UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| STATE OF NEW YORK, *et al.*,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,<br><br>Defendant. | Civil Action No. 18-CV-2921 |
| NEW YORK IMMIGRATION COALITION, *et al.*,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,<br><br>Defendant. | Civil Action No. 18-5025<br>(Consolidated Case)<br><br>Hon. Jesse M. Furman<br><br>**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTIONS *IN LIMINE*** |

# TABLE OF CONTENTS

INTRODUCTION .....1

ARGUMENT.....1

MIL 1: The Court Should Preclude Defendants from Offering Post-Hoc Justifications of Secretary Ross's March 26, 2018 Memorandum.....1

MIL 2: Defendants Should Be Precluded From Using Deliberative Process Privilege as a Sword And A Shield .....3

MIL 3: Defendants Should Be Precluded From Arguing That There Is No Evidence That Census Response Rates Will Decline.....6

MIL 4: Defendants Should Be Precluded from Proferring Testimony From Any Fact Witnesses at Trial. .....9

CONCLUSION.....10

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*Bowen v. Georgetown Univ. Hosp.*,
488 U.S. 204 (1988) ..... 2

*Bradberry v. Dir., Office of Workers' Comp. Programs*,
117 F.3d 1361 (11th Cir. 1997) ..... 2-3

*Burka v. N.Y.C. Transit Auth.*,
110 F.R.D. 660 (S.D.N.Y. 1986) ..... 5

*Chevron Corp. v. Donziger*,
No. 11-Civ.-0691, 2013 WL 4045326 (S.D.N.Y. Aug. 9, 2013) ..... 3

*In re City of New York*,
607 F.3d 923 (2d Cir. 2010) ..... 3, 6

*Favors v. Cuomo*,
285 F.R.D. 187 (E.D.N.Y. 2012) ..... 3

*Innis Arden Golf Club v. Pitney Bowes, Inc.*,
No. 3:06-cv-1352 (JBA), 2009 WL 5873112 (D. Conn. 2009) ..... 10

*In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liability Litig.*,
898 F. Supp. 2d 603 (S.D.N.Y. 2012) ..... 3, 5, 6

*In re Nielsen*,
No. 17-Civ.-3345, 2017 U.S. App. LEXIS 27681 (2d Cir. Dec. 27, 2017) ..... 5

*In re Sims*,
534 F.3d 117 (2d Cir. 2008) ..... 3

*In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*,
145 F.3d 1422 (D.C. Cir. 1998) ..... 5

*U.S. Steel Mining Co., LLC v. Dir., OWCP*,
386 F.3d 977 (11th Cir. 2004) ..... 2

*U.S. v. Bilzerian*,
926 F.2d 1285 (2d Cir. 1991) ..... 4, 5, 6, 9

*U.S. v. Ghailani*,
751 F. Supp. 2d 498 (S.D.N.Y. 2010) ..... 3, 6

*U.S. v. Wells Fargo Bank, N.A.*,
No. 12-CV-7527 (JMF), 2015 WL 6935917 (S.D.N.Y. Oct. 22, 2015) ..... 3

*William Bros. v. Pate*,
833 F.2d 261 (11th Cir. 1987) ..... 2

**Other Authorities**

Federal Rule of Civil Procedure 26 ..... 8, 9, 10

Federal Rule of Civil Procedure 37 ..... 10

## INTRODUCTION

Pursuant to this Court's Individual Rules and Practices 5(B).i, Plaintiffs, the State of New York and New York Immigration Coalition *et al.*, submit these motions *in limine* to bar defendants from introducing certain testimony or other evidence at trial. Plaintiffs seek to exclude the following specific categories of testimony and other evidence: (1) post hoc justifications for Secretary Ross's March 26, 2018 memorandum; (2) testimony or argument based on deliberative processes that were not disclosed in discovery by defendants; (3) testimony or argument from Defendants that census response rates will not decline or that there will not be an undercount; (4) testimony or argument that plaintiffs and their experts did not adequately prove that a decline in response rates will occur or that there will be an undercount; and (5) testimony from any non-disclosed fact witness.

## ARGUMENT

### MIL 1: THE COURT SHOULD PRECLUDE DEFENDANTS FROM OFFERING POST-HOC JUSTIFICATIONS OF SECRETARY ROSS'S MARCH 26, 2018 MEMORANDUM

Defendants should not be allowed to offer post-hoc rationalizations or support for Secretary Ross's March 26, 2018 memorandum. (March 26, 2018 Mem. of Secretary Wilbur Ross, AR0001313). In response to the DOJ's request that the Census Bureau add a citizen question to the decennial census, Secretary Ross determined that adding the citizenship question to the 2020 decennial census was "necessary to provide complete and accurate data" to aid DOJ in enforcement of the Voting Rights Act. *Id.* at AR0001313, AR0001320. Secretary Ross explained in the March 26 memo that he took a "hard look at the request" and "considered all facts and data relevant" in order to make his decision. *Id.* Secretary Ross further explained the four options he was considering, two of which included adding the citizenship question per

DOJ's request; and stated that he consulted with "Census Bureau leadership and interested stakeholders" to conduct a "thorough review of the legal, program and policy considerations," that included an evaluation of the impact of adding a citizenship question. *Id.*

Defendants have since sought to buttress Secretary Ross's memorandum with additional, after-the-fact rationalizations. For example, during their testimony, senior Commerce officials testified about new rationales and justifications for asking the citizenship question, unrelated to the Voting Rights Act (*see* Ex. A; Comstock Tr. 107-110, 261-262). These rationales and evidence were not considered by Secretary Ross when he wrote the March 26 memorandum, and should not be admitted for the purpose of supporting Secretary Ross's March 26 memorandum.

Deference traditionally afforded an agency is not appropriate when the agency's position "appears to be nothing more than an agency's convenient litigating position." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988); *U.S. Steel Mining Co., LLC v. Dir., OWCP*, 386 F.3d 977, 986 (11th Cir. 2004) ("we do not afford deference to ad hoc positions of agencies adopted in reaction to the exigencies of litigation; rather, deference is due when an agency has taken a constant and unchanging—and reasonable—position . . . ."). Here, Secretary Ross, and Defendants, have insisted that the Voting Rights Act rationale was the only basis for the decision to add the citizenship question to the Decennial Census. They have insisted that the evidence available and presented in the March 26 memo justified the addition of the question. Defendants should therefore now be prohibited from offering any post hoc rationale or evidence justifying the decision for the simple reason that it would not be the stated reason for Secretary Ross's decision. *See William Bros. v. Pate*, 833 F.2d 261, 265 (11th Cir. 1987) (Court was not "inclined to defer to an inconsistent position" where a "Director has seen fit to adopt a contradictory position on related issues when to do so furthers the chances of success in litigation); *Bradberry*

*v. Dir., Office of Workers' Comp. Programs*, 117 F.3d 1361, 1366 (11th Cir. 1997)("we need not defer to a mere litigating position").

**MIL 2: DEFENDANTS SHOULD BE PRECLUDED FROM USING DELIBERATIVE PROCESS PRIVILEGE AS A SWORD AND A SHIELD**

Defendants have invoked deliberative process privilege as a shield to withhold discovery about their intent in including the citizenship question in the census. Defendants should therefore be precluded from introducing evidence or argument at trial as a sword to challenge Plaintiffs' evidence and arguments about Defendants' discriminatory intent.

