

Nos. 18A375

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

IN RE DEPARTMENT OF COMMERCE, et al.,

Applicants.

RESPONSE OF GOVERNMENT PLAINTIFFS
TO RENEWED APPLICATION FOR A STAY PENDING
DISPOSITION OF A PETITION FOR A WRIT OF MANDAMUS
TO THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MATTHEW COLANGELO
Executive Deputy Attorney General
ELENA GOLDSTEIN
Senior Trial Counsel
Division of Social Justice

BARBARA D. UNDERWOOD*
Attorney General
State of New York
STEVEN C. WU
Deputy Solicitor General
JUDITH N. VALE
Senior Assistant Solicitor General
SCOTT A. EISMAN
Assistant Solicitor General

**Counsel of Record*

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INTRODUCTION

Defendants—the U.S. Department of Commerce (Commerce), Secretary of Commerce Wilbur Ross, Jr. (the Secretary), the Bureau of the Census (Bureau), and Acting Bureau Director Ron S. Jarmin—seek a stay of several pretrial discovery orders by the United States District Court for the Southern District of New York (Furman, J.) in this ongoing lawsuit challenging defendants’ decision to modify the decennial census to include a question about citizenship status. The challenged orders allowed narrow discovery beyond the initial administrative record produced by defendants and further authorized depositions of the Secretary and of Acting Assistant Attorney General John Gore. Because defendants fail to satisfy the stringent standards necessary for this Court to take the extraordinary step of interfering with a district court’s ongoing management of pretrial proceedings, this Court should deny a stay.

Equitable considerations alone foreclose a stay of discovery beyond the two depositions that are the overwhelming focus of defendants’ stay application. Defendants object to that discovery based solely on their disagreement with the district court’s reasoning in a July 3 order. But defendants failed to seek any appellate relief from that order for nearly two months, and at this point only three days of the discovery contemplated by that order remain. Aside from the depositions of the Secretary and Gore, defendants have never identified any specific concerns with the limited discovery that remains, and indeed expressly declined to seek relief on much of that discovery in the courts below. And defendants have likewise never articulated any concrete harm from completing the last three days of discovery, such as practical burden or violation of some specific privilege. By contrast, suspending the completion of discovery will substantially prejudice plaintiffs by making it more difficult to complete various pretrial

filings and threatening to delay the imminent trial scheduled for November 5—a critically important date to ensure that this case can be resolved in time for the Bureau to complete preparations for the 2020 census.

This Court should also deny a stay of the depositions of the Secretary and Gore. Defendants object to those depositions principally on the ground that they are unnecessary given the default “record rule” that restricts judicial review of agency action under the Administrative Procedure Act (APA) to the agency’s stated rationale and the record it chooses to produce. But as defendants concede, well-established exceptions to this rule authorize additional discovery in APA cases when there has been a strong showing of bad faith or improper behavior or when there are concerns that the record initially produced by the agency does not reflect its actual rationale or reasoning. Moreover, as defendants also acknowledge, that additional discovery may include depositions of high-level officials, including cabinet secretaries, under appropriate circumstances. Because there is thus no categorical legal barrier to the depositions ordered by the district court here, the only question presented is whether the district court’s factual findings are sufficient to support those depositions. That highly case- and fact-specific question would not warrant this Court’s extraordinary intervention in ongoing pretrial proceedings even if there were some doubt about the district court’s conclusions.

In any event, defendants have failed to show that the district court so severely abused its discretion in ordering these depositions that this Court should intercede. The district court did not clearly err in identifying several highly unusual circumstances that called into question the accuracy and completeness of the Secretary’s stated rationale for adding the citizenship question and of the administrative record that the agency initially produced. Most prominently, the Secretary publicly reversed himself on the justification for this decision: first claiming that

he was merely responding to a request from the Department of Justice (DOJ) for citizenship data to enforce the Voting Rights Act (VRA), but later admitting that he, not DOJ, had initiated the project to add a citizenship question many months earlier, and indeed had played a direct and personal role in enlisting DOJ's support and overriding its initial reluctance. Defendants attempt to downplay the significance of this reversal, but their arguments fundamentally misstate the substantial shift in the Secretary's justification—from purported reliance on DOJ's independent judgment to an admission that the Secretary had been driving this process (including DOJ's request) from the start. In addition, the district court did not clearly err in ordering additional discovery due to the patent deficiencies in defendants' initial administrative record, which contained no documents preceding DOJ's request despite the Secretary's admission that he had engaged in extensive deliberations about the citizenship question for nearly a year before that request. These circumstances (among others) support the district court's conclusion that limited discovery beyond defendants' initial administrative record was appropriate.

The district court also did not clearly abuse its discretion in further concluding that this additional discovery should include deposition testimony from the Secretary and Gore. As the district court reasonably found, and defendants do not seriously dispute, the Secretary was directly and personally involved to an extraordinary degree in the months-long project to add a citizenship question to the decennial census. But despite plaintiffs' best efforts to pin down the actual basis for the Secretary's decision and to obtain a comprehensive picture of all information he directly or indirectly considered, there remain obvious and significant gaps in the record. The district court did not clearly err in ruling that the Secretary's deposition was essential to filling those gaps. Indeed, multiple high-level officials at Commerce have testified

that the Secretary—and the Secretary alone—possesses critical information about the nature and timing of his decision to add a citizenship question.

Similarly, Gore’s deposition is warranted because of his unique personal knowledge about a key aspect of the Secretary’s decision-making: Gore’s direct collaboration with Commerce to produce the DOJ request that the Secretary later cited as the sole basis for his decision to add a citizenship question. Gore’s deposition is essential because plaintiffs have not been able to uncover the details of this critical interaction from other sources.

STATEMENT

A. Factual Background

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

The “decennial enumeration of the population is one of the most critical constitutional functions our Federal Government performs.” Pub. L. No. 105-119, § 209(a)(5), 111 Stat. 2440, 2481 (1997). The enumeration affects the apportionment of Representatives to Congress among the States, the allocation of electors to the Electoral College, the division of congressional electoral districts within each State, and the apportionment of state and local legislative seats. *See* U.S. Const. art. I, § 2, cl. 3; *Evenwel v. Abbott*, 136 S. Ct. 1120, 1127-29 (2016); Second Am. Compl. (Compl.) ¶¶ 152-156 (Gov’t Resps. App. (GRA) 179-245). The

census's population count also directly affects the distribution of hundreds of billions of dollars of federal funding each year to States and localities. Compl. ¶¶ 139-150.

Congress has assigned its constitutional duty to conduct the decennial enumeration to the Secretary of Commerce and Census Bureau. The Secretary's fundamental obligation is to obtain a total-population count that is "as accurate as possible, consistent with the Constitution" and the law. Pub. L. 105-119, § 209(a)(6), 111 Stat. at 2481; *see Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996). The Bureau conducts the required decennial enumeration principally by sending a short questionnaire to every household. Compl. ¶ 33. To ensure the accuracy of the population count, the Bureau uses detailed standards to govern the development and testing of each question. *Id.* ¶¶ 56-69, 79.

2. The decennial census questionnaire sent to every household has not included any question related to citizenship status for more than sixty years. For nearly forty years, in both Republican and Democratic administrations, the Bureau has vigorously opposed adding any such question based on its concern that doing so would depress response rates, including those of noncitizens and immigrants, thereby undermining the accuracy of the headcount. *See New York v. Department of Commerce*, 315 F. Supp. 3d 766, 782-85 (S.D.N.Y. 2018); Compl. ¶¶ 39-55, 84-91. For example, the Bureau has found that questions "to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count" because such questions "are particularly sensitive in minority communities and would inevitably trigger hostility, resentment and refusal to cooperate." *FAIR*, 486 F. Supp. at 568. Bureau directors appointed by presidents of both political parties have agreed. Compl. ¶¶ 43-47. And defendant Jarmin recently testified that a citizenship question will deter response rates largely by immigrant and Hispanic populations. *Id.* ¶ 80.

Although the Bureau has recently requested citizenship information through other means besides the decennial census questionnaire, such requests have gone to a limited number of individuals and thus have not raised the same concerns as does adding a citizenship question to the decennial census. Until 2000, the Bureau requested such information through a “long-form” census questionnaire—a list of questions sent each decade to just one of every six households. In 2005, the Bureau replaced the long-form questionnaire with the American Community Survey (ACS), which contains more than forty-five questions and is sent annually to only one of every thirty-six households. The substantial differences between these more limited requests for information and the decennial census mean that testing used for the ACS or the long-form questionnaire “cannot be directly applied to a decennial census environment.” U.S. Census Bureau, Supporting Statement A, 2018 End-To-End Census Test–Peak Operations 22-23 (Jan. 23, 2018).

3. In March 2018, Secretary Ross announced that he had decided to add a citizenship question to the 2020 census questionnaire sent to every household—contravening the Bureau’s long-held opposition to such a question, and disregarding the conclusions of his own staff, including the Bureau’s Chief Scientist, that adding the question would “harm the quality of the census count” by “reduc[ing] the self-response rate.” (GRA 75, 110.)

In a March 2018 memorandum announcing this decision, the Secretary represented that he “began” considering adding a citizenship question “[f]ollowing the receipt” of a DOJ letter, dated December 12, 2017. (App. to Renewed Application for a Stay (Stay Appl.) 117a; *see* App. 117a-124a.) That letter requested block-level citizenship data to enforce the Voting Rights Act’s prohibition against diluting the voting power of minority groups. (App. 125a-127a.) That DOJ request, the Secretary claimed, “initiated” a review process by Commerce to

give the Secretary “all facts and data relevant to the question” (App. 117a). The Secretary reiterated in congressional testimony that DOJ had “initiated the request for inclusion of the citizenship question,” *Hearing on Recent Trade Actions: Hr’g Before the H. Comm. on Ways & Means (March 22 Hr’g)*, 115th Cong. p. 51 (Mar. 22, 2018) (unofficial transcript 2018 WLNR 8951469), and that Commerce was “responding *solely* to [DOJ’s] request” for citizenship data, *Hearing on F.Y. 2019 Dep’t of Commerce Budget: Hr’g Before the Subcomm. on Commerce, Justice, Sci., & Related Agencies of the H. Comm. on Appropriations (March 20 Hr’g)*, 115th Cong. video 36:20 (Mar. 20, 2018) (unofficial transcript 2018 WLNR 8815056) (emphasis added). And the Secretary stated that he was “not aware” of any discussions between himself and any White House officials about the citizenship question. *Id.*

These descriptions of the Secretary’s decision-making process were false, as the Secretary himself later admitted. In June 2018, after this lawsuit had been filed, the Secretary acknowledged in a supplemental decision memorandum that DOJ’s letter had *not* initiated the Secretary’s consideration of adding a citizenship question to the decennial census. To the contrary, the Secretary began considering the citizenship question “[s]oon after [his] appointment as Secretary” in February 2017—almost a year before DOJ’s letter. (App. 116a.) And DOJ had *not* submitted the December 2017 letter on its own initiative, as the Secretary’s March 2018 memorandum suggested. Rather, the Secretary and his staff had approached DOJ to ask if it “would request[] inclusion of a citizenship question.” (App. 116a.) Moreover, today, defendants suddenly acknowledged for the first time that the Secretary in fact spoke to then–White House Chief Strategist Stephen Bannon in September 2017 about the citizenship question—contrary to what he told Congress.

As discovery has revealed, even the June 2018 memorandum failed to characterize accurately the Secretary’s extensive and personal efforts to identify *some* rationale to support the addition of a citizenship question—a process that played out for months before DOJ or its VRA rationale entered the picture. Early in the Secretary’s tenure, at the direction of then–White House Chief Strategist Stephen Bannon, the Secretary spoke with Kris Kobach, the Kansas Secretary of State, who urged the Secretary to add a citizenship question as an “essential” tool to resolve “the problem” of noncitizens’ being counted for purposes of congressional apportionment.¹ (GRA 23-24.) Although Kobach’s email made no mention of the VRA, the Secretary pressed his staff to add a citizenship question to the decennial census and repeatedly and personally intervened when they failed to move quickly. In May 2017, the Secretary asked his staff member Earl Comstock why “nothing [has] been done in response to *my months old* request that we include the citizenship question” (App. 128a (emphasis added))—to which Comstock replied that Commerce would “get that in place” and “work with Justice to get them to request that citizenship be added.” (App. 128a.) Comstock then reached out to both DOJ and the Department of Homeland Security to see if either agency would request the addition of a citizenship question, but both agencies declined. (GRA 35.) And in August and September, the Secretary repeatedly requested updates on whether his staff had accomplished his goal of adding the citizenship question. (GRA 25-33.)

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

Around this time, Acting Assistant Attorney General John Gore became DOJ's point person for communicating with Commerce regarding the Secretary's decision to add a citizenship question. Even though DOJ had earlier declined to submit a request for such a question, in September 2017, Gore contacted the Secretary's Chief of Staff, Wendy Teramoto, to discuss this issue. (GRA 42.) Gore put Teramoto in touch with Danielle Cutrona, an advisor to Attorney General Jeff Sessions. (GRA 41.) Cutrona then arranged a phone call between the Attorney General and the Secretary. (GRA 41, 43.) Cutrona also reassured the Secretary's Chief of Staff that, based on "what John told" her, DOJ "can do whatever you all need for us to do." (GRA 41.) After Teramoto contacted Gore again (GRA 43), Gore wrote the DOJ letter, which was signed by a different DOJ official. (GRA 56-57; App. 127a.)

Throughout this process, the Secretary and his staff never informed the Census Bureau about the Secretary's decision to add a citizenship question or his efforts to get another federal agency to request the question. (GRA 174-176.) When the Bureau's professional staff received DOJ's December 2017 request for citizenship data, they invited DOJ's technical experts to meet to discuss the best way to provide that data, specifically noting that adding a citizenship question would *not* provide the data that DOJ wanted, because such a question would suppress response rates and thus undermine the quality of the data. (GRA 71-72, 75.) Even though such meetings are routine—and sensible, given the Bureau's expertise over demographic data collection—senior DOJ officials, including Gore, rejected the invitation. (GRA 99, 168-171.) The Secretary then forged ahead with adding the citizenship question over the strong objections of the Bureau's professional staff, who informed him that adding the question would undermine the accuracy of the enumeration and thus fail to provide the block-level citizenship data that DOJ claimed to need (GRA 111-119).

B. This Lawsuit

1. Initial proceedings

Plaintiff States and local governments filed suit in April 2018, alleging that the Secretary's decision to add a citizenship question was arbitrary and capricious, in violation of the APA; contrary to law, in violation of the APA; and unconstitutional under the Enumeration Clause. Compl. ¶¶ 178-197. In May 2018, defendants moved to dismiss the complaint, and plaintiffs opposed.

In June 2018, defendants purported to file the complete administrative record of all materials considered by the Secretary in deciding to add the citizenship question. But defendants' administrative record contained scarcely *any* documents from before DOJ sent its December 2017 letter, even though the Secretary had engaged in extensive consideration of the citizenship question long before DOJ's letter. A few weeks later, on June 21, defendants submitted the Secretary's supplemental decision memorandum, which admitted for the first time—in conflict with his initial explanation—that he had pursued a citizenship question for nearly a year before DOJ's letter. (App. 116a.) The parties then filed letters to address the administrative record and discovery.

2. The district court's July 3 order allowing limited discovery on multiple grounds

In July, the district court authorized three categories of limited discovery. (App. 96a-97a.) *First*, the court held that the administrative record was patently deficient and ordered defendants to complete the record. (App. 98a-101a.) The court emphasized that defendants had failed to provide *any* documents predating DOJ's December 2017 letter, despite the Secretary's

concession that he had been deliberating about adding a citizenship question long before that date. (App. 99a.)

Second, the court authorized limited expert discovery to aid the court in adjudicating certain complex issues. (App. 106a-107a.)

Third, the court authorized certain additional discovery based on the irregularity of the record that defendants had produced and a strong showing of “bad faith or improper behavior.” (App. 101a (quotation marks omitted).) The court identified several factors that, taken together, justified this additional discovery, including (a) the Secretary’s admission that he had been pursuing the citizenship question *before* DOJ’s December 2017 letter; (b) the Bureau’s failure to conduct its normal testing procedures; (c) evidence that the Secretary had overruled objections of the Bureau’s professional staff, who warned that the question would “harm the quality of the census count”; and (d) evidence that the Secretary’s stated rationale—to support DOJ’s enforcement of the VRA—was pretextual. (App. 101a-104a.)

The court strictly limited further discovery. The court authorized discovery only from Commerce and DOJ and generally prohibited discovery from other third parties. (App. 104a-105a.) The court limited all plaintiffs to ten fact-witness depositions. (App. 105a.) And the court limited the duration of discovery, ordering completion of all discovery by October 12, and setting multiple intermediate deadlines. (App. 107a-108a.) As the court explained, “time is of the essence here given that the clock is running on census preparations.” (App. 96a.)

3. The decision on the motion to dismiss

Shortly after issuing its discovery order, the court denied defendants’ motion to dismiss in part and granted it in part. The court concluded that plaintiffs had plausibly alleged their

standing, and that sufficient legal standards existed to review the Secretary's decision under the APA. *New York*, 315 F. Supp. 3d at 781-90, 793-98. The court thus allowed plaintiffs' APA claims to proceed. *See id.* at 811. The court dismissed plaintiffs' Enumeration Clause claim for failure to state a claim. *See id.*

4. The August 17 order authorizing Gore's deposition

Among the witnesses plaintiffs sought to depose was Gore, who had written DOJ's December 2017 letter. Defendants opposed Gore's deposition, asserting (without detail) that the information he possesses is "privileged or irrelevant." (GRA 270.)

On August 17, the district court granted plaintiffs' motion to compel Gore's deposition. The court found that Gore had been centrally involved in the exchanges between Commerce and DOJ that led to DOJ's December 2017 letter, and that Gore's testimony would thus shed light on an important part of the Secretary's decision-making process. The court also determined that plaintiffs could not obtain the information possessed by Gore from another source. The court found that sitting for a single deposition would not impose undue burdens on Gore or DOJ. (App. 18a-19a.)

5. The September 21 order authorizing the Secretary's deposition

On September 21, the district court granted plaintiffs' motion to compel the Secretary's deposition, finding that "exceptional circumstances" warranted the deposition. (App. 5a-6a (quotation marks omitted).) *First*, the district court concluded that the Secretary "plainly has unique first-hand knowledge related" to plaintiffs' claims. (App. 6a (quotation marks omitted).) As the court explained, the Secretary's decision would be arbitrary and capricious

if his “stated rationale” for adding the citizenship question “was not his *actual* rationale.” (App. 7a.) And the Secretary has important first-hand knowledge because he was “personally and directly involved” in the “unusual process” that led to his decision. (App. 7a-8a.)

Second, the district court concluded that taking the Secretary’s deposition was “the only way to fill in critical blanks in the current record.” (App. 11a.) As the court explained, plaintiffs had taken the depositions of the Secretary’s three most senior advisors, but each of them had testified that the Secretary “was the only person who could provide” certain critical information; the content of the Secretary’s conversations with Kris Kobach and the Attorney General; and the Secretary’s actual reasons for adding the citizenship question. (App. 11a-12a.)

Third, the district court rejected defendants’ contention that plaintiffs were required to pursue other discovery routes before taking the Secretary’s deposition. The court emphasized that plaintiffs had “already pursued several of these options, yet gaps in the record remain.” (App. 13a.) And the court explained that, in any event, a short deposition of the Secretary would be more efficient and less burdensome given the limited time remaining until the close of discovery and trial. (App. 13a, 16a.)

Finally, to guard against undue burdens on the Secretary, the district court limited the deposition to four hours and required that it take place at a location convenient for the Secretary. (App. 16a.)

6. The Second Circuit’s first denial of mandamus relief

On September 7, 2018—more than two months after discovery began, and with only one month of discovery remaining—defendants petitioned the Second Circuit for mandamus

relief to halt further discovery and to quash the Gore deposition. On discovery, defendants explicitly declined to seek a stay of all discovery and clarified that they were “not seeking relief from those portions of the district court’s July 3 order that require the government to supplement the administrative record or that permit expert discovery on collateral matters such as plaintiffs’ standing.” Defs. Reply Br. (Reply) 17, No. 18-2652, *In re U.S. Dep’t of Commerce* (2d Cir. Sept. 21, 2018), ECF No. 56. Defendants also expressly declined to seek “retrospective relief” for any discovery already turned over. *Id.*

On September 25, 2018, the Second Circuit denied defendants’ first mandamus petition. (App. 3a-4a.) Finding that the district court had “applied controlling case law and made careful factual findings” to support its conclusions, the Second Circuit determined that the district court had not clearly erred in ordering “limited extra-record discovery” based on both “its conclusion that the initial administrative record was incomplete” and its determination that plaintiffs had “made a sufficient showing of ‘bad faith or improper behavior’” by defendants. (App. 4a.)

The Second Circuit also determined that the district court had not clearly erred in finding that exceptional circumstances warranted Gore’s deposition. Noting that Gore wrote the DOJ letter that the Secretary claimed to have relied on in adding the citizenship question, the court found no clear error in the district court’s conclusion that Gore possessed unique first-hand knowledge about relevant issues—including whether “the Secretary used the December 2017 Department of Justice letter as a pretextual legal justification for adding the citizenship question.” (App. 4a.)

7. The Second Circuit's second denial of mandamus relief

Six days after the district court's order authorizing the Secretary's deposition, defendants again petitioned the Second Circuit for mandamus relief. The Second Circuit administratively stayed the Secretary's deposition pending resolution of the mandamus petition (App. 2a) and declined to otherwise stay discovery (App. 129a).

On October 9, the Second Circuit denied defendants' petition. The court concluded that the district court had not clearly abused its discretion in finding that "exceptional circumstances" warrant the Secretary's deposition given the "detailed factual findings" that the Secretary possesses "unique firsthand knowledge central" to plaintiffs' claims. (App. 131a.) As the Second Circuit explained, "deposition testimony by three of Secretary Ross's aides indicated that only the Secretary" could provide critical information about whether the Secretary used DOJ's December 2017 letter as a pretextual justification for adding the citizenship question. (App. 131a.)

8. Defendants' stay requests

Ostensibly to comply with this Court's Rule 23.3, defendants have sought multiple stays of discovery and of the depositions of Gore and the Secretary during the proceedings described above. As relevant here, on September 28, defendants asked the district court to stay all discovery. On September 30, the district court declined to issue any stay. The court explained that defendants' request to stay *all* discovery was "particularly frivolous—if not outrageous—given their inexplicable (and still unexplained) two-month delay in seeking that relief, and their representation to the Second Circuit only last week that they were *not* actually seeking a stay of all discovery." (GRA 246 (citation omitted).) The court also declined to stay

the depositions of Gore and the Secretary. (GRA 246.) Defendants sought corresponding stays from the Second Circuit. The Second Circuit continued its administrative stay of the Secretary's deposition for forty-eight hours. On October 9, the Second Circuit also granted an administrative stay of Gore's deposition for thirty-six hours. However, that order denied defendants' request to stay all documentary discovery, noting that such broad relief "was not sought in [defendants'] initial mandamus petition." (GRA 248.)

Also on October 9, defendants renewed a prior application for a stay of discovery to this Court, including but not limited to the depositions of the Secretary and Gore. Justice Ginsburg temporarily stayed three of the district court's orders—the July 3 order authorizing discovery, the August 17 order authorizing Gore's deposition, and the September 21 order authorizing the Secretary's deposition.

9. The current status of discovery

Pursuant to the district court's July 3 discovery order, defendants have to date supplemented their original, patently deficient record—which consisted of only 190 documents totaling 1,320 pages—with several thousand additional pages that have filled some but not all of the gaps in the original record. Defendants also produced five fact witnesses from Commerce and the Bureau for depositions, received the expert reports of all seven of plaintiffs' experts (and deposed six of those experts), and served plaintiffs' with an expert report from their expert witness.

Discovery is scheduled to close tomorrow, October 12. When Justice Ginsburg issued a temporary stay, only three days of discovery remained. That discovery included five depositions of defendants' fact and expert witnesses. In addition, defendants have yet to

produce additional documents from Commerce and DOJ that are needed to complete the administrative record, and to respond to plaintiffs' requests for admission and interrogatories.

ARGUMENT

This Court will grant a stay pending its review of a forthcoming mandamus only in “extraordinary cases.” *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (quotation marks omitted). The party requesting a stay “bears the burden of showing that the circumstances justify an exercise of [judicial] discretion” to grant such extraordinary relief. *Indiana State Police Pension Trust v. Chrysler LLC*, 556 U.S. 960, 961 (2009) (per curiam).

Here, defendants have failed to satisfy their heavy burden of showing that the equities warrant a stay of all further discovery or an order constraining the district court's forthcoming review of the merits of plaintiffs' claims. *See Barnes v. E-Systems, Inc. Group Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304-05 (1991) (Scalia, J., in chambers). Defendants have also failed to show either “a fair prospect that a majority of the Court will vote to grant mandamus and a likelihood that irreparable harm will result from the denial of a stay,” as is required to obtain a stay pending disposition of a petition for a writ of mandamus.² *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). Given the district court's careful management of the proceedings below and the highly unusual circumstances that led

² Because defendants challenge the district court's interlocutory discovery orders, rather than a “final judgment,” they cannot obtain a stay pending disposition of any forthcoming petition for certiorari. *See* 28 U.S.C. § 2101(f). Even if such relief were available, defendants have not shown that this Court would likely grant certiorari. At most, defendants claim that the district court erred in applying settled law. But this Court “rarely” grants certiorari to correct “the misapplication of a properly stated rule.” Sup. Ct. R. 10.

the court to allow limited discovery, including deposition testimony, there is no basis for this Court's extraordinary intervention in ongoing pretrial proceedings.

I. THE COURT SHOULD DENY DEFENDANTS' REQUEST TO STAY ALL FURTHER DISCOVERY AND TO CONSTRAIN THE DISTRICT COURT'S FORTHCOMING REVIEW OF PLAINTIFFS' CLAIMS

A. The Balance of the Equities Tilts Sharply Against a Stay of All Further Discovery.

Defendants have asked this Court to stay the district court's July 3 order, which authorized several categories of additional discovery and set an expedited discovery schedule that was scheduled to conclude tomorrow, October 12. While defendants' application purports to limit their requested relief to a stay of all "discovery beyond the administrative record" (Stay Appl. 40), defendants have broadly interpreted Justice Ginsburg's temporary stay and have refused to complete the last few outstanding items of discovery, including depositions of four fact witnesses (aside from the Secretary and Gore), various overdue document productions, and responses to interrogatories and requests for admissions. On equitable grounds alone, this Court should deny a stay of the limited amount of discovery that remains. *See Barnes*, 501 U.S. at 1305.

First, defendants seek relief that is far broader than the relief they requested from the courts below. As the Second Circuit recently noted in denying defendants' request for a stay of further discovery, defendants never sought a stay of *all* discovery authorized by the July 3 order. (GRA 248.) To the contrary, defendants expressly disclaimed any request for relief from the portions of the order requiring completion of the administrative record and permitting expert discovery. Reply 17. And aside from the depositions of the Secretary and Gore,

defendants have never raised any objections specific to the other fact and expert depositions authorized by the July 3 order. Nor have defendants sought a single protective order from the district court to limit further discovery in any way. Because defendants have failed to preserve any objections specific to most of the remaining discovery ordered by the district court, this Court should decline their request to stay all such discovery. *See Sprietsma v. Mercura Marine*, 537 U.S. 51, 56 n.4 (2002).

Second, defendants' extreme delay in seeking relief from further discovery counsels strongly against a stay. *See Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (Marshall, J., in chambers). Defendants waited more than *two months* before seeking any appellate relief from the July 3 order, and because of this delay, a stay at this point would affect only the last three days of a more-than-three-month discovery schedule. Defendants have never explained the reason for taking months to seek the relief that they now insist they need on an emergency basis. Their "failure to act with greater dispatch tends to blunt [their] claim of urgency." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317-18 (1983) (Blackmun, J., in chambers).

Third, apart from the depositions of the Secretary and Gore, defendants do not claim that they will suffer any harm, much less irreparable harm, from completing the last three days of discovery. *See, e.g., Conkright*, 556 U.S. at 1402. Indeed, the only mention of harm in defendants' application (at 7) is that two "high-level Executive Branch officials will be forced to prepare for and attend the[ir] depositions." For the other discovery that remains, defendants have identified no practical burden, no specific concerns about privilege, and no other injury. If any such concerns arise, defendants can seek relief first in the district court, which has promptly resolved such disputes. That "corrective relief will be available at a later date, in the

ordinary course of litigation,” provides further reason to deny a stay of discovery here. *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (quotation marks omitted).

