

August 30, 2018

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

RE: Plaintiffs' letter motion for leave to conduct discovery and depose non-party Kris Kobach in *New York Immigration Coalition, et al. v. U.S. Dep't of Commerce, et al.*, 18-CV-5025 (JMF), and *State of New York, et al. v. U.S. Dep't of Commerce, et al.*, 18-CV-2921 (JMF).

Dear Judge Furman,

Plaintiffs write to seek leave to conduct limited document discovery and a deposition of non-party Kris Kobach, as contemplated by Local Civil Rule 37.2 and Rule 2(C) of this Court's Individual Rules and Practices. Defendants do not consent to Plaintiffs' request.

In the initial order regarding discovery, the Court initially limited third-party discovery to the Department of Justice based on the premise that, "to the extent that third parties may have influenced Secretary Ross's decision, one would assume that influence would be evidenced in Commerce Department materials and witnesses themselves." July 3, 2018 Hearing Tr. at 86.¹ The Court invited Plaintiffs to show "with specificity . . . why additional depositions would be needed" at a later time. *Id.* at 90. Plaintiffs have reached that moment with Mr. Kobach.

The Administrative Record reflects that Mr. Kobach was a leading, early proponent of adding the citizenship question and lobbied Secretary Ross in 2017 after a previous conversation with Steve Bannon. AR 763–64, 2561.² The language in these communications is consistent with the conclusion that this question was motivated by impermissible reasons (including improper political influence and discriminatory animus against immigrant communities of color) and that the later-articulated rationale for the question is pretext.

The record indicates that Secretary Ross spoke to Mr. Kobach about the citizenship question in both April 2017 and July 2017. AR 763-64, 2561. The individual at Commerce who facilitated the July conversation was Secretary Ross's Chief of Staff, Wendy Teramoto. The record reflects Ms. Teramoto—without the participation of any other officials from the Department of Commerce—had at least one email exchange and one direct conversation with Mr. Kobach, also in July 2017. AR 763-64. At her deposition, however, Ms. Teramoto testified she had no recollection about these interactions, and she expressly disclaimed knowing who Mr. Kobach is, despite being confronted with emails between her and Mr. Kobach. (Teramoto Dep. at 39:4–45:17.)³ The only other person who possesses information about these interactions is Mr. Kobach himself, and obtaining his testimony and documents is necessary to understand why Secretary Ross decided to add a citizenship question.

¹ Excerpts of the July 3, 2018 hearing transcript are attached as Exhibit A.

² Attached as Ex. B.

³ Excerpts of the Aug. 24, 2018 Wendy Teramoto Deposition Transcript are attached as Exhibit C.

1. *Targeted Extra-record Discovery is Appropriate When Connected to the Decisionmaker's Bad Faith or as Necessary to Explain Agency Action.* Under Rule 26(b)(1), a party may take discovery “regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” This Court has already explained (and allowed in limited fashion) that in a challenge to agency action, where—as here⁴—the party seeking discovery has made a prima facie showing of bad faith, extra-record discovery targeted to the intention of the decision-maker is appropriate. *See, e.g., Nat’l Audubon Society v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997); *Tummino v. von Eschenbach*, 427 F. Supp. 2d 212, 233 (E.D.N.Y. 2006). The same is true where the discovery is “necessary to explain agency action.” *Pub. Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982); *see also Exxon Corp. v. Dept. of Energy*, 91 F.R.D. 26, 32–33 (N.D. Tex. 1981) (“the ‘whole record’” is more than just the “documents that the agency has compiled and submitted” but includes “all the evidence that was before the decision-making body”).

2. *Mr. Kobach May Have Relevant Information Related to His Role in Influencing Secretary Ross’s Decision:* The NYIC Plaintiffs’ complaint sets out some of Mr. Kobach’s involvement in Secretary Ross’ citizenship-question decision. (18-CV-5025, ECF No. 1.) According to Mr. Kobach, he proposed to President Trump that he add the citizenship question “shortly after he was inaugurated” in January 2017, and reported that the President “absolutely was interested in this.” (Compl. ¶ 101.) Mr. Kobach made his reasons for wanting Ross to add the citizenship question plain: he wanted to strip political representation from immigrant communities by providing a way to allow states and/or the federal government to omit non-citizens from apportionment calculations. (*Id.* ¶ 102.)

