Nos. 19-1382 (L), 19-1387, 19-1425 (Cross-Appeal)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

La Unión Del Pueblo Entero, *et al.*,

Plaintiffs-Appellees/Cross Appellants,

v.

Wilbur L. Ross, *et. al.*,

Defendants-Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the District of Maryland (8:18-cv-01570-GJH and 8:18-cv-01410-GJH)

PLAINTIFFS-APPELLEES' REPLY BRIEF

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INTRODUCTION

Defendants' opposition errs in the same way as the District Court's opinion—failing to evaluate the post-trial findings within the totality of circumstances leading to the addition of the citizenship question. Defendants incorrectly perceive that their salvation lies in the District Court's failure to find direct evidence of Secretary Ross' racial animus. Defendants' arguments ignore or systematically isolate each of the numerous factual findings that, taken together, require the conclusion that unlawful discrimination motivated the decision to add a citizenship question to the 2020 Census.

The most telling of all of the protests contained in Defendants' opposition may be the following: "The circumstances surrounding the Secretary's decision to reinstate a citizenship question thus bear no resemblance to the circumstances present in *North Carolina State Conference of NAACP v. McCrory [("NAACP")]*, 831 F.3d 204 (4th Cir. 2016), the case on which plaintiffs principally rely." Defs.' Br. at 28–29. Plaintiffs do rely on *NAACP*, with very good reason. This Court's recent opinion in that case is instructive to the point of parallelism.

In both cases, the district court entered extensive factual findings, many of which rested on uncontested facts, including findings that demonstrated the defendants' awareness of disproportionate, discriminatory impact. In *NAACP*, those facts included knowledge on the part of legislators that many Black voters

lacked the kind of photo identification the legislation required, as well as an awareness of the racial breakdown in usage of certain voting procedures, all of which were found to be used disproportionately by Black voters and all of which were eliminated by the legislation. 831 F.3d at 216–18. Here, Secretary Ross requested and received from the Census Bureau scientific analysis concluding that the addition of a citizenship question would harm data quality, and would cause a disproportionate decline in response rates among noncitizen and Latino households. JA 2860–71.

The justifications proffered in *NAACP* were found to be "meager." 831 F.3d at 214. Here, the "justification" is even more inculpatory. The proffered Voting Rights Act ("VRA") enforcement justification was found to be pretextual, and the record reflects no other justification. JA 2951–60. The *NAACP* opinion found that the challenged actions were "inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist." 831 F.3d at 214. In this case, the district court found that the VRA rationale was "manufactured" by the Secretary's staff, JA 2952–54, long after the "Secretary [started] pursuing a citizenship question with urgency," JA 2952, 2874–77, and that "DOJ did not need the data it requested[,]" JA 2878–79. In *NAACP*, this Court responded to partisan justifications offered by the North Carolina legislature, by holding that partisan interests cannot justify discriminatory means. 831 F.3d at 225–26, 233. Here, this

Court should approach with similar caution Defendants' contention that seeking to exclude all noncitizens, who are primarily Latino, from redistricting and apportionment is not discriminatory. Defs.' Br. at 45–46.

Finally, this Court observed that the *NAACP* district court applied its factual findings when analyzing whether the legislation had a discriminatory result under Section 2 of the VRA, "but not when analyzing whether it was motivated by discriminatory intent." 831 F.3d at 225. Here, the district court applied its extensive findings of improprieties, of falsehoods, of departures from procedure, of disparate impact, of manufactured rationale, all to find in favor of Plaintiffs on their claims under the APA and the Enumerations Clause, but failed to apply those same findings to conduct an *Arlington Heights* analysis of whether the question was motivated, in whole or in part, by discriminatory intent. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.* ("*Arlington Heights*"), 429 U.S. 252 (1977).

Defendant's approach, like the approach taken by the district court in *NAACP*, "missed the forest in carefully surveying the many trees." 831 F.3d at 214. The approach also fails to take into account this Circuit's recognition of the purpose and propriety of a "holistic" *Arlington Heights* analysis, "for '[d]iscrimination today is more subtle than the visible methods used in 1965.' H.R. Rep. No. 109–478, at 6 (2006), *as reprinted in* 2006 U.S.C.C.A.N. 618, 620." *Id.* at 221. "[O]utright admissions of impermissible racial motivation are infrequent

and plaintiffs often must rely upon other evidence." *Id.* (*quoting Hunt v. Cromartie*, 526 U.S. 541, 553 (1999)).

Like the extensive findings in *NAACP*, the district court's factual findings here are accurate and well-supported, many uncontested. And, like the facts in *NAACP*, the findings here "are devastating." *Id*. at 227. They reveal administration officials, guided by outside partisan interests, who set in motion a plan that they hope will inexorably lead to the exclusion of Latinos and noncitizens from their constitutionally guaranteed right to equal representation in apportionment and redistricting. Therefore, when the Department of Commerce, which is constitutionally charged with taking an *accurate* Census for purposes of apportionment, is warned that adding a citizenship question will make the count inaccurate, and will further negatively affect noncitizens and Latinos due to disproportionate non-response rates, the plan proceeds without a hiccup—because the predicted inaccuracy is wholly consistent with the motive.

The district court's conclusion on intentional discrimination is inconsistent with the admonition in *NAACP* and *Arlington Heights* against viewing the evidence piecemeal. The district court made extensive findings that were material to each *Arlington Heights* factor, but then failed to engage in the analysis required, and instead incongruously concluded that there was "little, if any evidence,

showing that Secretary Ross harbors animus towards Hispanics[.]" JA 2959. That incongruity constitutes reversible error.[1]

ARGUMENT

I. Disparate Impact is Probative of Discriminatory Intent

Ignoring the district court's findings to the contrary,[2] Defendants argue that the evidence of impact has minimal probative value. The district court, however, concluded that "[o]verwhelming evidence supports the [c]ourt's finding that a

[1] Defendants argue that if the Supreme Court concludes that Defendants complied with the APA, the Supreme Court will "likely reject the materiality" of Plaintiffs' allegations that go to racial animus. Defs.' Br. at 21–22. There is a myriad of possible outcomes from the Supreme Court reviewing the APA claim in the *New York* case. None of those uncertainties are reason to delay determining whether intentional discrimination motivated the addition of the citizenship question, which is not before the Supreme Court. Moreover, judicial deference of the kind accorded to governmental decision-making under the APA is not warranted when this Court reviews whether the record supports a conclusion that Defendants engaged in unconstitutional discrimination. *Id*. This is because a finding that Defendants' justifications are rational "is a far cry from a finding that a particular law would have been enacted without considerations of race." *NAACP*, 831 F.3d at 234 (citing *Arlington Heights*, 429 U.S. at 265–66).

[2] Although the Administrative Record includes evidence sufficient to conclude that Defendants violated the equal protection clause, the Court's review is not limited to the Administrative Record. It was proper for the district court to allow and consider extra-record discovery both because Plaintiffs plausibly alleged a claim of intentional discrimination and were thus separately entitled to discovery, *see Webster v. Doe*, 486 U.S. 592, 604 (1988), and because Plaintiffs made a "'strong showing of 'bad faith' or improper behavior' [by Defendants] in constructing the record and making the agency decision," JA 2940–41 (*citing Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997)).). Plaintiffs' showing ultimately "matured into a factual finding of bad faith and pretext." JA 2941.

citizenship question will cause a differential decline in Census participation among noncitizen and Hispanic households." JA 2886.

In support of the purported rationality and procedural regularity of the decision, Defendants rely primarily on Secretary Ross' announcement memorandum ("Ross Memo"). *See* Defs.' Br. at 6–9, 25. However, the district court found each of the justifications recited in the Ross Memo to be incorrect, unfounded, and deceptive, whether based on the Administrative Record alone, *see* JA 2867–74, JA 2951–54, or extra-record evidence, JA 2874–85.

Defendants incorrectly argue that the evidence in the record cannot reliably predict a disparate impact because the Census Bureau's non-response analysis does not take into account other alleged factors that could account for a differential non-response. Defs.' Br. at 28. To the contrary, the court found that the Census Bureau's study predicting a 5.8 percent decline in self-response did in fact utilize statistical controls, and that the differential decline is not explained by the greater length of the ACS questionnaire or by other potentially sensitive questions on the ACS. JA 2889–90; JA 4139.[3]

[3] On June 21, 2019, Defendant Census Bureau released a paper titled, "Predicting the Effect of Adding a Citizenship Question to the 2020 Census." J. David Brown et al., U.S. Census Bureau, Center for Economic Studies, *Predicting the Effect of Adding a Citizenship Question to the 2020 Census*, (CES 19-18, 2019), https://www2.census.gov/ces/wp/2019/CES-WP-19-18.pdf. The Bureau concluded that "the addition of a citizenship question will have an 8.0 percentage point larger effect on self-response rates in households that may have noncitizens

Furthermore, the district court found, based on quantitative and qualitative evidence in the record, that "because of trust and confidentiality issues—heightened by the macro-environment—questions about citizenship are particularly sensitive for Hispanics and noncitizens, meaning self-response rates among these groups will decline more than any decline in overall participation." JA 2888; *see also* JA 2886–88.

Defendants erroneously cite to the district court's findings for the proposition that non-response follow-up ("NRFU") "would correct most of the decline in initial response rates that plaintiffs' experts estimated." Defs.' Br. at 25–26. This is false—the district court found the opposite. "[L]ower self-response causes higher net undercounts because lower participation results in more enumerations through NRFU, which generates poorer quality data and undercounts," JA 2893, and that a decline in self-response rates "is especially likely to lead to differential undercounts of Hispanics and noncitizens because at every step in the NRFU and imputation process, these remedial efforts will be less effective at mitigating the decline in these groups' participation rates," JA 2895.

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relative to those with only U.S. citizens." *Id.* at 1. As it did previously, the Census Bureau used a regression analysis accounting for variables, including household size, home ownership, income, the presence of children in the home, employment status, and various demographic characteristics (including marital status, sex, race/ethnicity, age, and educational attainment). *Id*. at 11. This new evidence indicates that the addition of a citizenship question will have a substantially greater impact on noncitizen self-response rates than was evident in the record available to the district court at trial.

Relying on *Personnel Adm'r of Mass. v. Feeney*, 442 U.S 256, 279 (1979), Defendants argue that the Secretary simply made a "policy judgment," based on a weighing of evidence and need for the data, and that therefore, at worst, the Secretary made the decision to add the question in spite of the negative effect, not because of it. Defs.' Br. at 26. However, *Feeney* simply stands for the proposition that impact alone, without more, cannot support a finding of intentional discrimination. In this case, in addition to the evidence of impact, the district court found, *inter alia*, that the entirety of the record showed that "the VRA rationale was a pretext, and the statements in the Ross Memo contradict the unanimous opinion of the Census Bureau" regarding the certain disparate impact of a quite unnecessary change to the Census. JA 2851. The "policy judgment" manifested no sensible judgment at all where Defendants have failed to provide a truthful reason, much less a compelling one, for the addition of the citizenship question.

II. The Court's Findings Confirm that the Arlington Heights Historical Background Factor Weighs in Favor of Finding That the Decision was Motivated by Racial Discrimination

Arlington Heights instructs the court to examine the "historical background of the decision," which may include a history of discrimination by the jurisdiction. 429 U.S. at 267; *NAACP*, 831 F.3d at 223. The Court in *NAACP* did both. When it looked at the long history of racial discrimination in North Carolina, it contextualized the historical background to the circumstances at hand. *See*

NAACP, 831 F.3d at 225–26. Defendants' reliance on the purported long record of "[q]uestions about birthplace and citizenship . . . on the census for most of the country's 200-year history," Defs.' Br. at 34, fails to present history in the full and proper context.

With the 1976 amendments to the Census Act, Congress encouraged the use of sampling and other means of data collection where possible, instead of the decennial Census. *See* S. Rep. No. 94–1256, at 4 (1976).[4] Specifically, the 1976 amendments required the Secretary to use administrative records instead of Census questions to collect demographic data "[t]o the maximum extent possible." 90 Stat. at 2460 (13 U.S.C. § 6(c)); *see also* JA 2924. The "Census Bureau is a principal statistical agency within the federal statistical system . . subject to the standards and directives of the Office of Management and Budget (OMB)" that regulate the methodologies, practices, and data quality of the Census. *See* JA 2925–26. Any analysis of the citizenship question's historical background, then, as in *NAACP*, is to be viewed "contextually" within the confines of these requirements.

[4] *See also* Pub. L. No. 94-521, sec. 7, § 141(d), 90 Stat. 2459, 2461-62 (codified as amended at 13 U.S.C. § 141(d) (1976)) (authorizing mid-decade Census); Pub. L. No. 94-521, sec. 10, § 195, 90 Stat. 2459, 2464 (codified as amended at 13 U.S.C. § 195 (1976)). The Secretary is to use the decennial Census to collect "other" information besides a "census of population," only "as necessary." Pub. L. No. 94-521, sec. 7, § 141(a), 90 Stat. 2459, 2461 (codified as amended at 13 U.S.C. § 141(a) (1976)); *see also* JA 2924.

Importantly, the modern Census has not asked the citizenship question of every household since 1950 when the Census questionnaire was conducted by in-person enumerators going door-to-door.[5] JA 675; JA 1470. And, it is no surprise that in this context, the Census Bureau and the Department of Commerce have opposed the collection of citizenship data in previous modern censuses. *See, e.g.*, *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 568 (D.D.C. 1980).[6]

Adding the untested citizenship question at the eleventh hour, knowing that it would compromise data accuracy, knowing that it would reduce self-response by Latinos and noncitizens, knowing that it was consistently opposed by Census Bureau experts, and justified only by a fabricated rationale, is the very definition of "unusual," and is plainly "suggestive of discriminatory motive." *See* Defs.' Br. at 29.

Finally, *NAACP* began its historical survey with laws upholding slavery prior to the Civil War, subsequent Jim Crow laws, and laws disenfranchising Black

[5] As the district court found, the modern Census "short form" questionnaire that goes to all households asks only a handful of questions compared to the ACS and its predecessor "long form" questionnaire, which is sent only to a sample of households. JA 2849–50.

[6] In opposing the collection of citizenship data in the 1980 Census, the Census Bureau and Commerce believed "any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count . . . . Questions as to citizenship are particularly sensitive in minority communities[.]" *Id.*

voters. *NAAPC*, 831 F.3d at 223. It is similarly worth noting that the history of the Census and apportionment in this country began in Article 1, Section 2 of the Constitution with the three-fifths compromise that counted only three of every five African-American enslaved persons for purposes of apportionment.[7] The administration's goal here is a zero-fifths rule for noncitizens in apportionment and redistricting, and a commensurate deprivation of political representation for the Latino communities in which noncitizens chiefly reside.

III. Defendants Departed from the Well-Established Process for Adding a Question to the Census in Order to Rush the Addition of the Question, Knowing It Would Harm Latinos and Noncitizens

Defendants do not refute that they failed to follow the "well-established process" for the addition of a question to the Census. Rather, by arguing that the individual components of the process leading up to the March 26 memorandum do not reveal discriminatory animus, Defendants incorrectly examine "each piece of evidence in a vacuum, rather than engaging in the totality of the circumstances analysis required by *Arlington Heights*." *NAACP*, 831 F.3d at 233.

First, Defendants argue that there is nothing unusual about a Secretary communicating with other government officials and outside stakeholders during the consideration of a policy matter. Defs.' Br. at 31. However, an examination of the sequence and content of these communications shows that the process of

[7] The three-fifths clause was superseded by Section 2 of the 14th Amendment.

adding the citizenship question was anything but usual, and that it was inextricably tied to whether noncitizens were to be included in apportionment and redistricting. The district court's findings recite the uncontested facts regarding the multiple communications between Commerce officials, the White House officials, DOJ, and Kris Kobach concerning the citizenship question and apportionment and redistricting.[8] JA 2851–60. Defendants' attempts to sanitize those communications is unavailing. They reveal, on their face, that the motive had nothing to do with Voting Rights enforcement and everything to do with skewed political representation.

The illegitimacy of the Secretary's proffered rationale is, under the mountain of findings confirming its history and pretext, more than well-established. Defendants nonetheless assert that the district court's finding of pretext is immaterial. Defs.' Br. at 46. Again, Defendants ignore the *Arlington Heights*

[8] Defendants rely on *Sylvia Dev. Corp. v. Calvert Cnty.*, 48 F.3d 810, 822–23 (4th Cir. 1995), to argue that Kobach's motives cannot be attributed to Secretary Ross. However, this reliance is misplaced. In *Sylvia*, this Court addressed the denial of a zoning designation to a foreign company with a foreign-born president. 48 F.3d at 815. The Court found that a question and comment from a single audience member at a public hearing regarding the national origin of the developer, which the commissioner dismissed as having "no bearing" on the hearing, should not be attributed to the commissioner. *Id.* at 822–24. Thus, *Sylvia* is easily distinguishable from this case, as the sequence of events leading up to the Ross Memo reveal numerous communications and statements by administration officials and others that indicate discriminatory motive. Moreover, in *Sylvia*, unlike the district court in this case, the court found that the board had a rational basis for denial—to avoid an adverse impact on traffic safety and water supply. *Id.* at 825.

analysis, which instructs the court to consider, among the totality of the circumstances, that the Secretary manipulated, prevaricated, misled Congress, enlisted the DOJ in the ruse, and filled his decision letter with baseless recitations of the process in which he claims to have engaged. *See NAACP*, 831 F.3d at 233.

Defendants' citation to a Title VII case decided under the burden-shifting *McDonnel Douglas* framework is nothing more than deliberate misdirection from the standards articulated in *Arlington Heights* and *NAACP*. Defs.' Br. at 44 (*citing St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 515–16 (1993)). The relevance of the falsity of the rationale in an *Arlington Heights* analysis is two-fold. First, pretext is part of the historical background of the decision and is probative of procedural and substantive irregularities. *See Arlington Heights*, 429 U.S. at 267. Second, when the *Arlington Heights* analysis leads to the conclusion that race was one of the motivating factors, the burden shifts to Defendants to demonstrate that Secretary Ross would have added the question for some other legitimate non-discriminatory reason. *NAACP*, 831 F.3d at 221 (citing *Hunter v. Underwood*, 471 U.S. 222, 228 (1985)); *Arlington Heights*, 429 U.S. at 271 n.21. In this case, there is no other reason—the "only reason provided" was pretextual. JA 2951–54.[9] As

[9] Defendants identify only one other piece of evidence in the Administrative Record purportedly supporting the need for a citizenship question: a handful of conclusory letters from States asserting "that citizenship data from the census would be useful for their own VRA and redistricting efforts." Defs.' Br. at 33. If the Secretary relied on these letters, they only further uphold a finding of pretext:

recently as June 18, 2019, when pressed by the district court to point to any evidence in the record for the decision, "other than the VRA pretext," defense counsel responded that "[t]he rationale that the Government believes is reflected in the record is that which is in the March memo from the Secretary[.]" Hulett Dec., Ex. A, Transcript of June 18, 2019 Oral Argument, *Kravitz v. Dep't of Justice*, No. 8:18-cv-01041-GJH at 87:25–88:8.

Next, Defendants further misapply the *Arlington Heights* analysis in their contention that discrimination did not motivate the Secretary's decision to reject the Census Bureau's recommendation to use administrative data ("Alternative C") over an alternative that combined the use of administrative data and the citizenship question ("Alternative D").[10] Defs.' Br. at 33–35. The Secretary's rejection of the Census Bureau's unanimous warnings inevitably shows his relentless pursuit of the plan in the face of scientifically based projections—one of the circumstances contributing to the totality under *Arlington Heights*.

