018 Order suggests that that Court may rule that this Court erred in its September 21, 2018 Order authorizing a deposition of Secretary Ross.<sup>4</sup> But that prospect alone does not warrant delaying the trial at Defendants’ request. If the Su-

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<sup>4</sup> In the Court’s view, that result would be regrettable, as Secretary Ross’s testimony is essential to fill gaps in, and clarify, the existing record. *See New York*, 2018 WL 4539659, at \*2-3. In fact, one might have thought that Secretary Ross himself would have been *eager* to testify, if only to clear up the record. Given that, and given the importance of the census, “there is something surprising, if not unsettling, about Defendants’ aggressive efforts to shield Secretary Ross from having to answer questions about his conduct.” *Id.* at \*5.



preme Court vacates this Court's September 21, 2018 Order before, during, or after trial, it will have no effect on the existing record, which presently lacks Secretary Ross's deposition testimony. And, however unlikely it may be, *but compare, e.g., Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1303 (1991) (Scalia, J., in chambers) (granting a stay pending a petition for certiorari based in part on the prediction that "a grant of certiorari" was "probable"), *with Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 502 U.S. 981 (1991) (mem.) (denying certiorari), if the Supreme Court allows a deposition of Secretary Ross before this Court enters final judgment, the transcript of that deposition can presumably be added to the trial record. In any event, it is Plaintiffs who bear the burden of proof in these cases, *see, e.g., Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005), and Plaintiffs who seek to secure Secretary Ross's deposition to meet that burden. Despite that, Plaintiffs are content to take their chances and proceed to trial knowing that, even if the Supreme Court ultimately lifts the stay and allows a deposition of Secretary Ross, it may be too late for them to benefit in these cases. Thus, while the likelihood of success on the merits of Defendants' challenge to this Court's September 21, 2018 Order justifies the already existing stay of *that* Order, it does not justify a stay of *trial*.

Perhaps recognizing that, Defendants confidently predict that the Supreme Court is likely to opine that this Court erred in authorizing extra-record discovery in the first place. (Gov't Stay Mot. 2-3). But they base that prediction almost exclusively on the *dissent* from the Supreme Court's Order. (*See id.* at 1-3). It should go without saying that the dissent did not carry

the day in the Supreme Court; instead, it represents the views of only two Justices. More to the point, there is nothing in the Supreme Court's Order itself that supports Defendants' confident prediction. Admittedly, the Supreme Court's Order states that "[t]he denial of the stay with respect to" the July 3, 2018 Order "*does not preclude* the applicants from making arguments with respect to" that Order. *In re Dep't of Commerce*, 2018 WL 5259090 at \*1 (emphasis added). But it is rather aggressive to read that language as an "invit[ation]," as Defendants do. (Gov't Stay Mot. 3). After all, if one person says to another "you are not precluded from attending my party," the latter would be hard pressed to describe the expression as an "invitation."<sup>5</sup> In any event, even if the Supreme Court's language could reasonably be read as an invitation, it is rank speculation to infer from that invitation that the Supreme Court is likely to hold, in the present interlocutory posture no less, that this Court erred in authorizing extra-record discovery.

In fact, for several reasons, the Court concludes that the Supreme Court is *unlikely* to disturb the July 3, 2018 Order in advance of this Court's consideration of the merits. First, that Order pertained to discovery,

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<sup>5</sup> The language at issue is more reasonably construed as a reaffirmation of the uncontroversial proposition that "[a] denial of a stay is not a decision on the merits of the underlying legal issues." *Indiana State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 960 (2009) (per curiam). Because Defendants invited the Supreme Court to treat their stay application as a petition for mandamus (or certiorari), see Renewed App. for Stay 40, No. 18A375 (U.S. Oct. 9, 2018), the Supreme Court had good reason to clarify that its disposition of the stay application did not extend to those alternative requests.

which—apart from the possible deposition of Secretary Ross—will be complete when Defendants file their petition with the Supreme Court. (*See* Docket No. 401).<sup>6</sup> Second, Defendants’ suggestion that this Court’s July 3, 2018 Order somehow licensed a burdensome intrusion into the workings of the Executive Branch is overblown. The Court was careful to observe “that discovery in an APA action, when permitted, should not transform the litigation into one involving all the liberal discovery available under the federal rules” and should instead be limited to what is “necessary to effectuate the Court’s judicial review.” (July 3rd Tr. 85 (internal quotation marks omitted)). On that basis, the Court sharply curtailed the discovery Plaintiffs could conduct. (*See id.* at 85-87 (limiting Plaintiffs to ten depositions and limiting discovery, absent agreement or leave of Court, to the Departments of Commerce and Justice)).<sup>7</sup> Moreover, Defendants’ cries of intrusion

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<sup>6</sup> The deposition of Mr. Gore is taking place today, October 26, 2018, and, thus, will be over before Defendants seek, let alone obtain, Supreme Court review. (*See* Docket No. 398, at 1).

<sup>7</sup> True to its word, the Court strictly policed what Defendants were required to disclose during discovery. (*See, e.g.*, Oct. 24th Tr. 21-23, 30-39 (denying or effectively denying several of Plaintiffs’ open discovery demands); Docket No. 403 (denying Plaintiffs’ motion to take *de bene esse* depositions or reopen depositions to address newly disclosed documents); Docket No. 369 (partially denying, on deliberative-process-privilege grounds, Plaintiffs’ motion to compel production of documents); Docket No. 361 (partially denying, on attorney-client-privilege grounds, Plaintiffs’ motion to compel documents); Docket No. 366, at 17 (denying Plaintiffs’ motions to compel interrogatory responses); Docket No. 323 (memorializing a ruling from the bench partially denying Plaintiffs’ motion to compel production of documents and to respond to interrogatories); Docket No. 303 (denying Plaintiffs’ motion for leave to seek third-

and burden ring hollow in light of their own conduct. Rather than seek immediate review of the Court’s July 3, 2018 Order authorizing extra-record discovery, they waited *nearly two full months*—until extra-record discovery was substantially complete—before seeking a stay and any form of appellate review. *See New York*, 2018 WL 4279467, at \*2.

Finally, the Court’s decision to authorize extra-record discovery was, and remains, well founded. In fact, if anything, it is on firmer ground today than it was on July 3, 2018, as the Court has since held that Plaintiffs allege a plausible claim that Defendants violated the equal protection component of the Due Process Clause of the Fifth Amendment. *See New York*, 315 F. Supp. 3d at 806-11.<sup>8</sup> Under longstanding Su-

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party discovery from Kris Kobach); Docket No. 261, at 3 (denying Plaintiffs’ motion to compel documents “erroneously withheld” from the administrative record); Docket No. 204 (denying Plaintiffs’ motion to shorten Defendants’ time to respond to discovery requests and for additional deposition time)).

<sup>8</sup> The Court’s authorization to engage in extra-record discovery did not rest heavily on Plaintiffs’ equal protection claim for reasons of timing: As of July 3, 2018, Defendants’ motion to dismiss that claim was still being briefed. As the Court noted at the time, the Supreme Court had faulted the district court in *In re United States*, 138 S. Ct. 443, 445 (2017) (per curiam), for authorizing expansive extra-record discovery without first resolving the Government’s threshold arguments. (July 3rd Tr. 76-77). The Court determined that was not a reason to defer decision on Plaintiffs’ request for extra-record discovery with respect to the APA claim because Defendants’ threshold arguments to dismiss that claim had been fully briefed and the Court was “sufficiently confident” that the claim would “survive, at least in part.” (*Id.* at 77). At the time, however, the Court was not in a position to make the same assessment with respect to Plaintiffs’ equal protection claim.

preme Court precedent, that claim turns on whether Plaintiffs can prove that Defendants acted with a “racially discriminatory intent or purpose.” *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). Moreover, that same precedent *mandates* “a sensitive inquiry into such circumstantial and direct evidence of intent as may be available,” and *explicitly calls for* consideration of “evidence” such as the “historical background of the decision,” the “specific sequence of events leading up the challenged decision,” procedural and substantive “departures” from the norm, and, in “some extraordinary instances,” the testimony of decisionmakers. *Id.* at 266-68. Having survived Defendants’ motion to dismiss that claim, Plaintiffs were surely entitled to seek evidence to support their claim through at least limited discovery, including discovery probative of the decisionmakers’ true “intent” and “purpose.” *Id.* at 265.<sup>9</sup> Indeed, it would be perverse—and risk undermining decades of equal protection jurisprudence—to suggest that litigants and courts evaluating whether government actors have engaged in invidious discrimination cannot look beyond the record that those very decisionmakers may have carefully curated to exclude evidence of their true “intent” and “purpose.”

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<sup>9</sup> That is not to say that plaintiffs can evade the APA record rule merely by bringing a constitutional claim. First, the doors to discovery would be open only to plaintiffs who allege a plausible claim, as Plaintiffs do here. Second, a court can and should still exercise its discretion under the Federal Rules of Civil Procedure to limit the scope of discovery to avoid undue intrusion on the governmental decisionmaking process, as the Court did here. (July 3rd Tr. 85).

Even without the equal protection claim, however, the Court's decision to authorize extra-record discovery was sound. For starters, although judicial review of agency action is generally limited to the administrative record, *see, e.g., Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985), it is well established that "an extra-record investigation by the reviewing court may be appropriate when there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decisionmakers," *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997). The "bad faith" exception "is logical because once there is a showing of bad faith by the agency, the reviewing court has lost its reason to trust the agency. There is no reason, then, to presume that the record is complete, and justice is served only by going beyond the record to ascertain the true range of information before the agency." James N. Saul, *Overly Restrictive Administrative Records and the Frustration of Judicial Review*, 38 *Env'tl. L.* 1301, 1308 (2008). More importantly, the exception was spawned by the Supreme Court itself, *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977), and has been adopted by every Court of Appeals in the country, *see Saul*, 38 *Env'tl. L.* at 1308-09 & n.57. Indeed, Defendants do not dispute—and have never disputed—that "bad faith" can justify extra-record discovery. (*See, e.g.,* Docket No. 194, at 4 (conceding that there is a "bad faith" exception to the "record rule"). And nothing in the Supreme Court's October 22, 2018 Order casts doubt on the well-established exception.

Notably, even the Justices who dissented from the Supreme Court’s Order seem to accept that there is a “bad faith” exception to the record rule. *See In re Dep’t of Commerce*, 2018 WL 5259090 at \*1-2 (Gorsuch, J., concurring in part and dissenting in part). Instead, they take issue with this Court’s conclusion that Plaintiffs made a sufficient preliminary showing to trigger that exception. *See id.* The Court respectfully disagrees. This Court’s conclusion that Plaintiffs had made such a showing was not based on a finding that Secretary Ross “c[ame] to office inclined to favor a different policy direction, solicit[ed] support from other agencies to bolster his views, disagree[d] with staff, or cut[] through red tape.” *Id.* at \*1. Such circumstances, even taken together, would not be exceptional. Instead, the Court’s conclusion was based on a combination of circumstances that were, taken together, most exceptional: (1) Secretary Ross’s own admission that he had “already decided to add the citizenship question before he reached out to the Justice Department” to request the question; (2) evidence that he had “overruled senior Census Bureau career staff, who had concluded . . . that reinstating the citizenship question would be very costly and harm the quality of the census count”; (3) indications that the Census Bureau had “*deviated significantly* from standard operating procedures in adding the citizenship question”; and (4) Plaintiffs’ *prima facie* showing that Secretary Ross’s stated justification was pre-textual. (July 3rd Tr. 82-83 (emphasis added) (internal quotation marks and brackets omitted)). Most significant, the Court found reason to believe that Secretary Ross had provided false explanations of his reasons for, and the genesis of, the citizenship question—in both his decision memo-

randum and in testimony under oath before Congress. (July 3rd Tr. 79-80).

If those circumstances, taken together, are not sufficient to make a preliminary finding of bad faith that would warrant extra-record investigation, it is hard to know what circumstances would—short of an agency head’s outright confession that his reasons were pretextual (in which case, of course, there would be no need for discovery). In fact, circumstances far short of those present in these cases have been found by other courts to justify discovery beyond the administrative record. *See, e.g., Pub. Power Council v. Johnson*, 674 F.2d 791, 794-95 (9th Cir. 1982); *Batalla Vidal v. Duke*, No. 16-CV-4756 (NGG), 2017 WL 4737280, at \*3-5 (E.D.N.Y. Oct. 19, 2017); *Tummino v. von Eschenbach*, 427 F. Supp. 2d 212, 231-33 (E.D.N.Y. 2006). Thus, there is nothing unusual with this Court’s decision to allow extra-record discovery and—in light of Defendants’ election not to move for summary judgment—to adjudicate Plaintiffs’ claims of bad faith and pretext through a trial.

### **C. Issuance of a Stay Would Injure Plaintiffs and Harm the Public Interest**

In short, Defendants fail to carry their burden on either of the first two, and “most critical,” factors in the analysis of whether a stay is warranted. *Nken v. Holder*, 556 U.S. 418, 434 (2009). The Court could stop there, *see id.* at 435, but the third and fourth factors—“whether issuance of the stay will substantially injure the other parties interested in the proceeding” and “where the public interest lies,” *U.S. S.E.C. v. Citigroup Glob. Mkts. Inc.*, 673 F.3d 158, 162 (2d Cir. 2012)—also weigh heavily against a stay. As



noted, Defendants have repeatedly insisted, and insist even now, that the resolution of Plaintiffs' claims "is a matter of some urgency." (Gov't Stay Mot. 4; *see* Docket No. 103, at 4-5 (noting that "the Census Bureau has indicated in its public planning documents that it intends to start printing the physical 2020 Census questionnaire by May 2019" and that Ron Jarmin, Acting Director of the Census Bureau and a Defendant here, "testified under oath before Congress . . . that the Census Bureau would like to 'have everything settled for the questionnaire this fall'" and "wants to resolve this issue 'very quickly'")). Awaiting prophylactic guidance from the Supreme Court—which may not come for months and may not come at all—would make it difficult, if not impossible, to meet that goal.<sup>10</sup> More broadly, as the Court has noted previously, "there is a strong interest in ensuring that the census proceeds in an orderly, transparent, and fair manner—and, relatedly, that it is conducted in a manner that 'bolsters public confidence in the integrity of the process and helps strengthen this mainstay of our democracy.'" *New York*, 2018 WL 4279467, at \*3 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 818 (1992) (Stevens, J., concurring in part and concurring in the judgment)). Those interests weigh heavily against any delay and in favor of making an adequate record for this Court to

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<sup>10</sup> Thus, Defendants are wrong in arguing, based on the dissent from the Supreme Court's October 22, 2018 Order, that Plaintiffs "would suffer no hardship from being temporarily denied that which they very likely have no right to at all." (Gov't Stay Mot. 4 (quoting *In re Dept of Commerce*, 2018 WL 5259090, at \*2 (Gorsuch, J., concurring in part and dissenting in part)). Plaintiffs' hardship is the risk that the census forms are printed before they have an opportunity to fully adjudicate their claims.

render an initial decision—and for higher courts to then review that decision without any risk that those courts would conclude that a remand to develop the record would be in order.

In their pending motion before the Second Circuit, Defendants contend that a stay of trial would not prevent resolution of Plaintiffs' claims before the census questionnaires have to be printed. (Motion for Stay ("2d Cir. Stay Mot."), at 9, Docket No. 68, No. 18-2856 (2d Cir. Oct. 25, 2018); *see also* Oct. 24th Tr. 11-12). The Court does not share their confidence. There is no telling when the Supreme Court will issue a decision on Defendants' forthcoming petition. It could do so in days; or it could take months. If the Supreme Court's decision does not affect this Court's plan to proceed with a trial, the Court would then have to reschedule trial—no small task given the upcoming holidays, the parties' schedules (including two trials in parallel cases pending in other districts scheduled in January), and the Court's own congested calendar.<sup>11</sup> If the Supreme Court's decision makes clear that Plaintiffs' claims should be resolved by summary judgment rather than trial, the parties will need to prepare extensive motion papers. In either case, it will take time for this Court

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<sup>11</sup> At present, the Court has two other trials scheduled for December and another two trials scheduled for January. Moreover, the second one in January is a bellwether trial in the *General Motors LLC Ignition Switch Litigation*, which is slated to last several weeks, would be difficult to reschedule, and which will likely involve dozens of pretrial motions. Thus, the fact that the *other* district courts overseeing challenges to Secretary Ross's decision "have scheduled trials to begin in January," as Defendants note in their motion to the Second Circuit (2d Cir. Stay Mot. 9), says nothing about this Court's ability to render a timely decision.

to issue a written ruling and enter final judgment. And whatever this Court decides, the losing parties will almost certainly appeal to the Second Circuit and, in turn, to the Supreme Court. It would be hard enough for that normally lengthy process to run its course by next May or June—when the census questionnaires are apparently scheduled to be printed (*see* Docket No. 103, at 4-5; Oct. 24th Tr. 11)—if these cases proceed to trial on November 5, 2018. Granting a stay of indefinite duration could make a timely final decision next to impossible.

\* \* \* \*

In short, as prudent as it might be under other circumstances to await further guidance from the Supreme Court, there are good reasons not to do so here and instead to proceed to trial as scheduled. Time is of the essence. At bottom, Defendants are seeking a preemptive ruling from the Supreme Court on a decision that this Court has not yet even made—namely, what evidence the Court may consider in ruling on the merits—thereby seeking to disrupt “the appropriate relationship between the respective courts.” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). Making matters worse, Defendants have not yet even formally asked the Court to make a decision on that issue. They elected not to do so in the form of a summary judgment motion, and thus conceded, as a procedural matter, that trial is appropriate. And, perhaps most importantly, Defendants suffer no substantive, cognizable harm whatsoever in proceeding to trial as scheduled. They can make, and thus preserve, any argument they want about the scope of what this Court may consider in rendering a decision. And if they are

unsuccessful before this Court, they can seek review of this Court's final judgment from the Second Circuit and, if necessary, the Supreme Court—as they could in any other case.

Put simply, the pending challenge to this Court's Order authorizing a deposition of Secretary Ross notwithstanding, Defendants provide no basis to deviate from the well-established and well-justified procedures that have generally been applied in federal courts for generations—whereby district courts decide cases in the first instance, followed by an appeal by the losing party, on a full record, to the court of appeals and, thereafter, a petition to the Supreme Court. Defendants may yet have their day to argue the merits in the Supreme Court. But for many salutary reasons, that day should not come before this Court has decided the merits in the first instance. *See, e.g., Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981) (“[The final judgment rule] emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. The rule also serves the important purpose of promoting efficient judicial administration.” (internal quotation marks and citation omitted)).

Accordingly, Defendants' motion for a stay of trial and associated deadlines is DENIED. The Clerk of Court is directed to terminate Docket No. 397.

SO ORDERED.

Dated: Oct. 26, 2018  
New York, New York

/s/ JESSE M. FURMAN  
JESSE M. FURMAN  
United States District Judge

Amended: Nov. 5, 2018

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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No. 18-CV-2921 (JMF)

STATE OF NEW YORK, ET AL., PLAINTIFFS

*v.*

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
DEFENDANTS

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Filed: Nov. 20, 2018

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**MEMORANDUM OPINION AND ORDER**

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JESSE M. FURMAN, United States District Judge:

These consolidated cases involve a challenge to Secretary of Commerce Wilbur L. Ross, Jr.’s decision to reinstate a question about citizenship status to the 2020 census questionnaire. Defendants, through their attorneys at the Department of Justice, have tried and failed repeatedly to halt the orderly progress of this litigation.<sup>1</sup> Their latest and strangest effort is a mo-

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<sup>1</sup> Indeed, as Plaintiffs note, since the eve of Labor Day Weekend, Defendants have filed in this Court, the Second Circuit, or the Supreme Court “an astonishing *twelve* requests to delay these proceedings”—“an average of a request to delay filed each and every single week from Labor Day to Thanksgiving.” (Docket No. 543 (“Pls.’ Opp’n”), at 1). With one narrow exception—the stay Defendants obtained from the Supreme Court of this Court’s Order authorizing a deposition of Secretary Ross, *see In re Dep’t of Commerce*, — S. Ct. —, No. 18A375, 2018 WL 5259090 (U.S. Oct. 22, 2018)—every one of those requests has been rejected. *See New*

tion to stay all further proceedings, including entry of final judgment, pending the Supreme Court’s resolution of their challenge this Court’s discovery-related orders. (Docket No. 540 (“Defs.’ Motion”)). What makes the motion most puzzling, if not sanctionable, is that they sought *and were denied* virtually the same relief only weeks ago—from this Court, from the Second Circuit, and from the Supreme Court itself. See *In re Dep’t of Commerce*, — S. Ct. —, No. 18A455, 2018 WL 5778244 (U.S. Nov. 2, 2018); *In re U.S. Dep’t of Commerce*, Nos. 18-2856 & 2857, 2018 WL 5603576 (2d Cir. Oct. 26, 2018); *New York v. U.S. Dep’t of Commerce*, No. 18-CV-2921 (JMF), 2018 WL 5307097 (S.D.N.Y. Oct. 26, 2018), *as amended*, 2018 WL 5791968 (Nov. 5, 2018). In fact, if anything, their request is significantly weaker this time around, as the trial is complete and the onus is now on the Court to issue a ruling that facilitates timely and definitive higher-court review. Moreover, Defendants themselves now concede, as they must, that a ruling from this Court will not hinder a higher court from granting full relief on appeal. (See Defs.’ Motion 1). Unless burdening Plaintiffs and the federal courts with make-work is a feature of

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*York v. United States Dep’t of Commerce*, — F. Supp. 3d —, No. 18-CV-2921 (JMF), 2018 WL 4279467 (S.D.N.Y. Sept. 7, 2018) (denying a stay of the deposition of the Acting Assistant Attorney General and all discovery); *In re U.S. Dep’t of Commerce*, No. 18-2652, 2018 WL 6006904 (2d Cir. Sept. 25, 2018) (same); *In re Dep’t of Commerce*, 2018 WL 5259090 (same); *New York v. U.S. Dep’t of Commerce*, No. 18-CV-2921 (JMF), 2018 WL 5307097 (S.D.N.Y. Oct. 26, 2018), *as amended*, 2018 WL 5791968 (Nov. 5, 2018) (denying a stay of pretrial proceedings and trial); *In re United States Dep’t of Commerce*, Nos. 18-2856 & 2857, 2018 WL 5603576 (2d Cir. Oct. 26, 2018) (same); *In re Dep’t of Commerce*, — S. Ct. —, No. 18A455, 2018 WL 5778244 (U.S. Nov. 2, 2018) (same).

Defendants' litigation strategy, as opposed to a bug, it is hard to see the point. To borrow from Camus, "[o]ne must imagine Sisyphus happy." ALBERT CAMUS, *THE MYTH OF SISYPHUS* 123 (Alfred A. Knopf 1991).

Defendants' stated reason for burdening Plaintiffs and the Court with the very application that three levels of federal courts only recently denied is the fact that, on November 16, 2018, the Supreme Court granted their petition for a writ of certiorari and set oral argument for February 19, 2019. (Defs.' Motion 1). But that development is not quite the "significant change in circumstances" that Defendants suggest. (*Id.*). First, as Defendants have previously noted, the Supreme Court's October 22, 2018 stay of this Court's Order authorizing a deposition of Secretary Ross had already signaled that the Supreme Court was likely to grant their petition, (Docket No. 397, at 1), and, notably, that stay did *not* disturb either of the two other discovery orders challenged in the petition, let alone further proceedings in this Court, *see In re Dep't of Commerce*, — S. Ct. —, No. 18A375, 2018 WL 5259090, at \*1 (U.S. Oct. 22, 2018). Second, that "likelihood" was unchanged when the Supreme Court summarily denied Defendants' request for a stay of further proceedings *before* trial. *In re Dep't of Commerce*, 2018 WL 5778244. And finally, when it granted certiorari and set a briefing schedule, the Supreme Court knew that this Court had completed trial, and it presumably expected that the Court would enter final judgment before the date that it set for oral argument. That is, the Supreme Court rejected Defendants' request for immediate relief, in the form of either mandamus or certiorari and reversal without further brief-



ing and oral argument. *See* Pet. for Writ of Mandamus 15, 33, No. 18-557 (U.S. Oct. 29, 2018).

Tellingly, this time, Defendants do not even attempt to argue that they are entitled to the extraordinary relief of a stay of all proceedings under the traditional factors. *See New York*, 2018 WL 4279467, at \*1. That is not surprising, as Defendants cannot satisfy any of the four factors, substantially for the reasons set forth in Plaintiffs' opposition to the motion, filed earlier today. (*See* Pls.' Opp'n 1-3). Among other things, as the Court stressed last time, the traditional test requires that Defendants show they would suffer "irreparable harm" absent a stay. *See New York*, 2018 WL 5791968, at \*2 (quoting *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam)). Defendants could not make that showing before trial, *see id.* at \*2-3, and they certainly cannot make it now. In fact, the words "harm" and "injury" do not appear anywhere in their motion. That is for good reason, as the notion that they—or anyone else—would suffer "irreparable harm" without a stay is laughable. The only "harm" Defendants suffer from denial of a stay is that they would be required to complete and file their post-trial submissions (which are due tomorrow and, presumably, almost done), and to appear for oral argument on November 27, 2018. As the Court has noted before, however, "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Id.* at \*2 (quoting *Renegotiation Bd. v. Banercraft Clothing Co.*, 415 U.S. 1, 24 (1974)).

Since reliance on the traditional test would obviously be unavailing, Defendants try their hand now with a new line of cases, which stand for the uncontroversial

proposition that a district court has discretion to stay civil proceedings where doing so would advance the interests of the parties, the courts, and the public. (Defs.' Motion 2 (citing cases)). But here, for reasons the Court has largely explained before, a stay would undermine, rather than advance, those interests. *See New York*, 2018 WL 5791968, at \*6-7. Indeed, by Defendants' own admission, it will take extraordinary efforts *as it is* to ensure "full merits briefing and argument in the Second Circuit, let alone the Supreme Court, . . . before" the census forms need to be printed in June 2019. (Defs.' Motion 2).<sup>2</sup> Such review would become practically impossible if this Court were to await the Supreme Court's decision after oral argument on February 19, 2019, to get briefing from the parties (on what would, at that point, be a stale record), and then to write and issue a final decision. Compounding matters, that harmful delay would come with no corresponding benefit: As Defendants concede, "the Supreme Court will be able to order effective relief notwithstanding this Court's entry of a final decision." (Defs.' Motion 1). Indeed, a ruling from this Court would aid, not hinder, the Supreme Court's task—as the Supreme Court may be able to avoid deciding a thorny legal question altogether (if, for instance, the Court enters judgment in favor of Defendants or enters judgment in favor of Plaintiffs without relying on evi-

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<sup>2</sup> Notably, Defendants took a different position in seeking to forestall trial. Before the Second Circuit, they argued that delaying trial pending a decision by the Supreme Court on their petition did *not* risk running out the clock, citing the fact that two other courts have scheduled related trials for January 2019. *See* Mot. to Stay Pretrial and Trial Proceedings 1-2, 9, *In re U.S. Dep't of Commerce*, No. 18-2856 (2d Cir. Oct. 25, 2018), ECF No. 68.

dence outside the administrative record), or would be able to decide that question and the merits together.