Finally, continuing the stay of further discovery will prejudice plaintiffs. Trial in this action is scheduled to begin on November 5—a date the district court set because of the imperative of resolving this case expeditiously, given the statutory and practical deadlines that apply to the conduct of the census. The district court has set extremely tight deadlines for pretrial memoranda, motions in limine, exhibit lists, and defendants’ anticipated summary judgment motion. *See* No. 18-cv-2921, ECF Nos. 199, 323, 362, 363 (S.D.N.Y.). Delaying completion of discovery will make it more difficult for the parties to finish their pretrial work and preparation.

B. There Is No Basis to Constrain the District Court’s Forthcoming Review of Plaintiffs’ Claims.

Defendants ask this Court direct the district court to confine its review of the Secretary’s decision to the administrative record. Stay Appl. 20. But defendants never requested such relief below; to the contrary, they represented to the Second Circuit that they were seeking no “retrospective relief” for discovery they had already produced. Reply 17. This Court should accordingly decline to entertain defendants’ effort to constrain the district court’s adjudication of the merits. *See Stern v. Marshall*, 564 U.S. 462, 481-82 (2011) (discussing forfeiture of arguments).

Defendants’ request is also premature. Trial is less than a month away, and the parties have not made—and the district court has not resolved—motions in limine. There is no reason for this Court to decide the scope of the district court’s review of the merits when the district court has yet to do so. *See Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005). In any event,

defendants’ ability to seek relief from the district court further counsels against a stay pending an application for mandamus relief, which is unavailable when a party has “other adequate means” of obtaining the relief it seeks. *Cheney v. United States Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 380 (2004) (quotation marks omitted).

II. THE COURT SHOULD DENY DEFENDANTS’ REQUEST TO STAY THE DEPOSITIONS OF SECRETARY ROSS AND ACTING AAG GORE

A. Defendants Have No “Clear and Indisputable” Right to Halt the Depositions.

Mandamus is “a ‘drastic and extraordinary’ remedy ‘reserved for really extraordinary causes.’” *See Cheney*, 542 U.S. at 380. To obtain such relief, defendants must show that they have a “clear and indisputable” right to quash a four-hour deposition of the Secretary. *Id.* (quotation marks omitted). Defendants have not established any such entitlement here.

1. Defendants principally argue that the district court clearly erred in allowing *any* extra-record discovery because APA review here is limited to “the reasons the Secretary gave” for his decision and to the administrative record he elected to produce to support that rationale. Stay Appl. 35; *see id.* at 23. But as defendants acknowledge (*id.* at 24), this Court has long held that this default “record rule” does not apply when there has been “a strong showing of bad faith or improper behavior,” or where “the bare record may not disclose the factors that were considered or the Secretary’s construction of the evidence,” *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). These circumstances warrant additional discovery—including potentially requiring “the administrative officials who participated in the decision to give testimony explaining their action,” *id.*—precisely because they raise serious doubts about the accuracy and comprehensiveness of the agency’s public justification, as well

as questions about the validity of the agency's determination. *See Woods Petroleum Corp. v. United States Dep't of Interior*, 18 F.3d 854, 859-60 (10th Cir. 1994) (setting aside agency action because "sole reason" for that action was "to provide a pretext" for the agency's "ulterior motive"), *adhered to on reh'g en banc*, 47 F.3d 1032 (10th Cir. 1995).

These exceptions to the "record rule" are bedrock principles of administrative law, and the district court did not clearly err in relying on them here. As this Court has repeatedly recognized, the courts' fundamental responsibility under the APA is to conduct a probing review of the actual basis on which an agency issued a challenged decision to decide whether that decision was arbitrary, capricious, or otherwise contrary to law. In the ordinary case, the agency's stated rationale and the administrative record it provides will enable a court to responsibly conduct this review. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973). But when there has been "a strong showing of bad faith or improper behavior" that calls into question whether the agency's stated rationale is pretextual, "effective judicial review" is impossible without further inquiry to confirm the agency's actual rationale. *Overton Park*, 401 U.S. at 420; *see also Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-68 (1962) ("[F]or the courts to determine whether the agency has" properly exercised its statutory duties, "it must disclose the basis of its order." (quotation marks omitted)). And when, as here, there are indications that an agency has *concealed* its actual rationale, additional discovery is particularly important because the act of concealment raises substantial concerns that the agency is masking an improper motivation. *Cf. Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) ("[T]he trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.").

Relatedly, as defendants do not dispute, additional discovery beyond the administrative record initially produced by the agency may be appropriate “when it appears [that] the agency has relied on documents or materials not included in the record.” *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988) (quotation marks omitted). As courts have explained, when it appears that an agency has failed to provide the “whole record” required by the APA, 5 U.S.C. § 706, a court must permit “limited discovery to explore whether some portions of the full record were not supplied” and ensure that the court receives all materials considered by the agency. *Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982); accord *Kent Cty., Del. Levy Court v. EPA*, 963 F.2d 391, 396 (D.C. Cir. 1992). That discovery may require the agency to disclose all of the information that the agency “directly or indirectly” considered, *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993), including “evidence contrary to the agency’s position,” *Thompson v. United States Dep’t of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (quotation marks omitted). Additional discovery is authorized in such circumstances because an agency’s failure to be forthright in its initial production of the administrative record raises serious questions about the reliability and regularity of its processes. See *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993).

2. Because well-established law authorizes discovery beyond the administrative record (including testimony by agency officials) under appropriate circumstances, the only question here is whether the district court clearly abused its discretion in finding that those circumstances were satisfied here. (App. 4a, 95a-104a, 131a.) Defendants have not identified any severe abuse of discretion in the district court’s “careful factual findings” (App. 4a) that

would warrant the extraordinary remedy of a stay or mandamus to quash the Secretary's deposition.

a. As the district court found, several extraordinary circumstances unique to this case provided a sufficiently strong showing of bad faith or improper conduct by defendants to call into serious question whether the Secretary's stated rationale for adding the citizenship question—DOJ's purported need for citizenship data to enforce the VRA—was his actual rationale.

Most striking, in announcing his determination, the Secretary initially gave an explanation to the public and to Congress that he reversed in material ways several months later when he adopted the new explanation that he now presents. When the Secretary announced his decision in March 2018, he stated that he "initiated" his consideration of the citizenship question *after* receiving DOJ's December 2017 letter. (App. 117a.) And the Secretary provided this same explanation in congressional testimony, repeatedly identifying DOJ's December 2017 letter as the sole factor that triggered Commerce's decision-making process. But as the Secretary's June 2018 supplemental decision memorandum later revealed, this account was false. In fact, the Secretary, not DOJ, initiated the process to add a citizenship question, nearly a year before DOJ's December 2017 letter and long before the Secretary was aware of any purported need for citizenship data to enforce the VRA. And it was the Secretary and his staff who worked with DOJ to obtain a letter that would make it appear as though DOJ had independently initiated a request for citizenship data. (*See* App. 116a.)

This extraordinary reversal strongly supports the district court's bad-faith finding. The initially concealed fact of the Secretary's earlier efforts to add a citizenship question raised substantial doubt about whether the Secretary decided to add the question only in March 2018,

as he claimed, or had actually reached this decision much earlier. Moreover, the surprising disclosure of the Secretary’s active role in soliciting and crafting DOJ’s December 2017 letter called into question whether the Secretary’s public reliance on the letter was pretextual—manufactured as a post hoc explanation for a decision the Secretary had already made for other, still-unacknowledged reasons. *See, e.g., Tummino v. von Eschenbach*, 427 F. Supp. 2d 212, 231-33 (E.D.N.Y. 2006); *New York v. Salazar*, 701 F. Supp. 2d 224, 242 (N.D.N.Y. 2010). And the Secretary’s belated revelation of a nearly yearlong deliberative process, referred to nowhere in his initial public announcement, triggered significant concerns that defendants had not provided all the information that the Secretary directly or indirectly considered in reaching his decision. *See infra* at 28. Indeed, these concerns have continued to deepen as recently as today, when defendants acknowledged after months of discovery that the Secretary had spoken to Stephen Bannon in September 2017, about the citizenship question. Given these exceptional circumstances and the questions they raised, the district court did not clearly abuse its discretion in authorizing limited additional discovery to confirm when the Secretary reached his decision, why he decided to add the citizenship question, and what information he relied on in making that determination.³

b. To counter the district court’s finding that the Secretary appeared to mislead the public and Congress in his initial justification for adding a citizenship question, defendants assert that the Secretary merely *omitted* relevant information from his March 2018 decision

³ The limited scope of discovery here distinguishes this case from *In re United States*, where the district court ordered “overly broad” discovery, 138 S. Ct. 443, 445 (2017) (*per curiam*). And unlike in that case, the district court here has already resolved defendants’ dismissal motion, so defendants do not need a stay to determine whether threshold arguments will eliminate the need for discovery. *Id.* at 445.

memorandum, and carefully parse the Secretary’s initial memorandum and congressional testimony to assert that his “admittedly imprecise” language should not be interpreted as intentionally misleading. Stay Appl. 36-37. But defendants’ strained reading of the Secretary’s words is simply not plausible—and comes nowhere close to showing that the district court clearly abused its discretion in coming to a contrary conclusion about the truthfulness of the Secretary’s public statements. For example, when questioned on the legitimacy of the VRA-enforcement rationale, the Secretary emphasized that “the Justice Department is the one *who made the request of us,*” masking his own active role in DOJ’s request. *Hearing on the F.Y. 2019 Funding Request for the Commerce Dep’t: Hr’g Before the S. Appropriations Comm*, 115th Cong. video 1:35 (May 10, 2018) (emphasis added) (unofficial transcript 2018 WL 2179074).

What these statements did (and were intended to) convey was that the Secretary was merely deferring to DOJ’s independent judgment about the need for citizenship data in an area of DOJ expertise—a façade that allowed the Secretary to disguise his own role in instigating DOJ’s letter and pushing for a citizenship question. Contrary to defendants’ contentions, the Secretary’s strategic omission of his considerable pre-December 2017 actions *did* make his statements to the public and Congress deeply misleading by presenting DOJ, rather than the Secretary, as the motivating force for the decision.

c. Although the Secretary’s reversal of his initial explanation for adding the citizenship question alone supports the district court’s finding of bad faith, the district court also did not plainly err in identifying additional factors that, taken together, raise serious questions about whether the Secretary had invoked DOJ’s December 2017 letter as a pretextual justification for adding the citizenship question.

For example, the Secretary decided to add a citizenship question without employing the rigorous process that the Bureau uses for even minor alterations of the census questionnaire, and over the strong and continuing objections of the Bureau’s experts. (App. 102a.) That process was a drastic departure from the well-established procedures that the Bureau typically follows.⁴ See *Tummino*, 427 F. Supp. 2d at 233; *Inforeliance Corp. v. United States*, 118 Fed. Cl. 744, 747-48 (2014).

The district court further had reasonable grounds to question the provenance of DOJ’s December 2017 letter. Defendants criticize the district court for not “engag[ing] with the reasons set forth” in the letter (Stay Appl. 28), but that argument simply misconceives the nature of the district court’s concerns, which were based principally on the circumstances of the letter’s creation. That DOJ’s letter did not emerge organically, but rather was the result of lobbying by and collaboration with the Secretary and his staff, raised serious concerns that DOJ’s request was itself pretextual. Those concerns were amplified by the fact that DOJ officials (including Gore) refused to meet with the Bureau’s staff to hear their views that adding a citizenship question would actually *undermine* VRA enforcement by harming the quality of the census count, and that there were better, alternative means to obtain the data that DOJ had requested. (GRA 71-72, 99, 168-171.) It remains unclear why DOJ officials ostensibly dedicated to obtaining accurate block-level citizenship data for VRA enforcement

⁴ Defendants assert (Stay Appl. 27-28) that the Secretary’s decision-making adhered to normal procedures because the citizenship question underwent testing for inclusion on the ACS. But defendants do not dispute that the census questionnaire usually goes through its own distinct multiyear testing process—one that the citizenship question has not undergone. And the Secretary’s decision departed from established procedures in other significant ways: for instance, the Secretary and his subordinates worked directly with DOJ officials, including Gore, without ever involving (or even notifying) officials at the Bureau. (GRA 174-176.)

would decline even to discuss pointed concerns on that subject raised by the Bureau's experts. And contrary to defendants' arguments (Stay Appl. 28), the questionable nature of DOJ's letter is relevant to the Secretary's decision-making, given the Secretary's direct role in inducing that letter and his subsequent reliance on that letter as the sole justification for adding a citizenship question.

3. The district court also did not plainly abuse its discretion in concluding that additional discovery was warranted here based on defendants' failure to provide the whole record on which the Secretary based his decision. In this Court, defendants repeatedly invoke the "extensive administrative record" produced below as a basis to halt further discovery, including the depositions of the Secretary and Gore. Stay Appl. 4. But this argument conveniently omits the fact that defendants first filed a patently deficient administrative record, and that the extensive record below was compelled over defendants' strenuous objections and was a direct result of the July 3 order that defendants now seek to stay or overturn. As a result, far from supporting defendants' invocation of the default "record rule" to resist further discovery (Stay Appl. 3, 5, 32), the extensive administrative record below in fact confirms that the district court acted well within its discretion in compelling additional discovery here.

Indeed, the discovery authorized by the district court so far, including deposition testimony, has confirmed that the district court had good reason to question the reliability of the Secretary's stated rationale and initial record. Much of what we now know about the Secretary's pursuit of the citizenship question for nearly a year before DOJ's December 2017 letter comes from the discovery compelled by the July 3 order. The current administrative record thus does not remotely suggest that the additional discovery ordered by the district court, including deposition testimony, is unnecessary.

4. Nearly all of defendants' objections to the Secretary's deposition presume the legitimacy and regularity of the Secretary's stated rationale and simply ignore the actual and extraordinary circumstances found by the district court here.

For example, defendants incorrectly characterize this case as one where the Secretary simply "favor[ed] a particular outcome *before* fully considering and deciding an issue" (Stay Appl. 25 (emphasis added)) in ordinary consultations with other government officials (*id.* at 34). Defendants similarly assert that the Secretary "sincerely believe[d]" the ground on which he rested his decision and had not "prejudg[ed]" the issue (*id.* at 25-26). But the district court did not clearly err in finding these characterizations inconsistent with the record evidence. That evidence shows that the Secretary had decided to pursue the citizenship question long before he was even aware of DOJ's purported need for citizenship data to enforce the VRA. See *infra* at 32-33. The evidence further shows the Secretary did not merely solicit input from other government officials, but rather actively collaborated with them to provide a cover rationale for a decision he had already made based on other, still-unacknowledged reasons. See *infra* at 32-33. And it is undisputed that the Secretary disregarded his own experts' strong opposition to adding a citizenship question. (GRA 18, 25, 29, 44, 53.) At minimum, the deep uncertainty about when, how, and even whether the Secretary came to adopt his stated rationale supported the narrow additional discovery that the district court has been carefully managing.

Defendants err (Stay Appl. 3) in characterizing the discovery ordered by the district court here as an effort to probe the Secretary's "mental processes" and "subjective motivations." The purpose of that discovery, including the Secretary's deposition, is to determine the actual basis and rationale for the Secretary's determination, in light of serious doubts about whether the stated rationale is pretextual. As this Court has recognized, such

discovery is not an improper “inquiry into the mental processes of administrative decisionmakers,” but rather a legitimate attempt to discern the true basis for agency action when “the bare record may not disclose the factors that were considered.” *Overton Park*, 401 U.S. at 420.

At bottom, defendants’ arguments simply beg the question at the heart of this dispute by assuming the accuracy and completeness of the Secretary’s public justification for adding the citizenship question and insisting on that basis that any exploration of information that they did not choose to provide is categorically barred. But the well-established exceptions to the default “record rule” identify the circumstances when that presumption of regularity may be rebutted and additional discovery would be not only permissible but essential for effective judicial review of the agency’s actions. Because the district court did not clearly err in finding that the unusual circumstances of this case satisfied these exceptions, defendants cannot to satisfy the stringent requirements to obtain mandamus relief, and this Court should deny the request to stay the depositions of the Secretary and Gore on that basis.

B. The District Court Did Not Clearly Abuse Its Discretion in Finding That Exceptional Circumstances Warrant the Secretary’s Deposition.

1. More than two months after appropriately authorizing limited extra-record discovery, the district court resolved the separate question of whether that discovery should include a deposition of the Secretary. In doing so, the district court relied on well-accepted principles about when testimony from a high-ranking official is properly authorized. As defendants concede (Stay Appl. 29-30), the standards set forth by the Second Circuit in *Lederman*, which the district court applied here, reflect a broad consensus that a court may order a high-level official’s deposition when “exceptional circumstances” warrant such a

deposition—including when “the official has unique first-hand knowledge related to the litigated claims” or “the necessary information cannot be obtained through other, less burdensome or intrusive means.” *Lederman*, 731 F.3d at 203; accord, e.g., *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007); *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985). As the district court correctly observed (App. 14a), where such exceptional circumstances are present, “courts have not hesitated to take testimony” from cabinet members, other federal agency heads, and even a sitting president. See, e.g., *Clinton v. Jones*, 520 U.S. 681, 705-06 (1997) (President); *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 33 (D.D.C. 1999) (Secretary of the Interior), *aff’d*, 240 F.3d 1081 (D.C. Cir. 1999). Indeed, 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 Bureau. (See GRA 260-264.)

This significant but attainable threshold for allowing the deposition of a high-level official disposes of the general separation-of-powers principles on which defendants rely (Stay Appl. 30-31) in seeking to quash the Secretary’s deposition. By requiring exceptional circumstances to authorize a high-level official’s deposition, courts ensure that such officials are not routinely required to take time and energy away from their public duties to sit for depositions. But where exceptional circumstances exist, interbranch comity does not bar the courts from authorizing depositions of high-level officials to elicit their unique, personal knowledge about matters directly relevant to a litigated issue. To the contrary, not even a sitting president is immune from having to give testimony in a civil lawsuit if the circumstances necessitate such testimony. *Jones*, 520 U.S. at 704 (“Sitting Presidents have responded to court

orders to provide testimony and other information with sufficient frequency that such interactions . . . can scarcely be thought a novelty.”).

2. There is no fair prospect that defendants will succeed at showing that the district court clearly erred in finding that exceptional circumstances warrant the Secretary’s deposition here under the unique circumstances of this case. Indeed, nearly three months of discovery has shown that only the Secretary can provide information about critical questions relevant to plaintiffs’ claims.

a. *Unique First-Hand Knowledge:* As the district court observed, the Secretary was “personally and directly involved” in nearly every aspect of the “unusual process” that led to his decision to add the citizenship question. (App. 8a) For example:

- In early 2017, at the direction of then–White House Chief Strategist Stephen Bannon, the Secretary spoke with Kris Kobach, who urged the Secretary to add a citizenship question as an “essential” tool to resolve “the problem” of noncitizens being counted for congressional apportionment. (GRA 16, 23-24.) Kobach’s email made no mention of the VRA.
- In March 2017, the Secretary’s chief policy advisor, Earl Comstock, responded to the Secretary’s “question on the census” by discussing whether the census’s total-population count must include noncitizens. The email did not discuss the VRA. (GRA 13-15.)
- In May 2017, the Secretary demanded to know why no action had been taken on his “*months old request*” to include the citizenship question. (GRA 18 (emphasis added).) This demand set off a flurry of activity among the Secretary’s staff, including discussions about the legal basis for counting “illegal immigrants” in the census. (GRA 20-22.)
- In August and early September 2017, the Secretary sent multiple emails to his staff demanding updates, briefings, and meetings about adding the citizenship question. Although one of these emails references DOJ and offers to call the Attorney General (GRA 25), none of them mentions the VRA (GRA 25-34).
- On September 8, 2017, Comstock informed the Secretary about his failed efforts to find an agency to sponsor the citizenship question, explaining that he had previously reached out to DOJ and the Department of Homeland Security, but that both agencies declined

to request the citizenship question. The memorandum stated that the Secretary's staff had been working on "how Commerce could add the question to the Census itself." (GRA 35.)

- In mid-September 2017, the Secretary spoke to the Attorney General about the citizenship question. No details of that conversation exist. (GRA 43-44.) As a result of that conversation, Gore drafted DOJ's letter. (GRA 41-42, 56.)

Defendants do not seriously dispute the Secretary's direct and personal involvement in the decision to add a citizenship question. But they argue (Stay Appl. 31) that a deposition of the Secretary is unnecessary because his decision must be evaluated based solely on his stated justification and proffered administrative record, without further inquiry into his "intent and credibility." This argument simply restates defendants' objection to extra-record discovery as a threshold matter and fails for the reasons already discussed.

Defendants also argue that the Secretary's personal involvement, including his direct conversations with various officials and outside stakeholders, was not "unusual" because high-level officials are often personally involved in important decisions and frequently consult with others. Stay Appl. 34. This argument mischaracterizes the district court's reasoning. What the district court found distinctive was the Secretary's personal involvement in "the *unusual process*" leading to the decision to add a citizenship question (Add. 8a (emphasis added))—the same process that raised serious questions whether the Secretary's stated reliance on DOJ's December 2017 letter was pretextual. The district court did not clearly abuse its discretion in relying on the Secretary's central, personal, and indispensable role in the key events underlying plaintiffs' claims as a basis for ordering his deposition.

b. *No Other Means to Obtain the Same Information:* The district court properly concluded that the critical information that the Secretary possesses "cannot be obtained through other, less burdensome or intrusive means." (App. 6a (quoting *Lederman*, 731 F.3d at

203).) Contrary to defendants' characterization, the court did not "jump[] straight to ordering" the Secretary's deposition (Stay Appl. 33), but rather declined to authorize the deposition at the outset of discovery while plaintiffs first attempted other reasonable discovery mechanisms. Since then, plaintiffs have diligently sought to obtain the information they need about the Secretary's decision-making without testimony from the Secretary, including by submitting interrogatories and taking the depositions of the Secretary's three most senior advisors. Despite these extensive efforts, "critical blanks in the current record" remain that only a deposition of the Secretary will fill. (App. 11a.)

Indeed, all three of the Secretary's senior advisors "testified repeatedly that Secretary Ross was the only person who could provide certain information" concerning the material that he directly or indirectly considered or the actual rationale for his final determination. (App. 11a.) For example, the Secretary's advisors could not provide any details about the Secretary's pre-December 2017 conversations with other officials and third parties, such as Kris Kobach and the Attorney General, even though the Secretary has now admitted that his deliberations about the citizenship question long predated DOJ's December 2017 letter. For instance, Teramoto did not know the substance of the Secretary's conversations with Kobach, could not remember her own conversation with Kobach in July 2017, and could not remember participating in the Secretary's September 2017 phone conversation with the Attorney General. (GRA 24, 134-141, 147, 163-166; *see* GRA 44.) And Comstock had no information about the substance of the Secretary's conversations with Kobach, and had not asked the Secretary about those conversations. (GRA 123-124.) The Secretary's deposition is thus necessary to uncover the nature of his deliberations during the critical period before DOJ's December 2017 letter.

Moreover, all three of the Secretary’s senior advisors have insisted that they lack any information about the Secretary’s reasons for pursuing the addition of a citizenship question for months before DOJ’s letter and before he was aware of any purported VRA-enforcement rationale. For instance, Teramoto testified that she had “no idea” why the Secretary had requested to add the citizenship question before speaking to DOJ. (GRA 132-133.) Comstock claimed that he had never asked the Secretary about his reasons for wanting to add the citizenship question, testifying that he did not “need to know what [the Secretary’s] rationale might be, because it may or may not be one that is . . . a legally valid basis.” (GRA 128; *see* GRA 128 (“You’d have to . . . ask [the Secretary].”).)

The Secretary’s deposition is thus the only means by which the district court can obtain critical facts about the rationale that animated the Secretary’s extensive efforts to add the citizenship question—facts that are central to understanding the Secretary’s actual rationale, evaluating plaintiffs’ claims of pretext, and ultimately determining whether the Secretary’s decision was arbitrary and capricious.

Contrary to defendants’ contention (Stay Appl. 32-33), the district court did not clearly err in declining to require plaintiffs to continue pursuing other discovery mechanisms before taking the deposition of the Secretary. Plaintiffs have already pursued several of defendants’ suggested options, “yet gaps in the record remain.” (App. 13a.) For example, multiple interrogatories and depositions have failed to identify the “senior Administration officials” whom the Secretary identified as first raising the issue of the citizenship question with him. (App. 12a.) Requiring plaintiffs to issue further interrogatories or requests for admission, or to depose yet other Commerce officials who will also not be aware of the Secretary’s decision-making process, would be less effective and more burdensome than simply deposing the

Secretary himself. Moreover, given the looming November 5 trial date and the interim pretrial deadlines before then, a deposition is the quickest and most efficient way to fill the gaps in the record, since depositions allow for “immediate follow-up questions” and objections rather than protracted written exchanges. *Fish v. Kobach*, 320 F.R.D. 566, 579, *review denied*, 267 F. Supp. 3d 1297 (D. Kan. 2017).

c. Finally, defendants have failed to establish that making the Secretary available for a mere four hours of deposition testimony would impose any undue burden on the Secretary or Commerce. Before Justice Ginsburg’s temporary stay, defendants had provided a date on which the Secretary was available, and they have not denied that the Secretary could be made available on another date if his deposition were to proceed. While the Secretary is a cabinet member with important responsibilities, the district court appropriately respected his position by imposing numerous limitations on the deposition, such as restricting its duration and requiring that it take place at a location convenient for the Secretary.

C. The District Court Did Not Clearly Abuse Its Discretion in Ordering Gore’s Deposition.

Defendants also seek to stay or quash the deposition of John Gore. This Court should deny this request as well. Gore’s deposition satisfies the “exceptional circumstances” test, particularly given his substantially lower rank than the Secretary. Gore has “unique first-hand knowledge,” *Lederman*, 731 F.3d at 203, about a central issue in this case—whether the Secretary’s decision to add a citizenship question was based on a pretextual rationale or was otherwise arbitrary and capricious. Indeed, Gore was DOJ’s point person in discussions with the Secretary’s Chief of Staff on Commerce’s request that DOJ become involved in the citizenship-question issue and DOJ’s decision to “do whatever you all need us to do.” (GRA

41.) Because Gore was involved in that process, and ultimately authored the letter that the Secretary requested, his testimony is not merely “relevant” (Stay Appl. 38), but essential to illuminate a critical moment in the Secretary’s decision-making.

Gore’s testimony will also help the district court evaluate the legitimacy of DOJ’s claim that it needs citizenship data. As discussed, there are substantial reasons to question whether DOJ’s request was itself pretextual, given evidence indicating that DOJ officials (including Gore) were not genuinely interested in obtaining accurate citizenship data. Gore’s testimony will shed light on this question.

The critical information that Gore possesses “cannot be obtained from another source.” (GRA 258 (emphasis omitted).) Gore is the DOJ official who wrote DOJ’s letter. Gore also personally engaged in multiple conversations about the citizenship question with the Secretary’s Chief of Staff, but the record does not document the contents of those conversations. Indeed, during her deposition, the Chief of Staff could not recall the contents of these conversations or even having spoken to Gore. (GRA 131-172.) Plaintiffs have thus been unable to obtain the information they need about Gore’s deep involvement in crafting the DOJ letter.⁵

⁵ The district court also did not clearly err in rejecting defendants’ generic claims that any testimony from both the Secretary and Gore will be privileged. As the district court correctly observed, there is no blanket exemption from being deposed based on unspecific privilege claims. And defendants may raise any specific claims of privilege later during the depositions. (Add. 19a.)

CONCLUSION

For the reasons stated above, the Court should deny the renewed application.