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in one of those letters, thirteen state attorneys general described a citizenship question as the "solution" to the alleged problem that "legally eligible voters may have their voices diluted or distorted" by "non-citizens." JA 3477–79.

[10] The district court described the alternatives as follows: "Alternative D refers to the fourth alternative analyzed by the Census Bureau and devised by Secretary Ross, which 'combined Alternative B (asking the citizenship question of every household on the 2020 Census) with Alternative C (do not ask the question, link reliable administrative data on citizenship status instead).'" JA 2944 n.23.

Defendants argue that the Secretary had good reason to disagree with the Census Bureau's recommendation because of his purported (pretextual) need for hard data rather than data obtained from administrative records. Defs.' Br. at 41–42. However, the district court found that "any superficial gain" from obtaining any additional citizenship data through the question "would come *at the expense* of accuracy[.]" JA 2946; *see also* JA 2862–63, 2868–69, 2921–22.[11] The decision to persist with the addition of a citizenship question in the face of overwhelming evidence of the harm it would cause is yet another piece of the motivation puzzle.

Defendants next contend that Secretary Ross did not mislead Congress by concealing the true rationale for the addition of the citizenship question. Defs.' Br. at 35. Secretary Ross stated in the March 26 memorandum that "*following* receipt of the DOJ request, I set out to take a hard look at the request . . . so that I could make an informed decision on how to respond." JA 3519 (emphasis added). However, the decision had been made months prior in concert with other Administration members and advisors. JA 2853, 2856–59. By omitting that the decision to add the question preceded the DOJ request, Secretary Ross concealed

[11] Defendants also state that the Census Bureau was unsure of the relative advantages of its "preferred approach" because it could not "quantify the relative magnitude of the errors across the alternatives" at the time. Defs.' Br. at 33–34. Defendants ignore the fact that regardless of the magnitude, the "Census Bureau's experts unanimously favored Alternative C over Alternative D," JA 2946 n.24, because, as Dr. John Abowd agreed during his deposition testimony, "Alternative D produces worse data quality," JA 726–33.

the real rationale.[12] In fact, had Secretary Ross not concealed the real rationale, there would have been no need for him to issue a "supplemental memorandum"—stating that he began considering the citizenship question soon after his appointment as secretary and consulted other agencies—on June 21, 2018, JA 3186, *after* lawsuits challenging the citizenship question had been filed and Administrative Record documents revealed the true sequence of events. The supplemental memorandum further failed to provide any alternative rationale for the addition of the question other than the pretextual VRA enforcement rationale. *Id.*

Finally, Defendants contend that the Secretary's decision did not break from past practice. Defs.' Br. at 36. Yet, the district court found that Secretary Ross, "on his path to adding a citizenship question . . . bulldozed over the Census Bureau's standards and procedures for adding questions, at times entirely ignoring the Bureau's rules." ECF No. 43-1, Ex. A at 10–11 (district court's memorandum

[12] Indeed, multiple fact-finders have found that Secretary Ross misled Congress. *See* JA 2874–75 (Secretary Ross "concealed" the fact that he "decided in the Spring of 2017, months before receiving DOJ's request, that he wanted to add a citizenship question to the 2020 Census . . . . when he represented to Congress that the Department of Commerce analysis around the citizenship question was 'solely' in response 'to the Department of Justice's request,' and not at the direction of President Trump or anyone at the White House . . . and that DOJ 'initiated the request for the inclusion of the citizenship question' to the 2020 Census[.]"); *New York v. Dep't Commerce*, 351 F. Supp. 3d 502, 547 (S.D.N.Y. 2019) (the Secretary's "first version of events, set forth in the initial Administrative Record, the Ross Memo, and his congressional testimony, was materially inaccurate").

opinion explaining order granting Plaintiffs' motion for an indicative ruling under Rule 62.1(A)) (*citing* JA 2943–51).

With regard to past practices, Defendants first claim that the decision to add a citizenship question itself was merely a "return to the traditional practice" because of the history of questions about citizenship or place of birth on past Census forms. Defs.' Br. at 36–37. However, as discussed above, a citizenship question has not been asked of every household on the decennial Census in the last 70 years. *See supra* Sec. B.

Defendants next rely on Justice Gorsuch's opinion regarding *discovery* to argue that Secretary Ross' solicitation of a request for the citizenship question from other agencies was not evidence of discriminatory motive because there is nothing unusual about a new secretary favoring a particular policy and soliciting support from other agencies to bolster his view. Defs.' Br. at 37 (quoting *In re Dep't of Commerce*, 139 S. Ct. 16, 17 (2018) (Gorsuch, J.)).[13] No matter how commonplace racial animus and prevarication has become in our political discourse, the Constitution remains a guard against their manifestation by public officials who make official decisions that affect the lives of those who are targeted.

[13] Justice Gorsuch wrote to concur in part and dissent in part on the Supreme Court's response to an application for stay (of a New York district court order compelling the deposition of Secretary Ross) presented to Justice Ginsburg and referred by her to the Court. *See In re Dep't of Commerce*, 139 S. Ct. at 17 (Gorsuch, J.).

It is indeed "unusual" for a cabinet member to manipulate laws and disregard the best available advice in order to serve a discriminatory end. It must be considered unusual for two cabinet members to conspire to manufacture facially neutral justifications to serve those ends, to lie to Congress about the true motivations that preceded, by months, the one offered to Congress and to the courts. It is not simple red tape-cutting for an agency to be forced to abandon all safeguards to ensure the accuracy of a constitutionally required Census of the population that will affect political representation and basic federal funding for the next decade.

IV. Discriminatory Statements Made by Administration Officials and Others Are Probative of Defendants' Discriminatory Intent

The district court erred in its review of the contemporaneous statements by those surrounding Secretary Ross, including high-ranking White House and administration staff. Plaintiffs are not required to provide direct admissions of racial animus by Secretary Ross in order for this Court to hold that the district court committed error when it failed to consider, as part of the totality of circumstances, its own factual findings regarding the motives of all the individuals who played a role in the addition of the question.

Defendants incorrectly argue that the only person who was interested in the citizenship question as a vehicle for affecting apportionment was Kobach, and that senior Commerce officials rejected his views. Defs.' Br. at 40. The record, however, reflects otherwise. There were a number of people communicating with

Secretary Ross who "had an interest in whether undocumented immigrants are counted in the Census for apportionment purposes, and that the Secretary did look at that issue." JA 2883–84; *see also* 2865–66, 2875–76. Indeed, exclusion of noncitizens from reapportionment is the most obvious motive found in internal Commerce communications and in communications with Kris Kobach. *See, e.g.*, JA 2851–52, 2854–55, 2865–66.[14]

Defendants are dismissive of the court's findings regarding racial animus of persons in Secretary Ross' orbit and the other evidence suggesting that the President had a hand in directing his Secretary on this question, again by misapprehending the exercise of reviewing contemporaneous statements and instead requiring direct evidence of the transfer of those motives to the Secretary in the context of the decisions he made. Neither *Arlington Heights* nor *NAACP* requires any such thing. Indeed, this Court in *NAACP* took care to dispel any suggestion that its conclusion meant that individual legislators harbored racial animosity, but nonetheless held that the totality of the circumstances revealed that

[14] Perhaps one of the most telling email exchanges is one in which the Commerce General Counsel tells the Secretary's assistant that his ideas include a useful "hook," to argue that Commerce will not be responsible if Congress, or the President, use the data for apportionment. JA 2897–88. The district court also noted evidence in the record that "show President Trump is concerned by the political power that undocumented immigrants may wield." JA 2884.

the legislators targeted Black voters who were unlikely to vote for them. 831 F.3d at 233.[15]

Defendants argue that the cat's paw theory of liability, under which Secretary Ross acted because of pressure from the administration, is not applicable to a cabinet secretary because it would limit the secretary's ability to carry out his duties. Defs.' Br. at 40–41 (citing *Staub v. Proctor Hospital*, 562 U.S. 411 (2011)). However, where the government action is taken for a discriminatory reason in violation of the U.S. Constitution, then liability cannot simply be laundered away with a pretextual justification that the Secretary manufactured. To hold otherwise would allow under-officials to escape judicial review for carrying out discriminatory, unlawful, and unconstitutional commands of the President.[16]

[15] In *NAACP*, the Fourth Circuit even considered the racist pre- and post-decisional public statements of Republican precinct chairman as "some evidence of the racial and partisan political environment in which the General Assembly enacted the law." 831 F.3d at 229 n.7.

[16] Defendants argue that the email from the President's re-election campaign, claiming Presidential credit for the addition of the citizenship question, should have been excluded as inadmissible hearsay. Defs.' Br. at 42. The Secretary acknowledged that he reviewed the email prior to his testimony before Congress, where he falsely testified that the DOJ "initiated" the process to add the citizenship question. *See* Pltfs.' Br. at 7–8; JA 2875, JA 3611, JA 5103, JA 5052 (video testimony). The email is not hearsay because it is not offered for the truth of the matter asserted. JA 4400. Rather, the email demonstrates the President's then-existing motive for adding the citizenship question and its transmission to the Secretary by his staff.

V. New Evidence Is Relevant With Respect to Defendants' True Motivation to Add the Citizenship

As noted in Plaintiffs' notice and motion to the Court, the district court granted Plaintiffs' Rule 62.1 motion, finding that the evidence is "new," admissible, and raises a substantial issue, *see* ECF No. 43-2 at 12–13 (district court opinion). Plaintiffs note that the newly discovered evidence is consistent with their allegations of discriminatory animus. The trial record and the Hofeller documents both reveal that the central purpose of adding a citizenship question was to deprive Hispanics and noncitizens of political representation. *See, e.g.*, JA at 2851–60, 2865–66 (documents showing Kobach had the same desire to deprive noncitizens of equal representation and later adopted the Hofeller/Neuman VRA rationale). That the citizenship question could enable this outcome by excluding certain populations from the Census count *and* by excluding them from redistricting does nothing to refute Plaintiffs' claim. To the contrary, it explains precisely why the Secretary pressed ahead with adding the citizenship question in the face of unequivocal and uncontradicted evidence that it would cause a disproportionate undercount of noncitizens and Latinos—because, as the district court found, this would result in the loss of political representation in areas with high Latino and noncitizen populations. JA 2860–70, JA 2929–31, JA 2947, JA 2955.

Defendants argue that the 2015 Hofeller study merely provides an "empirical observation on the impact of a switch to the use of citizen voting age

population ("CVAP") for redistricting," Defs.' Br. at 50. However, his study suggests that switching to the use of CVAP data for redistricting would benefit Republicans and non-Hispanic whites, *to the detriment* of Latinos, and that the way to achieve this goal was to add a citizenship question to the Census. This is not merely an empirical observation; this is evidence of the racial animus that ultimately led to the addition of the citizenship question. It may be that it is constitutional for states to make a decision about what population base to use so long as the decision is not based on discriminatory animus. But seeking to create a database in order to exclude noncitizens because they are primarily Latino and Democrat, and then moving forward with this decision because it will further a partisan goal by depressing the response rates of this population *is* discriminatory. *See NAACP*, 831 F.3d at 233.

CONCLUSION

For the foregoing reasons, the district court's denial of Plaintiffs' equal protection claim should be reversed.

Date: June 26, 2019

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

In accordance with Rules 32(a)(7)(B) and (C) of the Federal Rules of Appellate Procedure, the undersigned counsel for appellees certifies that the accompanying brief is printed in 14-point Times New Roman typeface, with serifs, and, including footnotes, contains no more than 6,500 words. According to the word-processing system used to prepare the brief, Microsoft Word, it contains 5,664 words.

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I hereby certify that on June 26, 2019, the foregoing Plaintiffs-Appellees' Reply Brief was served on all parties or their counsel of record through the CM/ECF system if they are registered users.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1382

LA UNIÓN DEL PUEBLO ENTERO, *et al.*

Plaintiffs-Appellees,

v.

WILBUR L. ROSS,
sued in his official capacity, as U.S. Secretary of Commerce, *et al.*

Defendants-Appellants.

DECLARATION OF DENISE HULETT IN SUPPORT OF PLAINTIFFS-APPELLEES' REPLY BRIEF

I, Denise Hulett, pursuant to the provisions of 28 U.S.C. § 1746, declare under penalty of perjury that the foregoing is true and correct.

1. I am over the age of eighteen years and make this declaration of my own personal knowledge. I am National Senior Counsel at the Mexican American Legal Defense and Educational Fund ("MALDEF"), attorneys for the Plaintiffs-Appellees in this matter.

2. Attached hereto as Exhibit A is a true and correct copy of the transcript of the motions hearing before the Honorable George J. Hazel on June 18, 2019 regarding Plaintiffs' motion for an indicative ruling on Plaintiffs' Rule 60(b) motion. The quoted text included in Plaintiffs' Reply appears at pages 87:25-88:8.

3. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct of my own personal knowledge except those matters stated on information and belief and, as to those matters, I believe them to be true. If called as a witness, I would competently testify thereto.

4. Executed on June 26, 2019 at San Francisco, California.

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EXHIBIT A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MARYLAND

ROBYN KRAVITZ, et al., Plaintiffs, vs. UNITED STATES DEPARTMENT OF COMMERCE, et al., Defendants.	Case Number: 8:18-cv-01041-GJH
LA UNION DEL PUEBLO ENTERO, et al., Plaintiffs, vs. UNITED STATES DEPARTMENT OF COMMERCE, et al., Defendants.	Case Number: 8:18-cv-01570-GJH

TRANSCRIPT OF PROCEEDINGS - MOTIONS HEARING
BEFORE THE HONORABLE GEORGE JARROD HAZEL
TUESDAY, JUNE 18, 2019; 2:00 P.M.
GREENBELT, MARYLAND

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription

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P R O C E E D I N G S

(Call to order of the Court.)

THE COURT: Good afternoon. You may all be seated. I should have gotten the bigger courtroom today.

If you could call the case.

THE COURTROOM DEPUTY: The matters now pending before this Court are civil docket number GJH-18-1041, Kravitz, et al., versus United States Department of Commerce, et al., and the related case civil docket number GJH-18-1570, La Union Del Pueblo Entero, et al., versus Ross, et al. These matters are before the Court for the purpose of a motions hearing.

Beginning with the plaintiffs, please enter your appearance for the record.

MR. DURAISWAMY: Good afternoon, Your Honor. Shankar Duraiswamy for the Kravitz plaintiffs.

MS. HULETT: Good afternoon, Your Honor. Denise Hulett for the LUPE plaintiffs.

MR. DUKE: Good afternoon, Your Honor. Ben Duke for the Kravitz plaintiffs.

MS. SENTENO: Good afternoon, Your Honor. Andrea Senteno for the LUPE plaintiffs.

MS. SHAH: Good afternoon, Your Honor. Niyati Shah for the Asian plaintiffs.

MR. GRANT: Good afternoon, Your Honor. Dan Grant for the Kravitz plaintiffs.

THE COURT: Welcome back to you all.

MR. GARDNER: Good afternoon, Your Honor. Josh Gardner, with the United States Department of Justice, on behalf of the defendants, and with me is my colleague Stephen Ehrlich.

THE COURT: Good afternoon to both of you and welcome back to you all.

Couple of preliminary issues. I'm going to grant defendants' motion to file a sur-reply, which I take it was filed last night. It reached my desk first thing this morning. I don't know if this was objected to, but, either way, I'm granting it. I do think it was responding to newly-raised arguments. And more to the point, I've read it. So it's not like I can zap it from my brain if I were to decide to deny it. So I am going to grant that motion.

The other thing, just so everyone has an understanding of what to expect today, I will issue an order resolving the motion tomorrow, after hearing argument today. So if anyone here is waiting to hear the ruling at the end of this hearing, my plan is to rule tomorrow. And that's a hard deadline. I will rule tomorrow.

I say that just to be candid. Like, I want to hear argument from both sides and then go back to my chambers or go home and sleep on it. I think this is an interesting enough issue that I don't want to just hear argument and just throw

out an answer. I plan to continue to think about it. And so I will issue an order. It might be a one-page order and then with an opinion to follow if I think it's helpful for anyone to my thoughts in writing on the issue. So just in terms of what the plan is, that's my plan.

With that, we are here on plaintiffs' motion, so I'll hear from whichever of plaintiffs' army is planning to speak. Mr. Duraiswamy.

MR. DURAISWAMY: Your Honor, consistent with our past practice, we've tried to divide up different parts of the argument. So I'll be addressing the significance of the new evidence on our equal protection claim and the intent issue. Ms. Hulett will address the significance of the evidence on the conspiracy claim, as well as the unfair prejudice argument, and Mr. Duke is prepared to address the arguments regarding reasonable diligence and the admissibility of the evidence.

So if it pleases the Court, I'll begin.

THE COURT: Sure.

ARGUMENT BY MR. DURAISWAMY FOR THE PLAINTIFFS

MR. DURAISWAMY: Your Honor, the newly-discovered evidence from the files of Tom Hofeller make it abundantly clear that the decision to add a citizenship question was driven by a desire to reduce political representation for Latinos and noncitizens and, in Dr. Hofeller's own words, advantage Republicans and non-Hispanic whites.

THE COURT: So let's jump to what I think is the core question. I think your statement, if I accept it, may be accurate, but is the fact that he was -- that the theory now would seem to be they are seeking to limit their representative power in a different way make it a different theory?

MR. DURAISWAMY: Your Honor, I would say it is the exact same theory that we've always pursued, as reflected in our proposed findings of fact. I believe the relevant paragraph is paragraph 275, where we said "the evidence supports the conclusion that the addition of the citizenship question was done for an improper purpose, to decrease the political power of immigrants of color and Latino and Asian citizens who live in proximity to immigrants of color." That is exactly the motivation that's reflected by the Hofeller document, so the theory is entirely identical --

THE COURT: But being done in a very different way, right? And part of this is just foundational, just to make sure I'm understanding.

As I understood the theory before, it was you add the citizenship question so that fewer immigrants and Hispanics respond. And now it seems like the theory would be you add the citizenship question so that they can get the CVAP data and use the CVAP data for redistricting and, in that way, you'll reduce their political power. It seems, if I'm understanding that, that those are two things getting you to the same place, but is

that enough for me to say, well, if I combine those two, that gets you to preponderance of the evidence? I think that's what I'm wrestling with.

MR. DURAISWAMY: So, Your Honor, there are multiple ways in which adding a citizenship question to the census can result in the discriminatory outcome of reducing political representation for Latinos. It is correct that one of those ways is the undercount that is generated as a result of the fear that the citizenship question creates and, thus, the drop in self-response rates among Latino and noncitizen communities.

Another way, which was reflected in the evidence that the Court cited in Your Honor's findings of fact and conclusions of law, was what Kris Kobach was talking about, which was essentially excluding certain categories of noncitizens from the counts. Whether they are formally counted as part of the census or not, once they are counted, you then exclude them from the population base for purposes of reapportionment and redistricting. So what Dr. Hofeller was talking about is, yes, the use of the data, which is entirely consistent with what Mr. Kobach was talking about.