Defendants' motion makes so little sense, even on its own terms, that it is hard to understand as anything but an attempt to avoid a timely decision on the merits altogether. That conclusion is reinforced by the fact that Defendants, once again, appealed to the Second Circuit even before this Court had heard from Plaintiffs, let alone issued this ruling on the motion. *See* Mot. to Stay District Court Proceedings, *In re U.S. Dep't of Commerce*, No. 18-2856 (2d Cir. Nov. 19, 2018), ECF No. 79.<sup>3</sup> If Defendants' motion in this Court comes close to the sanctionable line, that filing would surely seem to cross it. The Second Circuit has held—in a case that Defendants themselves cite (*see* Defs.' Motion 1)—that the decision to deny a stay is “so firmly within the discretion of the district court” that it “will not be disturbed . . . absent demonstrated prejudice so great that, as a matter of law, it vitiates a defendant's constitutional rights or otherwise gravely and unnecessarily prejudices the defendant's ability to defend his or her rights.” *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 100 (2d Cir. 2012). “Indeed,

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<sup>3</sup> Defendants justified that step by suggesting that this Court had “implicitly den[ie]d” their motion. Mot. to Stay District Court Proceedings 1 n.1, *In re U.S. Dep't of Commerce*, No. 18-2856. The Court did no such thing: It merely entered an order giving Plaintiffs one day to respond to Defendants' motion. (Docket No. 541). Unsurprisingly, the Court of Appeals did not countenance Defendants' extraordinary lack of respect for the ordinary incidents of due process and regular procedure. Earlier this afternoon, that Court summarily denied Defendants' motion as “premature.” Order, *In re U.S. Dep't of Commerce*, No. 18-2856 (2d Cir. Nov. 20, 2018), ECF No. 84.

so heavy is the defendant’s burden in overcoming a district court’s decision to refrain from entering a stay” that it is almost impossible to find examples “in which a district court’s decision to deny a stay was reversed on appeal.” *Id.* (noting that the defendants had “pointed to only one” such case “and that case was decided more than thirty years ago”).<sup>4</sup>

In the final analysis, Defendants’ motion is most galling insofar as it is premised on the suggestion that granting a stay would help conserve judicial resources. (*See* Defs.’ Motion 2-3).<sup>5</sup> It is plainly more efficient

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<sup>4</sup> If past is prologue and Defendants seek a stay from the Supreme Court yet again, their burden will be equally high, if not higher: A request that the Supreme Court “exercise its ‘supervisory authority’ over” a district court’s case management decisions, which is what such an application would be, “implicates a standard even more daunting than that applicable to a stay of a judgment subject to the [Supreme Court’s] review.” *Gray v. Kelly*, 564 U.S. 1301, 1303 (2011) (Roberts, C.J., in chambers); *see also, e.g., Ehrlichman v. Sirica*, 419 U.S. 1310, 1313 (1974) (Burger, C.J., in chambers) (rejecting a stay application and noting that “[t]he resolution of these issues should they arise after [judgment] must await the normal appellate processes”).

<sup>5</sup> A close second is Defendants’ suggestion that “a stay would . . . reduc[e] any risk that the Court’s consideration of extra-record evidence would affect the analysis of record materials.” (Defs.’ Motion 2). Putting aside the arguable insult to the Court’s intelligence, Defendants themselves do not appear to believe their own suggestion. As they acknowledge, the Court “has already been exposed to the extra-record evidence” during discovery and trial; no Supreme Court decision can undo that. (*Id.*). Moreover, as Defendants also acknowledge (*id.*), “district courts routinely must disregard improper evidence that has been put before them.” *See, e.g., Harris v. Rivera*, 454 U.S. 339, 346 (1981) (“In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions.”).

for this Court to rule expeditiously, while the evidence from trial (the vast majority of which pertains to standing and which Defendants concede may be considered no matter what the Supreme Court decides (Trial Tr. 1421-22)) is fresh. It is also more efficient for this Court to create a comprehensive record that would enable a single round of higher-court review than to tee up a second round of review with almost no time remaining on the clock. And beyond that, if Defendants were truly interested in conserving judicial resources, they could have avoided burdening this Court, the Second Circuit, and the Supreme Court with *twelve* stay applications over the last eleven weeks that, with one narrow exception, have been repeatedly rejected as meritless. *See supra* note 1. Instead, Defendants would have focused their attention on the ultimate issues in this case, where the attention of the parties and the Court now belongs.

Enough is enough. Defendants' latest motion to halt these proceedings is DENIED. Barring a stay from the Second Circuit or the Supreme Court, Defendants shall file their post-trial briefing by the Court-ordered deadline of tomorrow and appear for oral argument as directed on November 27, 2018. The Clerk of Court is directed to terminate Docket No. 540.

SO ORDERED.

Dated: Nov. 20, 2018  
New York, New York

/s/ JESSE M. FURMAN  
JESSE M. FURMAN  
United States District Judge

---

**From:** James B Treat (CENSUS/ADDC FED)  
[James.B.Treat@census.gov]

**Sent:** 2/13/2018 2:05:35 PM

**To:** Ron S Jarmin (CENSUS/ADEP FED)  
[Ron.S.Jarmin@census.gov]; Enrique Lamas (CENSUS/ADDP FED)  
[Enrique.Lamas@census.gov]; Albert E Fontenot (CENSUS/ADDC FED)  
[Albert.E.Fontenot@census.gov]; John Maron Abowd (CENSUS/ADRM FED)  
[john.maron.abowd@census.gov]

**Subject:** Notes from the meeting with the Secretary

I identified the following actions from yesterday's meeting with the Secretary.

1. Update the MOU with SSA and determine if SSA is ok with our plans on using their data. Assess our ability to ingest their data. Report out by the end of the week. John is the POC.
2. Send the Secretary a copy of the 2010 Census ads. POC and when to provide the information was not determined.
3. Identify the list of stakeholders the Secretary should meet with (I believe next week) on this issue. POC and when to provide the information was not determined.
4. Secretary wants to meet with Y&R to discuss how they would handling messaging if citizenship is on the

form. POC was not identified. Based on item 3, I would assume he wanted to meet with them next week.

5. During the conversation it was suggested that we have the Census logo on the devices. POC was not identified.

Items for future consideration if we were to ask citizenship in the 2020:

1. If we compare responses to the Admin Records data and see a difference are we going to re-contact the household to determine the correct response, a content reinterview? If so we are re-contacting respondents are we doing it on a sample basis or for everyone?

2. What are the impacts in AIAN areas/population?

If I did not get everything right please edit.

thanks - jim

**James B. Treat**

Assistant Director for Decennial Programs

U.S. Census Bureau

Office 301.763.3609 Room 2K276

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[census.gov](http://census.gov)

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PRIVILEGED AND CONFIDENTIAL  
PRE-DECISIONAL DRAFT

**As part of his decision-making process, Secretary Ross spoke to a number of different stakeholders about the Department of Justice’s request to reinstate the citizenship question on the 2020 Decennial. These notes attempt to memorialize those conversations. These are not verbatim transcripts and each summary reflects the recollections of attendees from the Department of Commerce. Every effort has been made to ensure these notes are an accurate reflection of Secretary Ross’s conversations with stakeholders.**

Christine Pierce, SVP of Data Science, Nielsen

On March 23, 2018, Secretary Ross and his staff spoke with Christine Pierce, Senior Vice President of Data Science for Nielsen. Ms. Pierce shared that Nielsen uses census data in a lot of important ways, specifically how they recruit and project samples. Ms. Pierce stated that Nielsen needed the census to be accurate and needed the census to be efficient and that the best census is one that produces the highest quality data at the lowest cost. Ms. Pierce stated that her biggest concerns was that the reinstatement of a citizenship question could lead to a lower response rate, and that the mailback rate (or initial response rate) is very important. Costs are lower when people respond the first time. Failure to respond increases costs because Census Bureau needs to deploy enumerators. Ms. Pierce stated that including a question on citizenship could make people less likely to respond, but that there is no data to predict how much lower the response rate might be.



In response to a question, Ms. Pierce stated that the longer a survey is, the less likely people are to respond. She further stated that the more sensitive the question, the more likely people are to be turned off by the question and decline to respond. Ms. Pierce explained that examples of sensitive questions included questions on religion and sexuality. Ms. Pierce stated that Nielsen sometimes chooses to ask sensitive questions even if they believe it will depress response rates. Ms. Pierce stated that Nielsen conducts a cost-benefit analysis to determine whether it is worth asking the question, even if it means having to do more extensive nonresponse follow-up. Ms. Pierce stated that sensitive questions often appeared on longer surveys and that longer surveys generally had lower response rates than shorter ones. Ms. Pierce stated that she was not aware of a short census survey that contained a sensitive question, but that Nielsen has tested some of the ACS questions perceived to be “sensitive” (birthplace and date of arrival in the US) on shorter surveys. Ms. Pierce noted that she and others at Nielsen were concerned about response rates declining due to the presence of the sensitive questions on the short questionnaire, but that Nielsen did not observe lower response rates to the survey. Ms. Pierce noted the importance of testing questions. She also noted that in the only specific situation she was aware of that sensitive questions were tested on a short questionnaire, there was no impact on response rates. Finally, in response to a question, Ms. Pierce stated that Nielsen incentivize participation with low dollar cash reward in the \$1-\$15

range. Ms. Pierce believed that for the survey referenced above, any incentive would have been at the lower end of the range.

- Lower response rate/higher NRFU
- Higher costs
- Testing

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

NEW YORK IMMIGRATION COALITION, ET AL., PLAINTIFFS

*v.*

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
DEFENDANTS

---

Washington, D.C.  
Thursday, Aug. 30, 2018

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**DEPOSITION OF: EARL COMSTOCK**

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\* \* \* \* \*

[54]

[REDACTED]

Q When did you first hear about the notion of adding a question about citizenship to the decennial census?

A Sometime in—shortly after the confirmation.

Q And who did you hear it from?

A The Secretary

\* \* \* \* \*

[62]

[REDACTED]

Q Were you shown this email in preparation for your deposition today?

MR. GARDNER: I'm going to object and instruct the witness not to answer on the grounds of attorney work product.

I'm happy to let you answer when was the last time you saw the document.

But you're asking about documents counsel may have shown that would be protected.

BY MR. COLANGELO:

[63]

Q When's the last time you saw this document, Mr. Comstock?

A Yesterday.

Q And do you see the subject line of this email is your question on the census?

A Yep.

Q Okay. And Secretary Ross was confirmed on February 28th, I think we agreed; is that right?

A Like I said, if that's the date, yes.

Q Okay. So this would have been Secretary Ross's eleventh day on the job as Commerce Secretary, give or take?

A Approximately, yes.

Q And the subject line of this email is your question on the census?

A Right.

Q What was the Secretary's question on the census?

A He appeared to have asked whether undocumented people were counted in the census.

Q Okay. And how did he ask you that [64] question?

A I don't recall. Probably at a meeting, possibly following up on a census briefing. I don't know.

[REDACTED]

Q Okay.

A By the way, I wanted to add one point. On the prior document, you need to understand that at that time, there were a number of questions that the prior administration had requested be placed, potentially, on the census that would have been involved in that notification. So that would have been a reason of why I would have been interested in that, on sexual orientation and gender identity. So that was an issue that was very at the forefront at the time of what to do about those requests.

[REDACTED]

[65]

[REDACTED]

Q Okay. Did he ask you whether noncitizen people were counted for apportionment purposes?

A Well, based on the answer, it appears he might have.

Q Appears he might have or appears he did?

A I couldn't tell you the answer on that.

Q Okay.

A I don't recall the question, so—

[REDACTED]

Q So you think it's likely that his question was about whether undocumented immigrants were counted for apportionment purposes?

A That's entirely possible, but he might [66] have also just asked do we count undocumented persons, and this is what I found on the Census website.

[REDACTED]

Q This link you've identified at [www.census.gov](http://www.census.gov), that's the Census Bureau's frequently asked web page for Congressional apportionment; is that right?

A Again, without pulling it up, I couldn't tell you specifically what it says.

Q Okay. If I represent to you that if you pulled up that website, it would say frequently asked questions for Congressional apportionment, would that assist you?

A I'd be happy to take your word for it.

[67]

Q So does that assist you in recalling that the Secretary asked whether noncitizens were counted for apportionment purposes?

A And I have no recollection of the question, so I can only go by the answer.

Q Okay. The email also includes a blog post from the Wall Street Journal; is that right?

A Uh-huh.

Q Okay. And your email to the Secretary says that this blog post, quote, confirms that neither the 2000s, nor the 2010 census asked about citizenship?

A Correct.

Q So does that lead you to conclude that the Secretary asked about whether the decennial census asks about citizenship?

A That would be a reasonable supposition, based on the response.

Q And this blog post is called the pitfalls of counting illegal immigrants; is that right?

A Yep.

Q And were you concerned on March 10, 2017 [68] about counting illegal immigrants?

A I—no, not personally.

Q Was the Secretary concerned on March 10, 2017 about counting illegal immigrants?

A Again, I have no recollection of the question, so I couldn't speculate as to what his concern was.

Q But you testified that a significant part of your job function involves answering questions from the Secretary on issues that matter to him, right?

A Correct.

Q And if he asked you a question, you would try to be responsive?

A Generally, yes.

Q You wouldn't ordinarily send him information that wasn't responsive to a question he asked, would you?

A Not—not characterized this way, no.

Q So you testified a minute ago that the Secretary—that you first heard about the notion of adding a question about citizenship to the \* \* \*

\* \* \* \* \*

[82]

their citizenship status.

Does that help you remember when the Secretary first expressed interest in adding a citizenship question to the decennial census?

A No.

Q And does that help you remember that it was no later than March 10th that the Secretary first asked you that question?

A Again, you're speculating as to when he asked. But he appeared to have inquired about some relevant aspects of it—

Q Okay.

A —on March 10th.

[REDACTED]

\* \* \* \* \*

[100]

[REDACTED]



Q Did you discuss the draft of this memo with anybody outside the Office of the General Counsel at Commerce?

A Other than when the Secretary signed it, no.

Q Okay. Tell me who you discussed it with when the Secretary signed it?

A The Secretary.

Q And what did you discuss with him when he signed it?

[101]

A Mr. Secretary, the Justice Department recommends that we file this supplemental memo, and so we recommend you sign it.

Q And did he read it when you showed it to him?

A I believe he did, yes.

Q Had you shown it to him before that conversation?

A I—I don't know.

Q Do you know if OGC had shown it to him before that conversation?

A It's entirely possible, yes.

Q Do you know if the Justice Department showed it to him before that conversation?

A I don't believe the Justice Department came over to meet with them.

Q Did you talk with anyone other than the Secretary or your colleagues from the Office of General Counsel about this memo before June 21st?

A Not that I recall.

Q Did you discuss with it Karen Dunn Kelley?

\* \* \* \* \*

[110]

a citizenship question could be warranted?

A Again, my formulation of a—of a decision that it could be warranted is largely based on common sense.

Q Okay. I just want to make sure that I understand. That as to the part of your answer that related to the practices of other countries, in the spring of 2017, you formed that view by Googling it?

A I may have asked if other countries did it or I may have gotten online and looked. I don't recall.

Q Who would you have asked if you asked?

A I likely would have asked somebody from Census or I might have asked David Langdon.

Q And if you asked, would that be reflected in your—in your email or your memo somewhere?

A If it was, you could have found the email. So I, obviously, did not send an email if I asked that question.

Q Okay. The—

MR. GARDNER: Matt, I'm sorry. I didn't [111] mean to break your line of questioning. Actually, we've been going about an hour and a half. Would now be an appropriate time for a break?

MR. COLANGELO: Yes.

MR. GARDNER: Let's take a break.

VIDEOGRAPHER: This concludes Media Unit Number 1. The time on the video is 10:32 a.m. We are now off the record.

(Off the record.)

VIDEOGRAPHER: This begins Media Unit Number 2. The time on the video is 10:45 a.m. We are on the record.

BY MR. COLANGELO:

Q Mr. Comstock, we were talking about the Secretary's June 21, 2018 memo which we marked as Exhibit 5. Do you still have that in front of you?

A I do.

Q Okay. That memo says that other senior administration officials had previously raised this question. Do you see that line?

A Yes.

[112]

Q Who are those other senior administration officials?

A You'd have to ask the Secretary.

Q You don't know yourself?

A I don't.

Q You have no idea which other senior administration officials raised this question, other than the Secretary?

A No.

Q You never asked him where the idea came from?

A Nope.

Q He never told you where the idea came from?

A Nope.

Q You spent a lot of time on this issue?

A Not relative to a lot of other things I work on, no.

Q How would you characterize the amount of time you spent on this issue?

A One one-hundredth of my time.

Q You agree that it's an important issue?

[113]

A Correct.

Q It was important to the Secretary?

A Correct.

Q He was motivated to get this done?

A He was working on a lot of different issues at the time.

Q But this one was important to him?

A Yes. Absolutely.

Q Okay. And when you saw the draft of this memo before June 21st and it refers to other senior administration officials, you didn't yourself have any view or understanding of who those other administration officials were?

A I did not, no.

Q You didn't ask the secretary who those other administration officials were?

A No.

Q Okay. When recommending that he sign the memo, he didn't say to you who are the other senior—who the other senior administration officials were?

A We did not discuss that, no.

\* \* \* \* \*

[146]

Q Okay. And you see that the Secretary has written you an email on May 2, 2017 that says, quote, worst of all, they emphasize they have settled with Congress on the questions to be asked. I am mystified why nothing has been done in response to my months' old request that we include the citizenship question. Why not?

Do you see that?

A I see that.

Q When did the Secretary make his months' old request to include the citizenship question?

A Again, sometime in the spring.

Q Probably on March 10th when you emailed him the Wall Street Journal blog post?

A Potentially. I don't recall.

[REDACTED]

\* \* \* \* \*

[151]

correct?

A To pursue, exploring the question.

Q This was instructions to add the question in response to my months' old request that we include the citizenship question, correct?

A This would be instructions to review and consider and present to him information that would allow him to make a decision on whether or not to take final action.

Q Mr. Comstock, I'm just asking you what you understood on May 2nd—

A And that's what I'm telling you I understood on May 2nd.

Q Hold on one second. Let me finish the question.

A Uh-huh.

Q The Secretary wrote, "I am mystified why nothing has been done in response to my months' old request that we include the citizenship question."

And you responded, "On the citizenship question, we will get that in place"?

[152]

A Correct.

Q Okay. So my question is: By we will get that in place, what did you mean?

A I meant that I will present to you the information and the process necessary for you to decide if you would like to pursue this question.

Q Your email says we will get that in place, correct?

A I mean, we will get in front of you the necessary information for you to make a decision. Part of my role in this process is explaining to people who have never worked in government before that there are processes that you have to follow in order to make an action happen. You're dealing with people who are used to being able to make a decision and it simply goes into effect.

Q Okay.

A That's not the way the U.S. government works.

Q So the process that you then go on to tell the Secretary he has to follow is later in your message; is that right?

[153]

A That part of the process, yes.

Q And that email says we need to work with Justice to get them to request that citizenship be added back as a census question; is that right?

A That's right.

Q Why would you say you needed to work with the Justice Department to get them to request that citizenship be added back?

A Because based on a very preliminary review, they appeared to be the most likely government body that would have a specific need for the information that would support adding a citizenship question to the decennial census.

Q Who conducted that preliminary review?

A We were told by the Census Bureau that the Justice Department was the person that had requested the citizenship question on the ACS and that they utilized the ACS data for Voting Rights Act information.

[REDACTED]

Q And why did you need a request from [154] Justice?

A Again, based on the preliminary review, the understanding we had was questions are added, based on requests from a government agency. There is such a thing as the Paperwork Reduction Act where you have to justify to OMB why do I need this information? That has to get cleared. So there are certain hurdles you have to get through. So if at the end of the day the Secretary decided to pursue this question, we would need to clear certain legal thresholds.

Q Why not just tell the Census Bureau to add the citizenship question and say the Secretary wanted it?

A Because I'm not sure that that would be the process they would necessarily agree to follow.

Q So you had to have it come from DOJ in order for the Census Bureau to agree to follow it?

A Again, that was a preliminary conclusion based on a cursory analysis.

[REDACTED]

[155]

[REDACTED]

What court cases were your referring?

A I don't recall the exact court cases.

Q Did you research those court cases?

A I did research a court case where there was a scenario in which you would need—it would be important to have Citizen Voting Age Population data in order to make a Voting Rights Act claim.



Q How did you identify that case?

A By a legal research.

Q What do you mean by legal research?

A Well, I think I talked to—I'm trying to think—I think Mark Neuman may have provided a case name. I talked to James Uthmeier, who looked at some cases. Basically said, okay, if this is the question—I mean, it's what you do as an attorney all day long, is to go find cases to support what you're looking for.

Q So Mark Neuman identified for you a case that would support DOJ's need for this information?

[156]

A Yeah. I said I may have spoken to Mark Neuman on that. I think he may have provided it. I don't recall. I know James Uthmeier looked at some cases.

Q Would he have provided that case for you on a phone call or by email?

A James?

Q Pardon me?

I'm sorry. Withdraw that question.

Would Mr. Newman have provided that case to you by email or on the phone?

A Well, if he provided it by email, you'd have it. I don't have the emails in front of me, so I can't tell you.

Q So by May of 2017, you'd come to the view that you needed another agency to request a citizenship question on the census?

A That was based on the preliminary analysis, yes.

Q You then say in your email, “I will arrange a meeting with DOJ staff this week to discuss.”

[157]

Do you see that?

A Yes.

Q Okay. So before May 2, 2017, you had not had any discussions with the Department of Justice about the citizenship question, right?

A Not to my knowledge.

Q What did you do to arrange a meeting with DOJ staff to discuss?

A I asked Eric Branstad for a name over at DOJ, and he provided me the name of Mary—Mary Jane [sic] Hankey I think it was, whom I then contacted.

Q Okay. Your email refers to the court cases to illustrate that DOJ has a legitimate need for the question to be included.

A That’s what it says, yes.

Q What were the other needs that you had talked about for including the citizenship question?

A I don’t recall.

Q Okay. And by legitimate need, were you concerned that other needs that didn’t come from [158] DOJ would not be legitimate needs?

A No. I think that’s just an imprecise—the use of the term legitimate, something to say that it would be a need that would be considered a government need for the information.

[REDACTED]

[171]

A I'd say that was the primary topic.

Q Okay. And what did you say to her when you met with her in person?

A That we—the Secretary had asked us to look into the possibility of adding a citizenship question, and that since the Justice Department was the agency that had sponsored the question for the ACS, it seemed that that was a logical place to start, and was there someone in the Justice Department with whom I should speak about that.

Q And what did she say?

A Let me look into it.

Q How long was the meeting?

A Well, we met for about 20 minutes.

Q Did you explain why the Secretary wanted the citizenship question?

A No.

Q Did you have an understanding at that point as to why the Secretary wanted the citizenship question?

A I've never asked the Secretary why he [172] wanted a citizenship question.

Q Did she ask you why it was important to Commerce Department to add a citizenship question? She being Ms. Hankey.

A No.

[REDACTED]

[173]

[REDACTED]

[174]

[REDACTED]

Q And after you met with Ms. Hankey and she said she'd look into it, what was the next that you heard from the Justice Department on this issue?

A I think when she contacted me, provided a name.

Q How long after your meeting did she contact you and provide a name?

A There's an email that documents it, you could tell from that, but otherwise, I have no idea.

Q Okay.

A I mean, it was sometime in the next couple weeks, but—

Q And what name did she give you?

A I—I know I put it in a memo to the Secretary later on, so you'd have to look at that memo.

Q Is it James McHenry?

A That sounds like the right name.

Q When she spoke to you to pass along [175] James McHenry's name, what did she say about why she was directing you to him?

A She didn't say much. Just said this would be the best guy to talk to.

Q Okay. Had you spoken to James McHenry before?

A Never talked to him before.

Q Did she tell you what his position was in the Department of Justice?

A She might have.

Q What was his position?

A I don't know, actually.

Q After she gave you Mr. McHenry's name, what did you do next to contact him?

A I called him on the phone.

Q And when you spoke to him on the phone what did you say?

A I outlined that we were interested in seeing what kind of level of interest the Justice Department would have in requesting the citizenship question be asked—added to the decennial census.

[176]

Q And did you tell him why the Commerce Department wanted the Justice Department to make that request?

A Because that was our understanding of the process. They were the people that needed it for ACS, and our understanding was that it might be useful for them to have it at a more granule level, which would be needed—you'd need to put it on the decennial census to do that.

Q So you were—you told him that the Commerce Secretary wanted the question and wanted to know if

DOJ would ask for the Census Bureau to add the question; is that right?

A Those are your words.

Q Well, I'm asking you to tell me yes or no.

A Well, if the question is yes or no, then the answer is no.

Q Okay. How would you put it in your words?

A In my words, what I told him was that we were exploring the possibility and wanting to know [177] the level of interest at the Justice Department in making such a request, would this be information they could use?

Q So this is the shortly—this is shortly after the Secretary of Commerce emailed you and said I am mystified why nothing had been done in response to my months' old request?

A Right.

Q But your testimony is that you conveyed to the Justice Department that you were exploring the issue?

A As I explained before, when—when the Secretary says he would like to do something, there's a presumption that we will attempt to do that. That's subject to revision as more information is made available. So I'm exploring what is necessary to follow through on the Secretary's request. That request may be modified or changed, based on the information that I provide.

Q Okay. How many times did you speak to Mr. McHenry?

[178]

A I think three or four times.

Q And what was the next time you spoke to him after the initial phone call?

A Maybe a week later.

Q Okay. And what did he say when he—did he call you or did you call him?

A I don't recall.

Q And what did you discuss on that conversation?

A That he was still exploring the question.

Q How long was that conversation?

A Five minutes.

Q Okay. So he didn't have anything new to report?

A Right.

Q Okay. And you said you spoke to him at least a couple more times; is that right?

A Again, I don't recall the exact number of times, but somewhere in the vicinity of three or four times.

Q So after the second call where he said he was still exploring it, tell me about the next [179] conversation?

A Memory serves, I think the next conversation was a similar one. He was still looking into the matter and then—and then the last conversation he and I had, he directed me to somebody at the Department of Homeland Security.

Q Okay. And over what period of time were you talking to Mr. McHenry on the phone?

A Probably over the course of a month.

Q So this was primarily in May of 2017?

A I honestly don't recall, but sometime in May, early June.

Q And who did he direct you to at the Department of Homeland Security?

A I don't remember the person's name.

Q Was it Gene Hamilton?

