



U.S. Department of Justice  
Civil Division  
Federal Programs Branch  
1100 L Street, N.W.  
Washington, DC 20005

**By ECF**

The Honorable Jesse M. Furman  
United States District Judge  
Southern District of New York

Re: *State of New York v. United States Department of Commerce*, No. 18-cv-2921

Dear Judge Furman:

The Court should deny Plaintiffs' motion (ECF No. 595) to issue an order to show cause why sanctions should not be imposed. The motion borders on frivolous, and appears to be an attempt to reopen the evidence in this already-closed case and to drag this Court into Plaintiffs' eleventh-hour campaign to improperly derail the Supreme Court's resolution of the government's appeal. The Court should not countenance Plaintiffs' tactics.

1. a. At the heart of Plaintiffs' motion is their claim that then-Acting Assistant Attorney General John Gore relied on a private, unpublished 2015 study by Dr. Thomas Hofeller in drafting the Department of Justice's formal December 2017 request (Gary Letter) to reinstate a citizenship question on the 2020 decennial census. That claim is false. Plaintiffs provide no evidence that Gore ever read, received, or was even aware of the existence of that unpublished study before the filing of Plaintiffs' motion and the near-simultaneous publication of an accompanying article in the *New York Times* last Thursday morning, *see* Gov't Ex. L, much less that he had any such awareness when drafting the Gary Letter. Nor can they, because such evidence does not exist. Neither Hofeller nor his unpublished study played any role whatsoever in the drafting of the Gary Letter. There is no smoking gun here; only smoke and mirrors.

In lieu of actual, admissible evidence, Plaintiffs rely on pure speculation to conjure an imagined link between the Hofeller study and the Gary Letter based on supposed "striking similarities" between the two documents. Plaintiffs' insinuation is false. The purported "striking similarities" between the study and the Gary Letter concern their respective descriptions of the widely and publicly-known problems of using citizenship data from the American Community Survey (ACS) for estimating the citizen voting-age population (CVAP). But even a cursory comparison of the two documents shows that they are not "strikingly" similar. For example, Plaintiffs contend that the Gary Letter's observation that "the [ACS's] margin of error increases as the sample size—and, thus, the geographic area—decreases" is "strikingly similar" to the study's assertion that "the [ACS's] accuracy for small units of geography is extremely poor." *See* Pls.' Ex. I. How those statements are "strikingly similar" is, to put it mildly, not self-evident. Plaintiffs' remaining examples (*see id.*) are of a piece, and their pattern-matching exercise reads more like the product of a conspiracy theorist than a careful legal analysis.

Indeed, the Gary Letter is far more similar to briefs filed in *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016), than to the Hofeller study. The Gary Letter expressly cites *Evenwel* in its discussion of the ACS, and Gore testified that he was familiar with the case and had read the briefs in it. *See* Gov't

Ex. G, Gore Dep. 339:13-340:4. Unsurprisingly, the Gary Letter contains many similarities—some even “striking”—to, for instance, the amicus brief filed by former Directors of the U.S. Census Bureau. *See* Gov’t Ex. D. That brief identifies the same problems with using ACS citizenship data that the Gary Letter identifies, often using identical language, as the attached chart (Gov’t Ex. C) demonstrates. Other amicus briefs in *Evenwel* also address the same problems, using similar language. *See, e.g.*, Br. for United States at 22–23; Br. of Democratic Nat’l Comm. at 15–19; Br. of Nathaniel Persily et al. at 11–24. (Those and other *Evenwel* briefs are available at [www.scotusblog.com/case-files/cases/evenwel-v-abbott](http://www.scotusblog.com/case-files/cases/evenwel-v-abbott).) The Persily brief even describes the problems with the ACS “in the exact same order,” Pls.’ Mot. at 3, as the Hofeller study and the Gary Letter, exposing the speciousness of Plaintiffs’ argument on that score too. *See* Br. of Nathaniel Persily et al. at 16-24.

