18-2659

United States Court of Appeals for the Second Circuit

In re UNITED STATES DEPARTMENT OF COMMERCE, WILBUR L. ROSS, JR., in his official capacity as Secretary of Commerce, BUREAU OF THE CENSUS, and RON S. JARMIN, in his capacity as the Director of the U.S. Census Bureau,
Petitioners.

ANSWER TO PETITION FOR WRIT OF MANDAMUS BY PLAINTIFFS-RESPONDENTS NEW YORK IMMIGRATION COALITION, CASA DE MARYLAND, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, ADC RESEARCH INSTITUTE, AND MAKE THE ROAD NEW YORK

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INTRODUCTION

Two-and-a-half months after the District Court found that Plaintiffs had made a strong showing that the Commerce Department had acted in bad faith in adding a citizenship question to the 2020 Decennial Census, that the administrative record regarding that decision was incomplete, and that limited extra-record discovery was appropriate, Defendants now seek the extraordinary remedy of a mandamus to shut down discovery virtually certain to illuminate their misconduct.

Plaintiffs have challenged Secretary Ross's March 26, 2018 decision to add a question to the 2020 Decennial Census regarding citizenship status on the grounds that it: (1) is arbitrary and capricious in violation of the Administrative Procedure Act, and (2) violates the Equal Protection Clause because it was intended to disadvantage immigrant communities of color. Those claims have survived a motion to dismiss, and trial is set for November 5.

Citing Supreme Court and this Court's precedent, Judge Furman's ruling on bad faith rested on evidence that:

- Secretary Ross overruled the judgment of senior Census Bureau career staff. Add. 85–86.
- Defendants significantly deviated from standard procedures to change the Census questionnaire. Add. 86.
- Secretary Ross decided to add the question before engaging in the administrative process. Add. 85.
- Secretary Ross changed his explanation of how and when the proposal to add a citizenship question arose. Secretary Ross's March 26, 2018 decisional memo ("March 26 Memo") stated that he began his consideration "following receipt" of a December 12, 2017 request from DOJ, to facilitate enforcement of the Voting Rights Act ("VRA"). A supplemental memorandum on June 21, 2018 ("June 21 Memo"), however, stated that Ross actually began considering the issue "soon after my appointment as Secretary," after "other senior Administration officials had previously raised" adding such a question, and that Ross asked "whether the Department of Justice would support, and if so would request, inclusion of a citizenship question." Add. 163.

- The sequence of events described in the June 21 Memo was "exactly opposite" of what Secretary Ross had previously represented in the March 26 Memo and in congressional testimony. Add. 163.

- Plaintiffs had presented evidence that the articulated rationale of Voting Rights Act enforcement was pretextual, including that DOJ enforced the VRA for fifty years without a citizenship question on the census. Add. 86, 162–163.

Because of DOJ's central role in this sequence of events, Judge Furman concluded that discovery from DOJ was appropriate.

The Supplemental Administrative Record produced since Judge Furman's July 3 order confirms that Secretary Ross decided to add the citizenship question in response to learning that "undocumented residents (aliens)" are included for apportionment and redistricting purposes. Supp. Ad. 14–16. He discussed the matter at the direction of White House Senior Counselor Steve Bannon. Supp. Ad. 17. He then instructed his staff to find an agency that could supply a public rationale for the decided outcome. Supp. Ad. 10, 28–29, 31, 30, 32.

The Supplemental Administrative Record likewise reveals that, after these events, DOJ provided that *post hoc* rationale. John Gore, the Acting Assistant Attorney General (AAAG) for the Civil Rights Division, personally communicated with senior Commerce Department leaders about Secretary Ross' desire to have a rationale for adding the citizenship question. Supp. Ad. 19–20, 23–24, 33, 12. AAAG Gore then ghostwrote a letter to make the request, Supp. Ad. 41, 42, dated December 12, 2017. Secretary Ross then used that letter to justify ignoring the warnings of the Census Bureau that adding a citizenship question is "very costly, harms the quality of the census count, and would use substantially less accurate citizenship status data than are available from" other sources that "best meets DOJ's stated uses." Supp. Ad. 1.

In light of the evidence of "bad faith" or "improper behavior," Add. 85, the court's decision to allow limited extra-record discovery, including a deposition of AAAG Gore (the

fourth level in the DOJ chain of command), is plainly justified. Judge Furman conducted a fact-specific inquiry, and found that AAAG Gore possesses unique, relevant, first-hand knowledge relevant to the claims in this case that can only be obtained through taking his deposition. Judge Furman's decision was appropriate and is not even close to an abuse of discretion that would warrant mandamus.

The Petition boils down to asking this Court to second-guess Judge Furman's discovery orders applying settled law to the facts of this case suggesting serious government misconduct. That is not the province of mandamus. *In re The City of New York*, 607 F.3d 923, 939–40 (2d Cir. 2010). Indeed, this Court recently denied the government's mandamus petition challenging discovery orders in another APA action. *See In re Nielsen*, No. 17-3345, slip op. (2d Cir. Dec. 27, 2017). The case for granting mandamus is far weaker here.

STATEMENT OF FACTS

A. The U.S. Constitution's Actual Enumeration Requirement

The Constitution requires the federal government to conduct a Decennial Census to count the total number of "persons"—citizen and non-citizen—residing in each state. The Decennial Census plays a foundational role in the democratic process. All states use it to draw their congressional districts, *Evenwel v. Abbott*, 136 S. Ct. 1120, 1128–29 (2016), and many states and municipalities, including New York City, use the data to draw state or municipal legislative *districts*, *see, e.g.* Fla. Const. art. X § 8; Tex. Const. art. III, § 26. Because the one-person, one-person vote governs apportionment, *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964), when a local community is disproportionately undercounted in the Census, the community will be placed in a legislative district—congressional, state, or municipal—that has greater population, and hence less political power, than other districts in the same state or municipality.

Decennial Census data also plays an important role in the allocation of hundreds of billions of dollars in public funding each year. *See, e.g.*, Andrew Reamer and Rachel Carpenter, Counting for Dollars: The Role of the Decennial Census in the Distribution of Federal Funds, (The Brookings Institution, Mar. 9, 2010), *available at* https://brook.gs/2xjxEax. The federal government distributes approximately $700 million annually through nearly 300 different census-guided federal grant and funding programs for education, public housing, transportation, health care and other services.

