

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

STATE OF NEW YORK, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT
OF COMMERCE, et al.,

Defendants.

18-CV-2921 (JMF)

NEW YORK IMMIGRATION
COALITION, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT
OF COMMERCE, et al.,

Defendants.

18-CV-5025 (JMF)
(Consolidated)

**NYIC PLAINTIFFS' [PROPOSED] SUR-REPLY IN
SUPPORT OF MOTION FOR SANCTIONS**

New information—which the House Committee on Oversight and Reform made public on November 12—makes clear that sanctions are not only justified, they are imperative.

In a short memorandum dated titled, *Update on Investigation of Census Citizenship Question Since House Held Attorney General Barr and Commerce Secretary Ross in Contempt of Congress* (“House Oversight Committee Update”), the House Oversight Committee released documents and testimony excerpts demonstrating further instances in which Defendants and their agents—in particular Mark Neuman, John Gore, and Peter Davidson—withheld crucial documents from Plaintiffs and misled the Plaintiffs and the Court. *See* ECF 635 at 26-28.

I. Newly-Discovered Emails and Texts from Mark Neuman Confirm that Defendants and Neuman Misrepresented Hofeller’s Role in the Genesis of the Citizenship Question.

At the heart of Defendants’ sanctionable conduct is their effort to conceal Dr. Thomas Hofeller’s central role in the attempt to add a citizenship question to the 2020 census. The basic facts are simple: Neuman incorporated verbatim the VRA enforcement rationale from a 2017 document Hofeller authored into an initial draft of DOJ’s letter requesting the citizenship question. *See* ECF 635 at 10. Defendants sought to brush off evidence of Hofeller’s role in adding a citizenship question to the census as a “conspiracy theory,” ECF 601 at 5, but the newly-released documents confirm that Hofeller played an even bigger part in Defendants’ scheme than previously was understood. And these new documents provide further proof that Defendants improperly withheld pertinent information from Plaintiffs and the Court.

Documents quoted in the House Oversight Committee Update establish that Neuman expressly sought and received an explicit affirmation from Hofeller and his business partner (Dale Oldham) for the language used in the draft DOJ request letter. In an email dated August 30, 2017, Commerce Secretary Ross’s “trusted advisor” Mark Neuman, ECF 451 at 3, directly asked Hofeller to review language for the DOJ request letter, urging Hofeller to “[p]lease make

certain that this language is correct.” Ex. A. Referring to Oldham, Hofeller’s business partner, Hofeller responded: “Dale Just read it, and says it is fine as written.” Ex. B. This exchange confirms Hofeller’s essential role devising Defendants’ “contrived” VRA enforcement rationale. *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019).

The House Oversight Committee Update also makes clear why Hofeller favored adding a citizenship question to the census: not to enforce the VRA and protect minority voting rights, but rather, as Christa Jones (the Census Bureau Chief of Staff) explained in sworn testimony, for “the Republican redistricting effort.” Ex. E at 12. Jones also confirmed that, in 2015, she contacted Hofeller on the “opportunity to mention citizenship” in response to a Census Bureau comment request because of his interest in the issue as a major figure in the “Republican redistricting community.” *Id.* And she testified that she knew Hofeller’s partner, Oldham, for a long time, and that Oldham pushed for a citizenship question for redistricting and apportionment “more times than I can remember.” *Id.*

In sum, contrary to Defendants’ assertion that Hofeller’s involvement was a “conspiracy theory,” ECF 601 at 5, these documents confirm Hofeller’s central involvement in the chain of events leading to DOJ’s request and Defendants’ effort to concoct a rationale for the question. Defendants repeatedly, and without justification, tried to withhold all of this from the public, Plaintiffs, and the Court.

II. A Newly-Discovered Text Message from Neuman Confirms that Defendants and Gore Concealed a Relevant Draft of the DOJ Request Letter, and Misrepresented the Initial Drafting Process of the Letter.

The House Oversight Committee Update also released an October 6, 2017 text message from Neuman to Gore with a second, previously-undisclosed draft DOJ request letter including the language that Hofeller and Oldham approved. Ex. C. This texted draft is different from the hard copy draft of the Neuman Letter that Defendants first improperly withheld, and then

belatedly disclosed in this case (without identifying information in the 90,000 page document dump on the eve of Gore's deposition). *Compare* Ex. C (text version addressed to Ron Jarmin, with citations to two VRA cases and a quote from one of them) *with* ECF 635-1, Ex. 9 (previously-produced version, addressed to John Thompson, which does not include VRA case citations or the accompanying quote). This version of the DOJ request letter, which Neuman sent to Gore, was not produced, logged, or otherwise disclosed.