A Again, I know I prepared a memo for the Secretary that had the name. So if that's the name that was on the memo, then, yes, that would be the person I spoke with.

Q How many times did you speak to your point of contact at the Department of \* \* \*

\* \* \* \* \*

[202]

Q Okay. And if you weren't in the meeting, would it be typical for Ms. Teramoto to be there?

A Again, it would depend on what her schedule was.

Q Okay. You'll see from this email at the top of Page 3702, that David Langdon is reporting to several people, quote, the Secretary seemed interested on subjects and puzzled why citizenship is not included in 2020.

Do you see that?



A Yes.

Q Okay. Do you remember a meeting where the Secretary was puzzled why citizenship was not included?

A I don't recall such a meeting, but—

Q And why does Mr. Langdon say the Secretary seemed puzzled why citizenship is not included?

MR. GARDNER: Objection. Calls for speculation.

THE WITNESS: Again, the Secretary was clear. He did not understand why a citizenship [203] question was not included, so he asked us to look into the matter.

BY MR. COLANGELO:

Q Okay. And then you see that Mr. Langdon sent the email to Lisa Blummerman. Am I saying that right?

A I think it's pronounced Blummerman.

Q Okay. Mr. Langdon sent the email to Lisa Blummerman at 10:51 p.m. on May 24.

Can you tell me who Ms. Blummerman is?

A She was—I believe at the time, in some kind of acting capacity. I don't know if she was the acting deputy director or whether she was the person in charge of budget. If you notice further down in the conversation, Lisa and I are happy to discuss the life-cycle stuff, which was beginning to become an issue. So Lisa, to my recollection, is largely budget side.

Q Is it your understanding that at the time, Ms. Blummerman was the associate director for decennial programs?

A That's entirely possible.

[204]

Q And is the associate director for decennial programs effectively the head of 2020 census?

A I believe that's correct, yes.

Q And you see that Mr. Langdon has asked Ms. Blummerman for an answer on the citizenship question ideally this evening?

A That's what his mail says.

Q Okay. It's fair to say that this was a matter of some urgency?

MR. GARDNER: Objection. Form.

THE WITNESS: Again, one of the biggest roles that I play is expediting things along. Because you have people from the private sector who are used to a much faster speed than the government usually operates at. So we spend a lot of time expediting things to get things back in place. So this is not uncommon for us to say everything the Secretary is requesting is urgent.

BY MR. COLANGELO:

Q Let's go back to Exhibit 7. Do you have that in front of you?

[205]

A Just a minute.

Yes

Q Okay. And Exhibit 7 is the email exchange with Kris Kobach; is that right?

A It's an email exchange between Kris Kobach and Wendy Teramoto.

Q And the Secretary, correct, on the second page?

A Yes. Appears to be one to the Secretary on the second page.

Q Okay.

A Though it's blanked out as to who it goes to.

Q If I represent to you that the government has represented to us that this was an email to the Secretary and that they've blanked out his name for personal privacy reasons, can we agree that it's an email to the Secretary on July 14th?

A I'll stipulate to that, yes.

Q And Mr. Gardner will tell me after lunch if that's wrong.

The—so you see that the—that [206] Mr. Kobach, who identifies himself as the Kansas Secretary of State, emailed the Secretary on July 14, 2017, correct?

A Correct.

MR. GARDNER: Objection. Lack of foundation.

BY MR. COLANGELO:

Q And you'll see that it says I'm following up on our telephone discussion from a few months ago, correct?

MR. GARDNER: Objection. Lack of foundation.

THE WITNESS: And you're reading from the email. So I have no idea if the email is correct or not.

BY MR. COLANGELO:

Q Did the Secretary ever tell you that he spoke to Kris Kobach?

MR. GARDNER: Objection. Asked and answered.

BY MR. COLANGELO:

Q You can still answer.

[207]

A No.

Q Sorry. We were speaking at the same time.

A I don't recall him ever telling me that he spoke to Kris Kobach.

Q This email reads, "As you may recall, we talked about the fact that the U.S. Census does not currently ask respondents their citizenship."

Do you see that?

A I see that.

Q The email also reads, "It also leads to the problem that aliens who do not actually reside in the United States are still counted for Congressional apportionment purposes."

Do you see that?

A I see that.

Q Did the Secretary ever tell you he was concerned about the problem that aliens who do not reside in the United States are still counted for Congressional apportionment purposes?

A He never expressed an opinion on that.

Q And when the Secretary asked you on [208] March 10, 2017 about the census and the citizenship question, did he ask you in the context of whether noncitizens should be included for Congressional apportionment purposes?

A He discussed Congressional apportionment purposes. If asked were the noncitizens counted, and we answered the questions, which is they are counted.

Q Well, you testified the link you sent him was the link to the Census Bureau's web page on whether noncitizens are counted for apportionment?

A That's correct. Well, I don't believe you can find a web page on the Census that doesn't speak to it in that context, whether noncitizens are counted other than for apportionment. That's the question that we asked. Do we count noncitizens? The answer is yes. What is the Census used for? It's used for apportionment. That's its primary function.

Q And you'll see that—going back to the first page of Exhibit 7, Ms. Teramoto has written to Mr. Kobach, “Kris, can you do a call with the [209] Secretary and Izzy tomorrow at 11:00 a.m.?”

A Correct.

Q And that's Izzy Hernandez, correct?

A I would believe that's the reference she's making, yes.

Q And he's copied at the top of this page, correct?

A Yes, he is.

Q Did you ever discuss with Izzy Hernandez a call with Mr. Kobach and the Secretary?

A I did not.

Q Did you ever discuss the citizenship question with Mr. Hernandez, at all?

A I think we discussed it once or twice.

Q And when were those conversations?

A I don't recall exactly.

Q Was it in the summer of 2017?

A It was sometime in the spring/summer of 2017.

Q Okay. So you had been working on the citizenship question for some number of months by late July of 2017; is that right?

\* \* \* \* \*

[221]

Q And we just saw an email from a few weeks earlier where Ms. Teramoto says let's keep Mr. Davidson and Ms. Kelley involved in a conversation about this, right?

A I wouldn't say keep, but—

Q Introduce them to this conversation?

A Introduce, yes.

Q So to your understanding, this was a meeting to discuss the citizenship question?

A Again, my understanding of this was to discuss key legal issues regarding the census.

Q Do you remember this meeting?

A Not specifically, no.

Q Do you remember any meetings with the Secretary and with this group on the census?

A Again, not specifically, no.

MR. COLANGELO: Okay. Let's have this marked as Exhibit 23. It's Document 2424.

(Plaintiffs' Exhibit 23, Email, was marked.)

BY MR. COLANGELO:

Q Do you have Exhibit 23 in front of you, \* \* \*

\* \* \* \* \*

[247]

[REDACTED]

THE WITNESS: Once again, the [248] Department of Justice, who are our counsel, suggested that a supplemental memorandum was needed. This was not something Department of Commerce generated. This was something the Department of Justice, as our counsel, recommended be provided. Following up on that advice, we worked on the document and then had the Secretary sign it. We were following advice of counsel.

[REDACTED]

[249]

[REDACTED]

[250]

[REDACTED]

Q All right. I want to go back to the spring of 2017 when Secretary Ross requests the [251] inclusion of a citizenship question on the census. At that point in time, the Department of Justice had made no request to Commerce for the addition of a citizenship question, correct?

A That's correct.

Q And they certainly hadn't asked—withdrawn.

The Department of Justice certainly hadn't asked Commerce to add a citizenship question because of the VRA. That's also correct; isn't it?

A Well, they didn't ask us to add a citizenship question at that point. So speculating as to why they would ask is irrelevant.

Q I'm not asking you to speculate. The one thing we can be sure of is they didn't ask about the VRA is because they didn't ask at all?

A Correct.

Q All right. And when Secretary Ross says to you in the spring, in whatever words he used, that he wants a citizenship question added to the [252] census, wouldn't you have had a discussion with him at the time about why he wants that?

MR. GARDNER: Objection. Asked and answered.



THE WITNESS: Again, the answer is no, I would not have a discussion. My boss, if he asked me to investigate something, I investigate it and report back the results.

[REDACTED]

[254]

rationale for why he would want it added is not relevant to my initial inquiry as to whether or not a question can be added.

BY MR. GERSCH:

Q Yeah. My question was a little different. The question I am trying to get you to focus on is: In your work for the Secretary, wouldn't it be helpful to you to understand as fully as possible why he thinks it's a good idea to add a citizenship question?

A And let—

MR. GARDNER: Objection. Asked and answered.

THE WITNESS: And let me get you to understand my answer, which is, no, it would not make a difference, because I don't need that information to investigate the question.

BY MR. GERSCH:

Q Anyone ever say anything to you about why the Secretary thought it was a good idea—withdrawn.

Am I right that your testimony is that [255] you've never had a discussion with the Secretary about why he thought it was a good idea to have a citizenship question added?

A That's correct. I have not had a conversation with him, no.

Q Okay. And did anyone else say anything to you about why the Secretary thought it was a good idea to have a citizenship question added?

MR. GARDNER: Objection. Form.

THE WITNESS: Again, no.

BY MR. GERSCH:

Q All right. If I remember correctly, you testified you worked in a bullpen area?

A Correct.

Q Outside the Secretary's office?

A Yes.

Q I'm not sure I've got all the people who were there, but Wendy Teramoto was there, right?

A Correct.

Q James Uthmeier was there?

A No.

Q I'm sorry.

[256]

You were there?

A Yes.

Q Eric Branstad, was he there?

A Yes.

Q That's three.

Izzy Hernandez, that's four. Was he there?

A Yes.

Q Who was the fifth?

A James Rockas.

Q And I'm right that there were five?

A Correct.

Q Okay.

A At times.

Q So you're all sitting there—and are—do you work in cubicles, open desks, how does it work?

A Wendy Teramoto had a seated desk. I had a standing desk. Izzy had a standing desk with a stool. James had a standing desk with a stool. Eric Branstad had a standing desk with a stool.

Q Are there walls? Are there partitions? [257]  
Are you all in an open space?

A I'm facing—I was facing Wendy. Izzy, who was rarely there, but his desk was next to mine, facing Eric, and then James was on the end.

Q And there are no walls, correct?

A No walls.

Q No partitions?

A No partitions.

Q Okay. In all the time that you're sitting there and you're all working together, no one says, why does the Secretary want to add a citizenship question—citizenship question?

A That's correct. Because, again, this was one of well over 100 different items we were working on. All of us were working on different things. I'm primarily tasked with policy. James is primarily tasked with press. And so you're dealing with all of these other issues. There's no reason to discuss it.

Q I'm not even talking about discussing it. No one mentioned? Did anyone mention it?

A Not that I recall.

[258]

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 [259] 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?

[260]

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 [261] 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 [262] 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—

[263]

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 [264] 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.

[265]

[REDACTED]

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 [266] 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 [267] 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 [268] 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?

[269]

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 off hand.

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—

[270]

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.

[271]

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 [272] 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 [273] 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.

[274]

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 [275] 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.

[276]

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 [277] 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 \* \* \*

\* \* \* \* \*

[337]

Q The initial impetus for putting the citizenship question on the 2020 census was not DOJ's idea; is that correct?

A That's correct.

Q It was Secretary Ross's idea, I think you've testified to that, correct?

A He was the one who asked me to investigate it, yes.

Q He told you sometime shortly after he was confirmed that he wanted the question on the 2020 census, correct?

A He asked me to explore putting it on, yes.

Q Well, he actually said he requests the question be put on the census, correct?

A That was the way he phrased it, yes.

Q You said you would make that happen, correct?

A I said I would do my best.

Q And you would get the citizenship question in place, I think was—were your words?

A I said I would work to get that in place.

[338]

[REDACTED]

[339]

[REDACTED]

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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No. 18-CV-2921 (JMF)

STATE OF NEW YORK, ET AL., PLAINTIFFS

*v.*

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
DEFENDANTS

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No. 18-CV-5025 (JMF) (Consolidated Case)

NEW YORK IMMIGRATION COALITION, ET AL., PLAINTIFFS

*v.*

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
DEFENDANTS

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Filed: Nov. 5, 2018

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**NOTICE OF FILING OF DEPOSITION DESIGNATIONS  
FOR JOHN GORE**

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Plaintiffs hereby file with the Court the synopsis of deposition excerpts for John Gore (Exhibit 1), and the deposition excerpts for John Gore that will be offered as substantive evidence (Exhibit 2).

\* \* \* \* \*

[64]

A. It was my understanding that somebody from Commerce had spoken to Mary Blanche Hankey, that

someone had spoken to James McHenry, and that Secretary Ross had spoken to the attorney general.

Q. And that all of those conversations were about the inclusion of a citizenship question on the census?

A. I wasn't a party to those conversations, but my understanding is that they would have touched on that issue.

[REDACTED]

[65]

[REDACTED]

Q. During this period, Mr. McHenry was not staff in the civil rights division, correct?

A. That's correct.

Q. And Mr. McHenry did not have any formal duties with respect to enforcement of the Voting Rights Act during this period, correct?

A. He had no formal duties. As I recall, he was for some period of time our point of contact in the Office of the Associate Attorney General, which is why I remember he was there. But he did not have formal duties with respect to enforcement.

[REDACTED]

[66]

[REDACTED]

Q. So you don't know of any reasons why Mr. McHenry could address the issue of including a citizenship question on the census?

MR. GARDNER: Same objection.

THE WITNESS: I—I don't know one way or the other.

[REDACTED]

[67]

[REDACTED]

Q. What was your understanding of who initiated those conversations?

A. My understanding was that those conversations were initiated by the Department of Commerce.

Q. Those initial conversations that are referred to in this memo, your testimony is that, to the best of your knowledge, those conversations were not initiated by the Department of Justice, correct?

A. Again, I wasn't a party to those conversations, but that's been my working understanding.

Q. And your working understanding is that the Department of Justice did not reach out to the Department of Commerce to initiate those conversations for the purposes of obtaining better data to enforce the Voting Rights Act, correct?

[68]

MR. GARDNER: Objection. Lack of foundation.

THE WITNESS: Again, I wasn't a party to those conversations, but that's been my working understanding.

[REDACTED]

Q. The second paragraph in this memo reads, "I spoke several times with James McHenry by phone

and, after considering the matter further, James said that Justice staff did not want to raise the question, given the difficulties Justice was encountering in the press at the time, the whole Comey matter. James directed me to Gene Hamilton at the Department of Homeland Security.”

So were you aware, before I read that, that as of September 8th, 2017, Justice staff did not want to raise the citizenship question?

MR. GARDNER: Objection. Lack of foundation.

THE WITNESS: Before you read that, yes, I was aware of that.

\* \* \* \* \*

[73]

[REDACTED]

Q. When did you first become involved in deliberations about whether or not to request a citizenship question on the decennial census questionnaire?

A. I first became involved in either late August or early September of 2017.

Q. You can't get more precise than late August or early September?

A. Well, I think it was either a day or two before Labor Day in 20—the Labor Day weekend in 2017 which I think that year may have fallen in late August.

Q. So as of September 8th, 2017, the date of Mr. Comstock's memo, your best recollection is that, as of that date, you were already involved in deliberations

over whether or not to include a—to request a citizenship question for the 2020 census questionnaire?

A. That is correct. And I don't know—Mr. Comstock's memo is dated September 8th. He doesn't give any dates for any of these [74] conversations, so I don't know if this memo was contemporaneous to conversations or related back to prior conversations he'd had.

But yes, that's my recollection, that, as of September 8th, I would have been involved in those deliberations.

Q. How did you become involved in deliberations over whether or not to request the a citizenship question be included on the 2020 census questionnaire?

MR. GARDNER: Objection.

To the extent that that answer would cause you to reveal information subject to deliberative process privilege, I instruct you not to answer. To the extent you can answer that question without divulging such information, you may do so.

THE WITNESS: I became involved through a conversation I had with two individuals at the Department of Justice.

BY MR. HO:

Q. Which two individuals at the Department [75] of Justice?

A. The attorney general and Mary Blanche Hankey.

Q. Roughly when did your conversations with Mary Blanche Hankey and the attorney general occur?



MR. GARDNER: Objection. Compound.

THE WITNESS: It was the day or two before the Labor Day weekend. The reason I remember that is that the attorney general is a college football fan, and he's a fan of the Auburn Tigers, so I ended the call with the cry for War Eagle, since the Auburn Tigers were playing their first game of the season that weekend.

[REDACTED]

\* \* \* \* \*

[83]

[REDACTED]

Q. You mentioned you had a conversation with the attorney general around Labor Day. Did you understand from that conversation that the Secretary of Commerce initiated the conversation between the Secretary of Commerce and the attorney general? Correct?

A. That's been my working understanding. [84]  
Yes.

Q. Your working understanding is not that the attorney general initiated a conversation with the Secretary of Commerce about the citizenship question, correct?

A. That's correct.

[REDACTED]

\* \* \* \* \*

[91]

[REDACTED]

Q. Who are the three individuals at the Department of Commerce—

A. Sure.

Q. —that you spoke to about the citizenship question on the census?

[92]

A. I didn't mean to cut you off, and I apologize, again, to the court reporter for being a fast talker.

I recall speaking to Peter Davidson, James Uthmeier, U-T-H-M-E-I-E-R—and Wendy Teramoto.

[REDACTED]

Q. Who was the first of those three individuals that you had a conversation with about the inclusion of a citizenship question on the 2020 census?

A. Peter Davidson.

[93]

Q. And roughly when was your first conversation with Peter Davidson about including a citizenship question on the 2020 census?

A. I don't recall exactly, but I would say it was probably around mid-September of 2017 or somewhere in that time frame.

Q. After you spoke to Mr. Davidson in mid-September, what was the next conversation that you had among those three individuals from Commerce about the citizenship question?

A. I don't recall exactly when it was. I had several conversations with Peter Davidson beginning in September and continuing through December. I had

a couple of conversations as well with Mr. Uthmeier, including at least one between just Mr. Uthmeier and me and one, and maybe two, where Mr. Uthmeier and Peter Davidson were both involved. Then I had a conversation at one point with Wendy Teramoto about a scheduling issue that I think took place in October of 2017, but I don't recall exactly. Somewhere in that time frame.

Q. Roughly when was your first conversation [94] with Mr. Uthmeier about the citizenship question?

A. I think it would have been either late September or sometime in October of 2017.

[REDACTED]

Q. Mr. Gore, I just want to follow up on something from before the break. The communications between the Department of Justice and the Department of Commerce about the citizenship question, those communications were not initiated by the voting section, correct?

[95]

A. That's correct. That's my understanding.

Q. And those communications were not initiated by anyone else in the civil rights division, correct?

A. Correct.

Q. And you did not initiate the communications between Commerce and Justice about the citizenship question, correct?

A. That's correct.

[REDACTED]

Q. In front of you is a document that's been marked as Exhibit 7. It's an e-mail thread between, among other people, you, Macie Leach, and Wendy Teramoto. The first page of the document is Bates marked 0002628. It's from the administrative record.

MR. GARDNER: I think you may have said Exhibit 7. It's Exhibit 6.

MR. HO: Oh, I'm so sorry. Exhibit 6.

[96]

[REDACTED]

Q. And that's two days after your exchange with Mr. Gary regarding 2020 census questions, correct?

A. Correct.

[REDACTED]

Q. The DOJ-DOC issue that you're referring to in this e-mail is the citizenship question, [97] correct?

A. Correct.

Q. What prompted you to reach out to Ms. Teramoto to talk to her about the citizenship question?

MR. GARDNER: Objection.

To the extent that that answer calls for the divulgence of information subject to deliberative process privilege, I instruct you not to answer. To the extent you can answer that question without divulging such information, you may do so.

THE WITNESS: It was a conversation I had with Peter Davidson.

[REDACTED]

Q. And what is Mr. Davidson's role at Commerce?

A. I don't know what his current role is. At the time, I understood him to be the general [98] counsel of the Department of Commerce.

Q. How did you come to talk to Mr. Davidson?

A. He called me.

[REDACTED]

Q. And Mr. Davidson asked you to reach out to Ms. Teramoto?

A. Yes, he did.

[REDACTED]

[99]

[REDACTED]

[100]

[REDACTED]

[101]

[REDACTED]

[102]

[REDACTED]

Q. Okay. I'm going to show you an e-mail that's been marked as Exhibit 7. It's an e-mail exchange between, among other people, you and Ms. Teramoto. The first page of it bears the Bates number 0002657. The top e-mail on the chain is dated 9/16/2017 from Danielle Cutrona to you, Mr. Gore, with a cc to Ms. Teramoto. It's part of the administrative record.

This e-mail thread—or the top e-mails on this thread, these are subsequent to the e-mail that we talked about earlier between you and Ms. Teramoto, correct?

A. Correct.

[REDACTED]

Q. And you, after speaking with Ms. Teramoto, then introduced her to Danielle Cutrona from the Department of Justice, correct?

A. That's correct.

[103]

Q. And Ms. Cutrona was a senior advisor to the attorney general at this time, correct?

A. That's probably a fair characterization, yeah.

[REDACTED]

[104]

[REDACTED]

Q. You're not aware of any experience that Ms. Cutrona has with respect to enforcing Section 2 of the Voting Rights Act, correct?

A. That's correct.

Q. Did Ms. Teramoto and Ms. Cutrona connect after this e-mail exchange?

A. I believe that they did.

Q. How do you know that?

A. Because I believe that Danielle let me know that they had.

[REDACTED]

[105]

[REDACTED]

Q. This is a continuation of the e-mail chain between you and Ms. Cutrona and Ms. Teramoto. The first page of it has the Bates number 0002653. It's part of the administrative record in this case. And the e-mail at the top is dated September 17th, 2017, from Ms. Cutrona to Ms. Teramoto.

The e-mail from Ms. Cutrona to Ms. Teramoto at the top reads, "Wendy, the attorney general is available on his cell. His number is"—and then the number is redacted. "He is in Seattle, so he's three 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 [106] assist."

So you had a conversation with Ms. Cutrona, correct?

[REDACTED]

[107]

[REDACTED]

[108]

[REDACTED]

[109]

[REDACTED]

[110]

[REDACTED]

Q. Okay. I'm going to show you another document. We'll mark this as Exhibit 9.

(Gore Deposition Exhibit 9 marked for identification and attached to the transcript.)

[111]

BY MR. HO:

Q. This is another e-mail from the administrative record, the first page of which—the only page of which has Bates number 0002636. The top e-mail is an e-mail to you dated September 18th, 2017. September 18th, 2017, that's two days after you connected Ms. Teramoto and Ms. Cutrona, correct?

A. That seems to be correct. Yes.

Q. And the e-mail to you states, "Hi. AG and Sec spoke. Please let me know when you have a minute."

What did you understand that to mean, AG and Sec spoke?

A. I understood it to mean what it says it means, that the attorney general and the Secretary spoke.

[REDACTED]

[112]

[REDACTED]

Q. I'm not asking for the content of the conversation, just whether or not they spoke about the citizenship question. Is that your understanding?

A. Yes, that would be my understanding.

[REDACTED]

\* \* \* \* \*



[118]

Q. And to the best of your knowledge, Mr. Uthmeier does not have any experience enforcing the Voting Rights Act, correct?

A. That is correct as well. Yeah.

Q. Did you ever return Mr. Uthmeier's call?

A. Yes. I believe I did.

[REDACTED]

Q. Did you talk to him about the citizenship question?

A. Yes, among other things.

Q. At some point you received a note and a memo from Mr. Uthmeier concerning the citizenship question, correct?

A. That's correct.

Q. Was the note handwritten?

[119]

A. Yes, it was.

Q. How was the note transmitted to you?

A. Along with the memo, it was delivered to my office.

[REDACTED]

Q. Was it after receiving this phone call to your office from Mr. Uthmeier on September 22nd, 2017?

A. I believe so, yes.

Q. Was it before the Department of Justice sent its letter to the Census Bureau on December 12th, 2017, requesting the citizenship question?

A. Yes.

[REDACTED]

\* \* \* \* \*

[123]

BY MR. HO:

Q. If you know.

A. That would be speculating. I don't know.

Q. Did the note state one way or the other whether or not it was prepared in anticipation of litigation?

A I don't recall that it did.

Q. And did the note state one way or the other whether or not it was requesting legal advice from you?

A. Yes, it did.

Q. And your answer is it was requesting legal advice, the note?

A Yes.

[REDACTED]

Did the Department of Justice rely on that note in drafting its request to the Census Bureau to include a citizenship question on the census?

MR. GARDNER: Objection. Vague.

THE WITNESS: The note contained information regarding that issue that was [124] considered by the Department of Justice in drafting its request.

[REDACTED]

\* \* \* \* \*

[126]

[REDACTED]

Q. This is marked as Exhibit 11. This is an e-mail to you—from you to Mr. Herren—Chris Herren, sorry—dated November 1st, 2017, with a cc to Ben Aguina-ga, correct?

A. That is correct.

Q. Chris Herren is the chief of the voting section, correct?

A. Yes. And a great lawyer.

Q. The subject line of your e-mail is, Confidential and closehold draft letter, correct?

A. That's correct.

Q. And in your e-mail to Mr. Herren you say that the draft letter is attached, correct?

A. Correct.

Q. Did you write the draft letter that is attached to this e-mail?

A. Yes, I did.

Q. The draft letter that is attached to this e-mail is an early draft of the December 12th letter from the Department of Justice to the Census Bureau request-ing a citizenship question on [127] the 2020 census questionnaire, correct?

A. Correct.

[REDACTED]

Q. Is it fair to say that you wrote the first draft of the letter from the Department of Justice to the Census Bureau requesting a citizenship question on the 2020 census questionnaire?

A. Yes.

[REDACTED]

\* \* \* \* \*

[151]

[REDACTED]

Q. Okay. Around November 1st of 2017, the only career staff in the civil rights division [152] from whom you received input on the letter was from Mr. Herren, correct?

A. That's correct.

[REDACTED]

\* \* \* of 2017 when you had drafted the initial draft of that letter, Mr. Herren gave you some edits, correct?

A. That's correct.

[REDACTED]

Q. So you have no recollection of receiving input from career civil rights division staff on the letter requesting a citizenship question other than that one occasion in early November around the time of the first draft from Mr. Herren, correct?

A. I believe that's correct. Yeah.

Q. You continued to revise the letter after early November of 2017 with input from different people.

But after that first round of edits from Mr. Herren, you received no subsequent edits from [153] people who were career staff in the civil rights division, correct?

MR. GARDNER: Objection. Compound.

THE WITNESS: To the extent I understand your question, I believe that's correct.

BY MR. HO:

Q. During this period when you were revising the letter to request a citizenship question, you had multiple conversations with legal staff at the Department of Commerce, correct?

A. Yes.

Q. And the edits that you were receiving to the letter from other DOJ personnel included political appointees in the front office of the Department of Justice and in the front office of the civil rights division, correct?

A. I—certainly that's correct with respect to the leadership offices at the Department of Justice. I can't remember if I was receiving edits from the front office of the civil rights division at that time after receiving the edits from Ms. Pickett.