B. The Census Bureau's Careful Efforts to Prevent Undercounting of Minority Communities

Certain demographic groups have proven more difficult to count than others. The Census Bureau refers to the undercounting of particular racial and ethnic groups as a "differential undercount." Dkt. 1 ¶ 78. Groups that have historically been the subject of a differential undercount include racial and ethnic minorities, immigrant populations, and non-English speakers. *Id.* ¶ 75. The Census Bureau has determined that Latinos in particular are at a greater risk of not being counted; persons identifying as Hispanic were undercounted by substantial numbers in both the 1990 and 2010 Decennial Censuses. *Id.* ¶¶ 76–77.

Given the critical importance of the Decennial Census, it is not surprising that the Census Bureau has traditionally taken great care to ensure its accuracy. Census Bureau guidelines require "extensive testing, review, and evaluation" whenever a question is revised or a new question is proposed. Dkt. 1 ¶¶ 152, 155. For the 2020 Decennial Census, the Census Bureau began testing questions in 2007 and continued with annual tests in 2013, 2014, and 2015 that reached approximately 1.2 million people. Dkt. 1 ¶ 156. The Census Bureau also consults various scientific advisory panels comprised of outside experts to provide advice on the census. *Id.* ¶ 158.

C. Defendants' Addition of the Citizenship Question

Due to concerns about exacerbating the differential undercount, the Census Bureau has for decades opposed inclusion of a question about citizenship status on the Decennial Census. *Id*. ¶¶ 81–90. Although the 1950 Census asked respondents not born in the United States about citizenship status, a citizenship question did not appear on the questionnaire sent to every household in any Decennial Census conducted from 1960 through 2010. *Id*. ¶ 82. Over the past 30 years, current and former Census Bureau officials appointed by presidents from both political parties have consistently concluded that a citizenship question was likely to reduce response rates by non-citizens and hence the accuracy of counts for both citizens and non-citizens alike. *Id*. ¶¶ 84–90. To the extent there has been a need for citizenship data, the Census Bureau has collected that information through sample surveys apart from the Decennial Census. *Id*. ¶¶ 92–95. That includes the American Community Survey ("ACS"), a yearly survey of approximately 2% of households that began in 2000 and that is used to generate statistical estimates and which can be adjusted for an undercount. *Id*. ¶ 93.

On March 26, 2018, however, Secretary Ross abruptly instructed the Bureau to include a citizenship question on the 2020 Decennial Census. Add. 170–77. Secretary Ross explained that his decision was in response to a December 12, 2017 letter from the Department of Justice ("DOJ Letter"), requesting reinstatement of the question to assist with enforcement of the VRA. Add. 170. Signed by Arthur Gary, General Counsel of the Justice Management Division, the DOJ Letter did not explain the sudden need for citizenship information or how citizenship information would aid in enforcement of the VRA. Add. 179–81. Nor did the Ross Memo. Moreover, in directing reinstatement of the citizenship question, the Ross Memo bypassed the normal process and testing procedures, as well as the various Census Bureau scientific advisory

panels, the Bureau typically employs before making changes to the census questionnaire. Dkt. 1 ¶¶ 151–63. The Ross Memo dismissed the need to test the citizenship question, and denied its novelty, by pointing to the ACS and, before that, the long-form Decennial Census. Add. 171. At the same time, however, the Ross Memo conceded that "the Decennial Census has differed significantly in nature from the sample surveys" like the ACS. Add. 172. Despite the absence of any supporting evidence, the Ross Memo nonetheless concluded that the "value of more complete citizenship data outweighed concerns regarding non-response" and rejected various other options including not asking about citizenship and using administrative records to calculate citizenship data. Add. 176.

Secretary Ross has articulated this chain of events—with DOJ initiating his process of considering the addition of a citizenship question to the census—in sworn testimony to Congress. A few days before the March 26 Memo, at a March 20 hearing before the House Appropriations Committee, Secretary Ross insisted that, in considering adding a citizenship question to the census, he was "responding solely to the Department of Justice's request." Letter from Jimmy Gomez, Member of Congress, et al, to Wilbur Ross, Secretary of Commerce (June 28, 2018), *available at* https://maloney.house.gov/sites/maloney.house.gov/files/618%20Sec%20Ross%20Supplemental%20Memo%20Letter.pdf. At another hearing on March 22, 2018 before the House Ways and Means Committee he testified that the Department of Justice "initiated the request" for a citizenship question. *Id.* On May 10, 2018, Secretary Ross similarly testified before the Senate Appropriations Committee on June 1, 2018, that "[t]he Justice Department is the one who made the request of us." *Id.*

Barely a month later, however, in the face of expected discovery in these cases, Secretary Ross changed his story. His June 21 Supplemental Memo admitted that he actually began

considering the citizenship question shortly after his appointment as Secretary of Commerce in February 2018—nearly ten months earlier than the date offered in the original memorandum. Add. 178. Secretary Ross admitted that he and his staff had discussed adding a citizenship question that had been proposed by other "senior Administration officials" and that he "inquired whether the Department of Justice would support, and if so request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act." *Id*. In other words, rather than DOJ originating the request to include a citizenship question to enhance enforcement of the VRA, Secretary Ross asked DOJ to ask the Department of Commerce add the citizenship question. And disclosure of documents subsequently produced in response to a FOIA request revealed yet another change in the story: The DOJ Letter was actually ghostwritten by AAAG Gore. Supp. Ad. 41.

D. District Court Proceedings

1. The Complaint in this case was filed on June 8, 2018, and was designated as a related action to the lawsuit filed by the State of New York and various other states, 18-CV-2921.

Plaintiffs are five organizations that serve immigrant communities likely to be affected by the differential undercount. The Complaint alleges that the addition of the citizenship question to the 2020 Census constitutes intentional discrimination in violation of the Fifth Amendment and is arbitrary and capricious in violation of the APA. In particular, Plaintiffs allege that reinstatement of the citizenship question reflects a deliberate decision to decrease the response rate among certain minority communities in order to diminish their political power and access to federal resources. Dkt. 1 ¶111. The citizenship question originally was promoted to, and within, the Trump Administration by individuals who have a long record of seeking to reduce immigration and the political power of immigrant communities. *Id*. ¶¶ 101–02. Their advocacy

dovetails with the Administration's hostility toward immigrants of color. *Id.* ¶ 104; 140–46. Proponents of adding the citizenship question to the Decennial Census have touted it as a way to base legislative apportionment on the number of citizens, thereby reducing political representation and economic assistance to communities with significant Hispanic and other minority immigrant populations. *Id.* ¶¶ 178–82.

