

1 JOSEPH H. HUNT  
 Assistant Attorney General  
 2 BRETT A. SHUMATE  
 Deputy Assistant Attorney General  
 3 JOHN R. GRIFFITHS  
 Director  
 4 CARLOTTA P. WELLS  
 Assistant Director  
 5 CAROL FEDERIGHI  
 KATE BAILEY  
 6 STEPHEN EHRLICH  
 Trial Attorneys  
 7 United States Department of Justice  
 8 Civil Division, Federal Programs Branch  
 P.O. Box 883  
 9 Washington, DC 20044  
 Tel.: (202) 514-1903  
 10 Email: carol.federighi@usdoj.gov

11 Attorneys for Defendants

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13  
14 UNITED STATES DISTRICT COURT

15 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

16  
17 CITY OF SAN JOSE, *et al.*,

18 Plaintiffs,

19 v.

20 WILBUR L. ROSS, JR. in his official capacity  
 21 as Secretary of Commerce, *et al.*,

22 Defendants.  
 23

Civil Action No. 3:18-cv-02279-RS

**DECLARATION OF CAROL  
 FEDERIGHI IN SUPPORT  
 OF DEFENDANTS' REPLY  
 IN SUPPORT OF THEIR MOTION  
 FOR SUMMARY JUDGMENT**

Date: December 7, 2018

Time: 10:00 a.m.

Judge: Honorable Richard Seeborg

Dept.: 3

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I, Carol Federighi, declare as follows:

1. I am an attorney at the United States Department of Justice, counsel for Defendants in the above-captioned litigation. I submit this declaration in support of Defendants' reply in support of their motion for summary judgment.
2. Attached as **Exhibit A** is a true and accurate copy of selections from the October 16, 2018, Deposition of Acting Assistant Attorney General John Gore.
3. Attached as **Exhibit B** is a true and accurate copy of selections from the November 14, 2018, trial testimony of Dr. John Abowd, chief scientist of the Census Bureau, in the matter *New York v. U.S. Dep't of Commerce*, 18-cv-2921 (S.D.N.Y.).

I declare under penalty of perjury that the foregoing is true and correct.

November 26, 2018  
Washington, D.C.

/s/ Carol Federighi  
Carol Federighi

# EXHIBIT A

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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NEW YORK IMMIGRATION :  
COALITION, et al., :  
:  
Plaintiffs, :

v. : Case No.  
:

: 1:18-CF-05025-JMF  
UNITED STATES DEPARTMENT :  
OF COMMERCE, et al., :  
:  
Defendants. :

- - - - -x

Friday, October 16, 2018  
Washington, D.C.

Videotaped Deposition of:

JOHN GORE,

called for oral examination by counsel for the  
Plaintiffs, pursuant to notice, at the law offices of  
Covington & Burling, LLP, One City Center, 850 Tenth  
Street, Northwest, Washington, D.C. 20001-4956,  
before Christina S. Hotsko, RPR, CRR, of Veritext  
Legal Solutions, a Notary Public in and for the  
District of Columbia, beginning at 9:05 a.m., when  
were present on behalf of the respective parties:

1 Q. But you're not saying that -- this letter  
2 is not saying that there was a prior point in time  
3 in which the Department of Justice had both total  
4 population and citizenship data in a single data  
5 set, correct?

6 A. I think the letter speaks for itself, and  
7 this particular bullet doesn't say that.

8 Q. Okay. Are you aware of a case where the  
9 Department of Justice was unable to succeed on a  
10 VRA claim because citizenship data and total  
11 population data were in two different data sets?

12 MR. GARDNER: I'm going to object to the  
13 extent that that calls for the disclosure of  
14 information subject to law enforcement privilege.

15 You can answer that question to the  
16 extent you can do that without disclosing  
17 privileged information.

18 THE WITNESS: I'm not aware of any such  
19 publicly disclosed case.

20 BY MR. HO:

21 Q. Okay.

22 MR. HO: So I'm going to sometimes ask

1 questions about whether or not DOJ has been able  
2 to succeed on cases. I'm going to make clear that  
3 those questions with limited to cases that have  
4 been filed -- right?