It is well established that "a party cannot use materials as a 'sword' in its defense 'while using privileges attaching to [materials relied upon for that defense] as a "shield."' *In re City of New York*, 607 F.3d 923, 946-47 (2d Cir. 2010) (quoting *John Doe Co. v. United States*, 350 F.3d 299, 302 (2d Cir. 2003)). In other words, "a party may not affirmatively rely on privileged communications to support a claim or defense and then shield those communications from discovery by its adversary." *U.S. v. Ghailani*, 751 F. Supp. 2d 498, 501 (S.D.N.Y. 2010). This doctrine applies in the context of various privileges. *See, e.g.*, *In re Sims*, 534 F.3d 117, 132 (2d Cir. 2008); *Chevron Corp. v. Donziger*, No. 11-Civ.-0691, 2013 WL 4045326, at *4 (S.D.N.Y. Aug. 9, 2013); *Favors v. Cuomo*, 285 F.R.D. 187, 212 (E.D.N.Y. 2012); *Ghailani*, 751 F. Supp. 2d at 501. That includes deliberative process privilege. *See, e.g.*, *U.S. v. Wells Fargo Bank, N.A.*, No. 12-CV-7527 (JMF), 2015 WL 6935917, at *2 (S.D.N.Y. Oct. 22, 2015); *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liability Litig.*, 898 F. Supp. 2d 603, 607 (S.D.N.Y. 2012).

This is important because the Defendants have repeatedly insisted that their intent and questions of pretext are irrelevant because they are entitled to a so-called "presumption of regularity," while continuing to shield hundreds of otherwise relevant Department of Commerce and Justice documents on the basis of deliberative privilege. While Plaintiffs have been selective

in challenging the invocation of this privilege, the Court has granted a number of Plaintiffs' motions requiring disclosure.[1] And the compelled documents show anything but "regularity" – including an email between Secretary Ross and a top aide about the need to censor the Administrative Record in light of judicial review, AR 12476, and a second document disclosing that "Justice Department staff did not want to raise the question. . . " and Commerce appointees would look into "how Commerce could add the question to the Census itself." AR 12755.

Defendants here have repeatedly invoked the deliberative process privilege as a basis to withhold otherwise relevant documents or information. Notwithstanding successful motions to compel, the Defendants have refused to independently evaluate those assertions and continue to assert deliberative privilege over hundreds of Commerce and Justice Department documents.

Parties may not assert a defense, including a purported lack of "intent," that "in fairness requires examination of protected communications." *U.S. v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991). In *United States v. Bilzerian*, a defendant charged with securities fraud sought to testify at trial that he had acted in good faith, *i.e.*, that his intent was to comply with the securities laws, without disclosing the content or even the existence of any privileged communications and without asserting a reliance on counsel defense. *Id.* at 1291. Because good faith necessarily called into question the defendant's communications with his attorney, the Second Circuit held that such testimony implicitly waived the attorney-client privilege. *See id.* at 1291–94. As the

[1] ECF No. 323, 369. For example, in response to plaintiffs' September 20, 2018 motion to compel challenging DOJ's invocation of deliberative 2018, Plaintiffs sought disclosure of 27 Department of Justice ("DOJ") documents Defendants withheld on the basis of deliberative process privilege. ECF 343. Plaintiffs argued these documents would "likely shed light on whether DOJ's purported rationale for requesting the citizenship question was legitimate or pretextual." *Id.* at 3. Defendants agreed to disclose one document and determined the material redacted from another was non-responsive. Docket No. 343 at 1. Defendants asserted deliberative process privilege over the remaining 25 documents. *See id.* These documents received *in camera* treatment after which the Court ruled 19 documents must be disclosed to Plaintiffs. ECF No. 369 at 6.

court explained, a party "may not use [a] privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes." *Id.* at 1292.

The integrity of decision-making by the Commerce Department is central to this litigation, and the withheld documents may shed light on that process. That is why Plaintiffs sought their production. The sword/shield doctrine squarely prevents Defendants from offering evidence or argument suggesting that the inclusion of the citizenship question is not pretextual, while withholding discovery into whether Defendants in fact developed a pretext. Nor can Defendants claim Plaintiffs' evidence of discriminatory intent is lacking, while withholding discovery into whether Defendants in fact acted with discriminatory intent. Defendants fought for, and won, the opportunity to shield these deliberations from disclosure. They cannot now turn around and weaponize these same withheld deliberations as evidence or argument at trial that they acted without discriminatory intent. *See Bilzerian*, 926 F.2d at 1291-92; *Burka v. N.Y.C. Transit Auth.*, 110 F.R.D. 660, 667 (S.D.N.Y. 1986) ("Where the decision-making process itself is the subject of the litigation, the deliverative [sic] privilege may not be raised as a bar against disclosure of critical information."). Nor can they strategically introduce portions of these communications about the citizenship question when they withheld others. *See Bilzerian*, 926 F.2d at 1292.

Any assertion by Defendants of a lack of intent to discriminate, absence of pretextual justification, or presumptions of regularity puts their own deliberations in these documents at issue. *See In re Nielsen*, No. 17-Civ.-3345, 2017 U.S. App. LEXIS 27681, at *11 n.2 (2d Cir. Dec. 27, 2017); *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998); *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liability Litig.*, 898 F. Supp. 2d 603, 609-10 (S.D.N.Y. 2012). In the *MTBE Product Liability Litigation*,

the New Jersey Department of Environmental Protection ("NJDEP") claimed various manufacturers of the gasoline additive MTBE had contaminated New Jersey's groundwater. 898 F. Supp. 2d at 606. NJDEP raised, among other claims, a failure to warn claim that requires establishing the product's lack of "adequate warning or instruction" of its dangers and safe uses. *Id.* at 608. This claim put at issue NJDEP's internal decision-making process, and therefore, "the deliberative process must give way." *Id.* at 610. The same would be true of any lack of intent defense Defendants raise based on the withheld information. Defendants cannot assert a lack of intent defense or lack of pretext defense without also asserting the withheld documents do not contain evidence of their discriminatory intent or pretextual justification. By raising this defense, Defendants would put at issue their lack of intent by seeking to rebut Plaintiffs' claims with evidence to which Plaintiffs do not have access. *See Ghailani*, 751 F. Supp. 2d at 501. They would be offering evidence or arguments that could only be proved or disproved with the materials over which they have asserted privilege. In so doing, Defendants would prejudice Plaintiffs. *See Bilzerian*, 926 F.2d at 1292. This is prohibited by the sword/shield doctrine.

For the foregoing reasons, Defendants should be barred from offering evidence or argument regarding lack of intent (including presumption of regularity), lack of pretext, or other topics about which they withheld discovery on the grounds of deliberative process privileged.

**MIL 3: DEFENDANTS SHOULD BE PRECLUDED FROM ARGUING THAT THERE IS NO EVIDENCE THAT CENSUS RESPONSE RATES WILL DECLINE.**

Likewise, defendants should be precluded from using Section 9 of Title 13 ("Title 13") as a sword and a shield. *In re City of New York*, 607 F.3d at 946-47 (quoting *John Doe Co. v. United States*, 350 F.3d 299, 302 (2d Cir. 2003)); *Ghailani*, 751 F. Supp. 2d at 501.

Throughout discovery, Plaintiffs have sought data, including Numident citizenship data and data from the American Community Survey ("ACS"), an annual survey conducted by the Census Bureau that includes a question concerning citizenship status, in order better quantify the impact of the citizenship question on the Census. But Defendants claim this data constitutes "proprietary information[.]" Citing Title 13, Defendants repeatedly refused to release this data. By withholding this data, *inter alia*, Defendants have prevented Plaintiffs from obtaining, through the normal course of discovery, evidence that would have allowed Plaintiffs' experts to buttress their testimony regarding the expected decline in participation in the 2020 Census should the citizenship question be added, and the resultant undercount.