\* \* \* \* \*

[228]

[REDACTED]

Q. You're not aware of any such communications between the Department of Justice and the Census Bureau about whether or not, due to disclosure avoidance techniques, the CVAP data produced from re-

sponses to the decennial census questionnaire, would, in fact, have smaller margins of error than the CVAP data currently relied on by the Department of Justice, correct?

A. I don't believe I'm aware of any such communication.

[REDACTED]

\* \* \* \* \*

[233]

precise than data that has larger margins of error, right?

A. Yes.

Q. Today, do you believe that CVAP data produced from responses to a question about citizenship on the census questionnaire will be more precise than the data that the Department of Justice is currently relying on with respect to CVAP for purposes of VRA enforcement purposes?

A. I'm not sure I have a view on that one way or the other, since I don't know what the margin of error is that the Census Bureau will assign to census responses and, particularly, the citizenship question should it be asked on the 2020 census.

Q. So just to clarify, right now you don't know whether or not CVAP data produced from responses to the citizenship question on the census questionnaire will, in fact, be more precise than the CVAP data on which DOJ is currently relying for purposes of VRA enforcement?

A. I believe that's correct. I don't know [234] what the margin of error is that will be assigned to that, to that data.

[REDACTED]

Q. Okay. Correct me if I'm wrong, but the \* \* \*

\* \* \* \* \*

[260]

[REDACTED]

Q. Okay. On page 3, page DOJ 2714, on January 2nd, Arthur Gary writes to Ron Jarmin, "It should work fine. Let me get back to you. Best wishes to you for 2018 as well."

I read that correctly, right?

A. Yes, you did.

Q. That's in response to a meeting—an e-mail on the following page which is from Ron Jarmin to Arthur Gary which reads, "Arthur, happy new year. Would the late next week work for a meeting?" Right?

A. Appears—that appears correct.

Q. Okay. So at this point, it looked like Mr. Gary was planning on having a meeting or suggested that a meeting the following week with the Census Bureau would work fine, correct?

A. Again, these e-mails speak for [261] themselves. And I can't speak for Mr. Gary. But that seems about right.

[REDACTED]

[262]

[REDACTED]

Q. Mr. Gary writes back to Ron Jarmin and offers a number of options for a meeting, including Friday, January 19th, at 11:00 a.m., right?

A. That appears to be correct.

Q. And in the next e-mail on the thread, Dr. Jarmin writes to Arthur Gary on January 10th, “Thanks, Gary. Let’s do Friday at 11:00. We’re fine meeting at main Justice.” Right?

A. Right.

Q. The next e-mail, which is on the first page at the bottom, on January 16th, 2018, Arthur Gary writes to cancel the meeting with Ron Jarmin, correct?

A. Well, it looks like—he says they’re unable—“We”—I don’t know who “we” are—“will be able to meet on Friday or this week.”

Q. Did you have any conversations with Mr. Gary about meeting with the Census Bureau between the date of Dr. Jarmin’s e-mail on [263] December 22nd requesting a meeting between Census Bureau and DOJ staff and Arthur Gary’s e-mail on January 16th stating, due to some scheduling conflicts, we will be unable to meet on Friday?

A. Yes.

[REDACTED]

Q. What was the content of that conversation?



A. I believe the content of that conversation related to this request that the Census Bureau and the Department of Justice hold a meeting.

Q. And what did Mr. Gary convey to you about the Census Bureau's request to have a meeting between DOJ and Census Bureau technical staff?

A. He conveyed to me that the request had been made.

[REDACTED]

[264]

[REDACTED]

Q. And what was your response to receiving that information?

A. I listened to what Mr. Gary had to say and told him that I would think about the issue and discuss it further with others.

[REDACTED]

[265]

[REDACTED]

Q. What, if anything, did you do with the information that the Census Bureau had an alternative means for providing DOJ with block-level CVAP data?

A. I discussed that with various people at the Department of Justice.

Q. And who did you discuss that with?

A. I discussed it with Rachael Tucker, Pat Hovakimian. I may have discussed it with Danielle Cutro-

na. I'm not sure. And I eventually discussed it with the attorney general.

[266]

[REDACTED]

Q. You mentioned that you discussed it with the attorney general. When did you discuss the fact that the Census Bureau had an alternative means of producing block-level CVAP data with the attorney general?

A. It would have been at some point after I spoke to Art Gary. I don't remember the exact date.

[REDACTED]

[267]

[REDACTED]

[268]

[REDACTED]

Q. You didn't ask Arthur Gary to get more information about the specifics of the proposal from the Census Bureau to get higher quality CVAP data at lower cost?

A. I don't recall asking him that and I don't recall him conveying that to me that that was a representation that the Census Bureau had made.

Q. Okay. You at some point had a conversation with the Attorney General about this. Was that in person or by phone?

[269]

A. In person.

Q. And it was in January of 2018?

A. Probably. Yeah.

[REDACTED]

[270]

[REDACTED]

[271]

[REDACTED]

Q. That's fine.

The decision was made not to pursue the Census Bureau's alternative proposal for producing [272] block-level CVAP data for purposes of VRA enforcement through a means other than including a citizenship question on the census, correct?

A. That is correct.

Q. Who made that decision?

A. The attorney general.

Q. When was that decision made?

A. Around this time. I don't know exactly when it was made. I can't remember the specific date.

Q. When you say "around this time," you mean around January of 2018, correct?

A. That is correct.

Q. Are the reasons for that decision memorialized anywhere?

A. Not to my knowledge.

Q. Were those reasons ever communicated to you?

A. Yes.

[REDACTED]

[273]

[REDACTED]

Q. Who informed Art Gary of the decision not to meet with the Census Bureau to discuss their alternative proposal for producing block-level CVAP data?

A. I did.

Q. When did you inform Mr. Gary of that [274] decision?

A. It would have been around this January 29th date, I believe. But I don't recall specifically.

Q. And who informed you that the Department of Justice should not meet with the Census Bureau to discuss the Census Bureau's alternative proposal for producing block-level CVAP data?

A. The attorney general.

Q. You received this e-mail thread from Arthur Gary, which includes the initial e-mail from Dr. Jarmin describing the alternative proposal for collecting CVAP data at higher quality produced at lower cost on January 29th, 2018, correct?

A. On this e-mail chain, that's correct. I don't know whether I received it before then or not. But yes, this e-mail—the e-mail dated January 29th, 2018, at 2:33 p.m., is the first e-mail in this chain where Mr. Gary sent me that information.

[REDACTED]

\* \* \* \* \*

[284]

[REDACTED]

Q. Dr. Jarmin was correct that DOJ leadership did not want to have a technical meeting to discuss DOJ's request for block-level CVAP data, correct?

A. I believe that's correct.

[REDACTED]

[285]

[REDACTED]

[286]

[REDACTED]

Q. Mr. Gore, as the head of the civil rights division, you want the civil rights division to have access to the most accurate CVAP data for purposes of VRA enforcement, right?

A. Right.

[REDACTED]

[287]

[REDACTED]

[288]

[REDACTED]

Q. Well, before Secretary Ross' decision memo—that decision memo was in March of 2018, correct?

A. Sounds right.

Q. Okay. So before Secretary Ross' memo, you didn't know what the Census Bureau's views were about the most accurate form of CVAP data, correct?

A. That's probably correct. Yeah.

Q. Okay. So before March of 2018, as someone who wants the Department of Justice to have the most accurate CVAP data for VRA enforcement, you wanted to be able to have a meeting of DOJ technical staff with the Census Bureau to learn about the Census Bureau's views about the most accurate CVAP data, correct?

MR. GARDNER: Objection. Hypothetical.

THE WITNESS: That's a hypothetical.

[REDACTED]

\* \* \* \* \*

[300]

December 12 letter, the Gary letter, did not use the word "necessary" with respect to the inclusion of a citizenship question on the 2020 census, correct?

A. Yes, I have just noted that in my testimony. I will say I don't know—I have no recollection of what this comment is referring to.

Q. You agree, right, Mr. Gore, that CVAP data collected through the census questionnaire is not necessary for DOJ's VRA enforcement efforts?

A. I do agree with that. Yes.

[REDACTED]

\* \* \* \* \*

[329]

no.

[REDACTED]

Q. Mr. Gore, just to circle back on something we talked about earlier, when Attorney General Sessions made the decision for there not to be a meeting between DOJ technical staff and the Census Bureau, at that time, Secretary Ross had not yet issued his decision memo directing the inclusion of a citizenship question on the census, correct?

A. That is correct.

Q. So it's accurate to say, since that decision memo had not yet been issued, that that decision memo did not play any role in the decision that was made not to have a meeting \* \* \*

\* \* \* \* \*

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

NEW YORK IMMIGRATION COALITION, ET AL., PLAINTIFFS

*v.*

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
DEFENDANTS

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Aug. 24, 2018

9:07 a.m.

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**VIDEOTAPED DEPOSITION OF WENDY TERAMOTO**

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\* \* \* \* \*

[32]

out that you say you can't read on here?

A. If that's what you are telling me, I have no reason to believe that it's not true.

Q. All right. When Secretary Ross says "I'm mystified why nothing have been done in response to my months old request," why did Secretary Ross request as of several months apparently before May 2nd, 10 2017, why did he request that a citizenship question be included on the census?

A. I have no idea. I mean, as you have correctly pointed out, this was in May. I didn't write the e-mail and I wasn't even—he didn't even send it to me.



Q. I take it your testimony is that Secretary Ross never told you the reason that he made such a request?

A. I have never asked.

Q. That's not my question. Did he ever tell you?

A. No.

Q. Did you ever learn to whom he made that request?

[33]

A. Of what?

Q. The request to add a citizenship question.

MS. WELLS: I object to form.

A. I guess I'm confused. Can you please repeat the question?

Q. Certainly.

He says he "made a months old request that we include a citizenship question." Did you ever learn to whom he made the request?

A. I have no idea.

Q. All right. So this is forwarded to you by Brook Alexander, and you respond by saying that you talk frequently with Marc Neumann and asking if the Secretary wants to meet with him.

Who is Marc Neumann?

A. So Marc Neumann was somebody that I met on the transition team who had worked at Census before.

Q. And did you discuss the citizenship question with Marc Neumann?

A. Did I?

Q. Yes.

\* \* \* \* \*

[40]

of State of Kansas, have you heard that before?

A. Well, I just read it right here.

Q. So you would have known that back in the day?

A. No.

Q. All right. So Kris Kobach writes an e-mail to you, if you look down that first page, July 21, 2017, he writes “Wendy, nice meeting you on the phone this afternoon. Below is the e-mail I sent to Secretary Ross”—

A. Sir, can I read the whole e-mail, please?

Q. Sure.

A. Thank you.

(Witness perusing document.)

A. Okay.

Q. All right. So there is an e-mail from Kris Kobach to you, July 21, in which he says—he references meeting you on the phone this afternoon.

Do you recall speaking with Kris Kobach?

[41]

A. Not at all.

Q. You don’t deny speaking with him?

A. I think you asked me if I remember. I don't remember talking to him.

Q. This is a different question.

You don't deny speaking with him?

A. Given this e-mail, I would assume that I spoke to him, but I don't remember ever speaking to him.

Q. All right. And he asks—withdrawn.

He says that he had sent an e-mail to Secretary Ross and he attaches it here. You see that, correct?

A. Well, I see his e-mail to me says "Below is the e-mail that I sent to Secretary Ross."

Q. Okay.

A. So I assume however this is produced, it would have been this e-mail.

Q. All right. And one of the things that the e-mail that Kris Kobach forwards to you, one of the things in it is [42] the statement "It is essential that one simple question be added to the upcoming 2020 census," that's the first sentence of the second paragraph of this forwarded e-mail; do you see that?

A. The second—the first sentence of the second paragraph that Kris Kobach sent to, I believe it is Secretary Ross, but I can't say his—there is no e-mail address—says "It is essential that one simple question be added to the upcoming 2020 census."

Q. All right. When you spoke with Kris Kobach, didn't he talk to you about adding a citizenship question to the census?

A. Again, I have no recollection ever speaking to him.

Q. Who did you understand Kris Kobach to be at the time?

A. I had no idea.

Q. Do you typically set up meetings with the Secretary or calls with the Secretary to people—with people you have no idea who they are?

[43]

A. You asked me, sir, if at the time if I knew who Kris Kobach was, and I said I didn't.

Q. Correct. I have asked you a different question now.

A. Okay. Could you please repeat it?

Q. My question is, would you typically set up a call for the Secretary with somebody who you didn't know anything about who they were?

A. Well, no.

Q. Why did you do so on this occasion?

A. Here it looks as though he forwarded to me and told me who he was.

Q. Okay. And why did you set up a call with him with the Secretary?

A. At this point in time, I don't remember.

Q. It had to do with the citizenship question, didn't it?

A. He had sent an e-mail requesting a call, and I don't remember, well, it looks like I set it up, so, you [44] know—

Q. Ms. Teramoto, my question is simply, the call that you set up, that was for the purpose of discussing the citizenship question, correct?

A. It was—I would have set up the call because somebody had asked for a call with the Secretary.

Q. Didn't you set it up for the Secretary in part because it was about the citizenship question?

A. I would have set up the call because somebody had asked for the call with the Secretary. It wouldn't be specifically because of a certain question.

Q. You wouldn't set up a call for anyone who asks for a call with the Secretary, would you?

A. If there is somebody who wants to speak to the Secretary and it seems like it is something that he would want to talk about, then I would set it up.

Q. So I take it he would, in your mind, he would have wanted to talk about the citizenship question?

[45]

A. I would have set up the call if somebody like this would have asked for a call with the Secretary, so if another Secretary of State had asked for some call with the Secretary, I would have tried to facilitate that.

Q. Wouldn't you have told the Secretary what the topic of the call was?

MS. WELLS: I object to the form.

A. It depends.

Q. Wouldn't you have told him what the topic of this call was?

MS. WELLS: I object to the form.

A. Somebody would have told him what the topic was.

Q. In this time period, July 2017, and earlier, hadn't you heard talk like this before that it is essential that the citizenship question be added to the census?

A. I don't remember anything specific.

Again, sir, I was not involved [46] in the day-to-day workings of the census. I think that's also demonstrated by the fact that I wasn't—I don't remember ever being on this call, and it doesn't look like when I set it up, I had any intention of being on that call.

Q. In his e-mail to you, Kris Kobach also said that when he spoke to the Secretary, he did so at the direction of Steve Bannon.

Steve Bannon worked in the White House, correct?

A. Yes.

Q. Did you ever talk to Steve Bannon about the census?

A. Never.

Q. Did you ever set up a call for the Secretary and Steve Bannon about the census?

A. No.

Q. Would there be notes of the Secretary's conversation with Kris Kobach?

A. I have no idea, sir, because I wasn't part of that call.

Q. Were there—but as his chief [47] of staff, was it typical that there would be notes of a call that people would have with the Secretary?

A. I don't take notes.

Q. Is there someone whose job it is, someone other than you, or an instruction that people should take notes?

A. No.

Q. How about to log the call, does the Secretary have a calendar in which his calls are logged, or some other document which logs his calls?

A. In general, sir?

Q. Yes.

A. Well, he does have a calendar.

Q. Do you keep his calendar?

A. No, sir.

Q. Who keeps his calendar?

A. There is a scheduler who keeps his calendar.

Q. Who is the scheduler?

A. For what time frame?

Q. This time frame, July 2017.

A. I don't remember.

Q. Who is it now?

\* \* \* \* \*

[58]

Ross, do you?

A. Again, from what I can see here, it looks as though I was either forwarded or CC'd it. I don't know. I'm guessing like you are, sir.

Q. My question was a little more specific.

You don't deny receiving a copy of Earl Comstock's e-mail at the bottom of that page—

MS. WELLS: I object to the form.

Q. —saying that he has got a memo for the Secretary about the citizenship question?

MS. WELLS: Objection to form.

A. My best guess, sir, is that it was sent to my e-mail.

Q. Thank you.

Let's mark this as Teramoto Exhibit No. 5. It is a two-pay document Bates stamped 1411 and 1412.

(Teramoto Exhibit 5 marked for identification.)

Q. All right. You have in front [59] of you what has been marked as Exhibit 5.

My first question is going to go to what is on the second page, that is the first email in the thread, which says it is sent from Peter Davidson August 29, 2017, to Israel Hernandez, Earl Comstock, James Uthmeier, CC'd to you, and it says "The Secretary asked to set up a briefing on some of the legal questions he is concerned with." The subject is the Census. And it goes on.



Do you know why this was CC'd to you?

A. Sir, can I read the e-mail, please?

Q. Sure.

A. Thanks.

(Witness perusing document.)

A. Okay. Could you please repeat your question, sir?

Q. Do you know why this was CC'd to you?

A. Probably for situational awareness or seeing if when he had time on his calendar.

[60]

Q. All right. And then—

A. Because this is, again, I was only CC'd, this isn't even to me.

Q. Understood.

A. Okay.

Q. Then the scheduler, who at the time, who is Chelsey Neuhaus, she sends around an e-mail August 29, 2017, this is on the first page, that says "Would one of you be able to confirm that these are the only attendees that should be included in next Wednesday's census briefing."

Do you see that?

A. Yes, sir.

Q. The first name of the people to be included is you, right?

A. Yes, sir.

Q. You participated in this briefing; is that right?

A. Not that I'm aware of.

Q. Do you deny that you participated in this meeting?

A. I don't remember attending this meeting. And just so you understand, sir, they usually included me as an attendee for [61] every single meeting of the Secretary. Many of them I don't attend.

Q. Okay. I understand you saying that you don't recall.

My question is, as you sit here today, do you deny attending this meeting?

A. As I set here today, I don't remember going to this and I highly doubt that I went to it. Again, I was not involved in the day-to-day interactions on the census.

[REDACTED]

\* \* \* \* \*

[73]

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.

[74]

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.

[75]

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 2 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.

[76]

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.

[77]

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 \* \* \*

\* \* \* \* \*

[84]

exhibit Bates stamped 2528. It is a single page and it is an e-mail from Wilbur Ross to Peter Davidson, "Subject: Census."

It contains a single line of text which reads as follows: "Wendy and I spoke with the AG yesterday. Please follow up so we can resolve this issue today. WLR."

Didn't you and Secretary Ross speak to the Attorney General on September 18th, 2017?

MS. WELLS: I object to form.

A. I don't remember being a part of that call at all.

Q. Do you deny being part of the call?

A. I said I don't remember being a part of that call. I remember calls with different cabinet members. I don't ever remember being on a call with the AG.

Q. Can you think of any reason why Mr. Ross would get this wrong just a day after the call?

MS. WELLS: I object to form.

A. You would have to ask him, but [85] 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 [86] 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.

[87]

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 [88] 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 [89] 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 [90] 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 [91] 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 [92] 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 [93] 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 [94] 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 \* \* \*

\* \* \* \* \*

[100]

MS. WELLS: I object to the form, and it also mischaracterizes the testimony, I believe.

Q. I'm characterizing the transcript, which I'm looking at.

A. I have not specifically asked for this letter that you're talking about.

Q. I take it you haven't asked for it generally either?

A. I don't know what you mean, generally.

Q. You said specifically. I don't know if you are meaning to exclude something.

A. I'm not a lawyer, so all I'm saying is I have not asked for it.

Q. Okay. I know you haven't seen this before today, but I want to point you to something just so we can have a framework.

Sort of almost halfway down the first paragraph of Teramoto Exhibit 1, Secretary Ross says that with respect to the fundamental issues regarding the census, he says "Part of these [101] considerations included whether to reinstate a citizenship question which other senior Administration officials had previously raised."

Do you know who the other senior Administration officials are?

A. I have no idea.

Q. Who would know?

A. You would have to ask Secretary Ross.

Q. I will represent to you that the Commerce Department, through its lawyers at the Department of Justice, said they can't figure out the answer to this question.

Do you have reason to believe that the identity of the senior Administration officials is some kind of state secret?

MS. WELLS: I object to the form of the question.

A. Are you being serious?

Q. Yeah. I'm, frankly, shocked that the Commerce Department and the United States Justice Department can't figure out [102] who these senior Administration officials are.

So I'm asking you, is this some kind of state secret?

MS. WELLS: I object to the form of the question and also—

Q. Is it any kind of secret? You can withdraw "state."

MS. WELLS: —the characterization of what the government has said in connection with the request for the information that you have presented in your interrogatory.

But you can answer the question, if you remember it.

THE WITNESS: I don't. Can you please read it back?

Q. I will rephrase it.

A. Okay.

Q. Can you think of any reason why the identity of the senior Administration officials who had raised the citizenship question to whom Mr. Ross refers, can you think of any reason why this is secret or why we can't know the answer to who those [103] people are?

MS. WELLS: I object to form.

A. I have no idea.

Q. I take it you have not heard any discussion of that issue?

A. Of the issue of the senior Administration officials?

Q. Yeah.

A. Right, I have not.

Q. You have not been—you have not been asked to find out the answer to that question?

A. I have not been a part of it at all. You are the first person who has raised it with me.

Q. Still on Teramoto Exhibit No. 1, when Secretary Ross says that soon after his appointment as Secretary of Commerce, he starts to have considerations into whether to reinstate a citizenship question, have you seen any documents about that of any kind, e-mails, scraps of paper, memoranda?

A. Where are you, sir?

Q. So second sentence is "Soon \* \* \*

\* \* \* \* \*



[118]

reason that the Department of Justice asked the citizenship question is because Secretary Ross asked the Department of Justice to ask the citizenship question?

MS. WELLS: I object to form.

A. I'm sorry if I don't understand your question, but when you ask it to me, it makes it sound like you are asking me if I understand why the Justice Department did something, and, again, I have no idea how the Justice Department works, so I can't tell you why they do or do not do anything; I'm sorry, I just don't.

Q. Do you understand from any source that Secretary Ross went to the Department of Justice and asked them to ask for a citizenship question on the census?

A. Again, I don't know what direct conversations the Secretary has had with the Justice Department.

Q. You haven't heard about that from any source?

A. Heard about what?

Q. That Secretary Ross went to the Department of Justice and asked the [119] Department of Justice to please request the addition of a citizenship question.

A. I have no recollection of the Secretary ever going to the Department of Justice.

Q. Including you have no recollection of the Secretary talking to Assistant Attorney—I'm sorry, to Attorney General Jeff Sessions about that?

A. No, that's not what I said.

Q. I know. That's a different question.

A. Okay. Can you ask your new question, please?

Q. Yes.

You understand that Attorney General Jeff Sessions spoke to Secretary Ross about asking a citizenship question on the census?

MS. WELLS: I object to the question, the form of the question.

A. From the e-mails, I can see that the Secretary and the AG spoke. What they spoke about, I don't know, because, as I said, I have no recollection of ever [120] being on a call between the two of them.

Q. Did you learn from any source that the Department of Commerce had made a decision in connection with the decisional memorandum not to let Congress and the public know that it was the Secretary who wanted the Department of Justice to add the citizenship question?

Withdrawn. Let me rephrase that.

A. Okay.

Q. Did you learn from any source that the Department of Commerce had made a decision in connection with the decisional memorandum not to let Congress and the public know that it was the Secretary who went to the Department of Justice, and it was the Secretary, the Secretary of Commerce, that is, who pressed the Department of Justice to ask for a citizenship question?

A. Sir, I'm not trying to be difficult. Can you shorten your questions, because there is a lot of notes and—

Q. Sure.

\* \* \* \* \*

[167]

Department of Commerce has ever had conversations with General Kelly about any of the topics we have just discussed?

A. I have no idea.

Q. Have you ever spoken to Kris Kobach, besides last summer?

A. Well, I don't even remember speaking to him, so other than that e-mail.

Q. Do you know if Secretary Ross has communicated with him before?

A. I have no idea.

Q. What about anyone at the Department of Commerce?

A. No idea.

Q. Are you aware that he also made a request to add a citizenship question to the 2020 census?

MS. WELLS: I object to the form.

A. Well, I mean, I've read the e-mail.

Q. Aside from the e-mail.

A. No.

Q. Have you ever spoken to Attorney General Jeff Sessions?

[168]

A. I think I might have said hi to him at the chief of staff meeting, but now that I think about it, I was late, so I don't even think I even shook his hand.

Q. How about Secretary Ross and Attorney General Jeff Sessions, are you aware of conversations between them?

A. I'm aware that they've had conversations. I'm not aware of the content of those conversations.

Q. Do you know if they have ever spoken about the census generally?

A. I have no idea.

Q. Do you know if they have ever spoken about immigration enforcement?

A. I have no idea.

Q. Voter fraud?

A. Zero idea.

Q. An undercount?

A. No idea.

Q. Congressional apportionment?

A. No idea.

Q. Redistricting?

A. No idea.

Q. So earlier you mentioned you \* \* \*

\* \* \* \* \*

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

NEW YORK IMMIGRATION COALITION, ET AL., PLAINTIFFS

*v.*

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
DEFENDANTS

---

Washington, D.C.  
Tuesday, Aug. 28, 2018

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**DEPOSITION OF: KAREN DUNN KELLEY**

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\* \* \* \* \*

[70]

to the final form is a draft. So anybody who saw it at that point was in the draft mode.

So I apologize. I just don't want—I don't want to not answer your question, because I know this is such a very, very important topic.

BY MR. GROSSI:

Q We'll hold it until this afternoon when I'll be able to put the document in front of you.

A Okay.

Q In the supplemental memorandum in the second sentence, Secretary Ross states, quote, soon after my appointment as Secretary of Commerce, I began

considering various fundamental issues regarding the upcoming 2020 census, including funding and content. Part of these considerations included whether to reinstate a citizenship question which other senior administration officials had previously raised.

Do you see that?

A Yes. I do see that.

Q Okay. So we know from the supplemental memorandum, that there were senior administration [71] officials who raised the issue of reinstating the citizenship question shortly after Secretary of Commerce Ross assumed the position in January 2017, correct?

MR. GARDNER: Objection. Lack of foundation.

THE WITNESS: I know what I read here.

BY MR. GROSSI:

Q Fair enough.

What I want to do is find out what you know from anything anybody has told you about which senior administration officials raised the issue of adding a citizenship question in this time frame soon after Secretary of Commerce Ross took the position.

Tell me from any source, including Secretary Ross or anything else you've been told, about who those senior administration officials were?

A I do not know.

Q You don't know who they are? You've never asked Secretary Ross where he got the idea [72] to add a citizenship question?

A I never asked the Secretary.

Q And he never told you?

A Again, I think you're conflating two questions. You asked about senior officials, administrative officials, and now you're saying how he got the idea. There's two separate topics here.

Could you clarify what you're asking me?

Q Well, Secretary Ross says he got the idea from senior administration officials, okay?

MR. GARDNER: Objection. Lack of foundation.

THE WITNESS: Okay. I know, again, what I've just read here.

BY MR. GROSSI:

Q Right. What we're trying to figure out from any source—and remember, it might even be hearsay—is who did Secretary Ross talk to in the spring of 2017 about this idea of adding a citizenship question? Any knowledge that you have from any source?