I don't think that it's necessary -- first of all, I don't think that it's really possible to disentangle these different threads. The Government's argument is a little bit amazing in the sense that what they're saying is there were multiple ways in which we may have intended to use the

citizenship question to reduce political representation for Latinos and noncitizens, and since this is a slightly different way from what the record evidence suggested before, that somehow that defeats their equal protection claim and refutes a showing of discriminatory motive.

The other thing I would say, Your Honor --

THE COURT: I guess the argument/question would be if they are two different theories or two different strains, do you have to pick one of them and prove that one by a preponderance of the evidence? Or is it enough for you to prove by a preponderance of the evidence that even though we're not sure which of the -- and I know you're saying it's one theory, but let's say I disagree with that, and I may or may not, ultimately. But if they are separate theories, is it enough for me to say, well, I think it's -- and the good thing about preponderance of the evidence, it's the one that you can actually assign math to. If I say the theory we'll call your trial theory -- and I know you want to say that they're the same, and that's fine, and you can argue that, but bear with me for this point. Your trial theory I say is 49 percent likely the right answer, right? And in some ways, that's effectively what I said in my opinion. Like, I think it's probably the most likely, but I don't know that you got above 50 percent, right? So let's say that's 49 percent and say that I see this as a slightly different theory even going to the same ultimate

end game, and I say, well, we'll add another number, 30 percent, right? I now think it's 30 percent likely that it's the Hofeller theory. Do I get to add those together and say, well, they're over a preponderance of the evidence now because they have these two different theories, and Ross probably gravitated to one or the other of them, and so I'll just put them together and say, well, that gets you above preponderance? Or do you have to prove that one of those theories is, by a preponderance of the evidence, the reason why he did this?

MR. DURAISWAMY: So accepting the Court's assumption --

THE COURT: For now, yes.

MR. DURAISWAMY: For now. I'd have two responses. First, yes, I think that you can, to put it in numerical terms, combine them because they produce the same effect and, therefore, they relate to the same discriminatory motive. I don't think that they're sort of entirely discreet notions of discriminatory motive.

And the Government doesn't cite any authority to the contrary. They don't cite any authority suggesting that somehow the individual elements in which you intend for a particular action, that you take as a governmental actor to produce a discriminatory effect for a particular population where there are multiple elements, the plaintiffs are confined to focussing on one of those multiple elements in establishing

discriminatory motive.

The other point I would make, Your Honor, is even if you do think that you have to focus on one or the other of these, if you do think that you have to focus on whether they had a discriminatory intent to disadvantage Latinos and noncitizens, specifically by not counting them in the census in the first place and by depressing their response rates, this evidence is still absolutely probative of the existence of that discriminatory intent. If the people who are at the center of the decision-making process for adding a citizenship question to the census have the ultimate goal and desire to reduce political representation for Latinos and noncitizens, then that is certainly probative of why Secretary Ross entirely ignored all of the cautions from the Census Bureau about the fact that adding this question would, in fact, undercount Latinos and noncitizens.

It is also, I would say, further evidence of Secretary Ross's, I would say, maybe not deference but acceptance of the views that were presented to him by Kris Kobach regarding adding a citizenship question in order to exclude certain noncitizen immigrant populations from the census count.

THE COURT: All right.

MR. DURAISWAMY: Let me just to return -- I did want to -- I think that's an important point, that we're talking about the same theory. Even if we're talking about different

theories, this still gets us past the tipping point of 50 percent.

But I also want to go through, in some level of detail, exactly what the evidence is and exactly why it reveals the discriminatory motive. Before I do that, I think it's worth briefly reviewing the bidding to see how we got here.

So we know that the Administration misled the country about the real reason that it added a citizenship question to the census. This Court, as well as two others, have already found that the stated reason for the decision was a pretext offered in bad faith. In other words, a cover story to conceal the actual motives for a decision that was made in the early months of the Trump Administration.

THE COURT: Let me just interrupt you for a second. I'm sure Ms. Davis really misses you, and it's probably coming back to her mind now, but if I could ask you to slow down a little bit.

MR. DURAISWAMY: I missed you too, Ms. Davis. I appreciate the discipline.

Throughout this litigation, the Administration has gone to great lengths to prevent plaintiffs and the country from learning what the real reason is for adding a citizenship question. They have attempted to manipulate the content of the administrative record. They have attempted to block any discovery into why they did this. They successfully blocked

the deposition of Secretary Ross, even while insisting, erroneously, that only his discriminatory animus is relevant. And they have broadly asserted deliberative process and other privileges over a huge swath of internal communications discussing the citizenship question, including several communications and documents exchanged with Mark Neuman, which to this day have not been produced.

Outside the courtroom, this campaign of concealment has continued. Just last week, at the request of Secretary Ross and the Attorney General, the President asserted Executive Privilege over numerous documents related to the citizenship question decision, including several drafts of the DOJ letter requesting the question.

So to this day, despite the findings of this Court and others, the Administration has refused to answer a simple question: What was the true reason for doing this? Despite that lack of transparency, every single piece of evidence that we were able to extract from the Government has pointed to the same discriminatory motive, to reduce political representation for Latinos and noncitizens. That includes Kris Kobach's multiple communications with Secretary Ross about the need for a citizenship question to ensure that so-called aliens are not included in the count for congressional apportionment. It includes internal discussions at the Commerce Department about excluding certain groups of immigrants from the census count

for purposes of congressional reapportionment. It includes Secretary Ross ignoring Census Bureau analyses showing that this would make it harder to count noncitizens and, potentially, Latinos. It includes this Court's finding that adding a citizenship question will likely result in a disproportionate undercount in areas with high percentages of Latinos and noncitizens, thereby depriving them of political representation. And it includes the contemporary statements and actions of Trump Administration officials and advisors evincing a discriminatory animus generally towards Latinos and noncitizens.

Indeed, on the basis of this evidence, the Court acknowledged, in the absence of any other non-pretextual rationale, discriminatory animus may well be the most likely explanation for Secretary Ross's addition of the citizenship question.

We understand the Court ultimately found that this existing record was not sufficient for plaintiffs to meet their burden to show that the decision was motivated by discriminatory animus. To be sure, we disagree with that conclusion, respectfully --

THE COURT: Hence, the appeal.

MR. DURAISWAMY: But even accepting the Court's conclusion, the newly-discovered evidence clearly takes us past the tipping point on our burden of proof, showing that the very

people who initiated the decision and orchestrated the decision were seeking to reduce political representation for Latinos and noncitizens. Ironically, this is the exact opposite of the pretextual rationale that they concocted, that a citizenship question is necessary to protect minority voting rights.

Your Honor, the census is the cornerstone of American democracy. It is the constitutional mechanism by which we ensure the right to equal political representation. It is now abundantly clear that the Administration is manipulating the census for discriminatory purposes and directly undermining that right.

We are, therefore, asking the Court to issue an indicative ruling, under Rule 62.1, that it would grant plaintiffs' Rule 60(b) motion to set aside the judgment based on newly-discovered evidence. That will enable us to obtain a remand from the Fourth Circuit so that the Court can enter judgment for plaintiffs on our equal protection claim. At a minimum, Your Honor, the.

Newly-discovered evidence warrants a remand for the Fourth Circuit so that we can take additional discovery that we did not have the opportunity to take before --

THE COURT: On that point -- and maybe it's the next thing you're going to say -- but what, specifically, would you want to do?

MR. DURAISWAMY: So I think there are a few things,

Your Honor. One is there are additional documents belonging to Tom Hofeller that we understand, based on Stephanie Hofeller's deposition, are in the possession of his business partner Dale Oldham. Dale Oldham was also mentioned, incidentally, by Mark Neuman at his deposition as someone that he's had interactions with. So we would like to issue a subpoena to get additional materials from Dr. Hofeller's files, including any in the possession of his business partners.

We would like to follow up with Mark Neuman -- frankly, we think these communications were covered by the original subpoena but were not properly produced -- to ensure that we have all of his communications with Dr. Hofeller, Oldham, anyone inside or outside the Government regarding the citizenship question.

THE COURT: Are you referring to the possibility that the survey was provided to someone else or the draft letter? The 2015 document or the 2017 document? Or are you just speculating, which you're allowed to do at that stage but --

MR. DURAISWAMY: I'm just referring generally to communications that Mark Neuman may have had with other third parties about the citizenship question which may reveal -- just like his interactions with Dr. Hofeller, they may reveal that, yes, he had possession of the paper itself, the 2015 paper, if that's what the Court is referring to --

THE COURT: It was.

MR. DURAISWAMY: -- but there may be communications otherwise that reveal the motivations behind the citizenship question.

Beyond that, Your Honor, we would seek documents from the Department of Commerce and the Department of Justice on the use of citizenship data in reapportionment and redistricting; citizenship data from the decennial census; documents from Christa Jones, who we reference in our reply brief, whose materials just came to our attention a day before we filed the reply brief, regarding the citizenship question; any communications that she may have had, including from her personal e-mail account, with Dr. Hofeller or others regarding a census citizenship question; documents from DOJ regarding the drafting of the DOJ letter, including the numerous drafts that we understand were prepared but were not actually produced, as well as communications --

THE COURT: I was going to say on that, that's not something you asked for before, or you're saying you think you asked for it before and just didn't get it?

MR. DURAISWAMY: My understanding -- and I'm happy to be corrected if I'm wrong, but my understanding is that we did request those materials and that they were withheld.

THE COURT: Withheld on the basis of privilege?

MR. DURAISWAMY: That's my understanding, yes.

THE COURT: Okay.

MR. DURAISWAMY: Communications among DOJ and Commerce Department officials and employees with Dr. Hofeller, and Mark Neuman, to the extent those have not been searched for in response to earlier discovery. And, Your Honor, we would ask for additional depositions -- and additional deposition of Mr. Neuman, of Ms. Jones, and we would also consider asking for --

THE COURT: I'm sorry, you said deposition of Ms. Jones?

MR. DURAISWAMY: Yes. We would also consider asking for a follow-on deposition of John Gore and a deposition of James Uthmeier, who is at the center of this, from the Commerce Department. We are assessing and analyzing the extent to which the new documents provide a basis for piercing some of the privilege claims that were previously asserted to shield many of the relevant communications from discovery.

THE COURT: I don't want to step on your colleague's prejudice argument, so I'll just ask this specific question and then wait until we get there. But part of my concern is timing. So how long, in theory, would you think it would take to do all that?

MR. DURAISWAMY: I don't want to get out over my skis and give a number that, (A), I haven't discussed with my colleagues and then, (B), I'm not sure is realistic, but I think --

THE COURT: It's almost a rhetorical question. The point is we have a timeline that is now even more compressed than it was the last time we were all together. And again, you told me someone else is dealing with prejudice. I won't push you too hard on it. But that's also part of my concern. I guess I'll wait for that part.

MR. DURAISWAMY: Unquestionably, Your Honor, we would want to move as expeditiously as possible, and the types of categories of discovery that I identified are intended to be directly tied to the material that has been revealed in recent weeks and to allow us to explore further the basis for our equal protection claim to the Court, to the extent that the Court believes that a fuller factual record is necessary to resolve that.

Let me move on, Your Honor, to discussing -- actually, before I get specifically into the new evidence, just a couple of preliminary points on legal standards.

First, the relevant factual question is whether an invidious discriminatory purpose was a motivating factor for the decision and, second --

THE COURT: I'm sorry. I apologize. I want to get back to the practical aspect of this for a second before we move off on that.

So I understand -- I'm just thinking practically now -- that you're asking me -- you're making alternative arguments,

one to at least say that there is a substantial issue being raised. But, second, it seems that you're also asking me to just go ahead and say that I would likely grant the motion, the ultimate motion to alter or amend. Am I right so far?

MR. DURAISWAMY: That's correct, yes.

THE COURT: You are arguing for both. And so is it your position that you would then want a new trial? That you would -- I'm just trying to play this all the way through.

MR. DURAISWAMY: So in the first instance --

THE COURT: Or would you just want me to enter judgment in your favor on that today?

MR. DURAISWAMY: Correct.

THE COURT: That's what you're hoping I will say.

MR. DURAISWAMY: In the first instance, Your Honor, we believe that, as I said, the newly-discovered evidence takes us past the tipping point, and the Court should enter judgment in favor of plaintiffs. To the extent the Court --

THE COURT: Based on -- and I'm sorry to interrupt, but I just want to stay on the track that I'm on. That's helpful. You're arguing that based on just the evidence as I've received it so far, i.e., just the documents I've received, without sort of live testimony authenticating it -- and I realize in your second submission you added some things to try to do that -- but it's your argument that just based on what I have in front of me, I have enough to say, yeah, I would

come out a different way, Fourth Circuit; if you send it back, I'm going to enter judgment in favor of plaintiffs on this. Without testimony, without anything else.

MR. DURAISWAMY: That's correct, Your Honor. That certainly is our position. Having said that, obviously, if the Court feels that the evidence warrants reconsideration of the judgment based on supplementation of the factual record, beyond just the submission of the documents in the moving papers, certainly, we would be open to a hearing to do that or to some amount of discovery, such as the discovery that I identified to first ascertain additional facts and then present them in the context of a formal evidentiary hearing --

THE COURT: But the only way to do that would be to say substantial issue, have the Fourth Circuit remand and then hold the hearing, or are you suggesting I could say come back tomorrow, have the hearing and, based on that, then I say --

MR. DURAISWAMY: I think you can say that you are inclined to grant the Rule 60(b) motion to set aside the judgment and reopen the factual record without necessarily committing to what your ultimate determination will be once the fact record is supplemented. But certainly at a minimum, you could make that point by issuing an indicative ruling noting that it raises a substantial issue.

THE COURT: Okay. You can go on to your next point.

MR. DURAISWAMY: The second preliminary point I

wanted to make, Your Honor, is that to meet our burden, we do not have to offer direct proof of the decision-maker's intent. As the Court has previously recognized, racially-discriminatory purpose may often be inferred from the totality of the relevant facts.

So to understand the significance of the new evidence, you have to start with the broader factual record, which includes two very significant, salient points that I mentioned earlier. First, that the Court found that the Administration did not disclose the true motive for adding the citizenship question and that the reason that was given was a pretext, and, secondly, that the only evidence that we have all points to one motive, reducing the political representation of Latinos and noncitizens.

So what is the new evidence, and how does it substantially build on this record?

First, a 2015 paper by Thomas Hofeller that makes two points. One point is that drawing voting districts based on citizen voting-age population instead of total population would, quote, be advantageous to Republicans and non-Hispanic whites, while alienating Latinos and provoking resistance from minority groups.

The paper makes a second point that logically follows from the first. A citizenship question on the census would be necessary to draw voting districts based on citizen voting-age

population instead of total population.

The second piece of newly-discovered evidence is a 2017 document generated --

THE COURT: Let me just ask real quick on that. Would you agree that nowhere does Hofeller -- I've been playing with his name so much, and now it's stuck in my head. Hofeller?

MR. DURAISWAMY: I believe it's Hofeller, but I could be wrong.

THE COURT: Hofeller. Does he suggest anywhere that there would be a reduction in responses from immigrants?

MR. DURAISWAMY: No, I don't believe he addresses that in that paper.

THE COURT: And so there's no connection between that and what Dr. Hofeller is suggesting. Between the issue of reducing immigrant response rates and what Dr. Hofeller was suggesting.

MR. DURAISWAMY: Dr. Hofeller is not addressing response rates to the census based on the presence of a citizenship question, that's correct.

THE COURT: So Dr. Hofeller suggests no interest in an inaccurate census.

MR. DURAISWAMY: Well, he does suggest -- I wouldn't go that far but --

THE COURT: Here's why I -- let me make this before I

even let you answer the first question. Because among the things that I'm thinking about is I did rule in your favor on the enumeration clause, right, based on a theory, based on a theory that the Government either didn't care about how much this was going to harm the census, or I said even possibly knew that it would and -- excuse me. Either they knew that it would and didn't care, or they were attempting to do it.

And so now you partially seem to be basing your argument on a theory that doesn't really go to that. Does that then -- and I know I'm completely getting you off track now, but it's a question I have. Does that in some way take away from the enumeration clause argument? Because now Dr. Hofeller isn't suggesting that this is reducing immigrant counting such that it harms the census. And it just seems like now -- it just goes back to my original point that it's just a completely different theory accomplishing different things.

MR. DURAISWAMY: Your Honor, I respectfully disagree. He's not addressing that issue at all. He's not addressing the question of whether it would harm response rates or not harm response rates, but the phenomenon that he's identifying is entirely consistent with the phenomenon of excluding people from the initial count. All he's saying is that even if -- essentially, what he's saying is that even if they're counted, they can then be excluded at the reapportionment and redistricting phase of the process, such that they don't matter

for purposes of political representation, even if they're formally included in the census count.

THE COURT: But he's not suggesting that the census count will be inaccurate. He's not trying to do something that will make the census count inaccurate. He's simply, as I understand it, trying to create a new dataset, a different dataset, the CVAP dataset. And so it's just -- you're creating a new dataset, but you're not making the census inaccurate. You're not seeking to make the census inaccurate.

So if you're now saying that that was what Ross was attempting to do, that he's following Dr. Hofeller -- and maybe that's not what you're saying, but if you are, again, it just seems like a completely different theory.

MR. DURAISWAMY: Let me take another crack at trying to explain this.

THE COURT: Please.

MR. DURAISWAMY: There are two ways in which you can effectively exclude noncitizens or Latinos from the reapportionment and redistricting process, and if you do that, the net effect, which, as the Court itself found, is that there will be reduced political representation in areas with large numbers of Latinos and noncitizens.

The two ways that you can do that are, one, you can just not count them at all, which is the effect that the citizenship question will have on the census --

THE COURT: That's theory number one. That's the trial theory.

MR. DURAISWAMY: All the evidence that we presented in the context of standing speaks to that.

The other way is they are counted, but then they don't matter because then they're excluded from the population base when you do reapportionment and redistricting --

THE COURT: But under that theory, is the census still accurate?

MR. DURAISWAMY: I'm not sure I follow the Court's question.

THE COURT: You're saying under theory number one, right -- and I'm referring to them as theories; you're referring to them as something else. But under theory number one, you're just not counting them, right?

MR. DURAISWAMY: Yes.

THE COURT: And so under that theory, the census is inaccurate.

MR. DURAISWAMY: Correct.

THE COURT: Okay. Under what I'm now referring to as plaintiffs' theory number two, you're saying, no, we're going to do the count. The only thing the citizenship question accomplishes is just creating a new dataset within the count, such that the census, you're not suggesting, is inaccurate. You're just saying we want a new dataset within the census.

So at that point you're not questioning the accuracy of the census, which, again -- and so my point is that's why I just -- I'm struggling with whether or not these are two completely distinct theories, such that I have to consider them separately and say, all right, you either, preponderance of the evidence, established it here or you established it there. That's what I'm struggling with.

MR. DURAISWAMY: Here's the point, Your Honor. They're entirely complimentary. Dr. Hofeller is not expressing a view as to whether all noncitizens and Latinos should be counted, through the NRFU process or otherwise, in the first instance. He's just saying whoever we count, let's exclude them from the reapportionment and redistricting process.

So you could envision a scenario, Your Honor, where, say, in a particular community, 60 percent of the community is noncitizen, let's say, just as a hypothetical example. You enact a citizenship question, and 30 percent of them are not counted because of all the issues with the undercount that we talk about at trial.

THE COURT: Yep.

MR. DURAISWAMY: And then the other 30 percent are counted, but they're excluded, too, from the reapportionment and redistricting process based on how you choose to use the citizenship data that you have left.