Because Defendants have withheld data relevant to the question of decline in response rates and undercounts for certain communities, Plaintiffs now move to prevent Defendants from offering any argument, testimony or other evidence at trial that (a) there is no evidence that adding the citizenship question to the 2020 Census would lead to a decrease in the response rate for certain communities, (b) there is no evidence that adding the citizenship question to the 2020 Census would lead to an undercount for certain communities, or that (c) Plaintiffs' experts have failed to quantify sufficiently the decline in those response rates or undercounts. While Defendants had a right to raise their objections, they cannot both deprive Plaintiffs of data that would assist their analysis by asserting Title 13 and then argue that Plaintiffs' proof regarding these topics is insufficient.

There is no question that the withheld data would allow Plaintiffs to further support their analyses. Plaintiffs' experts have already produced substantial evidence that the addition of the citizenship question will reduce response rates of noncitizen, immigrant, and Hispanics, particularly in light of the current political climate. They have supplemented their analysis as

more data becomes available. For example, the 2017 PUMS ACS data was publicly released on October 18, 2018, and Plaintiffs have now been able to analyze some of that data. In fact, Plaintiffs' expert quickly analyzed the data about non-response and demonstrated that, since 2016, trends indicative of a decline in self-response have significantly increased. Plaintiffs presented this analysis in an October 23 supplemental disclosure. However, none of the public ACS data contains information like Numident citizenship data, so this recent analysis cannot be as robust as the analysis done by the Census Bureau. *See* Ex. B, ACS Breakoff Analysis, AR0010382. As Plaintiffs' experts have made clear, access to the information that Defendants have withheld would have allowed Plaintiffs to further bolster their analysis. *Id.* For example, when asked at her deposition whether she had "attempted to quantify the potential impact of a citizenship question on the self-response rate of Hispanic citizens," Dr. Hillygus testified that "[t]he Census Bureau has not produced the data that would make that possible." (Ex. C, Deposition of Dionne Sunshine Hillygus at 25:21-25). By withholding this data, Defendants have deprived Plaintiffs of the means by which their experts could bolster their analysis.

Plaintiffs expect that Defendants will try to contend at trial, as they have in the past, that the expected decrease in response rates of minorities and hard-to-count populations is "speculative" by arguing that Plaintiffs and Plaintiffs' experts lack empirical data to show the decline. Further, Plaintiffs expect that Defendants will argue, as their expert Dr. John Abowd has, that:

> no expert has produced credible quantitative evidence that the addition of a citizenship question to the 2020 Census would increase the net undercount or increase differential net undercounts for identifiable sub-populations. Therefore, there is no credible quantitative evidence that the addition of the citizenship question would affect the accuracy of the count. (Defendants' Disclosures Pursuant to Rule 26(A)(2)(C) at 3.)

Dr. Abowd repeatedly criticized Plaintiffs' experts for failing to adequately quantify the undercount that would result from adding the citizenship question to the Census. *See also* ECF No. 387-5 (Abowd 10/12 Tr. at 72:17-73:3 (stating that Dr. Matthew Barreto lacked "credible evidence that the citizenship question will have a bearing on the net undercount"); *id.* at 216:3-12 (claiming that Plaintiffs' experts "should have been able to" provide a quantification of the difference caused by adding the citizenship question).

At the same time, Defendants have failed to conduct the analysis themselves, all while invoking Title 13 to deprive Plaintiffs of the data to independently conduct such analysis. Indeed, Dr. Abowd conceded that the Census Bureau could have used this information to study this question and that Dr. Abowd, himself had proposed studying this question to Census Bureau leadership – but did not do so. *Id.* at 288-289. As a result, Defendants complain about insufficiency of proof as to the decline in self-response or undercount when they had exclusive possession of the data necessary to measure and refused Plaintiffs the opportunity to do so.

For these reasons, Defendants should not be allowed to argue that Plaintiffs have failed to present such evidence. Having refused to give Plaintiffs that information, Defendants should not be able to argue at trial (or put on testimony) about the adequacy of Plaintiffs proof or any purported failure by Plaintiffs to prove undercount that would result if the citizenship question were included. *United States v. Bilzerian*, 928 F.2d 1285, 1292 (2d Cir. 1991) (a party "may not use . . . privilege to prejudice his opponent's case).

**MIL 4: DEFENDANTS SHOULD BE PRECLUDED FROM PROFERRING TESTIMONY FROM ANY FACT WITNESSES AT TRIAL.**

Defendants failed to identify any fact witnesses in their initial disclosures, but have reserved their right to call anyone who is on Plaintiffs' initial disclosure list, or who has appeared in a deposition. The Court should not permit testimony by additional witnesses to be put forth at

trial. Rule 26(a)(3) requires parties, in an initial disclosure, to "provide to the other parties . . . information about the evidence that it may present at trial other than solely for impeachment," including "the name . . . of each witness." Fed R. Civ. P. 26(a)(3)(A). Federal Rule of Civil Procedure 37(c)(1), in turn, provides that if a party fails to disclose information required by Rule 26(a) or (e), "the party is not allowed to use that information" at trial "unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1).

Defendants' initial disclosure of July 23, 2018 (attached as Ex. D) stated that "there are no fact witnesses Defendants intend to use to support their claims or defenses, other than for impeachment," and Defendants have never supplemented this disclosure. (Ex. D, Defs.' Initial Disclosure at 2). Defendants have made no indication that they intend to call further witnesses – instead reiterating that the agency action should be reviewed only "on the basis of the administrative record produced by the agency," and the Court should not permit Defendants to change course now. At this stage of the proceedings, Defendants can make no reasonable argument that the failure to disclose any fact witnesses was substantially justified; and on the other side of the ledger, Plaintiffs would be significantly prejudiced by such a late addition of a witness. Accordingly, the Court should not allow Defendants to present any factual witnesses at trial. *E.g.*, *Innis Arden Golf Club v. Pitney Bowes, Inc.*, No. 3:06-cv-1352 (JBA), 2009 WL 5873112, *3 (D. Conn. 2009) ("Rule 37(c)(1)'s preclusionary sanction is automatic absent a determination of either substantial justification or harmlessness.") (citation omitted).

## CONCLUSION

For the foregoing reasons, plaintiffs request that the Court grant the relief requested in motions *in limine* 1 through 4.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

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NEW YORK IMMIGRATION COALITION, ET AL.,

Plaintiffs,

vs. Case No. 1:18-CF-05025-JMF

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

Defendants.

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Washington, D.C.