[73]

A I don't remember any. No. I do not remember any.

Q Let me ask about some of the names that the government has mentioned in a slightly different capacity, which are the people who did discuss the topic, whether they raised it or not.

Taking a look at Page 14 of the government's responses, they list the following people in response to

the question of who discussed this with Secretary Ross. The first one is Mary Blanche Hankey.

Do you know her?

A No.

Q Do you know that she works at the White House?

A No.

Q You've never heard her name in connection with this topic?

A No.

Q James McHenry, do you know who he is?

A No.

Q And your testimony is, you've never heard

\* \* \*

\* \* \* \* \*

[105]

exhibit.

(Plaintiffs' Exhibit 9, Email, was marked.)

BY MR. GROSSI:

Q Exhibit 9.

Exhibit 9 is an email chain that begins on August 29th where Mr. Davidson wrote to Mr. Hernandez, Comstock, Uthmeier and other names that have been blocked out, as well as a copy to Ms. Teramoto.

A Excuse me. Are they other names or are they just simply the email addresses?



Q I'm not sure. I really don't know.

It says, "The Secretary asked to set up briefing" —"a briefing on some key legal issues he is concerned about." And the overall subject line is census. "Can we get something on the books for next week when Izzy returns. I can't find Karen in the directory, but she should be included, as well." And then there is additional information about scheduling leading to an email from a Chelsey Neuhart—haus to various people [106] indicating that she wanted to confirm that the attendees at the next census briefing regarding legal questions should be Ms. Teramoto, Mr. Hernandez, Mr. Comstock, Mr. Uthmeier, Mr. Davidson and you, Ms.—Secretary Kelley.

Now, we have not been provided with any information about what the subject matter was, other than it has been produced in the case. And what I want to ask you is: Do you recall in late August 2017, attending a meeting where legal issues involving the census were discussed?

A No. I do not recall that.

Q Do you think it's possible—

A I do not remember is what I said. I apologize.

Q Is it possible that one of those legal issues was this question you mentioned about the legal implications of adding a citizenship question to the census?

MR. GARDNER: Objection. Form.

THE WITNESS: Sir, I don't remember the meeting. I don't know that the meeting got [107] cancelled, took place, whether I could be there or not be there. So for me to speculate, at all, as to what was

discussed or not discussed would be an erroneous things. I just have no recollection of this whatsoever. And even if there was a meeting, did I get called to something—I just don't know. I would be speculating if I said anything to this.

BY MR. GROSSI:

Q And you don't recall specifically on the last page, what legal issues—key legal issues Secretary Ross was interested in pertaining to the census at about this time? Doesn't refresh your recollection?

A No, it does not sir. It does not. I'm sorry. It does not.

Q Let's take the next one.

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

BY MR. GROSSI:

Q I mrked as Exhibit 10, 9799 and 9800. It's an email sent to Karen Kelly on \* \* \*

\* \* \* \* \*

[285]

sentence, because it's a long one. "DOJ states that the current data collected under the ACS are insufficient in scope, detail and certainty to meet its purpose under the VRA."

Do you see that?

A And DOJ states current data collected under—yes.

Q What, if anything, did Commerce do to validate that rationale, to your knowledge?

A I'm not aware. I'm not aware of anything.

Q And, to your knowledge, what, if anything, did the Census Bureau do to validate that rationale?

A You have to ask Census that question.

Q You're not aware of anything, correct?

A Correct.

Q To your knowledge, did the—

A I know that they have fully researched and they fully understand—they've been doing this for a long time, but you need to get into details with them on that.

\* \* \* \* \*

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

NEW YORK IMMIGRATION COALITION, ET AL., PLAINTIFFS

*v.*

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
DEFENDANTS

---

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

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**DEPOSITION OF: DR. RON JARMIN**

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\* \* \* \* \*

[18]

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 [19] 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 [20] 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 [21] 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.

[22]

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.

[23]

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.

[24]

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?

[25]

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?

[26]

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 [27] 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 [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.

[29]

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.)

\* \* \* \* \*

[32]

Plaintiffs' Exhibit 4. It's Bates stamp 1357.

Do you recognize this document?

A Yes.

Q What is it?

A An email.

Q Are these emails that you received or sent?

A Looks like one of each.

Q So if you go to the bottom on Monday, December 18th, you email Karen Dunn Kelley, “any news”; is that correct?

A Yes.

Q What are you referring to?

A So I don’t recall this exactly, but I think we were—Barry Robinson, who was at OGC at the time, was reaching out to Art Gary at DOJ to see if we could set up a time to discuss the letter.

Q What is OGC?

A Office of General Counsel.

Q And is that—which department is that?

A Commerce.

[33]

Q And why was Barry reaching out to Gary to set up at time to discuss the letter?

A So I believe that Barry knew Gary, and, you know, we wanted—we wanted to meet with them to discuss their request.

Q Why is that?

A Because we typically meet with folks who have a data request.

Q And what’s the purpose of that meeting?

A To understand their—their needs.

Q Can you tell me a little bit more?

A So to have them describe what they need from a technical perspective so that we can best understand how we would go about seeing if we could fulfill it.

Q Who typically attends those meetings?

A Usually, methodologists and technical people.

Q From?

A From Census, along with the subject matter experts from the requesting organization.

Q Who are the subject matter experts that [34] would attend—that would typically attend from the Department of Justice?

A So in this case, I guess it would be the folks that were involved in Voting Rights Act enforcement.

Q Do you know who those people are?

A I don't have firsthand knowledge, no.

Q Do you know what job titles they have?

A I can't tell you.

Q Are there statisticians or methodologists at the Department of Justice who are involved in voting rights enforcement?

MS. BAILEY: Objection.

THE WITNESS: I don't know.

BY MS. GOLDSTEIN:

Q Why is it important to have a meeting to understand their technical needs?

A So it's important so that when you go through the expense and effort of a data collection, that it actu-

ally solves the measurement objective that the subject matter experts have in mind.

[35]

Q How long do those meetings typically take?

A You know, they vary. Some requesting agencies have very well-defined requests and we understand it clearly and it could happen efficiently, and some requesting organizations are less organized. So, you know, it's context specific.

Q Can you give me a range?

A I mean, anywhere from, you know, one or two meetings to many months of negotiations.

Q Prior to the citizenship question, had you received requests for data from the Department of Justice specifically?

A Well, we do—so I don't know if we received requests or not. I mean, we do produce Citizen Voting Age Population data from the ACS, and I know there had been conversations between Census and Justice regarding those data. So I would assume so, but I was not involved in any of those conversations or how that was initiated.

Q And those were prior to your becoming—

[36]

A Yes.

Q —acting director?

A Yes.

Q Is it fair to say that part of the purpose for these technical meetings is to determine the fit be-



tween the data that the agency is requesting and the way in which the Census Bureau obtains that data?

MS. BAILEY: Objection. Vague.

THE WITNESS: So I'll answer what I think your question is

BY MS. GOLDSTEIN:

Q All right.

A The reason is there's a subject matter need for information, and the Census Bureau will try to understand what that need is and best design a data collection and processing methodology to meet the subject matter experts' requirement.

BY MS. GOLDSTEIN:

Q Has DOJ ever asked for a question to be added to the short form of the census prior and [37] persistent to the citizenship question?

MS. BAILEY: Objection.

THE WITNESS: Not that I know of.

BY MS. GOLDSTEIN:

Q Are you aware of any agency asking for a question to be added to the short form?

A Not to my knowledge, no.

Q Do agencies—agencies typically request data, not questions, correct?

A No. That—agencies often will request a question when they're really requesting data, because they don't know the difference.

Q And that's why you have those meetings, correct?

A Yes.

Q So turning back to Exhibit 4, did you get any more information from Barry about his efforts to reach out to Gary?

A I—I don't think that we did. I mean, it was—you know, this was coming up on the holidays. I'm getting—communicating with folks was a little hit or miss. And so we certainly [38] didn't get anything that was substantive [sic] that I recall. But it was—I think there was some—some inefficiencies in the communication channel. So—

Q Why do you say that?

A —I—it didn't seem like, you know, that he was making himself available to talk to Barry, so.

Q And when you say he, "he," you're refer- —

A Gary, yeah.

Q It's a rhyme. It's like a limerick.

A Yeah.

Q But at some point, looking at the top email here, Barry did speak to Mr. Gary, correct?

A Correct. Yes.

Q And do you know what they conversed about?

A I think they were trying to set up a meeting, and that didn't happen.

Q Okay. Did Barry—did you learn anything else from Barry, other than what you told \* \* \*

\* \* \* \* \*

[58]

Q Is it fair to say it's another—another version of the process that's listed on 9865?

A Yes.

Q And do you agree that this is another version of the well-established process when adding questions to the decennial census?

A Sure. Yes.

Q Anything you disagree with in 9867?

MS. BAILEY: Objection. Vague.

THE WITNESS: No.

BY MS. GOLDSTEIN:

Q I'll take that back.

After you learned of the citizenship question, were you given any instructions about—withdrawn.

After you learned about this citizenship question, a couple of weeks before receiving the Gary letter, were you given any instructions?

A No.

Q After receiving the Gary letter, were you given any instructions about next steps?

A I don't think we were given explicit [59] instructions. I think it was taken for granted that we were going to start this process.

Q The well-established process for adding a question to the census?

A Yes.

Q The first step of which is the technical meetings.

A Technical meetings.

Q Did you have any conversations about getting this process started after you received the letter?

A Well, I recall meeting with my staff and discussing, you know, how we were going to proceed, and we were trying to take as broad a view as possible. So I believe, you know, it was agreed that we would—we would explore the use of administrative records to fulfill the request, as well.

Q And why was that an area that you were exploring?

MS. BAILEY: Objection. Vague.

THE WITNESS: Well, it's an area that we [60] always explore. So for—you know, it's often easier, potentially more accurate to administrative records, but it's also the intention of Congress in Title 13, the census code, that when possible, we use administrative records in lieu of direct collection. So this is something that we typically—typically do.

BY MS. GOLDSTEIN:

Q Did you receive any direction from Secretary Ross at this point?

A No.

Q Did you receive any directions from Karen Dunn Kelley at this point?

A No. Other than, you know, proceed with, you know, our analysis.

Q Any other instructions from Ms. Kelley?

A No.

Q Any directions from anyone else at Commerce at this time?

A No.

Q So let's talk a little bit more about what you did after you first received the Gary [61] letter. What exactly did you ask your staff to do?

A So we—you know, we knew that the questions was already on the ACS, so the testing things was not a priority. You know, I think we all agreed that the question on the ACS performed as well as it could. The focus was primarily on seeing whether the administrative records assets that we have at the Census Bureau were useful in this regard to do a comparison of administrative records and—and survey responses on the ACS and to come up with a—with an analysis and suggestions as to what's the best way to proceed.

Q Did you have a timeline that you were working on?

A So we were on a tight timeline because, obviously, we needed to provide the questions to Congress by the end of March. So the Secretary needed to make a decision prior to that, so we were trying to work as quickly as we could.

Q And had anyone from Commerce given you any interim timelines before the point at which [62] you knew Congress had to get these questions?

A No. I don't think—I think everybody knew the time was short.

Q Who did you speak to on staff at the outset?

A So I primarily worked through John Abowd—who you spoke with last week, I believe—who is the chief scientist and associate director for research and methodology, and he assembled the team that did the analysis.

Q So you said a moment ago that the citizenship question on the ACS performed as well as it could. What do you mean by that?

A I'm not really sure what I meant by that, but it performs well. So it—relative to other questions on the form, it has about, you know, a middle range of allocation rates, and that means, you know, what we have to do for imputation and whatnot. You know, compared to a question like income, it's a much better performing question.

Q And what do you mean by better \* \* \*

\* \* \* \* \*

[64]

Q So I'm showing you a document that's been marked as Plaintiffs' Exhibit 7. It is Bates number 3289.

COUNSEL: Can you repeat the Bates number again, please?

MS. GOLDSTEIN: 3289.

BY MS. GOLDSTEIN:

Q And it is a set of emails that were sent on December 22, 2017.

Do you recognize this email?

A Yes, I do.

Q What is this?

A In was an email from me to Art Gary with survey results of a preliminary analysis that our staff had put together very quick.

Q And why did you send this email?

A To try to motivate a meeting with Department of Justice technical experts.

Q So this response to Mr. Gary was sent about a week after the DOJ's request?

A Yep.

Q Is that a typical time frame for the [65] Census Bureau to respond to an agency's data response?

A It is when we have a tight deadline to get the questions to Congress.

Q Have you ever had such a tight deadline to get a—the questions to Congress?

A So, I wouldn't know. I wasn't involved with prior decennials in this fashion. This is the only thing where we have to do this with, so. On the business side of the house, we have a luxury of not having to get Congress's permission on every change to a survey, so we didn't have this constraint.

Q So prior to your current role, you weren't involved in the question-making process for the census?

A For the decennial, no.

Q Okay. And the to line here is entirely redacted, but this email was sent to Art Gary, correct?

A Yes. I believe so.

Q And so this email says that you directed [66] staff to review all possible ways to address the needs expressed in the letter.

A Uh-huh.

Q I need yes or no.

A Yes.

Q That's the Gary letter, correct?

A Yes.

Q And your staff found that, "The best way to provide PL94 block-level data with citizen voting population by race and ethnicity would be used by outlining a linked file of administrative and survey data the Census Bureau already possessed."

Correct?

A Correct.

Q That is what you staff found?

A Yes.

Q And did you agree with that conclusion?

A I did.

Q And the next line says, "This would result in higher-quality data produced at a lower cost."



[67]

Do you agree with that conclusion?

A Yes.

Q And then you write that—you suggest we schedule a meeting of Census and DOJ technical experts to discuss the details of this proposal, correct?

A Uh-huh. Yes.

Q And that's the technical meeting that we spoke about earlier, correct?

A Yes.

Q To your knowledge, had DOJ ever requested PL94 block-level data with citizen voting age population by race and ethnicity before?

A Not that I know of.

Q Did you communicate your conclusion in this email that you should use a linked file, administrative and survey data to the Department of Commerce prior to sending this email to DOJ?

A No. I don't believe I did, but I think I forwarded this email to Karen Dunn Kelley shortly afterwards, so.

[68]

Q When you sent this email to Mr. Gary, did Karen Dunn Kelley know that the Census Bureau had concluded that using this linked file of administrative records and survey data was the Census Bureau's preferred approach?

A So I don't think it's fair to say at this time that it was a conclusion necessarily.

Q Sure.

A I mean, this was sort of a preliminary finding, and we wanted to get together with folks at DOJ to discuss that, so.

Q Absolutely. So was Ms. Dunn Kelley aware of that preliminary finding?

A I don't recall discussing it with her before I forwarded this to—her, but she knew that we were trying to work with the folks from DOJ. So—but I don't recall—I mean, she knew we were also looking into administrative records. So I mean—

Q How did she knew that?

A I think we said that we were.

Q When?

[69]

A Probably shortly after getting the letter, that we were going to review our options and see what we could do.

Q And do you recall how she responded to that?

A I—I don't actually, no, so.

Q Do you remember any other communications between yourself and the folks at Commerce about the citizenship question in the time period between receiving the Gary letter and sending this email?

A You know, other than we were getting to work and, you know—the time frame was short and the people saying the time frame was short was primarily us, because I think we knew we needed to get the questions to Congress by the end of March, so.

Q Any instructions from Commerce?

A No.

Q Typically, when an agency requests for data—  
I'm sorry. Withdrawn.

Typically, when an agency requests data, \* \* \*

\* \* \* \* \*

[88]

So Earl may have been in the room, but I did not have a conversation with Earl about this.

Q What happened after this email was sent?

MS. BAILEY: Objection. Vague.

THE WITNESS: After this email?

BY MS. GOLDSTEIN:

Q Yes. Did you receive a response from DOJ?

A I already sort of hinted at that eventually I got a response that they didn't need to meet, but I don't think that came at this time.

Q Do you remember how you first received a response from DOJ? Was it a phone call? Was it an email?

A So there was a couple emails back and forth with Art Gary and I about trying to set a meeting up and that he was working on that.

Q And then what happened?

A And then, eventually, I got a reply back that they did not want to meet.

Q Did you get a—was that in a phone call or was that an email?

\* \* \* \* \*

[101]

Q Anything that would help you remember?

A Well, at some point, he sent me an email saying that they were not going to meet. So whether that was prompted by me or not, I don't know.

Q Do you recall any phone calls with him at this time?

A No.

Q Were you ever given a reason why DOJ was cancelling this meeting?

A As I recall from the email that he sent—that I imagine you have in your packet there—that DOJ believed that their technical specifications were completely laid out in their—in the December letter.

Q Do you agree with that?

A I probably don't agree with that because I think we wanted to understand how they used the data, so—so we would have liked an additional—additional meeting with them.

Q Let's go to that one. Can I have that back, please?

\* \* \* \* \*

[105]

as surprised. You know, it was what it was.

Q What does that mean?

A It's business. They didn't want to meet, so.

Q Other than these communications with Mr. Gary that you've described so far, did you have any communications with anyone at the Department of Justice about the citizenship question?

A No.

Q To your knowledge, did the Census Bureau have any communications with the Department of Justice about the citizenship question?

A No.

Q After you spoke with Art Gary and he indicated that DOJ did not want to meet with the Census Bureau, did you speak to anyone at Commerce about that refusal?

A This is an email to Karen Dunn Kelley, so yes.

Q And did you speak to her about this [106] following this email?

A I mentioned that we probably discussed it at some point, but I think this was the gist of that conversation.

Q Did Ms. Dunn Kelley have any response to the DOJ's refusal to meet?

A I don't recall.

Q Is there anything that would help you recall?

A Whether she had a response? I doubt it. I don't think—so.

Q Did you ask anyone in Commerce to help you set up a meeting with DOJ?

A We'd already had Barry Robinson try to do that, so I think this is where we left it, or this is where we left it.

Q I'll take that, please.

Do you believe that the letter requesting citizenship be added to the 2020 census from DOJ, the Gary letter, fully describes the DOJ request?

MS. BAILEY: Objection. Vague.

THE WITNESS: It does spell out the need [107] to have citizenship status added to the—the PL94 level data. To that extent that it requires block level data, it is a pretty well-formulated request, so.

BY MS. GOLDSTEIN:

Q Does the Gary letter answer all of the Census Bureau's technical questions about the Gary letter's request?

MS. BAILEY: Objection. Form.

THE WITNESS: Yeah. We would have had the additional questions.

BY MS. GOLDSTEIN:

Q What kind of questions would you have had?

A Questions that would have helped us strategize how we would perform disclosure avoidance on these files. You know, so that's another technical matter how we—you know, by law, we can't disclose the identity of any particular individuals, so there's a process afterwards that we—that we—you know, sum of the data, perhaps add some noise. Understanding [108]

how the data are used to help us do that in a way that optimizes the data for their intended use.

Q What else would have been discussed at the technical meeting between DOJ and the Census Bureau?

A So there might have been discussions about, you know, various cross tabulations of the data, what characteristics were the most important for their purposes.

Q And does that go to the fit between the method proposed and the data used?

A And what they're using.

Q What else?

A That's about it.

Q And so is it fair to say that the Census Bureau has never had conversations with the Department of Justice about that fit question?

A That's correct.

(Plaintiff's Exhibit 14, Email, was marked.)

BY MS. GOLDSTEIN:

Q I'm showing you what's been marked as \* \* \*

\* \* \* \* \*

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

NEW YORK IMMIGRATION COALITION, ET AL., PLAINTIFFS

*v.*

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
DEFENDANTS

---

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

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**DEPOSITION OF: DR. JOHN ABOWD**

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\* \* \* \* \*

[50]

A It doesn't have sampling error.

Q Thank you.

The tabulation of CVAP data does have sampling error associated with it, correct?

A Yes.

Q So when you publish the CVAP tabulation, you're not publishing any particular person's responses to the ACS citizenship question in a way that would enable you to identify that person's responses, correct?

A If we did not apply disclosure avoidance prior to the tabulation, then the CVAP table, as well as the P.L. 94 tables, would be subject to reidentification risks.



Q So what are the disclosure avoidance steps that are used for the tabulation of CVAP data?

A The CVAP data are tabulated from the production of the American Community Survey Office tabulation system. The exact specification for the disclosure avoidance that has been applied to them is confidential and I can't give you those [51] specifications. What we say in our technical documents is that we apply household-level swapping and some synthetic data noise infusion.

Q Let's talk about those two things. What's household-level swapping?

A Household-level swapping means that the certain variables on the household record, not the person record, certain variables on the household record are matched to variables on a household record in a different geographic area. And if the household is selected for swapping, and when the match is found, essentially all the values are swapped, except the address ID. So it looks as if the data from a different address lived at the address of the original and vice versa.

Q So when you're building the CVAP tabulation, in some cases, it's based on data that's been swapped between two households where the ACS citizenship response for one household has been swapped with another; is that right?

A I am only allowed to tell you the variables that are used in the swap that are in [52] public documents. And I told you what was in the public documents.

Q Okay.

A So the swap controls for family size, for the number of persons in—not family size. That was not a correct technical term.

Q Household?

A Household size. Thank you.

And the number of members of the household above voting age—voting age or above.

Q When households are swapped, at what level of geography are they swapped?

A I'm only allowed to say that the search is over nearby geographic regions.

Q So you're not swapping someone from Maine with someone in Arizona?

A I'm also allowed to say that the swap never crosses state lines.

Q Does the swap ever cross county lines?

A If you can produce a technical document that says it does or doesn't, I can confirm it. I can't remember ever reading that, one way or [53] another.

Q And can you say, one way or another, whether or not the swap ever occurs across census block group lines?

A I have read a lot of the public documents. I have also read a lot of the confidential documents. I do not recall any public document explicitly saying anything other than we don't swap across state boundaries.

Q And do—so that would—okay. Thank you.

Well, does swapping ever occur between census blocks?

MR. EHRLICH: Objection. Form.

THE WITNESS: Of course swapping occurs across census blocks, because there would be no point in it otherwise.

BY MR. HO:

Q You mentioned synthetic data noise infusion for disclosure avoidance. Can you describe what you mean by that?

A There are two methods of doing that. The [54] one that is used in the American Community Survey is to develop a model for when a particular record or item on a record is sensitive. The models are more precise, but, again, their parameters are not confidential. Basically, you think of extreme values as sensitive.

And then the statistical model replaces the sensitive value with a value that's sampled from the model and from the error distribution of the model.

[REDACTED]

[55]

[REDACTED]

Q So as of right now, a decision has not been made yet as to whether or not the CVAP table—table that is produced to the Department of Justice is going to be based primarily on responses to the citizenship question on the decennial enumeration or on a different source; is that right, Dr. Abowd?

A With one correction. We are not producing a CVAP for the Department of Justice. We are producing a CVAP table at the block level as a public use product.

Q But otherwise, the answer to my question is yes?

A We have not made a decision on the way in which we will aggregate the data to the block level.

Q Other than responses to the citizenship question on the decennial questionnaire, what [56] other data sources might you use in the production of the block-level CVAP table?

A We have said that we will use the—what’s called the census NUMIDENT data. In addition, we are negotiating with the U.S. CIS—Customs and Immigration Service, did I expand it right—U.S. CIS and with the State Department to acquire additional citizenship data and data on visas that have been issued to legal visitors to the United States.

Q Is it fair to say that it has not yet been decided precisely how the block-level CVAP table will be assembled?

A That’s correct.

Q Has it been decided whether or not the block-level CVAP data will be included in the P.L. 94-171 data file?

A It has not.

[REDACTED]

\* \* \* \* \*

[64]

[REDACTED]

[65]

[REDACTED]

Q I'll represent to you that that's—that the numbers are population counts, and assuming that that's correct, some of the census blocks represented on this map have only one person on them, right, Dr. Abowd?

A Yes. I found a singleton.

Q Let's talk about that singleton. Now, [66] you'd agree with me, Dr. Abowd, that if you publish citizenship information at the block level based on the responses to the decennial enumeration solely—so ignore the administrative data for a second—then any singleton, any person who is the one individual on a census block, you would be publicizing that person's response to the citizenship question, correct?

A No.

MR. EHRLICH: Objection. Form.

THE WITNESS: No.

BY MR. HO:

Q Why not?

A Hasn't been correct since 1990.

Q Please explain to me why that's the case.

A Even before we considered the citizenship variable, that one person, that household that has only one person in it, had other characteristics, and the goal of our disclosure avoidance system has been to inhibit a user's ability to say that the person identified as that one count here has these characteristics.

[67]

In 2000 and 2010, that was accomplished by swapping, primarily. In 2020, that's going to be ac-

complished by what's called differential privacy. They amount to similar goals. One is a more hardened technique.

Q Uh-huh.

A But, basically, if you do it properly, then everything is an estimate and nothing is an exact tabulation of what happened there.

Q Okay. So for these singletons, when you publish block-level CVAP data, a census block with one person on it and you publish data that shows whether or not that person is a citizen, you're telling me that's not going to disclose that person's actual citizen status?

A It's not even going to be that person's actual citizenship value for any person.

Q So the—just to be clear—I just want to be clear about this. The CVAP block-level data that gets produced by the Census Bureau, in some cases, the block-level citizenship values that are reported on that table are not going to be the [68] actual citizen statuses of the person or persons on that census block; is that right?

A No, not in some cases. In all cases.

Q Okay.

A There won't be a single block in which the citizenship variables or the race and ethnicity variables are the values reported by the people who live there.

Q So I'm new to this, so I just—forgive me.

A You're not the only one.

Q I want to come back to that.

But just explain this to me like a fifth grader, okay? When you publish—after the 2020 enumeration, when you publish block-level citizenship data and you say X number of people on a particular census block, whether it's one out of one people, eight of ten people, whatever the number is, are citizens, according to the table, that table will not accurately reflect the citizenship status of the people enumerated in those citizen blocks; is that right, Dr. Abowd?

[69]

A No. But I'm actually going to treat you like a college-aged person and not a fifth grader.

Q Let me just get a clarity on what the no was, no. No, I was not right or no—

A That's correct. No, you were not right.

Q Please explain to me.

A The use case for block-level data is not that when I take a microscope to the census and I look at a block, the answers I get there are right for that block. That would be enormously disclosive and would be almost impossible to prevent reidentification of the confidential Title 13 data, and we haven't done that—we didn't do it in 2010. We didn't do it in 2000.

What has happened between 2010 and 2020 is that we now actually know how to produce block-level data that are suitable for their use without having to put the exact—what you call accurate, but I think you really mean exact tabulation in that block. It's too dangerous in terms of the confidentiality of the underlying records to put the exact tabulation there. So you [70] have to introduce randomness, and what—we

introduced that randomness through a swapping system in 2010 and in 2000. We're replacing that swapping system with a system that introduces the randomness in a much more controlled way for 2020. Such that, as you take those blocks—even though the block number is going to be noisy and we're going to tell you how noisy it is—when you add them up to voting districts, the more people that are in that voting district, the more accurate estimate you get of all of the things you're trying to tabulate. Not just citizenship, race/ethnicity.