Mr. Kobach’s role did not end with his early meeting with President Trump. Documents produced in the Administrative Record reveal that Mr. Kobach had a phone conversation with Secretary Ross in late winter or early spring of 2017 about adding a citizenship question in part because of the “problem that aliens who do not actually ‘reside’ in the United States are still counted for congressional apportionment purposes.” (AR 763.) In July 2017, Kobach followed up from the conversation with a discussion with Wendy Teramoto, referencing the original conversation he had with Ross “at the direction of Steve Bannon.” (*Id.*) Ms. Teramoto planned a call with Kobach that day and set up a call including Secretary Ross for the following day. (*Id.*)

Despite these emails and calls between Teramoto and Kobach, Ms. Teramoto has no recollection of these events. She testified that she does not remember emailing or speaking with Mr. Kobach, setting up a meeting for him with Secretary Ross, the purpose of his conversation with her or Secretary Ross, or anything else about the series of events. (Teramoto Dep. at 40:8–45:17.)⁵ Ms. Teramoto testified that she did not and does not know who Mr. Kobach is. (*Id.* at 39:4–40:6, 42:19–21.) Nor did Commerce Under Secretary for Economic Affairs Karen Dunn Kelley and Director of the Office of Policy and Strategic Planning Earl Comstock, when asked at their depositions, have any knowledge of conversations between Mr. Kobach and Commerce officials.

⁴ See July 3, 2018 Hearing Tr. at 82–85.

⁵ Excerpts of the Aug. 24, 2018 Wendy Teramoto Deposition Transcript are attached as Exhibit C.

Ms. Teramoto is the only individual who knows about the content of her conversations with Mr. Kobach other than Mr. Kobach himself. Through her deposition testimony, she has rebutted any inference that Commerce personnel are able to testify about important interactions with non-parties such as Kobach or Bannon. Without Mr. Kobach's testimony, the substance of this critical series of interactions will be lost.

3. *Information About Mr. Kobach's Communications with Secretary Ross is Necessary and Relevant to the APA and Equal Protection Claims:* Mr. Kobach's public statements and the Administrative Record reflect that Mr. Kobach proposed the citizenship question to President Trump "shortly after he was inaugurated," discussed the issue with Secretary Ross in early 2017 at the direction of Steve Bannon, and communicated with Secretary Ross and Wendy Teramoto in July 2017 about this subject.

These conversations directly relate to *why* Secretary Ross decided to add the citizenship question. Mr. Kobach is a critical witness to whether the decision to add the question was the result of political pressure. And because Mr. Kobach wanted Secretary Ross to add the question not for Voting Rights Act enforcement purposes but to dilute the political power of immigrant communities of color, his influence relates to whether the rationale offered by Secretary Ross was a pretext and whether the decision was motivated by discriminatory animus. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977) (discussing the relevance of "contemporary statements by" the decisionmakers and the historical background of the decision to discriminatory intent analysis); *New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766 n.24 (S.D.N.Y. 2018) (noting that "evidence of pretext alone . . . may well suffice to prove a violation of the APA — as Defendants themselves conceded"); *see also Long Island Head Start Child Dev. Servs. v. N.L.R.B.*, 460 F.3d 254, 259 (2d Cir. 2006) (holding that an agency may not advance a "new rationale" for a decision "for the first time on judicial review").

Because Mr. Kobach's involvement in the process of adding the citizenship question relates to the central legal issues in this case, and because Ms. Teramoto's deposition proved that no other source besides Mr. Kobach can complete the record, the Court should authorize Plaintiffs to seek a Rule 45 deposition of and limited document discovery from Mr. Kobach.

Respectfully submitted,

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** Not admitted in District of Columbia; practice limited per D.C. App. R. 49(c)(3).