Thursday, August 30, 2018

Deposition of:

EARL COMSTOCK

called for oral examination by counsel for Plaintiffs, pursuant to notice, at the office of Arnold & Porter, 601 Massachusetts Avenue NW, Washington, D.C., before KAREN LYNN JORGENSON, RPR, CSR, CCR of Capital Reporting Company, beginning at 9:08 a.m., when were present on behalf of the respective parties:

CONTENT


| | PAGE |
|---|---|
| EARL COMSTOCK | 9 |
| Examination by Mr. Colangelo | 9 |
| Examination by Mr. Gersch | 241 |
| Examination by Mr. Rosenberg | 336 |
| Examination by Ms. Senteno | 381 |
| Examination by Ms. Boutin | 419 |


COMSTOCK DEPOSITION EXHIBITS


| EXHIBIT NUMBER | | | PAGE |
|---|---|---|---|
| Plaintiffs' Exhibit 1 | Email | | 56 |
| Plaintiffs' Exhibit 2 | Email | | 62 |
| Plaintiffs' Exhibit 3 | Email | | 82 |
| Plaintiffs' Exhibit 4 | Email | | 87 |
| Plaintiffs' Exhibit 5 | Memo | | 93 |
| Plaintiffs' Exhibit 6 | Email | | 114 |
| Plaintiffs' Exhibit 7 | Email | | 120 |
| Plaintiffs' Exhibit 8 | Email | | 123 |
| Plaintiffs' Exhibit 9 | Email | | 137 |
| Plaintiffs' Exhibit 10 | Email | | 145 |
| Plaintiffs' Exhibit 11 | Email | | 147 |
| Plaintiffs' Exhibit 12 | Email | | 158 |
| Plaintiffs' Exhibit 13 | Email | | 164 |
| Plaintiffs' Exhibit 14 | Email | | 167 |
| Plaintiffs' Exhibit 15 | Memo | | 182 |
| Plaintiffs' Exhibit 16 | Memo | | 189 |
| Plaintiffs' Exhibit 17 | Meeting notification | | 194 |
| Plaintiffs' Exhibit 18 | Email | | 199 |
| Plaintiffs' Exhibit 19 | Email | | 212 |
| Plaintiffs' Exhibit 20 | Email | | 215 |
| Plaintiffs' Exhibit 21 | Email | | 218 |
| Plaintiffs' Exhibit 22 | Email | | 219 |
| Plaintiffs' Exhibit 23 | Email | | 221 |
| Plaintiffs' Exhibit 24 | Email | | 224 |
| Plaintiffs' Exhibit 25 | Email | | 226 |
| Plaintiffs' Exhibit 26 | Email | | 234 |
| Plaintiffs' Exhibit 27 | Testimony from | | 293 |

| | | | |
|---|---|---|---|
| | | Committee on Oversight and Government Reform | |
| Plaintiffs' Exhibit 28 | | Memo | 309 |
| Plaintiffs' Exhibit 29 | | Memo | 317 |
| Plaintiffs' Exhibit 30 | | Decisional memorandum | 326 |
| Plaintiffs' Exhibit 31 | | Questions on draft Census memo | 372 |
| Plaintiffs' Exhibit 32 | | Memo | 374 |
| Plaintiffs' Exhibit 33 | | Questions on draft Census memo | 376 |
| Plaintiffs' Exhibit 34 | | Email | 378 |
| Plaintiffs' Exhibit 35 | | Trump campaign email | 383 |


(Exhibits attached to transcript.)

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P R O C E E D I N G S

WHEREUPON,

VIDEOGRAPHER: Good morning. We are going on the record at 9:01 a.m. on Thursday, August 30, 2018. Please note that the microphones are sensitive and may pick up whispering, private conversations and cellular interference. Please turn off all cell phones or place them away from the microphones, as that can interfere with the deposition audio. Audio and video recording will continue to take place unless all parties agree to going off the record.

This is Media Unit 1 of the video recorded deposition of Earl Comstock to be taken by counsel for the plaintiff in the matter of the New York Immigration Coalition, et al., v. The United States Department of Commerce, et al. This case is filed in the United States District Court for the Southern District of New York. This deposition is being held at the law office of Arnold & Porter located a 601 Massachusetts Avenue Northwest, Washington, D.C. 20001.

My name is Dan Reidy from the firm Veritext Legal Solutions, and I am the videographer. The court reporter is Karen Jorgenson from Veritext Legal Solutions.

I am not authorized to administer an oath. I am not related to any party in this action, nor am I financially interested in the outcome.

Also, counsel appearances will be noted on the stenographic report rather than orally at this time.

Will the court reporter please swear in the witness?

EARL COMSTOCK,

called as a witness, and having been first duly sworn, was examined and testified as follows:

THE WITNESS: I do.

EXAMINATION BY MR. COLANGELO:

Q Please state your name and work address.

A Earl Comstock, U.S. Department of Commerce.

Q And we met a minute ago, but for the

record, I'm Matthew Colangelo. I work for the New York Attorney General, and I represent plaintiffs in one of the actions challenging the inclusion of a citizenship question on the decennial census. I'll be taking your deposition today.

Have you been deposed before?

A Nope.

Q Okay. So I will ask questions. I just ask that you answer honestly and completely. If at any point you don't understand a question I've asked, please just let me know that it was unclear and I can see if I can rephrase it.

A Okay.

Q Does that work?

A Sure.

Q Karen introduced herself. She's transcribing this deposition. She'll be taking down my questions and your answers. In order to make sure that we have a clear transcript, please wait until I'm done asking a question before you answer it, and I will try to make sure I don't

interrupt your answers either.

Sound good?

A Sounds perfect.

Q Great.

Can you tell me how you prepared for your deposition today?

A Met with counsel yesterday.

Q And did you review any documents during that meeting?

A A few documents that are in the record, yes.

Q Great.

And did you review any of those documents for the purpose of refreshing your recollection about any of the events involved in this lawsuit?

A No.

Q Tell me about your educational background after high school.

A After high school, I went to the University of California Santa Barbara, and then worked in Alaska for a couple years. Started working for Senator Ted Stevens from Alaska and

the Senate Committee, Science and Transportation. Did that for ten years.

Left the Hill, and became a partner at a law firm. Did that for six years, and then was CEO of a trade organization for two years. Ran my own consulting firm for about seven years. Went back to a law firm for about a year and a half, and then became counsel for a start-up.

Q Okay. So I got your UCSB degree. That was a bachelor's degree?

A Correct.

Q And I may have missed it in your answer. But I take it at some point you earned a law degree.

A I did.

Q Okay.

A I went to night law school while working for the Senate.

Q Got it.

And what year did you earn your J.D.?

A 1992.

Q 1992. Okay.

And are you currently admitted to the practice?

A In the District, yes.

Q In D.C.

Is your registration active or inactive?

A I believe it's active. I'd have to go double-check.

Q Okay. And are you admitted in any other states?

A I was admitted in Alaska and that's inactive.

(Thereupon, the court reporter clarified.)

BY MR. COLANGELO:

Q And tell me what your college degree field of study was?

A Political science.

Q Do you have any education training or experience in statistics?

A Did -- well, George Mason University does accounting, statistics and economics for lawyers, which is a required part of the course. So I had

two years of that, and also had an environmental science minor at UCSB, so did a number of statistics and chemistry and biology courses in relation to that.

Q And by in relation to that, you mean in relation to the environmental science degree?

A Correct.

Q Okay. Do you have any education, training or experience in survey methodology?

A No.

Q Do you have any education, training or experience in demography?

A Other than basic introduction to demography, no.

Q What do you mean by introduction?

A Well, what you take in an undergraduate course that covers demography.

Q Okay. Do you have any education, training or experience in voting rights law?

A No.

Q Do you have any education training or experience in redistricting?

A No.

Q Do you have any education, training or experience in election law?

A Again, other than as an attorney and the ability to read laws, no.

Q Okay. By as an attorney and the ability to read laws, you mean if you needed to read a law, you could?

A Meaning if I had read a statute related to those, then I would be able to understand it, yes.

Q But you've never studied election law?

A I've never studied election law.

Q You've never practiced election law?

A No.

Q Okay. Were -- between November 2016 and February 2017, you were a member of the presidential transition team?