Dated: New York, New York

October 11, 2018

Respectfully submitted,

BARBARA D. UNDERWOOD*

Attorney General

State of New York

STEVEN C. WU

Deputy Solicitor General

JUDITH N. VALE

Senior Assistant Solicitor General

SCOTT A. EISMAN

Assistant Solicitor General

MATTHEW COLANGELO

Executive Deputy Attorney General

ELENA GOLDSTEIN

Senior Trial Counsel

Division of Social Justice

**Counsel of Record*

GOVERNMENT RESPONDENTS' APPENDIX



U. S. Department of Justice

Justice Management Division

Office of General Counsel

Washington, D.C. 20530

JUN 25 2014

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

Re: Legal Authority for American Community Survey Questions

Dear Mr. Welsh:

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

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

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

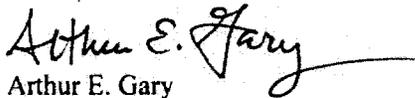
000278

GRA1

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

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

Sincerely yours,



Arthur E. Gary
General Counsel

Attachment

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

000279

GRA2

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

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

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

Statutory Requirement	Citations	Classification	Uses	Lowest geography	ACS Characteristics	Frequency
Title VI of Civil Rights Act of 1964 (Nondiscrimination in federally assisted programs and activities)	42 USC 2000d to 2000d-7; <i>Leu 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, LAN, INC, AGE, HIS	Annual
Executive Order 13166: Improving Access to Services for Persons with Limited English Proficiency	65 Fed. Reg. 50,121 (August 16, 2000)	R	Used by federal agencies and recipients of federal financial assistance to provide, identify any need for services to those with limited English proficiency (LEP) in order to comply with the prohibition against national origin discrimination programs and activities receiving federal financial assistance and federally-conducted programs and activities.	Census block group	ANC, LAN, INC, AGE, HIS	Annual
Fair Housing Act of 1968	42 U.S.C. 3601 et seq.; 24 C.F.R. 100.500	P	Used in enforcement efforts to eliminate and remedy unlawful discrimination in housing.	Census block group	SEX, HISP, RACE, ANC, DIS, INC, HHREL, STRUC, YRBUILT, TEN, VAL, RENT	Annual
Equal Credit Opportunity Act	15 U.S.C. 1691 et seq.	P	Used in enforcement efforts to eliminate and remedy unlawful discrimination in lending.	Census block group	SEX, AGE, HISP, RACE, VAL, ANC, MS, INC, TEN	Annual

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

Statutory Requirement							
Title	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, LE, POW, JTW, OCC, IND, INC, WSLY.	Annual	
Civil Rights Act of 1964 (Rights to Public Education and Equal Educational Entitlement)	42 U.S.C. 2000c et seq.	R	Used in the enforcement of nondiscrimination in education by state and local governments, including monitoring desegregation.	Place	AGE, SEX, RACE, ANC, HISP, ATT, ENR.	Annual	
Equal Educational Opportunities Act of 1974	20 U.S.C. 1701 et seq.; <i>Castaneda v. Pickard</i> , 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. Atonio</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 General Counsel

Washington, D.C. 20530

November 4, 2016

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

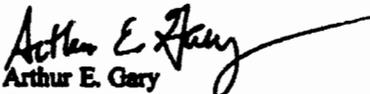
Re: Legal Authority for American Community Survey Questions

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 populations. The attached spreadsheet accurately reflects the legal authority supporting the necessity for the collection of this information.

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

Sincerely yours,


Arthur E. Gary
General Counsel

Attachment

Cc: Civil Rights Division
Office of the Deputy Attorney General

000311

GRA7

**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 3796gg(b)(5), 3796gg(b)(19), 3796gg-7(d), 10420(c)(1)(B), 13925(a)(29), 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).	F	Would be used to help administer grants, and plan education about and enforcement of prohibitions against discrimination in programs or activities receiving financial assistance administered by OVW.	Census block group	Annual
Title VII of the Civil Rights Act of 1964	42 USC 2000e et seq.; 42 USC 2000e-2(k); <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.	F	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

000312

GRA8

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

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

GRA9

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

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

GRA10

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

Statutory Authority		Classification	Uses	Lowest geography	Frequency
Title	Citations				
Violent Crime Control and Law Enforcement Act of 1994	42 USC 14141	R	Would be used to enforce the prohibition against patterns or practices of unlawful conduct by law enforcement or by officials in the juvenile justice system.	Place	Annual
Violent Crime Control and Law Enforcement Act of 1994	42 USC 14141	P	Would be used to help plan education and enforcement efforts to eliminate patterns or practices of unlawful conduct by law enforcement or by officials in the juvenile justice system.	Census block group	Annual
Matthew Shepard and James Byrd, Jr., Hate Crime 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

000315

000316

GRA12

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 nonpartisan 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]

[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 missing 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 Camarota, 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 significant. "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.

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

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]

[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]

[REDACTED]

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

I agree Mr Secretary.

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

Earl

Sent from my iPhone

> On May 2, 2017, at 10:04 AM, Wilbur Ross [REDACTED] wrote:
>

[REDACTED]

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

[REDACTED]

> Sent from my iPhone

From: 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) [REDACTED]
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



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.

000763

GRA23

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

000764

GRA24

From: Wilbur Ross [PII]
Sent: 8/10/2017 7:38:25 PM
To: Comstock, Earl (Federal) [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) [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 solving 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]

>
>

From: Comstock, Earl (Federal) [REDACTED]@doc.gov
Sent: 8/16/2017 8:44:41 PM
To: Teramoto, Wendy (Federal) [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]@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]
[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]
[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 (Federal) [REDACTED]
Israel Hernandez (Federal) [REDACTED]
Earl Comstock (Federal) [REDACTED]
James Uthmeier (Federal) [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 (Federal) <[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]@doc.gov]
Sent: 9/1/2017 3:21:06 AM
To: Wilbur Ross [REDACTED]
CC: Teramoto, Wendy (Federal) [REDACTED]@doc.gov]
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]

[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 -

>>



>> 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=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A958CB55921544F58C573600E973E87F-JAMES UTHME]
Sent: 9/4/2017 11:36:33 PM
To: Davidson, Peter (Federal) [PII]; Kelley, 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]

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

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]

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]@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 macle 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=6EA444C1E0EB42CF8DC621A7B6D014B4-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

September 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 nonresponse 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=█), cognitive interviews with Spanish-speaking respondents (N=█), four focus groups with Spanish-speaking Field Representatives (FRs) (N=█), five focus groups with Field Supervisors (FSs) and Field Representatives (N = █), and █ focus groups with respondents (N=█). 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 FSs 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 materials 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.”

█████ 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 █████ 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.

█████ 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 █████ alone in his or her home. She suggested that respondents might have concerns about confidentiality given “the current political climate.”

A █████ 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 “immigration 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 █████ focus group, the █████ 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, ██████████ 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 respondents 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.

From: Wilbur Ross [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP
(FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=6EA444C1E0EB42CF8DC621A7B6D014B4-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

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

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
United States 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

GRA58

0002496

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. 12th).pdf
Date: Tuesday, December 12, 2017 1:44:00 PM
Attachments: [U. S. Census Bureau Dr. Jarmin \(Revised Dec. 12th\).pdf](#)

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

Art

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

Art,

As Requested.

Michelle



U.S. Department of Justice
Justice Management Division
Office of General Counsel

Washington, D.C. 20530

DEC 12 2017

VIA CERTIFIED RETURN RECEIPT

7014 2120 0000 8064 4964

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

Re: Request To Reinstate Citizenship Question On 2020 Census Questionnaire

Dear Dr. Jarmin:

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

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

GRA61

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

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

In the 2010 Census, however, no census questionnaire included a question regarding citizenship. Rather, following the 2000 Census, the Census Bureau discontinued the "long form" questionnaire and replaced it with the American Community Survey (ACS). The ACS is a sampling survey that is sent to only around one in every thirty-eight households each year and asks a variety of questions regarding demographic information, including citizenship. See U.S. Census Bureau, *American Community Survey Information Guide at 6*, available at [https://www.census.gov/content/dam/Census/programs-surveys/acs/about/ACS Information Guide.pdf](https://www.census.gov/content/dam/Census/programs-surveys/acs/about/ACS%20Information%20Guide.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 *Everwel 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.

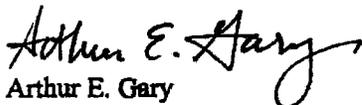
- Because the ACS estimates are rolling and aggregated into one-year, three-year, and five-year estimates, they do not align in time with the decennial census data. Citizenship data from the decennial census, by contrast, would align in time with the total and voting-age population data from the census 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 (last visited November 22, 2017). By contrast, decennial census data is a full count of the population.
- Census data is reported to the census block level, while the smallest unit reported in the ACS estimates is the census block group. See *American Community Survey Data* 3, 5, 10. Accordingly, redistricting jurisdictions and the Department are required to perform further estimates and to interject further uncertainty in order to approximate citizen voting-age population at the level of a census block, which is the fundamental building block of a redistricting plan. Having all of the relevant population and citizenship data available in one data set at the census block level would greatly assist the redistricting process.

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

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

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

Sincerely yours,



Arthur E. Gary
General Counsel
Justice Management Division



U.S. Department of Justice
Justice Management Division
Office of General Counsel

Washington, D.C. 20530

DEC 12 2017

VIA CERTIFIED RETURN RECEIPT

7014 2120 0000 8064 4964

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

Re: Request To Reinstate Citizenship Question On 2020 Census Questionnaire

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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).

000663

GRA64

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

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

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

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

Sincerely yours,



Arthur E. Gary
General Counsel
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.Jarmin@census.gov]
CC: [REDACTED] (CENSUS/ OTHER) [REDACTED]; Snyderman, Rachel B. EOP/OMB
[REDACTED] Enrique Lamas (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 [REDACTED]; Kraninger, Kathleen L. EOP/OMB [REDACTED]; Enger, Michelle A. EOP/OMB [REDACTED]; Marten, Lexi N. EOP/OMB [REDACTED]
Subject: RE: Census Question Request

+ others from OMB

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
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
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
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]; Lai, Joseph G. EOP/WHO [REDACTED]; Swonger, Amy H. EOP/WHO [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: Simms, 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
[census.gov](#) Connect with us on [Social Media](#)

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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GRA70

0005489

From: Ron S Jarmin (CENSUS/ADEP FED) [mailto:Ron.S.Jarmin@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
census.gov Connect with us on [Social Media](#)

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.S.Jarmin@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,

0005490

GRA71

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

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

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

January 19, 2018

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

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

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

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

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

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

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

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

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

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

Approved: _____ Date: _____

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

Detailed Analysis of Alternatives

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

Alternative A: Make no changes

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

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

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

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

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

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

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

B.1. Quality of citizenship responses

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

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

B.2. Self-response rate analyses

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

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

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

B.3. Breakoff rate analysis

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

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

B.4. Cost analysis

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

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

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

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

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

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

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

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

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

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

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

C.1. Quality of 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%, noncitizen: 66.4%, and missing: 3.7%.

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

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

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

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

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

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

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

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

C.3. Cost of administrative record data production

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

From: PII/Earl Comstock
Sent: 1/30/2018 1:53:17 PM
To: Langdon, David (Federal) [PII]@doc.gov
CC: Uthmeier, James (Federal) [PII]@doc.gov; Willard, Aaron (Federal) [PII]@doc.gov; Park-Su, Sahra (Federal) [PII]@doc.gov; Davidson, Peter (Federal) [PII]@doc.gov
Subject: Re: questions re: draft census memo

Thanks David. I may 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) <[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) <[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]@doc.gov>
Date: Tuesday, January 30, 2018 at 7:51 AM
To: "Willard, Aaron (Federal)" <AWillard@doc.gov>, "Park-Su, Sahra (Federal)" <[PII]@doc.gov>, "Davidson, Peter (Federal)" <[PII]@doc.gov>, David Langdon [PII]@doc.gov
Cc: "Comstock, Earl (Federal)" <[PII]@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

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

- 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.

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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 nonmissing 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

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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 1990-1999.¹

- 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 mail-out/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 areas 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).

¹ 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(5), pp. 1451-1467.

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,

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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 interagency 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.

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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 OnTheMap 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 C are 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

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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.

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- 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.

Kelley, Karen (Federal)

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](tel:3017632160)

On Jan 30, 2018, at 6:52 PM, Comstock, Earl (Federal) <**PII**@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 the 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 me at **PII** or contact Karen.

Thanks again!

Earl

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

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]

[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

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> 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

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 [REDACTED]

[REDACTED] 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. [REDACTED]

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 Curation
Economic Reimbursable Surveys Division
U.S. Census Bureau
Washington D.C. 20233
Phone 301-763-2028
E-mail: michael.a.berning@census.gov

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.Jarmin@census.gov> wrote:

Fascinating....

Sent from my iPhone

Begin forwarded message:

From: "Ron S Jarmin (CENSUS/ADEP FED)" <Ron.S.Jarmin@census.gov>
Date: February 13, 2018 at 3:46:46 PM EST
To: "Michael R. Strain" <[REDACTED]@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

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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>]
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

GRA104

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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: Ron.S.Jarmin@census.gov [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]; Enrique Lamas (CENSUS/ADDP FED) [Enrique.Lamas@census.gov]
Subject: Fwd: DOJ

FYI

Sent from my Phone

Begin forwarded message:

From: 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>
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

March 1, 2018

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

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

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

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

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

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

See attached.

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

Preliminary Analysis of Alternative D

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

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

What are the weaknesses in Alternative C?

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

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

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

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

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

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

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

1. U.S. citizens from birth with no SSN or U.S. passport. They will not be processed by the production record linkage system used for the 2020 Census because their personally identifiable information won't find a matching Protected Identification Key (PIK) in the Person Validation System (PVS).
2. U.S. citizens from birth born outside the U.S., who do not have a U.S. passport, and either applied for an SSN prior to 1974 and were 18 or older, or applied before the age of 18 prior to 1978. These people will be found in PVS, but none of the administrative sources discussed above will reliably generate a U.S. citizenship variable.
3. U.S. citizens who were naturalized prior to 2001 and did not inform SSA of their naturalization because they originally applied for an SSN after they were naturalized, and it was prior to when citizenship verification was required for those born outside the U.S. (1974). These people already had an SSN when they were naturalized and they didn't inform SSA about the naturalization, or they didn't apply for an SSN. The former group have inaccurate data on the Numident. The latter group will not be found in PVS.
4. U.S. citizens who were automatically naturalized if they were under the age of 18 when their parents became naturalized in 2000 or later, and did not inform USCIS or receive a U.S. passport. Note that such persons would not be able to get an SSN with U.S. citizenship on the card without either a U.S. passport or a certificate from USCIS. These people will also not be found in the PVS.

5. Lawful permanent residents (LPR) who received that status prior to 2001 and either do not have an SSN or applied for an SSN prior to when citizenship verification was required for those born outside the U.S. (1974). The former group will not be found in PVS. The latter group has inaccurate data in Numident.
6. Noncitizen, non-LPR, residents who do not have an SSN or ITIN and who did not apply for a visa extension. These persons will not be found in PVS.
7. Persons with citizenship information in administrative data, but the administrative and decennial census data cannot be linked due to missing or discrepant PII.

Can survey data address the gaps in Alternative C?

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

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

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

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

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

What methodological challenges are involved when combining these sources?

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

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

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



UNITED STATES DEPARTMENT OF COMMERCE
The Secretary of Commerce
Washington, D.C. 20230

To: Karen Dunn Kelley, Under Secretary for Economic Affairs

From: Secretary Wilbur Ross *Wilbur Ross*

Date: March 26, 2018

Re: Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire

Dear Under Secretary Kelley:

As you know, on December 12, 2017, the Department of Justice ("DOJ") requested that the Census Bureau reinstate a citizenship question on the decennial census to provide census block level citizenship voting age population ("CVAP") data that are not currently available from government survey data ("DOJ request"). DOJ and the courts use CVAP data for determining violations of Section 2 of the Voting Rights Act ("VRA"), and having these data at the census block level will permit more effective enforcement of the Act. Section 2 protects minority population voting rights.

Following receipt of the DOJ request, I set out to take a hard look at the request and ensure that I considered all facts and data relevant to the question so that I could make an informed decision on how to respond. To that end, the Department of Commerce ("Department") immediately initiated a comprehensive review process led by the Census Bureau.

The Department and Census Bureau's review of the DOJ request – as with all significant Census assessments – prioritized the goal of obtaining *complete and accurate data*. The decennial census is mandated in the Constitution and its data are relied on for a myriad of important government decisions, including apportionment of Congressional seats among states, enforcement of voting rights laws, and allocation of federal funds. These are foundational elements of our democracy, and it is therefore incumbent upon the Department and the Census Bureau to make every effort to provide a complete and accurate decennial census.

At my direction, the Census Bureau and the Department's Office of the Secretary began a thorough assessment that included legal, program, and policy considerations. As part of the process, I also met with Census Bureau leadership on multiple occasions to discuss their process for reviewing the DOJ request, their data analysis, my questions about accuracy and response rates, and their recommendations. At present, the Census Bureau leadership are all career civil servants. In addition, my staff and I reviewed over 50 incoming letters from stakeholders, interest groups, Members of Congress, and state and local officials regarding reinstatement of a citizenship question on the 2020 decennial census, and I personally had specific conversations on

the citizenship question with over 24 diverse, well informed and interested parties representing a broad range of views. My staff and I have also monitored press coverage of this issue.

Congress has delegated to me the authority to determine which questions should be asked on the decennial census, and I may exercise my discretion to reinstate the citizenship question on the 2020 decennial census, especially based on DOJ's request for improved CVAP data to enforce the VRA. By law, the list of decennial census questions is to be submitted two years prior to the decennial census – in this case, no later than March 31, 2018.

The Department's review demonstrated that collection of citizenship data by the Census has been a long-standing historical practice. Prior decennial census surveys of the entire United States population consistently asked citizenship questions up until 1950, and Census Bureau surveys of sample populations continue to ask citizenship questions to this day. In 2000, the decennial census "long form" survey, which was distributed to one in six people in the U.S., included a question on citizenship. Following the 2000 decennial census, the "long form" sample was replaced by the American Community Survey ("ACS"), which has included a citizenship question since 2005. Therefore, the citizenship question has been well tested.

DOJ seeks to obtain CVAP data for census blocks, block groups, counties, towns, and other locations where potential Section 2 violations are alleged or suspected, and DOJ states that the current data collected under the ACS are insufficient in scope, detail, and certainty to meet its purpose under the VRA. The Census Bureau has advised me that the census-block-level citizenship data requested by DOJ are not available using the annual ACS, which as noted earlier does ask a citizenship question and is the present method used to provide DOJ and the courts with data used to enforce Section 2 of the VRA. The ACS is sent on an annual basis to a sample of approximately 2.6 percent of the population.

To provide the data requested by DOJ, the Census Bureau initially analyzed three alternatives: Option A was to continue the status quo and use ACS responses; Option B was placing the ACS citizenship question on the decennial census, which goes to every American household; and Option C was not placing a question on the decennial census and instead providing DOJ with a citizenship analysis for the entire population using federal administrative record data that Census has agreements with other agencies to access for statistical purposes.

Option A contemplates rejection of the DOJ request and represents the status quo baseline. Under Option A, the 2020 decennial census would not include the question on citizenship that DOJ requested and therefore would not provide DOJ with improved CVAP data. Additionally, the block-group level CVAP data currently obtained through the ACS has associated margins of error because the ACS is extrapolated based on sample surveys of the population. Providing more precise block-level data would require sophisticated statistical modeling, and if Option A is selected, the Census Bureau advised that it would need to deploy a team of experts to develop model-based methods that attempt to better facilitate DOJ's request for more specific data. But the Census Bureau did not assert and could not confirm that such data modeling is possible for census-block-level data with a sufficient degree of accuracy. Regardless, DOJ's request is based at least in part on the fact that existing ACS citizenship data-sets lack specificity and

completeness. Any future modeling from these incomplete data would only compound that problem.

Option A would provide no improved citizenship count, as the existing ACS sampling would still fail to obtain *actual*, complete number counts, especially for certain lower population areas or voting districts, and there is no guarantee that data could be improved using small-area modeling methods. Therefore, I have concluded that Option A is not a suitable option.

The Census Bureau and many stakeholders expressed concern that **Option B**, which would add a citizenship question to the decennial census, would negatively impact the response rate for non-citizens. A significantly lower response rate by non-citizens could reduce the accuracy of the decennial census and increase costs for non-response follow up (“NRFU”) operations. However, neither the Census Bureau nor the concerned stakeholders could document that the response rate would in fact decline materially. In discussing the question with the national survey agency Nielsen, it stated that it had added questions from the ACS on sensitive topics such as place of birth and immigration status to certain short survey forms without any appreciable decrease in response rates. Further, the former director of the Census Bureau during the last decennial census told me that, while he wished there were data to answer the question, none existed to his knowledge. Nielsen’s Senior Vice President for Data Science and the former Deputy Director and Chief Operating Officer of the Census Bureau under President George W. Bush also confirmed that, to the best of their knowledge, no empirical data existed on the impact of a citizenship question on responses.

When analyzing Option B, the Census Bureau attempted to assess the impact that reinstatement of a citizenship question on the decennial census would have on response rates by drawing comparisons to ACS responses. However, such comparative analysis was challenging, as response rates generally vary between decennial censuses and other census sample surveys. For example, ACS self-response rates were 3.1 percentage points less than self-response rates for the 2010 decennial census. The Bureau attributed this difference to the greater outreach and follow-up associated with the Constitutionally-mandated decennial census. Further, the decennial census has differed significantly in nature from the sample surveys. For example, the 2000 decennial census survey contained only eight questions. Conversely, the 2000 “long form” sample survey contained over 50 questions, and the Census Bureau estimated it took an average of over 30 minutes to complete. ACS surveys include over 45 questions on numerous topics, including the number of hours worked, income information, and housing characteristics.

The Census Bureau determined that, for 2013-2016 ACS surveys, nonresponses to the citizenship question for non-Hispanic whites ranged from 6.0 to 6.3 percent, for non-Hispanic blacks ranged from 12.0 to 12.6 percent, and for Hispanics ranged from 11.6 to 12.3 percent. However, these rates were comparable to nonresponse rates for other questions on the 2013 and 2016 ACS. Census Bureau estimates showed similar nonresponse rate ranges occurred for questions on the ACS asking the number times the respondent was married, 4.7 to 6.9 percent; educational attainment, 5.6 to 8.5 percent; monthly gas costs, 9.6 to 9.9 percent; weeks worked in the past 12 months, 6.9 to 10.6 percent; wages/salary income, 8.1 to 13.4 percent; and yearly property insurance, 23.9 to 25.6 percent.

The Census Bureau also compared the self-response rate differences between citizen and non-citizen households' response rates for the 2000 decennial census short form (which did not include a citizenship question) and the 2000 decennial census long form survey (the long form survey, distributed to only one in six households, included a citizenship question in 2000). Census found the decline in self-response rates for non-citizens to be 3.3 percent greater than for citizen households. However, Census was not able to isolate what percentage of decline was caused by the inclusion of a citizenship question rather than some other aspect of the long form survey (it contained over six times as many questions covering a range of topics). Indeed, the Census Bureau analysis showed that for the 2000 decennial census there was a significant drop in self response rates overall between the short and long form; the mail response rate was 66.4 percent for the short form and only 53.9 percent for the long form survey. So while there is widespread belief among many parties that adding a citizenship question could reduce response rates, the Census Bureau's analysis did not provide definitive, empirical support for that belief.

Option C, the use of administrative records rather than placing a citizenship question on the decennial census, was a potentially appealing solution to the DOJ request. The use of administrative records is increasingly part of the fabric and design of modern censuses, and the Census Bureau has been using administrative record data to improve the accuracy and reduce the cost of censuses since the early 20th century. A Census Bureau analysis matching administrative records with the 2010 decennial census and ACS responses over several more recent years showed that using administrative records could be more accurate than self-responses in the case of non-citizens. That Census Bureau analysis showed that between 28 and 34 percent of the citizenship self-responses for persons that administrative records show are non-citizens were inaccurate. In other words, when non-citizens respond to long form or ACS questions on citizenship, they inaccurately mark "citizen" about 30 percent of the time. However, the Census Bureau is still evolving its use of administrative records, and the Bureau does not yet have a complete administrative records data set for the entire population. Thus, using administrative records alone to provide DOJ with CVAP data would provide an incomplete picture. In the 2010 decennial census, the Census Bureau was able to match 88.6 percent of the population with what the Bureau considers credible administrative record data. While impressive, this means that more than 10 percent of the American population – some 25 million voting age people – would need to have their citizenship imputed by the Census Bureau. Given the scale of this number, it was imperative that another option be developed to provide a greater level of accuracy than either self-response alone or use of administrative records alone would presently provide.

I therefore asked the Census Bureau to develop a fourth alternative, Option D, which would combine Options B and C. Under Option D, the ACS citizenship question would be asked on the decennial census, and the Census Bureau would use the two years remaining until the 2020 decennial census to further enhance its administrative record data sets, protocols, and statistical models to provide more complete and accurate data. This approach would maximize the Census Bureau's ability to match the decennial census responses with administrative records. Accordingly, at my direction the Census Bureau is working to obtain as many additional Federal and state administrative records as possible to provide more comprehensive information for the population.

It is my judgment that Option D will provide DOJ with the most complete and accurate CVAP data in response to its request. Asking the citizenship question of 100 percent of the population gives each respondent the opportunity to provide an answer. This may eliminate the need for the Census Bureau to have to impute an answer for millions of people. For the approximately 90 percent of the population who are citizens, this question is no additional imposition. And for the approximately 70 percent of non-citizens who already answer this question accurately on the ACS, the question is no additional imposition since census responses by law may only be used anonymously and for statistical purposes. Finally, placing the question on the decennial census and directing the Census Bureau to determine the best means to compare the decennial census responses with administrative records will permit the Census Bureau to determine the inaccurate response rate for citizens and non-citizens alike using the entire population. This will enable the Census Bureau to establish, to the best of its ability, the accurate ratio of citizen to non-citizen responses to impute for that small percentage of cases where it is necessary to do so.

Consideration of Impacts I have carefully considered the argument that the reinstatement of the citizenship question on the decennial census would depress response rate. Because a lower response rate would lead to increased non-response follow-up costs and less accurate responses, this factor was an important consideration in the decision-making process. I find that the need for accurate citizenship data and the limited burden that the reinstatement of the citizenship question would impose outweigh fears about a potentially lower response rate.

Importantly, the Department's review found that limited empirical evidence exists about whether adding a citizenship question would decrease response rates materially. Concerns about decreased response rates generally fell into the following two categories – distrust of government and increased burden. First, stakeholders, particularly those who represented immigrant constituencies, noted that members of their respective communities generally distrusted the government and especially distrusted efforts by government agencies to obtain information about them. Stakeholders from California referenced the difficulty that government agencies faced obtaining any information from immigrants as part of the relief efforts after the California wildfires. These government agencies were not seeking to ascertain the citizenship status of these wildfire victims. Other stakeholders referenced the political climate generally and fears that Census responses could be used for law enforcement purposes. But no one provided evidence that reinstating a citizenship question on the decennial census would materially decrease response rates among those who generally distrusted government and government information collection efforts, disliked the current administration, or feared law enforcement. Rather, stakeholders merely identified residents who made the decision not to participate regardless of whether the Census includes a citizenship question. The reinstatement of a citizenship question will not decrease the response rate of residents who already decided not to respond. And no one provided evidence that there are residents who would respond accurately to a decennial census that did not contain a citizenship question but would not respond if it did (although many believed that such residents had to exist). While it is possible this belief is true, there is no information available to determine the number of people who would in fact not respond due to a citizenship question being added, and no one has identified any mechanism for making such a determination.

A second concern that stakeholders advanced is that recipients are generally less likely to respond to a survey that contained more questions than one that contained fewer. The former Deputy Director and Chief Operating Officer of the Census Bureau during the George W. Bush administration described the decennial census as particularly fragile and stated that any effort to add questions risked lowering the response rate, especially a question about citizenship in the current political environment. However, there is limited empirical evidence to support this view. A former Census Bureau Director during the Obama Administration who oversaw the last decennial census noted as much. He stated that, even though he believed that the reinstatement of a citizenship question would decrease response rate, there is limited evidence to support this conclusion. This same former director noted that, in the years preceding the decennial census, certain interest groups consistently attack the census and discourage participation. While the reinstatement of a citizenship question may be a data point on which these interest groups seize in 2019, past experience demonstrates that it is likely efforts to undermine the decennial census will occur again regardless of whether the decennial census includes a citizenship question. There is no evidence that residents who are persuaded by these disruptive efforts are more or less likely to make their respective decisions about participation based specifically on the reinstatement of a citizenship question. And there are actions that the Census Bureau and stakeholder groups are taking to mitigate the impact of these attacks on the decennial census.

Additional empirical evidence about the impact of sensitive questions on survey response rates came from the SVP of Data Science at Nielsen. When Nielsen added questions on place of birth and time of arrival in the United States (both of which were taken from the ACS) to a short survey, the response rate was not materially different than it had been before these two questions were added. Similarly, the former Deputy Director and COO of the Census during the George W. Bush Administration shared an example of a citizenship-like question that he believed would negatively impact response rates but did not. He cited to the Department of Homeland Security's 2004 request to the Census Bureau to provide aggregate data on the number of Arab Americans by zip code in certain areas of the country. The Census Bureau complied, and Census employees, including the then-Deputy Director, believed that the resulting political firestorm would depress response rates for further Census Bureau surveys in the impacted communities. But the response rate did not change materially.

Two other themes emerged from stakeholder calls that merit discussion. First, several stakeholders who opposed reinstatement of the citizenship question did not appreciate that the question had been asked in some form or another for nearly 200 years. Second, other stakeholders who opposed reinstatement did so based on the assumption that the data on citizenship that the Census Bureau collects through the ACS are accurate, thereby obviating the need to ask the question on the decennial census. But as discussed above, the Census Bureau estimates that between 28 and 34 percent of citizenship self-responses on the ACS for persons that administrative records show are non-citizens were inaccurate. Because these stakeholder concerns were based on incorrect premises, they are not sufficient to change my decision.