Attorneys for NYIC Plaintiffs

EXHIBIT A

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 STATE OF NEW YORK, et al.,

4 Plaintiffs,

5 v.

18 Civ. 2921 (JMF)

6 UNITED STATES DEPARTMENT OF
7 COMMERCE, et al.,

Argument

8 Defendants.

9
10 -----x
11 NEW YORK IMMIGRATION
12 COALITION, et al.,

13 Plaintiffs,

14 v.

18 Civ. 5025 (JMF)

15 UNITED STATES DEPARTMENT OF
16 COMMERCE, et al.,

Argument

17 Defendants.

18 -----x
19
20 New York, N.Y.
21 July 3, 2018
22 9:30 a.m.

23 Before:

24 HON. JESSE M. FURMAN,

25 District Judge

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1 full scope of such materials. Accordingly, plaintiffs' request
2 for an order directing defendants to complete the
3 Administrative Record is well founded.

4 Finally, I agree with the plaintiffs that there is a
5 solid basis to permit discovery of extra-record evidence in
6 this case. To the extent relevant here, a court may allow
7 discovery beyond the record where "there has been a strong
8 showing in support of a claim of bad faith or improper behavior
9 on the part of agency decision-makers." National Audubon
10 Society v. Hoffman, 132 F.3d 7, 14 (2d Cir. 1997). Without
11 intimating any view on the ultimate issues in this case, I
12 conclude that plaintiffs have made such a showing here for
13 several reasons.

14 First, Secretary Ross's supplemental memorandum of
15 June 21, which I've already discussed, could be read to suggest
16 that the Secretary had already decided to add the citizenship
17 question before he reached out to the Justice Department; that
18 is, that the decision preceded the stated rationale. See, for
19 example, Tummino v. von Eschenbach, 427 F.Supp. 2d 212, 233
20 (E.D.N.Y. 2006) authorizing extra-record discovery where there
21 was evidence that the agency decision-makers had made a
22 decision and, only thereafter took steps "to find acceptable
23 rationales for the decision." Second, the Administrative
24 Record reveals that Secretary Ross overruled senior Census
25 Bureau career staff, who had concluded -- and this is at page

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1 1277 of the record -- that reinstating the citizenship question
2 would be "very costly" and "harm the quality of the census
3 count." Once again, see Tummino, 427 F.Supp. 2d at 231-32,
4 holding that the plaintiffs had made a sufficient showing of
5 bad faith where "senior level personnel overruled the
6 professional staff." Third, plaintiffs' allegations suggest
7 that defendants deviated significantly from standard operating
8 procedures in adding the citizenship question. Specifically,
9 plaintiffs allege that, before adopting changes to the
10 questionnaire, the Census Bureau typically spends considerable
11 resources and time -- in some instances up to ten years --
12 testing the proposed changes. See the amended complaint which
13 is docket no. 85 in the states' case at paragraph 59. Here, by
14 defendants' own admission -- see the amended complaint at
15 paragraph 62 and page 1313 of the Administrative Record --
16 defendants added an entirely new question after substantially
17 less consideration and without any testing at all. Yet again
18 Tummino is instructive. See 427 F.Supp. 2d at 233, citing an
19 "unusual" decision-making process as a basis for extra-record
20 discovery.

21 Finally, plaintiffs have made at least a prima facie
22 showing that Secretary Ross's stated justification for
23 reinstating the citizenship question -- namely, that it is
24 necessary to enforce Section 2 of the Voting Rights Act -- was
25 pretextual. To my knowledge, the Department of Justice and