A From November -- yeah, just after Thanksgiving until I began working for the Department of Commerce, yes.

Q Okay. And when did you begin working at

Department of Commerce?

A January 31st, I believe.

Q 31st, okay.

When did you join the presidential transition team?

A This would have been around November 28th.

Q And what were your responsibilities on the transition?

A I was Sherpa for getting people through the confirmation in the Senate Commerce Committee.

Q Sherpa for getting people through confirmation in the Senate Commerce meeting.

Can you tell me what Sherpa means as you use that term?

A Yeah. It's a colloquial term. It's basically a person that helps the nominee, and in my case, I had two nominees that were being -- would be considered by the Senate Commerce Committee. So you advise them on, you know, what the different members are going to care about, what the general subject matter issues

are. As former staff for the committee, I was familiar with the issues that would be of importance to the members of the committee, so that's why I was asked to do the job.

Q You mentioned that you were the Sherpa for nominees through the Senate Commerce Committee. I take it one of those was Secretary Ross?

A Secretary Ross and Deputy Secretary Todd Riggins.

Q And did your responsibilities on the transition team include anything other than the Sherpa role you've just described?

A No.

Q Did you work on the campaign, at all -- the presidential campaign for the 2016 presidential --

A I did not.

Q What -- tell me a little bit more about your role as Sherpa for the Secretary.

A Well, it involved setting up meetings with members of the committee, advising the

Secretary on subject matter that Department of Commerce handles and that the committee cares about. My particular areas of expertise are fisheries and telecommunications, and so those are two rather arcane but rather important areas of the Senate Commerce Committees jurisdiction.

I've also, as former legislative director for Senator Stevens, basically covered all of the issues in front of the committee, so aviation, space, science issues, climate change, all of those.

Q And what were the specific issues that you briefed Secretary -- or then nominee Ross on?

A Essentially, everything that the department covers across the board, including the census, to the extent I had background.

Q Okay. And tell me -- I want to ask you a couple questions about that. But before we do, in addition to preparing the Secretary -- or the nominee, I should say --

A Right.

Q -- for his meetings and his hearing, did you have any role in developing policy positions for the incoming administration?

A Not in that sense, no.

Q Not in what sense?

A Not in -- no. I was not involved in the policy discussions. There were different teams handling that.

Q Okay. You were not -- you're not involved in developing policy?

A Correct.

Q And did you participate in any policy meetings, at all?

A No.

Q Okay. You mentioned that among others, you briefed the Secretary on Census Bureau matters; is that right?

A Right. For example, doing the census in Alaska is handled differently than the rest of the census.

Q How so?

A Well, they start it in January so that

you don't -- in a lot of the remote villages, if you tried to do the census on census day, the rivers would be impassable. So people would be able -- unable to get in and out to get to the census.

So that is an area that Senator Stevens spent a lot of time on, that, and postal service and some other issues unique to Alaska, so --

Q And what other census-related issue did you prepare the nominee -- and when I say the nominee, I mean the nominee Secretary Ross. I'm not talking now about the deputy secretary nominee.

A Right. Mostly --

Q What are -- I'm sorry. Let me just finish the question for the clarity of the record.

What other census-related issues did you prepare future Secretary Ross on in advance of his confirmation hearing?

A Largely, the size of the budget, the fact that it had to be conducted based on a certain schedule, and that it would require a large ramp

up of personnel.

Q And this was because the -- when you say it would require a large ramp up, what would require a large ramp up?

A Conducting the census.

Q Okay.

A You, basically, have to hire about half a million part-time workers.

Q Got it.

Did you have any discussion with Secretary Ross when he was nominee regarding the citizenship question?

A No.

Q Okay. And when I say the citizenship question, you understand that I mean the inclusion of a citizenship question on the 2020 census?

A I took that to be your meaning, yes.

Q Thank you.

You mentioned you also were involved as the Sherpa for the deputy secretary nominee?

A Correct.

Q And tell us about any briefings that you

gave the deputy -- the then deputy secretary nominee regarding any Commerce Department matters?

A Again, basically, the same subject matter. The Secretary -- the only difference being that the Secretary typically asked more questions than the deputy secretary nominee did.

Q Did you brief them -- at the same time or did you brief them in separate meetings?

A No. They were on separate tracks.

Q And then -- I take it -- you testified you took them up for meetings on the hill.

A Correct.

Q And did you take the Secretary and the deputy secretary up together or separately?

A Separately.

Q How many -- how many Hill meetings do you recall going to with the Secretary when he was the nominee?

A Well, we met with every member of the committee, so I think that's about -- I don't know -- somewhere in the vicinity of 30. I'd have to go pull the list of the committee -- we met

with every member of the committee. We may have met with a couple of them twice if they had follow-up questions.

Q And then did you --

A And then there were a few members who were -- who had either just rolled off the committee or, obviously, the leader -- you know, leadership, so Leader McConnell and Mr. Schumer are not on the committee, but we, obviously, met with them, as well.

Q Okay.

A So I don't know, 35 meetings in all.

Q Okay. And did you meet with any staff members on the committee outside of staff who would have attended meetings with the senators?

A In one case, with Senator Nelson, we met with the staff prior to meeting with the Senator. But, otherwise, yes, the staff was always there with the member.

Q Okay. And in any of the meetings that you had with senators or staff during the confirmation process --

A Yeah.

Q -- did anyone ask you about the citizenship question?

A Not that I recall.

Q Okay. And did you raise the citizenship question in any of those conversations?

A Not that I recall.

Q And did the Secretary raise the citizenship question in any of those conversations?

A Not that I recall.

Q Okay. In any of the meetings that you had with members and the deputy secretary nominee, did any of the members ask you about the citizenship question?

A Not that I recall.

Q And did you raise the citizenship question with any of the members?

A Not that I recall.

Q And did the deputy secretary nominee raise the citizenship question with any of the members?

A Not that I recall.

Q The -- let me go back one second to when you joined the transition team. How did you come to join the transition team?

A I was contacted by a former colleague who was tasked with setting up the Sherpa teams.

Q Who was that?

A Christine Ciccone.

Q Can you spell that for the record?

A Well, Christine, C-H-R-I-S-T-I-N-E. And then Ciccone, I think is C-I-C-C-O-N-E.

Q And you mentioned Christine Ciccone was a former colleague?

A Correct.

Q Where had you worked together?

A She worked as staff on the governmental affairs committee when Senator Stevens was chairman.

Q And what was her role on the transition team?

A Setting up the Sherpa meetings.

Q Okay. So between -- shortly after

Thanksgiving and inauguration, your only role on the transition team was as the Sherpa to the Commerce committee?

A Right.

Q And your only functions as Sherpa to the Commerce committee included the functions that we've just discussed with regard to the Commerce Secretary nominee and the deputy secretary nominee; is that correct?

A Right. We were responsible for prepping them for the meetings and assisting with the questions for the record --

(Thereupon, the court reporter clarified.)

THE WITNESS: Questions for the record that came out.

BY MR. COLANGELO

Q And --

A And hearing prep.

Q Great. So let's take those separately.

Did you receive any questions for the record -- well, let's do the hearing first.

Do you remember when the Secretary's nomination was?

A Well, when his nom- -- he was nominated before I came on board, so --

Q Okay. If I told you he was nominated on November 30, 2016, would that sound about right?

A Yeah. It sounds right.

Q And your recollection is you came on board shortly after he was nominated?

A It was at the end of November, so he may have been -- they may have brought me on without knowing who it was, but it was right about that time frame.