Q Just to clarify my understanding again, my question wasn't about fitness of use. My question was just about exact measurement.

And is it correct that after you received the decennial enumeration questionnaire responses and you tabulate CVAP data at the block level, that the numbers that you produce for CVAP at particular census blocks will not reflect the exact actual values of the number of citizen of [71] voting age at each of those census blocks?

A Could you read his question back to me?

(Thereupon, the reporter read the record as requested.)

THE WITNESS: As read to me, that statement is correct.

[REDACTED]

Q Another way to put it is, after you tabulate the CVAP data at the block level, those CVAP numbers at the block level will have error margins associated with them, right, Dr. Abowd?



A That's correct.

[REDACTED]

\* \* \* \* \*

[96]

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.

[REDACTED]

[97]

[REDACTED]

[98]

[REDACTED]

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 [99] 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.

[REDACTED]

\* \* \* \* \*

[139]

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  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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18-CV-2921 (JMF)

STATE OF NEW YORK, ET AL., PLAINTIFFS

*v.*

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
DEFENDANTS

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Filed: Nov. 7, 2018

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**NOTICE OF FILING OF DEPOSITION DESIGNATIONS  
FOR DAVID LANGDON**

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\* \* \* \* \*

[81]

first briefing, but it touches on topics of policy content that are going to be immediately relevant. And that was, you know, a congressional notification about our most—our flagship survey and the decennial census—rises to that level.

Q. And, so according to the e-mail, you then did reach out to Mr. Comstock to gauge his interest in hearing about that issue at the briefing. Is that fair to say?

A. Yeah. I mean, based on what I'm reading here, yeah.

Q. But I'm just trying to—if I understand what you're—the answer you just gave, you were reaching

out to gauge his interest in including that in the briefing that he was going to receive; is that right?

A. Yep. Exactly.

Q. Then you asked—and you say, “Earl is very interested and thinks the Secretary will be as well,” correct?

A. Uh-huh. Yep.

Q. Was the conversation in which you asked \* \* \*

\* \* \* \* \*

[93]

A. I don’t understand the—certainly?

I—I don’t know.

Q. Okay. Well, let’s try to refresh your recollection since—

A. Okay.

Q. —it’s—apparently some of these things are challenging for your to recall.

(Deposition Exhibit Number 2 was marked for identification.)

BY MR. DURAISWAMY:

Q. I’m handing you what we’ve marked as Exhibit 2.

A. Okay.

Q. So this is an e-mail from you to Mr. Comstock dated March 10, 2017, correct?

A. Correct.

Q. And it was sent at 7:50 p.m., right?

A. Yep.

Q. Do you recall this e-mail?

A. This specific e-mail? I don't recall it, but it looks—looks like an e-mail I would have written.

[94]

Q. Do you recall e-mails about this topic?

A. About this briefing?

Q. Yes.

A. Not specifically. I mean, like I say, it was—we were in a period of transition where we would normally schedule briefings for Earl or for others on specific topics that they cared about. So this is consistent with the way things operate, yeah.

Q. For the record, in this e-mail, you ask Mr. Comstock, “What does your schedule look like to receive a one-hour (max) briefing on 2020 census and ACS topics later next week?” Correct?

A. Correct.

Q. And you say, “The goal is help you understand the congressional notification process as well as the actual topics themselves,” correct?

A. Correct.

Q. Do you know if this is the follow-up briefing that you were referring to in your February 2nd e-mail?

[95]

A. I don't know if it's that specific briefing, but it's—that's—it's consistent with what the goal would have been. The goal would have been to help them understand the subject, so how we notified Congress and

the—you know, the actual—what we ask in these surveys. You know, they didn't—yeah.

Q. And if you—let me hand you what we've marked as Exhibit 3.

(Deposition Exhibit Number 3 was marked for identification.)

BY MR. DURAISWAMY:

Q. This is an e-mail from you to Mr. Comstock and Ellen Herbst, copying Dennis Alvord, dated March 15, 2017. Do you see that?

A. Yes.

Q. And in this e-mail you say, "Earl and Ellen: I would like to schedule a Census Bureau briefing on the 2020 census and ACS topics before the Census Bureau does its Hill notifications on March 31," correct?

A. Yep.

[96]

Q. And you say, "The goal is for all to be on the same page about the notification process for the topics this year and questions next year."

A. Uh-huh.

Q. Correct?

A. Yep.

Q. So this is five days after the last e-mail. You're still trying to schedule this briefing, correct?

A. That's par for the course, yeah.

Q. Okay. And you're trying to schedule this particular briefing because Mr. Comstock had indicated to

you that this was a topic of particular interest to him and the Secretary, correct?

MS. WELLS: Object to the form.

THE WITNESS: So—yeah. I mean, so this is—like I say, this is par for course with Earl and with the Secretary. They—you know, when we're notifying, in this case, the Hill on a major policy decision, they want to know how it works and what the content is.

[97]

BY MR. DURAISWAMY:

Q. Why did you understand it to be a major policy decision?

A. Well, I mean, you know, it's the nature of the surveys. It's the 2020 census. It's, you know, one of our, you know, congressionally—or constitutionally mandated operation that we do. And on the ACS which is our—you know, the largest survey that the Census Bureau conducts. And there's—you know, there's a lot of sensitivity around topics, particularly at that point. The background I'm coming into this with is probably largely on the ACS as well. There was a lot of sensitivity about the topics actually on that, so ...

Q. When you say there was a lot of sensitivity about the topics, what are you referring to?

A. Kind of what I mentioned earlier. I mean, there's a history that that the survey in particular has had with the Hill that's perceived as burdensome. That includes topics that don't [98] really need—that some members of the Congress or the public feel shouldn't be on there. And so, you know, notifying Congress that,



you know, these—that we’re going to ask about any number of things could, you know, trigger concerns. Yeah. It’s been a sensitive—the ACS part has been sensitive for years and so . . .

Q. Was there any change to the content of the ACS that was being contemplated at the time that would make you think it was a major issue?

A. I’m trying to think. So, I mean, there had been—let’s see. I mean, there was sensitivity about health—health insurance and then the—sexual orientation. I mean, some—you know, some—there had been discussions about that as well, so . . .

Q. I assume that all these efforts to schedule this briefing on the notification process regarding decennial and ACS topics was in response to some conversations you had with Mr. Comstock about his interest in these issues, correct?

\* \* \* \* \*

[160]

included him, which would have been Burton.

Q. Do you have a sense of what his responsibilities were that related to the subject matter of these e-mails?

A. No. I think I just answered that. So no.

Q. You don’t?

A. No.

Q. Okay. You respond at 5:53 p.m. and you say, “Actually, the Secretary seemed interested on subjects and puzzled why citizenship is not included in 2020.”

What subjects was Secretary Ross interested in at that meeting on May 24th?

A. So “subjects” references the—you know, the actual topics of the—that are on the 2020 census, you know, what—what gets asked, like the topic areas, you know, like, age—you know, as examples of subjects would be like age, race, ethnicity, number of people in your household. That’s what that refers to. And citizenship is not on the list, or at [161] that point wasn’t on the list.

Q. Why—why was he puzzled?

MS. WELLS: Object to form.

THE WITNESS: I can’t answer why the Secretary was puzzled or not. I don’t know.

BY MR. DURAI SWAMY:

Q. Did he express puzzlement about why citizenship was not included in the 2020—

A. Yeah, he would have.

Q. —topics?

A. Based on this e-mail—I don’t recall the meeting, but, yeah, based on this e-mail, he would have inquired—not understood why citizenship was not part of it.

Q. And what was your understanding as to why he was puzzled about that?

A. I don’t know. I don’t know why he was puzzled about that.

Q. Was there a discussion about that at the meeting?

A. Like I not, I don’t recall the specific aspects of the meeting. But, you know this—[162] like I say, there’s

a learning process that—this is one example of it—that people go through when they’re dealing with these surveys, in trying to figure out what we ask, why we ask it, why things are on there.

Q. Right. But he didn’t—you didn’t write that he was puzzled about why some other—

A. Yeah.

Q. —topics or questions—

A. That’s true.

Q. —were not included.

A. Yeah.

Q. You wrote only that he was puzzled about why citizenship was not included, correct?

A. That’s right. Yep.

Q. Can you recall any other issues that Secretary Ross was concerned about or took an interest in with respect to the content of the 2020 census questionnaire?

A. No.

Q. You then say, “It might be good to have in our back pocket the criteria used to pick \* \* \*

\* \* \* \* \*

[167]

Q. When did you become more fluent on the subject matter?

A. I mean, over time, really. I mean, it was, like —it was engaging with—you know, with Melissa— particu-

larly with Melissa, but also with Lisa on basically trying to gain an understanding of a lot of the questions. I was particularly interested for one—one that's unrelated to this, but was on the 2020 census I didn't understand was, for example, the housing tenure question. There's a question on there, do you own or rent your house? And it didn't really enter into my mind why—

Q. Right. So—

A. —that question was on the form.

Q. Okay. So in the context of pursuing this idea of adding a citizenship question to the decennial census, you developed a greater understanding of why some—the criteria for including some topics on the ACS versus the decennial, correct?

A. Yeah. And why—why every question [168] that's on the decennial is actually on there. It was something at that point that I was not—I was generally aware of, but not specifically aware of.

Q. Why were you asking for an answer that evening at 10:51 at night?

A. Good question. Yeah, good question. I don't know.

Q. It suggests there was some urgency to this, correct?

A. Oh, yeah. Yeah. Based on the e-mails, probably just given, like, the fact that the Secretary himself was asking as opposed to, like, me just, you know, interested and trying to do some, you know, research.

Q. Right. So this is—you're trying to respond promptly to questions that he asked at this meeting on May 24th about why citizenship—the citizenship question is on the ACS but not the Census; is that right?

A. Well, not just—that is one example. I mean it's the broader question of what's on each \* \* \*

\* \* \* \* \*

[172]

Q. You see that this is an e-mail that you sent to Earl Comstock and Ellen Herbst on the evening of May 24th after the meeting with Secretary Ross?

A. Yes.

Q. And it's in the midst of the other e-mails that you were exchanging with census staff—

A. Yep.

Q. —that are in Exhibit 6, correct?

A. Yeah, exactly.

Q. Okay. I assume that you were sending e-mails late at night like this because you felt it important to respond to urgent inquiries raised by the Secretary at the meeting with him, correct?

A. That's one possibility. Other times I might be doing evening work because I had to, like, leave work early to do kids' stuff, and so I'm trying to catch up late at night. So it could be urgency or because I was making up for lost time.

Q. Okay. Presumably that was not the case [173] on this date, because you had a very long meeting with the Secretary—

A. That's probably true, yeah.

Q. —that you just got out of in the late afternoon, right?

A. Yeah. So I'm probably trying to be responsive to Earl on something that was important.

Q. Okay. And the important issue in this e-mail is the counting of illegal immigrants, correct? That's the subject?

A. Let me take a look at it.

Q. Sure.

A. Uh-huh. Okay. Can you ask the question again?

Q. Yeah. So the important issue that you were trying to be responsive to Earl about on the night of May 24th, after the meeting with Secretary Ross, was the counting of illegal immigrants, correct?

A. So the—the two cases I was looking into here, based on these e-mails, dealt [174] specifically with illegal immigrants.

Q. Right.

A. And so I was answering that question.

Q. Right. And that was the important issue that you were trying to be responsive to Earl about, correct?

A. Uh-huh. Because that's what the two documents dealt with.

Q. Right. And the subject—the subject— in fact, the subject of the e-mail is counting of illegal immigrants, correct?

A. Yeah. That's correct?

Q. Okay. And you say, in the first paragraph, “Earl and Ellen: Long story short is that the counting of illegal immigrants (or of the larger group of non-citizens) has a solid and fairly long legal history,” correct?

A. Correct.

Q. And you go on to discuss a case, Louisiana v. Bryson, in which the courts rejected a challenge to including illegal immigrants in the census totals for apportionment purposes, correct?

[175]

A. Uh-huh.

Q. And that’s the same case, Louisiana v. Bryson, that you referenced in your e-mail exchange with Mr. Geist [sic] in Exhibit 6, correct?

A. Unless there’s another Louisiana versus Bryson, it’s the same case, yeah.

Q. Fair to say it’s the same case, given the timing of these e-mails?

A. Yeah.

Q. Okay. And that’s a case that was passed along to you as part of the research package that Mr. Geist [sic] sent to you, correct?

A. Yeah, exactly.

Q. And you were sending this to address the question of whether certain immigrants should not be included in the apportionment count, correct?

MS. WELLS: Object to the form.

THE WITNESS: Yeah, I can't say that. I mean, what I'm answering here is actually just—it goes back to sort of scoping questions—right?—I mean, who is counted and who is not [176] counted in the surveys.

BY MR. DURAISWAMY:

Q. But specifically whether illegal immigrants are counted in the census counts for apportionment purposes, correct?

A. That's what these cases dealt with. Yeah. So—

Q. Right. And that's—

A. —Earl asked—let me finish.

Q. Go ahead.

A. Earl asked me to basically review these and summarize them from my non-lawyerly point of view. And that's what I did.

Q. Okay. He wanted you to provide some information about the history of including or excluding illegal immigrants from the census counts for apportionment purposes, correct?

MS. WELLS: Object to the form.

THE WITNESS: He wanted me to answer the question of how—of what these cases actually looked at, which was whether or not illegal immigrants were part of the—first of all—two [177] things here. There's whether they're counted and then whether they're part of the apportionment counts, and distinguish between them.

BY MR. DURAISWAMY:

Q. And which was it that you were addressing?



A. Both, according to—I mean, I’m just summarizing the cases. Right? So—

Q. Right.

A. —I mean, the one case was dealing with apportionment. And the second one was actually just the broader question, based on this e-mail, of just whether or not illegal immigrants even should be counted.

Q. Right. And you were conveying that there’s a long history of both including illegal immigrants in the census count and including them in the counts for apportionment purposes, correct?

A. Yeah.

Q. Okay. Because Mr. Comstock wanted you to look into that issue, right?

A. Yeah, he asked me to look into the— \* \* \*

\* \* \* \* \*

[182]

Let me start over. That evening, as you were exchanging e-mails with census staff about issues raised at the meeting with Secretary Ross, you were also exchanging e-mails with census staff and with Mr. Comstock and Ms. Herbst about the history of counting or not counting illegal immigrants in the census or in the apportionment counts, correct?

A. So it’s two related lines of—it’s two related questions. So I was getting information on both. One question was Earl’s, and it was specific to these court cases dealing with illegal immigrants.

A. related issue is whether or not—you know, whether or not or how we count citizens in the decennial census.

Q. Right. And why is it related?

A. Well, because illegal immigrants are a subset of non-citizens.

Q. In fact, you state that in this e-mail, correct?

A. Which e-mail?

[183]

Q. In this e-mail that we're looking at right now.

A. I've got a couple—

Q. Exhibit 7. You say, "Illegal immigrants (or of the larger group of non-citizens)," right?

A. Yep. Actually, yeah. Making that connection right there. There you go.

Q. Right. So this question of counting illegal immigrants is fundamentally connected to this issue of whether you are identifying citizens or non-citizens in the census, right?

A. They're related, but that—yeah. I mean, they're related, because you're talking about different subsets of, you know, the non-citizen population.

Q. Right. And presumably they came up together in the meeting earlier that day, correct?

A. I wouldn't—

MS. WELLS: Object to form.

THE WITNESS: I don't share that presumption.

BY MR. DURAISWAMY:

[184]

Q. You think it's a coincidence that you just happened to be writing an e-mail about counting of illegal immigrants at the same time that you're exchanging e-mails about Secretary Ross' curiosity about the citizenship question?

MS. WELLS: Object to the form.

THE WITNESS: Yeah. I do not recall the Secretary ever asking specifically about illegal immigrants that are counting [sic] on the decennial census. Citizenship, certainly, but not illegal immigrants specifically.

BY MR. DURAISWAMY:

Q. So what prompted this e-mail?

MS. WELLS: Objection.

THE WITNESS: A request from Earl.

BY MR. DURAISWAMY:

Q. When did you receive that request?

A. I don't know. I'd have to go back and check. You know, if he sent me an e-mail, whenever I got that e-mail, if he asked me, then—or Ellen, who is also on this.

Q. What did he tell you about why he was \* \* \*

\* \* \* \* \*

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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18-CV-2921 (JMF)

STATE OF NEW YORK, ET AL., PLAINTIFFS

*v.*

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
DEFENDANTS

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Filed: Nov. 6, 2018

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**NOTICE OF FILING OF DEPOSITION DESIGNATIONS  
FOR SAHRA PARK-SU**

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Plaintiffs hereby file with the Court the synopsis of deposition excerpts for Sahra Park-Su (Exhibit 1), and the deposition excerpts for Sahra Park-Su that will be offered as substantive evidence (Exhibit 2) (Plaintiffs' designations are indicated in purple, and Defendants' counter-designations are indicated in green).

Respectfully submitted,

BARBARA D. UNDERWOOD  
*Attorney General of the State of New York*

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\* \* \* \* \*

[136]

about this document?

Q. In—in the latter half of January 2018.

A. Possibly. I don't know.

Q. Did you attend any meeting where this document was discussed?

A. Not that I can recollect.

Q. Did you attend any meeting where Options A, B and C were discussed?

THE WITNESS: I'm sorry. Just to clarify, discussed this with Karen Dunn Kelly or with Census?

BY MR. ADAMS:

Q. With anyone within the Department of Commerce or the Census Bureau.

A. Around this time in late January, I don't—I don't recall.

Q. Do you recall the Department of Commerce coming up with a set of 35 questions for the Census Bureau?

A. I don't know if there are 35 questions. I know that Commerce did come up with a list of questions based off of this options paper that was provided by Census.

Q. How did Commerce come up with those [137] questions?

A. So Commerce was given a copy of this document, the options paper, and it was shared with some of us at Commerce. And I believe after reviewing it there's some folks that came back with questions. And so there was an effort to compile those questions because different people had different questions.

Q. Do you recall who had questions?

A. I believe David Langdon, I think James Uthmeier may have, and I think Earl may have, as well. I don't know if there would be more or—or less.

Q. Karen Dunn Kelly,—

A. Mm-hmm.

Q. —did—did she have questions, that you recall?

A. I don't know. I can't remember. Somebody was collecting everybody's questions, so she may or may not have. But I wasn't compiling everybody's questions, so I don't know.

MR. ADAMS: I'm showing you what's been marked as Exhibit 16. This is Bates Number 3706.

[138]

(Deposition Exhibit No. 16, a document Bates Numbered 3706, was marked.)

THE WITNESS: Mm-hmm. Okay.

BY MR. ADAMS:

Q. Does this refresh your recollection as to whether Secretary Kelly may have had questions?

A. I do not know. Just to clarify, I don't know if they're Karen's questions or if they're a compilation of questions, but it sounds like I had a copy of some questions—her copy at my desk.

Q. At some point were the que—were the questions transmitted to the Census Bureau?

A. I don't know. I'd imagine they were, because Census provided responses.

Q. But you did not transmit them?

A. I did not transmit those questions.

Q. Did you receive responses to the questions—

A. I think—

Q. —from Census?

A. —I may have seen a copy of them. I don't know if I was on an e-mail. I can't [140] recall.

Q. The administrative record reflects multiple versions of these questions. What do you recall about the process of preparing a final set of responses?

MS. BAILEY: Objection; foundation.

THE WITNESS: All I know was a final copy was given to me to keep for record's sake, and that's all I know.

MR. ADAMS: I'd like to show you what's been marked as Exhibit 17.

(Deposition Exhibit No. 17, Defendant's Objections and Responses to Plaintiff's Third Set of Interrogatories in the New York Action, Case No. 18-2025, was marked.)

BY MR. ADAMS:

Q. Exhibit 17 is Defendant's Objections and Responses to Plaintiff's Third Set of Interrogatories in the New York—in the related New York action, Case Number 18-5025. I'd like to direct your attention to Page 2 of the document.

A. Mm-hmm.

Q. And at the bottom of the page is Interrogatory Number 5. With regard to [140] draft and final response to Question 31 in the questions on the January 19th draft census memo on the DOJ Citizenship Reinstatement Request, found at Administrative Record 2302 to 2304 and Administrative Record 196, please identify, A, all persons who worked on any draft of the response.

A. Mm-hmm.

Q. And in response the Department of Commerce responded with a list of names, among others, yours, correct?

A. Mm-hmm. Yes.

Q. In what ways did you work on a draft of the response to Question 31, and I can—would it help to show you Question 31?

A. Sure. That would be helpful. I think it's in reference to what we spoke about earlier, —

Q. It is.



A —but I'd love to see a copy.

MR. ADAMS: Sure. So what I'm marking as Exhibit Number 18 is Bates Number 1286 from the administrative record.

(Deposition Exhibit No. 18, a document Bates Numbered 1286, was marked.)

[141]

BY MR. ADAMS:

Q. And Question 31 appears on Page 11.

A. Mm-hmm.

Q. What is the process that was used in the past to get questions added to the Decennial Census, or do we have something similar where a precedent was established?

A. Mm-hmm.

Q. And as we saw in Exhibit 17, the Department of Commerce responded with your name when asked for all people who worked on any draft of the response.

A. Yep.

Q. And what work did you do on a draft of re—of the response to this question?

A. Yes. It goes back to what I mentioned earlier. Census, based off of our understanding of our meetings with them, had indicated that there was a distinction between the process that's used at questions to the American Community Survey, which they had shared with us, and that the Decennial Census did not necessarily have a similar process, to their knowledge, that they could point to. And, therefore, it would not be an

accurate [142] characterization to say that it was the same. And so based off of that, Census was to go about—my understanding from the meeting was that Census was going to go back and work on the draft response to Question 31.

Now, as I mentioned, these were extremely busy times. And I think a few days, if not a week or so had gone by, and this was not updated. And I was in a meeting with Mike Walsh, we had a call with Census in lieu of an in-person meeting that we typically have, and had a hard copy of this and had asked Mike Walsh, our Deputy General Counsel, based off of his recollection of our meeting with Census, could he draft together a draft response so that I can send it to Census for clearance, comments or edits so I could get the ball rolling so we can finalize these answers.

Mike Walsh then handwrote the draft response for me on my paper, which then I then went back and typed it up and sent it to Census.

I sent it to—by e-mail to Ron Jarmin, I believe Enrique Lamas, Christa, which those are, typically, the people that I'll e-mail asking for their comments, suggestions or clearance on [143] this.

And that was my involvement regarding this question and answer.

Q. When was—so Census sent a draft response to Question 31 to Commerce?

A. Mm-hmm.

Q. And you asked at some point for a revision to that response?

A. I don't recall myself asking. I remember at the meeting the understanding was Census was going to go back, because I don't believe this was the only one where they were going to revisit. This was one of some that Census was supposed to come back with their revision.

Q. Do you recall when Census was first asked to revisit their initial response to Question 31?

A. I don't. I would imagine it probably wasn't too long after they provided this response, and it was probably during the course of one of our subsequent meetings with them, either weekly or biweekly, or even a phone conversation—no, it was an in-person meeting. Excuse me.

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UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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18 Civ. 2921 (JMF)

STATES OF NEW YORK, COLORADO, CONNECTICUT,  
DELAWARE, ILLINOIS, IOWA, MARYLAND, MINNESOTA,  
NEW JERSEY, NEW MEXICO, NORTH CAROLINA,  
OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON,  
ET AL., PLAINTIFFS

*v.*

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
DEFENDANTS

---

18 Civ. 5025 (JMF)

NEW YORK IMMIGRATION COALITION, ET AL.,  
CONSOLIDATED PLAINTIFFS

*v.*

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
DEFENDANTS

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New York, N.Y.

Nov. 5, 2018

9:00 a.m.

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**TRIAL TRANSCRIPT**

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Before: HON. JESSE M. FURMAN, District Judge

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[883]

A. Yes.

Q. And the views are expressed in this memo are the views of the technical team, the SWAT team that assisted you, correct?

A. The views in this memo are a summary of the technical work that that SWAT team did and the contributions made by other senior executives at the Census Bureau.

Q. You agree with the conclusions in this memo, right, Dr. Abowd?

A. Yes, I do.

Q. And Acting Census Bureau Director Ron Jarmin reviewed and approved this memo, correct?

A. Yes, he did.

Q. And this is the last version of this memo, correct?

A. Yes, it is.

Q. This memo was routed to the secretary of commerce, correct?

A. Yes, that's correct.

Q. And you eventually had a meeting to discuss this memo with Secretary Ross on February 12, 2018, correct?

A. Yes, that's correct.

Q. Now, before your meeting with Secretary Ross that day, you had a premeeting on the same day with Undersecretary Karen Dunn Kelley in the Department of Commerce, correct?

A. Yes, that's correct.

Q. And during that premeeting with the undersecretary, you discussed this memo, correct?

[884]

A. We all discussed it, yes.

Q. And when you met with Undersecretary Kelley, she did not express any disagreements with the analysis in this memo, correct?

A. That's my recollection from the meeting, yes.

Q. And during the meeting that you had with Secretary Ross later that day, he asked you questions that indicated to you that he had a thorough understanding of the issues in this memo, correct?

A. Yes, that's correct.

Q. And that was the only meeting that you had with Secretary Ross to discuss the citizenship question before Secretary Ross issued his March 26 decision memo, correct?

A. Yes, that's correct.

Q. So let's be clear. Secretary Ross had only one meeting with the chief scientist at the Census Bureau



about the citizenship question before he issued his decision memo, correct?

A. Yes, that's correct.

Q. Now, your memo here, it addresses—I'm sorry.

MR. HO: Let's bring up your memo, Plaintiffs' Exhibit 22.

Q. It addresses three alternatives in response to the Department of Justice request, correct?

A. Yes, that's correct.

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[1030]

commit to delivering block-level CVAP data in a timely fashion consistent with the delivery date for the PL 94.

Q. The Census Bureau hasn't made a decision yet about how it will process responses to the citizenship question alongside the administrative citizenship data that you have, correct?

A. That's correct.

Q. Dr. Abowd, even if a citizenship question remains on the 2020 census questionnaire, the Census Bureau hasn't determined whether the block-level CVAP data that it produces will, in fact, be based primarily on responses to the citizenship question, correct?

A. That is correct.

Q. Dr. Abowd, let's assume now that the citizenship question stays on the 2020 census questionnaire and let's talk about how, to the extent you know right now, that would play out in practice in terms of producing a

block-by-block-level-CVAP data. Responses to the census questionnaire are prohibited from disclosure under Title 13, correct?

A. Publications identifying a business or individual or household specifically and providing identifiable data on that entity are prohibited.

Q. And that prohibition on disclosure also applies, as far as you know, on prohibiting the disclosure of that information to the Department of Justice, correct?