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1 civil rights groups have never, in 53 years of enforcing
2 Section 2, suggested that citizenship data collected as part of
3 the decennial census, data that is by definition quickly out of
4 date, would be helpful let alone necessary to litigating such
5 claims. See the states case docket no. 187-1 at 14; see also
6 paragraph 97 of the amended complaint. On top of that,
7 plaintiffs' allegations that the current Department of Justice
8 has shown little interest in enforcing the Voting Rights Act
9 casts further doubt on the stated rationale. See paragraph 184
10 of the complaint which is docket no. 1 in the Immigration
11 Coalition case. Defendants may well be right that those
12 allegations are "meaningless absent a comparison of the
13 frequency with which past actions have been brought or data on
14 the number of investigations currently being undertaken," and
15 that plaintiffs may fail "to recognize the possibility that the
16 DOJ's voting-rights investigations might be hindered by a lack
17 of citizenship data." That is page 5 of the government's
18 letter which is docket no. 194 in the states case. But those
19 arguments merely point to and underscore the need to look
20 beyond the Administrative Record.

21 To be clear, I am not today making a finding that
22 Secretary Ross's stated rationale was pretextual -- whether it
23 was or wasn't is a question that I may have to answer if or
24 when I reach the ultimate merits of the issues in these cases.
25 Instead, the question at this stage is merely whether --

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1 assuming the truth of the allegations in their complaints --
2 plaintiffs have made a strong preliminary or prima facie
3 showing that they will find material beyond the Administrative
4 Record indicative of bad faith. See, for example, Ali v.
5 Pompeo, 2018 WL 2058152 at page 4 (E.D.N.Y. May 2, 2018). For
6 the reasons I've just summarized, I conclude that the
7 plaintiffs have done so.

8 That brings me to the question of scope. On that
9 score, I am mindful that discovery in an APA action, when
10 permitted, "should not transform the litigation into one
11 involving all the liberal discovery available under the federal
12 rules. Rather, the Court must permit only that discovery
13 necessary to effectuate the Court's judicial review; i.e.,
14 review the decision of the agency under Section 706." That is
15 from Ali v. Pompeo at page 4, citing cases. I recognize, of
16 course, that plaintiffs argue that they are independently
17 entitled to discovery in connection with their constitutional
18 claims. I'm inclined to disagree given that the APA itself
19 provides for judicial review of agency action that is "contrary
20 to" the Constitution. See, for example, Chang v. USCIS, 254
21 F.Supp. 3d 160 at 161-62 (D.D.C. 2017). But, even if
22 plaintiffs are correct on that score, it is well within my
23 authority under Rule 26 to limit the scope of discovery.

24 Mindful of those admonitions, not to mention the
25 separation of powers principles at stake here, I am not

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1 inclined to allows as much or as broad discovery as the
2 plaintiffs seek, at least in the first instance. First, absent
3 agreement of defendants or leave of Court, of me, I will limit
4 plaintiffs to ten fact depositions. To the extent that
5 plaintiffs seek to take more than that, they will have to make
6 a detailed showing in the form of a letter motion, after
7 conferring with defendants, that the additional deposition or
8 depositions are necessary. Second, again absent agreement of
9 the defendants or leave of Court, I will limit discovery to the
10 Departments of Commerce and Justice. As defendants' own
11 arguments make clear, materials from the Department of Justice
12 are likely to shed light on the motivations for Secretary
13 Ross's decision -- and were arguably constructively considered
14 by him insofar as he has cited the December 2017 letter as the
15 basis for his decision. At this stage, however, I am not
16 persuaded that discovery from other third parties would be
17 necessary or appropriate; to the extent that third parties may
18 have influenced Secretary Ross's decision, one would assume
19 that that influence would be evidenced in Commerce Department
20 materials and witnesses themselves. Further, to the extent
21 that plaintiffs would seek discovery from the White House,
22 including from current and former White House officials, it
23 would create "possible separation of powers issues." That is
24 from page 4 of the slip opinion in the Nielsen order. Third,
25 although I suspect there will be a strong case for allowing a

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1 deposition of Secretary Ross himself, I will defer that
2 question to another day. For one thing, I think it should be
3 the subject of briefing in and of itself. It raises a number
4 of thorny issues. For another, I'm inclined to think that
5 plaintiffs should take other depositions before deciding
6 whether they need or want to go down that road and bite off
7 that issue recognizing, among other things, that defendants
8 have raised the specter of appellate review in the event that I
9 did allow it. At the same time, I want to make sure that I
10 have enough time to decide the issue and to allow for the
11 possibility of appellate review without interfering with an
12 expeditious schedule. So on that issue I'd like you to meet
13 and confer with one another and discuss a timeline and a way of
14 raising the issue, that is to say, when it is both ripe but
15 also timely and would allow for an orderly resolution.