Finally, I have considered whether reinstating the citizenship question on the 2020 Census will lead to any significant monetary costs, programmatic or otherwise. The Census Bureau staff have advised that the costs of preparing and adding the question would be minimal due in large part to the fact that the citizenship question is already included on the ACS, and thus the citizenship question has already undergone the cognitive research and questionnaire testing required for new questions. Additionally, changes to the Internet Self-Response instrument, revising the Census Questionnaire Assistance, and redesigning of the printed questionnaire can be easily implemented for questions that are finalized prior to the submission of the list of questions to Congress.

The Census Bureau also considered whether non-response follow-up increases resulting from inclusion of the citizenship question would lead to increased costs. As noted above, this estimate was difficult to assess given the Census Bureau and Department's inability to determine what impact there will be on decennial census survey responses. The Bureau provided a rough estimate that postulated that up to 630,000 additional households may require NRFU operations if a citizenship question is added to the 2020 decennial census. However, even assuming that estimate is correct, this additional ½ percent increase in NRFU operations falls well within the margin of error that the Department, with the support of the Census Bureau, provided to Congress in the revised Lifecycle Cost Estimate ("LCE") this past fall. That LCE assumed that NRFU operations might increase by 3 percent due to numerous factors, including a greater increase in citizen mistrust of government, difficulties in accessing the Internet to respond, and other factors.

Inclusion of a citizenship question on this country's decennial census is not new – the decision to collect citizenship information from Americans through the decennial census was first made centuries ago. The decision to include a citizenship question on a national census is also not uncommon. The United Nations recommends that its member countries ask census questions identifying both an individual's country of birth and the country of citizenship. *Principals and Recommendations for Population and Housing Censuses (Revision 3)*, UNITED NATIONS 121 (2017). Additionally, for countries in which the population may include a large portion of naturalized citizens, the United Nations notes that, "it may be important to collect information on the method of acquisition of citizenship." *Id.* at 123. And it is important to note that other major democracies inquire about citizenship on their census, including Australia, Canada, France, Germany, Indonesia, Ireland, Mexico, Spain, and the United Kingdom, to name a few.

The Department of Commerce is not able to determine definitively how inclusion of a citizenship question on the decennial census will impact responsiveness. However, even if there is some impact on responses, the value of more complete and accurate data derived from surveying the entire population outweighs such concerns. Completing and returning decennial census questionnaires is required by Federal law, those responses are protected by law, and inclusion of a citizenship question on the 2020 decennial census will provide more complete information for those who respond. The citizenship data provided to DOJ will be more accurate with the question than without it, which is of greater importance than any adverse effect that may result from people violating their legal duty to respond.

To conclude, after a thorough review of the legal, program, and policy considerations, as well as numerous discussions with the Census Bureau leadership and interested stakeholders, I have determined that reinstatement of a citizenship question on the 2020 decennial census is necessary to provide complete and accurate data in response to the DOJ request. To minimize any impact on decennial census response rates, I am directing the Census Bureau to place the citizenship question last on the decennial census form.

Please make my decision known to Census Bureau personnel and Members of Congress prior to March 31, 2018. I look forward to continuing to work with the Census Bureau as we strive for a complete and accurate 2020 decennial census.

CC: Ron Jarmin, performing the nonexclusive functions and duties of the Director of the Census Bureau

Enrique Lamas, performing the nonexclusive functions and duties of the Deputy Director of the Census Bureau



UNITED STATES DEPARTMENT OF COMMERCE
The Secretary of Commerce
Washington, D.C. 20230

**Supplemental Memorandum by Secretary of Commerce Wilbur Ross
Regarding the Administrative Record in Census Litigation**

This memorandum is intended to provide further background and context regarding my March 26, 2018, memorandum concerning the reinstatement of a citizenship question to the decennial census. 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. My staff and I thought reinstating a citizenship question could be warranted, and we had various discussions with other governmental officials about reinstating a citizenship question to the Census. As part of that deliberative process, my staff and I consulted with Federal governmental components and inquired whether the Department of Justice (DOJ) would support, and if so would request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act.

Ultimately, on December 12, 2017, DOJ sent a letter formally requesting that the Census Bureau reinstate on the 2020 Census questionnaire a question regarding citizenship. My March 26, 2018, memorandum described the thorough assessment process that the Department of Commerce conducted following receipt of the DOJ letter, the evidence and arguments I considered, and the factors I weighed in making my decision to include the citizenship question on the 2020 Census.

A handwritten signature in black ink, appearing to read "Wilbur Ross".

Wilbur Ross
June 21, 2018

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK IMMIGRATION COALITION, ET AL.,

Plaintiffs,

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

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

Defendants.

Washington, D.C.

Thursday, August 30, 2018

Deposition of:

EARL COMSTOCK

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

1 a citizenship question could be warranted?
 2 A Again, my formulation of a -- of a
 3 decision that it could be warranted is largely
 4 based on common sense.
 5 Q Okay. I just want to make sure that I
 6 understand. That as to the part of your answer
 7 that related to the practices of other countries,
 8 in the spring of 2017, you formed that view by
 9 Googling it?
 10 A I may have asked if other countries did
 11 it or I may have gotten online and looked. I
 12 don't recall.
 13 Q Who would you have asked if you asked?
 14 A I likely would have asked somebody from
 15 Census or I might have asked David Langdon.
 16 Q And if you asked, would that be reflected
 17 in your -- in your email or your memo somewhere?
 18 A If it was, you could have found the
 19 email. So I, obviously, did not send an email if
 20 I asked that question.
 21 Q Okay. The --
 22 MR. GARDNER: Matt, I'm sorry. I didn't

1 mean to break your line of questioning. Actually,
 2 we've been going about an hour and a half. Would
 3 now be an appropriate time for a break?
 4 MR. COLANGELO: Yes.
 5 MR. GARDNER: Let's take a break.
 6 VIDEOGRAPHER: This concludes Media Unit
 7 Number 1. The time on the video is 10:32 a.m. We
 8 are now off the record.
 9 (Off the record.)
 10 VIDEOGRAPHER: This begins Media Unit
 11 Number 2. The time on the video is 10:45 a.m. We
 12 are on the record.
 13 BY MR. COLANGELO:
 14 Q Mr. Comstock, we were talking about the
 15 Secretary's June 21, 2018 memo which we marked as
 16 Exhibit 5. Do you still have that in front of
 17 you?
 18 A I do.
 19 Q Okay. That memo says that other senior
 20 administration officials had previously raised
 21 this question. Do you see that line?
 22 A Yes.

1 Q Who are those other senior administration
 2 officials?
 3 A You'd have to ask the Secretary.
 4 Q You don't know yourself?
 5 A I don't.
 6 Q You have no idea which other senior
 7 administration officials raised this question,
 8 other than the Secretary?
 9 A No.
 10 Q You never asked him where the idea came
 11 from?
 12 A Nope.
 13 Q He never told you where the idea came
 14 from?
 15 A Nope.
 16 Q You spent a lot of time on this issue?
 17 A Not relative to a lot of other things I
 18 work on, no.
 19 Q How would you characterize the amount of
 20 time you spent on this issue?
 21 A One one-hundredth of my time.
 22 Q You agree that it's an important issue?

1 A Correct.
 2 Q It was important to the Secretary?
 3 A Correct.
 4 Q He was motivated to get this done?
 5 A He was working on a lot of different
 6 issues at the time.
 7 Q But this one was important to him?
 8 A Yes. Absolutely.
 9 Q Okay. And when you saw the draft of this
 10 memo before June 21st and it refers to other
 11 senior administration officials, you didn't
 12 yourself have any view or understanding of who
 13 those other administration officials were?
 14 A I did not, no.
 15 Q You didn't ask the secretary who those
 16 other administration officials were?
 17 A No.
 18 Q Okay. When recommending that he sign the
 19 memo, he didn't say to you who are the other
 20 senior -- who the other senior administration
 21 officials were?
 22 A We did not discuss that, no.

1 Q Okay. And if you weren't in the meeting,
2 would it be typical for Ms. Teramoto to be there?

3 A Again, it would depend on what her
4 schedule was.

5 Q Okay. You'll see from this email at the
6 top of Page 3702, that David Langdon is reporting
7 to several people, quote, the Secretary seemed
8 interested on subjects and puzzled why citizenship
9 is not included in 2020.

10 Do you see that?

11 A Yes.

12 Q Okay. Do you remember a meeting where
13 the Secretary was puzzled why citizenship was not
14 included?

15 A I don't recall such a meeting, but --

16 Q And why does Mr. Langdon say the
17 Secretary seemed puzzled why citizenship is not
18 included?

19 MR. GARDNER: Objection. Calls for
20 speculation.

21 THE WITNESS: Again, the Secretary was
22 clear. He did not understand why a citizenship

1 Q And is the associate director for
2 decennial programs effectively the head of 2020
3 census?

4 A I believe that's correct, yes.

5 Q And you see that Mr. Langdon has asked
6 Ms. Blummerman for an answer on the citizenship
7 question ideally this evening?

8 A That's what his mail says.

9 Q Okay. It's fair to say that this was a
10 matter of some urgency?

11 MR. GARDNER: Objection. Form.

12 THE WITNESS: Again, one of the biggest
13 roles that I play is expediting things along.

14 Because you have people from the private sector
15 who are used to a much faster speed than the
16 government usually operates at. So we spend a lot
17 of time expediting things to get things back in
18 place. So this is not uncommon for us to say
19 everything the Secretary is requesting is urgent.

20 BY MR. COLANGELO:

21 Q Let's go back to Exhibit 7. Do you have
22 that in front of you?

1 question was not included, so he asked us to look
2 into the matter.

3 BY MR. COLANGELO:

4 Q Okay. And then you see that Mr. Langdon
5 sent the email to Lisa Blummerman. Am I saying
6 that right?

7 A I think it's pronounced Blummerman.

8 Q Okay. Mr. Langdon sent the email to
9 Lisa Blummerman at 10:51 p.m. on May 24.

10 Can you tell me who Ms. Blummerman is?

11 A She was -- I believe at the time, in some
12 kind of acting capacity. I don't know if she was
13 the acting deputy director or whether she was the
14 person in charge of budget. If you notice further
15 down in the conversation, Lisa and I are happy to
16 discuss the lifecycle stuff, which was beginning
17 to become an issue. So Lisa, to my recollection,
18 is largely budget side.

19 Q Is it your understanding that at the
20 time, Ms. Blummerman was the associate director
21 for decennial programs?

22 A That's entirely possible.

1 A Just a minute.

2 Yes.

3 Q Okay. And Exhibit 7 is the email
4 exchange with Kris Kobach; is that right?

5 A It's an email exchange between
6 Kris Kobach and Wendy Teramoto.

7 Q And the Secretary, correct, on the second
8 page?

9 A Yes. Appears to be one to the Secretary
10 on the second page.

11 Q Okay.

12 A Though it's blanked out as to who it goes
13 to.

14 Q If I represent to you that the government
15 has represented to us that this was an email to
16 the Secretary and that they've blanked out his
17 name for personal privacy reasons, can we agree
18 that it's an email to the Secretary on July 14th?

19 A I'll stipulate to that, yes.

20 Q And Mr. Gardner will tell me after lunch
21 if that's wrong.

22 The -- so you see that the -- that

1 Mr. Kobach, who identifies himself as the Kansas
2 Secretary of State, emailed the Secretary on
3 July 14, 2017, correct?

4 A Correct.

5 MR. GARDNER: Objection. Lack of
6 foundation.

7 BY MR. COLANGELO:

8 Q And you'll see that it says I'm following
9 up on our telephone discussion from a few months
10 ago, correct?

11 MR. GARDNER: Objection. Lack of
12 foundation.

13 THE WITNESS: And you're reading from the
14 email. So I have no idea if the email is correct
15 or not.

16 BY MR. COLANGELO:

17 Q Did the Secretary ever tell you that he
18 spoke to Kris Kobach?

19 MR. GARDNER: Objection. Asked and
20 answered.

21 BY MR. COLANGELO:

22 Q You can still answer.

1 A No.

2 Q Sorry. We were speaking at the same
3 time.

4 A I don't recall him ever telling me that
5 he spoke to Kris Kobach.

6 Q This email reads, "As you may recall, we
7 talked about the fact that the U.S. Census does
8 not currently ask respondents their citizenship."

9 Do you see that?

10 A I see that.

11 Q The email also reads, "It also leads to
12 the problem that aliens who do not actually reside
13 in the United States are still counted for
14 Congressional apportionment purposes."

15 Do you see that?

16 A I see that.

17 Q Did the Secretary ever tell you he was
18 concerned about the problem that aliens who do not
19 reside in the United States are still counted for
20 Congressional apportionment purposes?

21 A He never expressed an opinion on that.

22 Q And when the Secretary asked you on

1 March 10, 2017 about the census and the
2 citizenship question, did he ask you in the
3 context of whether noncitizens should be included
4 for Congressional apportionment purposes?

5 A He discussed Congressional apportionment
6 purposes. If asked were the noncitizens counted,
7 and we answered the question, which is they are
8 counted.

9 Q Well, you testified the link you sent him
10 was the link to the Census Bureau's web page on
11 whether noncitizens are counted for apportionment?

12 A That's correct. Well, I don't believe
13 you can find a web page on the Census that doesn't
14 speak to it in that context, whether noncitizens
15 are counted other than for apportionment. That's
16 the question that we asked. Do we count
17 noncitizens? The answer is yes. What is the
18 Census used for? It's used for apportionment.
19 That's its primary function.

20 Q And you'll see that -- going back to the
21 first page of Exhibit 7, Ms. Teramoto has written
22 to Mr. Kobach, "Kris, can you do a call with the

1 Secretary and Izzy tomorrow at 11:00 a.m.?"

2 A Correct.

3 Q And that's Izzy Hernandez, correct?

4 A I would believe that's the reference
5 she's making, yes.

6 Q And he's copied at the top of this page,
7 correct?

8 A Yes, he is.

9 Q Did you ever discuss with Izzy Hernandez
10 a call with Mr. Kobach and the Secretary?

11 A I did not.

12 Q Did you ever discuss the citizenship
13 question with Mr. Hernandez, at all?

14 A I think we discussed it once or twice.

15 Q And when were those conversations?

16 A I don't recall exactly.

17 Q Was it in the summer of 2017?

18 A It was sometime in the spring/summer of
19 2017.

20 Q Okay. So you had been working on the
21 citizenship question for some number of months by
22 late July of 2017; is that right?

1 rationale for why he would want it added is not
 2 relevant to my initial inquiry as to whether or
 3 not a question can be added.
 4 BY MR. GERSCH:
 5 Q Yeah. My question was a little
 6 different. The question I am trying to get you to
 7 focus on is: In your work for the Secretary,
 8 wouldn't it be helpful to you to understand as
 9 fully as possible why he thinks it's a good idea
 10 to add a citizenship question?
 11 A And let --
 12 MR. GARDNER: Objection. Asked and
 13 answered.
 14 THE WITNESS: And let me get you to
 15 understand my answer, which is, no, it would not
 16 make a difference, because I don't need that
 17 information to investigate the question.
 18 BY MR. GERSCH:
 19 Q Anyone ever say anything to you about why
 20 the Secretary thought it was a good
 21 idea -- withdrawn.
 22 Am I right that your testimony is that

1 you've never had a discussion with the Secretary
 2 about why he thought it was a good idea to have a
 3 citizenship question added?
 4 A That's correct. I have not had a
 5 conversation with him, no.
 6 Q Okay. And did anyone else say anything
 7 to you about why the Secretary thought it was a
 8 good idea to have a citizenship question added?
 9 MR. GARDNER: Objection. Form.
 10 THE WITNESS: Again, no.
 11 BY MR. GERSCH:
 12 Q All right. If I remember correctly, you
 13 testified you worked in a bullpen area?
 14 A Correct.
 15 Q Outside the Secretary's office?
 16 A Yes.
 17 Q I'm not sure I've got all the people who
 18 were there, but Wendy Teramoto was there, right?
 19 A Correct.
 20 Q James Uthmeier was there?
 21 A No.
 22 Q I'm sorry.

1 You were there?
 2 A Yes.
 3 Q Eric Branstad, was he there?
 4 A Yes.
 5 Q That's three.
 6 Izzy Hernandez, that's four. Was he
 7 there?
 8 A Yes.
 9 Q Who was the fifth?
 10 A James Rockas.
 11 Q And I'm right that there were five?
 12 A Correct.
 13 Q Okay.
 14 A At times.
 15 Q So you're all sitting there -- and are --
 16 do you work in cubicles, open desks, how does it
 17 work?
 18 A Wendy Teramoto had a seated desk. I had
 19 a standing desk. Izzy had a standing desk with a
 20 stool. James had a standing desk with a stool.
 21 Eric Branstad had a standing desk with a stool.
 22 Q Are there walls? Are there partitions?

1 Are you all in an open space?
 2 A I'm facing -- I was facing Wendy. Izzy,
 3 who was rarely there, but his desk was next to
 4 mine, facing Eric, and then James was on the end.
 5 Q And there are no walls, correct?
 6 A No walls.
 7 Q No partitions?
 8 A No partitions.
 9 Q Okay. In all the time that you're
 10 sitting there and you're all working together, no
 11 one says, why does the Secretary want to add a
 12 citizenship question -- citizenship question?
 13 A That's correct. Because, again, this was
 14 one of well over 100 different items we were
 15 working on. All of us were working on different
 16 things. I'm primarily tasked with policy. James
 17 is primarily tasked with press. And so you're
 18 dealing with all of these other issues. There's
 19 no reason to discuss it.
 20 Q I'm not even talking about discussing it.
 21 No one mentioned? Did anyone mention it?
 22 A Not that I recall.

1 Q No one says the reason the Secretary
2 wants to add a citizenship question is whatever
3 the reason is, no one ever said anything like
4 that?

5 A No.

6 MR. GARDNER: Objection to form.

7 THE WITNESS: Not to my recollection.

8 BY MR. GERSCH:

9 Q Okay. Did you ever have a discussion
10 with people from the Office of General Counsel at
11 Commerce about why the Secretary wanted to add a
12 citizenship question?

13 A No.

14 Q And in your time there, did you never see
15 a document analyzing why it was a good idea for
16 Census to add a citizenship question?

17 A Again, you're -- we have a fundamental
18 disagreement on the premises of your question.
19 Your premise is that somehow a reason needs to be
20 provided. The question before us is the Secretary
21 has the legal authority to add questions to the
22 census. Is there a governmental need? And if

1 there is, then you're off to the races.

2 Q My question was a little different. My
3 question was --

4 A I understand your question.

5 Q Sir, I'll repeat it for you.

6 My question is: In all the time you're
7 there, did you never see a document spelling out
8 the reasons why it would be a good idea to add a
9 citizenship question? Why it would be good from
10 Commerce's perspective?

11 MR. GARDNER: Objection. Form.

12 THE WITNESS: Again, that's not the
13 question. Commerce --

14 BY MR. GERSCH:

15 Q Excuse me, sir. That is my question.
16 Could you answer my question?

17 A Okay. No.

18 Q Not even a scrap of paper, right?

19 A Nope.

20 Q No memoranda, right?

21 A No.

22 Q No emails?

1 A Not that I recall.

2 Q And I just want to be straight on my
3 understanding. I think I got you correctly, but I
4 just want to make sure and test that I'm right.

5 It couldn't possibly assist you in your
6 work, in any way, to know why the Secretary wanted
7 to add a citizenship question? Do I understand
8 that correctly?

9 A It's not relevant to my analysis.

10 Q And so it couldn't possibly help you in
11 any way in your work?

12 A I'm not going to agree with your
13 statement that way, no.

14 Q Well, that's my question -- withdrawn.

15 Well, is there any way in which knowing
16 what the Secretary's reason was for wanting to add
17 a citizenship question, is there any way that
18 could assist you in your work at
19 Department of Commerce?

20 A Assist me on my work at the Department of
21 Commerce, no.

22 Q Is there any way that it could help you

1 help the Secretary add a citizenship question?

2 A If I had found it difficult or
3 challenging, yes. Knowing more about why he
4 wanted it would have been helpful, but I didn't
5 say that there was an issue. It had been asked
6 for hundreds of years, and it had been asked on
7 the ACS. So, clearly, there's a need for it. And
8 so, no, that was not a particularly troublesome
9 aspect of the question I was being asked to look
10 into.

11 Q When you said if I had found it difficult
12 or challenging, what did you mean? What's the it?

13 A If -- if what I had been requested to do
14 seemed to have significant legal obstacles to the
15 ability to do that question or take that action,
16 then I would probably inquire more fully to see if
17 there's an alternative way to address what the
18 Secretary is trying to get to. In this particular
19 case, you have something that has been on the
20 decennial census before that is currently being
21 asked on the ACS. There's clear legal authority
22 for him to add the question. So, frankly, the

1 reasons that he wants to add it doesn't add
 2 anything to the analysis. There is a governmental
 3 need for this information. That's a question
 4 that's already established, so I don't need to
 5 inquire further as to what his personal beliefs
 6 regarding this question might be.
 7 Q What's the governmental need for the
 8 question?
 9 A Enforcement to the Voting Rights Act,
 10 determining how many undocumented citizens there
 11 are. You name it, there's a whole bunch of
 12 reasons. That's why every government in the world
 13 collects this information.
 14 Q Well, correct me if I'm wrong, we're
 15 talking about at a period in the spring of 2017
 16 when the Voting Rights Act hadn't come up, the
 17 Department of Justice hadn't made a request for
 18 it. What does the Voting Rights Act got to do
 19 with it in the spring of 2017?
 20 A When you inquire as to what does the
 21 Department of Justice use the citizenship data
 22 on --

1 Q That wasn't my question. My question
 2 is --
 3 A I'm answering your --
 4 Q -- why is it a good idea, why does the
 5 government need it back in the spring of 2017?
 6 A Finished with your question?
 7 Q That's my question.
 8 A The answer is for the same reason they've
 9 been collecting it for the last 200-plus years.
 10 Q What's the government need in the spring
 11 of 2017?
 12 A I already answered that question. If
 13 they collect the data under the ACS for Voting
 14 Rights Act enforcement, that is one of the primary
 15 reasons they collect the data.
 16 Q Okay. It's on the ACS. What's the
 17 need -- governmental need for it to be on the
 18 census?
 19 MR. GARDNER: Objection. Asked and
 20 answered.
 21 THE WITNESS: The governmental need is,
 22 again, if you're going to get more detailed

1 information, then you need that information.
 2 BY MR. GERSCH:
 3 Q Who said in the spring of 2017 that the
 4 government needed more detailed information?
 5 A Again, I'm presented with a request by
 6 the Secretary to say, can we add this question to
 7 the census? I inquire about that, and I looked at
 8 it. One of the reasons you would need it is
 9 voting rights. If you're going to do voting
 10 allocations on the basis of census allocations,
 11 that's the reason it's perfectly sufficient.
 12 Q Who said that in the spring of 2017?
 13 A That was -- that was determined after
 14 taking a quick look at the issue. I don't need
 15 more than that to continue to pursue the question.
 16 Q Who told you that the government needed,
 17 in the spring of 2017, more detailed information
 18 about citizenship than was contained in the ACS?
 19 A Nobody.
 20 Q You came to that decision on your own; is
 21 that right?
 22 A Correct.

1 Q But you're not a voting rights lawyer,
 2 right?
 3 A Irrelevant to the question.
 4 Q That's not my question. You're not a
 5 voting rights lawyer, right?
 6 A I've already said that.
 7 Q So you decided on your own in the spring
 8 of 2017 that it would be a good idea for the
 9 government to have more information than was
 10 available from the ACS about citizenship to
 11 enforce the Voting Rights Act, even though you're
 12 not a voting rights lawyer?
 13 A I don't agree with that characterization,
 14 at all. I decided that there was sufficient
 15 information for me to pursue the Secretary's
 16 request to consider placing a citizenship question
 17 on the decennial census and that there was
 18 sufficient potential reason to collect that
 19 information to warrant moving forward. If I'd
 20 come to an opposite conclusion that there was not
 21 sufficient potential reason or that there was some
 22 insurmountable legal bar, then I would have

1 reported back to the Secretary, I'm sorry,
 2 Mr. Secretary, it does not appear we can
 3 accomplish this objective.
 4 Q Why did you need to come up with a reason
 5 for asking the question, separate and apart from
 6 whatever reason the Secretary had in his own head?
 7 A Again, my job is to figure out how to
 8 carry out what my boss asks me to do. So you go
 9 forward and you find a legal rationale. Doesn't
 10 matter what his particular personal perspective is
 11 on it. It's not -- it's not going to be the basis
 12 on which a decision is made.
 13 Q That's your understanding, that the way
 14 you should do it, is come up with a rationale that
 15 has nothing to do with what's in the Secretary's
 16 mind as to why he wants it; is that your
 17 understanding of how it's supposed to work?
 18 A No. Again, you continue to characterize
 19 things in a way that you believe may be correct,
 20 but not the way I believe to be correct. My job,
 21 as a person who has been doing this for 30-plus
 22 years for clients and people in the government, is

1 if they would like to accomplish an objective, I
 2 see if there's a way to do that. And, again, if
 3 it's not legal, you tell them that. If it can't
 4 be done, you tell them that. If there's a way to
 5 do it, then you help them find the best rationale
 6 to do it. That's what a policy person does.
 7 And so, again, if I came up with a
 8 rationale that the Secretary didn't agree with or
 9 didn't support, then he was going to tell me that.
 10 I have no doubt about that. But in the meantime,
 11 he doesn't -- I don't need to know what his
 12 rationale might be, because it may or may not be
 13 one that is -- that is something that's going to a
 14 legally-valid basis.
 15 So, again, he's got -- he's asked, can we
 16 put -- can we put a question on? The job of a
 17 policy person is go out and find out how you do
 18 that. Whether that decision is going to be made
 19 ultimately to do it or not, that's up to the
 20 decision-maker.
 21 Q Are you saying you're better off not
 22 knowing what the Secretary's own rationale is for

1 wanting the citizenship question?
 2 A The Secretary, as you would point out, is
 3 not a voting rights lawyer, so I would not expect
 4 him to necessarily come up with a rationale.
 5 That's the job of the staff at work.
 6 Q You certainly wouldn't expect the
 7 Secretary to have come up with the idea that the
 8 reason he should want the citizenship question is
 9 the Voting Rights Act; you wouldn't expect him to
 10 come up that on his own?
 11 A I -- he might well. I don't know.
 12 Q You have no reason to believe that he
 13 did, right?
 14 MR. GARDNER: Objection. Calls for
 15 speculation.
 16 THE WITNESS: I'm not going to speculate
 17 about what his rationale was. You'd have to --
 18 BY MR. GERSCH:
 19 Q Because --
 20 A -- ask him.
 21 Q -- because you have no idea what his
 22 rationale is?

1 A That's correct.
 2 Q Counsel asked you about contact you made
 3 with the Department of Justice --
 4 A Correct.
 5 Q -- starting with a Ms. Haney [sic], I
 6 believe.
 7 Do you recall that?
 8 A Yes. I believe her name is Hankey,
 9 but --
 10 Q Hankey. I apologize.
 11 What was the full name? I can get it out
 12 if you don't know it offhand.
 13 A Mary Blanche, but --
 14 Q I'll find it in here.
 15 A It's in one of these exhibits, the memo
 16 that I wrote. Here.
 17 Q Mary Blanche --
 18 A Yep.
 19 Q -- Hankey; is that right?
 20 A Yeah.
 21 Q All right. So you went -- you called
 22 Mary Blanche Hankey --

1 A Correct.
 2 Q -- with regard to adding a citizenship
 3 question to the census, right?
 4 A Correct.
 5 Q And you wanted to see if the
 6 Department of Justice would sponsor the question?
 7 A Correct.
 8 Q And you had a phone call with her, and
 9 you had at least a meeting with her, right?
 10 A Right.
 11 Q So at least two contacts?
 12 A Three, when she called me back with
 13 somebody else's name.
 14 Q Fair enough.
 15 Didn't -- didn't Ms. Hankey say, why do
 16 you want to have a citizenship question?
 17 A No, she didn't.
 18 Q Didn't come up, at all?
 19 A Nope.
 20 Q She referred you to a Mr. McHenry; is
 21 that right?
 22 A Correct.

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

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

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

1 If another agency calls and says, will
2 the Department of Commerce do such and such,
3 whatever it is --

4 A Right.

5 Q -- don't you say to them in some form or
6 another, why do you want this?

7 MR. GARDNER: Objection. Hypothetical.

8 BY MR. GERSCH:

9 Q Why does your agency need this?

10 MR. GARDNER: Objection. Hypothetical.

11 THE WITNESS: Again, I don't question why
12 their boss might want it. I might say, what is it
13 you think we can provide or why do you think the
14 Department of Commerce is the right agency for
15 this? But if they say we need this data because
16 we're negotiating a trade agreement, whatever,
17 that's fine. I don't question their basis.