A. That's correct.

[1031]

Q. Now, census blocks vary significantly in terms of the size of their populations, correct?

A. Yes, they do.

Q. Some census blocks have fewer than ten people on them, right?

A. Yes.

Q. Some census blocks have one person on them, right?

A. That's correct.

MR. HO: I want to bring up Plaintiffs' Exhibit 513, which we're using purely for demonstrative purposes. This is a map of the Fort Myers area, census blocks in Fort Myers, and if we could blow up kind of the middle of the map around where it says Lee. This was built using data from the Census Bureau's publicly available website of the total population on various census blocks.

Q. Dr. Abowd, if we look at some of these squares right around Lee, I mean, all of the census blocks right around where Lee is written have fewer than ten people on them, right?

A. Yes.

Q. And several of them have only one person on them, right?

A. Yes.

Q. So, Dr. Abowd, you'd agree with me that with respect to a census block that has only one person on it, when the Census Bureau produces block-by-block citizenship data, the Census Bureau was legally prohibited from producing data that would [1032] accurately reflect what that one person said in response to a citizenship question on the census, correct?

A. We interpret that provision of Title 13 as prohibiting us from releasing data at the block level that would make it possible to identify the person who supplied those data.

Q. So when you produce block-by-block CVAP data, for a block with one person, you're not going to produce data that reveals that person's response to the citizenship question, right?

A. We'll apply disclosure avoidance before tabulating that block, yes.

Q. So if a person exists in a block with one person on it, right where it says Lee, to the right, diagonally above it, that person says "I'm not a citizen" in response to the citizenship question, and you publish a total number of noncitizens for that block, can you publish one?

A. If they said they're not a citizen?

Q. Yes. Can you publish one for there's one noncitizen on this block?

A. So what we would do is we would add random noise to the tabulation, reconstruct the microdata and then publish the counts from the random noise. The random noise introduces substantial uncertainty about the single person and less and less uncertainty as the number of persons involved increases.

Q. And the reason why you do that, Dr. Abowd, is because if you didn't do it, publishing the CVAP data at the block level [1033] would create what you might call re-identification risks for that person, right?

A. Yes.

Q. And just so we're all clear, re-identification is when there's data that's anonymous but a third party can look at it and then manage to discover the individual to which that data belongs, right?

A. That's correct.

Q. And you apply data disclosure-avoidance techniques to prevent that from happening, right?

A. That's correct.

Q. And you don't just do that for census blocks that have a single person on them; you do that for every census block, right?

A. That's right.

Q. So, Dr. Abowd, there won't be a single census block in which the citizenship numbers, as reported by the census after the 2020 census questionnaire, reflect the

actual responses reported by the people who live there in their responses to the citizenship question on the 2020 census, correct?

A. Except randomly, correct.

THE COURT: Can I just ask a few questions about how this works.

First of all, by way of background, how is it determined what a census block is? Why do some have zero [1034] people, some have one, some have hundreds?

THE WITNESS: So, your Honor, census blocks are used for two basic purposes. One purpose is to organize the work flow in collecting census, we generally call enumeration blocks. And the other is for producing summaries later on. We generally call them tabulation blocks. They're not exactly the same, but they're very similar.

A tabulation block is the lowest level of geography, smallest level of geography that we publish any data on, and we publish it so that users of those data can assemble arbitrary geographic areas, like school districts or voting districts, with enough granularity so that they can meet the purpose of making a school district or a voting district. And so the granularity in the block definitions is determined over the course of the decade by negotiation in many cases with bipartisan redistricting offices to determine that the, basically the pixel that you're going to build geographic units from is sufficiently small that you can get the geographic areas you're trying to draw accurate enough but not so small that we're simply releasing one—the contents of each address in the MAF.

THE COURT: All right. Thank you. That's helpful.

And then could you just flesh out what the process involves of introducing random noise, what that means in practice. I don't know if it's helpful to use some of these [1035] census blocks by way of example, but how would you mask, in this Lee census block that has only one person in producing that data to the Justice Department or whomever, how would you mask that person's citizenship?

THE WITNESS: So, one of the things we're doing with the 2020 census is we are moving from what is called traditional statistical disclosure limitation to modern disclosure limitation processes that were invented by cryptographers, and the particular process that we're using is called differential privacy. That's a system where you—you set up a mathematical guarantee about how much any user of the data can learn about an individual who contributes to those data, and that mathematical guarantee looks like, if I do the tabulation with your data in or out of the overall database, the statistics that I produce are only allowed to be different by an amount epsilon. So basically, your—the statistics with or without your data are indistinguishable from the statistics, the statistics with your data are indistinguishable from the statistics without your data by an amount that controls the randomness that we add.

We have developed a lot of public materials on this, but we're not as practiced in talking about it as the historical methods that we use, as you might have noticed from the awkwardness of that answer, for which I apologize. So it basically says you make the

tabulation from the real data, you [1036] add an amount of noise to each, in this case block, in the real data that's been calibrated so that I can make that promise to you that your data didn't affect this overall tabulation by any more than epsilon, and then you take the noisy data and re-create the microdata from the tabulated.

THE COURT: All right. Let me see if I can translate this into more plain English. Would there be any way, for example, to take the census block just above the E that has a one in it—right, that's one person in that census block?

THE WITNESS: Yes.

THE COURT: I presume there would be no way to disclose the data for that particular person without, at the census block level in an accurate way that wouldn't reveal things that you're prohibited from revealing under Title 13, is that correct?

THE WITNESS: That's our interpretation of the law, yes, sir.

THE COURT: OK. So by introducing noise, I take it you need to go out to a broader geographic range, and in essence, you're sort of swapping people between the blocks? How does it work?

THE WITNESS: We're not—excuse me, your Honor. I didn't mean to interrupt.

We're not swapping. We're basically replacing the real microdata with microdata that tabulate up accurately as [1037] the more—as there are more and more people in the area that you're looking at, but in the block that had one person on it, basically every

characteristic of that person has been infused with noise, so changed, if you like.

THE COURT: So swapped.

THE WITNESS: Well, swap implies that it came from someplace else. That's why—

THE COURT: But in other words, presumably any change up on one dimension or characteristic would have to be matched somewhere else by a change down.

THE WITNESS: The population totals are controlled to the national level, that's right. And so are the tabulations of the detailed variables, but even the national table has been protected except for the population total.

THE COURT: In other words, if someone, I don't know what this red box is, but if someone within this Lee area, the local jurisdiction wanted to get accurate citizen voting-age population for within that area, is that something that could be done consistent with the disclosure restrictions in Title 13?

THE WITNESS: Yes, your Honor.

THE COURT: And how would that be done?

THE WITNESS: Well, we actually had to work pretty hard to do it. We had to design the algorithm so that it could publish at the block level so you could build the arbitrary [1038] geographic areas that you needed, and the statistics kept getting more and more accurate as the number of people in that geographic area increased. So there are—



Perhaps Mr. Ho knows the total of the number of people in that red box, but looks like there's about 50 or 60. The data will be quite accurate for such advocacy. That's enough people so that the fact that we added noise to the individual data doesn't affect the tabulations very much.

THE COURT: How many people would you need for it to remain accurate but still allow you to mask in the way that you're required to do?

THE WITNESS: So, your Honor, that's not a question that can be answered in a vacuum. The way we are doing it is when you add the noise this way, you can produce a drawing that shows how the accuracy of various tabulations is affected by the amount of noise that you've infused, and it gives you the feasible levels. If you're going to protect the confidentiality, then you have to choose a point on this graph.

What we have to do is we have to decide, based on the use cases for the data, how to allocate that accuracy so that it meets the client use cases. So we're evaluating the way we will do this at the block level so that it would be useful for redistricting and for Section 2 scrutiny under the Voting Rights Act, and we have been given test cases from the Department of Justice in order to facilitate this evaluation so [1039] that we can show them that it's still fit for use.

We did not ever previously do this. Previously we just added the noise and told the users that we weren't going to tell them anything about it.

THE COURT: And maybe this is an unintelligible question, but is there a census block size that is

adequate enough that you would not need to introduce noise in order for the relevant data to be masked?

THE WITNESS: No. You have to introduce noise, your Honor, to every block, to every tabulation, but you control the amount of noise that you introduce so as to guarantee accuracy along the dimensions that the use case requires.

THE COURT: All right.

Mr. Ho.

MR. HO: I may have some questions that might clarify some of this, your Honor.

Q. Dr. Abowd, with respect to what the Census Bureau's done in the past, the publicly available technical documents state that in the past the Census Bureau has applied household-level swapping and synthetic data noise infusion, correct?

A. That's correct.

Q. Let's talk about those two different things, and let's start with household-level swapping.

Household-level swapping would be where you take certain variables on one household's record and you match them up to [1040] the variables on another household's record, located in a different geographic area, and then you swap those values except the address so that it looks like essentially one household lives at one location and the other household lives in another location, right?

A. Yes, that's essentially correct.

Q. And when you do that, when you've done that in the past, you would swap the households across census blocks, correct?

A. Yes, sir.

Q. And you do that because there would be no point in swapping households within a census block, right?

A. That's right.

Q. Now, let's talk about synthetic data noise infusion. That's a different technique, right?

A. That is correct.

Q. And that's what you were talking about with Judge Furman earlier, right?

A. I was talking about a particular form of that, yes.

Q. Right, because there are multiple forms of synthetic data noise infusion, correct?

A. They're multiple forms of noise infusion. They don't all involve synthetic data.

Q. Thank you.

Now, one way of doing noise infusion is to develop a model for when you have a particular item or variable on a [1041] household's record that's sensitive and then replacing that variable as reported by the household with synthetic, essentially made-up data based on the model, is that right?

A. With a draw from the model's predictive distribution, that's correct.

Q. And the idea is that at a high level of geography, like a county, the overall aggregate numbers are going to remain essentially the same, right, Dr. Abowd?

A. So, some disclosure-avoidance methods have that property and some don't. Without getting into the deep weeds of ones that you're talking about, the particular synthetic data property that you just described won't have that feature unless it is engineered into the synthesizer.

Q. For the use case that you have here—right—when you're talking about higher levels of geographic units, like counties, when you infuse the synthetic data, the idea is that the aggregate numbers are going to be basically the same? Right?

A. The idea is not with respect to the geographic area but with respect to the population within the geographic area.

Q. Thank you.

A. The denser the population the more accurate the statistics.

Q. OK. So, the larger the population size of the geographic area the more accurate the data will remain even after synthetic data noise infusion, correct?

A. After the disclosure-avoidance procedure we're implementing [1042] for the 2020 census, that's correct.

Q. But at the smaller levels of geographic specificity, like the individual census block, the more noise there's going to be—I mean, in terms of the population—

MR. HO: Let me start that question again.

Q. Areas with smaller population sizes—like census blocks typically have smaller population sizes than counties—there's going to be more noise at that level of

geographic specificity once you employ noise infusion, correct?

A. That's correct.

Q. So, leaving all the noise infusion and the CVAP data using responses to the citizenship question, today, when we use ACS CVAP data, generally speaking, we have more accuracy at geographic levels of specificity that have larger populations and more uncertainty at lower levels, correct?

A. That's correct.

Q. And that's also going to be true with CVAP data produced based on responses to the decennial census question due to noise infusion at higher levels of geography with more people, more accuracy but greater uncertainty at smaller levels of geography with smaller populations, correct?

A. It's the smaller populations that make the sentence correct, and yes, it is, with that qualification.

Q. Now, the Census Bureau has not yet set the parameters for disclosure avoidance for the CVAP table that will be created [1043] after the 2020 census, correct?

A. That's correct.

Q. If you do data disclosure avoidance properly, then the block-level CVAP data that you produce after the 2020 census including a citizenship question, the block-level data is going to be a series of estimates for each block rather than an exact tabulation of census responses, correct?

A. I have difficulty answering that question because “estimates” has a specific legal meaning that’s not quite the same as the generally understood statistical meaning. The data produced for each block and for the entire country and for every geographic area in between will be based on the entire enumeration, so in that sense not an estimate.

In the sense that they have been infused with noise to protect confidentiality and therefore have margins of error that resemble the margins of error that you would get in statistical processes that become more accurate as the number of cases increases, then it is correct. So they are not estimates in the sense that the law understands sample-based estimates. They’re based on the entire population.

Q. Well, let’s not talk about the law for a moment. I just want to—and let’s not worry about sample-based estimates, or whatever.

Just in your words, Dr. Abowd, you would describe the block-level CVAP data that’s produced even after a citizenship [1044] question is on the census as an estimate rather than a precise tabulation, correct?

A. Yes.

Q. So the block-level CVAP tabulation produced by the Census Bureau will not reflect the actual values of the number of citizens of voting age in each of those census blocks after the 2020 census, correct?

A. It will not be exactly equal to that number. It will be approximately equal to that number, with the approximation improving as the population increases.

Q. And after the 2020 decennial census even if there is a citizenship question, when the Census Bureau produces block-level CVAP data, there will be error margins associated with that data, correct?

A. Yes.

Q. And after the 2020 decennial census, when the Census Bureau produces block-level CVAP data, even if there is a citizenship question on the census, as of right now, the Census Bureau doesn't know whether the margins of error associated with that block-level CVAP data will be larger or smaller than the CVAP data that DOJ currently uses, correct?

A. We don't know, but we are able to control the margin of error in different ways, and so we intend to produce those tables in a manner that is fit for use by the Department of Justice.

[1045]

Q. But you don't know right now whether or not the margins of error associated with block-level CVAP data produced after the 2020 census, assuming that there's a citizenship question on it, that those block-level estimates will have margins of error that are any smaller than the block-level CVAP data that DOJ currently relies on, correct?

A. I'd like to answer your question, Mr. Ho, but the DOJ doesn't currently work with any block-level CVAP data, so—

Q. Well, the DOJ does translate ACS CVAP data at one level of geographic specificity and combines it with decennial census data to produce block-level CVAP estimates, correct?

A. That's not my understanding of how it's done. My understanding of how it's done is that they combine block-level CVAP data with block-level other data, PL 94 data, and they estimate the citizen population in the voting districts that they're trying to supply—to do scrutiny of. Sometimes that involves having to model down to the block level, but it doesn't always.

Q. OK. Dr. Abowd, this is a very simple question. The CVAP data that the Census Bureau's going to produce after the 2020 census, assuming that the 2020 census includes a citizenship question, we don't know today whether or not that data will have margins of error that are any more precise than the CVAP data on which the Department of Justice currently relies, correct?

[1046]

A. Because the parameters have not been set, the answer to that question has to be yes.

Q. Dr. Abowd, there were never any conversations between the Department of Justice and the Census Bureau about this issue prior to Secretary Ross's issuance of his decision memo ordering the inclusion of the citizenship question on the census, correct?

A. That's correct.

Q. DOJ refused to meet with you to discuss, right?

A. So, I don't know that DOJ would have refused to meet with us to discuss disclosure avoidance on the PL 94 and CVAP table. All I know is that they didn't meet with us to discuss the specific request about adding a citizenship question to the 2020 census.



Q. During that whole process, between when you began your analysis with the SWAT team and when Secretary Ross issued his decision memo, there were never any conversations between commerce and the Census Bureau about how disclosure avoidance might affect the precision of the CVAP data that the Census Bureau could produce after the 2020 census, correct?

A. Not entirely. I had already briefed Undersecretary Kelley on the consequences of modernizing the disclosure-avoidance system at the Census Bureau. I briefed her, I believe, in November of 2017.

Q. That was before you began working on the citizenship [1047] question, right, Dr. Abowd?

A. That's correct.

Q. OK. My question was meant to be a little more precise, and I apologize if I didn't word it correctly. But my question is from the time that you started analyzing the citizenship question request from the Department of Justice to when Secretary Ross issued his decision memo, there were no conversations between the Census Bureau and commerce department officials about whether disclosure avoidance might affect the precision of the block-by-block CVAP data that the Census Bureau could produce based on responses to the citizenship question on the census, correct?

A. Not quite. We did, both in discussing it with the secretary and in discussing it with the undersecretary, remind them both that we would be using disclosure-avoidance procedures at the block level.

Q. And in spite of that reminder, the secretary forged ahead and ordered a citizenship question anyway, right, Dr. Abowd?

A. The secretary was aware of our intention to use disclosure avoidance—

Q. There are no documents in the administrative record that you're aware of, Dr. Abowd, that reflect the way in which disclosure avoidance might affect the precision of block-by-block CVAP data that the Department of Justice was requesting from the Census Bureau through a citizenship \* \* \*

\* \* \* \* \*

[1265]

Q. OK. Lets bring up Plaintiffs' Exhibit 355.

Dr. Abowd, are you familiar with this document?

A. It is the sixth edition of principles and practices for a federal statistical agency published by the Committee on National Statistics.

Q. You're familiar with it?

A. Yes, I am.

Q. I would like to turn to page three of this document, which I believe is page 24 of the PDF, once you get past all the tables.

Not 124, just 24 of the PDF. There we go.

I would like to look at principle four, Dr. Abowd. Principle four is independence from political and other undue external influence.

Do you see that?

A. Yes, I do.

Q. The first two sentences of principle four read: To be credible, trustworthy, and unhindered in its mission,

a statistical agency must maintain a position of independence from undue external influences (even as it proactively seeks input on its program and priorities). It must avoid even the appearance that its collection, analysis, or dissemination processes might be manipulated for political or partisan purposes or that individually identifiable data collected under a pledge of confidentiality might be turned over for [1266] administrative, regulatory, or law enforcement uses.

Do you see that?

A. Yes, I do.

Q. The last sentence reads: The credibility that comes from independence is essential for users to maintain confidence in the accuracy and objectivity of a statistical agency's data and for data providers to be willing to cooperate with agency requests.

Did I read that correctly?

A. Yes, you did.

Q. Dr. Abowd, is a process where an agency makes a request to the Census Bureau for data to be collected through the census, but then refuses to meet to discuss the technical aspects of that data request, is a process like that consistent with principle four?

A. A process like that is very problematic with respect to principle four.

Q. Is it inconsistent with principle four?

A. So, in my opinion, principle four is also something that a statistical agency needs to work with within the parameters of its own enabling legislation. And in this case, were the decision up to the Census Bureau

with regard to the request for the question from the Department of Justice, I think you already have my answer on what we would do. But that's not the case.

[1267]

Q. Is a process where the head of a cabinet agency personally directs staff not to meet with the Census Bureau to discuss the Census Bureau's ideas for producing better quality data for that agency at lower cost consistent with principle four?

A. Once again, I think I have answered that question. I've already said that if it were up to the Census Bureau, I already said what we would have done with that request.

Q. I appreciate that that is your position, Dr. Abowd.

But my question wasn't about what the Census Bureau would do, it was about whether or not this process comports with principle four as you understand it as an expert on statistical practices.

Is what I described to you, in terms of what the Attorney General did in directing Department of Justice staff not to meet with the Census Bureau to discuss the Census Bureau's proposal for producing higher quality block level CVAP data at lower cost, consistent with principle four?

MR. EHRLICH: Objection.

THE COURT: Sustained as to form.

Q. Dr. Abowd, was the process leading up to the decision to include the citizenship question, to the extent—the aspect of the process where the Department of Justice was directed by the Attorney General not to meet

with the Census Bureau, was that aspect of the process consistent with principle four?

MR. EHRLICH: Objection.

[1268]

THE COURT: I'll allow it.

Overruled.

A. Many experts, including myself, would interpret that as political influence.

Q. Dr. Abowd, was the process in which you were and other Census Bureau professionals were directed to conduct a technical analysis of DOJ's data request without being told that the Commerce Secretary had been working for months on including a citizenship question in the census, is that aspect of the process consistent with principle four?

MR. EHRLICH: Objection, mischaracterizes the evidence.

THE COURT: Why don't you rephrase, Mr. Ho?

MR. HO: Thank you, your Honor.

BY MR. HO:

Q. The process here involved a directive to you and your swat team to study the technical aspects of the Department of Justice's request to include a citizenship question on the census for the purpose of producing block level CVAP data for VRA enforcement; you understand that, right, Dr. Abowd?

A. Yes, I do.

Q. The process that you undertook where you conducted an extensive technical review of that request,

without being told that for months the Secretary had already been considering the inclusion of a citizenship question, does that process comport \* \* \*

\* \* \* \* \*

[1275]

A. I think I corrected that the first time I was asked to point out that when the census was conducted by enumerators, all you can see is the sheet with columns in it. So I will agree that in the earlier forms conducted by enumerators, there was a column for nativity and a column for citizenship. In subsequent ones where they are self-administered, the question does precede the citizenship question, yes.

Q. The citizenship question on the 2020 census will not be preceded by a question on nativity, correct?

A. That's correct.

Q. The Census Bureau is not aware of any cognitive testing of the citizenship question planned for the 2020 census without a preceding question on nativity, correct?

A. That's correct.

Q. And the Census Bureau's opinion is that the 2020 census questionnaire, including a citizenship question, has not undergone adequate cognitive testing, correct?

A. That's correct.

Q. Dr. Abowd, I want to talk about your opinion on the exception for the pretesting requirement under the Census Bureau's standards. I want to start with your

expert report, which just for identification is Plaintiffs' Exhibit 310.

MR. HO: We are not offering this into evidence, your Honor. We withdraw it from our list as an official exhibit. But I want to look at page 22 of your report, which is page 23 [1276] of the PDF.

BY MR. HO:

Q. Under the header adding survey questions, you have two paragraphs, and I want to ask about the second paragraph.

In the second sentence, you write: Pretesting of a specific question previously used on another survey however is not required (see the note to standard sub requirement A2-3.3.1).

That is what you wrote, right?

A. Yes.

Q. Now, you're relying on the note to Census Bureau standards subrequirement A2-3.3.1 for your opinion that pretesting was not required in accordance with the Census Bureau's standards, correct?

A. Yes.

Q. OK. Lets look at that section of the Census Bureau's quality standards, Plaintiffs' Exhibit 260, which is in evidence.

These are the U.S. Census Bureau statistical quality standards, correct?

A. Yes.

Q. And your work at the Census Bureau is guided by these standards, correct?

A. That's correct.

Q. And these standards are intended to reflect the OMB's [1277] standards and guidelines for statistical surveys, correct?

A. That's correct.

(Continued on next page)

[1278]

MR. HO: Look at page 8 of this document, which is page 18 of the PDF, once you get past the table of contents.

Q. And this is subrequirement A2-3.3. Do you see that?

A. Yes, I do.

Q. And under subrequirement A2-3.3, generally speaking, survey questionnaires must be pretested to identify problems and then refined based on pretesting results before being implemented. Correct?

A. I assume you're reading from that. I haven't found the sentence you were reading.

Yes, that's correct.

Q. OK. I believe you discussed the note to this subrequirement with Mr. Ehrlich, the one that reads—

MR. HO: Not that one yet. Let's start with the top note:

“On rare occasions, cost or schedule constraints may make infeasible to perform complete pretesting. In such cases, subject matter and cognitive experts must discuss the need for and feasibility of pretesting. The program manager must document any decisions



regarding such pretesting, including the reasons for the decision. If no acceptable options for pretesting can be identified, the program manager must apply for a waiver”.

Q. Do you remember discussing that with Mr. Ehrlich?

A. I remember discussing the other note, but—yes, I do [1279] recall discussing that. Yes. Go ahead.

Q. I think you said that this note contemplates the fact that there might be time constraints sometimes, which makes pretesting difficult. Do you remember that?

A. Yes, I do.

Q. OK. And then the note says that under such circumstances, essentially, the program manager must apply for a waiver. Do you see that?

A. Yes, I do.

Q. A waiver was not applied for before the citizenship question was decided to be added to the 2020 census, correct?

A. That’s correct.

Q. Now I want to talk about the note to subrequirement A2-3.3.1. “Pretesting is not required for questions that performed adequately in another survey.” Did I read that right?

A. Yes, you did.

Q. This is what you’re relying on when you say that pretesting was not required of the citizenship question

in accordance with the Census Bureau's standards, correct?

A. That's correct.

Q. And you would agree, Dr. Abowd, that if this note to subrequirement A2-3.3.1 did not exist, that you would have to perform pretesting of the citizenship question before including it in the 2020 census, correct?

[1280]

A. Or apply for a waiver.

Q. But that didn't happen either, right?

A. That's correct.

Q. OK. So if this note didn't exist, you'd have two options, either pretest or apply for a waiver, right?

A. That's correct.

Q. And you didn't do either of those things, right?

A. That's correct.

MR. HO: Let's bring up your report now, and I want to bring it up alongside that note so we can compare the text of the two.

Q. Now, in your note, when you describe standard subrequirement A2-3.3.1 and the need for pretesting under it, you noted that the exception excuses pretesting for a question that has been previously used on another survey, but you left out the fact that in order for this exception to apply, the question at issue has to have performed adequately on that survey, right, Dr. Abowd?

A. If I didn't say it in that paragraph, I certainly said it in another paragraph of my—

Q. OK. Well, just stay here for a second, Dr. Abowd. The note says that you don't need pretesting if a question's been on another survey if it's been performed adequately on that survey, right?

A. That's what the note says, yes.

[1281]

Q. OK, but your report, at least in this paragraph, when you cite this exception, you describe it as allowing the use of questions that have appeared on other surveys, but you left out the fact that the question has to have performed adequately on that survey, right?

A. It's not in that paragraph, but I did say that the question had to have been adequately tested in the context of the ACS, so I've already established that point.

Q. Well, we can talk about that, but this paragraph certainly doesn't say that, right, Dr. Abowd?

A. I don't see the words in this particular set of sentences, that's right.

Q. Now, you know, based on the analysis of your SWAT team, Dr. Abowd, that more than 30 percent of individuals who were identified in administrative records as noncitizens respond to the citizenship question on the ACS stating that they are, in fact, citizens, right?

A. Yes, that's right.

Q. And as we went over yesterday, you have reason to believe that if you put this question on the 2020 census, noncitizens are going to get the answer wrong even more frequently on the 2020 census than they do on the ACS, correct?

A. You're interpreting the higher disagreement rate in 2016 as that evidence, if that's what you mean, then yes.

THE COURT: What do you mean by the higher [1282] disagreement rate?

THE WITNESS: The statistic that Mr. Ho quoted at around 30 percent applies to the 2010 American Community Survey. The disagreement rate is higher for the 2016 American Community Survey, closer to 37 percent.

THE COURT: And that's based on the breakoff data?

THE WITNESS: That's based on the linkage, your Honor, to the—

THE COURT: I'm sorry. Keep your voice up.

THE WITNESS: The numbers that we're talking about right now are based on the linkage of the American Community Survey to the administrative record data on citizenship.

THE COURT: Understood.

BY MR. HO:

Q. Given the rate at which noncitizens provide inaccurate responses to the citizenship question on the American Community Survey, Dr. Abowd, the Census Bureau now acknowledges that there's a problem with the ACS citizenship question, correct?