16 So with those limitations, I will allow plaintiffs to
17 engage in discovery beyond the record. Further, I will allow
18 for expert discovery. Expert testimony would seem to be
19 commonplace in cases of this sort. See, for example, Cuomo v.
20 Baldrige, 674 F.Supp. 1089 (S.D.N.Y. 1987). And as I indicated
21 in my colloquy with Ms. Vargas, I do not read Sierra v. United
22 States Army Corps of Engineers, 772 F.2d 1043 (2d Cir. 1985),
23 to "prohibit" expert discovery as defendants suggestion. That
24 case, in my view, speaks the deference that a court ultimately
25 owes the agency's own expert analyses, but it does not speak to

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1 the propriety of expert discovery, let alone clearly prohibit
2 such discovery, let alone do so in a case where, as I have just
3 done so, a finding of bad faith and a rebuttal of the
4 presumption of regularity are at issue.

5 That leaves only the question of timing. I recognize
6 that you proposed schedules without knowing the scope of
7 discovery that I would permit. I would like to set a schedule
8 today. In that regard, would briefly hear from both sides with
9 respect to the schedule. Alternatively, I could allow you to
10 meet and confer and propose a schedule in writing if you think
11 that that would be more helpful. Let me facilitate the
12 discussion by throwing out a proposed schedule which is based
13 in part on your letters and modifications that I've made to the
14 scope of discovery.

15 First, by July 16, I think defendants should produce
16 the complete record as well as a privilege log and initial
17 disclosures. I recognize that Rule 26(a)(1)(B)(i) exempts from
18 initial disclosure "an action for review on an administrative
19 record" but in light of my decision allowing extra-record
20 discovery I do not read that exception to apply.

21 Then I would propose that by September 7, plaintiffs
22 will disclose their expert reports.

23 By September 21, defendants will disclose their expert
24 reports, if any.

25 By October 1, plaintiffs will disclose any rebuttal

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1 expert reports.

2 And fact an expert discovery would close by
3 October 12, 2018.

4 Plaintiffs also propose that the parties would then be
5 ready for trial on October 31. My view is it's premature to
6 talk about having a trial. For one thing, it may well end up
7 making sense to proceed by way of summary judgment rather than
8 trial. For another thing, I don't know if we need to build in
9 time for Daubert motions or other pretrial motions that would
10 require more than 19 days to brief and for me to decide. I
11 would be inclined, instead, to schedule a status conference for
12 sometime in September to check in on where things stand, making
13 sure that things are proceeding apace and get a sense of what
14 is coming down the pike and decide how best to proceed. Having
15 said that, I think it would make sense for you guys to block
16 time in late October and November in the event that I do decide
17 a trial is warranted. Again, I am mindful that my word is not
18 likely to be the final one here and I want to make sure that
19 all sides have an adequate opportunity to seek whatever review
20 they would need to seek after a final decision.

21 So that's my ruling. You can respond to my proposed
22 schedule. I'd be inclined to set it today but if you think you
23 need additional time.

24 MR. FREEDMAN: Your Honor, John Freedman. Just one
25 clarification. I think it was clear from what you said but in

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1 terms of the number of depositions you meant ten collectively
2 between the two cases, not ten per case?

3 THE COURT: Correct. And they would be
4 cross-designated or cross-referenced in both cases. Correct.

5 MR. FREEDMAN: Understood, your Honor.

6 THE COURT: And, again, I don't mean to suggest that
7 you will get more, but that's not -- I did invite you to make a
8 showing with specificity for why additional depositions would
9 be needed. If it turns out that it is warranted, I'm prepared
10 to allow it but, mindful of the various principles at stake and
11 the limited scope of review under the APA, I think that it
12 makes sense to rein discovery in in a way that it wouldn't be a
13 standard civil action.