18 BY MR. GERSCH:

19 Q Okay. But if I understood your last
20 answer, you added something important, you said,
21 if they call and say we need this for the trade
22 ag- -- trade agreement, you say I don't question

1 Q Did he also say, listen, I don't really
2 need that information, or my guys don't need that
3 information, or my department doesn't need that
4 information or something like that?

5 MR. GARDNER: Objection to form.

6 THE WITNESS: Again, no, he did not
7 indicate that they did not need the information.
8 He simply suggested that they were rather busy and
9 why don't I talk to the Department of
10 Homeland Security.

11 BY MR. GERSCH:

12 Q It's your testimony that he said they
13 were too busy to do it?

14 A Unfortunately, that's not an uncommon
15 response from other agencies. They don't
16 necessarily look for extra work.

17 Q Okay. So they were too busy to ask for
18 it, that's what you understood them to say?

19 A Yeah. Their inclination was they weren't
20 inclined to do the work, to ask for it, yeah.

21 Q Okay. Okay. So Mr. McHenry let's you
22 know he's not inclined or the department is not

1 them. But if they don't give a reason, sir, don't
2 you say to them, why do you want it?

3 MR. GARDNER: Objection. Calls for a
4 hypothetical.

5 THE WITNESS: Again, I already provided
6 the reason for Department of Justice. I said,
7 would it be useful for you to have more granular
8 voting data at the census lock level? He said he
9 would inquire. That answers your question. I'd
10 already provided the answer.

11 BY MR. GERSCH:

12 Q Mr. McHenry comes back at some point and
13 he says he's not interested, right, in words or
14 substance?

15 A He suggested that I contact the
16 Department of Homeland Security.

17 Q But I take it he makes it clear to you in
18 some fashion -- withdrawn.

19 Let's start with this. What did he say
20 to you?

21 A He suggested I talk to the Department of
22 Homeland Security.

1 inclined to do the work, to ask for it, and he
2 refers you to Homeland Security, correct?

3 A Correct.

4 Q And you speak to a Mr. Hamilton, right?

5 A Right.

6 Q And Mr. Hamilton, he's not a VRA guy,
7 right?

8 A I have no idea what his background is.

9 Q Certainly, it's your understanding that
10 the Department of Homeland Security has nothing to
11 do with enforcing the Voting Rights Act?

12 A It would not normally be something I
13 would think they would do, no.

14 Q And you talked to Mr. Hamilton how many
15 times?

16 A I don't know, three or four times.

17 Q Over what period?

18 A Again, two weeks. I don't know.

19 Q And don't you say to Mr. Hamilton, here's
20 why we want the information, here's why we want
21 you to ask for the citizenship question?

22 A Again, it was the same explanation as I

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 Case No. 1:18-CF-05025-JMF

4 -----x
NEW YORK IMMIGRATION COALITION, ET AL.,

5
6 Plaintiffs,

7
8 - against -

9
10 UNITED STATES DEPARTMENT OF COMMERCE,
11 ET AL.,

12 Defendants.

-----x

13 August 24, 2018
14 9:07 a.m.

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

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

1 out that you say you can't read on here?

2 A. If that's what you are telling
3 me, I have no reason to believe that it's
4 not true.

5 Q. All right. When Secretary Ross
6 says "I'm mystified why nothing have been
7 done in response to my months old request,"
8 why did Secretary Ross request as of
9 several months apparently before May 2nd,
10 2017, why did he request that a citizenship
11 question be included on the census?

12 A. I have no idea. I mean, as you
13 have correctly pointed out, this was in
14 May. I didn't write the e-mail and I
15 wasn't even -- he didn't even send it to
16 me.

17 Q. I take it your testimony is
18 that Secretary Ross never told you the
19 reason that he made such a request?

20 A. I have never asked.

21 Q. That's not my question. Did he
22 ever tell you?

23 A. No.

24 Q. Did you ever learn to whom he
25 made that request?

1 A. Of what?

2 Q. The request to add a
3 citizenship question.

4 MS. WELLS: I object to form.

5 A. I guess I'm confused. Can you
6 please repeat the question?

7 Q. Certainly.

8 He says he "made a months old
9 request that we include a citizenship
10 question." Did you ever learn to whom he
11 made the request?

12 A. I have no idea.

13 Q. All right. So this is
14 forwarded to you by Brook Alexander, and
15 you respond by saying that you talk
16 frequently with Marc Neumann and asking if
17 the Secretary wants to meet with him.

18 Who is Marc Neumann?

19 A. So Marc Neumann was somebody
20 that I met on the transition team who had
21 worked at Census before.

22 Q. And did you discuss the
23 citizenship question with Marc Neumann?

24 A. Did I?

25 Q. Yes.

1 of State of Kansas, have you heard that
2 before?

3 A. Well, I just read it right
4 here.

5 Q. So you would have known that
6 back in the day?

7 A. No.

8 Q. All right. So Kris Kobach
9 writes an e-mail to you, if you look down
10 that first page, July 21, 2017, he writes
11 "Wendy, nice meeting you on the phone this
12 afternoon. Below is the e-mail I sent to
13 Secretary Ross" --

14 A. Sir, can I read the whole
15 e-mail, please?

16 Q. Sure.

17 A. Thank you.

18 (Witness perusing document.)

19 A. Okay.

20 Q. All right. So there is an
21 e-mail from Kris Kobach to you, July 21, in
22 which he says -- he references meeting you
23 on the phone this afternoon.

24 Do you recall speaking with
25 Kris Kobach?

1 A. Not at all.

2 Q. You don't deny speaking with
3 him?

4 A. I think you asked me if I
5 remember. I don't remember talking to him.

6 Q. This is a different question.
7 You don't deny speaking with
8 him?

9 A. Given this e-mail, I would
10 assume that I spoke to him, but I don't
11 remember ever speaking to him.

12 Q. All right. And he asks --
13 withdrawn.

14 He says that he had sent an
15 e-mail to Secretary Ross and he attaches it
16 here. You see that, correct?

17 A. Well, I see his e-mail to me
18 says "Below is the e-mail that I sent to
19 Secretary Ross."

20 Q. Okay.

21 A. So I assume however this is
22 produced, it would have been this e-mail.

23 Q. All right. And one of the
24 things that the e-mail that Kris Kobach
25 forwards to you, one of the things in it is

1 the statement "It is essential that one
2 simple question be added to the upcoming
3 2020 census," that's the first sentence of
4 the second paragraph of this forwarded
5 e-mail; do you see that?

6 A. The second -- the first
7 sentence of the second paragraph that Kris
8 Kobach sent to, I believe it is Secretary
9 Ross, but I can't say his -- there is no
10 e-mail address -- says "It is essential
11 that one simple question be added to the
12 upcoming 2020 census."

13 Q. All right. When you spoke with
14 Kris Kobach, didn't he talk to you about
15 adding a citizenship question to the
16 census?

17 A. Again, I have no recollection
18 ever speaking to him.

19 Q. Who did you understand Kris
20 Kobach to be at the time?

21 A. I had no idea.

22 Q. Do you typically set up
23 meetings with the Secretary or calls with
24 the Secretary to people -- with people you
25 have no idea who they are?

1 A. You asked me, sir, if at the
2 time if I knew who Kris Kobach was, and I
3 said I didn't.

4 Q. Correct. I have asked you a
5 different question now.

6 A. Okay. Could you please repeat
7 it?

8 Q. My question is, would you
9 typically set up a call for the Secretary
10 with somebody who you didn't know anything
11 about who they were?

12 A. Well, no.

13 Q. Why did you do so on this
14 occasion?

15 A. Here it looks as though he
16 forwarded to me and told me who he was.

17 Q. Okay. And why did you set up a
18 call with him with the Secretary?

19 A. At this point in time, I don't
20 remember.

21 Q. It had to do with the
22 citizenship question, didn't it?

23 A. He had sent an e-mail
24 requesting a call, and I don't remember,
25 well, it looks like I set it up, so, you

1 know --

2 Q. Ms. Teramoto, my question is
3 simply, the call that you set up, that was
4 for the purpose of discussing the
5 citizenship question, correct?

6 A. It was -- I would have set up
7 the call because somebody had asked for a
8 call with the Secretary.

9 Q. Didn't you set it up for the
10 Secretary in part because it was about the
11 citizenship question?

12 A. I would have set up the call
13 because somebody had asked for the call
14 with the Secretary. It wouldn't be
15 specifically because of a certain question.

16 Q. You wouldn't set up a call for
17 anyone who asks for a call with the
18 Secretary, would you?

19 A. If there is somebody who wants
20 to speak to the Secretary and it seems like
21 it is something that he would want to talk
22 about, then I would set it up.

23 Q. So I take it he would, in your
24 mind, he would have wanted to talk about
25 the citizenship question?

1 A. I would have set up the call if
2 somebody like this would have asked for a
3 call with the Secretary, so if another
4 Secretary of State had asked for some call
5 with the Secretary, I would have tried to
6 facilitate that.

7 Q. Wouldn't you have told the
8 Secretary what the topic of the call was?

9 MS. WELLS: I object to the
10 form.

11 A. It depends.

12 Q. Wouldn't you have told him what
13 the topic of this call was?

14 MS. WELLS: I object to the
15 form.

16 A. Somebody would have told him
17 what the topic was.

18 Q. In this time period, July 2017,
19 and earlier, hadn't you heard talk like
20 this before that it is essential that the
21 citizenship question be added to the
22 census?

23 A. I don't remember anything
24 specific.

25 Again, sir, I was not involved

1 in the day-to-day workings of the census.
2 I think that's also demonstrated by the
3 fact that I wasn't -- I don't remember ever
4 being on this call, and it doesn't look
5 like when I set it up, I had any intention
6 of being on that call.

7 Q. In his e-mail to you, Kris
8 Kobach also said that when he spoke to the
9 Secretary, he did so at the direction of
10 Steve Bannon.

11 Steve Bannon worked in the
12 White House, correct?

13 A. Yes.

14 Q. Did you ever talk to Steve
15 Bannon about the census?

16 A. Never.

17 Q. Did you ever set up a call for
18 the Secretary and Steve Bannon about the
19 census?

20 A. No.

21 Q. Would there be notes of the
22 Secretary's conversation with Kris Kobach?

23 A. I have no idea, sir, because I
24 wasn't part of that call.

25 Q. Were there -- but as his chief

1 of staff, was it typical that there would
2 be notes of a call that people would have
3 with the Secretary?

4 A. I don't take notes.

5 Q. Is there someone whose job it
6 is, someone other than you, or an
7 instruction that people should take notes?

8 A. No.

9 Q. How about to log the call, does
10 the Secretary have a calendar in which his
11 calls are logged, or some other document
12 which logs his calls?

13 A. In general, sir?

14 Q. Yes.

15 A. Well, he does have a calendar.

16 Q. Do you keep his calendar?

17 A. No, sir.

18 Q. Who keeps his calendar?

19 A. There is a scheduler who keeps
20 his calendar.

21 Q. Who is the scheduler?

22 A. For what time frame?

23 Q. This time frame, July 2017.

24 A. I don't remember.

25 Q. Who is it now?

1 A. Am I --

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

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

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

10 A. Okay.

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

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

17 (Witness perusing document.)

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

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

25 A. Yes, sir.

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

4 MS. WELLS: I object to the
5 form.

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

14 Q. No.

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

20 Q. This call that you had --
21 withdrawn.

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

24 MS. WELLS: I object to the
25 form.

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

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

5 MS. WELLS: I object to form.

6 A. I don't remember.

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

9 (Teramoto Exhibit 9 marked for
10 identification.)

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

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

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

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

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

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

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

12 (Witness perusing document.)

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

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

17 MS. WELLS: Objection to form.

18 A. I don't remember speaking to
19 him.

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

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

5 MS. WELLS: I object to the
6 form.

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

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

14 Wasn't that in connection with
15 the citizenship question?

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

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

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

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

1 exhibit Bates stamped 2528. It is a single
2 page and it is an e-mail from Wilbur Ross
3 to Peter Davidson, "Subject: Census."

4 It contains a single line of
5 text which reads as follows: "Wendy and I
6 spoke with the AG yesterday. Please follow
7 up so we can resolve this issue today.
8 WLR."

9 Didn't you and Secretary Ross
10 speak to the Attorney General on September
11 18th, 2017?

12 MS. WELLS: I object to form.

13 A. I don't remember being a part
14 of that call at all.

15 Q. Do you deny being part of the
16 call?

17 A. I said I don't remember being a
18 part of that call. I remember calls with
19 different cabinet members. I don't ever
20 remember being on a call with the AG.

21 Q. Can you think of any reason why
22 Mr. Ross would get this wrong just a day
23 after the call?

24 MS. WELLS: I object to form.

25 A. You would have to ask him, but

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

3 Q. Do you have any reason to
4 believe Mr. Ross would make up the fact
5 that you were on the call with him and the
6 Attorney General on or about September
7 18th, 2017?

8 MS. WELLS: I object to form.

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

12 Q. "Him" being Secretary Ross?

13 MS. WELLS: I object to the
14 form.

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

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

20 A. Yes, sir.

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

25 MS. WELLS: Objection to the

1 form. Asked and answered.

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

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

8 A. Okay.

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

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

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

25 MS. WELLS: I object to form.

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

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

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

11 MS. WELLS: I object to form.

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

14 MS. WELLS: I object to the
15 form.

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

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

22 (Teramoto Exhibit 11 marked for
23 identification.)

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

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

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

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

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

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

17 A. Okay. Then okay.

18 Q. Do you accept their
19 representation?

20 A. Sure.

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

24 A. Sure.

25 Q. So "the Attorney General and

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

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

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

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

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

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

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

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

24 MS. WELLS: Objection to form.

25 A. Again, this is, you know, an

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

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

10 MS. WELLS: I object to form.

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

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

16 MS. WELLS: I object to form.

17 A. Sure.

18 Q. And what did you speak with him
19 about?

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

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

25 MS. WELLS: I object to the

1 form of the question.

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

4 Q. Yeah.

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

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

10 A. Sure.

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

15 MS. WELLS: I object to form.

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

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

23 MS. WELLS: I object to form.

24 Q. Are you?

25 MS. WELLS: I object to the

1 form.

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

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

16 A. Sure.

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

19 Q. What's the reason?

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

1 does.

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

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

21 MS. WELLS: I object to form.

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

24 Q. I will withdraw the question.
25 You say you weren't the best

1 person to be involved with census issues.

2 A. And I'm still not.

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

12 MS. WELLS: I object to form.

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

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

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

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

1 MS. WELLS: I object to the
2 form, and it also mischaracterizes the
3 testimony, I believe.

4 Q. I'm characterizing the
5 transcript, which I'm looking at.

6 A. I have not specifically asked
7 for this letter that you're talking about.

8 Q. I take it you haven't asked for
9 it generally either?

10 A. I don't know what you mean,
11 generally.

12 Q. You said specifically. I don't
13 know if you are meaning to exclude
14 something.

15 A. I'm not a lawyer, so all I'm
16 saying is I have not asked for it.

17 Q. Okay. I know you haven't seen
18 this before today, but I want to point you
19 to something just so we can have a
20 framework.

21 Sort of almost halfway down the
22 first paragraph of Teramoto Exhibit 1,
23 Secretary Ross says that with respect to
24 the fundamental issues regarding the
25 census, he says "Part of these

1 considerations included whether to
2 reinstate a citizenship question which
3 other senior Administration officials had
4 previously raised."

5 Do you know who the other
6 senior Administration officials are?

7 A. I have no idea.

8 Q. Who would know?

9 A. You would have to ask Secretary
10 Ross.

11 Q. I will represent to you that
12 the Commerce Department, through its
13 lawyers at the Department of Justice, said
14 they can't figure out the answer to this
15 question.

16 Do you have reason to believe
17 that the identity of the senior
18 Administration officials is some kind of
19 state secret?

20 MS. WELLS: I object to the
21 form of the question.

22 A. Are you being serious?

23 Q. Yeah. I'm, frankly, shocked
24 that the Commerce Department and the United
25 States Justice Department can't figure out

1 who these senior Administration officials
2 are.

3 So I'm asking you, is this some
4 kind of state secret?

5 MS. WELLS: I object to the
6 form of the question and also --

7 Q. Is it any kind of secret? You
8 can withdraw "state."

9 MS. WELLS: -- the
10 characterization of what the government has
11 said in connection with the request for the
12 information that you have presented in your
13 interrogatory.

14 But you can answer the
15 question, if you remember it.

16 THE WITNESS: I don't. Can you
17 please read it back?

18 Q. I will rephrase it.

19 A. Okay.

20 Q. Can you think of any reason why
21 the identity of the senior Administration
22 officials who had raised the citizenship
23 question to whom Mr. Ross refers, can you
24 think of any reason why this is secret or
25 why we can't know the answer to who those

1 people are?

2 MS. WELLS: I object to form.

3 A. I have no idea.

4 Q. I take it you have not heard
5 any discussion of that issue?

6 A. Of the issue of the senior
7 Administration officials?

8 Q. Yeah.

9 A. Right, I have not.

10 Q. You have not been -- you have
11 not been asked to find out the answer to
12 that question?

13 A. I have not been a part of it at
14 all. You are the first person who has
15 raised it with me.

16 Q. Still on Teramoto Exhibit No.
17 1, when Secretary Ross says that soon after
18 his appointment as Secretary of Commerce,
19 he starts to have considerations into
20 whether to reinstate a citizenship
21 question, have you seen any documents about
22 that of any kind, e-mails, scraps of paper,
23 memoranda?

24 A. Where are you, sir?

25 Q. So second sentence is "Soon

1 reason that the Department of Justice asked
2 the citizenship question is because
3 Secretary Ross asked the Department of
4 Justice to ask the citizenship question?

5 MS. WELLS: I object to form.

6 A. I'm sorry if I don't understand
7 your question, but when you ask it to me,
8 it makes it sound like you are asking me if
9 I understand why the Justice Department did
10 something, and, again, I have no idea how
11 the Justice Department works, so I can't
12 tell you why they do or do not do anything;
13 I'm sorry, I just don't.

14 Q. Do you understand from any
15 source that Secretary Ross went to the
16 Department of Justice and asked them to ask
17 for a citizenship question on the census?

18 A. Again, I don't know what direct
19 conversations the Secretary has had with
20 the Justice Department.

21 Q. You haven't heard about that
22 from any source?

23 A. Heard about what?

24 Q. That Secretary Ross went to the
25 Department of Justice and asked the

1 Department of Justice to please request the
2 addition of a citizenship question.

3 A. I have no recollection of the
4 Secretary ever going to the Department of
5 Justice.

6 Q. Including you have no
7 recollection of the Secretary talking to
8 Assistant Attorney -- I'm sorry, to
9 Attorney General Jeff Sessions about that?

10 A. No, that's not what I said.

11 Q. I know. That's a different
12 question.

13 A. Okay. Can you ask your new
14 question, please?

15 Q. Yes.

16 You understand that Attorney
17 General Jeff Sessions spoke to Secretary
18 Ross about asking a citizenship question on
19 the census?

20 MS. WELLS: I object to the
21 question, the form of the question.

22 A. From the e-mails, I can see
23 that the Secretary and the AG spoke. What
24 they spoke about, I don't know, because, as
25 I said, I have no recollection of ever

1 being on a call between the two of them.

2 Q. Did you learn from any source
3 that the Department of Commerce had made a
4 decision in connection with the decisional
5 memorandum not to let Congress and the
6 public know that it was the Secretary who
7 wanted the Department of Justice to add the
8 citizenship question?

9 Withdrawn. Let me rephrase
10 that.

11 A. Okay.

12 Q. Did you learn from any source
13 that the Department of Commerce had made a
14 decision in connection with the decisional
15 memorandum not to let Congress and the
16 public know that it was the Secretary who
17 went to the Department of Justice, and it
18 was the Secretary, the Secretary of
19 Commerce, that is, who pressed the
20 Department of Justice to ask for a
21 citizenship question?

22 A. Sir, I'm not trying to be
23 difficult. Can you shorten your questions,
24 because there is a lot of notes and --

25 Q. Sure.

1 Department of Commerce has ever had
2 conversations with General Kelly about any
3 of the topics we have just discussed?

4 A. I have no idea.

5 Q. Have you ever spoken to Kris
6 Kobach, besides last summer?

7 A. Well, I don't even remember
8 speaking to him, so other than that e-mail.

9 Q. Do you know if Secretary Ross
10 has communicated with him before?

11 A. I have no idea.

12 Q. What about anyone at the
13 Department of Commerce?

14 A. No idea.

15 Q. Are you aware that he also made
16 a request to add a citizenship question to
17 the 2020 census?

18 MS. WELLS: I object to the
19 form.

20 A. Well, I mean, I've read the
21 e-mail.

22 Q. Aside from the e-mail.

23 A. No.

24 Q. Have you ever spoken to
25 Attorney General Jeff Sessions?

1 A. I think I might have said hi to
2 him at the chief of staff meeting, but now
3 that I think about it, I was late, so I
4 don't even think I even shook his hand.

5 Q. How about Secretary Ross and
6 Attorney General Jeff Sessions, are you
7 aware of conversations between them?

8 A. I'm aware that they've had
9 conversations. I'm not aware of the
10 content of those conversations.

11 Q. Do you know if they have ever
12 spoken about the census generally?

13 A. I have no idea.

14 Q. Do you know if they have ever
15 spoken about immigration enforcement?

16 A. I have no idea.

17 Q. Voter fraud?

18 A. Zero idea.

19 Q. An undercount?

20 A. No idea.

21 Q. Congressional apportionment?

22 A. No idea.

23 Q. Redistricting?

24 A. No idea.

25 Q. So earlier you mentioned you

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK IMMIGRATION COALITION, ET AL.,

Plaintiffs,

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

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,
Defendants.

Washington, D.C.

Wednesday, August 29, 2018

Deposition of:

DR. JOHN ABOWD

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

Veritext Legal Solutions

Mid-Atlantic Region

1250 Eye Street NW - Suite 350

Washington, D.C. 20005

1 NUMIDENT?

2 A That's correct.

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

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

9 A That's correct.

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

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

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

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

20 BY MR. HO:

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

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

6 You wrote that, right?

7 A I did, yes.

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

11 A Yes, she is.

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

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

17 Q Okay.

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

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

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

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

12 A That's correct.

13 Q Do you know why?

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

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

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

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

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

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

10 MR. EHRLICH: It's okay with me.

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

14 (Off the record.)

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

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

1 citizenship question?

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

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

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

11 A No.

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

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

16 (Off the record.)

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

20 BY MR. HO:

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

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK IMMIGRATION COALITION, ET AL.,

Plaintiffs,

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

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,
Defendants.

Washington, D.C.

Monday, August 20, 2018

Deposition of:

DR. RON JARMIN

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

Veritext Legal Solutions

Mid-Atlantic Region

1250 Eye Street NW - Suite 350

Washington, D.C. 20005

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

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

1 employer, business in the country. A number of
 2 current economic indicator surveys, monthly retail
 3 trade, wholesale trade, those sorts of things.
 4 Q Okay. I'll take that back.
 5 When did you first learn of the
 6 possibility of adding a citizenship question to
 7 the census?
 8 A So I think around the time that
 9 John Thompson was retiring, I had -- I had
 10 heard -- I think from John, but I'm not exactly
 11 sure -- that there was interest in a citizenship
 12 question, which is, you know, not a necessarily
 13 new thing. There was interest in the citizenship
 14 question in 2010, as well. So that's -- that's --
 15 but other than a vague notion that there may be
 16 folks asking for a citizenship question, that was
 17 the extent of my knowledge of that.
 18 Q And when was that conversation with
 19 Mr. -- Dr. Thompson?
 20 A So that would have been May, June-ish of
 21 2017.
 22 Q And what do you recall Dr. Thompson

1 telling you about the citizenship question?
 2 A Basically what I just -- that there may
 3 be interest putting it on there. It was not a
 4 particularly detailed conversation.
 5 Q Do you remember asking him questions
 6 about that?
 7 A No.
 8 Q Do you remember anything else about that
 9 conversation?
 10 A No. It was a conversation about, you
 11 know, him leaving, and Enrique and I sort of
 12 taking over. So it was, you know, all the fun
 13 stuff that was in store for us.
 14 Q I'm sure that's a big list.
 15 A It was a big list.
 16 Q Sure.
 17 When was the next time you heard about
 18 the possibility of a citizenship question being
 19 added to the census?
 20 A Probably shortly before the -- the letter
 21 came from Art Gary.
 22 Q Tell me how you learned about this.

1 A Folks at the department were asking
 2 if -- were saying that a letter was forthcoming --
 3 Q And when you --
 4 A -- and that we should be looking out for
 5 it.
 6 Q And when you say "the Department," what
 7 do you mean?
 8 A Department of Commerce.
 9 Q And who told you this, that you should be
 10 looking out for this?
 11 A I don't recall exactly who told me. But
 12 I think, you know -- I think there was multiple
 13 people that expressed, so, you know, I think
 14 Earl Comstock and Karen Dunn Kelley had both
 15 expressed, but I think I actually learned it from
 16 somebody else before that, so.
 17 Q Do you remember who you learned it from?
 18 A I don't.
 19 Q What were your conversations with
 20 Comstock?
 21 A Well, there were no --
 22 MS. BAILEY: Objection. Vague.

1 THE WITNESS: So there were no
 2 conversations. It was -- it was information
 3 transfer. I was told to keep an eye out for a
 4 letter. We didn't have any conversations.
 5 BY MS. GOLDSTEIN:
 6 Q So how were you told to keep an eye out
 7 for a letter?
 8 A We're expecting a letter from the
 9 Department of Justice, you know, keep an eye out
 10 for.
 11 Q Was that an oral conversation or
 12 email --
 13 A Yes. It was oral.
 14 Q And what did -- did you have
 15 communications with Karen Dunn Kelley prior to
 16 receiving the letter?
 17 A Yeah. It would have been the same
 18 nature. Nothing in detail.
 19 Q Did you have any conversations with
 20 Secretary Ross about adding a citizenship question
 21 prior to receiving the Gary letter?
 22 A No.

1 Q With Wendy Teramoto?
 2 A No.
 3 Q Any other communications with anyone from
 4 the Department of Commerce about the citizenship
 5 question --
 6 A No.
 7 Q -- before you received --
 8 A No.
 9 Q -- the letter?
 10 A No.
 11 Q And I'm just going to ask just for the
 12 record --
 13 A That's fine.
 14 Q -- I know that my questions are often
 15 going to be really predictable, and that's really
 16 just for the Court and for the transcript, if I
 17 can finish first and then you answer.
 18 A Go ahead.
 19 Q Thank you.
 20 So how many days prior to receiving the
 21 Gary letter did you hear about the possibility of
 22 a citizenship question?

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

1 A No.
 2 Q How did you receive the letter?
 3 A I got a copy via fax. That's how I first
 4 saw it.
 5 Q From where?
 6 A From the Department, actually. They had
 7 a copy of it.
 8 Q And when you say the Department --
 9 A The Department of Commerce. Right.
 10 Yeah. If I talk about another department, I'll
 11 name it exclusively.
 12 Q So going forward, Department means
 13 Department of Commerce, right?
 14 A Yeah.
 15 Q And do you remember when that was?
 16 A In like early December.
 17 Q So when you heard about the citizenship
 18 question prior to receiving the Gary letter, did
 19 you hear that DOJ wanted a citizenship question or
 20 wanted citizenship information or something else?
 21 MS. BAILEY: Objection. Compound.
 22 THE WITNESS: So I believe I heard it as

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

1 partially meet a particular measurement objective.
 2 And so the Census Bureau often explores whether
 3 there's a nonsurvey source that we could use
 4 rather than putting a burden on the public through
 5 a survey question.
 6 Q So is it fair to say that a citizenship
 7 question is one way to get that data?
 8 A Yes.
 9 Q And there are other ways, as well?
 10 A In this case, yes.
 11 Q Okay. So let's look at this Exhibit 2.
 12 It is Bates number 1332. Do you recognize this
 13 document?
 14 A Yeah, I guess.
 15 Q What is it?
 16 A An email.
 17 Q This is an email from Aaron Willard dated
 18 12/15/2007 [sic] to you, correct?
 19 A Uh-huh.
 20 Q I'm sorry. You need yes or no.
 21 A Yes.
 22 Q Thank you.

1 And does this -- this email refers to a
 2 letter from DOJ, correct?
 3 A Yes.
 4 Q What letter is that?
 5 A I believe that would be the Art Gary
 6 letter.
 7 Q And when we're talking --
 8 A I'm assuming that's the only letter I
 9 know of.
 10 Q And when we're talking about the Gary
 11 letter, we're referring to the letter from Art
 12 Gary requesting a citizenship question?
 13 A Yes.
 14 Q How did you learn that Karen got a call
 15 from the Secretary and has an update for you-all?
 16 A Via this email.
 17 Q Was there any other way you learned this
 18 before this?
 19 A I don't think so.
 20 Q Okay.
 21 (Plaintiffs' Exhibit 3, Email, was
 22 marked.)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK IMMIGRATION COALITION, ET AL.,

Plaintiffs,

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

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

Defendants.