Moreover, it is hardly surprising that the Gary Letter, *Evenwel* briefs, and Hofeller study all describe similar problems with ACS citizenship data. Those issues are widely known, and have been discussed in case law and academic literature for years. *See, e.g.*, *Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1030 (E.D. Mo. 2016); *Fabela v. City of Farmers Branch, Tex.*, 2012 WL 3135545, at \*7 (N.D. Tex. Aug. 2, 2012); *Benavidez v. Irving Indep. Sch. Dist., Tex.*, 690 F. Supp. 2d 451, 457-458 (N.D. Tex. 2010); Justin Levitt, *Democracy on the High Wire*, 46 U.C. Davis L. Rev. 1041, 1109 n.116 (2013); Nathaniel Persily, *The Law of the Census*, 32 Cardozo L. Rev. 755, 776-777 (2011). The Census Bureau itself has long acknowledged these limitations of the ACS. *See, e.g.*, U.S. Census Bureau, *A Compass for Understanding and Using American Community Survey Data: What General Data Users Need to Know*, at 4, 8-11 (Oct. 2008), available at <https://www.census.gov/content/dam/Census/library/publications/2008/acs/ACSGeneralHandbook.pdf>. The assertion that Gore relied on a private, unpublished study to compile information that is widely known and publicly available is absurd.

b. Without any actual evidence that the Gary Letter relied on or was even influenced by the unpublished Hofeller study, Plaintiffs attempt to build a link by a circuitous path. According to Plaintiffs, a paragraph in a letter that Mark Neuman gave to Gore (Neuman Letter) matches a paragraph found in a document on one of Hofeller’s hard drives. From this, Plaintiffs leap to the conclusion that a completely separate document on one of Hofeller’s hard drives (*i.e.*, the unpublished study) also must have made its way to Gore—through mysterious and unidentified channels. Plaintiffs’ illogical speculation is baseless.

Even assuming Hofeller gave Neuman a paragraph from one document on his hard drive, it would not even arguably show that he also gave an entirely separate document (the study) to Neuman, much less that Hofeller (or anyone else) gave it to Gore. Indeed, although Plaintiffs state that Neuman produced the Neuman Letter in discovery, they do not say that Neuman produced a copy of the 2015 study, because he did not. That, in turn, strongly suggests that he did not have it in his possession, custody, or control. The Department of Justice, too, produced the Neuman Letter but not the 2015 study. That is because the study was not in the possession, custody, or control of any of the relevant custodians at DOJ. Those facts alone rebut Plaintiffs’ baseless assertions that DOJ or Gore had the Hofeller study and based the Gary Letter on its contents.

Nor is there any logical basis to draw a link between the Neuman Letter and the Gary Letter. Plaintiffs’ assertion that the “December 2017 DOJ letter was adapted from the Neuman DOJ Letter, including, in particular, Dr. Hofeller’s VRA rationale” is risible. The Gary Letter bears no resemblance to anything in the Neuman Letter, including the nonsensical paragraph allegedly written by Hofeller. *Compare* Pls.’ Exs. G & H *with* Gov’t Ex. F. Neither the text nor the substance of the Neuman Letter appears anywhere in the Gary Letter, and Neuman himself testified that he “wasn’t part of the drafting process of the [Gary] [L]etter” and that the Neuman Letter is “very different” from the Gary Letter.

Gov't Ex. H, Neuman Dep. 114:19-20, 280:23-24. Tellingly, Plaintiffs have had the Neuman Letter for *months*, yet never previously suggested that it bore any resemblance to the Gary Letter. Plaintiffs' repeated insistence on conflating the two documents, as if the Neuman Letter were an early draft of the Gary Letter, is disingenuous, misleading, and contradicted by the evidence in the record.

2. In addition to incorrectly claiming that the Gary Letter was based on the unpublished Hofeller study, Plaintiffs allege that Gore and Neuman testified falsely about Hofeller's involvement in drafting the Gary Letter. As explained above, neither Hofeller nor his unpublished study played any role whatsoever in the drafting of the Gary Letter, so Plaintiffs' allegations fail at the outset. But they fail even on their own terms.

a. Plaintiffs assert that "Gore repeatedly testified that he prepared the initial draft of the DOJ letter, failing to disclose that Neuman gave a draft of the DOJ letter in October 2017." Pls.' Mot. at 1. The first half of that sentence is unequivocally true: Gore *did* prepare the first draft of the *Gary Letter*, and Plaintiffs have not identified any evidence to the contrary. *See* Ex. G, Gore Dep. 152:4-155:8. (Again, Plaintiffs' insistence on calling both the Neuman Letter and the Gary Letter "the DOJ letter" is misleading because it willfully conflates two entirely different documents.)