2. On July 3, 2018, Judge Furman heard motions filed by Plaintiffs in this case and the States' case seeking to supplement the administrative record and conduct discovery. Add. 4; Dkt. 30. Judge Furman granted the motions in part and denied in part. Add. 1–3.

a. Judge Furman ordered Defendants to supplement the administrative record. He acknowledged that a party can rebut the "presumption of regularity" that typically attaches to an agency's designation of the Administrative Record by showing that "'materials exist that were actually considered by the agency decision-makers but are not in the record as filed.'" Add. 82 (quoting *Comprehensive Community Development Corp. v. Sibelius*, 890 F. Supp. 2d 305, 309 (S.D.N.Y. 2012)). Noting Secretary Ross's revised explanation for the timing and origin of the citizenship question, Judge Furman found it "hard to fathom" "the absence of virtually any documents" in the Administrative Record that predated DOJ's December 2017 "request." Add. 83. And taking the changed explanation into account, the court found it "inconceivable . . . that there aren't additional documents from earlier in 2017 that should be made part of the Administrative Record." Add. 83.

b. Judge Furman also granted Plaintiffs' motion to permit a limited amount of extra-record discovery. Add. 85. Quoting *Nat'l Audubon Society v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997)), Judge Furman made four findings that supported the conclusion that Plaintiffs had carried their burden of making a "'strong preliminary or prima facie showing that they will find

material beyond the Administrative Record indicative of bad faith.'" Add. 85–88. First, the June 21 Memo "could be read to suggest that [Secretary Ross] had already decided to add the citizenship question before he reached out to the Justice Department; that is, that the decision preceded the stated rationale." Add. 85 (citing *Tummino v. von Eschenbach*, 427 F. Supp. 2d 212, 233 (E.D.N.Y. 2006)). Second, Secretary Ross's decision overruled senior Census Bureau career staff who had advised him that "reinstating the citizenship question would be 'very costly' and 'harm the quality of the census count,'" supported a showing of bad faith. Add. 85–86 (citing AR 1277). Third, Plaintiffs alleged that Defendants "deviated significantly from standard operating procedures in adding the citizenship question" and "added an entirely new question after substantially less consideration and without any testing at all." Add. 86. Fourth, Plaintiffs made "at least a *prima facie* showing that Secretary Ross's stated justification for reinstating the citizenship question—namely, that it is necessary to enforce Section 2 of the Voting Rights Act—was pretextual." Add. 86.

Despite finding that extra-record discovery was warranted, Judge Furman strictly limited its scope. Add. 88–89. Although Plaintiffs requested 20 fact depositions, the Court permitted only 10. Add. 89. Second, absent agreement of Defendants or leave of Court, Plaintiffs could seek discovery *only* from the Departments of Commerce and Justice. *Id.* With respect to DOJ, the district court pointed out that Defendants' own arguments made clear that its materials "are likely to shed light on the motivations for Secretary Ross's decision—and were arguably constructively considered by him insofar as he has cited the December 2017 letter as the basis for his decision." *Id.* The court did not allow any other third party discovery, including from the White House. *Id.*

c. Judge Furman also ordered Defendants to produce the complete administrative record, with a privilege log, and to serve initial disclosures by July 23. Add. 94. Discovery will close on October 12, 2018. Add. 92.

d. On July 26, 2018, Judge Furman denied Defendants' motion to dismiss with respect to Plaintiffs' APA and intentional discrimination claims. Add. 104, 167–68.

3. Because AAAG Gore is the actual author of the DOJ Letter, Plaintiffs on July 12 requested that Defendants provide dates when he would be available for deposition. After ignoring multiple follow-up requests for AAAG Gore's availability, on August 3, Defendants stated that they would not produce him for deposition. On August 10, Plaintiffs moved for an order compelling his deposition. Add. 1. Defendants opposed the motion, challenging the relevance of Gore's deposition, but not disputing that he had played a central role in the phony origination of the citizenship question, that he was the DOJ Letter's actual author, or that he was DOJ's primary point of contact with senior Commerce Department political appointees about adding the question. *Id.*; Dkt. 90; *see* Supp. Ad. 11, 12, 13, 18, 21–22, 25–26, 19–20, 33.

4. On August 17, Judge Furman granted Plaintiffs' motion, finding that Gore's testimony is "plainly 'relevant'" and, given Plaintiffs' claim that he "'ghostwrote'" the DOJ letter, that he "possesses relevant information that cannot be obtained from another source." Add. 2. Citing cases ordering depositions of senior government officials, the district court also was "unpersuaded" that "compelling AAAG Gore to sit for a single deposition would meaningfully 'hinder' him 'from performing his numerous important duties,' let alone 'unduly burden' him or the Department of Justice." *Id.*.

5. The additional material Defendants have included in the administrative record following the district court's July 3 order further supports Plaintiffs' allegations. Among other

things, it is clear that the idea of adding the citizenship question arose from a concern about "the counting of illegal immigrants" for apportionment purposes, that DOJ had no interest in the data before Secretary Ross suggested it to them, and that political appointees at the Commerce Department interfered with the Census Bureau's standard processes and recommendations. Dkt. 129 at 2 n.1, Ex. 4. Supp. Ad. 34, 35, 38–40, 36, 37.

6. Judge Furman has carefully managed discovery disputes in this case, and has denied a number of Plaintiffs' requests. *See, e.g.*, Dkt. 83, 91, 119, 127, 133.

7. On the evening of August 31, nearly two months after Judge Furman authorized extra-record discovery, Defendants filed a letter motion to stay all discovery, particularly the Gore deposition, pending resolution of a forthcoming mandamus petition. Dkt. 116.

8. After receiving a response from Plaintiffs, Dkt. 128, Judge Furman denied the motion to stay on September 7, 2018, noting Defendants "do not come close to showing likelihood of success on the merits," noting that the Defendants had cited the wrong legal standard and that the Defendants had "badly mischaracterized" the findings of bad faith. Dkt. 134 at 6. Noting the exacting standards for mandamus and to stay pending mandamus, and citing Defendants' nearly two-month delay after discovery began before filing the mandamus petition, Judge Furman observed that Defendants' motion to stay all discovery "is frivolous." *Id*. at 4. Judge Furman further found that Defendants could not establish irreparable harm because the obligation to respond to discovery does not constitute irreparable harm.