5 MR. GARDNER: Okay.

6 THE WITNESS: Okay.

7 MR. HO: And litigated in court.

8 MR. GARDNER: That's fair enough.

9 THE WITNESS: Thank you.

10 BY MR. HO:

11 Q. So the cases that DOJ has filed, you're  
12 not aware of any of those cases being unsuccessful  
13 because citizenship data and total population data  
14 were in two different data sets, correct?

15 A. That's correct. Again, we're not talking  
16 about cases that weren't filed. And, obviously,  
17 any case that was filed was a case that the  
18 Department of Justice believed it could win.

19 Q. Okay. You're not aware of any case filed  
20 by any plaintiff anywhere under the Voting Rights  
21 Act where the claim failed because of the fact  
22 that total population data and citizenship data

1 correct?

2 A. Five-year estimates? That's correct.

3 Q. Okay. You're not aware of any case where  
4 plaintiffs, other than DOJ, declined to bring a  
5 VRA case -- let me start that question again.

6 You're not aware of any case where  
7 plaintiffs declined to bring a VRA claim because  
8 ACS data are statistical estimates with a margin  
9 of error, correct?

10 A. That is correct. I am aware of one case  
11 in which a court held that the one-year ACS  
12 estimate, because of its associated margin of  
13 error, was insufficiently reliable to allow the  
14 plaintiff in that case to proceed with a Section 2  
15 claim.

16 Q. Right. That's the Benavidez case, right?

17 A. That is correct.

18 Q. We'll talk about that in a bit, but I  
19 want to talk about something else first.

20 (Gore Deposition Exhibit 19 marked for  
21 identification and attached to the  
22 transcript.)

1 but did indicate it would assist our enforcement  
2 efforts. John's note to CIV specifically noted  
3 that the letter did not say the data  
4 was 'necessary,' and I think we should avoid that  
5 term."

6 Did I read that right?

7 A. Yes, you did.

8 Q. Okay. So is it correct, as this comment  
9 notes, that the December 12 letter requesting a  
10 citizenship question be added to the census did  
11 not say that it was necessary to collect CVAP data  
12 through the census questionnaire for VRA  
13 enforcement?

14 A. That is correct.

15 Q. And as the comment bubble indicates, you,  
16 Mr. Gore, have at some point specifically noted  
17 that the letter did not use the word "necessary"  
18 with respect to collecting CVAP data through the  
19 census questionnaire, correct?

20 A. That is what the comment says. Correct.

21 Q. And you -- my question was, you,  
22 yourself, have specifically noted that the



1 responses."

2 Did I read that right?

3 A. Yes.

4 Q. If we look back at Exhibit 26,  
5 Mr. Aguinaga's e-mail to you, the fourth sentence  
6 in his e-mail, beginning with the second draft  
7 answer at the end of the second line, it reads,  
8 "The second draft answer does not directly address  
9 the question because the question asks whether the  
10 department agrees with the 2010 OLC opinion and  
11 whether any law compels the disclosure of  
12 confidential questionnaire responses. I don't  
13 think we want to say too much there in case the  
14 issues addressed in the OLC opinion or related  
15 issues come up later for renewed debate."

16 Did I read Mr. Aguinaga's words  
17 correctly?

18 A. Yes.

19 Q. Okay. I'm going to show you a document  
20 which we'll mark as Exhibit 28.

21

22

1 (Gore Deposition Exhibit 28 marked for  
2 identification and attached to the  
3 transcript.)

4 BY MR. HO:

5 Q. This is a Department of Justice Office of  
6 Legal Counsel opinion dated January 4th, 2010,  
7 titled, Census confidentiality and the  
8 Patriot Act.

9 Does that appear correct to you?

10 A. One moment.

11 Yes, that appears correct.

12 Q. When Mr. Aguinaga, in his e-mail,  
13 referenced a 2010 OLC opinion concerning whether  
14 any law compels the disclosure of confidential  
15 questionnaire responses, he's referring to this  
16 OLC memo, census confidentiality and the  
17 Patriot Act, Exhibit 28, correct?