As for the second half: Gore, it is true, did not testify that Neuman gave him a draft of the Neuman Letter. But that is because *Plaintiffs did not ask him about it*. Gore disclosed that he talked to Neuman while drafting the Gary Letter. *See* Ex. G, Gore Dep. 437:20-438:13. When Plaintiffs asked for the substance of that conversation, the government appropriately asserted deliberative-process privilege—an assertion that Plaintiffs chose not to challenge. *Id.* at 437:14-20. And instead of following up to ask whether Neuman gave him any materials, Plaintiffs simply moved on to other topics. *Id.* at 437:22-438:13. The lack of testimony from Gore about the Neuman Letter is thus the result of Plaintiffs' own deposition techniques and strategic litigation choices. Gore's testimony was entirely truthful.

Perhaps more important, *Plaintiffs have long known that Gore had the Neuman Letter*. The government produced the Neuman Letter in full in discovery. *See* Gov't Ex. E, at 4–5. In the cover email to Plaintiffs' counsel, the government expressly said: "These materials were collected from John Gore" "in hard copy." *Id.* at 3. Accordingly, Plaintiffs have known since at least October 23, 2018, that Gore had the Neuman Letter—which belies their repeated claims that they learned that fact only recently. It is thus unclear how Plaintiffs could have been misled by Gore's failure to tell them something they (1) did not ask him and (2) have known since last October. Plaintiffs' obliviousness is not a valid basis to sanction the government.

Plaintiffs' other accusations of false or misleading testimony on the part of Gore are even more perplexing. For example, they assert that "Gore, meanwhile, testified that he 'drafted the initial draft of the [Gary Letter] sometime around the end of October or early November of 2017,' and he did not name Neuman or Dr. Hofeller as people who provided 'input' on the initial draft." Pls.' Mot. at 2. Of course the reason Gore did not identify Neuman or Hofeller as people who provided input on the Gary Letter is that neither Neuman nor Hofeller provided any input on the Gary Letter. Plaintiffs have identified no evidence to the contrary. Similarly baseless is Plaintiffs' denunciation of Gore for not "disclos[ing] that Dr. Hofeller ghostwrote a substantial part of the Neuman DOJ Letter setting forth the VRA rationale," and for "conceal[ing] Dr. Hofeller's role in crafting the October 2017 draft letter and the VRA enforcement rationale it advanced." Pls.' Mot. at 1, 3. Again, Plaintiffs have provided no evidence whatsoever that Gore was aware of Hofeller's involvement in anything, much less his alleged contribution of a cryptic paragraph in the Neuman Letter. Besides, as noted above, Plaintiffs neglected to ask Gore about any materials he might have received from Neuman, so Gore

never opined on what he thought of that letter or who he thought might have contributed to it.

b. Plaintiffs attack Neuman's testimony on similar grounds. Neuman is not a governmental employee and was represented by private counsel in this litigation. His acts or omissions are thus not attributable to the government and provide no basis for sanctions against the government. Nevertheless, Plaintiffs' accusations against Neuman fail for largely the same reasons as with Gore.

Plaintiffs assert that "Neuman testified that his October 2017 meeting with Gore was *not* about a 'letter from DOJ regarding the citizenship question,' and that he gave Gore only a different document." Pls.' Mot. at 3. That is false. Neuman never said he gave Gore "only" a different document. Plaintiffs asked him what he gave to Gore, and Neuman answered: "Mainly the—mainly a copy of the—of the letter from the Obama Administration, Justice Department, to the Census Bureau on the issue of adding a question on the ACS." Gov't Ex. H, Neuman Dep. 123:25-124:3. After asking some follow-up questions about that document, *id.* at 124:4-126:16, counsel moved on to another topic, *see id.* at 126:19-20 ("Did [Gore] provide you any information at that meeting?"). Counsel never asked *what else*, if anything, Neuman gave Gore beyond the Obama-era document. Neuman's failure to inform Plaintiffs that he also gave Gore a copy of the Neuman Letter is thus traceable to Plaintiffs' inadequate deposition questioning, not Neuman. (Besides, as noted above, Plaintiffs already knew that Gore had received a copy of the Neuman Letter.)

Also the product of Plaintiffs' own deposition decisions is Neuman's alleged failure to inform Plaintiffs of Hofeller's purported role in drafting the Neuman Letter. Neuman was discussing the letter's authorship when the questioner cut him off: "I don't—I don't want—I'm not asking you to tell me about who the original author was or anything." Gov't Ex. H, Neuman Dep. 281:23-25. It is quite rich for Plaintiffs to now complain about Neuman's failing to tell them something he was instructed not to tell them. And Plaintiffs did not lack for opportunity; Neuman testified at length about Hofeller and the discussions they had about redistricting and the census. *See id.* at 33:2-10, 36:19-45:14, 51:7-53:3, 55:9-59:6, 64:18-67:14, 89:11-90:13, 100:18-101:7, 136:17-139:3, 143:13-144:6.

c. In a chart attached to their motion, Pls.' Ex. A, Plaintiffs repeat the allegations of misrepresentations above and add additional allegations, including about statements in the government's court filings. All of the allegations are meritless. The government has prepared an expanded version of Plaintiffs' chart, Gov't Ex. A, explaining that there are no misrepresentations in Gore's testimony, Neuman's testimony, or the government's filings.