So I want to be clear, and I don't know if the Court is

suggesting this or asking about this. Dr. Hofeller's theory does not at all depend on the accuracy of the census. In fact, his ultimate goal of reducing representation for noncitizens and Latinos is entirely complimentary with the undercount that you get from depressing response rates in the first instance. It just adds an additional what I would say is a sort of paper undercount or a formal undercount on top of the de facto undercount that you'd get, which is they've been counted, but now we've just sort of wiped them from the books when we do --

THE COURT: So is your ultimate theory now, as you sit here, that, ultimately, the decision-makers sort of adopted both theories?

MR. DURAISWAMY: Absolutely, Your Honor, that is absolutely correct because they both lead to the same place. They are both ways of excluding certain populations from political representation from the counts that are used for reapportionment and for redistricting, with the ultimate goal and the ultimate effect being a reduction in political representation for Latinos and noncitizens.

THE COURT: Okay.

MR. DURAISWAMY: Your Honor, the second piece of evidence that is new is a 2017 document generated by Dr. Hofeller, specifically in August 2017, that includes a paragraph asserting that a citizenship question must be added to the decennial because, based on court decisions, block level

citizenship data is necessary to enforce the VRA and, contrary to Dr. Hofeller's own conclusions in 2015, to ensure, allegedly, that the Latino community achieves full representation in redistricting. That paragraph then appeared verbatim in a draft version of the DOJ letter that Mr. Neuman provided to John Gore.

Now, the Government tries to dismiss the significance of these two new pieces of evidence by analyzing each document in the abstract, ignoring the broader context. But to understand the significance of this evidence, you have to look at it in the context of the broader fact record, and when you do that, it becomes clear why the new evidence pushes us well past the tipping point of establishing a discriminatory motive behind the citizenship question.

First, Dr. Hofeller and Mr. Neuman played a central role in initiating the decision by Secretary Ross and others to add a citizenship question. Second, they played a central role in developing the pretextual rationale, the cover story, for adding the question that Secretary Ross and the Commerce Department gave to DOJ to get them to request the question. And finally, based on the evidence that we've submitted, the newly discovered evidence, it is clear they were driven by discriminatory motives.

Let me walk through each of these points in turn.

First, the point that Dr. Hofeller and Mr. Neuman were

central to the decision to add the citizenship question. To underscore Mr. Neuman's significance, I think it's worth considering how the Government described him in its brief asserting privilege over documents that were shared with him. These are quotes from the brief. "Mr. Neuman is a subject-matter expert who worked on three censuses, served on a census advisory committee in the presidential transition team, and regularly advised Secretary Ross and other commerce officials, both during and after the transition, as a trusted advisor." This is from a declaration by James Uthmeier.

It goes on. "Mr. Neuman functioned as a trusted advisor and consultant to the agency. Here, because Mr. Neuman was operating as a trusted advisor to Commerce, he and Commerce were engaged in a common enterprise of seeking to improve the 2020 census."

So this shows just how central Mr. Neuman was to the issues related to the census during the transition, as well as, certainly in 2017, as an advisor to Secretary Ross and other senior political staff.

So Mr. Neuman was the transition staffer responsible for all issues related to the census, and Mr. Hofeller was the person who raised the issue of a citizenship question with Mr. Neuman during the transition. Mr. Neuman refers to him as a long-time friend of 30 years, someone who -- we know from the additional documents that were submitted with our reply brief,

someone with whom Mr. Neuman has been in communications about redistricting issues for years, for the past decade, even long before the Trump Administration.

After the transition, Mr. Neuman promptly discusses the citizenship question with Secretary Ross and his advisors early in the Trump Administration. We don't have all of the documents and communications that reflect those communications because the Government has withheld many of them as privileged. But at a minimum, we know the following:

Secretary Ross appears to have had multiple discussions with Mr. Neuman in March 2017. During those discussions, they discussed the citizenship question issue. Mr. Neuman testified to that at his deposition;

In April 2017, Mr. Neuman had multiple e-mail communications with Earl Comstock, the senior political staffer who was assisting Secretary Ross with the citizenship question at issue. Those e-mails include discussion of the deadline for notifying Congress about a change to the census questionnaire and apparent advice from Mr. Neuman on how to deal with potential objections regarding the impact on response rates. The documents, in particular, that I'm referring to are docket entry 162-4 and 162-6.

Interestingly, Mr. Neuman also sent to Mr. Comstock the *LULAC* case that is the 2006 court case cited in the DOJ letter about the supposed need for CVAP data for VRA enforcement

purposes.

Then in May, when Secretary Ross was frustrated about the lack of progress on his request to add the question, his chief of staff offered to discuss the issue again with Neuman, and Ross suggested that they, quote, stick him in there to fact find. That's at PX-83.

Also in May, in response to Secretary Ross's frustration about the lack of movement on his months-long request to add a citizenship question, Mr. Comstock responds and says "we have the Court cases to illustrate that DOJ has a legitimate need for the question to be included." That is particularly notable because, in April, we know that Mr. Neuman had sent the *LULAC* case to Comstock. That is one of the cases that, ultimately, the DOJ letter purports to rely on for its request.

All of this underscores his critical role in the process. So we know Mr. Neuman is at the center of the decision to add the citizenship question, and we know Mr. Hofeller is the 30 year lifelong friend of his who initiates this issue with him during the transition.

The second key point is that both of these individuals were central to the development of the pretextual rationale, that we didn't understand the extent of that until the newly-discovered evidence.

And remember, as the Court indicated in your findings of fact, by August of 2018, Secretary Ross and the Commerce

Department had intensified the pressure on DOJ to request the question. As part of this effort, James Uthmeier reached out to Mr. Neuman to discuss the issue and ultimately asked him to meet with John Gore. Mr. Neuman then met with John Gore, and they discussed the citizenship question, according to both of them.

We now know that Neuman provided Gore a draft letter from DOJ, requesting a citizenship question in order to support enforcement of the VRA based on John Gore's testimony. In other words, we know that now as a result of John Gore's congressional testimony.

A week later, after that meeting, Secretary Ross e-mails Peter Davidson, his general counsel at Commerce. Subject line, letter from DOJ. The text of the e-mail is what's the status. This is important because it shows that Secretary Ross understood that his Commerce Department was orchestrating the effort to get the letter from DOJ and that he understood that Mr. Neuman was the central player in that effort. Because Mr. Davidson responds "I'm on the phone with Mark Neuman right now; he is giving me a readout of his meeting last week; I can give you an update via phone if you like."

Given what we now know, that Mr. Neuman provided John Gore the letter at that meeting, the only reasonable inference from this is that Mr. Davidson is referring to the Neuman-Gore meeting and that Secretary Ross had already understood that

Mr. Neuman was going to have this meeting with DOJ to push forward the letter.

And now we know the origins of the pretextual rationale that went into that letter. It came from Mr. Hofeller. That is the second piece of newly-discovered evidence, the paragraph generated in August 2017 by Mr. Hofeller. Now, the Government seems to dismiss this as inconsequential, an inscrutable paragraph, they say.

In fact, this paragraph is the entire substance of the pretextual rationale that the Administration concocted, that federal court decisions purportedly require block level CVAP data to enforce the Voting Rights Act. That paragraph is then copied verbatim into the draft DOJ letter that Mr. Neuman provided to Mr. Gore. The Government says, well, so what; if you compare this draft letter to the final letter that is signed by Arthur Gary, they have nothing to do with each other.

Respectfully, Your Honor, I think the Government is asking the Court to be wilfully obtuse. Of course the documents are related. First, even if all you're looking at is the four corners of the document, both are draft letters from DOJ to the Commerce Department regarding a request for a citizenship question. In fact, if you look, the last line of the draft letter and the final letter are nearly identical.

Second and more importantly, it was the meeting with Neuman, where he provided the draft letter to Gore, that

started the entire process that culminated in the final letter, which we know that John Gore prepared, requesting that the Commerce Department add the citizenship question. So, obviously, this is the start of the process, and this is the culmination of the process. There's a clear connection in that regard.

Third, again, the central point in the Hofeller document, the Neuman letter, and the final letter from DOJ to the Commerce Department is exactly the same, that, as they assert, there must be a citizenship question on the census in order to obtain block level CVAP data to enforce the VRA. That is the sum and substance of the pretextual rationale and, as we know now and as the evidence strongly suggests, it originated with Dr. Hofeller.

So Dr. Hofeller and Mr. Neuman are the two people who are at the enter of both the initial decision to add a citizenship question and the effort to develop what the Court has already found was a pretextual rationale. Any evidence regarding their motivations is, therefore, very strong evidence of the intent behind the decision to add the question. And we now note that their motivations were, in fact, discriminatory because of the statements in the 2015 Hofeller paper.

Now, the Government makes a couple of points actually trying to deny that the Hofeller paper from 2015 reflects discriminatory motives. First, they say the paper doesn't

actually say using census citizenship data will disadvantage Hispanics. Hofeller expressly says it will advantage non-Hispanic whites. It follows logically that it disadvantages Hispanics, and he even shows how that will happen by looking at various legislative districts in Texas. He shows how the districts in which Hispanics constitute a significant percentage of the population, those districts in which they have a reasonable opportunity to elect a representative of their choice, would have to be consolidated into fewer districts. Why? Because the people in those districts who are noncitizens would effectively be taken out.

I think this underscores, Your Honor, my response to your earlier question about whether these are really two different theories. They really are not. They are both fundamentally about excluding noncitizens and Latinos from the population base that is used to apportion and allocate political representation in this country. And whether you go into those districts and you effectively take those people out by not counting them in the census or whether you count them in the census but then take them out anyway, after the fact, using the data that you have, identifying which of them is a citizen or not a citizen, both of them accomplish the very same purpose. What was that purpose? Dr. Hofeller says it quite explicitly in the conclusions of his paper, which was to advantage Republicans and non-Hispanics whites.

Now, I want to address the point that the Government makes about how if the Kobach evidence that the Court considered after trial could not be sufficient, then this could not possibly be sufficient. Two points on this.

First, this is different from the Kobach evidence because it shows that the very people at the center of Secretary Ross's decision-making circle and his efforts to develop a cover story for the decision were driven by a discriminatory motive. The Government has not, to my knowledge, referred to Kris Kobach as a trusted advisor to Secretary Ross on census issues, as the Administration transition staffer on census issues.

Secondly -- and this is also important and also goes, I think, to the questions the Court was asking earlier -- the evidence builds on the Kobach evidence to paint an even clearer picture. The Government wants you to compare the Hofeller and Neuman evidence to the Kobach evidence as they were just two entirely discreet possibilities that had nothing to do with each other. So if the Kobach evidence over here wasn't sufficient, than the Hofeller/Neuman evidence over here can't be sufficient --

THE COURT: No, I get it. I agree with you on that analysis. The question then becomes do I add them together. But I do agree with you that the core response to the defendants' point on that is that you're not asking me to say it's just one or it's just this. You're asking me to say, all

right, I almost got there just on Kobach; I should add this on top of that, and that takes me over. I think you're right as to that analysis.

MR. DURAISWAMY: Okay. That's exactly correct, Your Honor --

THE COURT: As to that framework, I'll say.

MR. DURAISWAMY: That's exactly correct, Your Honor. What I would add with respect to that is the reason that they compliment and build on each other is, again, because they reflect the same underlying discriminatory motive of reducing political representation and political power for Latinos and noncitizens.

I do think it is odd for the Government to be arguing -- and I know that they attempt to make argument suggesting that, well, the 2015 paper doesn't actually reflect any discriminatory intent. But they go on to say, essentially, even if it does, it's a different kind of discriminatory intent from the one that we talked about at trial. I just think it's not credible to say that somehow we have failed in showing that the decision to add a citizenship question was motivated by the effort to reduce political representation for Latinos, which is clearly actionable under the Fifth Amendment and the equal protections of the Fifth Amendment, simply because there was more than one way in which the addition of a citizenship question would reduce political representation for Latinos.

Finally, Your Honor, I want to briefly touch on the Christa Jones communications.

Actually, before I do that, one other point that I wanted to reiterate, which is the Court had asked if you really do have to find that only one of the two theories gets past the 50 percent threshold, is this relevant, and I would reiterate, again, it absolutely is relevant because evidence suggesting that the people who are involved in this decision had a desire and a goal to ultimately disadvantage Latinos and noncitizens in terms of political representation, whatever they were contemplating in terms of how to accomplish that objective, evidence that they had that objective is certainly probative and certainly strong evidence of the fact of why Secretary Ross and the other decision-makers moved forward, knowing that this would suppress response rates and lead to an undercount in these communities and would produce the same deleterious effect on political representation that Your Honor found in the context of the standing inquiry that you did.

THE COURT: I take your point on that.

MR. DURAISWAMY: Finally, Your Honor, I do want to speak to the Christa Jones communications, which, admittedly, we raised only in our reply brief, and that was only because the documents came to us literally the day before. I did have a chance to review what the Government said about them in their sur-reply brief.

I want to be clear about the reason that we put those documents in our reply brief and what we believe they show. What they show is the influence that Dr. Hofeller had with senior officials at the Commerce Department. This is not some guy who is just out there in the wilderness. He was deeply enmeshed with these senior officials within the Commerce Department who were involved in this. Ms. Jones herself was directly involved in the process of approving the revisions to the Q&A document that the Court may recall was discussed at length at trial. So she, too, is not a person who is just sort of a random individual within the Census Bureau.

Their sur-reply essentially argues that these communications by themselves don't show discriminatory intent. That's not our argument, so that's a bit of a straw man. But I do think the fact that their sur-reply focuses on that issue so much is illustrative of a core flaw with the way that the Government approaches the significance of the new evidence, which is to treat each of it as though it was an individual item that has to, in and of itself, prove discriminatory intent. It's like trying to understand what your television is showing you by moving from one pixel to the other pixel, rather than just taking a few steps back and seeing how the pixels fit together.

I think for the reasons that we articulated in our briefs and that I just articulated now, the way the newly-discovered

evidence fits within the framework of the existing fact record and everything else that we know, given the utter lack of any evidence regarding any other motive, and the fact that all of the prior evidence pointed to the same motive is abundantly clear that the reason that the Government added a citizenship question to the census was to reduce political representation for Latinos and noncitizens, in violation of the Equal Protection Clause.

THE COURT: Thank you, sir.

Ms. Hulett is up next, if I remember the order correctly. Good to see you again, Ms. Hulett.

ARGUMENT BY MS. HULETT FOR THE PLAINTIFFS

MS. HULETT: Good to see you again, Your Honor. I'm here to address the claim that we have under Section 1985, but before I do, I wanted to briefly respond to some of the questions about how the motive that we've been presenting is alternative theories. I want to give you a metaphor that we think addresses that.

Obviously, our position is the one that Mr. Duraiswamy described, which is that the initial motivation was exacerbated by the study that showed -- the effect of that was exacerbated by the study that showed that there was going to be an undercount.

So in our view, not only does the undercount and the analysis that the Census Bureau did explain why they moved

forward, but it explains why someone like Secretary Ross, who is in charge of the accuracy of the census, would ignore all unanimous scientific opinion that adding this question was going to jeopardize the census, make it more expensive, and that, indeed, there was another way to accomplish what he said his goal was.

So what we were thinking about is suppose that a Republican governor of a state wants to implement voter ID because he knows that when Latino voters go to the polls, fewer of them will have the kind of ID that the state is requiring. So he decides to implement that in order to infringe upon Latino voting rights. Now, there's a local Republican politician who agrees, who is running for office, and he wants to implement this same voter ID because he knows that Latino voters, who are the opposite party from him, are the most likely to be challenged. So he thinks it's a great idea. And then the attorney general does a study and realizes that putting out an announcement that the ID would be carefully scrutinized and violators would be prosecuted is going to deter naturalized citizens, most Latino, from even registering in the first place, from participating in the system at all. The attorney general brings that information to the Republican governor and the Republican governor says fine; all the better.

We think that's exactly what happened here. All the better. There will be fewer Latinos, fewer immigrant

communities participating, being represented in redistricting and in apportionment, and those communities will experience injury.

The other injuries that we presented at trial, that were all due to the undercount, were injuries that, true, Dr. Hofeller may not have anticipated. He may not have given two thought to funding, for example. It's nonetheless an injury that flowed from that initial discriminatory intent.

THE COURT: So I actually want to play with your metaphor for a second then. Would that not -- I guess your argument there would be that evidence of what the attorney general was doing would provide additional evidence of the motivation of the ultimate GOP party in your hypothetical. I take that to be the argument but --

MS. HULETT: Our argument is that when the governor hears that evidence --

THE COURT: Whoever, whoever we're making the decision-maker.

MS. HULETT: The decision-maker thinks fine.

THE COURT: That, yes, that then creates an additional -- it's additional evidence of the motive behind what he's doing.

MS. HULETT: Right.

THE COURT: But you would, would you not -- and maybe it's just a flaw in the hypothetical, which is fine, but would

you not say that those are two separate actions being challenged? Right? Like, you wouldn't say, okay, both of those things are discriminatory, so I'll find that thing number one violated the Equal Protection Clause. In the hypothetical you just suggested, you would bring two different challenges of two different things under two different theories.

MS. HULETT: No.

THE COURT: So that's what I'm suggesting is happening here.

MS. HULETT: No, we would not. We would bring the initial challenge to the voter ID requirement. The idea that people wouldn't register because they understood that it might present problems for them later is an exacerbating factor. Those two different actions, those two different injuries, the two different methods, they're all being confused with motive, with the initial motive, and they're not --

THE COURT: I get that. I actually think that was ultimately the most compelling argument Mr. Duraiswamy made on that point, that to the extent that you have this sort of second thing -- and this is, again, what I was giving you as the compelling part of your sort of metaphor is that to the extent that this second thing might strengthen the argument for, oh, look what they're trying to do, I get that. I get that. So that might be the strongest point you have on that, that it provides more evidence of what the ultimate motive was

for what they were doing. I take that point.

MS. HULETT: And it wouldn't require separate causes of action or separate theories any more than all the various challenges -- I'm sorry, the various voting procedures and voter ID requirements and elimination of certain early-voting procedures that were invalidated in *McCrory* presented. That was one case.

THE COURT: That's fair.

MS. HULETT: And the intent was one motive.

THE COURT: Understood.

MS. HULETT: I'm going to address for a few minutes the Section 1985 claim. If this Court reconsiders its intentional discrimination finding, we, of course, also request that it proceed to analyze whether defendants have conspired to deprive plaintiffs of their constitutional rights.

Now, on the one hand, it's quite correct to say that if there's no deprivation of constitutional rights, no intentional discrimination, there's no 1985 claim. The reverse, of course, is not true, and the totality of the facts that have emerged here demonstrate the intent behind the motive to add the citizenship question, also point to a group of officials and others who shared that single motive of furthering their interests by infringing -- partisan interests by infringing upon the constitutionally guaranteed rights of Latinos and noncitizens.

Now, I understand that the standard is different on summary judgment than it is after trial, but the same facts that demonstrated coordination among these actors, that this Court relied on to deny summary judgment, haven't changed. In fact, almost all of those facts, if not all, were found following trial. We believe it's significant that the Court's factual findings contain all of those discriminatory reasons for wanting to add the citizenship question, including Kobach's communication with Administration officials, the falsity of the voting rights rationale, and all of the other facts that Mr. Duraiswamy went through a few minutes ago.