With regard to AAAG Gore, Judge Furman found that the Defendants "inexplicably delayed in seeking relief" and that any "irreparability" of harm was due to Defendants delay. *Id.* at 8–9. Judge Furman also found that Defendants had failed to show likelihood of success on the merits, noting both that their opposition to the motion to compel AAAG Gore's testimony failed

to cite or argue that his deposition could be justified by exceptional circumstances, and that exceptional circumstances were present because AAAG Gore had "unique first-hand knowledge related to the litigated claims" which "could not be obtained through other, less burdensome or intrusive means." *Id.* at 10. Judge Furman again found that AAAG Gore's role in ghostwriting the December 12 DOJ request—which Defendants do not and cannot deny—warranted his deposition. *Id.* at 10–11.

LEGAL STANDARD

"Mandamus is 'a drastic and extraordinary remedy reserved for really extraordinary causes.'" *Balintulo v. Daimler AG*, 727 F.3d 174, 186 (2d Cir. 2013) (quoting *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004)). As this Court recognized, a petitioner is not entitled to mandamus except upon a showing "(1) that it has 'no other adequate means to obtain the relief [it] desires,' (2) that 'the writ is appropriate under the circumstances,' and (3) that the 'right to issuance of the writ is clear and undisputable.'" *In re Nielsen*, slip op. at 1 (quoting *In re Roman Catholic Diocese of Albany, Inc.*, 745 F.3d 30, 35 (2d Cir. 2014)). A writ thus "will not issue absent a showing of 'a judicial usurpation of power or a clear abuse of discretion.'" *Id.* Analysis of whether the petitioner has "a clear and indisputable right to the writ" is even "more deferential to the district court than . . . review on direct appeal." *Linde v. Arab Bank, PLC*, 706 F.3d 92, 108–09 (2d Cir. 2013) (internal quotation marks omitted).

This Court is especially reluctant to "'issue writs of mandamus to overturn discovery rulings,' and will do so only 'when a discovery question is of extraordinary significance or there is an extreme need for reversal of the district court's mandate before the case goes to judgment.'" *In re Nielsen*, slip op. at 1. Except in limited circumstances involving privileges not asserted here, this Court routinely denies petitions for mandamus related to discovery orders, preferring to

postpone appellate review until a final judgment is entered. *E.g.*, *In re Nielsen*, slip op. at 1-2; *In re Weisman*, 835 F.2d 23, 27 (2d Cir. 1987). Unlike cases involving privilege, where mandamus may be appropriate to avoid turning post-judgment appellate review into "an exercise in futility," *In re von Bulow*, 828 F.2d 94, 99 (2d Cir. 1987), the burden associated with potentially erroneous discovery is not typically enough to support mandamus relief and departure from the "salutary rule" that "[p]retrial discovery orders are generally not appealable," *In re W.R. Grace & Col-Conn.*, 984 F.2d 587, 589 (2d Cir. 1993).

ARGUMENT

The orders allowing extra-record discovery and the deposition of AAAG Gore do not raise novel or exceptional issues that would warrant the extraordinary remedy of mandamus. Judge Furman has carefully managed proceedings, recognizing the importance of affording meaningful judicial review while respecting the separation of powers and inter-branch concerns. That concern is on full display in the discovery orders Defendants challenge: Judge Furman permitted only limited extra-record discovery, far less than what would be permitted under Rules 26 or 45. Judge Furman has also paid close attention to separation of powers concerns and has repeatedly ruled for Defendants on various discovery disputes, including challenges to privilege assertions. Defendants—who inexplicably waited more than two months after Judge Furman ordered discovery from Defendants and DOJ before filing this petition—do not come close to showing that the discovery issues are of "extraordinary significance" or that there is "an extreme need for reversal."

I. DEFENDANTS ARE NOT ENTITLED TO MANDAMUS RELIEF WITH RESPECT TO THE DISTRICT COURT'S ORDER PERMITTING DISCOVERY

A. Mandamus is Not Appropriate Given Defendants' Delay in Filing

Judge Furman ordered extra-record discovery on July 3. For more than two months, Defendants participated in that discovery without making any attempt to seek a protective order or obtain review of the discover order, and then abruptly filed their Petition on September 7. That is far too long to wait to seek the extraordinary remedy of mandamus of a discovery order. *See In re Robinson*, 198 Fed. Appx. 71, 72 (2d Cir. Aug. 31, 2006) (holding that granting mandamus was not "appropriate under the circumstances" where *pro se* prisoner waited until nearly two months after his habeas petition was transferred to another court to bring challenge and he did not "seek any other form of interim relief from the transfer order").

Defendants do not even attempt to explain their delay in seeking mandamus or how they face any exceptional burden from allowing the case to proceed to resolution. As the district court pointed out in denying Defendants' motion to stay, the fact that 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 . . . belies [their] conclusory assertions of irreparable harm." Dkt. 134 at 4–5 (emphasis in original). *Cf. Fed. Ins. Co. v. U.S.*, 882 F.3d 348, 365 (2d Cir. 2018) (noting that timeliness of mandamus should be determined based on laches); *United States v. Olds*, 426 F.2d 562, 566 (3d Cir. 1970) (denying government's mandamus petition due to delay and noting that "[it] must be sought with reasonable promptness"). Laches bars mandamus relief where, as here, "the petitioner 'slept on his rights . . ., especially if the delay has been prejudicial to the [other party], or to the rights of other persons.'" *Cheney*, 542 U.S. at 379 (quoting *Chapman v. County of Douglas*, 107 U.S. 348, 355 (1883)).

Based on Defendants' delay alone, mandamus should be denied.

B. The District Court properly authorized limited discovery beyond the administrative record

The discovery orders at issue here are no more exceptional than what was at issue in *In re Nielsen*, where this Court denied the government's mandamus petition challenging district court orders requiring it to supplement the administrative record and file a privilege log.

a. There are well-recognized exceptions to the "record rule," which generally holds that federal courts should review agency action based on the "whole record," 5 U.S.C. § 706, as it was "compiled by th[e] agency when it made the decision." *Nat'l Audubon Society v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997). Notably for this case, "an extra-record investigation by the reviewing court may be appropriate when there has been a strong showing in support of bad faith or improper behavior on the part of agency decisionmakers. . . ." *Id.*; *see also Tummino v. von Eschenbach*, 427 F. Supp. 2d 212, 231 (E.D.N.Y. 2006).

