

November 14, 2018

**VIA ECF**

The Honorable George J. Hazel  
United States District Court  
District of Maryland  
6500 Cherrywood Lane  
Greenbelt, MD 20770

**Re: Plaintiffs' Letter Brief Requesting Reconsideration of Order, ECF No. 81,  
Denying Plaintiff's Motion for Discovery, ECF No. 70  
*La Unión del Pueblo Entero, et al., v. Ross, et al., No. 18-01570***

Dear Judge Hazel,

Plaintiffs submit this letter brief to request reconsideration of this Court's order, ECF No. 81, denying Plaintiffs' letter brief requesting discovery, ECF No. 70, solely with respect to the deposition of Kansas Secretary of State Kris Kobach. To the extent that the order denying Plaintiffs' motion was based on the mistaken belief that Plaintiffs have had the opportunity to depose Secretary Ross, Plaintiffs note that the Supreme Court has prevented Plaintiffs from deposing the Secretary.

This Court found that Plaintiffs plausibly allege that a "meeting of the minds" existed with regard to Plaintiffs' claims that Defendants conspired to deprive them of their constitutional rights under 42 U.S.C. § 1985(3). ECF No. 80 at 22. This Court further found that "Plaintiffs have had the opportunity to sufficiently test this theory by eliciting testimony from Secretary Ross and Mr. Gore about the source and intent of the citizenship question plan." *Id.* at 25. However, the Supreme Court has stayed Secretary Ross's deposition, and Plaintiffs have therefore not had the opportunity to depose Secretary Ross.<sup>1</sup>

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<sup>1</sup> Judge Furman initially allowed plaintiffs to take Secretary Ross's deposition because, "among other things, his intent and credibility are directly at issue in these case," *New York, v. United States Dep't of Commerce*, No. 18-cv-2921, 2018 WL 4539659 at \*1 (S.D.N.Y. Sept. 21, 2018), and the Second Circuit declined to enter a stay of Judge Furman's order, *In Re U.S. Dep't of Commerce, et al.*, No. 18-CV-2857, ECF No. 53. On October 22, 2018, the United States Supreme Court issued a stay of Judge Furman's order. On October 29, 2018, Defendants filed in the Supreme Court an application for a stay of trial proceedings in the New York Cases, including a request for an administrative stay, pending consideration of their simultaneously filed petition for a writ of mandamus to the district court, ordering it to: (1) halt the deposition of Secretary Ross; (2) exclude discovery outside the administrative record that has already been produced, including Acting Assistant Attorney General Gore's deposition testimony; and (3) confine its review to the administrative record. The petition is filed only with regard to the New York cases, and therefore the Supreme Court's stay technically does not govern the instant case, except that the rulings in those cases provide a "starting point for determining what discovery outside of the Administrative Record the Plaintiffs are entitled." ECF No. 80.

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As set forth fully in Plaintiffs' letter brief requesting discovery, ECF No. 70, Mr. Kobach's testimony is relevant and necessary because Secretary Ross's intent is directly and critically at issue with regard to Plaintiffs' claims under the Equal Protection Clause and with regard to whether there was a "meeting of the minds" sufficient to establish liability under 42 U.S.C. §1985(3). *See* ECF No. 80 at 22. Plaintiffs allege, and the documents support, that it was Mr. Kobach who brought the idea of adding a citizenship question to Secretary Ross. *Id.* at 22. Notably, at the same time Defendants resist any discovery regarding Secretary Ross or Mr. Kobach, they insist that Plaintiffs' claims turn on the intent of Secretary Ross, and in particular, whether he adopted Mr. Kobach's reasoning and motives regarding the addition of the citizenship question. *See, e.g.*, ECF No. 82-1, Memorandum in Support of Defendants' Motion for Summary Judgment, at 25-26.<sup>2</sup>

However, Plaintiffs have been unable to depose Secretary Ross, Mr. Kobach, or anyone at all that has personal knowledge of the conversations between them concerning their agreement to add a citizenship question to the decennial census. Plaintiffs have deposed Mr. Gore, the Department of Justice attorney who drafted the letter providing the pretextual justification for the citizenship question at the request of Secretary Ross, but Mr. Gore never spoke to Mr. Kobach, Mr. Bannon, or Secretary Ross about the citizenship question. Exhibit 1, Transcript of Deposition of John Gore at 89:22-90:2, 409:5-14. Mr. Gore discussed the issue with then-Attorney General Sessions, who made the decision to decline the Census Directors' invitation to meet regarding a lower cost, higher quality alternative to the citizenship question. *Id.* at 254:16-273:4. Mr. Gore also communicated with White House officials about the citizenship question, but during his deposition he declined to answer questions about the substance of those conversations based on executive privilege. *Id.* at 409:19-413:9. But Mr. Gore never spoke with Mr. Kobach or Secretary Ross about the citizenship question. *Id.* at 89:22-90:2, 409:5-14.

Department of Commerce employees that plaintiffs have deposed provided no knowledge of Secretary Ross's discussions with Mr. Kobach. Judge Furman, in ruling that plaintiffs should be allowed to take the deposition of Secretary Ross, notes that "no witness has been able to—or presumably could—testify to the substance and details of Secretary Ross's early conversations regarding the citizenship question with the Attorney General or with interested third parties such as Kansas Secretary of State Kris Kobach." *New York*, 2018 WL 4539659 at \*3. Documents that evidence communications between Secretary Ross and Mr. Kobach do not contain any details or explanation of the substance of those communications. Unless the Supreme Court lifts

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<sup>2</sup> Defendants argue that "Plaintiffs' Equal Protection Clause claim fails because . . . Plaintiffs cannot demonstrate that Secretary Ross acted with discriminatory intent. Plaintiffs' claim under 42 U.S. C. similarly fails because Plaintiffs cannot demonstrate that there was a "meeting of the minds" regarding the purported conspiracy." ECF No. 82-1 at 4-5. "Here there is no evidence that, as the sole decisionmaker, *Secretary Ross* directed reinstatement of a citizenship question on the 2020 Census *because of* potential adverse effects on a protected class." (emphasis in original) *Id.* at 21-22. "There is even less evidence that Secretary Ross gave Kris Kobach's recommendations any weight whatsoever, let alone that he achieved a "meeting of the minds" with Mr. Kobach. *Id.* at 29.

the stay on Secretary Ross's deposition, there is literally no other way for Plaintiffs to discover the facts that are in his possession, particularly with respect communications between Secretary Ross and Mr. Kobach. Plaintiffs respectfully request that the Court reconsider its order denying Plaintiffs' request to depose Mr. Kobach.

Respectfully submitted,

By: /s/ Burth G. Lopez

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*\* Pro hac vice application forthcoming*