18 MR. GARDNER: Objection. Calls for  
19 speculation.

20 THE WITNESS: I'm not sure what he was  
21 referring to. I don't know.

22

1 BY MR. HO:

2 Q. Are you aware of any other 2010 OLC  
3 opinion besides Exhibit 28 that deals with the  
4 confidentiality of census responses?

5 A. No.

6 MR. GARDNER: Objection. Lack of  
7 foundation.

8 BY MR. HO:

9 Q. The opening paragraph of this memo --  
10 or -- I'm sorry. The last line of the opening  
11 paragraph of this memo reads, "We have identified  
12 no provision of the Patriot Act that would compel  
13 the Secretary to disclose such protected  
14 information."

15 Did I read that right?

16 A. Yes.

17 Q. Have you seen this OLC memo before?

18 A. I believe I have once before. Yes.

19 Q. And it's your understanding that this  
20 2010 OLC opinion states that there's no provision  
21 of the Patriot Act that would compel the Secretary  
22 of Commerce to disclose census information to

1 federal law enforcement, correct?

2 A. That is correct. That's the sentence  
3 that you just read.

4 Q. Okay. As Mr. Aguinaga notes, your draft  
5 answer to Congressman Gomez does not directly  
6 address this question, correct?

7 A. That was his characterization, yeah.

8 Q. Do you agree with his characterization  
9 that it does not -- as drafted, that response --  
10 directly address the question of whether or not  
11 the Patriot Act would compel disclosure of  
12 otherwise confidential census information?

13 A. I -- I think it's responsive to the  
14 extent that the second question is asking about  
15 disclosure of confidential census data. It's a  
16 two-part question propounded by Congressman Gomez.

17 Q. I know that it's responsive. I didn't  
18 dispute that.

19 A. I see.

20 Q. My question was whether or not you agreed  
21 with Mr. Aguinaga's characterization that the  
22 response, as drafted, does not directly address

1 this issue.

2 A. Yeah. That appears to be correct. The  
3 question is about whether the department and the  
4 attorney general agree with that opinion.

5 Q. Mr. Aguinaga also said, "I don't think we  
6 want to say too much there."

7 Do you agree with that, that you don't  
8 want to say too much in response to this question?

9 MR. GARDNER: Objection. Form.

10 THE WITNESS: I'm not sure what  
11 Mr. Aguinaga meant by that or what his reasons  
12 were for that other than what he says in the rest  
13 of the sentence, which you didn't read: "In case  
14 the issues addressed in the OLC opinion or related  
15 issues come up later for renewed debate."

16 And so I believe that what he was saying  
17 was that there was no need to commit the  
18 department to a position on that, given that the  
19 department might have to revisit that issue at a  
20 later time.

21 BY MR. HO:

22 Q. Okay. So let me just ask you about what

1 you just said there.

2           You didn't want to commit too much about  
3 the department's position in case the department  
4 might, at a later time, revisit whether or not the  
5 Patriot Act compels the disclosure of otherwise  
6 confidential census information, right?

7           A. I think -- well, it could be that or some  
8 other issue. I don't know what other issues might  
9 be implicated, but I think it's routine for the  
10 Department of Justice not to overcommit on  
11 particular legal questions that it may need to  
12 revisit in light of new facts or legal  
13 understanding.

14           Q. Well, you agree that when the Office of  
15 Legal Counsel issues an opinion, the department is  
16 committed on that opinion, correct?

17           A. Yes.

18           Q. Okay. So the department has already  
19 committed, pursuant to this memo, to the opinion  
20 that the Patriot Act does not compel the  
21 disclosure of otherwise confidential census  
22 information, correct?

1           A. That would be true as a matter of the  
2 department as an institution. But that commitment  
3 could be revisited at a later time.

4           Q. Okay. So your testimony is that this  
5 administration might revisit the opinion as to  
6 whether or not the Patriot Act compels disclosure  
7 of otherwise confidential census responses to  
8 federal law enforcement, correct?