What's different today is that the newly-discovered evidence further illuminates that coordination. Now, as we said, defendants' primary argument is that plaintiffs have failed to show a meeting of the minds, and, again, they rely on the idea that there's two separate motives, and I think, hopefully, we've covered here that we believe that there was one single primary motive. When the new evidence is viewed with what's in the trial record, you can see that the original anticipated political impact was exacerbated by the predicted undercount, but the intent remains the same.

I'd like to talk about three separate periods -- without rehashing this evidence, talk about three separate periods where the trial evidence and the new evidence dovetailed to illuminate the coordination.

The first period is early in 2017. This is the time of the transition team, the inauguration, and the early days of this Administration. Dr. Hofeller pressed Commerce Department to add the citizenship question through Neuman during this period, with the specific intent to advantage Republicans and whites by disadvantaging Latinos. His report quantified the loss of Latino-majority districts that would ensue. And it's significant that his discussions were with Neuman, his discussions about the political consequences, who was the point person on the transition team, who was the trusted advisor, later, to Ross on the census, who was a long-time friend of Hofeller, and with whom he discussed this issue on several occasions during the transition, and that Neuman eventually discussed the citizenship question with Ross and advisers multiple times.

Now, at the same time, Kobach, whose motives have already been established, was speaking to Trump, to Bannon, to Reince Priebus, to other top White House officials, at the very same time about the citizenship question. These conversations where all happening at the same time that Ross decided he wanted to ask the question, early in 2017. Bannon then arranges for Kobach and Ross to meet and speak, and this Court has already made findings about the events that took place in the spring of 2017, which I won't rehash here, but they include Ross's impatience with his staff that they have failed to find an

agency willing to make his request; his suggestion that they stick Neuman in there to fast find; Comstock's efforts with DOJ, DHS and, again, DOJ. I won't belabor those, but those happened right after these conversations in January and February.

This political strategy from Kobach and Hofeller and Neuman and this idea to add a citizenship question was a topic in the transition team that got passed to Commerce and carried out accordingly.

The second period I want to talk to, I want to skip over the spring and talk about August. There's a very interesting series of e-mails that take place from August 8th to August 11th. The e-mails are particularly relevant to the Government's current argument that a politically- and racially-discriminatory motive behind adding the question to create a redistricting database only results in a constitutional violation if the states choose to use CVAP for redistricting, in which case the proper defendants are the states that choose to do so.

On August 8th Secretary Ross is pushing Comstock to get it done, and he's offering to call Sessions to speed it up.

Next day, on August 9th, Comstock advises Secretary Ross that a memo is coming, and the issue might go to the Supreme Court, so we have to be careful.

The next day, on August 10th, Secretary Ross agrees they

do indeed have to be careful whether or not it goes to the Supreme Court.

Then on August 11th -- and this is at PX-607. This is an e-mail between Uthmeier, who is the Department of Commerce counsel, and Comstock, and Uthmeier says he wants to be thorough, given the issues and uncertainty around the exact questions being presented, and he attaches a draft legal memo, which, according to the privilege log, is legal memorandum, and I quote, "written by attorney for the purpose of providing legal advice to his client and to aid in Commerce's deliberations about whether or not to add a citizenship question to the census, prepared in anticipation of litigation following the decision."

In this e-mail attaching the legal memorandum, Uthmeier says he's got some new ideas on execution, and the sentence immediately following that says, "ultimately, we do not make the decision on how the data should be used for apportionment. That is for Congress or, possibly, the President to decide. I think that is our hook here."

So we don't have that memo prepared in anticipation of litigation, but we have the commerce attorney providing a legal hook. By hook then, it's logical to assume that he intended that Commerce would be insulated from liability because, quote, it's not Commerce diluting the Latino political representation -- I'm sorry, that's not a quote; that's me.

It's not Commerce diluting the Latino political representation; it's Congress or the President who decide to use the data.

It's logical to infer then that the liability the hook was supposed to protect Commerce from was the liability for dilution of Latino representation in apportionment.

Now, not coincidentally, August is also the time when the Hofeller paragraph was drafted on Hofeller's computer, a paragraph that demonstrates collaboration, a paragraph that ended up in what is being referred to now as the Neuman letter, the letter that eventually made its way to Gore through Neuman. And in that paragraph, as Mr. Duraiswamy talked about, with the Voting Rights Act enforcement rationale was created the very same month that Ross and his advisors were shopping for and found a rationale, the very same month that the Commerce attorneys were asserting themselves that the hook that would insulate them is that the damage wouldn't happen unless states chose to use the CVAP data as a population base.

The inference one can draw from the August events is that the motive was shared by Hofeller, Commerce attorneys, Ross, and his advisors.

The third period I want to talk about is moving forward briefly to September, when Uthmeier and Neuman are connected by Commerce general counsel Davidson, who recommends the connection he made because of his concern about contacting Kobach directly. Uthmeier also urged Neuman to meet with Gore,

which he did, and Neuman provided Gore with the -- as I said, with this being referred to as the draft letter, the same letter that contained, verbatim, the voting rights rationale that originated on Dr. Hofeller's computer.

Uthmeier also had a memorandum on the citizenship questions hand-delivered to Gore, along with a handwritten note. That memo was also withheld, so we don't know for sure whether or not it contained Uthmeier's hook insulating Commerce.

Mr. Gore informed committee staff that in the fall of 2017, he had discussions about the citizenship question and apportionment with Attorney General Jeff Sessions and, separately, with two lawyers from the Department of Commerce, Peter Davidson and James Uthmeier.

Now, as for Gore, the Government is correct, we have no direct proof as to whether Gore shared Hofeller's motive. But we have some inferences. We know that he received the Voting Rights Act rationale authored by the first man to quantify the loss of Latino political strength. We know that Gore was a voting rights defense lawyer prior to joining the DOJ and, presumably, had a basic understanding of reapportionment law and the effect of manipulating population bases. We know he had a conversation with Attorney General Sessions about the question of using total population or some other measure for apportionment. And we know that he had conversations with the

Commerce attorneys about the citizenship question and apportionment.

Whether Gore shared this motive, believed in it, approved of it or not, his role was to execute the plan, and he did.

These three time periods I've just covered contain an abundance of facts, connections, discussions regarding the citizenship question about legal hooks, about apportionment, and it is more than sufficient to conclude that Kobach and Hofeller shared/embraced explicit discriminatory motives; that Kobach shared his motives with Trump, with top White House officials; that Bannon facilitated the transmission of the motive to Ross through Kobach; and that Hofeller created the Voting Rights Act enforcement rationale to assist in covering the true motive; that the lawyers in the Commerce Department did the same, knowing plaintiffs would sue over the inevitable damage to their political representation; and that Commerce advisors conspired to put that cover in place; and Ross and Sessions, with Gore's help, carried out the false rationale to cover the true one.

Your Honor asked about a finding or a conclusion that you made after trial, and I think it was found at page 113 of ECF 15. At worst, if this was the one you were talking about, the Secretary intended to negatively affect the distributive accuracy of the census --

THE COURT: The enumeration clause point?

MS. HULETT: Yes. At best, the Secretary ignored clear evidence that the citizenship question would harm the distributive accuracy. Is that the one you were talking about?

THE COURT: I think my larger point -- I probably was not quoting myself accurately, which does happen sometimes. But I think just my larger point was if it's a new theory -- and you're suggesting that it's not, but if it was a new theory, does it also cause me to revisit the enumeration clause finding, which I made in your favor, because that was based on an argument that what was being done was to harm -- or at least being done without concern for whether it harms the accuracy of the census, whereas Dr. Hofeller does not seem to be -- that theory does not seem to be similarly focussed on harm being done to the census.

So while I may have misquoted myself, that's the point I was trying to make.

MS. HULETT: No, I'm suggesting that the same conclusion remains. Because, at best, the Secretary ignored clear evidence that the undercount caused by the citizenship would harm distributive accuracy and ignored clear evidence that the motive for including the question was to harm Latino representation. Or, at worst, he intended to negatively affect the distributive accuracy of the census after he learned that that's what happened.

So I don't think that it alters the ultimate finding in

that regard at all.

I want to talk very briefly about prejudice. I want to start by saying --

THE COURT: Just to make sure I'm keeping track, and so that we're not here until eight o'clock, I thought Mr. Duke was doing that.

MS. HULETT: I don't know.

THE COURT: Was I wrong about that?

MS. HULETT: Oh, I'm sorry. What did you say?

THE COURT: You said that you were about to turn to prejudice. My notes might be wrong. I thought Mr. Duke was going to cover prejudice.

MS. HULETT: No, Mr. Duke is going to cover the evidentiary issues.

THE COURT: I apologize.

MS. HULETT: This is only going to be a second.

THE COURT: No, go right ahead.

MS. HULETT: I want to start very briefly with the idea that the trial evidence shows that the 2010 census was the most accurate census recorded, that it had the smallest undercounts --

THE COURT: I'm sorry, which census? I apologize.

MS. HULETT: The 2010, the last one.

THE COURT: 2010. Okay.

MS. HULETT: That it had the smallest undercounts;

that the Census Bureau had been so diligent and so talented that they nearly got it perfectly right that time.

The Government, at the very last minute, decided to add a question, without testing and in the face of unanimous scientific evidence that it was going to mess up that record, that it was going -- this time we would not have what we had last time --

THE COURT: So I take it where you're going with this is that to the extent that we are approaching the deadline, it's a problem of their own making.

MS. HULETT: It is. We've always asked -- plaintiffs have always asked, and I think in all six of these cases, for expedited proceedings, and defendants have asked for delay. From the last-minute decision that I just spoke of, to the repeated request for delay in these proceedings and on appeal, the campaign of concealment that Mr. Duraiswamy described, and Mr. Uthmeier's failure to reveal that he and Neuman had anything to do with providing the Voting Rights Act rationale, what the Government requests now are equities that are difficult to sustain.

We do agree that it should proceed as quickly as possible because we do understand that there are real issues --

THE COURT: So would you agree, even if I am convinced that it's of their own making, that if I were to -- actually, that might be contradictory. Let me just say it like

this.

Would you agree that if I were to make the ruling you're asking for and if -- I mean, look, the Fourth Circuit still has to decide whether they'll remand or not regardless of what I say. But if they do, and then you come back for discovery, and Mr. Duraiswamy listed a number of things you'd like to do, that it is this side of the room that will bear the ultimate burden. As we get clearly past June, and we get closer and closer to October, like, it's this side of the room that will bear that burden. Whether it's increased expense or -- I don't even know how they get back in front of the Supreme Court in time for October.

MS. HULETT: That's why you would be surprised that our first preference, of course, is that we expeditiously move to block this question. It's our understanding that the Census Bureau was ready to proceed either way, and that should this Court decide to reconsider and enter an injunction based on the intent claim, then the Government can choose to either abide by the injunction or it can appeal. You're correct --

THE COURT: I would assume they would appeal.

MS. HULETT: You're correct that there's already an appeal on this issue in the Fourth Circuit, and the Fourth Circuit can decide to rule either way on that one.

But the one other thing I wanted to point out to you is that this question of intent has to be dealt with in some way,

either by you and the appellate court or by the appellate court alone, because what is in front of the Supreme Court right now, the APA and enumeration claims, are not -- except under the very narrowest circumstances that I could possibly imagine, are going to be dispositive of these claims.

THE COURT: I would assume -- I should have started with this, because I spent some time -- and I was the only one -- Mr. Gardner already knows what I'm going to say. That's why he's smiling. I was the only one who sort of suggested this the last time we were all together. I would assume if they affirm Judge Furman, this is moot.

MS. HULETT: Oh, yes.

THE COURT: Okay. So there's a very clear way in which --

MS. HULETT: Yes. That would be the best way, yes.

THE COURT: Well, for you, yes.

MS. HULETT: The Government suggests that there's something sort of inappropriate about us proceeding in both ways. We filed this motion after the appeal because that's when we discovered the evidence, when it was filed in New York, and there's nothing inappropriate about proceeding on two fronts here. And there's also nothing inappropriate --

THE COURT: Well, what about the idea that you had access to the information prior to my ruling?

MS. HULETT: We did not. That's my answer. We did

not. We did not have access to the information until it was filed in New York.

THE COURT: Okay. And what about -- and I'm just trying to anticipate because I don't actually let you ask each other questions. But what about the notion that you're effectively working with the plaintiff lawyers in New York? Did they have access to it?

MS. HULETT: The evidence came from a North Carolina case.

THE COURT: Right, I understand that.

MR. DUKE: I can address that.

MS. HULETT: Mr. Duke is signalling me that he would prefer to address that, so I'm going to pass on that.

THE COURT: That's fine. I'll wait until his turn and ask him that. That's fine.

MS. HULETT: Okay. So, Your Honor, just in closing, we request that should this Court determine that there is a basis on which to reverse itself and reconsider its ruling regarding intentional discrimination, that it also rule in our favor on the Section 1985 conspiracy claim because we believe that the evidence supporting the first claim also supports the idea that there was coordination that amounted to conspiracy, coordination that amounted to shared motive among the Government officials and others who pushed this plan forward.

THE COURT: All right.

MS. HULETT: Thank you.

THE COURT: Thank you.

ARGUMENT BY MR. DUKE ON BEHALF OF THE PLAINTIFFS

MR. DUKE: Thank you, Your Honor. Good to see you again.

THE COURT: Good to see you again.

MR. DUKE: I'd like to, as efficiently as possible, address some of the arguments that the Government made at the back end of their opposition brief. And in particular, the first one is the suggestion that somehow plaintiffs in this action could have discovered this evidence earlier or didn't act with reasonable diligence in bringing the newly-discovered evidence to the Court's attention. There is no basis for that suggestion.

As Ms. Hulett referred to, the documents were first produced in the North Carolina redistricting litigation. That resulted in a very large volume of documents, overall, being produced in a different litigation, involving different issues, and as we understand it, the focus in reviewing those documents, when they were first obtained in that case, was the issue -- the central issue in that case, and so the citizenship question was not immediately focussed on.

Plaintiffs' counsel in the New York case brought the newly-discovered evidence relating to the citizenship question, once they found it on the media that had been produced in the

North Carolina case, to Judge Furman's attention within one week of becoming aware of it.

We obtained the documents even later. The New York plaintiffs filed their motion on May 30th. We filed our 60(b) motion here on June 3rd. So we acted with as much dispatch as we possibly could as soon as we saw and understood the import of the documents, and we presented them to the Court.

With regard to reasonable diligence in the context of this case and discovery in this case, plaintiffs here, and in the cases generally, since the discovery was consolidated, but we had no reasonable ability to identify this source of evidence and pursue it in the context of the discovery that we were able to obtain. By the time of Mr. Neuman's deposition on October 28th of last year, Mr. Hofeller was deceased. He passed away two months earlier.

So even if we had thought, based on deposition testimony by Neuman, who was the first person to raise Hofeller's name, even if we had thought that Hofeller was a person of interest, there was no reason to think that a subpoena to his estate would have yielded anything. And, certainly, there was every reason to think that the Government would have opposed any attempt to obtain that third-party discovery.

The backdrop to Mr. Neuman's deposition, moreover, is that the Government really did everything at their disposal to hinder our ability to actually get access to him. In

September, the Government opposed our taking of Mr. Neuman's deposition at all. The plaintiffs finally got to take his deposition on, essentially, the last day of fact discovery.

Plaintiffs filed a motion to compel production of additional Neuman-related documents almost simultaneously in New York. That was unsuccessful. Defendants opposed that motion largely on the basis of claims that Mr. Neuman was protected by the deliberative process privilege as a trusted advisor to the Secretary, a representation or characterization of Mr. Neuman that the Government now wants to distance itself from in order to somehow disconnect Mr. Neuman from the circle of trust that embraced the discriminatory intent, this evidence in the documents we've now discovered.

The defendants, having blocked plaintiffs' follow-up inquiries, can hardly complain now that plaintiffs didn't go even further in trying to track down evidence that they we had been forwarded in pursuing in other respects.

With regard to the testimony of Mr. Neuman and whether he had actually misrepresented the truth or lied at his deposition, it's important to distinguish our posture here from the posture in New York. The motion that was made in New York was a motion for sanctions, with a higher standard with regard to what conduct they have to show in order to actually justify or warrant the imposition of sanctions on a witness.

We're not in that posture here. The question is only

whether we exercised reasonable diligence in pursuing all the evidence that we now have. And in that regard, if you take a step back and look at Mr. Neuman's testimony, you can't avoid the conclusion that he was, at best, evasive and misleading in important respects in the testimony that he gave.

Just a couple of examples. First of all, he deliberately portrayed Hofeller as concerned about drawing maps to maximize Latino representation, claiming that Hofeller would actually have said that block-level data was needed to avoid cheating Latinos out of representation. We now know, from the 2015 study that turns up in his files, that he believed exactly the opposite.

A second example is that Mr. Neuman testified that he was not part of --

THE COURT: Just to make sure I'm clear on the record, is there evidence that Neuman actually got a copy of that report, the 2015 document?

MR. DUKE: That's something we would like to ask him for sure.

THE COURT: As we sit here now.

MR. DUKE: As we sit here now, we don't have any testimony --

THE COURT: So I just wanted to make sure. So you're drawing an inference when you say that the existence of the document shows that Neuman is untruthful about what

Dr. Hofeller believed. I'm not saying it's not a strong inference. I'm just making it clear that it's an inference.

MR. DUKE: Mr. Neuman testified expressly about what Hofeller had said about cheating Latinos out of representation as a result of the lack of block-level data. He did not testify about the 2015 study. The 2015 study, juxtaposed with that testimony, shows that, in fact, Hofeller's subjective belief was the opposite.

THE COURT: I understand. I understand.

MR. DUKE: Another example there is Mr. Neuman testified that he was not part of the process of drafting the DOJ letter. We now know that, in fact, he was the source of the draft letter, which incorporated language that was found on Hofeller's computer, and that draft letter was actually delivered directly to Mr. Gore, who had it in front of him when he was drafting the letter that ultimately went from DOJ to the Department of Commerce, asking for the citizenship question.

So even if -- the Government now tries to distinguish the Neuman letter from the Gary letter and suggests that those are two completely distinct processes, and, therefore, Mr. Neuman's testimony that he wasn't part of the drafting of the DOJ letter was completely accurate. Mr. Gore actually had the Neuman letter in front of him, with him, in his possession when he drafted the DOJ letter. So, at best, it is disingenuous for Mr. Neuman to testify that he had no part in that when he

actually did provide a draft letter that effectively was -- at least the rationale that was articulated in that letter was incorporated into the ultimate DOJ letter.

And the contention that the Government makes, that plaintiffs' counsel taking Mr. Neuman's deposition somehow didn't pursue the testimony in that regard, is inaccurate. In fact, the example that's most prominently cited by the Government in their brief regarding the authorship of the letter, if you actually just go back a couple of pages in the deposition transcript, you see that the reason why counsel was saying I'm not asking you about who authored the letter is because -- actually, not because he didn't want to know the answer and didn't pursue it but, rather, because he had asked it before and Mr. Neuman had already testified that he didn't know. So it was merely a way of indicating to Mr. Neuman that the same question wasn't being asked again; it was a different question.

The upshot of all of this is that there was no way for plaintiffs here to foresee the potential to obtain this evidence. There was nothing in the record that suggested this evidence could come to light if only we poked in a couple of other areas.