Washington, D.C.

Tuesday, August 28, 2018

Deposition of:

KAREN DUNN KELLEY

called for oral examination by counsel for
Plaintiffs, pursuant to notice, at the office of
Arnold & Porter, 601 Massachusetts Avenue NW,
Washington, D.C., before KAREN LYNN JORGENSON,
RPR, CSR, CCR of Capital Reporting Company,
beginning at 9:04 a.m., when were present on
behalf of the respective parties:

Veritext Legal Solutions

Mid-Atlantic Region

1250 Eye Street NW - Suite 350

Washington, D.C. 20005

1 to the final form is a draft. So anybody who saw
 2 it at that point was in the draft mode.
 3 So I apologize. I just don't want -- I
 4 don't want to not answer your question, because I
 5 know this is such a very, very important topic.
 6 BY MR. GROSSI:
 7 Q We'll hold it until this afternoon when
 8 I'll be able to put the document in front of you.
 9 A Okay.
 10 Q In the supplemental memorandum in the
 11 second sentence, Secretary Ross states, quote,
 12 soon after my appointment as
 13 Secretary of Commerce, I began considering various
 14 fundamental issues regarding the upcoming 2020
 15 census, including funding and content. Part of
 16 these considerations included whether to reinstate
 17 a citizenship question which other senior
 18 administration officials had previously raised.
 19 Do you see that?
 20 A Yes. I do see that.
 21 Q Okay. So we know from the supplemental
 22 memorandum, that there were senior administration

1 officials who raised the issue of reinstating the
 2 citizenship question shortly after
 3 Secretary of Commerce Ross assumed the position in
 4 January 2017, correct?
 5 MR. GARDNER: Objection. Lack of
 6 foundation.
 7 THE WITNESS: I know what I read here.
 8 BY MR. GROSSI:
 9 Q Fair enough.
 10 What I want to do is find out what you
 11 know from anything anybody has told you about
 12 which senior administration officials raised the
 13 issue of adding a citizenship question in this
 14 time frame soon after Secretary of Commerce Ross
 15 took the position.
 16 Tell me from any source, including
 17 Secretary Ross or anything else you've been told,
 18 about who those senior administration officials
 19 were?
 20 A I do not know.
 21 Q You don't know who they are? You've
 22 never asked Secretary Ross where he got the idea

1 to add a citizenship question?
 2 A I never asked the Secretary.
 3 Q And he never told you?
 4 A Again, I think you're conflating two
 5 questions. You asked about senior officials,
 6 administrative officials, and now you're saying
 7 how he got the idea. There's two separate topics
 8 here.
 9 Could you clarify what you're asking me?
 10 Q Well, Secretary Ross says he got the idea
 11 from senior administration officials, okay?
 12 MR. GARDNER: Objection. Lack of
 13 foundation.
 14 THE WITNESS: Okay. I know, again, what
 15 I've just read here.
 16 BY MR. GROSSI:
 17 Q Right. What we're trying to figure out
 18 from any source -- and remember, it might even be
 19 hearsay -- is who did Secretary Ross talk to in
 20 the spring of 2017 about this idea of adding a
 21 citizenship question? Any knowledge that you have
 22 from any source?

1 A I don't remember any. No. I do not
 2 remember any.
 3 Q Let me ask about some of the names that
 4 the government has mentioned in a slightly
 5 different capacity, which are the people who did
 6 discuss the topic, whether they raised it or not.
 7 Taking a look at Page 14 of the
 8 government's responses, they list the following
 9 people in response to the question of who
 10 discussed this with Secretary Ross. The first one
 11 is Mary Blanche Hankey.
 12 Do you know her?
 13 A No.
 14 Q Do you know that she works at the
 15 White House?
 16 A No.
 17 Q You've never heard her name in connection
 18 with this topic?
 19 A No.
 20 Q James McHenry, do you know who he is?
 21 A No.
 22 Q And your testimony is, you've never heard

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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

Plaintiffs,

v.

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

and

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

Defendants.

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

SECOND AMENDED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

JURISDICTION AND VENUE

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

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

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

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

PARTIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ALLEGATIONS

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

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

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

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

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

34. Some demographic groups have proven more difficult to count than others. Minority and immigrant populations have historically been some of the hardest groups to count accurately in the decennial census, due to issues such as language barriers and distrust of government. For example, the 2010 Census failed to count more than 1.5 million minorities. Indeed, Census Bureau analyses show the fast-growing Hispanic population was undercounted by 1.54% in 2010, by 0.71% in 2000, and by 4.99% in 1990.⁵

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

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

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

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

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

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

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

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

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

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

⁷ Ross Memo at 5.

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

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

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

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

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

⁹ *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹³ *Immigration and Customs Enforcement and Customs and Border Patrol Fiscal Year 2018 Budget Request: Hearing Before the Subcomm. on Homeland Sec. of the H. Comm. on Appropriations*, 115th Cong. (2017) (statement of Thomas D. Homan, Acting Director, Immigration and Customs Enforcement).

¹⁴ Memorandum from the U.S. Census Bureau, Ctr. for Survey Measurement to Assoc. Directorate for Research and Methodology, *Respondent Confidentiality Concerns 1* (Sept. 20, 2017), <https://www2.census.gov/cac/nac/meetings/2017-11/Memo-Regarding-Respondent-Confidentiality-Concerns.pdf>.

troubling given that they impact hard-to-count populations disproportionately, and have implications for data quality and nonresponse.”¹⁵

53. Defendants’ decision to add a citizenship demand to the 2020 Census questionnaire will add to this unprecedented level of anxiety in immigrant communities. It will lead to nonresponse and lower participation by many immigrants who are citizens and legal residents and live in mixed immigration status households, as well as by undocumented immigrants, all of whom may seek to protect their own privacy or the privacy of their household. This exacerbated deterrent effect began on March 26, 2018, when immigrant communities learned that Secretary Ross directed the Census Bureau to add a citizenship demand to the 2020 Census.

54. Further, the Census Bureau will have to expend significant additional resources due to the lowered participation of immigrant communities, including hiring more census enumerators for in-person follow-up. However, enumerators are unlikely to succeed in meaningfully addressing nonresponses to the census where individuals decline to participate due to fear or mistrust of the federal government.

55. While Defendants recognize the detrimental impact that the addition of a citizenship demand will cause to the accuracy of the 2020 Census, they nevertheless decided to demand citizenship status from every individual resident in the country through the 2020 Census questionnaire.

¹⁵ *Id.* at 7.

C. Defendants ignored their own standards for ensuring the accuracy of the decennial census.

56. In adding a citizenship demand to the 2020 Census, Defendants departed from statistical standards that promote the accuracy of information collected and disseminated by Defendants.

57. For each decennial census, the Census Bureau meticulously develops and tests the content, specific language, order, and layout of the questionnaire to improve the accuracy of the enumeration. In addition to fulfilling the Census Bureau's constitutional duty, this development process involves multiple steps that ensure the accuracy, reliability, and objectivity of the final data, as consistent with prior Census Bureau practice and as required by the Information Quality Act ("IQA"). Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763 (Dec. 21, 2000).

58. Government-wide statistical standards adopted under the IQA require the Commerce Department and the Census Bureau to carefully design the census questionnaire to "minimize respondent burden while maximizing data quality" and to "achieve the highest rates of response."¹⁶ The standards also require testing each component of the questionnaire to ensure that it operates as intended.

59. The questionnaire development process and the evaluation of changes to individual inquiries take several years to complete.

60. Indeed, the Census Bureau has spent almost ten years developing and testing the content, specific language, and layout of just one proposed change to the question regarding race and ethnicity on the 2020 questionnaire. From 2008 through 2012, the Census Bureau conducted

¹⁶ Office of Mgmt. & Budget, *Statistical Policy Directive No. 2: Standards and Guidelines for Statistical Surveys*, Sections 1.3, 1.4, 2.3.1 (2006).

comprehensive research into the possibility of combining race and ethnicity into one question on the 2020 Census. The research focused on whether this proposed change would improve respondent understanding of the question, as well as improve the accuracy of the race and ethnicity data collected.

61. The Census Bureau then spent several years designing and conducting tests on the proposed change to explore different alternatives for the language, layout, and instructions regarding a revised question. The testing was designed to assess the accuracy and reliability of alternative forms of asking the proposed question. In 2016, the Census Bureau conducted outreach to federal agencies and to the public to obtain feedback on the proposed change.

62. The Bureau concluded its process at the end of 2017, after nine years of evaluation and testing, because it “needed to make a decision on the design of the race and ethnicity questions by December 31, 2017 in order to prepare for the 2020 Census systems, and deliver the final 2020 Census question wording to Congress by March 31, 2018.”¹⁷

63. In contrast, Defendants added a demand for citizenship information to the 2020 questionnaire after less than four months of consideration, conducted almost entirely after the Bureau’s internal December 31, 2017 deadline for adding questions to the 2020 Census. Defendants did not conduct any research into the potential performance of the citizenship demand or test the impact of adding a citizenship demand on data accuracy. Nevertheless, Secretary Ross directed the Census Bureau to add a citizenship demand to the 2020 Census questionnaire, overruling Census Bureau officials and the Bureau’s own expert advisory committee.

¹⁷ Memorandum, U.S. Census Bureau, *2020 Census Program Memorandum Series: 2018.02, Using Two Separate Questions for Race and Ethnicity in 2018 End-to-End Census Test and 2020 Census* (Jan. 26, 2018), https://www2.census.gov/programs-surveys/decennial/2020/program-management/memo-series/2020-memo-2018_02.pdf.

(1) Defendants failed to adequately test the inclusion of a citizenship demand on the 2020 Census.

64. Defendants added a citizenship demand to the 2020 Census without following required standards for testing the content, specific language, and layout of new inquiries. Specifically, Defendants ignored IQA standards that require testing of each inquiry to “ensure that all components of a survey function as intended,” and require incorporation of testing results into the final design of the questionnaire.¹⁸ These testing standards promote the accuracy of the decennial census, which is Defendants’ primary constitutional obligation.

65. Major testing of proposed changes to the 2020 Census questionnaire began with the 2014 Census Test. At that time, the Census Bureau assessed wording changes to the race and Hispanic origin question, as well as new potential response categories for married and unmarried relationships. The 2014 test did not assess the content, wording, or layout of a demand for citizenship information.

66. For the 2020 Census, the 2015 National Content Test was the opportunity for the U.S. Census Bureau to “compare different versions of questions prior to making final decisions.”¹⁹

67. The Census Bureau designed and conducted the National Content Test in 2015. While the Census Bureau tested the changes to questions related to race and ethnicity, the Bureau did not design tests of language, layout, or instructions for a potential citizenship demand. The Census Bureau announced the results of this test in early March 2017, none of which related to citizenship.

¹⁸ Office of Mgmt. & Budget, *Statistical Policy Directive No. 2: Standards and Guidelines for Statistical Surveys* Section 1.4 (2006).

¹⁹ U.S. Census Bureau, *Information Collection Request: 2015 National Content Test*, 80 Fed. Reg. 29,609, 29,610 (May 22, 2015).

68. The Census Bureau had other opportunities during the major tests in 2016 and April 2017 to test its questionnaire for the 2020 Census. However, the questionnaires assessed in these tests did not include a question regarding citizenship. In fact, the Census Bureau did not begin considering whether to add a demand for citizenship information to the 2020 Census until approximately eight months after it began conducting major testing in 2017.

69. The last major test before the 2020 Census—the 2018 end-to-end test—began on April 1, 2018. The end-to-end test is a dress rehearsal for the upcoming census, in which the Bureau tests and validates all major components, including operations, procedures, systems, and infrastructure. The 2018 end-to-end test does not include any request for citizenship information on the questionnaire provided to households. As a result, none of the major tests for the 2020 Census will have assessed the content, language, layout, or order of the citizenship demand on the questionnaire or the impact that the demand for person-by-person citizenship status would have on response rates and accuracy.

70. Defendants acknowledge that they are unable “to determine definitively how inclusion of a citizenship question on the decennial census will impact responsiveness,”²⁰ but they added a citizenship question without conducting the necessary testing to determine the impact of this decision on the 2020 Census.

71. To date, the Census Bureau has not tested the language or layout of the newly added demand for person-by-person citizenship information. Indeed, the purpose of testing is to promote accuracy by ensuring that the components of the census function as intended. Yet, the Bureau has failed to conduct any testing to assess the accuracy and reliability of “different ways

²⁰ Ross Memo at 7.

to ask the question” before adding it to the questionnaire.²¹ The Census Bureau also failed to test the content and order of the citizenship demand on the proposed census questionnaire with actual respondents as required by its own standards. Such testing could have allowed the Bureau to identify potential problems, including adverse impact of the citizenship demand on response rates and accuracy.

72. The Census Bureau’s failure to test its demand for citizenship information before deciding to include it on the 2020 Census questionnaire is unprecedented in the modern administration of the decennial census. For each decennial census since 1970, “the Census Bureau has conducted content tests to research and improve the design and function of different questions.”²² The Census Bureau spent three to four years thoroughly testing proposed changes to topics and question wording “to ensure census questionnaires are easily understood and reflect the population accurately.”²³ This thorough vetting process included testing of the language of specific questions in decennial National Content Tests in 1976, 1986, 1996, 2005, and 2015, as well as testing the performance of proposed topics and specific questions in the field with actual respondents.

73. In sharp contrast to these extensive testing practices, the Bureau failed to conduct any tests to determine the performance of its new demand for citizenship status on the 2020 questionnaire. Instead the Census Bureau simply transferred the citizenship demand from the existing American Community Survey (“ACS”) to the 2020 Census questionnaire.

²¹ U.S. Census Bureau, *How a Question Becomes a Part of the American Communities Survey* (2017) <https://www.census.gov/content/dam/Census/library/visualizations/2017/comm/acs-questions.pdf>.

²² U.S. Census Bureau, *Content Research* (Jan. 11, 2017), <https://www.census.gov/programs-surveys/decennial-census/2020-census/research-testing/content-research.html>.

²³ *Id.*

74. While the Census Bureau currently inquires into citizenship status on the annual ACS, it cannot simply transfer the demand from the ACS to the decennial census without testing. The ACS is a sample survey sent to 3.5 million households annually, rather than a complete enumeration of every household in the United States.

75. Moreover, the testing the Census Bureau has conducted on the citizenship demand in the ACS was done to refine the question in the context of the ACS questionnaire. The citizenship demand's specific language, layout, order, and instructions remain untested in the context of the decennial census questionnaire.

76. For instance, the Census Bureau developed the language of the citizenship demand on the ACS to fulfill various purposes, including the "evaluation of immigration policies."²⁴ As a result, the citizenship demand on the ACS requires citizens to disclose whether they were born in "United States territories," whether they were born "abroad" to U.S. parents, or if and when they were "naturalized."²⁵ This information is entirely irrelevant to the sole stated purpose for adding the citizenship demand to the 2020 Census questionnaire: to provide the Department of Justice with data it claims to need to enforce Section 2 of the Voting Rights Act.²⁶ The Census Bureau has not tested either how these components of the citizenship demand will perform on a person-by-person questionnaire or whether the language can be refined to minimize respondent burden.

77. Finally, the demand for information regarding the citizenship status of every individual in the United States has not been tested in the contemporary environment of high immigrant anxiety and concerns over privacy. Secretary Ross ignored these requirements when

²⁴ Final Questions Report at 59.

²⁵ *Id.* at 7.

²⁶ Ross Memo at 1, 8.

he asserted that the demand for citizenship status had been adequately tested by virtue of its inclusion on the so-called “long-form census” that was sent to a random sample of households from 1960 to 2000 and on the ACS since 2005. As the Census Bureau’s Scientific Advisory Committee publicly asserted on March 30, 2018, Secretary Ross’s reliance on these prior surveys is based on “data collected in a different data collection context, in a different political climate, before anti-immigrant attitudes were as salient and consequential” as they are at present.²⁷

78. Indeed, during general testing from February through September 2017, the Census Bureau found that unprecedented anxiety in immigrant communities—even without the inclusion of a demand for citizenship status—could increase non-response rates and adversely affect data quality for the 2020 Census. Defendants did not incorporate these findings into the final design of the 2020 Census questionnaire. Instead, Defendants incorporated a demand for citizenship status that will exacerbate anxiety in immigrant communities and further diminish the accuracy of the 2020 Census.

(2) Defendants disregarded respondent burden on potential response rates.

79. The IQA standards require Defendants to design questionnaires “in a manner that achieves the best balance between maximizing data quality . . . while minimizing respondent burden and cost,” and “achieves the highest practical rates of response.”²⁸ Further, under agency-specific IQA standards adopted by the Census Bureau, the Bureau committed to verify that questions are not “unduly sensitive” and “do not cause undue burden.”²⁹

²⁷ Michael Wines, *Census Bureau’s Own Expert Panel Rebukes Decision to Add Citizenship Question*, New York Times (Mar. 30, 2018).

²⁸ Office of Mgmt. & Budget, *Statistical Policy Directive No. 2*, § 2.3 at 11.

²⁹ U.S. Census Bureau, *Statistical Quality Standards* ii, 7–8 reqs. A2-3 & A2-3.3 (Jul. 2013).

80. Defendants failed to follow these directives, despite acknowledging that the citizenship question will have a negative impact on response rates. During sworn congressional testimony on April 18, 2018, Defendant Jarmin acknowledged that the Census Bureau provided Secretary Ross with an estimate of potential non-response resulting from inclusion of a citizenship demand on the 2020 Census. Defendant Jarmin noted that the impact “might be important” in some communities,³⁰ and that he expected the negative impact of the citizenship demand on response rates “would be largely felt in various sub-groups, in immigrant populations, [and] Hispanic populations.”³¹

81. Rather than adding a person-by-person citizenship demand on the 2020 Census questionnaire, Defendant Jarmin and the Census Bureau recommended that the best approach “would be to use administrative records” to calculate citizenship data.³²

82. Secretary Ross disregarded the Census Bureau’s recommendation and directed the Census Bureau to include a citizenship demand on the 2020 Census questionnaire. While Secretary Ross recognized the potential for higher rates of non-response, he concluded that the value of more complete citizenship data outweighed concerns regarding non-response.³³

83. Abandoning the goal of higher response rates and overall accuracy runs contrary to Defendants’ constitutional mandate to pursue an accurate enumeration of the population, and violates the IQA standards that the Census Bureau must follow.

³⁰ *House Appropriations Committee, Commerce, Justice, Science and Related Agencies Subcommittee Hearing on Bureau of the Census*, 115th Cong. 20 (April 18, 2018).

³¹ *Id.* at 23.

³² *Id.* at 13.

³³ Ross Memo at 7.

(3) Defendants disregarded stakeholder concerns.

84. A number of affected stakeholders have expressed concern to Defendants regarding the inclusion of a demand for citizenship status on the 2020 Census.

85. On January 8, 2018, the American Statistical Association (“ASA”) urged the Census Bureau not to collect citizenship information because of the “very strong potential the quality of the census will be undermined.”³⁴ In addition, the ASA raised concerns that the addition of a citizenship demand this late in the preparation process “would likely increase distrust or suspicion of the government among immigrants, many of whom are already anxious about government inquiries and activities.”³⁵ Moreover, the timing of the Census Bureau’s consideration “[did] not allow time for adequate testing to incorporate new questions, particularly if the testing reveals substantial problems.”³⁶

86. The National League of Cities also flagged concerns that the addition of a citizenship demand at such a late stage in the census planning process was “reckless and disruptive,” and would “spike fears about data confidentiality.”³⁷

87. Plaintiff USCM also sent Secretary Ross a letter signed by 161 Republican and Democratic mayors, expressing concerns about the addition of a citizenship demand to the 2020 Census questionnaire. The USCM noted that adding a demand for citizenship status late in the 2020 Census development process would nullify years of careful planning by the Census Bureau,

³⁴ Letter from Lisa LaVange to Sec’y of Commerce Wilbur Ross (Jan. 8, 2018), <http://www.amstat.org/asa/files/pdfs/POL-CitizenshipQuestion.pdf>.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Letter from Clarence Anthony to Sec’y of Commerce Wilbur Ross (Feb. 8, 2018), <http://www.nlc.org/sites/default/files/users/user125/Ross%20Letter%20on%20Citizenship%20Question.pdf>.

and would require staffing beyond currently planned levels to address higher rates of non-response in light of the anticipated chilling effect.

88. On February 12, 2018, nineteen state Attorneys General and the Governor of Colorado urged Secretary Ross not to collect citizenship information on the 2020 Census. In addition to the issues highlighted above, the states explained in detail that the collection of citizenship data is “unnecessary to enforce the vote-dilution prohibition in Section 2 of the Voting Rights Act,” and that “[c]ollecting citizenship data would undermine the goal of fair and effective representation for all communities, which the Voting Rights Act was enacted to protect.”³⁸

89. Several former directors of the Census Bureau voiced similar concerns after Defendants began considering this change. The Census Bureau Director from 2013 to 2017 explained, “[t]here are great risks that including that question, particularly in the atmosphere that we’re in today, will result in an undercount, not just of non-citizen populations but other populations that are concerned with what could happen to them.”³⁹ While Secretary Ross acknowledged receipt of some of these letters in his March 26, 2018 memorandum, he disregarded the serious concerns raised in these letters and directed the Census Bureau to demand the citizenship status of all respondents to the 2020 Census.

90. In his memorandum, Secretary Ross supported his decision by citing to several conversations with interested parties. One interested party, the former Deputy Director and Chief Operating Officer of the Census Bureau under President George W. Bush, subsequently

³⁸ Letter from Eric Schneiderman *et al.* to Sec’y of Commerce Wilbur Ross (Feb. 12, 2018), https://ag.ny.gov/sites/default/files/multi-state_letter_2020_census.pdf.

³⁹ Kriston Capps, *Ex-Census Director: Citizenship Question is ‘a Tremendous Risk’*, CityLab (Feb. 27, 2018), <https://www.citylab.com/equity/2018/02/former-census-director-citizenship-question-is-a-tremendous-risk/554372/>.

stated “there’s a high burden of proof that must be met about its value . . . and I told [Secretary Ross] that I don’t think the case has been made that [the citizenship question] is so important that it’s worth endangering this fragile instrument.”⁴⁰

91. Secretary Ross also cited discussions with a representative from Nielsen, a private survey company, as support for his conclusion that sensitive questions from the ACS caused no appreciable decrease in response rates. Nielsen took issue with this characterization of their representative’s discussion with the Secretary, and subsequently, issued a statement clarifying that it did not support Defendants’ inclusion of a citizenship question on the 2020 Census because it would lead to “inaccuracies in the underlying data.”⁴¹

(4) Defendants failed to justify their changes to the subjects to be included on the 2020 Census.

92. Finally, Defendants failed to comply with their statutory obligations to advise Congress of the subjects to be included on the decennial census, and of any “new circumstances” that “necessitate” changes to those subjects. The Census Act required the Commerce Secretary, not later than three years before the decennial census date (that is, before April 1, 2017), to transmit to Congress “a report containing the Secretary’s determination of the subjects proposed to be included” in the census. 13 U.S.C. § 141(f)(1). The report of subjects that Defendants submitted in March 2017 included the same subjects as the 2010 Census, and did not indicate any change to include citizenship information.

⁴⁰ Jeffrey Mervis, *Trump officials claim they can avoid 2020 census problems caused by controversial citizenship question. Experts are very skeptical.* Science (April 13, 2018), http://www.sciencemag.org/news/2018/04/trump-officials-claim-they-can-avoid-2020-census-problems-caused-controversial?utm_campaign=news_daily_2018-04-16&et rid=272854805&et cid=1976256best.

⁴¹ *Id.*

93. In reversing course just a year later, Defendants failed to identify and explain any “new circumstances” that “necessitate” this modification to the subjects they submitted in 2017, as required by statute. 13 U.S.C. § 141(f)(3).

III. Defendants’ decision to include a citizenship demand on the 2020 Census is not supported by the stated justification.

94. Defendants assert that they included a citizenship demand on the 2020 Census in response to a request from the United States Department of Justice (“DOJ”) dated December 12, 2017 (the “DOJ Letter”).

95. The DOJ Letter asserted that person-by-person information on the citizenship status of every individual in the country was necessary to enforce Section 2 of the Voting Rights Act. Specifically, DOJ claimed that it needs a “reliable calculation of citizen voting-age population” in order to determine whether a minority group can constitute a majority in a single-member district, the first element in a vote dilution case.⁴²

96. Collecting citizenship information from every person in the United States is not necessary to achieve the goal of effective Section 2 enforcement. The Supreme Court has never held that citizen voting-age population (“CVAP”) is the proper measure for examining whether a minority group can constitute a majority in a single-member district.

97. Congress could not have intended for effective Section 2 enforcement to depend on the availability of person-by-person citizenship data, because such data has never been available at any point since Section 2 was enacted in 1965. Data collected through the decennial census would not provide a “reliable calculation” of CVAP in any event, because citizenship

⁴² Letter from Arthur E. Gary, General Counsel, Justice Management Division, U.S. Dep’t of Justice, to Ron Jarmin, Performing the Non-Exclusive Functions and Duties of the Director, U.S. Bureau of the Census, U.S. Dep’t of Commerce (Dec. 12, 2017).

information collected decennially will quickly become outdated and less reliable over the course of the subsequent decade.

98. Further, the ACS already provides a reliable calculation of annually updated citizenship information that is collected through less invasive methods. In fact, DOJ and voting rights advocates have long used data from the ACS or a functionally equivalent survey to effectively enforce the law, and have never relied on the decennial census for this purpose.⁴³

99. Even if demanding citizenship status from every person residing in the United States were necessary to enforce Section 2 of the Voting Rights Act — which it is not — Defendants’ decision would impermissibly sacrifice the accuracy of the constitutionally-mandated census for non-constitutional purposes.

100. Defendants added a citizenship demand to the 2020 Census questionnaire knowing that it would likely lead to increased non-response and decreased accuracy in the 2020 Census. Nevertheless, Secretary Ross concluded that the accuracy of the citizenship data requested by the DOJ was “of greater importance” than the adverse effect resulting from higher levels of non-response.⁴⁴ In making this conclusion, Secretary Ross weighed a purported statutory purpose as having greater importance than the only constitutional requirement for the census: pursuing an accurate enumeration of the whole number of persons in the United States.

101. Demanding citizenship status on the 2020 Census will undermine, not advance, the goals of the Voting Rights Act. A person-by-person citizenship demand that leads to a

⁴³ Section 2 of the VRA was enacted in 1965, and no citizenship question has been included on the decennial census since 1950. From 1970 to 2000, a citizenship question was included only on the “long form” questionnaire, which was distributed to a sample of about one in six households in lieu of the decennial census questionnaire. Following the 2000 Census, the Census Bureau discontinued the “long form” questionnaire and replaced it with the American Community Survey, which is now sent to about one in every 38 households each year.

⁴⁴ Ross Memo at 7.

systematic undercount of minority populations across the United States will impair fair representation of those groups and the states in which they live.

102. It is clear that DOJ's stated rationale for demanding information on the citizenship status of every resident in the country is contrary to the evidence, and was not, in fact, the true reason DOJ sought this change in practice from the Census Bureau. On March 19, 2018, President Trump's reelection campaign sent a fundraising email stating, "The President wants the 2020 United States Census to ask people whether or not they are citizens . . . The President wants to know if you're on his side."⁴⁵ There was no assertion that the President sought this information to strengthen enforcement of the Voting Rights Act.⁴⁶ On March 28, 2018 — the day before the Census Bureau sent a report to Congress indicating that the 2020 Census would include a citizenship demand — President Trump's reelection campaign sent another fundraising email declaring that the President "officially mandated" that a citizenship demand be included on the 2020 Census. Again, the email had no mention of Voting Rights Act enforcement.⁴⁷

103. Further, the assertion that President Trump compelled the addition of a demand for citizenship information undermines Secretary Ross's claims that Defendants made an informed decision to add this question based on a comprehensive review process. Therefore, Defendants' unfounded and conflicting rationales indicate that the stated reason for demanding citizenship information is pretext.

⁴⁵ Tara Bahrapour, *Trump's Reelection Campaign Calls For Adding Citizenship Question To 2020 Census Amid Criticism That He Is Politicizing The Count*, Washington Post (Mar. 20, 2018), https://www.washingtonpost.com/local/social-issues/trump-campaign-calls-for-adding-citizenship-question-to-2020-census-amid-accusations-that-the-president-is-politicizing-the-annual-count/2018/03/20/dd5929fe-2c62-11e8-b0b0-f706877db618_story.html.

⁴⁶ Ross Memo at 1, 8.