9           MR. GARDNER: Objection.  
10 Mischaracterizes the witness' prior testimony.

11           THE WITNESS: It does mischaracterize my  
12 testimony. No, that's not my testimony. And  
13 you've just asked me a hypothetical, and I won't  
14 engage in a hypothetical.

15 BY MR. HO:

16           Q. But the reason why, as Mr. Aguinaga put  
17 it, your answer does not directly -- the proposed  
18 draft does not directly answer Congressman Gomez's  
19 question and that you don't want to say too much  
20 about this issue is because there's a possibility  
21 that the administration might abandon the view  
22 that the Patriot Act does not compel the

1 disclosure of otherwise confidential census  
2 information, correct?

3 MR. GARDNER: Objection. Lack of  
4 foundation. Calls for speculation.

5 THE WITNESS: And is a  
6 mischaracterization of what Mr. Aguinaga  
7 read [sic]. He didn't say anything about this  
8 administration. He just said, "In case the issues  
9 addressed in the OLC opinion or related issues  
10 come up later for renewed debate."

11 That wouldn't necessarily have to be  
12 during this administration. It wouldn't even  
13 necessarily have to be at the Department of  
14 Justice. It's an issue that could be litigated in  
15 court. It's an issue that could be raised in  
16 Congress. There are all kinds of ways that issue  
17 could arise again.

18 So to the extent you're suggesting that  
19 Mr. Aguinaga said anything about what this  
20 administration would do, that's flatly  
21 inconsistent with the actual words on the page.

22



1 BY MR. HO:

2 Q. Is it your understanding that this  
3 administration will not reconsider the view that  
4 the Patriot Act does not compel disclosure of  
5 otherwise confidential census information?

6 MR. GARDNER: Objection to the extent it  
7 calls for the disclosure of information subject to  
8 deliberative process privilege.

9 To the extent you can answer that  
10 question without divulging such information, you  
11 may do so. Otherwise, I instruct you not to  
12 answer.

13 THE WITNESS: Consistent with that  
14 instruction, I can't answer.

15 BY MR. HO:

16 Q. So you've been involved in conversations  
17 about whether or not the administration might  
18 abandon the view that the Patriot Act does not  
19 compel the disclosure of otherwise confidential  
20 census information?

21 MR. GARDNER: Same objection. Same  
22 instruction.

1 THE WITNESS: Consistent with that  
2 instruction, the answer I will provide is, no, I  
3 have not been involved in those conversations.

4 MR. HO: Okay. But, I mean, deliberative  
5 process is what you're asserting here?

6 MR. GARDNER: Yes.

7 BY MR. HO:

8 Q. Okay. So there are deliberations  
9 occurring right now about whether or not to  
10 abandon the position that the Patriot Act does not  
11 compel the disclosure of otherwise confidential  
12 census information?

13 MR. GARDNER: Same objection. Same  
14 instruction.

15 THE WITNESS: No, that's not my  
16 testimony. And I am not aware of any such  
17 deliberations or conversations.

18 (Gore Deposition Exhibit 29 marked for  
19 identification and attached to the  
20 transcript.)

21 BY MR. HO:

22 Q. I'm going to show you a document marked

# EXHIBIT B

IBESNYS1

1 UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 STATES OF NEW YORK, COLORADO,  
4 CONNECTICUT, DELAWARE, ILLINOIS,  
5 IOWA, MARYLAND, MINNESOTA,  
6 NEW JERSEY, NEW MEXICO,  
7 NORTH CAROLINA, OREGON,  
8 RHODE ISLAND, VERMONT,  
9 and WASHINGTON, *et al.*,

7 Plaintiffs,

8 v.

18 Civ. 2921 (JMF)

9 UNITED STATES DEPARTMENT OF  
10 COMMERCE, *et al.*,

Trial

11 Defendants.

12 -----x

13 NEW YORK IMMIGRATION  
14 COALITION, *et al.*,

15 Consolidated Plaintiffs,

16 v.