A. That's correct.

Q. There's no consensus view right now within the Census Bureau as to what to do about that problem, right?

A. That's correct.

Q. Given this problem, when the next ACS content review takes place, there's going to be a review of the citizenship question on the ACS and how it's performing on that survey, correct?

[1283]

A. That's my understanding, yes. That program hasn't actually started, so all I can say is that's the intention.

Q. And I believe you testified with Mr. Ehrlich that this problem, assessing and addressing it will be an important component of the ACS content review process, correct?

A. That's my expectation, yes.

Q. And it's possible that at the conclusion of that ACS content review process, the recommendation that will come out of that will be to remove the citizenship question from the ACS because of its problematic performance, correct?

MR. EHRLICH: Objection.

THE COURT: Sustained.

Q. Dr. Abowd, it's fair to say that one possible result of this process of content review is that the citizenship question could be removed from the ACS, right?

A. That is a possible outcome, yes.

Q. Dr. Abowd, when you have questions as to whether or not a certain procedure or methodology within the Census Bureau is compliant with the bureau's statistical quality standards, you ask a quality program staff for guidance about how to proceed, right?

A. That's one option, yes.

Q. And the content review process of the ACS, the intention to review the performance of the ACS question as part of that content review process, that's consistent with this practice of [1284] getting quality program staff involved for guidance, correct?

A. Yes, it is.

Q. Dr. Abowd, for purposes of the 2020 census, you haven't gone to the quality program staff for guidance about how to proceed in light of the problem that we've identified with the ACS citizenship question in terms of noncitizens frequently giving erroneous answers, correct?

A. I don't believe that the quality program staff has been consulted directly. One member of the quality program staff was among the people that was consulted when we were preparing our internal position.

Q. Do you remember agreeing with me earlier, Dr. Abowd, that changes to the decennial census questionnaire are more dramatic than changes to the ACS?

A. Yes, I do.

Q. But before Sec'y Ross made a decision to add a citizenship question to the decennial census, the Census Bureau had not undertaken a review of the citizenship question and its performance for purposes of adjusting

content in the same way that is currently being contemplated for the ACS content review, correct?

A. I'm sorry, Mr. Ho. I don't understand exactly what you're asking me.

Q. That's all right. That was inartful. Let me try again.

The content review for the ACS is going to look at the [1285] performance of the citizenship question on the ACS; at least that's the current intention, correct?

A. That's correct.

Q. And one reason for that is because of the problematic performance of the ACS citizenship question, correct?

A. The specific reason for that is the evidence uncovered in the process of addressing the DOJ request of the disagreement between the survey response and the administrative records.

Q. There's no analogous review that's taken place for the 2020 decennial census and the inclusion of the citizenship question in it that's been completed prior to Sec'y Ross's decision to include the question, correct?

A. Well, the analyses that we did and the technical report that we've been talking about today is the beginning of that analysis. That's what's been done.

Q. But you haven't completed a content review process along the lines of what's being contemplated for the ACS, where, among other things, you'll look at how the question's performed and make a decision about whether or not to continue to include it; you haven't

done something like that for purposes of the 2020 census before Sec'y Ross made his decision, correct?

A. That's correct.

Q. And the Census Bureau was not making any refinements to the citizenship question in light of its performance problems on the ACS prior to its implementation on the 2020 census [1286] questionnaire, correct?

A. So, I would characterize the current state of the research as a question about whether a survey response or an administrative record response is the preferred way of managing the burden in collecting data on citizenship, so the actionable consequence—one of the actionable consequences is certainly to modify the survey question, but the actionable consequence that we pursued with respect to the 2020 census was to simply get the content from an alternative source. That's a live option for the ACS as well.

Q. But there's no possibility you're going to remove it from the questionnaire based on the content review?

A. Not unless the secretary so instructs.

MR. HO: Let's bring plaintiffs' demonstrative exhibit 1 back on the screen, Dr. Hillygus's—

THE COURT: Let me interrupt for a moment.

In your expert opinion, would you say in light of the 30 to 37 percent, I'll call it error rate for lack of a better term, that the citizenship question on the ACS has performed adequately?

THE WITNESS: So, your Honor, first of all, we call it a disagreement rate, and it should be clear from all of the technical advice that you've heard me talk



about that I do not believe that the survey question is the best way to collect that information. And so if your conclusion from that is that [1287] it is not performing adequately, then I'd accept that conclusion.

I do have to say, though, that among the methodologists at the Census Bureau, many would like to see a further analysis of the—that disagreement in light of additional data about naturalizations and missing updates to our source of citizenship data before concluding that it's in error. And so the disagreement is not in dispute. The fact that it is so large makes it difficult to attribute the bulk of it to an error in updating naturalizations, but we would like to know about how often it is—they disagree because one of our primary citizenship data sources has to be updated by an affirmative action if citizenship happens, and we don't know the rate at which that happens.

We can tell that it happens in looking at successive copies of the NumIdent, but that's the sort of quantitative research that a content review would normally undertake before deciding to whom the question would be posed or whether the question would be substituted for an alternative source.

THE COURT: All right. Let me ask you, in your opinion, your expert opinion, based on the existing data—that is to say, the absence of a content review that breaks down the disagreement rate in the way that you just described—would you describe the question as performing adequately in light of the existing data?

[1288]

THE WITNESS: No, I don't think the question performs adequately.

BY MR. HO:

Q. Dr. Abowd, at the time that Sec'y Ross made his decision, he was aware of the fact that noncitizens were likely answering this question on the ACS incorrectly more than 30 percent of the time, correct?

A. Yes, that's correct.

Q. And he knew that because you told him that in your January 2018 memo, correct?

A. Yes, I did.

Q. And Sec'y Ross also mentioned this fact in his decision memo, correct?

A. As I recall, yes.

Q. But Sec'y Ross's view was that a question that noncitizens get wrong 30 percent of the time has been well tested, right?

A. That was also the advice we gave the secretary.

Q. Sec'y Ross made his decision to include the citizenship question without conducting any analysis of whether or not people might answer the question more accurately—less accurately in today's political environment, correct?

A. I'm sorry. Could you repeat that? It was clear. I just lost the first part.

Q. No. It's all right. It's my fault.

The decision to add the citizenship question was made by [1289] Sec'y Ross without conducting any testing to see whether or not, in today's political environment, noncitizens might answer the citizenship ques-

tion erroneously at an even higher rate than they had in previous ACSs, correct?

A. It was made without any additional testing of the question, correct.

Q. And just to close the loop on what well tested meant, well tested, as used in Sec'y Ross's memo, is consistent with not performing adequately?

MR. EHRLICH: Objection.

THE COURT: I'll allow you to answer. In your opinion, are those two terms consistent?

THE WITNESS: Yes, they are, and I agree it's rather nuanced.

MR. HO: Thank you, Dr. Abowd.

Let's turn to your next opinion, the one about whether or not the reduction in self-response rates will translate into an undercount.

Q. I believe you testified with Mr. Ehrlich that you have no ability, I think, is the phrase that you used to predict the effect of the reduction in response rates caused by the citizenship question on a differential undercount. Is that right?

A. I'm not sure which of my statements you're directly quoting, so let me make it as precise as I can.

\* \* \* \* \*

[1421]

But bottom line is, coordinate with my chambers, with the District Executive's office, and make sure that you are in here and test it before that day.

MR. COLANGELO: Thank you, your Honor.

THE COURT: Mr. Gardner?

MR. GARDNER: Nothing from the defendants.

THE COURT: All right. Then lets turn to a couple substantive questions or issues, in part, to make sure that we're all on the same page and, in part, to sort of identify some issues that I want to make sure that you address that you probably would have addressed anyway.

First, let me just direct a question at defense counsel.

Mr. Gardner, are you the unfortunate victim of who is answering?

MR. GARDNER: Depends on what the question is, your Honor. In seriousness, I think Mr. Schumate will likely answer most of the questions you have.

THE COURT: All right.

MR. GARDNER: Hopefully.

THE COURT: All right. Lucky for you.

Mr. Schumate then, I guess I wanted to just confirm, is there any dispute, that I know that there is a big issue looming here whether and to what extent I can rely on materials outside of the administrative record. Do you dispute that I [1422] can rely on such materials for purposes of evaluating plaintiffs' standing?

MR. SCHUMATE: Your Honor, I don't think we dispute that the court can consider extra-record evidence for purposes of standing, but depending on what

the Supreme Court rules on our mandamus petition, that would define the scope of what the court could consider with respect to the merits.

THE COURT: Understood.

But in other words, a lot of the testimony, certainly in court, has been, I think, largely relevant to the question of standing, whether there is any injury, whether the injury is fairly traceable to the citizenship question and so forth.

There is no dispute that I can consider all of that testimony in evaluating that question?

MR. SCHUMATE: I think that is correct, your Honor.

THE COURT: All right. Thank you.

Good. I guess there are a couple things that I would like to make sure you address, and you probably would have done so for any number of reasons, including inferring some of my thinking from the questions I have posed to the witnesses in the last few days.

But one is, it seems to me that if you take Dr. Abowd's testimony and Dr. Salvo's testimony together, that there doesn't seem to be any—first of all, I don't think there is any dispute—let me back up.

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UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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Civil Action No. 1:18-cv-2921 (JMF)

STATE OF NEW YORK, ET AL., PLAINTIFFS

*v.*

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
DEFENDANTS

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[Oct. 25, 2018]

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**AFFIDAVIT OF CHRISTINE PIERCE**

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Pursuant to 28 U.S.C. § 1746(2), I, Christine Pierce, hereby declare as follows:

1. I am over the age of eighteen and have personal knowledge of all the facts stated herein.

2. I am Senior Vice President of Data Science for The Nielsen Company (US) LLC (“Nielsen”). I am a social scientist by training and worked as a demographer for Nielsen prior to my current role leading a team of scientist who support Nielsen’s audience measurement products. I earned a Master of Public Policy from the University of Minnesota and a graduate certificate in Applied Statistics from Pennsylvania State University. I frequently represent Nielsen at research conferences and have authored papers and presentations for the American Association of Public Opinion Research foundation, and the Population Association of America. In the fall of 2018, the New York State Office of the At-

torney General requested that I submit a voluntary affidavit in this case describing my communication with the Department of Commerce in lieu of potentially receiving a trial subpoena.

3. I am submitting this affidavit in order to ensure that the record accurately reflects my communications with the Department of Commerce.

4. In the spring of 2018, Nielsen received a request from an assistant to Secretary Ross asking to set up a meeting with someone at Nielsen who is familiar with Nielsen's use of Census data. At the time, I was under the impression that the phone call would be to discuss the importance of the Census generally, the need for Nielsen and its commercial clients to have as complete and accurate a count as possible, and to advocate for full funding for Census operations. Nielsen's SVP Community Engagement (Don Lowery) received this request. When Don Lowery sent the email connecting me to the Secretary's office he included a statement that said "Christine looks forward to speaking to the Secretary regarding the importance of the 2020 Census to Nielsen." *See* PX-532 (a true and accurate copy of email communications with Department of Commerce).

5. Prior to the phone call, Brian Lenihan from Secretary Ross's staff asked me via email for a "copy of my biography (paragraph) along with a description of Data Science/Nielsen and how Census data comes into play." I indicated that "For Nielsen, these public data sources such as the Decennial Census and ACS serve a crucial role in planning samples and consumer panels. Accurate population estimates enhances the sample design and ensures the most accurate coverage of house-

holds and persons with various demographic characteristics. Additionally, these public data sources are used to adjust the unweighted input to reflect the entire population.” *See id.*

6. I exchanged several emails with the staff regarding the date/time for the call. The staff did not mention the citizenship question in any of these emails. Other than the aforementioned biography and description, Secretary Ross’s staff did not ask me to provide any other documents or data nor did I provide any other data or documents to the Department of Commerce in Spring 2018.

7. On the evening of March 23, 2018, I had a telephone call with Secretary Ross and Michael Walsh, a lawyer from the Commerce Department. This telephone call lasted approximately 10-20 minutes. This was the only time that I spoke with Secretary Ross. I understand that three days after our conversation, Secretary Ross wrote a memo in which he discussed our conversation (the “Ross Memo”).

8. Prior to speaking to the Secretary, I was not aware that the citizenship question was going to be a topic of conversation. However, it immediately became apparent that the citizenship question was the only topic of conversation. Secretary Ross and Mr. Walsh told me that they needed to make a recommendation about whether to include a citizenship question on the Decennial Census and were reaching out to experts and stakeholders to gather information.

9. During this conversation, I told Secretary Ross unequivocally that I was concerned that a citizenship question would negatively impact self-response rates.



I explained that people are less likely to respond to a survey that contains sensitive questions. I also added that increasing the length of a survey can reduce response rates. I discussed the impact that lower response rates have on survey costs. I emphasized that Census non-response follow up operations are expensive because they require a full count and non-response follow up operations for the Decennial Census include in-person data collection.

10. The Ross Memo states that I “confirmed that, to the best of [my] knowledge, no empirical data existed on the impact of a citizenship question on responses.” (Ross Memo at 3). I did not say “to the best of [my] knowledge, no empirical data existed on the impact of a citizenship question on responses.” I did discuss the importance of testing questions to understand any impacts to response and I explained that a lack of testing could lead to poor survey results. I confirmed that I was not aware of any such test of a citizenship question by the Census Bureau. I cannot and did not attempt to quantify the extent of the reduction in self response.

11. During our conversation, Secretary Ross and Mr. Walsh asked me if Nielsen asked any sensitive questions. I told them that Nielsen does not ask about citizenship status on its surveys but that we do have surveys that occasionally include sensitive questions.

12. The Ross Memo explains that Nielsen “stated that it had added questions from the ACS on sensitive topics” including “immigration rates.” (Ross Memo at 3). I did not share that Nielsen had added “questions

concerning immigration status to short survey forms without any appreciable decrease in response rates.”

13. I did explain to Secretary Ross and Mr. Walsh that Nielsen does ask certain questions from ACS in our surveys and of our panelists, including place of birth and year of entry to the United States. I stressed the importance of specifically testing changes to questionnaires and that Nielsen had done such testing specifically because we anticipated these sensitive questions could have a negative impact on response rates. I did confirm that these place of birth and year entry questions had not caused a significant decline in response rates on Nielsen surveys or in our panels. But I did not suggest that Secretary Ross could draw parallels between the surveys conducted by Nielsen and the Decennial Census.

14. Nielsen’s survey and panel operations are entirely different from the Decennial Census operations. Nielsen surveys are not conducted by a government agency and are not required by law. Nielsen studies are intended to understand consumer purchases and media usage. Response rates to the Nielsen surveys and panels in my purview generally range from 5% to 40%. If individuals do not answer a Nielsen survey or decline to participate in a panel, Nielsen will select and recruit different respondents to ensure we have the desired reporting sample size. While we strive for an accurate representation of the population, we are not required to count all people. And unlike the Census, Nielsen provides incentives—usually cash—for filling out our surveys.

15. To my knowledge, the Department of Commerce has not asked for any documents related to

Nielsen's survey work or questionnaire testing. To my knowledge, no one else at Nielsen has been asked for, or provided, any additional data, documents, or surveys to the Department of Commerce in response to the discussions around the citizenship question.

16. I have reviewed a copy of the Commerce Department's notes of my March 23, 2018 conversation, marked as page 1276 in the Administrative Record ("AR 1276") for this case.

17. AR 1276 states that "Ms. Pierce stated that including a question on citizenship could make people less likely to respond, but that there is no data to predict how much lower the response rate might be." I do not recall making this statement as worded here. Any statement like this would have been in the context of stressing the importance of conducting specific tests for the purpose of predicting the response rates. Adding a citizenship question to the Decennial Census introduces risk specifically because the impacts have not been tested.

18. AR 1276 states that I "noted that in the only specific situation she was aware of that sensitive questions were tested on a short questionnaire, there was no impact on response rates." I did not state that "in the only specific situation that I was aware of that sensitive questions were tested on a short questionnaire, that there was no impact on response rates." However, I did discuss Nielsen's use of certain ACS questions and how Nielsen has tested those questions specifically to understand any impact to response. I did not provide any written reports with testing results nor did I provide Nielsen data in an attempt to esti-

mate the impact of adding a citizenship question to the Decennial Census.

Executed on Oct. 25, 2018.

/s/ CHRISTINE PIERCE  
CHRISTINE PIERCE

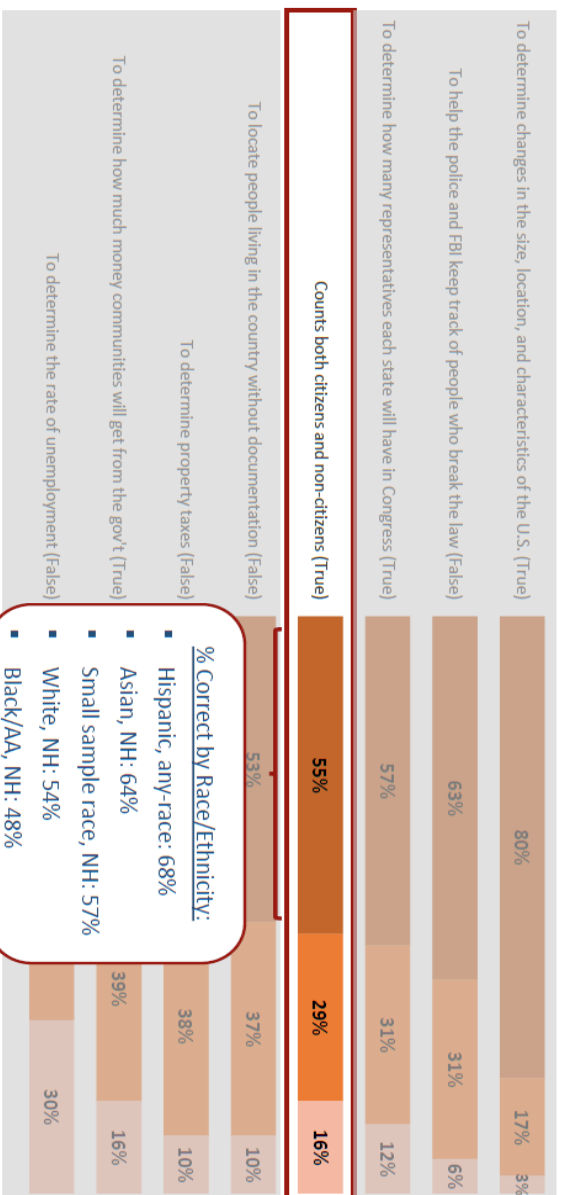


2020 Census Barriers, Attitudes, and Motivators Study (CBAMS) Survey  
and Focus Groups:  
Key Findings for Creative Strategy

October 31, 2018

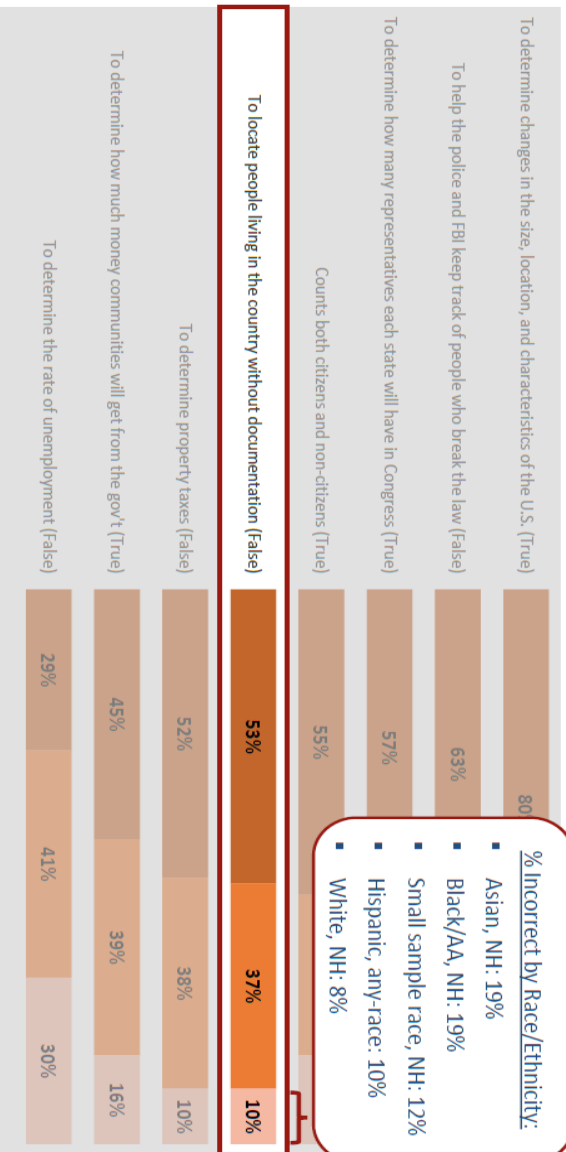
# Hispanics & Asians know census counts non-citizens

As you understand it, will the 2020 Census be used in any of the following ways or not?



# Asians & Blacks are misinformed about use of census

As you understand it, will the 2020 Census be used in any of the following ways or not?



Hispanics believe the census would be used to find undocumented people

*I feel that it does go to the immigration agency.”*  
— Spanish (U.S. Mainland)

*[I would not participate in the census because] they [immigration] will know where we are and what our names are and where we live...”*  
— Spanish (U.S. Mainland)

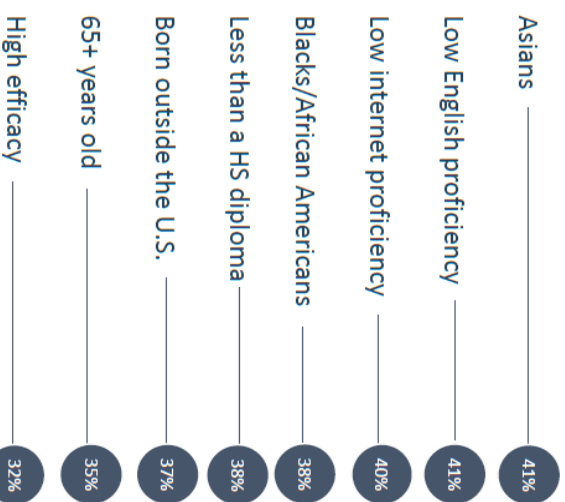
*For example, let's say in my house two people would be affected... And sometimes, it is the opposite. Sometimes the others can't be affected, but we can. The heads of households. So, in any case, one is at risk [by filling out the census].”*  
— Spanish (U.S. Mainland)



## Respondents worry about confidentiality



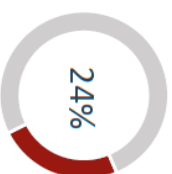
### Select groups with the highest levels of worry about confidentiality



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Some are concerned the census shares data

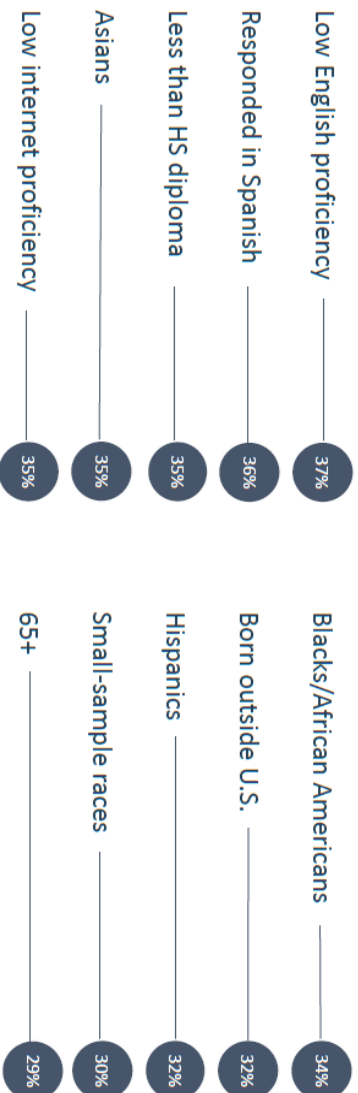


were “extremely concerned” or “very concerned” that the Census Bureau would share their answers with other government agencies.

## Some are concerned the census shares data



### Select groups with the highest levels of concern about data sharing



Nearly 1 in 4 respondents fear that their answers to the 2020 Census will be used against them



were “extremely concerned” or “very concerned” that their answers would be used against them.

557

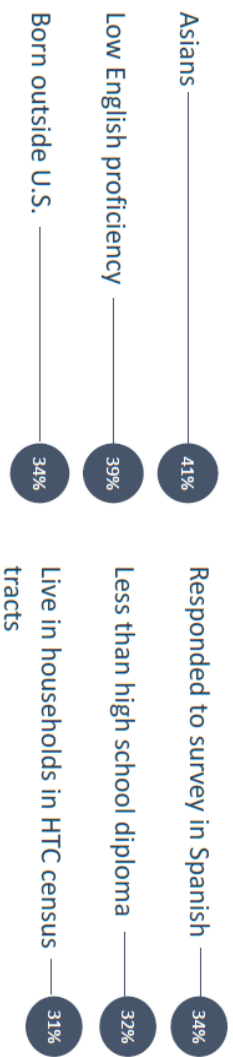
34

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Nearly 1 in 4 respondents fear that their answers to the 2020 Census will be used against them



Select groups with the highest levels of fear



558

The citizenship question may be a major barrier



1. **Its purpose is to find undocumented immigrants**
2. **The political discourse is targeting their ethnic group – residents and citizens may also feel endangered**

“ [The purpose is] to make people panic... Some people will panic because they are afraid that they might be deported.”  
— Vietnamese

“ For this census, a lot of people are afraid. It doesn't matter if they ask you whether or not you're a citizen. The first question they ask you, are you Hispanic or Latino? And that's enough. That's all they need. And people are scared.”  
— Spanish (U.S. Mainland)

“ ICE is working with different groups on deportation sweeps, and it would make me feel like I'm aiding in that. They're doing a lot of illegal stuff, and so I wouldn't fill out any of the questions.”  
— MENA

“ [Latinos will not participate] out of fear... [there] is practically a hunt [for us] ...Latinos are going to be afraid to be counted because of the retaliation that could happen - it's like giving the government information, saying, 'Oh, there are more here.'”  
— Spanish (U.S. Mainland)

## Audience: Hispanic



Intent to respond (65%) was slightly below average



Top misconceptions about the census the marketing campaign could address

- Used to determine how much money communities get from gov't (true, 17% incorrect)
- Used to determine number of representatives in congress (true, 16% incorrect)
- Used to locate people living in the country without documentation (false, 10% incorrect)



Top attitudinal barriers

- Concern about confidentiality of answers (34%)
- Concern that answers will be shared with other government agencies (32%)
- Fear of repercussions (33%)



Other considerations

- Focus group participants expressed intense fear that information will be shared with other government agencies to help them find undocumented immigrants. Participants worried that their participation in the census could harm them personally or others in their communities/households they care about.
- When presented with the Census Bureau's promise of confidentiality, participants did not believe the promise would be kept.
- In Puerto Rico, Hurricane Maria displaced many people, and multiple families now occupy a single address, creating significant confusion about how to define a household.

560

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