And case law that the Government cites is simply not supportive. In fact, really, the case law in this regard is pretty clear that the failure to pursue discovery to the utmost

limit does not preclude a successful 60(b) motion. In fact, it requires actual knowledge of some specific evidence and at least some kind of action, consciously, by the party to forgo or decline to pursue it or to pursue some other angle. That's absolutely not the case here.

With regard to the authenticity of this evidence, Your Honor, plaintiffs have submitted two key components that establish the authenticity of these documents.

First, the transcript of Stephanie Hofeller's deposition. Stephanie Hofeller is Mr. Hofeller's daughter who provided -- obtained the documents -- or rather obtained a number of computer hard drives and thumb drives, various types of computer media, and provided those, pursuant to a subpoena, to the plaintiffs in the North Carolina case. She subsequently gave a deposition in the North Carolina case in which she authenticated the drives. She identified, she explained the whole process whereby she provided them to counsel. She identified the box that she had provided them in, and that testimony is admissible under Federal Rule of Evidence 804(b)(1) because it is the sworn testimony of an unavailable witness in a prior proceeding. And the defendants in the North Carolina case who cross-examined Ms. Hofeller were -- it was a governmental party with exactly the same motivation and incentive to cross-examine on the very issue of authenticity that the Government would have here --

THE COURT: I'm sorry, Ms. Hofeller is the unavailable witness or Dr. Hofeller?

MR. DUKE: Yes. She's a resident of Kentucky, and we have no reason to think that we could get her into --

THE COURT: Okay.

MR. DUKE: The defendants' efforts to distinguish the Fourth Circuit decisions that we cited in our brief, in particular, *Horne* and the *Supermarket of Marlinton* cases, is unavailing. The *Horne* case, in particular, is quite clear that in the Fourth Circuit it does not require privity between the party that cross-examined in the prior proceeding and the party that the evidence is offered against in the current proceeding. It only requires a showing that the context in which the testimony was given and cross-examined -- there was cross-examination by someone who had the same motivation and interest to pursue the issue that is relevant here.

THE COURT: Now, in the interest of fairness, I want to make sure Mr. Gardner has equal time, even if he doesn't need it or chooses not to use all of it. How much more do you have?

MR. DUKE: I have just -- really just a few more minutes, I think. I should be able to wrap up pretty quickly.

With regard to the other piece of this, the Matthews declaration picks up where Stephanie Hofeller leaves off. It provides the authentication of the actual documents that we've

submitted and picks up with a clean chain of custody from the package that Ms. Hofeller sent in to the actual documents. Effectively, what that declaration does is it establishes that these documents are, in fact, what we claim them to be. They establish where they came from, and there is no reason to think that Ms. Hofeller, who was Mr. Hofeller's daughter and actually went to his house and knew exactly where to go to find these, recognized these as her father's work files, that they are anything other than what we represent them to be.

With regard to the admissibility of these documents for the purpose of this motion, the critical point here is that these documents are actually -- they are admissible because they are -- the hearsay issue is not a bar to admitting these documents because these documents really are not being offered for the truth of their contents. We are not trying to take the 2015 study to prove that the citizenship question would, in fact, lead to the effects that Hofeller foresaw or predicted in that document. Rather, we are offering them as evidence of the belief, the state of mind, the subjective understanding that the citizenship question would facilitate the use of CVAP in redistricting, result in advantage to Republicans and non-Hispanic whites, to the detriment of Hispanics and other immigrants. So on that basis they are admissible under 8033.

Even if they were offered for the truth, at least the 2015 study is admissible as a statement against interests,

under 804(b)(3), because of the e-mail string that was found and is submitted at exhibit C to docket 162-3 -- it's exhibit 1 to Mr. Grant's declaration that was submitted with our motion -- which reflects that, in fact, this was something that Hofeller was concerned about getting out because he knew that it could potentially harm his ability to work as an expert witness if this kind of material got out and would be used --

THE COURT: I think I take your argument, subject to Mr. Gardner, perhaps, or Mr. Ehrlich convincing me otherwise, that it's probably not for the truth of the matter. I'm not sure I accept that, but I understand all of your arguments.

MR. DUKE: Okay. Finally, Your Honor, there's a congressional memo regarding Mr. Gore's testimony which contains a revelation that had not previously been known to the defendants. That document is also admissible as a congressional memorandum.

But more to the point, this is a document that -- there is only one fact that plaintiffs rely on this memo for, the fact that Mr. Gore got the draft letter, the draft Neuman letter directly from Mr. Neuman, and that's a fact that is reflected in the transcript that is quoted in that document, and the Government has this transcript, and it would be -- they don't actually say that this is not an accurate statement of Mr. Gore's testimony in that interview with Congress, and, instead, they just attack the admissibility of the document.

If there were any basis to attack the actual bona fides of the fact that it's being offered for, then they should produce the transcript showing that it's inaccurate.

Thank you.

THE COURT: Thank you.

Mr. Gardner, I presume?

MR. GARDNER: Thank you. Good afternoon.

THE COURT: Good afternoon, sir.

ARGUMENT BY MR. GARDNER FOR THE DEFENDANTS

MR. GARDNER: Good early evening. May it please the Court.

Several months ago, after almost a two-week trial, the Court rejected plaintiffs' equal protection and 1985 claims based on insufficient evidence. Now plaintiffs have come back to court, peddling an even more attenuated theory than the one this Court previously rejected, based on allegedly newly-discovered evidence.

Under plaintiffs' new theory, Latino Commerce Department advisor Mark Neuman, in cahoots with a deceased Republican-redistricting strategist, Thomas Hofeller, somehow orchestrated a plan to place a citizenship question on the census to disadvantage Latinos and noncitizens, and they've pulled this caper off, according to the plaintiffs, perhaps without even the Department of Justice or the Secretary himself being aware of that plan.

Plaintiffs' latest allegations in their Rule 60 motion fail at every level. First, this newly discovered evidence is immaterial and cannot change the results in this case. Plaintiffs have failed to diligently pursue the evidence they now claim is newly discovered. This evidence is inadmissible, and defendants would plainly be unjustly prejudiced by this late-filed attempt to raise new evidence.

We set forth in our opposition and our sur-reply all the many, many reasons this motion is fatally defective. What I'd like to do in the time I have is set forth some big-picture thoughts and then, obviously, answer any questions the Court may have.

So where I want to start off, I think, is where Mr. Duraiswamy started off, which is plaintiffs' theory of the case. To understand why plaintiffs' alleged newly-discovered evidence is immaterial and cannot change the result, I think it's helpful to start off with understanding what plaintiffs are alleging and what they aren't alleging.

Plaintiffs first allege that a paragraph, that appears in a letter that Mark Neuman gave to John Gore, allegedly came from Dr. Hofeller. Plaintiffs do not allege that that paragraph evidences discriminatory intent. Indeed, there's nothing on the face of this paragraph that suggests an intention to discriminate based on a protected class. Plaintiffs don't even attempt to argue that.

Second, plaintiffs do not provide any evidence that Gore actually relied upon this paragraph in drafting the Gary letter. Indeed, there are no similarities between this Neuman-drafted letter or this Neuman-contained draft and the Gary letter. Even Mr. Neuman testified to that fact in his deposition, that these were radically different documents.

THE COURT: To your first point -- and I'm sure you understand this is their argument, but I just want to hear you respond to it. To the extent that you say there's no discriminatory intent shown in that paragraph, the idea isn't that -- they're intentionally drafting that paragraph to have a pretext, arguably -- and I've already found this -- that covers up the discriminatory intent. So I don't understand how it gets you anywhere to say the paragraph itself doesn't have discriminatory animus. It was designed to not have it to cover up the actual animus.

MR. GARDNER: Well, so then we get to the 2015 unpublished study, which they allege reflects some sort of discriminatory animus, from Dr. Hofeller's files that somehow may or may not have been transmitted to Mr. Neuman. So let's talk about that 2015 study and explain why that does not evidence discriminatory intent in the least bit.

First of all, plaintiffs continuously mischaracterize the nature of this document, to the extent they can authenticate it, and I'll explain why they can't in a minute.

The best anyone can tell about this unpublished study is that it appears to be in connection with the *Evenwel* case in the Supreme Court. So let's back up a second and talk about what *Evenwel* was about.

In *Evenwel*, the petitioners argued that it was unconstitutional to rely upon total population for purposes of redistricting, and they argued that, well, wait a seconds; what if we used CVAP instead. The State of Texas came back and said, well, you know what, you could use CVAP, or you could use total population, but it's up to our prerogative. And then the United States came in with yet a third view.

This study, when read in context, explains why the use of CVAP would have problems and that there could be potential political opposition to the use of CVAP. It doesn't advocate for any particular result, and that's clear from the face of this. It makes the empirical observation that the use of CVAP for redistricting will advantage Republicans at the expense of Democrats. I don't think anyone in this room disagrees with that proposition. That is a factual observation. And then --

THE COURT: And you're saying it can't be inferred that he sees that as a positive thing, that this is just him making a nonpartisan -- just making an observation, just doing a study.

MR. GARDNER: I didn't mean to interrupt you. What I'm saying is that that's exactly what this is. It is a study

critiquing what appears to be the plaintiffs' position in the Supreme Court.

And by the way, if plaintiffs wanted this citizenship question on the census through Dr. Hofeller, then it certainly is odd that Dr. Hofeller himself, on the very last page of this study, expresses scepticism that the Supreme Court would support a citizenship question on the census. That's sort of a bizarre way to go about this cabal the plaintiffs are alleging. And that's on the very last page. I can grab it for you or if you don't have it.

THE COURT: I do have it in front of me.

MR. GARDNER: And the very last page, the last bullet point expresses the scepticism that the Supreme Court would support a citizenship question on the census.

So plaintiffs' theory that, one, this is an advocacy piece or, two, that it is inherently discriminatory is absolutely incorrect.

And how do we know it's not inherently discriminatory? We know that because the Supreme Court itself has allowed the use of CVAP by a state for redistricting. That's the *Burns versus Richardson* case in the Supreme Court.

We also know that in *Evenwel* itself, both Justices Alito and Justice Thomas kept open the possibility that, yes, CVAP could be used for redistricting.

So this notion that CVAP and redistricting by a state is

inherently discriminatory simply doesn't hold muster. In addition to the fact that Dr. Hofeller -- assuming this is his study, and there's reason to question what this study is -- is not actually even advocating that.

And that goes to the questions you asked my colleague right in the beginning, is isn't this a different theory? Of course it's a different theory. And why is it a different theory? Because we know that CVAP can be used for redistricting, consistent with the Constitution. But where it isn't used consistent with the Constitution, then plaintiffs have a cause of action against the state that improperly uses that CVAP information. That is a completely different theory than the use of a citizenship question on the decennial census, which may have the effect of reducing participation. Those are two completely different things, and that's exactly why plaintiffs are introducing an entirely new theory at the 11th hour.

THE COURT: But what about the argument that they make that to the extent they ultimately have the same ultimate motive and ultimate objective, that it's, in effect, the same theory seeking to accomplish the same goal, just two different ways of doing it, perhaps? Well, I'm not even sure they would concede they're two different ways. They sort of put them together.

MR. GARDNER: Sure. Well, again, they aren't two

different way to reach the same result because one can only be conducted by the states, a completely different actor than the federal government. In fact, if plaintiffs --

THE COURT: But they're saying that you need to add the citizenship question in order to accomplish that, so that they're assisting in that process, even if I accept your proposition.

MR. GARDNER: And that's why plaintiffs are dead wrong, because Mr. Neuman testified that Mr. Hofeller believed that accuracy was paramount for the decennial census, that it was absolutely critical to have accurate data. So how, on the one hand, can Mr. Hofeller be wanting accurate data and then, on the other hand, trying to undermine that for purposes of redistricting? That's why their theories really are at war with each other, Your Honor. They're not alternative theories. They're inconsistent theories. We cite to that testimony from Mr. Neuman on page 9 of docket 166.

So these aren't complimentary theories in the least bit. They are at war with each other.

THE COURT: But both of them, ultimately, suggest that adding the citizenship question would have the ultimate effect of reducing Hispanic and noncitizen political power. Do you disagree with that?

MR. GARDNER: I don't think that Dr. Hofeller's study bears the weight of that conclusion. He isn't saying that at

all. He's making the empirical observation that the use of CVAP data will advantage Republicans at the expense of Democrats, but he's not advocating for that result.

THE COURT: Well, first, he says "without a question on citizenship being included" -- I'm sure you've read it -- "on the 2020 decennial census questionnaire, CVAP is functionally unworkable."

MR. GARDNER: Correct.

THE COURT: And then says "a switch to the use of CVAP as the redistricting-population base would be advantageous to Republicans and non-Hispanic whites."

MR. GARDNER: And then proceeds to say but he does not believe that including a citizenship question on the decennial census would be practical because it would not be supported by the Supreme Court --

THE COURT: Well, he says the chances of a mandate seeking to add it are not high.

MR. GARDNER: Yes, correct. But, again, I think we go back to the notion that none of this is advocacy. It is, again, an analysis in the context of the *Evenwel* briefing and the petitioner's arguments that CVAP, through the ACS, should be the constitutionally appropriate way to conduct redistricting. I think in that context, there's nothing at all inherently discriminatory about this. He's evaluating the petitioner's arguments.

Beyond that fact though, there is no evidence, Your Honor, none, that this 2015 study from Dr. Hofeller has been made known to anyone inside or outside the federal government. This unpublished study, which no one argues has ever seen the light of day, there was no evidence that this was shared with Mr. Neuman. There's no evidence that this sentiment was shared with Mr. Neuman. There's no evidence that this document was ever shared with anyone inside or outside the federal government.

Frankly, Your Honor, given how broad plaintiffs' discovery requests were in this case and the other two cases, if the Commerce Department, the Census Bureau, or the Department of Justice had Dr. Hofeller's study in its files, I am very confident that that would have been produced in this case.

THE COURT: But do you disagree with the notion that the fact that the creation of the pretext -- and I don't know if you assume this to be true or not -- but that the creation of the pretext seems to have been at least partially done by Dr. Hofeller, as seen by the 2017 paragraph -- and you might not accept that, but accept it for the moment -- that that suggests or at least raises the inference that he's involved enough in this process to suggest that his views, as articulated in the survey or this document, did, in fact, reach Mr. Neuman, who's intimately involved with the decision-making

process, reporting to Secretary Ross?

MR. GARDNER: I don't at all.

THE COURT: I said a lot there, so you'll have to tell me which part you disagree with.

MR. GARDNER: And I'm going to try to break up each of those things.

THE COURT: I recognize I said a lot there.

MR. GARDNER: I think the problem with trying to obtain these disparate files from a dead redistricting expert is that plaintiffs have no basis to know what these files are. So one possibility is that there was a draft letter out there created by someone, and Dr. Hofeller extracted a paragraph, and it's in his files. Another possibility is someone sent him the paragraph. A third possibility is he prepared the paragraph and sent it to someone else. The problem is there's no --

THE COURT: But aren't those all the kind of things that might make me say, you know what, they've raised a substantial issue here; it was on his computer; Fourth Circuit, if you'll be so kind -- I can't tell them what to do -- send it back so I can have them do some discovery, and maybe we can figure out what was going on here.

MR. GARDNER: There's no need to, and let me explain why. There is no dispute that whatever the relationship is between this paragraph and what I will call the Neuman letter, there is no tether between those things and the Gary letter.

Plaintiffs say in their reply brief that they cannot figure out --

THE COURT: I may or may not look at this differently than plaintiffs, but for me, the import of that in this case isn't establishing that there was a pretext, such that you say, oh, well, if it didn't get into the Gary letter, then who cares. I've already found it's a pretext, so that part of it doesn't matter to me as much.

It's more that it indicates that he's involved enough -- Dr. Hofeller is involved enough that this isn't just some random person on the street who had this document in his file. It's somebody who was actually working with Mr. Neuman, provided this paragraph that made it into that letter. Doesn't that at least suggest that Dr. Hofeller is someone who we should say, oh, if he's creating this document, I can infer that this document was part of the process, part of the decision-making tree?

MR. GARDNER: I resist the proposition that Dr. Hofeller had any involvement in the process. But let's assume for purposes of discussion that that's correct, that he drafted a paragraph and that paragraph appeared in a draft letter that Mr. Neuman had in his possession. That tells the Court nothing about the key issue in this case, which is what was the Secretary's intention? What was his motivating purpose in deciding to reinstate a citizenship question?

So that fact, even considered in the totality, does not move the needle one iota, and the reason it doesn't is this massive assumptive leap that somehow there is some motivation from Dr. Hofeller that can be derived from this unpublished 2015 study and this inscrutable 2017 paragraph that, on its face, is not discriminatory.

So let's assume that Dr. Hofeller was involved in preparing a paragraph, to which we would say "and what?" There's no tether --

THE COURT: I guess just to get what their response would be, the "what," I presume, would be that it seals or connects the dots, to use language I used in my opinion, between Hofeller and Neuman, such that then when I go back and say, well, do I think, should I consider that Dr. Hofeller created this survey, this document, did it get to Mr. Neuman? Did it not? Did it get to the Secretary? Well, if his pretext paragraph did, perhaps I can assume that his earlier document did.

MR. GARDNER: But again, going back to it, even if you assume this 2015 unpublished study did, so what. It doesn't evidence discriminatory intent.

THE COURT: I understand your argument on that point.

MR. GARDNER: But more fundamentally, there's no evidence in the record that Mr. Neuman shares Dr. Hofeller's views.

And one thing I want to back up and mention, because my colleague said this, is --

THE COURT: Well, he included it in his paragraph in his letter. So he at least shared that paragraph.

MR. GARDNER: He shared a paragraph, which, on its face, is not discriminatory and does not evidence discriminatory intent. In fact, it is an inscrutable paragraph.

THE COURT: I have found that it was pretext for something else. So what the something else is what we're still deciding.

MR. GARDNER: I understand that, Your Honor, but even if you decide it's a pretext for something else, it is not obvious to me in any way, shape, or form that this paragraph, either standing alone or in connection with other evidence, supports the proposition that that paragraph evidences discriminatory intent. I think that's the key here.

But to back up one more step to respond to one of my colleague's statements, she mentioned the fact that, well, Mr. Neuman spoke to Dr. Hofeller during the transition. They're absolutely correct, and what did the transcript say? Mr. Neuman said that Dr. Hofeller was flagging for him the citizenship question because he knew people in Congress would be raising it. And Mr. Neuman testified that one of the reasons he needed to know that was, being on the transition

team, he had to flag for the Secretary and other decision-makers, look, here are the types of things Congress is going to be considering; and you need to be aware of it.

Mr. Neuman never says anywhere in his deposition, to my recollection, that Dr. Hofeller was advocating for the inclusion of a citizenship question. He simply flagged it as an issue that was going to come up. And in fact, we know it did come up because there was draft legislation about a citizenship question. It didn't go anywhere, but that's the point.

So again, plaintiffs make a ton of assumptions about intent and chains that simply don't bear the weight that they are alleging.

The other point I do want to make, Your Honor, is, you know, plaintiffs allegation of Neuman's new-found centrality of this case sort of flies in the face of how this entire case has been litigated. I do think it is worth noting that plaintiffs designated none, and I mean none of Mr. Neuman's deposition testimony for trial. I think the reason for that is fairly obvious, because if you were to read that entire deposition, on the whole, it really does not support any of their claims. Mr. Neuman testifies he's a Latino who is concerned about diluting voting rights. He cares about one person, one vote.