3. Plaintiffs' assertions are not only false, but legally irrelevant as both a procedural and substantive matter.

Procedurally, it is too late to reopen the evidence in this already-closed case (setting aside that this Court has no jurisdiction over that aspect of the case while the Supreme Court considers the government's appeal). Moreover, the supposedly "new" evidence from Hofeller's files likely would be inadmissible, in particular because none of it has been authenticated and all of it is hearsay. *See* Gov't Ex. B (describing some of the evidentiary problems with Plaintiffs' submissions). It would be improper to impose sanctions on the basis of inadmissible evidence. To the extent Plaintiffs claim the "new" evidence is their learning that Gore had the Neuman Letter, as discussed above, they knew that in October and decided not to pursue it further. Plaintiffs also made the strategic litigation choice not to challenge the government's assertion of deliberative-process privilege over Gore's discussions with Neuman, and similarly decided not to "close out" their questioning of Neuman on that point. Plaintiffs are not entitled to a do-over.

Substantively, the "new" evidence is irrelevant because the critical issue in this APA case is

whether the Secretary provided an objectively rational basis for his decision to reinstate the citizenship question. Nothing in the private files of a deceased political operative can affect the resolution of that issue. To the extent Plaintiffs believe the “new” evidence affects their equal-protection claim, the question there is whether *Secretary Ross* harbored discriminatory animus. Not even Plaintiffs allege that Secretary Ross was aware of Hofeller’s unpublished 2015 study or its ideas. And this Court has already determined that the private motivations of various non-governmental actors cannot be attributed to the Secretary. *See New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502, 570–71 (S.D.N.Y. 2019). The secret motivations of Hofeller, allegedly memorialized in a private, unpublished study recovered from his hard drive long after his death, likewise are not attributable to the Secretary.

Finally, Plaintiffs have misrepresented the nature of Hofeller’s study. Contrary to their representation, the study did *not* conclude “that adding a citizenship question to the 2020 Census ‘would clearly be a disadvantage to Democrats’ and ‘advantageous to Republicans and Non-Hispanic Whites’ in redistricting.” Pls.’ Mot. at 1. Rather, the study concluded that “[a] *switch to the use of citizen voting age population* as the redistricting population base for redistricting would be advantageous to Republicans and Non-Hispanic Whites,” Pls.’ Ex. D at 9, and that “[u]se of CVAP would clearly be a disadvantage for the Democrats,” *id.* at 7. Those statements demonstrate no discriminatory animus against anyone; they are empirical observations about the likely impact of using CVAP for redistricting. They are also inapposite to Plaintiffs’ claims. Plaintiffs’ theory is *not* that the citizenship question will harm them *because it will enable the use of CVAP* in redistricting. Rather, their theory is that the citizenship question harms them by causing an undercount in certain noncitizen populations *regardless* of whether future redistricting is done by CVAP or total population. Hofeller’s study does not address that issue at all.

\* \* \* \* \*

The Department of Justice takes accusations of false testimony very seriously. For the reasons set forth above and in the attached charts, Plaintiffs’ accusations are meritless. Plaintiffs had an obligation to conduct a pre-filing investigation before leveling such inflammatory accusations, especially against a high-ranking DOJ official. And they have had ample time to conduct that investigation; according to the *New York Times*, Plaintiffs’ counsel have had the Hofeller materials since at least February. *See Gov’t Ex. L*, at 3. Yet they appear to have spent more time coordinating with the media—the detailed *Times* article was posted online less than an hour after the ECF filing notice—than performing the requisite investigation. Plaintiffs apparently hope that by filing their eleventh-hour motion they might (improperly) derail the Supreme Court’s resolution of this case. There is no other plausible explanation for why they spilled so much ink describing “new” evidence that they have known since October and conjuring a conspiracy theory involving a deceased political operative that essentially hinges on wordplay. The Court should deny their baseless motion.

Dated: June 3, 2019

Respectfully submitted,

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