Judge Furman did not clearly and indisputably err either in relying on this standard or in finding that Plaintiffs had made a strong showing of bad faith as to warrant extra-record discovery. Indeed, Defendants do not dispute that Judge Furman properly articulated this Court's bad faith standard, quoting directly from *National Audubon* in his oral decision. Add. 85. Judge Furman also pointed to a constellation of factors that, taken together, supported a finding that Plaintiffs had made a strong showing of bad faith. They include: (1) the suggestion in the Supplemental Memo that, rather than a response to a request from DOJ, Secretary Ross's decision to add a citizenship question pre-dated the DOJ request, which Secretary Ross and his staff solicited from DOJ; (2) Plaintiffs' allegations (and now clear proof) that Secretary Ross overruled senior career staff in the Census Bureau; (3) the Commerce Department's significant deviation from established procedures for adding a questions to the census; and (4) allegations

that Secretary Ross's justification for adding the citizenship question to enhance enforcement of the VRA was pretextual. Add. 82–83.

That is not the only evidence of bad faith. Secretary Ross's extraordinary supplemental Memo, which offered a completely different explanation for his decision to add the citizenship question than he originally set out in the Ross Memo and repeated on three separate occasions in congressional testimony, undoubtedly supports the district court's finding that Plaintiffs made a strong showing of bad faith. Further, material made part of the Administrative Record and evidence from discovery confirm that senior political staff in the Commerce Department went searching for a legal rationale to support Secretary Ross's decision. Dkt. 129, Supp. Ad. 43–44. Federal courts have authorized extra-record discovery under similar circumstances. *See, e.g.*, *Eschenbach*, 427 F. Supp. 2d at 231, 233; *Schaghticoke Tribal Nation v. Norton*, 2006 WL 3231419, at *4–6 (D. Conn. Nov. 3, 2006); *Sokaogon Chippewa Cmty. (Mole Lake Band of Lake Superior Chippewa) v. Babbitt*, 961 F. Supp. 1276, 1280–81 (W.D. Wis. 1997).

Judge Furman's straightforward application of this Court's settled precedent and federal law does not come close to warranting extraordinary mandamus relief. Indeed, Defendants make almost no attempt to explain how this was a clear abuse of discretion or judicial usurpation of power. And even if this Court were to disagree with Judge Furman's application of *National Audubon* to the facts, that does not, by itself, give rise to "such a novel and important issue as to warrant mandamus review." *LILCO*, 129 F.3d at 271 (quoting *In re W.R. Grace & Co.*, 984 F.2d 587, 589 (2d Cir.1993)).

b. Nor can Defendants credibly argue that Judge Furman applied the wrong standard. Defendants argue that the district court misunderstood what constitutes "bad faith" in this context and that "the type of 'bad faith' necessary to authorize extra-record discovery under the

APA requires a strong demonstration that the Commerce Secretary did not actually believe his stated rationale for reinstating a citizenship question." Pet. 17. But Defendants misconstrue case law to reach this conclusion.

Defendants' principal case, *National Security Archive v. CIA*, 752 F.3d 460, 462 (D.C. Cir. 2014), is not remotely on point. As Judge Furman observed, it is "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." Dkt. 134 at 6.

Jagers v. Federal Corp Ins. Corp., 758 F.3d 1179, 1186 (10th Cir. 2014), which is also not binding, is even further afield. That decision has nothing to do with when extra-record discovery is permissible in an APA action due to the government's bad faith and simply held that a "subjective desire to reach a particular result" does not "necessarily invalidate the result, regardless of the objective evidence." *Id.*

Defendants' remaining cases merely repeat the record rule and say nothing about the legal standard for when a district court may authorize extra-record discovery in an APA action based on bad faith. Contrary to the erroneous portrayal by Defendants, the Supreme Court does not bar extra-record discovery in APA cases across the board; nor is judicial review automatically limited to the administrative record proffered by the agency. *In re Nielsen*, slip op. at 2 n.1 (rejecting government's argument that administrative review is confined to record initially created by agency).

Even taking their argument about the bad faith standard on its own terms, Defendants still have not carried their burden to prove a clear and indisputable right to relief. Plaintiffs *did* show that "the Commerce Secretary did not actually believe his stated rationale for reinstating a citizenship question." Pet. 17. Secretary Ross knew at the time he issued the March 26 Memo

that DOJ did not originate the request to add the citizenship question to the census. And there is ample evidence that Secretary Ross's explanation that citizenship data is needed for VRA enforcement was pretextual. Yet, as they did in their stay motion, Defendants "badly mischaracterize the basis for the Court's finding of potential bad faith," which "relied on several considerations that, *taken together*, provided a 'strong showing . . . of bad faith.'" Dkt. 134 at 6 (emphasis added). Defendants again quibble with Judge Furman's findings, looking individually at the reasons for its finding that Plaintiffs made a strong showing of bad faith. Pet. 19. But Defendants never grapple with the cumulative impact of the district court's findings, nor do they point to any case denying discovery in an APA case that involved a record as thorough and replete with departures from standard agency practice and decisionmaking as the record shows here.

c. This Court should also deny the petition because discovery is permissible based on Plaintiffs' equal protection claim. Dkt. 1 ¶¶ 193–200. Plaintiffs have substantial allegations to support this claim, including statements from the senior government officials, including President Trump, as well as various third parties who influenced the Trump Administration. *Id.* Judge Furman agreed that Plaintiffs stated a plausible claim for intentional discrimination, adding that they will need to prove that the "decision to reinstate the citizenship question was motivated at least in part by discriminatory animus." Add. 168. Discovery is often the only way to smoke out invidious discrimination. And the Supreme Court has recognized that public officials are not immune from discovery in cases that turn on motive. *Crawford-El v. Britton*, 523 U.S. 574, 593 n.14 (1998); *Webster v. Doe*, 486 U.S. 592, 604 (1988) (permitting constitutional claim to proceed, even with discovery, despite fact that there was no APA review because issue was committed to agency discretion).

The district court's sole rationale for authorizing discovery was that the APA already permits "judicial review of agency action that is 'contrary to' the Constitution." Add. 88 (citing *Chang v. U.S. Citizenship & Immigration Servs.*, 254 F. Supp. 3d 160, 162 (D.D.C. 2017)). But the APA does not expressly foreclose discovery for constitutional claims. Although *Chang* and other courts have denied discovery of constitutional claims in APA cases, the rationale expressed in those cases does not apply. Here, the intentional discrimination claim is not "fundamentally similar to their APA claims" because it is not predicated only on an allegation of agency conduct that was "irrational and arbitrary." *Chang*, 254 F. Supp. 3d at 162. Rather, Plaintiffs allege discrimination on the basis of race and national origin, which requires heightened justification. Dkt. 1 ¶¶193-200. Unlike equal protection or due process claims that are subject only to rational basis review, there is no reason to believe the information necessary to assess whether Defendants were motivated by discriminatory animus toward Latinos and other minority communities will be found in the administrative record. *Cf. Chang*, 254 F. Supp. 3d at 162. For this reason, as well, this Court should deny the Petition.