The text message definitively shows how the VRA pretext was relayed from Hofeller through Neuman to Gore. And it also shows that Gore made numerous statements in his sworn testimony and declaration that are misleading, if not outright misrepresentations:

- Gore did not, as he testified in this case, write the initial draft of the DOJ request letter as he claimed in his deposition. *See* ECF 635-1, Ex. 7 at 127, 150, 343. Rather, he received at least *two separate drafts* from Neuman, both of which included Hofeller's VRA enforcement rationale.
- In his declaration, Gore averred that "shortly after receiving it from Mr. Neuman, [Gore] placed [the Neuman Letter] in a file folder in [his] office," ECF 648-1, Ex. 6 at ¶ 8 strongly implying that he had only a hard copy of the letter. The text exchange shows that was *not* the case—that he in fact received *a separate electronic version* of the DOJ Request Letter. Defendants never disclosed or logged this electronic version.
- In his declaration, Gore averred that he "had no further oral or written communications with Mr. Neuman after receiving the Neuman Letter from him." ECF 648-1, Ex. 6, at ¶ 6. In fact, the text exchange between Gore and Neuman suggests Gore met with Neuman in person *after* receiving the texted version of the DOJ request letter. *See* Ex. C (Text between Gore and Neuman on October 6, reading, "On my way").
- During his testimony, Gore initially testified that he "may have" used "personal e-mail, text messaging, or private messaging apps to communicate about DOJ work," but then reversed course and affirmatively denied that he had done so, stating "I don't think I have used [personal text messages] for DOJ work." Ex. F. The fact that Neuman texted him a copy of the draft DOJ letter raises, at a minimum, serious doubts about the accuracy of that denial.
- In his declaration, Gore averred that as "a member of the Bar and an official of the Department of Justice, I took with utmost seriousness my duties and obligations to

comply with all requests for discovery in this matter . . . At no time, including during my deposition, did I withhold, direct anyone to withhold, or become aware that anyone had withheld documents or information required to be produced in discovery, except for documents and information withheld on grounds of privilege that were accounted for in Defendants' privilege logs" ECF 648-1, Ex. 6 at ¶ 18. Yet Gore failed to produce the texted version of the draft DOJ letter that Neuman provided him on October 6.

III. A Newly-Discovered Text Message from Neuman Confirms that Defendants and Davidson Concealed a Relevant Communications About Secretary Ross' Awareness of the Drafting of the DOJ Request Letter.

The House Oversight Committee Update also released a series of text messages between Neuman and Commerce Department General Counsel Peter Davidson, including exchanges on October 7 and October 8, 2017 and January 3, 2018. These texts show that following his meeting with Gore, Neuman gave a readout to Davidson, who discussed it with Secretary Ross. On October 8, 2017, Davidson sent a text message to Neuman, stating that "[Secretary Ross] appreciated the update and your help." Ex. D. Defendants failed to produce or log this text message.

Defendants' withholding of their correspondence with Neuman was the subject of several motions to compel in the underlying litigation, ECF 117, 237, 338, 414, yet they failed to produce this exchange. This failure not only sheds further doubt on the completeness of Defendants' production, it also contradicts Davidson's August 2, 2019 declaration in which he averred that as "a member of the Bar and an official with the Department of Commerce, I took with the utmost seriousness my duties and obligations to comply with all requests for discovery in this matter . . . [a]t no time did I withhold, direct anyone to withhold, or become aware that anyone had withheld documents or information required to be produced in discovery, except for documents and information withheld on grounds of privilege that were accounted for in Defendants' privilege logs." *See* ECF 648-1, Ex. 26 at ¶ 11. And, given the timing of the withheld text—which confirms Neuman gave Davidson a readout on his meeting with Gore—the

failure to produce the exchange with Neuman also raises substantial questions about Davidson's averment that he "was unaware" that Neuman "had in his possession a draft letter concerning a citizenship question." *Id.* at ¶ 5.

IV. Defendants and Their Agents Concealed These Documents from Plaintiffs and the Court, Casting Further Doubts about the Completeness of Their Productions.

Another thing is now obvious: Neuman produced documents and communications to congressional investigators that were highly relevant to this case but somehow went undisclosed in litigation. *See* Ex. E at 10, 12. At all points in discovery, through many twists and turns, Neuman and Defendants withheld these documents from Plaintiffs and the Court. They only became known to Plaintiffs because the House Oversight Committee made them public on November 12. As Plaintiffs previously explained, Defendants' failure to log or produce this material during the litigation reflects numerous violations of court orders and Federal Rules.

CONCLUSION

Defendants are no longer entitled to the benefit of doubt. There is now a well-developed body of evidence showing that Defendants repeatedly prevented the Court from being able to review a complete record in this litigation. It was Neuman—not Defendants, their counsel, or Gore—who produced the emails, text messages, and documents discussed above to congressional investigators. Litigating this case, Defendants did not log or produce *any* of the communications to or from Gore or Davidson mentioned *supra*—including the different version of the Neuman Letter that Neuman sent to Gore in a text message on October 6, 2017—and despite Gore's and Davidson's sworn statements that their productions were complete.

The recent revelation of these documents raises serious doubts about the candor of Messrs. Gore, Davidson, and Neuman and the conduct of Defendants. It also raises other troubling questions. In addition to concealing one version of the DOJ letter, why wasn't the

second version of the draft DOJ letter produced? What other text messages did Messrs, Gore, Davidson, and Neuman have relevant to the matter that were not produced? Did Gore and Davidson fail to preserve their copies of these text messages, and if so, how do they square that with the fact that Defendants contend that they were anticipating litigation over these issues? Did other witnesses have relevant text messages that weren't produced? Why didn't the Defendants produce any text messages at all?

Defendants have had countless opportunities to be straight with Plaintiffs and this Court. Instead, they have repeatedly misled and have never provided a complete record. The need for sanctions, including the targeted discovery that Plaintiffs outlined in their motion, is now starker than ever. *See* ECF 635 at 24-32. As the Court said almost exactly a year ago, "enough is enough." ECF 544 at 7.

Respectfully submitted,

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