⁴⁷ Tal Kopan, *Trump Campaign Rallies Supporters on Census Citizenship Question*, CNN (Mar. 28, 2018), <https://www.cnn.com/2018/03/28/politics/trump-census-citizenship/index.html>.

IV. Plaintiffs will be injured by Defendants' actions.

A. Plaintiffs are vulnerable to an undercount of their hard-to-count immigrant communities.

104. Plaintiffs are home to some of the hardest-to-count communities in the nation, including significant populations of authorized and undocumented immigrants. Many of these immigrants live in mixed-status families, with U.S. citizen children, siblings, or spouses. As a result, Defendants' decision increases the risk of undercounting both the citizens and noncitizens in these populations.

105. For instance, in New York State, 24.2% of households are "hard-to-count," meaning they did not mail back their 2010 Census questionnaire, which required the Census Bureau to conduct in-person follow-up. Approximately 36% of New York State's overall population and over one-half of its Hispanic population live in hard-to-count neighborhoods. Among these hard-to-count communities are New York's large immigrant population. Over one in five residents of New York State is foreign-born, the second highest proportion of foreign-born residents in the United States. In addition, in 2014, New York State had the fourth largest population of undocumented residents in the nation. New York's immigrants often reside in mixed-status households. Approximately 1.2 million New Yorkers, including 410,525 born in the United States, lived with at least one undocumented family member between 2010 and 2014.

106. In Colorado, 20.9% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 9.8% of Colorado's population, and in 2014 about 200,000 immigrants in Colorado were undocumented. Over 275,000 Colorado residents, including 127,582 born in the United States, lived with at least one undocumented family member between 2010 and 2014.

107. In Connecticut, 20.9% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Approximately 22% of the population currently lives in hard-to-count neighborhoods. Immigrants account for 14.4% of Connecticut's population, and in 2014, nearly one in every four immigrants in Connecticut was undocumented. Nearly 144,000 Connecticut residents, including 47,220 born in the United States, lived with at least one undocumented family member between 2010 and 2014.

108. In Delaware, 20% of households did not mail back their 2010 census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 9.4% of Delaware's population, and in 2014, approximately 31% of Delaware's immigrant population was undocumented. Nearly 30,000 Delaware residents, including 12,939 born in the United States, lived with at least one undocumented family member between 2010 and 2014.

109. In the District of Columbia, 21.7% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 13.3% of D.C.'s population, and in 2014, over one in four immigrants in D.C. was undocumented. Nearly 24,000 D.C. residents, including 8,912 born in the United States, lived with at least one undocumented family member between 2010 and 2014.

110. In Illinois, 19.3% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 13.9% of Illinois's population, and in 2014, approximately 24% of Illinois's immigrant population was undocumented. Between 2010 and 2014, approximately 344,000 U.S.-born Illinoisans lived with at least one undocumented family member.

111. In Iowa, 16.7% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 5.1% of Iowa's population, and in 2014, over one in four immigrants in Iowa was undocumented. Nearly 58,959 Iowa residents, including 23,639 born in the United States, lived with at least one undocumented family member between 2010 and 2014.

112. In Maryland, 19.7% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Moreover, Hispanic children in Maryland between the ages of 0 and 4 were undercounted by an estimated 9%. Immigrants account for 15.2% of Maryland's population, and in 2014, over one in four immigrants in Maryland was undocumented. Nearly 300,000 Maryland residents, including 99,846 born in the United States, lived with at least one undocumented family member between 2010 and 2014.

113. In Massachusetts, 21.1% of households did not mail back their 2010 Census questionnaire, which required the Census Bureau to conduct in-person follow-up, and approximately 23% of the population currently lives in hard-to-count neighborhoods. Immigrants account for 16.5% of Massachusetts's total population, and in 2014, nearly one in five immigrants in Massachusetts was undocumented. In Massachusetts, 28.5% of all child residents have at least one immigrant parent, and 80% of the children of immigrants under 18 are U.S. born.

114. In Minnesota, 14.4% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 8.2% of Minnesota's population, and in 2014, nearly one in four immigrants in Minnesota was undocumented. Nearly 140,000 Minnesota residents, including

54,857 born in the United States, lived with at least one undocumented family member between 2010 and 2014.

115. In New Jersey, 21.9% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Approximately 22% of the population currently lives in hard-to-count neighborhoods. Immigrants account for 22.5% of New Jersey's population, and in 2014, nearly one in four immigrants in New Jersey was undocumented. Over 600,000 New Jersey residents, including 204,946 born in the United States, lived with at least one undocumented family member between 2010 and 2014.

116. In New Mexico, 26.2% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Approximately 43% of the overall population and over 50% of New Mexico's Hispanic population lives in hard-to-count neighborhoods. Immigrants account for 9.5% of New Mexico's population, and in 2014, approximately 37% of immigrants in New Mexico were undocumented. Over 115,000 New Mexico residents, including 54,068 born in the United States, lived with at least one undocumented family member between 2010 and 2014.

117. In North Carolina, 19.3% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 7.8% of North Carolina's population, and in 2014, approximately 43% of immigrants in North Carolina were undocumented. Nearly 430,000 North Carolina residents, including 186,930 born in the United States, lived with at least one undocumented family member between 2010 and 2014.

118. In Oregon, 20.2% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for nearly 10% of Oregon's population. Additionally, in 2016, over 12% of Oregon's population were native born Americans who had at least one immigrant parent. In 2014, approximately 32% of immigrants in Oregon were undocumented, and children of undocumented immigrants accounted for 8.6% of Oregon's K-12 population.

119. In Pennsylvania, 17.7% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 6.8% of Pennsylvania's population, and in 2014, over one in five immigrants in Pennsylvania was undocumented. Nearly 195,000 Pennsylvania residents, including 66,576 born in the United States, lived with at least one undocumented family member between 2010 and 2014.

120. In Rhode Island, 22.3% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 13.5% of Rhode Island's population, and in 2014, nearly one in five immigrants in Rhode Island was undocumented. Nearly 38,000 Rhode Island residents, including 14,507 born in the United States, lived with at least one undocumented family member between 2010 and 2014.

121. In Vermont, 20.3% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 4.5% of Vermont's population, and in 2014, approximately 8% of Vermont's immigrant population was undocumented.

122. In Virginia, 19.2% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 12.3% of Virginia's population, and in 2014, approximately 28% of Virginia's immigrant population was undocumented. Over 325,000 Virginia residents, including 113,072 born in the United States, lived with at least one undocumented family member between 2010 and 2014.

123. In Washington, more than 20% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Roughly one in seven Washington residents is an immigrant, and one in eight native-born U.S. citizens in Washington lives with at least one immigrant parent. Over 170,000 U.S. citizens in Washington live with at least one family member who is undocumented. Between 2010 and 2014, over 351,000 people in Washington, including 151,209 born in the United States, lived with at least one undocumented family member.

124. In Chicago, 34% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Approximately 48% of Chicago's population lives in hard-to-count neighborhoods. Immigrants account for 20.8% of Chicago's population, and in 2014, an estimated 425,000 undocumented immigrants lived in the Chicago metro area.

125. In Columbus, 29% of households did not mail back their 2010 census questionnaire, requiring the Census Bureau to conduct in-person follow-up interviews. Over 60% of Columbus's Hispanic population live in hard-to-count neighborhoods. Immigrants account for 11.6% of the City's population and in 2014, approximately 22% of Columbus's immigrant population was undocumented.

126. In New York City, 29% of households did not mail back the 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. New York City is home to 3.4 million foreign-born residents, and approximately 46% of foreign-born residents are non-citizens. Immigrants and the children of immigrants account for 60% of New York City's population. The New York metropolitan area is also home to an estimated 1.15 million undocumented immigrants.

127. In Philadelphia, 26.9% of households did not mail back the 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 13.1% of Philadelphia's population, and in 2014, an estimated 50,000 undocumented immigrants lived in the City of Philadelphia.

128. In Maricopa County, where the City of Phoenix is located, 22.4% of households did not mail back the 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 19.8% of Phoenix's population, and in 2014, an estimated 250,000 undocumented immigrants lived in the Phoenix metro area.

129. In Allegheny County, where the City of Pittsburgh is located, 17.5% of households did not mail back their 2010 census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for approximately 8.5% of Pittsburgh's population, and in 2014, approximately 18% of Pittsburgh's immigrant population was undocumented.

130. In Providence County, Rhode Island, where Providence and Central Falls are located, 24.8% of households did not mail back the 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Approximately 37% of Providence County's current population lives in hard-to-count neighborhoods. Immigrants account for

nearly 30% of Providence's population, and over 38% of the population in Central Falls.

Providence and Central Falls are both taking part in the 2018 Census End-to-End Test.

131. In the City and County of San Francisco, 22.6% of households did not mail back the 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 34.9% of San Francisco's population, and an estimated 44,000 immigrant residents are undocumented. San Francisco is also home to thousands of mixed-status families, and over 8,000 undocumented residents reside with at least one United States citizen.

132. In Seattle, Washington, 20.7% of households did not mail back their 2010 census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Immigrants account for 16.9% of Seattle's population. Between 2000 and 2014, Seattle's immigrant population grew 20% compared to 14% for the overall population, and in 2014, approximately 4% of Seattle's immigrant population was undocumented.

133. In Cameron County, Texas, located on the border with Mexico, 26.5% of households did not mail back their 2010 Census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Approximately 47% of Cameron County's overall population, and over 80% of its Hispanic population lives in hard-to-count neighborhoods. Nearly one-fourth of Cameron County's population is foreign born, and, in 2014, approximately 9% of the county's residents were undocumented.

134. In El Paso County, Texas, located on the border with Mexico, 22.9% of households did not mail back their 2010 census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Approximately 26% of El Paso County's overall

population lives in hard-to-count neighborhoods. Over 25% of El Paso's population is foreign born, and in 2014, 50,000 undocumented immigrants lived in El Paso.

135. In Hidalgo County, Texas, located on the border with Mexico, 29.3% of households did not mail back their 2010 census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Approximately 58% of Hidalgo County's overall population, and over 90% of the County's Hispanic population, lives in hard-to-count census tracts. Nearly 28% of Hidalgo County's population is foreign born, and in 2014, over 10% of residents were undocumented.

136. In Monterey County, California, 24.2% of households did not mail back their 2010 census questionnaire, and therefore required the Census Bureau to conduct in-person follow-up. Approximately 35% of Monterey's population lives in hard-to-count neighborhoods. Also, 30% of Monterey County's population is foreign born. In 2014, approximately 10.2% of the immigrant population in Salinas, by far the largest city in Monterey County, was undocumented, and 50,000 undocumented immigrants lived in the Salinas metro area.

137. The members of the USCM are home to the majority of immigrants in the United States. In 2014, 104 metro areas, including many USCM members, accounted for over 86% of the immigrant population of the United States. Moreover, 61% of the nation's undocumented population live in the 20 largest metro areas in the United States, all of which contain cities that are USCM members.

138. Given the prevalence of Plaintiffs' hard-to-count populations, Plaintiffs are particularly susceptible to an undercount. Defendants' decision to add a person-by-person citizenship demand to the 2020 Census questionnaire will disproportionately impact Plaintiffs'

hard-to-count immigrant populations. The resulting undercounts in these communities will harm Plaintiffs' interests in full federal funding, accurate redistricting, and fair representation.

B. Defendants' conduct harms Plaintiffs' funding interests.

139. Many federal programs rely on the population figures collected in the decennial census to distribute federal funds among states and local governments. A total of approximately \$700 billion is distributed annually to nearly 300 different census-guided federal grant and funding programs. These programs support essential services for Plaintiffs, including healthcare, public education, social services, and infrastructure development. Inaccurate population counts resulting from Defendants' decision to add a citizenship demand to the 2020 Census will harm Plaintiffs by depriving them of their statutory fair share of federal funding, and removing crucial resources for important government services.

(1) Defendants' decision will deprive Plaintiffs of necessary infrastructure funding.

140. Many federal funding programs provide crucial support for the planning, construction, maintenance, and operation of essential infrastructure projects. Several of these federal programs, including the Highway Trust Fund program, the Urbanized Area Formula Funding program, the Metropolitan Planning program, and the Community Highway Safety Grant program distribute funds based, at least in part, on population figures collected through the decennial census. 23 U.S.C. § 104(d)(3); 49 U.S.C. §§ 5305, 5307, 5340; 23 U.S.C. § 402.

Plaintiffs rely on these programs to meet their infrastructure needs. For instance:

- a. In fiscal year 2015, New York received \$1.66 billion from the Highway Trust Fund, and over \$645 million in Urbanized Area Formula grants.
- b. In fiscal year 2015, Colorado received over \$520 million from the Highway Trust Fund, and over \$72 million in Urbanized Area Formula grants.

- c. In fiscal year 2015, Connecticut received over \$470 million from the Highway Trust Fund, and nearly \$94 million in Urbanized Area Formula grants.
- d. In fiscal year 2015, Delaware received nearly \$182 million from the Highway Trust Fund, and over \$19 million in Urbanized Area Formula grants.
- e. In fiscal year 2015, the District of Columbia received over \$185 million from the Highway Trust Fund, and over \$20 million in Urbanized Area Formula grants.
- f. In fiscal year 2015, Iowa received over \$506 million from the Highway Trust Fund, and over \$20 million in Urbanized Area Formula grants.
- g. In fiscal year 2015, Maryland received about \$597 million from the Highway Trust Fund, and over \$154 million in Urbanized Area Formula grants.
- h. In fiscal year 2015, Massachusetts received nearly \$614 million from the Highway Trust Fund, and over \$194 million in Urbanized Area Formula grants.
- i. In fiscal year 2015, Minnesota received over \$673 million from the Highway Trust Fund, and over \$59 million in Urbanized Area Formula grants.
- j. In fiscal year 2015, New Jersey received over \$839 million from the Highway Trust Fund, and over \$390 million in Urbanized Area Formula grants.
- k. In fiscal year 2015, New Mexico received nearly \$361 million from the Highway Trust Fund, and over \$23 million in Urbanized Area Formula grants.
- l. In fiscal year 2015, North Carolina received over \$237 million from the Highway Trust Fund, and over \$66 million in Urbanized Area Formula grants.
- m. In fiscal year 2015, Oregon received nearly \$431 million from the Highway Trust Fund, and over \$51 million in Urbanized Area Formula grants.

- n. In fiscal year 2015, Pennsylvania received over \$1.67 billion from the Highway Trust Fund, and over \$177 million in Urbanized Area Formula grants.
- o. In fiscal year 2015, Rhode Island received nearly \$217 million from the Highway Trust Fund, and over \$27 million in Urbanized Area Formula grants.
- p. In fiscal year 2015, Vermont received over \$206 million from the Highway Trust Fund, and over \$2 million in Urbanized Area Formula grants.
- q. In fiscal year 2015, Virginia received over \$953 million from the Highway Trust Fund, and over \$123 million in Urbanized Area Formula grants.
- r. In fiscal year 2015, Washington received over \$663 million from the Highway Trust Fund, and over \$140 million in Urbanized Area Formula grants.
- s. In fiscal year 2015, New York City received \$34 million in Urbanized Area Formula grants.
- t. During Philadelphia's fiscal year 2016, Philadelphia received over \$41 million from the Highway Trust Fund.
- u. In fiscal year 2017, Illinois received over \$1.46 billion from the Highway Trust Fund, and over \$235 million in Urbanized Area Formula grants.
- v. In fiscal year 2017, Columbus received \$11 million from the Highway Trust Fund, and over \$11 million in Community Highway Safety grants.
- w. In fiscal year 2017, San Francisco received over \$73 million in Urbanized Area Formula grants.
- x. In fiscal year 2017, Monterey County received \$2.6 million in pass through funds from the Highway Trust Fund.

141. Defendants' decision will lead to an undercount in the decennial census that will deprive Plaintiffs of crucial federal funds for infrastructure provided under these and other programs.

(2) Defendants' decision will deprive Plaintiffs of funding necessary to support public education.

142. Federal funding programs are also essential for supporting public education, especially for low-income children and families. Undercounts in the decennial census can impact allocations under many of these programs, including Special Education grants, and the Title I funding program. For instance, the United States Department of Education allocates Title I funding based on the number and percentage of children living in families with incomes below the poverty line, which it obtains through the Census Bureau's Small Area Income and Poverty Estimates (SAIPE) program. 20 U.S.C. §§ 6333-6335. The SAIPE program incorporates ACS estimates, which are calculated using the results of the decennial census count. As a result, any undercount in the decennial census will carry over into ACS estimates and the SAIPE, and will ultimately decrease funding under Title I.

143. Plaintiffs rely on federal funding programs to meet their public education needs. In fiscal year 2017, the United States Department of Education appropriated:

- a. Approximately \$1.2 billion in Title I funds to school districts in New York, including \$779 million for New York City. In addition, New York received \$781 million in Special Education grants.
- b. Over \$152 million in Title I funds to school districts in Colorado, and nearly \$164 million to Colorado in Special Education grants.
- c. Nearly \$130 million in Title I funds to school districts in Connecticut, and nearly \$137 million to Connecticut in Special Education grants.

- d. Nearly \$51 million in Title I funds to school districts in Delaware, and nearly \$37 million to Delaware in Special Education grants.
- e. Over \$47 million in Title I funds to school districts in the District of Columbia, and nearly \$19 million to the District of Columbia in Special Education grants.
- f. Over \$678 million in Title I funds to school districts in Illinois, including over \$283 million for Chicago. In addition, Illinois received nearly \$518 million in Special Education grants.
- g. Over \$97 million in Title I funds to school districts in Iowa, and nearly \$126 million to Iowa in Special Education grants.
- h. Over \$230 million in Title I funds to school districts in Maryland, and nearly \$206 million to Maryland in Special Education grants.
- i. Over \$226 million in Title I funds to school districts in Massachusetts, and over \$292 million to Massachusetts in Special Education grants.
- j. Over \$163 million in Title I funds to school districts in Minnesota, and over \$195 million to Minnesota in Special Education grants.
- k. Nearly \$365 million in Title I funds to school districts in New Jersey, and over \$372 million to New Jersey in Special Education grants.
- l. Nearly \$120 million in Title I funds to school districts in New Mexico, and nearly \$94 million to New Mexico in Special Education grants.
- m. Nearly \$451 million in Title I funds to school districts in North Carolina, and over \$346 million to North Carolina in Special Education grants.
- n. Over \$152 million in Title I funds to school districts in Oregon and over \$132 million to Oregon in Special Education grants.

- o. Over \$621 million in Title I funds to school districts in Pennsylvania, including nearly \$220 million for Philadelphia and \$18 million for Pittsburgh. In addition, Pennsylvania received over \$438 million in Special Education grants.
- p. Over \$53 million in Title I funds to school districts in Rhode Island, including \$21 million for Providence, and \$3 million for Central Falls. In addition, Rhode Island received over \$45 million in Special Education grants.
- q. Over \$35 million in Title I funds to school districts in Vermont, and \$29 million to Vermont in Special Education grants.
- r. Over \$265 million in Title I funds to school districts in Virginia, and nearly \$300 million to Virginia in Special Education grants.
- s. Over \$228 million in Title I funds to school districts in Washington, including \$10 million for Seattle. In addition, Washington received \$227 million in Special Education grants.
- t. Over \$30 million in Title I funds to the Brownsville Independent School District in Cameron County.
- u. Over \$23 million in Title I funds to the El Paso Independent School District in El Paso County.
- v. Over \$11 million in Title I funds to the McAllen Independent School District and over \$17 million in Title I funds to the Edinburg Consolidated Independent School District, both in Hidalgo County.

144. Defendants' decision will lead to an undercount in the decennial census that will deprive Plaintiffs and their residents of crucial federal funds for public education provided under these and other programs.

(3) Defendants' decision will deprive Plaintiffs of funding necessary for critical social services.

145. Federal funding programs also provide increased access to healthcare, child care, affordable housing, and nutrition. For instance, the Medical Assistance Program (“Medicaid”) provides financial assistance for payment of medical expenses on behalf of certain eligible groups, including low-income families, children, and pregnant women. Medicaid relies on “per-capita income” information calculated with decennial census data to determine the amount to reimburse each state for medical assistance payments on behalf of low-income individuals. 42 U.S.C. §§ 1301, 1396d. Several Plaintiffs will lose millions of dollars in reimbursement as a result of even a 1% undercount. In fiscal year 2015:

- a. Colorado received \$3.4 billion in reimbursement under the Medicaid program, and an additional 1% undercount on the 2010 Census would have resulted in losses of over \$63 million in federal funding.
- b. Delaware received \$771 million in reimbursement under the Medicaid program, and an additional 1% undercount on the 2010 Census would have resulted in losses of over \$14 million in federal funding.
- c. Illinois received \$7.19 billion in reimbursement under the Medicaid program, and an additional 1% undercount on the 2010 Census would have resulted in losses of over \$122 million in federal funding.
- d. Iowa received \$2.14 billion in reimbursement under the Medicaid program, and an additional 1% undercount on the 2010 Census would have resulted in losses of over \$38 million in federal funding.

- e. New Mexico received \$2.49 billion in reimbursement under the Medicaid program, and an additional 1% undercount on the 2010 Census would have resulted in losses of over \$23 million in federal funding.
- f. North Carolina received \$8.43 billion in reimbursement under the Medicaid program, and an additional 1% undercount on the 2010 Census would have resulted in losses of over \$94 million in federal funding.
- g. Oregon received \$3.64 billion in reimbursement under the Medicaid program, and an additional 1% undercount on the 2010 Census would have resulted in losses of over \$44 million in federal funding.
- h. Pennsylvania received \$11.2 billion in reimbursement under the Medicaid program, and an additional 1% undercount on the 2010 Census would have resulted in losses of nearly \$222 million in federal funding.
- i. Vermont received \$774 million under the Medicaid program, and an additional 1% undercount on the 2010 Census would have resulted in losses of over \$14 million in federal funding.
- j. Washington received \$3.92 billion under the Medicaid program, and an additional 1% undercount on the 2010 Census would have resulted in losses of over \$2 million in federal funding.

146. In addition, in fiscal year 2017, the City of Columbus received \$69.7 million under the Medicaid program and an undercount of its population would lead to a loss of crucial Medicaid funds.

147. The Child Care and Development Fund (“CCDF”), a program that helps low-income families obtain child care so that family members can work, also allocates funds on the

basis of population data collected through the decennial census. 45 C.F.R. § 98.63. In fiscal year 2015:

- a. New York received over \$198 million in CCDF grants.
- b. Colorado received over \$38 million in CCDF grants.
- c. Connecticut received over \$36 million in CCDF grants.
- d. Delaware received nearly \$9.9 million in CCDF grants.
- e. The District of Columbia received over \$7.2 million in CCDF grants.
- f. Illinois received over \$126 million in CCDF grants.
- g. Iowa received over \$25 million in CCDF grants.
- h. Maryland received nearly \$54 million in CCDF grants.
- i. Massachusetts received over \$76 million in CCDF grants.
- j. Minnesota received over \$52 million in CCDF grants.
- k. New Jersey received nearly \$72 million in CCDF grants.
- l. New Mexico received over \$20 million in CCDF grants.
- m. North Carolina received over \$122 million in CCDF grants.
- n. Oregon received nearly \$39 million in CCDF grants.
- o. Pennsylvania received over \$116 million in CCDF grants.
- p. Rhode Island received over \$11 million in CCDF grants.
- q. Vermont received nearly \$6.7 million in CCDF grants.
- r. Virginia received nearly \$64 million in CCDF grants.
- s. Washington received nearly \$78 million in CCDF grants.

148. The Community Development Block Grant (“CDBG”) program provides annual grants to qualifying jurisdictions for the purpose of undertaking development activities directed

toward housing and housing-related facilities and services, such as neighborhood revitalization, economic development, and community facilities. Grantees must spend at least 70% of CDBG funds on activities that benefit low- and moderate-income persons. Funding allocation under the CDBG program is determined on the basis, at least in part, of information collected by the Census Bureau. 42 U.S.C. §§ 5302, 5306; 24 C.F.R §§ 570.3-4. Plaintiffs receive annual CDBG funds. For example, Chicago received over \$80 million under the CDBG program in fiscal year 2018, Phoenix was allocated over \$16 million in fiscal year 2018, Columbus received nearly \$7.7 million in fiscal year 2017, Pittsburgh received approximately \$10.3 million in fiscal year 2016, and Philadelphia received nearly \$46 million during the city's 2016 fiscal year.

149. Several federal programs improve nutrition for low-income families, including the School Breakfast and National School Lunch programs, as well as the Supplemental Nutrition Assistance Program ("SNAP"). Funding allocations for these programs are often determined on the basis of information collected by the Census Bureau. Plaintiffs receive annual funds under the School Breakfast and National School Lunch Program. For example, in fiscal year 2017, Virginia received nearly \$90 million under the School Breakfast program, and over \$250 million under the National School Lunch Program. Plaintiffs also receive significant annual funding under SNAP. For instance, in fiscal year 2015, Delaware received \$228 million under SNAP, New Mexico received \$685 million, and Oregon received \$1.15 billion, and in fiscal year 2017 Monterey County received \$12.8 million.

150. Defendants' decision will lead to an undercount in the decennial census that will deprive Plaintiffs of crucial federal funds that provide increased access to social services under these and other programs.

151. An undercount of Plaintiffs' populations as a result of the demand for person-by-person citizenship status of every resident in the country will also lead to losses of funding for Plaintiffs in many other federally-funded programs that tie allocations to data collected during the decennial census. Losses of funding for these programs will significantly harm Plaintiffs, who will either need to procure additional resources to meet these shortfalls in funding, or their resource needs will be unmet.

C. Defendants' conduct harms Plaintiffs' interests in accurate redistricting and compliance with the Constitution's one-person, one-vote mandate.

152. Defendants' decision to demand person-by-person citizenship information on the 2020 Census questionnaire also harms Plaintiffs' interests in obtaining accurate population figures for redistricting purposes.

153. Plaintiff States rely on tabulations of the population produced by the Census Bureau from the decennial census to draw statewide redistricting plans for their congressional and state legislative districts.

154. When drawing these districts, Plaintiff States must adhere to the U.S. Constitution's one-person, one-vote requirement, which requires that congressional and state legislative districts must be "as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 559, 577 (1964); see *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964); *Karcher v. Daggett*, 462 U.S. 725, 734 (1983); *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983). The drawing of congressional districts is subject to a strict constitutional standard, and even small population deviations, if avoidable, are unconstitutional. Moreover, at least for congressional districts, the Constitution requires apportionment "based on total population," not citizen voting age population. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1128-29 (2015).

155. Defendants' decision will create avoidable errors in the data provided to Plaintiff States for congressional redistricting, and districts drawn on that data will impair the right to equal representation for residents of over-populated districts.

156. Plaintiff the District of Columbia relies on tabulations of the population produced by the Census Bureau to redistrict for local elections within the District, setting boundaries for wards that elect members to the local legislative body, the Council of the District of Columbia, as well as boundaries for Advisory Neighborhood Commissions, Single Member Districts, and voting precincts. Similarly, most Plaintiff Cities and Counties also rely on population tabulations produced by the Census Bureau in order to reapportion their legislative districts. Like all U.S. States, the District of Columbia, and the Cities of Central Falls, Chicago, Columbus, New York, Philadelphia, Phoenix, Providence, and Seattle, the City and County of San Francisco, the Counties of Cameron, El Paso, Hidalgo and Monterey, and the members of the USCM are also bound by the U.S. Constitution's one-person, one-vote requirement.

157. By causing disproportionate undercounts of citizens and noncitizens in communities with immigrant populations, the addition of a citizenship demand to the 2020 Census will jeopardize the ability of Plaintiffs to comply with the one-person, one-vote requirement. Undercounts of citizens and noncitizens in these communities will create avoidable distributional inaccuracies in the data on which Plaintiffs rely to draw district lines. Districts drawn on the basis of inaccurate data may systemically dilute the voting power of persons living in communities with immigrant populations, and impair their right to equal representation in congressional, state, and local legislative districts.

158. As a result, Defendants' decision will harm Plaintiffs' interest in complying with the constitutional equal population principle in redistricting.

D. Defendants' conduct harms Plaintiffs' representational interests.

159. Defendants' decision to demand person-by-person citizenship information on the 2020 Census questionnaire will harm Plaintiffs' interest in fair representation in Congress by depressing participation in the decennial census within Plaintiffs' diverse naturalized, documented, and undocumented immigrant populations, leading to inaccurate responses and a significant undercount of Plaintiffs' residents.

160. For instance, an undercount resulting from Defendants' decision to add a citizenship demand will lead to loss of representation in Rhode Island. As a result of the 2010 Census, Rhode Island was allocated two seats to the United States House of Representatives in accordance with U.S. Const. art. I, § 2. Rhode Island has maintained two seats to the United States House of Representatives for over 200 years. According to the Census Bureau estimates for 2017, the population of Rhode Island is 1,059,639. Based on these 2017 estimates of its population, if 157 persons that reside in Rhode Island are not counted in the 2020 Census, Rhode Island will lose one of its two seats in the United States House of Representatives.