II. DEFENDANTS ARE NOT ENTITLED TO MANDAMUS RELIEF WITH RESPECT TO THE DISTRICT COURT'S ORDER COMPELLING AAAG GORE'S DEPOSITION

Defendants' request to quash the deposition of AAAG Gore is untimely. Judge Furman issued his order requiring extra-record discovery—including from DOJ—on July 3, and his order compelling AAAG Gore's deposition on August 17. Defendants inexplicably waited 14 days before seeking a stay of the latter order. Add. 190. That delay is grounds to deny this petition.

But even if Defendants had sought timely relief, they have not carried their burden of establishing a "clear and indisputable" right to relief, *Cheney*, 542 U.S. at 381, much less that the dispute here is of "extraordinary significance" or that "there is extreme need for reversal . . . before the case goes to judgment." *In re City of New York*, 607 F.3d at 939. Defendants

maintain that the district court's order compelling Gore's deposition was an abuse of discretion because the district court failed to apply the "exceptional circumstances" legal standard outlined in *Lederman v. New York City Dep't of Parks and Rec.*, 731 F.3d 199, 203 (2d Cir. 2013). Pet. 22.

But Defendants waived that argument because they did not raise it in opposing the motion to compel. Instead of invoking *Lederman*'s "exceptional circumstances" standard, Defendants argued only that, under Rule 45's standard for third party discovery, Dkt. 90 at 1, the court should quash the subpoena because of the purportedly "low likelihood of AAAG Gore's testimony resulting in any relevant evidence" and because of the purported "burden" of the deposition, *id.*; *see* Add. 191. Judge Furman properly rejected both contentions. Add. 2. Defendants now argue that *Lederman*'s "exceptional circumstances" standard should apply to AAAG Gore's deposition, but "[t]he law in this Circuit is clear that where a party has shifted his position on appeal and advances arguments available but not pressed below, waiver will bar raising the issue on appeal." *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 132 (2d Cir. 2008) (alterations and quotation marks omitted). That is especially so where, as here, the appellant "did not even cite the [circuit court] authority upon which it now primarily relies." *Id.* *Cf. Scanscot Shipping Servs. GmbH v. Metales Tracomex LTDA*, 617 F.3d 679, 683 (2d Cir. 2010).

Nor have Defendants established that their right to relief is clear and indisputable. Defendants do not establish that *Lederman* even applies to the deposition of AAAG Gore. *Lederman* concerned the deposition of the head of the city government—the mayor of New York—and the deputy mayor. For the "exceptional circumstances" standard, it relied on cases concerning other high-ranking officials, mostly "heads of government agencies," *Kyle Eng'g Co.*

v. Kleppe, 600 F.2d 226, 231 (9th Cir. 1979), or deputy heads. *See, e.g.*, *United States v. Morgan*, 313 U.S. 409, 422 (1941) (Secretary of Agriculture); *In re U.S.*, 197 F.3d 310, 313 (8th Cir. 1999) (Attorney General and Deputy Attorney General); *In re U.S.*, 985 F.2d 510, 511 (11th Cir. 1993) (FDA Commissioner). But AAAG Gore is three full rungs below the Attorney General: AAAG Gore reports to the Associate Attorney General, who reports to the Deputy Attorney General, who in turn reports to the Attorney General. And he is only a caretaker – serving in an Acting capacity. This Court has never applied *Lederman* to an official at AAAG Gore's level, much less a temporary official. Defendants offer no argument or reason why the normal Rule 45 standard—which incorporates an "undue burden" test—is not sufficiently protective of an official like AAAG Gore. Fed. R. Civ. P. 45(d)(3)(A)(iv). Other courts have applied the normal relevance and burden tests in evaluating depositions of assistant attorneys general. *United States v. Winner*, 641 F.2d 825, 833-34 (10th Cir. 1981). In the absence of any precedent, much less from this Circuit, even applying *Lederman*'s "exceptional circumstances" standard to an official at AAAG Gore's level, Defendants cannot establish that their right to relief is "clear and indisputable," as the mandamus standard requires.

In any event, even if *Lederman* applied, Defendants cannot show that *Lederman* would clearly and indisputably bar the Gore deposition. *Lederman* holds that a party may demonstrate "exceptional circumstance justifying [a] deposition" where, "for example," the "official has unique first-hand knowledge related to the litigated claims or … the necessary information cannot obtained through other, less burdensome or intrusive means." *Lederman*, 731 F.3d at 203. Judge Furman held in its August 17 order compelling the deposition that Gore had unique first-hand knowledge, citing his "role in drafting the Department of Justice's December 12, 2017 letter requesting that a citizenship question be added to the decennial census." Add. 2.

And the Administrative Record confirms that AAAG Gore was the primary DOJ contact with senior Commerce Department officials orchestrating the request. For example, on September 13, 2017, after Commerce Department officials decided to reach out to DOJ, AAAG Gore called Secretary Ross's Chief of Staff. Supp. Ad. 23–24. Later that day, AAAG Gore arranged for Attorney General Sessions to talk with Secretary Ross, Supp. Add. 23, following which AAAG Gore reported back to Commerce officials "we can do whatever you all need us to do." *Id.* Several weeks later, AAAG Gore sent the initial draft of the DOJ request to Mr. Gary. Supp. Ad. 41. Materials produced by the DOJ confirm that data generated by asking a citizenship question will not enhance enforcement of the VRA, and that when Census Bureau officials asked to meet with DOJ to discuss the irrelevance of the data, DOJ refused. Supp. Ad. 27.[1] And when several weeks later Secretary Ross complained to the Commerce General Counsel that "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," the Commerce General Counsel called AAAG Gore. Supp. Ad. 33, 12.

Tellingly, Defendants respond only to Judge Furman's observation that AAAG Gore's testimony is "plainly relevant," arguing that such a finding was insufficient. Pet. 23. They simply ignore Judge Furman's further finding that AAAG Gore had first-hand knowledge of critical events. Although Judge Furman's August 17 order did not cite *Lederman* (because Defendants at that time argued that Rule 45 applied), Judge Furman explained in his September 7 order denying a stay that its prior findings would satisfy the *Lederman* first-hand knowledge exception. Add. 192. Similarly, Judge Furman held on August 17 that the information AAAG

[1] Every case cited in the *amicus* brief filed by PILF was litigated without block-level citizenship data, confirming that collection of the data will not enhance VRA enforcement.

Gore holds "cannot be obtained from another source," Add. 2, and confirmed in its September 7 order that such a finding would satisfy the second, alternative *Lederman* exception. Add. 192.