Q Okay. And when was the Secretary confirmation hearing?

A It was in early January, I believe.

Q Okay. Would January 18, 2017 sound about right?

A Yeah. When's the -- the inaugural [sic] is on the 20th --

Q Inauguration was on the --

A Yeah. Sounds about right. Shortly

before the inauguration.

Q So you mentioned that you assisted with questions for the record?

A Yes.

Q Can you describe what questions for the record, are?

A Well, in the course off the nomination hearing, many members then send follow-up questions, particularly, Democratic members send follow-up questions. So those -- the typical process for a nominee is in order to get confirmed, you have to complete answering all the information that the committee requests.

Q And those questions for the record, I take it those were all submitted after the confirmation hearing?

A If I remember right -- and thank you for the reminder that it was on the 18th -- the committee gave the members until, I think it was midnight that night to submit questions for the record, and then we -- the objective was to try to get the questions answered in time that they could

be confirmed shortly after the President's confirmation.

Q Got it. Okay.

A So --

Q But you didn't get any questions for the record before his hearing on the 18th, did you?

A No.

Q And your recollection is that all of the questions for the record, would have come in on the 18th after the hearing?

A I think that's correct, yes.

Q And you assisted in preparing responses to those --

A Correct.

Q -- QFRs?

A Yes.

Q If I say QFRs, will you understand --

A I --

Q -- I mean questions for the record?

A I will. Yes.

Q And how did you prepare responses to those QFRs?

A Typically, the Secretary would take a first pass at them, and then I would follow in. And if it was a question he really didn't -- was unfamiliar with, then I would try to provide information, run that by him. And if he concurred in the response, we would send that.

Q Did you work with any other members of the transition team on the responses to the QFRs?

A No.

Q Did you work with any members of the Commerce Department -- any employees of the Commerce Department on the responses of the QFRs?

A No. Because he was not part -- we were -- I mean, we were in that awkward period where you're transitioned but you're not part -- we could ask -- we could send questions, but given the timing, it was highly unlikely that we were going to get a quick response. There were people standing by to try to assist, but we -- there wasn't a very well-defined process for getting that information back and forth.

Q Okay. Did you have any interaction with

employees at the Commerce Department from the time that you joined the transition team until Inauguration Day?

A No. There was pretty large firewalls between the two.

Q Okay.

A There were a couple members of the transition who were allowed to go in. They were sort of -- I forget when they call them beach head team --

Q Uh-huh.

A -- but none of them were the same people doing the Sherpa process, so it was a little bit awkward.

Q And did any of those QFRs that the Secretary received after his confirmation hearing relate to the citizenship question?

A No.

Q In the period after his confirmation hearing on January 18th, did you have any discussions with the Secretary about any Commerce Department matters, other than the

responses to the QFR?

A Other than -- no. I mean, other than basic personnel as he was trying to figure out, you know, who he was bringing on board.

Q Okay.

A That was all the discussion.

Q Okay. So in that period after his confirmation hearing and before he was confirmed, did you have any discussions about policy matters?

A No.

Q Okay. Did you -- after the confirmation hearing, was there a meeting with the Secretary and the transition team?

A I imagine there was, but I don't recall one.

Q Okay. So you don't remember leaving the -- leaving the Hill and going to a meeting anywhere in Washington with Commerce Department transition team members?

A Not that I recall, no.

Q And do you remember, was Wendy Teramoto at that confirmation hearing?

A Yes.

Q Do you remember a meeting that you and Wendy and the Secretary attended on the 18th after the confirmation hearing?

A Not with any particularity, no.

Q Okay. Mr. Comstock, tell me what your current position is?

A I'm the deputy chief of staff and director of policy.

Q Deputy chief of staff and director of policy.

When did you become the director of policy?

A On January 31st --

Q January 31st.

A -- 2017.

Q The -- was January 31, 2017 your first day in the office at the Commerce Department?

A Yes. If I'm recalling correctly, that that was Monday, yes. It was the 30th or 31st. It was whatever the Monday was at the end of January.

Q Would it help if I told you that Monday was the 30th?

A I'll take your word for it.

Q Okay. So your recollection is, then, that --

A They start you at the beginning of a pay period is the way it works --

Q Okay.

A -- in the federal.

Q So your first day was January 30, 2017?

A Correct.

Q So between Inauguration Day on the 20th and the 30th, you weren't physically present at the Commerce Department?

A I was not.

Q Did you have any conversations with any Commerce Department staff during that time period?

A Well -- no. Well, other than the gentleman who was helping with processing my paperwork.

Q Personnel onboarding?

A Right.

Q Other than the personnel onboarding, did you have conversations --

A No.

Q -- with anyone at the Commerce Department between January 20th and January 30th of 2017?

A No.

Q Did you have any conversations with Secretary Ross between January 20th and January 30th of 2017?

A Nothing particularly that I recall, but I'm sure I talked to him, yes.

Q Okay. You mentioned that your title is deputy chief of staff and director of policy.

When did you became deputy chief of staff?

A In April of this year.

Q So from January 30, 2017 until April 2018, you were director of policy?

A Correct.

Q Is director of policy a position within the Office of the Secretary?

A Yes.

Q And is that the same as director of policy and strategic planning?
A Correct.
Q Who do you report to?
A The Secretary.
Q Directly to the Secretary?
A Well, and to the chief of staff and to the deputy secretary.
Q Okay. Was there a chief of staff on January 30, 2017?
A There was not.
Q Okay. So until there was a chief of staff, who would you say you reported to?
A Well, until the Secretary came on board, sort of no one.
Q Okay.
A No. The -- the acting deputy secretary, obviously, was the career official who was in charge of making any final decisions for the department, so --
Q And can you identify her for the record?
A Ellen Herbst.

Q When did the Secretary come on board as Secretary?

A Again, I think his confirmation, if I remember right, was the 28th of February. And, again, you'd have to confirm that with records.

Q Okay. So between January 30th and February 28th of 2017, you were director of the Office of Policy and Strategic Planning?

A Right.

Q Notionally, you reported to the chief of staff and the Secretary, but neither of those --

A Weren't there.

Q -- roles had been filled?

A Correct.

Q And so you reported to nobody?

A Well, no. Again, to the extent that any decisions needed to be made, they were made by the career officials who were there. I would advise those career officials as to what my best guess of administration's policy on a particular matter would be.

Q In your position as director of the

policy office, how are you assigned work?

A Whatever the Secretary decides he wants me to work on.

Q Do you have a job description?

A Yes. I'm sure there is a job deception.

Q Have you seen a job description for that position?

A Not that I recall.

Q Do you have any regular or standing meetings with the Secretary?

A No standing meetings. I meet with him on a daily basis.

Q Do you -- is it a scheduled daily meeting?

A No.

Q So you don't see him at the same time every morning or afternoon?

A I do not.

Q And the Secretary doesn't have a daily senior staff meeting?

A No.

Q Are your daily meetings with him

scheduled or are they ad hoc?

A They're both. I mean, if there's -- if there's a meeting on his schedule for which I have relevant expertise or they would like my advice and counsel, I'm added to that meeting. If there's a meeting we need to have with him because something has come up, then we just -- when he's available, we go meet with him.

Q You said if they would like your advice or counsel, who is they?

A They meaning the Secretary and chief of staff.

Q And can you identify the chief of staff for the record?

A The chief of staff currently is Wendy Teramoto.

Q And there was no chief of staff in January of 2017?

A Correct.