14 So, thoughts?

15 MR. COLANGELO: Your Honor, for the state and local
16 government plaintiffs, we have no concerns at all.

17 THE COURT: Microphone, please.

18 MR. COLANGELO: For the state and local government
19 plaintiffs, we have no concerns at all with the various
20 deadlines that the Court has set out. Thank you.

21 MR. FREEDMAN: Your Honor, for the NYIC plaintiffs we
22 concur. We think that it sets an appropriately expedited
23 schedule that will resolve the issues in time and we appreciate
24 the expedited consideration.

25 THE COURT: All right. Defendants.

EXHIBIT B

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

Thanks.

Kris Kobach

[REDACTED]

----- Forwarded message -----

From: **Kris Kobach** <[REDACTED]>

Date: Fri, Jul 14, 2017 at 9:12 AM

Subject: Follow up on our phone call

To: [REDACTED]

Secretary Ross,

Kansas Secretary of State Kris Kobach here. I'm following up on our telephone discussion from a few months ago. As you may recall, we talked about the fact that the US census does not currently ask respondents their citizenship. This lack of information impairs the federal government's ability to do a number of things accurately. It also leads to the problem that aliens who do not actually "reside" in the United States are still counted for congressional apportionment purposes.

It is essential that one simple question be added to the upcoming 2020 census. That question already appears on the American Community Survey that is conducted by the Census Bureau (question #8). A slight variation of that question needs to be added to the census. It should read as follows:

Is this person a citizen of the United States?

☐ **Yes, born in the United States**

☐ **Yes, born in Puerto Rico, Guam, the U.S. Virgin Islands, or Northern Marianas**

☐ **Yes, born abroad of U.S. citizen parent or parents**

☐ **Yes, U.S. citizen by naturalization – Print year of naturalization _____**

☐ **No, not a U.S. citizen – this person is a lawful permanent resident (green card holder)**

☐ **No, not a U.S. citizen – this person citizen of another country who is not a green card holder (for example holds a temporary visa or falls into another category of non-citizens)**

Please let me know if there is any assistance that I can provide to accomplish the addition of this question. You may reach me at this email address or on my cell phone at [REDACTED]

Yours,

Kris Kobach

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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
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balexander@doc.gov
202-482-[REDACTED] office
[REDACTED] cell

EXHIBIT C

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,
ET AL.,

11 Defendants.

-----x

12 August 24, 2018
9:07 a.m.

13
14
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
MID-ATLANTIC REGION
24 1250 Eye Street NW - Suite 350
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Make the Road New York

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1 which at the top says from Kris Kobach to
2 Wendy Teramoto, CC Brooke Alexander, Israel
3 Hernandez, date is July 24th, 2017.

4 And my first question is, who
5 is Kris Kobach?

6 A. I would like to read the
7 document, sir.

8 Q. I will withdraw the question.
9 Let me ask you a different question. If
10 you need to read the document to answer
11 that question, it is fine with me.

12 He was vice chair of the
13 Presidential Advisory Committee on Election
14 Integrity and Secretary of State of Kansas;
15 isn't that right?

16 A. I have no idea.

17 Q. All right.

18 A. He was vice what?

19 Q. Vice chair of the Presidential
20 Advisory Commission on Election Integrity.

21 A. Okay.

22 Q. Is this the first you're
23 hearing that?

24 A. Yes, sir.

25 Q. If I tell you he was Secretary

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

CERTIFICATION

I, TODD DeSIMONE, a Notary Public for
and within the State of New York, do hereby
certify:

That the witness whose testimony as
herein set forth, was duly sworn by me; and
that the within transcript is a true record
of the testimony given by said witness.

I further certify that I am not related
to any of the parties to this action by
blood or marriage, and that I am in no way
interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set
my hand this 24th day of August, 2018.



TODD DESIMONE

* * *