Under these circumstances, mandamus is not appropriate. At most, Defendants have an argument that the district court misapplied the *Lederman* exceptions. But it is well-settled that "[a]n allegedly incorrect application of a well-developed principle does not, by itself, give rise to such a novel and important issue as to warrant mandamus review." *In re The City of New York*, 607 F.3d at 940 (internal quotation marks omitted).

Defendants also argue that AAAG Gore's deposition is irrelevant to show bad faith because Secretary Ross, rather than AAAG Gore, was the decisionmaker and the district court has not found that DOJ itself acted in bad faith. Pet. 23. But as the district court explained: "[I]t does not follow" from such arguments "that the information possessed by AAAG Gore is irrelevant to assessing the Commerce Secretary's reasons for adopting a citizenship question." Add. 192–93 (quotations omitted). "Among other things, AAAG 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.'" Add. 193 (quotations omitted). "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." Add. 193. ***Exactly***. Despite their burden to establish that the district court clearly and indisputably abused its discretion in ordering a deposition of AAAG Gore, Defendants make no effort to respond to any of these findings by the district court.[2]

[2] Defendants suggest that AAAG Gore's testimony "is likely to be protected by privilege." Pet. 24. But they do not challenge the district court's conclusion that "any applicable privileges can be protected through objections to particular questions at a deposition; they do not call for precluding a deposition altogether." Add. 3.

Defendants next argue that Gore's deposition is unnecessary "given the voluminous discovery that Plaintiffs have already received" from the Commerce Department. Pet. 24. But they cite no specific documents or testimony that could replace testimony by the individual who wrote the letter on which the Secretary of Commerce purported to rely in making his decision, and who spoke with senior Commerce Department officials in the period when Commerce was looking for another agency to supply a rationale for adding the citizenship question. Given that Plaintiffs have made a *prima facie* case that reliance on the VRA was pretextual, Add. 86–87—*a finding that Defendants do not dispute for purposes of this appeal*—there is no substitute for testimony by the individual who *supplied* the potentially pretextual rationale. Certainly Defendants cannot establish that Judge Furman "clearly and indisputably" abused his discretion in so holding. Defendants say the "district court nowhere explained why information about the Secretary's intent in reintroducing a citizenship question cannot be obtained through this extensive evidence" from Commerce, Pet. 25, but the court did. Judge Furman concluded that AAAG Gore had unique first-hand knowledge, Add. 2, because he was "the person who apparently wrote the memorandum that Secretary Ross himself requested and then later relied on." Add. 193. And Defendants do not deny that AAAG Gore wrote that memorandum. Add. 192.

Finally, Defendants argue that the district court "downplay[ed]" the burden of being deposed and that the court's observation that AAAG Gore need only sit for a single deposition would "permit the deposition of high-ranking officials as a matter of course." Pet. 25. First, the court did not hold that a single deposition is *never* an undue burden; it held that *this* deposition would not be an undue burden. Add. 2. Contrary to Defendants' claim, Pet. 25, the court expressly acknowledged the "special [burden] considerations" attendant on deposing government

officials. Add. 2. Second, *Lederman* held that the "exceptional circumstances" test is satisfied whenever the government official has "unique first-hand knowledge related to the litigated claims." *Lederman*, 731 F.3d at 203. AAAG Gore has such knowledge, and the deposition is therefore appropriate under *Lederman* regardless of whether it would be burdensome.

Notably, Defendants make no effort to explain why deposing AAAG Gore in this case about a document he wrote would be unusually or uniquely burdensome. Pet. 25. Accordingly, to sustain their mandamus petition, this Court would have to hold that it is (1) clear and indisputable that (2) a deposition of an Acting Assistant Attorney General is *always* an undue burden, without regard to the individual circumstances of the case. Defendants cite no law supporting such a holding. Indeed, although Defendants repeatedly characterize a deposition of an "Acting Assistant Attorney General" as "unprecedented," Pet. 26, that is untrue. *See, e.g.*, *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, No. 05-cv-2078 (EGS), 2006 WL 1518964, at *1 (D.D.C. June 1, 2006) (ordering deposition of the Associate Attorney General, *i.e.*, an official of even higher rank than AAAG Gore); *Winner*, 641 F.2d at 834 (holding that Assistant Attorney General's "presence [to testify] may be required if found necessary" by the district court and denying mandamus). Defendants do not cite any decision granting mandamus to quash an order compelling the deposition of an Acting Assistant Attorney General, much less one who holds unique first-hand knowledge relevant to the case.

CONCLUSION

The Court should deny the petition for writ of mandamus and terminate the administrative stay of the Gore deposition.

DATED: September 17, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the word limit of Federal Rule of Appellate Procedure 21(d)(1) because the motion contains 7,780 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this motion complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using Microsoft Word 2013 in a proportionally spaced typeface, 12-point New Times Roman font.

Dated: September 17, 2018

/s/ Elisabeth S. Theodore
Elisabeth S. Theodore

Attorney for Plaintiffs-Respondents New York Immigration Coalition, CASA de Maryland, American-Arab Anti-Discrimination Committee, ADC Research Institute, and Make the Road New York

CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2018, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. All counsel in this case are participants in the district court's CM/ECF system.

/s/ Elisabeth S. Theodore
Elisabeth S. Theodore

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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 underling the Secretary's revised life-cycle cost estimates. The estimated cost is about $350,000 because that is approximately the cost of resources that would be used to do the modeling for the DoJ.

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

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

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

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

B.1. Quality of citizenship responses

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

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

B.2. Self-response rate analyses

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

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

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

B.3. Breakoff rate analysis

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

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

B.4. Cost analysis

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

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 [redacted] 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 t[redacted] 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 [redacted]

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]

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

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

To: Wilbur Ross [redacted]
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. No major government survey, including the decennial census now under way, asks Americans about their citizenship status. 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. Many more foreign-born residents were counted in 2000 than was expected based on annual estimates produced by the bureau. 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

Full Name: John Gore-DOJ
First Name: John Gore-DOJ

Home Phone: [redacted]

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]

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 iPhone

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: Leach, Macie (Federal) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=31AC94C0639C44C0B45307BC2A9427F0-SALLY LEACH]
Sent: 9/13/2017 9:02:32 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]
Cell: ([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 iPhone

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 12:24:55 AM
To: Cutrona, Danielle (OAG) [redacted]
Subject: Re: Call

They connected. Thanks for the help. Wendy

Sent from my iPhone

On Sep 17, 2017, at 12:10 PM, Cutrona, Danielle (OAG) <[redacted]> wrote:
Wendy,
The Attorney General is available on his cell. His number is 2[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 iPhone

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 iPhone

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 iPhone

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 iPhone

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]

From: Cutrona, Danielle (OAG) [redacted]
Sent: 9/18/2017 1:05:14 AM
To: Teramoto, Wendy (Federal) [redacted]
Subject: Re: Call

Excellent. Thanks.