Q When did she become chief of staff?

A I think she officially became chief of staff in August 2018.

Q 2018?
A Sorry. 2017.
Q So you mentioned you work on whatever the Secretary wants you to work on?
A Correct.
Q How does he identify matters that he wants you to work on?
A He says, Earl, can you get this done? Or we attend this meeting, and he says, can you follow up on that?
Q And how do you keep the Secretary informed about what you are doing on important matters or on assignments that he's given you?
A By email, by oral briefing, and sometimes by memos.
Q How do you decide whether you're going to update Secretary Ross by email, by briefing or by memo?
A Just depends on the time frame, the speed of which I need to get something to him, how extensive it is. You know, if there's a lot of information that it would be helpful for him to

have and review in advance, then I typically would try to do a memo.

Q How big is the policy office?

A We currently have six people.

Q Six people.

And what are those individuals' functions?

A Well, the policy office existed prior to my arrival, and it's staffed, essentially, by career -- largely by career staff. So their primary function is to assist me and the Secretary in identifying who can get something done within the department. They also review memorandums and correspondence that comes in from the different bureaus to try to identify if they're -- you know, flag policy issues, flag things they think might be concerning to the Secretary. So they're really an interface to help us figure how to manage the leviathan.

Q Manage the leviathan?

A Yeah.

Q And by leviathan, can you explain what

you mean?

A The Department of Commerce. It's 47,000 people who all report to work every day, and they all do a great job. And when you're trying to figure out what everybody's doing and make sure that what they're doing is consistent with the administration's policy, that's a large task.

Q Can you tell me what the professional background is of the six people on your staff in the policy office?

A Most of them are detailed from the different departments, so they have some experience or expertise in that particular department.

Q Do you have anybody in the policy office detailed from the Census Bureau?

A We have somebody from the economics and statistics administration which oversees the Census Bureau.

Q You don't have anybody detailed to the policy from the Census Bureau; is that correct?

A Not that I'm aware of.

Q And is the individual from ESA an economist?

A Good question. I don't know.

Q Okay. Have you seen the resumes of the people who work in your office and report to you?

A No.

Q Were all of them there when you became the director of the policy office?

A Well, not all the current ones, but, yes, everybody was there that was working for me when I started, yeah.

Q I'm not sure I understand that answer.

A In other words, they switch. So, for example, the person from NIST has left. I have an Army -- a detailee from the Army logistics command who comes in every year. I'm now on my third person for that job.

Q So would it be fair to say that you have six people in the policy office, and those people are details from different bureaus or agencies within the Department of Commerce, and they're on a fixed term and when one person leaves, another

person from that bureau comes in?

A Essentially, yes. I mean, the fixed term is somewhat flexible. But, for example, the person doing the National Oceanic and Atmospheric Administration has now moved on to be one of the budget directors for them.

So it's a position that's seen by the bureaus as something that could be good for leadership development. So they'll send somebody up and they'll work there for a year. The person who did the National Institutes of Standards Technology, NTIA, et cetera, has now moved back to NIST to take a more senior position there.

Q And do you have any regular -- strike that.

Does the policy office have any regular functions, other than whatever the Secretary wants us to work on?

A Well, yeah. Each one of the policy office people is responsible for managing their area, alerting me and the Secretary to issues that are coming up in those particular bureaus. So

it's a monitoring function in some ways. And so they're not necessarily developing policy for those bureaus as much as they are keeping track of what the bureaus are doing.

Q Okay. Is it unusual for the policy office to develop policy for a bureau?

A Not if we're developing for the Secretary, no.

Q You just said, I believe, your testimony was --

A What I'm saying is the staff that works that --

Q I'm sorry. Hang on. Just let me finish my question.

Your testimony was, so they're not necessarily developing policy for those bureaus, as much as they are keeping track of what the bureaus are doing?

A Correct.

Q So is it usual for the policy office to develop policy as opposed to keeping track of policy?

A No.
Q Please explain.
A Well, again, it depends on who you're talking about at the policy office. If you're talking about my staff at the policy office, they do not, as a general rule, develop the policy. The policy is generally developed by the Secretary with input from me and with input from them when needed.
Q And not with input from the bureaus?
A Well, absolutely. We go back and forth with the bureaus all the time.
Q You mentioned that the individuals in the policy office monitor specific areas; is that right?
A Correct.
Q Do you have somebody assigned to monitor the Census Bureau?
A Yes.
Q Who is that?
A David Langdon.
Q And what is David Langdon's background?

A He is in the Economic & Statistics Administration and knows -- knows the people down there, knows how to get stuff done, so --

Q Okay. And did you hire Mr. Langdon?

A I did not.

Q Was he in the policy office when you got there?

A He was.

Q How often do you interact with the Census Bureau?

A Directly? Depends on the issue. Like when we were doing the lifecycle cost estimate, quite a bit. When we were doing the census -- the citizenship question, interacted with the staff there -- the senior staff on a fairly frequent basis.

Q Do you have any standing meetings with the Census Bureau?

A No. Well, other than when they come and brief the Secretary sort of on a monthly basis, I'll attend those meetings.

Q Okay. I'll come back to the monthly

briefings in a minute.

In your job as director of policy, do you a -- have any role with regard to interacting with the White House?

A Sure. I'm the primary person that gets contacted when they've got a document they're trying to circulate and clear.

Q When the White House has a document they're trying to circulate and clear?

A Correct.

Q Okay. And so who would contact you in the course of circulating and clearing a document?

A Staff Secretary.

Q And what kind of documents would be circulated and cleared through the Commerce Department from White House?

A Op eds, presidential memorandums, executive orders.

Q And how often does the White House ask you to clear a document?

A Sometimes I get to clear multiple documents in a day.

Q So daily?
A Yes.
Q Okay. And when you get a document from the White House to clear, what do you do?
A I usually send it off to the affected bureaus and ask for their input.
Q And how much turnaround time do you typically have if you get a document from the White House to clear?
A It ranges from less than two hours to a week and a half.
Q And --
A Typically, in that ballpark.
Q And when you get a document from the White House to clear, how is it transmitted to you?
A By email.
Q From the Office of the Staff Secretary?
A Yeah.
Q Is it ever transmitted to you directly from a policy office within the White House?
A I'm not sure what you mean.

Q Would you get a document from the Domestic Policy Council directly or from the National Economic Council directly, or would you always get a document from --

A If we were working on something and there's something relevant that they would need to send it, sure.

Q So you get documents to clear from the White House and they can come from either the Staff Secretary or from another office within the White House?

A Sure. I mean, to give you an example, working on the steel proclamation, having to do with Section 232 tariffs, there's all kinds of interaction back and forth with the White House, White House -- Office of White House Counsel, NEC, CEA. I mean, it just depends on who's working on an issue.

Q And for the record, can you say what CEA?

A Counsel of Economic Advisors.

Q And, for the record, can you say what NEC?

A National Economic Council.

Q Great.

Did you have any interaction with the White House on the census citizenship question?

A No.

Q Did you have any interaction with the White House on the Census Bureau, at all?

A Not that I recall.

Q What is your typical -- do you have any typical role with regard to interacting with other cabinet agencies?

A Again, if there's an issue that the Secretary is working on and we're trying to communicate with the other departments, I'll often be asked to track down somebody in the other department to whom we can have a conversation.

Q So, yes, you do typically have a role interacting with other cabinet agencies?

A Yes.

Q On -- is that role on policy matters --

A Yes.

Q -- exclusively?

A I'm not sure what you mean by exclusively.