161. In addition, the undercount resulting from Defendants' decision will threaten additional Plaintiffs with losses in representation.

162. For example, New York is projected to lose one representative as a result of the 2020 Census, and is on the cusp of losing a second. Illinois also risks losing additional representation in Congress. An undercount of immigrant communities in these states will result in losses of these seats, and harm these states' interest in fair representation in Congress and in the Electoral College.

163. Moreover, Defendants' decision will also harm representational interests within their states. Plaintiff Cities, Counties, and the members of Plaintiff USCM are home to larger immigrant populations than other areas within their states. For instance:

- a. The foreign-born population of Central Falls is 38%, and Providence is 30%, compared to 13.5% for the State of Rhode Island.
- b. The foreign-born population of Chicago is approximately 20.8% of the total population, compared to 13.9% for the State of Illinois.
- c. The foreign-born population of Columbus is 11.6%, compared to 4.4% for the State of Ohio.
- d. The foreign-born population of San Francisco is 34.9%, and Monterey County is 30%, compared to 27% for the State of California.
- e. The foreign-born population of Philadelphia is 13.1% and Pittsburgh is 8.5%, compared to 6.5% for the State of Pennsylvania.
- f. The foreign-born population of Phoenix is 19.8%, compared to 13.4% for the State of Arizona.
- g. The foreign-born population of Cameron County is 24%, El Paso County is 25%, and Hidalgo County is 28%, compared to 17% for the State of Texas.

164. Defendants' decision to include a citizenship demand on the 2020 Census questionnaire will lead to undercounts in immigrant communities, and, as a result, will disproportionately affect areas with larger immigrant communities. Redistricting on the basis of these inaccurate numbers will harm these areas, including Plaintiff Cities, Counties, and the members of Plaintiff USCM, vis-a-vis other areas within their states with smaller immigrant communities.

E. Plaintiffs will expend significant resources to mitigate the harm from Defendants' decision.

165. Plaintiffs already devote considerable resources every ten years to ensuring that they receive an accurate count of their populations on the census. For instance, Colorado

devoted resources to train and educate local partners and update address lists. Massachusetts funded community outreach grants in 2000 and 2010 focused on increasing immigrant participation in the decennial census. Minnesota expended resources during the 2010 Census on efforts to coordinate with local governments, promote the Census at community events, and engage community leaders and organizations. Similarly, San Francisco expended resources in connection with the 2010 Census, creating a Complete Count Committee, conducting a citywide campaign, and supporting multilingual outreach to immigrant and historically undercounted populations.

166. Plaintiffs also devoted significant employee time to outreach efforts. For the 2010 Census, the District of Columbia devoted an employee to reach out to the District's Hispanic community, hosted a training of Hispanic Census workers, and educated parents, English as a Second Language teachers, and counselors on the importance of a complete count. Chicago and its sister agencies devoted over 1600 staff hours to programs encouraging residents to participate, including door-to-door distribution of flyers and information, sending Census messages on student report cards, and installing posters at bus shelters. Oregon similarly devoted significant employee time to community outreach efforts.

167. Several Plaintiffs have started making efforts encourage participation for the 2020 Census. For instance, Illinois has enacted a Complete Count Commission to develop a census outreach strategy. 20 Ill. Comp. Stat. 5100/15. New Mexico has spent \$300,000 to identify housing units for the Census Bureau's address list, and expects to spend additional funds on a proposed Complete Count Committee and other efforts to encourage participation. Maryland allocated \$5 million to assist local governments and nonprofits in obtaining an accurate count. New York City has budgeted \$4 million to hire staff and develop programs to address the

unprecedented challenges New York City anticipates. Many of these efforts did not, however, account for additional levels of non-response resulting from Defendants' decision to add a person-by-person citizenship demand to the 2020 Census questionnaire.

168. Plaintiffs will have to expend additional funding to combat the undercount that the addition of a citizenship demand will cause, such as expending resources on greater public outreach to encourage anxious residents, particularly in immigrant communities, to respond to the 2020 Census.

F. Defendants' conduct harms the health of Plaintiffs' residents.

169. Many federal health agencies and public health organizations rely on the decennial census for accurate demographic statistics of the population of the United States.

170. These statistics help healthcare providers and policymakers contain and prevent the spread of disease by efficiently allocating funding and limited resources for targeted interventions. For example, census statistics help reduce the incidence of asthma and other preventative diseases by using demographic data to model neighborhoods before initiating preventative programs.

171. An inaccurate census would not just result in worse health outcomes for undercounted communities, but for the nation as a whole. An undercount in the 2020 Census would undermine efforts to prevent disease and cost millions of dollars in long-term treatment.

G. Defendants' conduct harms Plaintiffs' economies and residents who are beneficiaries of private funding.

172. An accurate census is essential for both public and private actors to identify and help meet community and business needs.

173. The Department of Commerce estimates that census data guide trillions of dollars in private sector investment and create \$221 billion in private sector revenue.

174. Non-profit organizations use census data to decide where to provide critical aid such as health care and natural disaster relief and where to conduct fundraising and advocacy drives.

175. Academics and researchers from Plaintiffs' universities rely on census data to conduct research on a wide variety of issues relating to race and ethnicity, population mobility, and other areas.

176. An undercount on the 2020 Census, caused by Defendants' demand for citizenship information from every respondent, will ultimately deprive historically marginalized communities of vital private resources over the next decade.

177. Plaintiffs will need to expend additional funds to compensate for the loss of vital aid from private actors to their residents.

FIRST CLAIM FOR RELIEF
(U.S. Constitution article I, section 2, clause 3;
U.S. Constitution amend. XIV, sec. 2)

178. Plaintiffs reallege and incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

179. The Constitution requires that Defendants conduct an "actual Enumeration" of the "whole number of persons" in the United States, so that Members of the U.S. House of Representatives may be "apportioned among the several States . . . according to their respective Numbers." U.S. Const. art. I, § 2, cl. 3; *id.* amend. XIV, § 2; *see* 13 U.S.C. §§ 4, 141.

180. Defendants' decision to add a citizenship demand to the 2020 Census questionnaire will deter participation in the decennial census and cause an undercount that impedes the "actual Enumeration" required by the Constitution.

181. Defendants' conduct poses a significant risk that Plaintiffs' number of U.S. Representatives and representation in the Electoral College will not reflect their actual population.

182. Defendants' violation causes ongoing harm to Plaintiffs and their residents.

SECOND CLAIM FOR RELIEF
**(Administrative Procedure Act – not in accordance with law,
contrary to constitutional right, beyond statutory authority, and without observance of
procedure required by law)**

183. Plaintiffs reallege and incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

184. Under the Administrative Procedure Act, courts must “hold unlawful and set aside” agency action that is “not in accordance with law,” “contrary to constitutional right,” in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” or that is “without observance of procedure required by law.” 5 U.S.C. § 706(2)(A)-(D).

185. Defendants' decision to add a citizenship demand to the 2020 Census questionnaire is inconsistent with and contrary to the constitutional mandate to conduct an “actual Enumeration” of “the whole number of persons” in the United States. U.S. Const. art. I, § 2, cl. 3; *id.* amend. XIV, § 2.

186. Defendants' decision is also inconsistent with the data quality requirements of the Information Quality Act and the guidelines implementing the IQA adopted by the Census Bureau. Pub. L. No. 106-554, § 515. The data quality requirements and testing standards developed pursuant to law and practice are designed to ensure accuracy, reliability, and objectivity in the final data, to minimize respondent burden and maximize data quality, and to achieve the highest rates of response. Defendants have failed to act in a manner consistent with these requirements and mandated procedures by failing to adequately test the citizenship

demand, minimize the burden that such a demand imposes on respondents, maximize data quality, or ensure the highest rates of response.

187. Defendants' decision to add a citizenship demand to the 2020 Census is therefore not in accordance with law; beyond statutory authority; and without observance of procedure required by law, in violation of the Administrative Procedure Act. 5 U.S.C. § 706(2).

188. Defendants' violation causes ongoing harm to Plaintiffs and their residents.

THIRD CLAIM FOR RELIEF
(Administrative Procedure Act – arbitrary and capricious)

189. Plaintiffs reallege and incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

190. The Administrative Procedure Act provides that courts must “hold unlawful and set aside” agency action that is “arbitrary, capricious, [or] an abuse of discretion.” 5 U.S.C. § 706(2)(A).

191. Defendants' decision to add a citizenship demand to the 2020 Census is arbitrary and capricious and an abuse of discretion for multiple reasons. First, there is no support for the Department of Justice's claim that effective enforcement of Section 2 of the Voting Rights Act requires person-by-person citizenship data; to the contrary, requesting citizenship data would undermine the purposes of the Voting Rights Act and weaken voting rights enforcement; and sufficient data for Voting Rights Act purposes is already available to the Department of Justice.

192. Second, Defendants' decision to add a citizenship demand is arbitrary and capricious because it reverses nearly seven decades of settled and well-considered practice without reasoned explanation, in contradiction to factual findings that underlay the Census Bureau's previous practice.

193. Third, Defendants' decision is arbitrary and capricious because Defendants entirely failed to consider important aspects of the problem, including the risk of inaccurate results and the availability of alternative data that serves the federal government's needs no less well.

194. Fourth, Defendants' decision is arbitrary and capricious because it was reached without complying with Defendants' own data quality requirements and testing standards.

195. Fifth, Defendants' unfounded and conflicting rationales indicate that the stated reason for adding the question is pretext.

196. Defendants' decision to add a citizenship demand to the 2020 Census is therefore "arbitrary, capricious, [or] an abuse of discretion" in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

197. Defendants' violation causes ongoing harm to Plaintiffs and their residents.

PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully request that this Court:

1. Declare that Defendants' decision to add a citizenship demand to the questionnaire for the 2020 Census is unauthorized by and contrary to the Constitution and laws of the United States;

2. Declare that Defendants' decision to add a citizenship demand to the 2020 Census is not in accordance with law, is beyond statutory authority, and is arbitrary and capricious, in violation of the Administrative Procedure Act, 5 U.S.C. § 706;

3. Enjoin Defendants and all those acting on their behalf from adding a citizenship demand to the 2020 Census;

4. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys' fees, pursuant to 28 U.S.C. § 2412; and

5. Award such additional relief as the interests of justice may require.

DATED: April 30, 2018

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York

By: /s/ Lourdes M. Rosado

Lourdes M. Rosado,† Bureau Chief
Matthew Colangelo,† Executive Deputy
Attorney General
Laura Wood,† Special Counsel
Elena Goldstein,† Senior Trial Counsel
Ajay Saini,† Assistant Attorney General
Diane Lucas,† Assistant Attorney General
Sania Khan,† Assistant Attorney General
Alex Finkelstein, Volunteer Assistant
Attorney General
Civil Rights Bureau
Office of the New York State Attorney
General
28 Liberty, 20th Floor
New York, NY 10005
Lourdes.Rosado@ag.ny.gov
Diane.Lucas@ag.ny.gov
Ajay.Saini@ag.ny.gov
Tel. (212) 416-6348
Fax (212) 416-8074

† Admitted in the S.D.N.Y.

JOHN W. HICKENLOOPER
Governor of the State of Colorado

GEORGE JEPSEN
Attorney General of the State of Connecticut

By: /s Jacqueline Cooper Melmed
Jacqueline Cooper Melmed,* Chief Legal
Counsel
Governor John Hickenlooper
136 State Capitol Building
Denver, Colorado 80203
Jacki.melmed@state.co.us
Tel: (303) 866-3788

By: /s Mark F. Kohler
Mark F. Kohler,*
Assistant Attorney General
Connecticut Office of the Attorney
General
55 Elm Street, P.O. Box 120
Hartford, CT 06106
Mark.Kohler@ct.gov
Tel. (860) 808-5020

MATTHEW DENN
Attorney General of the State of Delaware

By: /s Ilona Kirshon
Ilona Kirshon,† Deputy State Solicitor
David Lyons, Deputy Attorney General
Department of Justice
Carvel State Building, 6th Floor
820 North French Street
Wilmington, Delaware 19801
Ilona.Kirshon@state.de.us
Tel. (302) 577-8372
Fax (302) 577-6630

KARL A. RACINE
Attorney General for the District of Columbia

By: /s Robyn R. Bender
Robyn R. Bender,* Deputy Attorney
General
Valerie M. Nannery,* Assistant
Attorney General
Public Advocacy Division
441 4th Street, NW
Suite 650 North
Washington, DC 20001
Robyn.Bender@dc.gov
Tel. (202) 724-6610
Fax (202) 730-0650

LISA MADIGAN
Attorney General of the State of Illinois

By: /s Cara A. Hendrickson
Cara A. Hendrickson,* Chief, Public
Interest Division
Karyn L. Bass Ehler,* Chief, Civil Rights
Bureau
Jeffrey VanDam,* Assistant Attorney
General
Matthew J. Martin,* Assistant Attorney
General
Civil Rights Bureau
Office of the Illinois Attorney General
100 W. Randolph Street
Chicago, IL 60601

THOMAS J. MILLER
Attorney General of the State of Iowa

By: /s Nathan Blake
Nathan Blake,* Deputy Attorney
General
Office of the Iowa Attorney General
1305 E. Walnut St.
Des Moines, IA 50319
nathan.blake@ag.iowa.gov
Tel. (515) 281-4325

JVanDam@atg.state.il.us
Tel. (312) 814-3400
Fax (312) 814-3212

BRIAN E. FROSH
Attorney General of the State of Maryland

By: /s/ John R. Grimm
John R. Grimm,* Assistant Attorney
General
Civil Litigation Division
Maryland Office of the Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
jgrimm@oag.state.md.us
Tel. (410) 576-76339
Fax (410) 576-6955

LORI SWANSON
Attorney General of the State of Minnesota

MAURA HEALEY
**Attorney General for the Commonwealth of
Massachusetts**

By: /s/ Jonathan Miller
Jonathan Miller,[†] Assistant Attorney
General
Miranda Cover,* Assistant Attorney
General
Ann E. Lynch,* Assistant Attorney
General
Public Protection & Advocacy Bureau
Massachusetts Attorney General's Office
One Ashburton Place
Boston, MA 02108
Jonathan.Miller@state.ma.us
Mercy.Cover@state.ma.us
Ann.Lynch@state.ma.us
Tel. (617) 727-2200
Fax (617) 727-5762

GURBIR S. GREWAL
Attorney General of the State of New Jersey

By: /s/ Rachel Wainer Apter
Rachel Wainer Apter*
Assistant Attorney General
Office of the Attorney General
Richard J. Hughes Justice Complex
25 Market Street, 8th Floor, West Wing
Trenton, New Jersey 08625-0080
Rachel.Apter@njoag.gov
Tel: (609) 376-2702

By: s/ Jacob Champion
Jacob Champion,* Assistant Attorney
General
Office of the Minnesota Attorney General
445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
jacob.champion@ag.state.mn.us
(651) 757-1459 (Voice)
(651) 282-5832 (Fax)

HECTOR H. BALDERAS
Attorney General of the State of New Mexico

By: /s Tania Maestas
Tania Maestas,* Deputy Attorney General
New Mexico Office of the Attorney
General
408 Galisteo St.
Santa Fe, NM 87501
tmaestas@nmag.gov
Tel. (505) 490-4060
Fax (505) 490-4883

JOSHUA H. STEIN
Attorney General of the State of North Carolina

By: /s Ryan Y. Park
Ryan Y. Park,[†]
Deputy Solicitor General
North Carolina Department of Justice
114 W. Edenton Street
Raleigh, NC 27603
RPark@ncdoj.gov
Tel. (919) 716-6400

ELLEN F. ROSENBLUM
Attorney General of the State of Oregon

By: /s Brian De Haan
Brian De Haan,[†]
Assistant Attorney General
Trial Attorney
Brian.A.DeHaan@doj.state.or.us

JOSH SHAPIRO
Attorney General of the Commonwealth of
Pennsylvania

By: /s Jonathan Scott Goldman
Jonathan Scott Goldman,*
Executive Deputy Attorney General,
Civil Law Division
Michael J. Fischer,*

Tel. (971) 673-1880
Fax (971) 673-5000

Chief Deputy Attorney General,
Impact Litigation Section
Office of Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120
MFischer@attorneygeneral.gov
Tel. (215) 560-2171

PETER KILMARTIN
Attorney General of the State of Rhode Island

By: /s Adam D. Roach
Adam D. Roach,* Special Assistant
Attorney General
RI Office of the Attorney General
150 South Main Street
Providence, RI 02903
aroach@riag.ri.gov
Tel: (401) 274-4400 ext. 2490
Fax: (401) 222-2995

MARK R. HERRING
Attorney General of the Commonwealth of Virginia

By: /s Matthew R. McGuire
Matthew R. McGuire,*
Deputy Solicitor General
202 North Ninth Street
Richmond, VA 23219
MMcguire@oag.state.va.us
Tel. (804) 786-7240
Fax (804) 371-0200

THOMAS J. DONOVAN, JR.
Attorney General of the State of Vermont

By: /s Benjamin D. Battles
Benjamin D. Battles,[†] Solicitor General
Julio A. Thompson,* Assistant Attorney
General, Civil Rights Unit
Office of the Vermont Attorney General
109 State Street
Montpelier, VT 05609
Benjamin.Battles@vermont.gov
Tel. (802) 828-5500
Fax (802) 828-3187

ROBERT W. FERGUSON
Attorney General of the State of Washington

By: /s/ Laura K. Clinton
Laura K. Clinton,*
Assistant Attorney General
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
LauraC5@atg.wa.gov
(206) 233-3383
Peter Gonick,
Deputy Solicitor General
Office of the Attorney General
PO Box 40100
Olympia, WA 98504-0100
peterg@atg.wa.gov
Tel. (360) 753-6245

MATTHEW JERZYK
City Solicitor for the City of Central Falls

EDWARD N. SISSEL
Corporation Counsel of the City of Chicago

By: /s Matthew Jerzyk
Matthew Jerzyk,*
City Solicitor
City of Central Falls
580 Broad Street
Central Falls, RI 02863
MJerzyk@CentralFallsRI.us
Tel. (401) 727-7422

By: /s John Hendricks
John Hendricks,* Deputy Corporation
Counsel
Andrew W. Worseck,* Chief Assistant
Corporation Counsel
Andrew S. Mine, Senior Counsel
Maggie Sobota,* Senior Counsel
Christie Starzec,* Assistant Corporation
Counsel
City of Chicago Law Department
30 N. LaSalle Street, Suite 1230
Chicago, IL 60602
John.Hendricks@cityofchicago.org
Andrew.Worseck@cityofchicago.org
Andrew.Mine@cityofchicago.org
Maggie.Sobota@cityofchicago.org
Christie.Starzec@cityofchicago.org
Tel. (312) 744-6975
Fax (312) 742-3925

ZACHARY M. KLEIN
Columbus City Attorney

By: /s Zachary Klein
Zachary M. Klein,* Columbus City
Attorney
Richard N. Coglianese,* Assistant City
Attorney
Lara N. Baker-Morrish,* Assistant City
Attorney
Alexandra N. Pickerill,* Assistant City
Attorney
77 North Front Street, 4th Floor
zmklein@columbus.gov
rncoglianese@columbus.gov
lnbaker@columbus.gov
anpickerill@columbus.gov
Tel. (614) 645-7385
Fax: (614) 645-6949

ZACHARY W. CARTER
Corporation Counsel of the City of New York

By: /s Sabita Krishnan
Gail Rubin[†]
Sabita Krishnan[†]
100 Church Street
New York, NY 10007
grubin@law.nyc.gov
skrishna@law.nyc.gov
Tel. (212) 356-2030
Fax (212) 356-2038

MARCEL S. PRATT

YVONNE S. HILTON

Solicitor of the City Of Philadelphia

By: /s Marcel S. Pratt
Marcel S. Pratt,* Acting City Solicitor
Eleanor N. Ewing,* Chief Deputy
Solicitor
Benjamin H. Field,* Deputy City
Solicitor
Michael W. Pfautz, Assistant City
Solicitor
City of Philadelphia Law Department
1515 Arch Street, 17th Floor
Philadelphia, PA 19102
marcel.pratt@phila.gov
eleanor.ewing@phila.gov
benjamin.field@phila.gov
Tel. (215)683-5000
Fax (215)683-5299

Acting City Solicitor of the City of Pittsburgh

By: /s Matthew S. McHale
Matthew S. McHale,* Associate City
Solicitor
City of Pittsburgh Department of Law
414 Grant Street, Room 323
Pittsburgh, PA 15219
yvonne.hilton@pittsburghpa.gov
Matthew.mchole@pittsburghpa.gov
Tel. (412) 255-2015

JEFFREY DANA
City Solicitor for the City of Providence

By: /s Jeffrey Dana
Jeffrey Dana,*
City Solicitor
City of Providence
444 Westminster Street
Providence, RI 02903
JDana@providenceri.gov
401-680-5333

CITY OF SEATTLE
City of Seattle City Attorney

By: /s Peter S. Holmes
Peter S. Holmes,*
City Attorney
Gary T. Smith, Assistant City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7097
Peter.Holmes@seattle.gov
Gary.Smith@seattle.gov
Tel. (206) 684-8200
Fax (206) 684-4648

DENNIS J. HERRERA
City Attorney for the City and County of San Francisco

ROLANDO L. RIOS
Special Counsel for Hidalgo and Cameron Counties

By: /s Dennis J. Herrera
Dennis J. Herrera,* City Attorney
Jesse C. Smith, Chief Assistant City
Attorney
Ronald P. Flynn, Chief Deputy City
Attorney
Yvonne R. Meré, Chief of Complex and
Affirmative Litigation
Mollie Lee,* Deputy City Attorney
Erin Kuka, Deputy City Attorney
Neha Gupta, Deputy City Attorney
San Francisco City Attorney's Office
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102
Mollie.Lee@sfcityatty.org
Tel. (415) 554-4748
Fax (415) 554-4715

By: /s Rolando Rios
Rolando Rios,* Special Counsel for
Hidalgo and Cameron Counties
115 E. Travis, Suite 1645
San Antonio, TX 78205
rrios@rolandorioslaw.com
(210) 222-2102

JO ANNE BERNAL
El Paso County Attorney

By: /s Joe Anne Bernal
Jo Anne Bernal,* County Attorney
Ian Kaplan,† Assistant County
Attorney
El Paso County Attorney's Office
500 E. San Antonio, Room 503
El Paso, TX 79901
Joanne.bernal@epcounty.com
Ian.kaplan@epcounty.com
Tel. (915) 546-2050

CHARLES J. McKEE
Monterey County Counsel

By: /s Charles J. Mckee
Charles J. Mckee, County Counsel
William M Litt., Deputy County
Counsel
Office of the County Counsel
County of Monterey
168 West Alisal St., 3rd Fl.
Salinas, CA 93901
McKeeCJ@co.monterey.ca.us
LittWM@co.monterey.ca.us
Tel. (831) 755-5045
Fax (831) 755-5283

**UNITED STATES CONFERENCE OF
MAYORS**

By: /s John Daniel Reaves
John Daniel Reaves*
General Counsel
United Conference of Mayor
1200 New Hampshire Avenue, NW
Third Floor
Washington, D.C. 20036
jdreavesoffice@gmail.com
Tel. (202) 974-5931

Office of the Phoenix City Attorney
Brad Holm, City Attorney

By: /s Patricia J. Boland
Patricia J. Boland*
Assistant Chief Counsel
City of Phoenix Law Department
200 West Washington, Suite 130
Phoenix, Arizona 85003-1611
Patricia.boland@phoenix.gov
Tel. (602) 262-6761

† Admitted in the S.D.N.Y.

*Seeking or obtained *Pro hac vice* admission

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X	
STATE OF NEW YORK, et al.,	:
	:
Plaintiffs,	:
	:
-v-	:
	:
UNITED STATES DEPARTMENT OF COMMERCE, et al.,	:
	:
Defendants.	:
	:
-----X	

18-CV-2921 (JMF)
MEMORANDUM
OPINION AND ORDER

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: September 30, 2018
New York, New York



JESSE M. FURMAN
United States District Judge

S.D.N.Y.-N.Y.C.
18-cv-2921
18-cv-5025
Furman, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of October, two thousand eighteen.

Present:

Pierre N. Leval,
Rosemary S. Pooler,
Richard C. Wesley,
Circuit Judges.

In Re: United States Department of Commerce, Wilbur L. Ross, in his official capacity as Secretary of Commerce, United States Census Bureau, an agency within the United States Department of Commerce, Ron S. Jarmin, in his capacity as the Director of the U.S. Census Bureau,

18-2652
18-2659
18-2856
18-2857

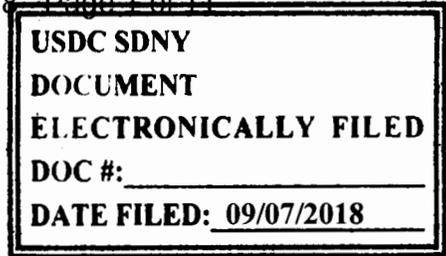
Petitioners.

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

GRA248



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
STATE OF NEW YORK, et al.,

Plaintiff,

-v-

UNITED STATES DEPARTMENT OF COMMERCE, et al.,

Defendants.

----- X
NEW YORK IMMIGRATION COALITION, et al.,

Plaintiff,

-v-

UNITED STATES DEPARTMENT OF COMMERCE, et al.,

Defendants.

----- X
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).¹ 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 . . . particularly 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

¹ Unless otherwise noted, docket references are to 18-CV-2921.

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 preliminary 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 “dilatatory 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 deposition 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 privilege that has literally nothing to do with the issue here.²

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

² 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.

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 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 dissemination 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 themselves 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 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 (RJW), 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 possesses 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: September 7, 2018
New York, New York



JESSE M. FURMAN
United States District Judge



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

BARBARA D. UNDERWOOD
ATTORNEY GENERAL

DIVISION OF APPEALS & OPINIONS
NEW YORK CITY BUREAU

October 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

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

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

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

GRA262

COMMERCE SECRETARY IS TOLD TO TESTIFY ON CENSUS COUNT

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

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.

End of Document

GRA264

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

NEW YORK IMMIGRATION
COALITION, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
COMMERCE, *et al.*,

Defendants.

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

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

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 completeness. 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: October 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

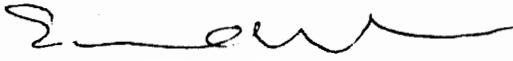
KATE BAILEY
GARRETT COYLE
STEPHEN EHRLICH
CAROL FEDERIGHI
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, DC 20005
Tel.: (202) 305-9803
Email: stephen.ehrlich@usdoj.gov

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: October 11, 2018



Earl Comstock

Freedman, John A.

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

Counsel,

Following up on our discussion Tuesday afternoon:

- A supplemental production including the documents inadvertently omitted from last week's productions, along with the Neuman email no longer designated as privileged, is being uploaded to the DOC FOIA reading room this evening. No new link is required; the additional documents will go live on the link provided to you last Thursday.
- Attached is a Production Letter, along with our Objections and Responses to your Rule 45 subpoena issued to the Department of Justice. As indicated in the Letter, a disc containing the first document production in response to the subpoena was sent via FedEx tonight. The Password for that disc is [REDACTED]
- Regarding depositions, Karen Dunn Kelley is available August 28; Earl Comstock is available August 30; and Wendy Teramoto is available September 7 in New York. We realize that we'd previously provided you a different date for Ms. Teramoto, but unfortunately, she no longer is available on that date. We have also confirmed the availability of Dr. Abowd on August 15 and Dr. Jarmin on August 20. We will follow up about the Census 30(b)(6) deposition shortly. As for deposition dates for John Gore, consistent with our objections to Plaintiffs' third-party subpoena to the Department of Justice (attached), the information possessed by Mr. Gore is either privileged or irrelevant to Plaintiffs' APA and equal protection claims. Accordingly, we will not provide deposition dates for Mr. Gore at this time.
- Regarding the legal memo prepared by Mr. Uthmeier, Esq., I inadvertently misspoke during our call Tuesday. That memo was among the documents mistakenly omitted from last week's production. It is included within the attached "08.03.18 Supplemental Production Priv Log," which encompasses all privileged materials within today's supplemental production.
- Although we continue to disagree about the sufficiency of the privilege logs we have provided, corrected versions of our previous logs are attached. We have reviewed each of the entries included in your attachment to your email below, and we have updated the log to include "To," "From," and/or "Date" where such information is apparent from the face of the document. Although the log now contains information for many of the entries you have challenged, we intend also to collect metadata, where available, from the underlying files and use that information to further supplement the log, in the interest of transparency. Early next week we will send you final, updated versions of the privilege log to include additional details obtainable from metadata.

Thank you,