Sent from my iPhone

On Sep 17, 2017, at 8:25 PM, Teramoto, Wendy (Federal) [redacted] wrote:
They connected. Thanks for the help. Wendy

Sent from my iPhone

On Sep 17, 2017, at 12:10 PM, Cutrona, Danielle (OAG) <[redacted]> wrote:
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 iPhone

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 iPhone

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 iPhone

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 iPhone

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]

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: 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 iPhone

On May 2, 2017, at 7:17 AM, Teramoto, Wendy (Federal) <[redacted]> wrote:
I continue to talk frequently with Marc Neumann and we often have dinner together. He will not leave les but is in love with the census and talks about it non stop. [redacted] Do you want me to set up another meeting? [redacted] Let me know if you want to have a drink or get together with him over the weekend.
Wendy

Sent from my iPhone

Begin forwarded message:
From: "Alexander, Brooke (Federal)" <[redacted]>
Date: May 2, 2017 at 7:10:21 AM PDT
To: "Teramoto, Wendy (Federal)" <[redacted]>
Subject: FW: Census

-----Original Message-----
From: Wilbur Ross [redacted]
Sent: Tuesday, May 02, 2017 10:04 AM
To: Comstock, Earl (Federal) <[redacted]>; Herbst, Ellen (Federal) <[redacted]>
Subject: Census

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

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

Thanks Eric! Earl

Sent from my iPhone

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]
-----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]

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: Wilbur Ross [redacted]
Sent: 8/10/2017 7:38:25 PM
To: Comstock, Earl (Federal) [redacted]
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. [redacted] WLR

Sent from my iPad

> On Aug 9, 2017, at 10:24 AM, Comstock, Earl (Federal) <[redacted]> 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. [redacted]
>
> Earl
>
> On 8/8/17, 1:20 PM, "Wilbur Ross" [redacted] wrote:
>
[redacted] Were you on the call this morning about Census? [redacted] 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) [redacted] wrote:
>>
>> [redacted]
>
>

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

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

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: 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 Amy have some additional questions to add. I will check with you when I get in. Earl
Sent from my iPhone

On Jan 30, 2018, at 8:50 AM, Langdon, David (Federal) <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

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
>
> 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: Langdon, David (Federal) [PII
Sent: 5/24/2017 10:51:56 PM
To: Blumerman, Lisa M [lisa.m.blumerman@census.gov]
Subject: Fwd: Requested Information - Legal Review All Residents...

Fyi on the citizenship question below. Can you provide a short answer? Ideally this evening.
-------- Original message --------
From: "Langdon, David (Federal)"
Date:05/24/2017 5:53 PM (GMT-05:00)
To: "Reist, Burton H (CENSUS/ADDC FED)"
Cc: "Creech, Melissa L" , "Dinwiddie, James L"
Subject: RE: Requested Information - Legal Review All Residents...

Actually, the Secretary seemed interested on subjects and puzzled why citizenship is not included in 2020.

It might be good to have in our backpocket the criteria used to pick topics for 2020 versus ACS. Say, citizenship. What criteria drives us to put it on ACS but not 2020?

From: Reist, Burton H (CENSUS/ADDC FED) [mailto:burton.h.reist@census.gov]
Sent: Wednesday, May 24, 2017 5:42 PM
To: Langdon, David (Federal) [PII
Cc: Creech, Melissa L <melissa.l.creech@census.gov>; Dinwiddie, James L <james.l.dinwiddie@census.gov>
Subject: Re: Requested Information - Legal Review All Residents...

David,

Melissa and I will be in early tomorrow. If you need anything let us know.

Lisa and I are also happy to discuss the Lifecycle stuff I sent and answer the questions you have.

Burton

From: Langdon, David (Federal) [PII
Sent: Wednesday, May 24, 2017 5:24:30 PM
To: Reist, Burton H (CENSUS/ADDC FED)

Cc: Melissa L Creech (CENSUS/PCO FED); James L Dinwiddie (CENSUS/ADDC FED)
Subject: RE: Requested Information - Legal Review All Residents...

Thank you!

I apologize for not answering sooner, but I honestly have been in meeting with SWR all afternoon. (Not the norm.)

This is a lot to digest, but Louisiana v. Bryson seems the most timely, along with the 1989 DOJ letter.

From: Reist, Burton H (CENSUS/ADDC FED) [mailto:burton.h.reist@census.gov]
Sent: Wednesday, May 24, 2017 4:10 PM
To: Langdon, David (Federal) PII
Cc: Creech, Melissa L <melissa.l.creech@census.gov>; Dinwiddie, James L <james.l.dinwiddie@census.gov>
Subject: Fw: Requested Information - Legal Review All Residents...

This is the more complete set of documents that I referenced in my earlier email.

Burton

From: Misty L Reed (CENSUS/DEPDIR FED)
Sent: Wednesday, May 24, 2017 4:02 PM
To: Reist, Burton H (CENSUS/ADDC FED)
Subject: Requested Information - Legal Review All Residents...

Hotspots are amazing and luckily I scanned the files (Melissa gave me hard copies).

Let me know if there's anything else I can provide.

Thanks,

Misty

Misty Reed, PhD, PMP, Special Assistant, Communications Directorate, U.S. Census Bureau
Office 301.763.0228 Cell PII misty.l.reed@census.gov
census.gov Connect with us on Social Media

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

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:

reported back to the Secretary, I'm sorry, Mr. Secretary, it does not appear we can accomplish this objective.

Q Why did you need to come up with a reason for asking the question, separate and apart from whatever reason the Secretary had in his own head?

A Again, my job is to figure out how to carry out what my boss asks me to do. So you go forward and you find a legal rationale. Doesn't matter what his particular personal perspective is on it. It's not -- it's not going to be the basis on which a decision is made.

Q That's your understanding, that the way you should do it, is come up with a rationale that has nothing to do with what's in the Secretary's mind as to why he wants it; is that your understanding of how it's supposed to work?

A No. Again, you continue to characterize things in a way that you believe may be correct, but not the way I believe to be correct. My job, as a person who has been doing this for 30-plus years for clients and people in the government, is