18 Civ. 5025 (JMF)

17 UNITED STATES DEPARTMENT OF  
18 COMMERCE, *et al.*,

19 Defendants.

20 -----x

New York, N.Y.  
November 14, 2018  
9:00 a.m.

21 Before:

22 HON. JESSE M. FURMAN,

23 District Judge

IBESNYS3

Abowd - Cross

1 populations.

2 Q. Then lastly, Dr. Hillygus says that depending on modeling  
3 assumptions, Brown, et al. estimates range from 5.1 to 11.9.

4 Do you agree with that?

5 A. I think I just expressed how that would properly be done  
6 with the analysis that the ranges from 5.1 percentage points to  
7 5.8 percentage points.

8 Q. We can take this down.

9 One last point on self-response before we turn to NRFU.

10 Do you recall Dr. Barreto's testimony regarding his  
11 survey he ran?

12 A. Yes, I do.

13 Q. What is your opinion of his survey?

14 A. So Dr. Barreto ran a public opinion survey of a telephone  
15 interview form sample from a combination of telephone lists  
16 used for that purpose and asked questions about intentions to  
17 do -- basically intentions to take the 2020 census in various  
18 forms.

19 He randomized which questions were asked to certain  
20 populations or certain sub samples. He didn't randomize the  
21 order in which the experiment was conducted. He drew  
22 conclusions about the relationship between the reported  
23 intentions to do something in a single survey to various  
24 operations in the 2020 census.

25 I disagree with most of those conclusions primarily

IBESNYS3

Abowd - Cross

1 because the asking someone about their intention to do  
2 something and actually measuring what they do in a field  
3 experiment is very different.

4 Just because something is randomized doesn't make it  
5 a salient, randomized controlled trial. You are trying to  
6 randomize the treatment that you actually want to implement.  
7 In this case, the relevant randomization is over whether or not  
8 there is a citizenship question in the census form when you're  
9 asked to take it.

10 The other reason that I disagree with Dr. Barreto's  
11 conclusions is that he had a 29 percent response rate, and that  
12 is perfectly respectable for public opinion polling. In fact,  
13 the CBAMS survey that we discussed earlier had a 31 percent  
14 response rate. But the Census Bureau, when it used the CBAMS  
15 result, used them to inform marketing and partnership  
16 decisions, not to make an inference about what would happen on  
17 the 2020 census, certainly not to make an inference about which  
18 sizes of households might be more or less inclined to go to  
19 proxy.

20 You have to be a lot more careful about the survey design  
21 if you want to do those household or population comparisons.  
22 In particular, you have to make sure the weights are correct  
23 so, in his analysis, the average household size is bigger for  
24 the whole population, is bigger than the estimate from the  
25 current population survey substantially bigger, so that means

IBESNYS3

Abowd - Cross

1 he didn't control his weights to any objective population  
2 totals, which is also perfectly fine for opinion polls. But  
3 not if you're then going to subsequently make an inference  
4 about the difference in the households sizes from two different  
5 sub populations, and particularly if you're not going to make  
6 an inference about one of those sub populations based on a very  
7 small sub sample of your survey data in the first place.

8 When you do that, not only do you have to get the weights  
9 right, you have to get the margins of error right. I'm not  
10 able to determine whether he made any corrections to the  
11 clustering that the various telephone lists that he used to  
12 draw the sample would have induced. I think the margins of  
13 error are seriously understated if that wasn't done.

14 So basically you can use that survey to say exactly the  
15 same thing that I've been saying since January 19. The  
16 presence of a citizenship question on the 2020 census is likely  
17 to depress self-response rates, and the people who are not  
18 likely to self-respond are going to be more difficult to follow  
19 up.

20 I don't think those points are in contention, and  
21 Dr. Barreto's survey provides additional evidence for them. It  
22 doesn't in any way explain how the NRFU component would be  
23 related to the survey component. It is all about intentions.

24 Q. Just one more question, Dr. Abowd, on Dr. Barreto's survey.  
25 We'll talk about his NRFU component in a moment.