So to the extent that Dr. Hofeller may have had some separate intention, how that is then imputed to Mr. Neuman and

then, apparently, to Mr. Gore and then to Secretary Ross, whether you view that as a cat's paw theory or some other transferred-intent theory under the Equal Protection Clause, there's just no legal support for that chain of flour different individuals with four different documents.

One other point that I want to make here. If Secretary Ross's true intent was to use CVAP for purposes of redistricting, he didn't need to rely upon an unpublished study did from a deceased Republican expert to do so. The administrative record itself reflects that the State of Louisiana expressed its support for a citizenship question, in part, because it wanted to use CVAP for redistricting. That's in evidence in this case. It's DX-1 at AR-1079. And I have copies that I can bring up if the Court would like to see it.

THE COURT: Sure. Or you can put it on the screen if that's easier.

MR. GARDNER: I can do that too.

THE COURT: Well, you'd have to open it up first.

MR. GARDNER: I can do both, how about that?

THE COURT: Whichever is easiest.

MR. GARDNER: I'll use the screen.

So, Your Honor, this is a February 8th letter. And to give you some context, at this time numerous stakeholders on both sides of the aisle were expressing their views about whether a citizenship question should or should not be

included. Here, the attorney general of the State of Louisiana expresses his view -- let me see if I can just -- and let me also give a copy to plaintiffs' counsel -- expresses his view that CVAP would be useful for purposes of state-level redistricting.

In fact, the administrative record further reflects that Secretary Ross met with the attorney general of Louisiana and his staff on March 12, 2018, again, in connection with all of those stakeholder meetings, and the Louisiana attorney general reiterated his view that the use of CVAP would be useful for redistricting.

That's, again, DX-1 at AR-1203. I'll just put that on the screen very quickly.

Again, this is the stakeholder summaries, and here, "AG Landry noted that states have a lot of flexibility when it comes to redistricting and having accurate data about citizen voting-age population would better inform the state legislatures charged with carrying out the task of redistricting."

We identified all of these stakeholder meetings in our post-trial proposed findings of fact beginning at paragraph 375.

Secretary Ross didn't adopt Louisiana's rationale in deciding to reinstate the citizenship question on the census. He accepted the rationale in the Gary letter.

Indeed, plaintiffs have never in this case argued that Secretary Ross adopted the views set forth publicly and directly by the State of Louisiana and others, which are in the administrative record. It would be implausible then for Secretary Ross to affirmatively have chosen not to accept the views of Louisiana yet secretly adopt essentially the same views reflected in an unpublished study that there is no evidence the secretary has ever seen or been aware of.

Now, in a passing footnote, plaintiffs argue in their moving brief that there are similarities between the 2015 Hofeller study and the Gary letter, and, therefore, the Gary letter must have utilized the rationale and the discriminatory intent alleged to be reflected in that Hofeller letter. They appear to abandon that argument in their reply brief, but as I heard plaintiffs today, they seem to be resurrecting it. So let me address this head on.

As we note in our opposition, to the extent these facile comparisons of similarities between documents are relevant at all, the fact is the Gary letter bears a much closer resemblance to the amicus briefs in the *Evenwel* case than this draft Neuman letter or this 2015 study. And that shouldn't be surprising to anyone in this room, because while reasonable people may disagree about the consequences, few people, I think, disagree that there are limitations in the ACS. Those limitations are well known, and they were articulated by the

former census directors in the amicus brief, the DNC in an amicus brief, even the United States in the last Administration. And this view about the limitations of the ACS are rampant throughout publications, in literature, as well as case law. So the notion that, well, DOJ's view must have come from this unpublished study I just don't think is consistent with the actual state of reality.

And here's the rub. Under plaintiffs' theory, if we're doing a facile matching game between documents, I don't think anyone on the other side would argue that the DNC and the former census directors have an interest in depressing minority participation in voting. So if we're matching up motive and intent with similarities, their theory has to fail.

At bottom, Your Honor, plaintiffs are pressing an even more attenuated theory of equal protection in 1985 than the Court rejected after trial. At trial, this Court credited Kris Kobach as having invidious discriminatory intent, having spoken to his Secretary, but that intent could not be transferred to the Secretary. Now plaintiffs want to go an even more remote route to establish the Secretary's intent.

THE COURT: But just to be clear, right, I mean, this goes to -- I think it was Mr. Duraiswamy; it might have been Ms. Hulett -- sort of the pixel theory. I'm not looking at any one pixel. I'm looking at the entire screen here.

If, if -- and this is still an if -- but if I accept that

both are evidence of discriminatory intent, then why don't I get to then say, all right, so the Kobach connection got me to 49 percent; now they're providing me with additional -- and they're saying additional, you're saying separate, and I'll have to decide that -- additional evidence of discriminatory intent, that that's now enough? It's not that I have to believe one or believe the other. That's now enough to put me over the 50 percent preponderance of the evidence threshold.

MR. GARDNER: Well, because, Your Honor, it's an even more attenuated theory of how this intent gets to the Secretary --

THE COURT: But in terms of more attenuated, that's fine, if that argument succeeds, if I say I have to look at it by itself. If I'm looking at it in combination, and I say, okay, this was really strong but not strong enough -- even if I say this is weaker, but it's still more evidence, then it might be enough to get me over preponderance of the evidence.

MR. GARDNER: I understand what the Court is asking, and I think my response to that is I resist the proposition that this even is evidence of intent, period, hard stop. But even if it were evidence, it is such weak evidence that even looked at in combination with what the Court did find, it's simply not enough to move the needle to a preponderance of the evidence.

THE COURT: But what evidence in the record is there

for Secretary Ross's decision, other than the VRA pretext that I've rejected and now what, for the sake of your argument, I'll say the two -- we'll call them two separate theories that plaintiff has put forth? Is there any other rationale?

MR. GARDNER: The rationale that the Government believes is reflected in the record is that which is in the March memo from the Secretary, which I know this Court has --

THE COURT: Which I have rejected.

MR. GARDNER: Yeah. I think to really take a step back, Your Honor, there's a bit of -- artificiality isn't the right word here, but the Supreme Court is deciding within the week whether or not this is a pretext, right? That is the central issue that's before the Supreme Court. So I'm not here to relitigate that issue with you, obviously.

THE COURT: No, I know.

MR. GARDNER: But to my colleague's statement that the Supreme Court's decision will not have any impact in this case, I don't see that --

THE COURT: Well, I think I push back on that. It depends on exactly what they say, obviously. But as I sit here now, right, a week from now, we'll see, and maybe I just write you all a note saying we're done here. But as I sit here now, this Court has rejected, and others have rejected, VRA as a pretext.

And so what I'm asking you is other than the now, we'll

say two, both, for the sake of argument, discriminatory-based reasons, is there anything else in the record for me to look at and say, well, okay, it could still be this, and so they still haven't proved it by a preponderance of the evidence?

MR. GARDNER: Let me answer the question this way. There's no evidence either way, if you accept the notion that it's a pretext, that there is an additional reason out there. This Court previously found that. You concluded it was a pretext, but you couldn't figure out what the real reason was. Obviously, we disagree with that, but I'm not here to fight you on that. My only point, though, is that even with this newly-discovered evidence, that isn't evidence of a discriminatory intent. It simply just does not move that needle, either collectively or when separately viewed.

Unless the Court has any more questions about the equal protection component, I wanted to very briefly talk about the LUPE plaintiffs' 1985 claim.

THE COURT: Sure.

MR. GARDNER: At the outset, it's notable that unlike the equal protection claim, LUPE hasn't appealed the 1985 claim, and I think this strongly suggests that even the LUPE plaintiffs do not have confidence in this claim, a claim that no --

THE COURT: I'll admit, as I was sitting here, I forgot that point.

MR. GARDNER: Yeah. No other plaintiff has pressed this 1985 theory other than the LUPE plaintiffs.

It also bears repeating or emphasizing, Your Honor, that the Kravitz plaintiffs haven't taken an appeal at all. They're responding to the Government's appeal, but they haven't appealed the equal protection claim either.

I think there's a good reason why plaintiffs have not appealed the 1985 claim, and that's because there is very little legal support for a 1985 claim in this context. And again, I'm not here to relitigate any issue that this Court has already decided, but I do want to flag that. I think there's some significance there.

As plaintiffs have acknowledged and this Court has found, this 1985 claim really does rise and fall largely with the determination of the equal protection claim. So I'm not going to go back over those things, but I do want to make a few additional points briefly.

First, I recognize plaintiffs are making alternative theories, but to the extent that they are pressing a cat's paw theory, that theory, a theory where Ross might have been an unwitting dupe, that theory is fundamentally inconsistent with a meeting-of-the-minds conspiracy. So I just wanted to flag that.

Second, plaintiffs attempt to define discriminatory intent at a very high level of generality, and that attempt

makes their claim self-defeating because, under 1985, the conspiracy must deprive the plaintiff of the equal enjoyment of rights secured by the law to all. But the rights the plaintiffs allege are subject to deprivation differ wildly among alleged conspirators.

As you already heard from the plaintiffs, and I think we agree with this, the way they characterize the different motives here do matter. For example, Kobach and the executive branch's alleged objectives, according to the plaintiffs, would mean that states with a large number of immigrants would get less representation in Congress by apportionment because of a decline in census participation.

But Neuman and Hofeller, according to the plaintiffs' alleged objectives concerning redistricting, would mean that immigrants simply have a more difficult time electing the same number of representatives they would have in an accurate census. In other words, the state does not need to lose a representative under plaintiffs' claimed Hofeller-Neuman theory.

More fundamentally, a conspiracy requires the suffering of an injury as a consequence of an overt act committed by the defendants in connection with the conspiracy. But under plaintiffs' Hofeller-Neuman theory, their objective only comes to fruition if a state chooses to use CVAP in a discriminatory manner in the context of redistricting. Therefore, plaintiffs

cannot establish a conspiracy under their newfound theory.

I next want to turn to the issue of whether this is newly-discovered evidence and diligence.

I understand what plaintiffs are saying, that they apparently had no awareness of this newly-discovered evidence that their own declarant says was discovered on March 13th, which is weeks before this Court entered judgment on April 5th. Obviously, throughout the course of discovery, we had been communicating with all the plaintiffs groups, and we know, because they tell us, they'd been communicating together. Perhaps those communications have stopped.

As an officer of the court, I take them at their word, but the fact is that this information was known to at least one of the plaintiffs' groups several months ago, and it wasn't acted on promptly. It certainly wasn't acted on before the Supreme Court held its oral arguments or before this Court entered its final judgment.

But even if that tardiness could be overlooked, plaintiffs have still failed to demonstrate diligence. Plaintiffs claim that they lacked the ability to discover Hofeller's significant role in promoting the addition of a citizenship question because Neuman misrepresented the extent of Dr. Hofeller's role. Of course, that assertion is only true if the Court accepts the following two propositions: One, that Dr. Hofeller actually had a significant role in the Secretary's

decision-making process, an assumption that has not been supported by any evidence; and, (B), that Neuman was aware of that role at the time of his deposition and did not provide accurate testimony to the questions posed. But plaintiffs have failed to establish either of those predicates.

So let's back up and talk about what was known during discovery. As reflected in exhibit 3 to plaintiffs' reply brief, on October 23, 2018, DOJ sent an e-mail to the plaintiffs' counsel expressly pointing out that the draft Neuman letter was being produced and that this came from John Gore and was received in hard copy. That is in the e-mail that is attached as exhibit 3. That e-mail was before John Gore's deposition, which was October 26th. Gore was never asked what documents, if any, Neuman provided him, and plaintiffs never showed Gore a copy of the Neuman letter.

Now, Neuman, in response to a separate Rule 45 subpoena, also produced the same copy of the draft letter before his deposition on October 28th, and during that deposition, plaintiffs did ask him about it. That's exhibit 18 to that deposition.

Now, during Neuman's deposition, plaintiffs' counsel asked Neuman what materials he provided to Gore. Neuman testified as to what he mainly provided Gore, but counsel never followed up and asked is that everything; is there anything else.

Now, plaintiffs argue in their reply that the fact that Neuman provided the draft to Gore was critical, but they do not contend, nor could they, that they were deprived of the opportunity to ask Neuman, or Gore for that matter, about this precise issue at their depositions, and this lack of diligence, Your Honor, is what defeats, among many other reasons, their Rule 60 motion.

Now, in addition, while Neuman testified that he was not entirely sure about the origins of that letter -- that's absolutely correct -- plaintiffs' counsel expressly told him that he did not want to know from Neuman who authored the letter. And that's at deposition page 281.

Neuman also testified at length, Your Honor -- and this is undisputed -- about his conversations with Dr. Hofeller about the citizenship question, as well as his conversations about redistricting and the census.

Now, when confronted with these shortcomings in their discovery tactics, plaintiffs attempt to shift the blame, and they try to shift the blame to Neuman, that he provided misleading testimony that deprived them of finding this evidence that they claim they could not have otherwise discovered.

Specifically, plaintiffs allege that Neuman misled plaintiffs about the following two propositions: Hofeller's views about the impact of a citizenship question and, second,

about his and Hofeller's involvement in developing the rationale for adding a citizenship question on the census.

As to the first conversation, there is no evidence that Neuman misstated his conversation with Dr. Hofeller about Hofeller's views. The fact that Hofeller allegedly prepared an unpublished study in 2015, concluding the views of CVAP for redistricting would advantage Republicans over Democrats, is a complete red herring as there's no evidence that Neuman was aware of that unpublished study or the unpublished study was ever discussed with him, or that any views reflected in there, to the extent there are views and it's not an empirical observation, were ever shared with Mr. Neuman. So the only way this Court can conclude that Mr. Neuman misled the plaintiffs is to conclude that there's a conversation that they have not proven exists.

As to the contention that Neuman gave misleading testimony about his and Dr. Hofeller's role in developing the rationale for the citizenship question, plaintiffs' evidence-free argument assumes the very fact that they claim is newly discovered. Plaintiffs' argument necessarily assumes that, prior to their receipt of the Neuman letter, the DOJ had not been considering a citizenship question or whether block-level data would be useful for CVRA cases.

And plaintiffs further assume that the Neuman draft played a role in DOJ's letter. Plaintiffs provide no factual

basis for that argument. And as I mentioned earlier, even a cursory comparison refutes that notion.

THE COURT: In terms of the ultimate reasonable -- the question of whether they used reasonable diligence here, am I remembering correctly that Mr. Neuman's -- and I might have this wrong; that's why I'm asking -- that Mr. Neuman's deposition was taken sort of at the very end of what was a very sort of tight scheduling order for discovery?

MR. GARDNER: He was taken, I believe, on the last day of discovery, but my recollection is that there was almost a full seven hours devoted to his deposition. It went fairly late into the night.

And, look, if plaintiffs believed there was additional evidence out there, they could have sought to extend the discovery schedule. That is certainly not unheard of in civil litigation. They could have sought a Rule 45 subpoena. There are a number of mechanisms they could have used.

THE COURT: Sure. But to counsel's earlier point, we're not here on a motion for sanctions. We're just here on whether or not they used reasonable diligence to pursue this issue.

MR. GARDNER: Absolutely, Your Honor, and I'm not suggesting they are asking for sanctions. My point is --

THE COURT: No, my only point is just in terms of how into the weeds I'm getting on whether he specifically misled

them, as opposed to -- you know, look, they got his deposition on the last day of discovery. They probably wouldn't have been allowed to go much further than that even if they had tried.

MR. GARDNER: I'm simply responding to the plaintiffs' argument that they couldn't discover this because of the misleading testimony.

THE COURT: No, I get that. I get that.

MR. GARDNER: And my point is it's not misleading at all, and they had all the information they possibly could have wanted to pursue this kind of claim, and they chose not to because, again, it's an entirely new theory that --

THE COURT: I get that.

MR. GARDNER: You get all that.

Very briefly, I want to talk about the admissibility of this evidence. As we explained in our initial opposition, plaintiffs fail to authenticate any of the documents that allegedly came from Dr. Hofeller's files. In apparent recognition of that, they tried to make up for that deficiency by putting forward two documents, a deposition of the estranged daughter of Dr. Hofeller, Stephanie Hofeller, and a declaration from a computer forensic company, which I'll call the Matthews declaration.

As an initial matter, Stephanie Hofeller's deposition testimony is inadmissible. With all due respect to my colleague Mr. Duke, his argument in this regard is completely

at war with itself. He says, on the one hand, plaintiffs had no opportunity to discover this information in March because it's in a totally different case. But then, on the other hand, they argue, well, wait a second, this is admissible under 804(b)(1) because they're substantially similar.

Now, plaintiffs argue that, well, there doesn't need to be privity. We never argued that there was. Under *Horne*, though, the cases have to be substantially similar, such that another party would have similar motivations. As Mr. Duke himself concedes, these proceedings, one, challenging the inclusion of a citizenship question on the census and, two, challenging North Carolina state redistricting, could hardly be more different. Therefore, 804(b)(1), by its plain terms, cannot make this admissible. So that piece of evidence is gone.

But even if you were to accept that evidence, it still fails to establish authentication even with the Matthews declaration. Remember, at most, plaintiffs have established that the thumb drives and portable drives were found in the home of Dr. Hofeller. They've not established anything about the authenticity of what is on those thumb drives. All the Matthews declaration says is that his firm received, from Arnold and Porter on March 13th, certain external hard drives and the contents of those drives. But he cannot and doesn't purport to establish the authenticity of the contents of those

hard drives or who the authors of those documents were.

Similarly, all the estranged daughter of Dr. Hofeller can establish is that she found assorted hard drives and thumb drives in her father's home and that she sent them to Arnold and Porter on March 13th. That's on page 14 of her deposition. She testified that she could recognize a couple of the devices she found -- sorry, she testified that she could recognize a couple of the devices from when she was living with her parents but couldn't identify which ones. That's the deposition on page 24. And she acknowledges that she didn't spend a lot of time looking at her father's work files. That's at page 83 of her deposition. Nor did she provide any testimony, any testimony at all to explain how she would have been familiar with any of files on those thumb drives.

Indeed, I heard my colleague say they want discovery from Dr. Hofeller's colleague, Dale Oldham, because he was a partner and he may have relevant information. In fact, Stephanie Hofeller testified in her deposition that Mr. Oldham had taken one of the laptops from the house, and she couldn't say whether he had taken everything that belonged to him rather than Dr. Hofeller.

At the end of the day, plaintiffs bear the burden to show the authenticity of the documents that they're relying upon to support their claim of newly-discovered evidence. It is not a heavy burden, Your Honor, nor are we suggesting it is, but they

can't meet even that minimal burden of establishing authenticity. For that reason, the Court should not consider any of documents contained, allegedly, on Dr. Hofeller's thumb drives and portable hard drives.

Briefly, let me talk about the transcribed interviews of John Gore and Kris Kobach. I am not a witness to these proceedings, Your Honor, but I participated in John Gore's transcribed interview. These are not taken under oath, and the Government does not have access to these transcripts. I will represent to you that the House Oversight Committee refuses to give transcripts to anyone who has provided testimony, despite our repeated asking for them.

What they will allow you to do is go to the room where the interview took place to review the transcript, make any changes in the errata, and then you have to leave it behind. And that's exactly why the Department of Justice, after reviewing John Gore's transcript, sent a letter, that's exhibit H to our opposition, where we note the substantial number of material misstatements the majority staff made to that summarized transcript -- or the transcribed interview.

So when we're talking about 803(a)(3), factual findings from a legally authorized investigation, plaintiffs entirely ignore the second part of that rule, which is 803(8)(b), which requires that the source is trustworthy. Here, the Government has more than met its burden to show that these summaries are

not trustworthy based on the numerous misstatements made as reflected in our exhibits.

Now, with respect to Mr. Kobach's transcribed interview, DOJ does not have access to that transcript. We did not participate in that interview, and plaintiffs are mistaken when they claim that the White House has invoked Executive Privilege over Mr. Kobach's transcribed interview. That is just factually incorrect, Your Honor. So I have no way of knowing, sitting here today, whether that summary accurately reflects everything Mr. Kobach stated.

But I do know that given the substantial number of misstatements to Mr. Gore's summary, there's every reason to think that the majority staff has made similar misstatements here, certainly, enough to raise the inference of a lack of trustworthiness. But that's just the first level of hearsay.

Then there's the second level of hearsay, and I heard my colleague say that what they really want is not the summary but actually the transcription from Mr. Gore. There's two problems with that. One, Mr. Gore's transcript itself, they argue it is admissible under 801(d)(2)(B), claiming, without any support, that the Commerce Department has adopted Mr. Gore's statement in the transcribed interview that the Commerce Department has never seen. Now, plaintiffs don't explain how that manifestation has been demonstrated by the Commerce Department or how the Commerce Department would even know how or whether

Mr. Gore's statements are correct, because, again, they don't have a copy of that transcript. Accordingly, the Gore summary itself, the transcript itself, the second level of hearsay, is inadmissible.

And with Mr. Kobach, it's an even easier analysis. So they claim this testimony is admissible under Rule 804(b)(1), but the transcribed interview is not a trial, hearing, or lawful deposition. They aren't taken under oath. That oath is important because that is what gives the veneer of trustworthiness. And because this is not an under-oath trial, hearing, or deposition, plaintiffs cannot meet their burden of establishing a hearsay exception under 804(b)(1)(A).

Finally, Your Honor, and I appreciate the Court's indulgence, I just want to briefly talk about the unfair prejudice that would ensue should the Court grant plaintiffs' request for an indicative ruling.

First, permitting the alleged newly discovered documents into this case now would permit plaintiffs to dramatically change or shift their theory of the case. It would go from the inclusion of a citizenship question on the census for a differential undercount to the use of CVAP to disadvantage Democrats and Hispanics in the course of state redistricting.

Now, in their reply brief, plaintiffs disclaim relying upon a theory that the use of CVAP for redistricting is unconstitutional. That's at page 19 of their reply. But this

simply reenforces then, Your Honor, the irrelevance of this alleged newly-found evidence, which has nothing to do with the citizenship question itself.

Second, beyond just introducing a completely new theory of liability, granting plaintiffs' Rule 60 motion less than two weeks before the Census Bureau has to finalize the census forms would effectively bar appellate review.

Now, plaintiffs contend that there would be no prejudice to defendants because Dr. Abowd testified in the New York trial that with exceptional resources, the final date for locking down the content of the questionnaire is October 31, 2019. Plaintiffs are mistaken on multiple fronts here. First, the testimony that the Maryland plaintiffs cite to comes from the New York trial, and Judge Furman, having considered that testimony, correctly concluded that time is of the essence because the Census Bureau needs to finalize the 2020 questionnaire by June of this year. That's at 351 F. Supp. 3d 502. The pin cite is 517.

Second, plaintiffs grossly misconstrued Dr. Abowd's testimony. Dr. Abowd testified that under the current budget, changes to the paper questionnaire after June of 2019 would impair the Census Bureau's ability to timely administer the 2020 census.

THE COURT: Let me ask you this. On the timing issue, right, like, as we sit here now, the Supreme Court

doesn't have these claims in front of it.

MR. GARDNER: They do.

THE COURT: The Supreme Court does?

MR. GARDNER: Yes. So last week the plaintiffs filed a motion seeking a limited remand based on these exact same issues. So that issue is currently before the Supreme Court as well. I didn't mean to interrupt you, by the way --

THE COURT: No, that was a helpful interruption, because I think I did see that, but I don't know that -- perhaps I didn't see the import of it. The issue has not been briefed before them -- and tell me if I'm wrong about that -- as to whether or not there was a violation of the Equal Protection Clause.

MR. GARDNER: So what's interesting is the plaintiffs in New York take a very different view or -- I don't want to say very different -- a different view than the plaintiffs here. Plaintiffs argue that this is additional evidence of pretext for their APA claim. However, in Maryland they're not arguing that it goes to pretext for the APA claim; they're arguing that it goes to the equal protection and 1985 claims. So in that respect, they're different.

But the evidence is the evidence, Your Honor, and the Court has before it the opportunity, if it thought appropriate, to remand this back. We will be filing a response, Your Honor, and I can assure you that response will be coming in the next

day or two.

THE COURT: I guess my point is that regardless, if the Supreme Court reverses Judge Furman, the Fourth Circuit still needs to decide the equal protection claim. Unless the Supreme Court, sort of on its own, gives some indication to the Fourth circuit -- I don't know that they would do that -- the Fourth Circuit is still going to have to decide. So the timing issue that you're pointing to as your prejudice might exist regardless.

MR. GARDNER: So what has happened in the Fourth Circuit, Your Honor, just so you know --

THE COURT: No, I know they're briefing just this issue right now.

MR. GARDNER: Yeah. The APA claims are held in abeyance pending the Supreme Court, and there's expedited briefing on the equal protection claim. I believe our opposition -- sorry, our reply, whatever it would be now, I guess third brief, second brief, it's hard to tell these days -- is due tomorrow, and then I believe there may be -- they can correct me if I'm wrong -- one more brief after that, with oral argument scheduled shortly thereafter.

THE COURT: Has an oral argument date been set?

MR. GARDNER: Yes, I believe it -- no?

MS. HULETT: No.

MR. GARDNER: I'm getting head-nods no. See, that's

why I should trust my notes more than anything else. I guess not.

I understand Your Honor's point, and the fact is that from the Census Bureau's perspective, June 30th is the drop-dead deadline, and whatever the decision is, one way or the other, they have to go forward.

THE COURT: That is my point. So whether or not there's a limited remand on this issue, I'm not sure if it actually does impact your appellate issue.

MR. GARDNER: Well, I think it would for the following reason. So let's take the assumption that the Supreme Court reverses, and so the Fourth Circuit obviously concludes that the APA claims have to be dismissed.

THE COURT: Sure.

MR. GARDNER: And then it has before it the appeal just of the LUPE plaintiffs for equal protection. If that exceeds past June 30th, my understanding is the Census Bureau has to go forward. So if it doesn't get resolved, that's going to be a problem.

Now, if this Court were to issue an injunction based on -- or issue an indicative ruling to the Fourth Circuit, saying that having considered all this, I would, you know, enter judgment on the equal protection claim --

THE COURT: Of course, they could say good for you; we're still not remanding it.

MR. GARDNER: They could. Sure, of course. I think that's the whole point here, Your Honor, is that with literally a week to go before the Supreme Court's decision and less than two weeks to go before the Census Bureau has to finalize, that is why this prejudice is absolutely compounded here. That's the Government's point.

THE COURT: Maybe I'll ask the question like this. Have you been guaranteed by the Fourth Circuit that you will get a ruling from them by June 30th?

MR. GARDNER: I don't recall any Court of Appeals ever guaranteeing me anything, Your Honor.

THE COURT: Precisely. In fact, it seems unlikely, just given where things stand now, because, again, if you're telling me oral argument hasn't even been set. So that's my point, that it seems like you're not going to have that claim resolved by June 30th regardless of how I rule on this issue.

MR. GARDNER: And to be sure, the LUPE plaintiffs waited quite a while to seek expedition in the Fourth Circuit. Initially, it wasn't set for expedited briefing at all, and then I think about a month after the appeal was docketed did they come back and seek expedition.

I will tell you this. The equal protection claim is up on the Supreme Court. I want to be very clear with you, it's certainly not the centerpiece of the case by any means, but, certainly, the Supreme Court is aware of the Equal Protection

Clause claim.

So I just say that because there is the possibility that the Supreme Court, in resolving the APA claims, in resolving the standing claims, which we haven't even talked about, could also decide to resolve the equal protection claims because they recognize what's going on in Maryland. But again, I'm not here to speculate as to what the Supreme Court or any court is going to do for that matter --

THE COURT: They could drop a footnote saying Hazel got that wrong too or Hazel got it right, whichever way. I take your point.

MR. GARDNER: My only point, though, is that we are so late in the game here that we have sort of a "heads they win; tails we lose" sort of strategy, which is deeply unfair.

THE COURT: I understand.

MR. GARDNER: So at bottom, Your Honor, plaintiffs' attempt to proceed upon an even more attenuated theory than the one the Court properly rejected, based on evidence that could have been discovered had plaintiffs acted diligently and at great prejudice to the Government, should be rejected, and plaintiffs' request for an indicative ruling granting Rule 60 relief should be denied.

Thank you.

THE COURT: I'll hear rebuttal from plaintiffs on all issues which they wish to address. I'll say I'm fairly

comfortable with the issues.

The one that I do have a star next to -- and this doesn't mean you have to do it in this order -- is the issue of the authentication as it relates to Ms. Hofeller's declaration. Again, it doesn't mean you have to start with -- I think that was Mr. Duke. It doesn't mean you have to start in that order. I'm just advising you that that's the issue with the star next to it on my motes. So you'll want to address that.

Everything else I feel fairly comfortable with, but you can still take your last shot at things.

REBUTTAL ARGUMENT BY MR. DURAISWAMY FOR THE PLAINTIFFS

MR. DURAISWAMY: Your Honor, there are a couple of points on the intent issue and what the evidence shows that I do want to cover.

The first point is with respect to the Hofeller 2015 analysis. Mr. Gardner characterizes this as basically a neutral analysis by an uninterested observer analyzing the practicality of using CVAP data should the Supreme Court later, in a subsequent post-*Evenwel* decision, allow states to do that.

That is clearly not what he's doing. He's analyzing the demographic and partisan effects of using CVAP data, and he even asks "would the gain of GOP voting strength be worth the alienation of Latino voters?" Why, if he's simply analyzing the practicality, would he prepare and attach to his study numerous tables showing how large Latino percentage districts,

represented by Democrats, would have a significant drop in population, such that they would have to be consolidated into fewer districts, with the net effect being that the individuals in those districts would lose representation? He's clearly analyzing this from the perspective of an interested observer. That's apparent from the face of the document.

It's also apparent from Mr. Neuman's testimony. I think I heard counsel suggest that Mr. Neuman never said at his deposition that Dr. Hofeller was actually interested in adding a citizenship question.

Here's what he said. He was asked, "Do you recall discussing with other individuals on the Commerce team whether there were particular people or constituencies who were interested in adding a citizenship question to the census?

"ANSWER: Tom Hofeller was, I think, the first person that said something to me about that issue."

When he was asked what was his understanding of potential uses -- I should say the testimony I just read is from page 51.

THE COURT: I'm familiar with it.

MR. DURAISWAMY: Page 54, he's asked about the potential uses. He says, "My understanding would be that the use would be having block-level citizen voting-age population data.

"QUESTION: And that was the understanding that you had at the time?

"ANSWER: That was what I was told was the principle objective.

"QUESTION: By who?

"ANSWER: By Tom Hofeller."

He goes on and says, when asked about the substance of his conversations with Dr. Hofeller, again, block level data is an obsession with him.

So it's clear from Mr. Neuman's testimony that Dr. Hofeller raised this, again, not as just this sort of abstract notion that this is an issue you may have to deal with but as something that he was interested in so that he could get block-level citizen voting-age population data.

I do want to address what I think counsel was suggesting, which is that if the Supreme Court has not ruled that using CVAP as the population base for redistricting purposes is impermissible, how can you come in and premise an equal protection claim on someone's desire to use CVAP as the population base for redistricting purposes? It's not inherently an equal protection violation, but it is an equal protection violation when the purpose is to advantage Republicans and non-Hispanic whites and disadvantage minorities and disadvantage Latinos. And it is clear, again, from the Hofeller study that that was, in fact, the purpose.

I do think there is some useful language in the *McCrory v. Harris* decision from the Fourth Circuit just a few years ago

that we cite, if not in our opening brief, in our reply brief that speaks to this issue of disadvantaging certain minority groups, essentially, for partisan purposes and how that does, in fact, constitute discriminatory intent.

With respect to Mr. Neuman, the suggestion that I heard from counsel is that, of course, Mr. Neuman could not possibly have shared in this discriminatory intent, and it's very telling that we didn't designate any of his deposition testimony at trial.

Your Honor, the reason we didn't designate any of his testimony at trial is because we believed he was not being truthful, and we believed he was being evasive, and we did not have a way to impeach him, given the evidence that was available to us. It's now even more clear that he was being untruthful, and it's even more clear that he was being evasive.

The second point I would say is in light of the new evidence, his testimony is clearly not credible. The Government, in their brief, they say, well, look at what Mr. Neuman himself says at his deposition; he says that he and Mr. Hofeller wanted to add a citizenship question, and they wanted block level citizenship data so that they could ensure Latino representation and strong representation for Latinos.

First of all, that is directly contrary to what Dr. Hofeller wrote in his 2015 study. Secondly, Your Honor has already ruled that that theory is a cover story, that it was a

pretext that was developed to conceal the real motive. And the third point on this is that the Government's argument essentially amounts to maybe Dr. Hofeller had some discriminatory intent. Well, I know they dispute that, but assuming that to be the case, they suggest that intent wasn't transferred to Mr. Neuman.

I just want to read a portion of Mr. Neuman's deposition transcript that I think underscores how implausible it is that Dr. Hofeller, having come to the conclusion that this would disadvantage Latinos and advantage non-Hispanic whites and Republicans, managed to manipulate his friend into believing that precisely the opposite was true, and then, through his friend, managed to manipulate the entire Commerce Department into believing that the opposite was true. This is how Mr. Neuman describes his relationship with Tom Hofeller. "Well, Tom and I are good friends, so I don't know -- you know, I've known him for 30 years. We talked a lot about his cancer treatment. We talked a lot" --

THE COURT: If you could slow down just a little.

MR. DURAISWAMY: Sorry. "We talked a lot about what he was going through. We talked a lot about prayer. So, you know, there would be conversations about what was going on in politics that would bleed into our personal conversations." He goes on and refers to him as "a good friend of a long time." That's also reflected in the e-mails attached to our reply

brief.

So to the extent there's a suggestion that whatever was in the Hofeller study, Mr. Neuman really believed that getting block level citizenship data by adding a citizenship question to the census was going to be great for Latino representation is just not credible and not remotely plausible given the relationship between the two of them and given Dr. Hofeller's own findings.

I do believe Mr. Duke may address this, but I feel compelled to say something about it. There was a suggestion that somehow we had these documents three months ago. It's utterly baseless, Your Honor. We became aware of these documents maybe two, maybe three days before the filing in the New York case. I don't need to speak for them, but what we've been told by the attorneys at Arnold and Porter is that they filed their motion with respect to these documents in New York within a week of identifying the documents, because the documents were obtained in the context of a different case, and they were searched for a different purpose before census citizenship-related documents were located.

Let me now turn it over to the thing that you really want to hear about, which is the authenticity issue.

REBUTTAL ARGUMENT BY MR. DUKE FOR THE PLAINTIFFS

MR. DUKE: Your Honor, I think either Mr. Duraiswamy or I have already addressed all the other points that were

made, so I'll address the authenticity issue.

THE COURT: I think Mr. Gardner raises a point on that, that that does give me some pause, so I wanted to give you an opportunity to have the last word on that.

MR. DUKE: Well, with respect to Ms. Hofeller's deposition, that is clearly admissible here.

And I think with all respect to Mr. Gardner, I think he just has the *Horne* case wrong. That's a case that says that when there is a situation like this one, that presentation of sworn testimony from a prior proceeding requires the party that the evidence is offered against to point up distinctions in the prior case that would preclude similar motives of witness examination.

THE COURT: But aren't we dealing with two separate issues, redistricting in one and citizenship in another?

MR. DUKE: Certainly they are different cases, but with respect to the Hofeller deposition, what that deposition was about was the authenticity of the documents. The cross-examination, which went on for hours in that deposition, was a blistering attack on the authenticity of the documents. And I think the deposition speaks for itself that it established nothing other than that the documents are, in fact, what they purport to be.

THE COURT: I'll confess I haven't read that yet. So that specific issue is covered, you would state, thoroughly in

the deposition, such that I could find that the Government clearly, in that case, had the same or acted with the same motivation that they would have here.

MR. DUKE: Yes, and I think the deposition is what we have for Ms. Hofeller, and I think it establishes the bona fides of the documents.

THE COURT: Okay.

MR. DUKE: With respect to identifying what's actually on the drives, I think that the Matthews declaration is not the only thing that enables the Court to do that with respect to the documents that are at issue here. Certainly, John Matthews doesn't know anything about the substance of the documents, nor does he pretend that he does. He is the forensic analyst who is authenticating the fact that these documents, that we've submitted to the Court, were, in fact, on these drives that were produced by Ms. Hofeller pursuant to a subpoena.

But beyond that, the documents themselves are contained on these drives. If you look at the paragraph, for example, which is authored by the owner of that computer, according to the metadata on that document, that is, verbatim, incorporated into another document that's produced in this litigation that we know the providence of. So the authenticity of that is certainly -- it's a fair inference, from what you have in front of you, that this document is an authentic document.

Similarly, with regard to the 2015 study, one of the documents that we've submitted is an e-mail string between Hofeller and the representative at the Beacon, the entity that commissioned the study, that very clearly identifies -- and is authentic on its face, identifies what the document was, what the purpose of it was. So it's not just a document that's floating in free space. There is ample material in the documents that we provided that allow the Court to infer the authenticity of the documents.

Thank you.

THE COURT: Thank you, Counsel. Seeing no one else making quick moves for the podium, I take it that we are then done with argument.

As I indicated, I do want to now go back, reflect on arguments, look over a couple of items, and then I do expect, by close of business tomorrow, probably at the outset, just sort of a one pager with probably a full memorandum opinion to come. And I say full. It still won't be lengthy. But sometime after that, to the extent that my specific thoughts might be useful. But I assume you want an answer to the question, and I'll give you an answer to the question tomorrow.

Anything else we need to discuss today?

MR. GARDNER: Nothing from the Government, Your Honor.

MR. DURAISWAMY: Nothing for the plaintiffs, Your

Honor.

THE COURT: Good to have this little reunion, and I'll be in touch shortly. Enjoy your day.

(The hearing concluded at 4:50 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, Cindy S. Davis, Federal Official Court Reporter in and for the United States District Court for the Southern District of Maryland, do hereby certify that I reported, by machine shorthand and computer-aided transcription, in my official capacity the motions hearing proceedings had in the case of Kravitz, et al., versus United States Department of Commerce, et al., case numbers 8:18-cv-01041-GJH and 8:18-cv-01570-GJH, in said court on June 18, 2019.

I further certify that the foregoing 118 pages constitute the official transcript of said proceedings, as taken from my electronic notes to the best of my ability.

In witness whereof, I have hereto subscribed my name this 24th day of June 2019.

Cindy S Davis

CINDY S. DAVIS, RPR
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