Q Budget, legal --

A Yeah.

Q -- any other --

A I mean, we talk all the time with OMB, for example, on our budget. I'm involved in that. Involved in strategic planning for the department. You know, we were working on a revision to a sugar agreement which involved a lot of interaction with the Department of Agriculture, so dealt heavily with Secretary Perdue and his senior staff on that matter. Just depends on the issue.

Q And do you have -- in your role as director of the policy office, do you have typical interaction with Congressional staff?

A On occasion, yes.

Q How much would you say you interact with Congressional staff?

A Well, depending on the issue, sometimes quite frequently. Sometimes -- usually, it's often when either their office -- like, for

example, on steel tariffs, we've had quite a bit of interaction with Chairman Brady and his staff, senior staff on the Ways and Means Committee would call frequently. On a red snapper issue, the staff of Mr. Scalise called. So it just depends on the issue.

Q Did you have any interaction with Congressional staff on the citizenship question?

A I did not.

Q Are you aware of anyone in the Commerce Department who did have interaction with Congressional staff on the citizenship question?

A Not that I recall.

Q Do you interact, at all, with members of Congress in your role as the director of policy?

A I do on occasion, yes.

Q Did you interact with any members of Congress on the citizenship question?

A I did not.

Q Is it typical in your function as director of the policy office to interact with outside stakeholders and nongovernmental

stakeholders?

A I take meetings when the Secretary can't, yes.

Q Do you ever take meetings independent of filling in for the Secretary?

A Yeah, on major policy issues I'm working on.

Q Did you meet with outside stakeholders on the citizenship question?

A No.

Q You didn't attend any meetings, including with the Secretary, on the citizenship question --

A I --

Q -- with outside stakeholders?

A With the outside stakeholders groups, no.

Q When did you first hear about the notion of adding a question about citizenship to the decennial census?

A Sometime in -- shortly after the confirmation.

Q And who did you hear it from?

A The Secretary.

Q And the Secretary was confirmed on February 28, 2017; is that right?

A I -- like I said, you'd have to confirm that date, but I think that was the date, yes.

Q And what did the Secretary tell you about the idea of adding a question on citizenship to the census during that first conversation shortly after his confirmation?

A Again, the exact time frame of the conversation, I can't tell you. It was sometime in that spring period. I don't recall the details. I think he simply inquired as to why don't we have a citizenship question on the census.

Q Okay. And what did you say to him when he inquired?

A Short answer, I don't know. I'll check.

Q Okay. And would that interaction be reflected in any documents?

A I don't -- I don't believe so, but it's possible it's in an email exchange.

MR. COLANGELO: Can we mark as Exhibit 1,

Comstock Exhibit 1?

(Plaintiffs' Exhibit 1, Email, was marked.)

MR. COLANGELO: I'm handing counsel Document Bates-stamped 1410.

BY MR. COLANGELO:

Q And I'll hand the document to the witness.

A Thank you.

Q Mr. Comstock, let me take that back and I'll give you the marked copy.

Mr. Comstock, have you seen this email before?

A Let's see it. It doesn't appear I was copied on it, so, no.

Q And you weren't shown this email in preparation for your deposition?

A No.

Q Okay. And this is an email from David Langdon to Ellen Herbst dated February 22, 2017; is that right?

A Correct.

Q And you testified that David Langdon works for you in the policy office; is that right?

A Correct.

Q And Ellen Herbst at the time was the acting deputy secretary; is that right?

A Right.

Q Do you see in this email where Mr. Langdon asks Ms. Herbst who is organizing the Census Bureau briefing for Earl and team?

A Yeah.

Q Okay. And take a look at the subject line, "Census Bureau briefing for OS politicals."

Does OS stand for Office of the Secretary?

A Yes.

Q Now, in the second paragraph of this email, you see the line where Mr. Langdon says, "Jim S. reminded me about the upcoming Congressional notification of decennial census and ACS topics and the need to gauge Earl's interest it." I believe he meant Earl's interest in it.

Do you see that line?

A I see it, yes.

Q And I take it that you would assume that Earl refers to you?

A I'm not aware of another Earl that works at the department at the moment, so --

Q Okay. Certainly, not another Earl that works at the Office of Secretary who's a political appointee?

A Correct.

Q And then Mr. Langdon then says, "Earl is very" -- underlined very -- "interested and thinks the Secretary will be, as well."

Do you see that?

A Yes.

Q On February 2nd of 2017 would have been your fourth day on the job; is that right?

A Yep.

Q Okay. And do you recall telling Mr. Langdon that you were very interested in Congressional notification of decennial ACS topics?

A I recall telling him that we were very

interested in the census and getting a briefing on it.

Q Okay.

A I don't specifically recall that, but --

Q Were you very interested in the decennial topics on February 2, 2017?

A What probably would have caught my attention is if we had to notify Congress about something, I would want to make sure we were up to speed on what we needed to notify them about.

Q As of this date, February 2, 2017, do you recall if you had already had discussions regarding adding a citizenship question to the census?

A I don't recall having a discussion before that.

Q Mr. Langdon's email says, quote, it would make sense for John Thompson to touch on this topic in his overview briefing and then to have a follow-up briefing very soon.

Was Mr. Thompson the Census Bureau director at the time?

A Yes.

Q And did that overview briefing take place that's referred to in this email?

A I imagine it did.

Q Do you remember when that happened?

A I couldn't tell you.

Q Do you keep a calendar?

A Yeah. There's an electronic calendar somewhere.

Q And your calendar records the meetings that you attend?

A Generally, yes.

Q Would it typically record a meeting with the Census director?

A It would depend if somebody sent me a calendar invite.

Q Would somebody typically send you a calendar invite for a meeting with the Census director?

A At that point in time, possibly. Yeah, I don't know.

Q The email refers, also, to a follow-up

briefing very soon. Do you remember that follow-up briefing?

A I don't have any specific recollection of that, no.

Q If there was a follow-up briefing on the question of Congressional notification of decennial topics, would that be reflected in your calendar?

A Again, possibly. But unless I entered it myself, which I may or may not have done, I don't know.

Q Do you have an assistant who adds meetings to your calendar?

A I do now, but I didn't then.

Q When did your assistant start?

A I think I finally got an assistant in May, maybe.

Q Okay. And before May, is it your testimony that meetings didn't appear on your calendar unless you put them there or somebody sent a calendar invite to you?

A Correct.

Q We'll mark this exhibit Comstock Exhibit 2.

(Plaintiffs' Exhibit 2, Email, was marked.)

BY MR. COLANGELO:

Q We are marking as Comstock 2 Document Bates numbered 2521.

Mr. Comstock, take a look at this email. You've seen this email before, right?

A I sent it.

Q So that's a yes?

A Yes.

Q Were you shown this email in preparation for your deposition today?

MR. GARDNER: I'm going to object and instruct the witness not to answer on the grounds of attorney work product.

I'm happy to let you answer when was the last time you saw the document.

But you're asking about documents counsel may have shown that would be protected.

BY MR. COLANGELO:

Q When's the last time you saw this document, Mr. Comstock?

A Yesterday.

Q And do you see the subject line of this email is your question on the census?

A Yep.

Q Okay. And Secretary Ross was confirmed on February 28th, I think we agreed; is that right?

A Like I said, if that's the date, yes.

Q Okay. So this would have been Secretary Ross's eleventh day on the job as Commerce Secretary, give or take?

A Approximately, yes.

Q And the subject line of this email is your question on the census?

A Right.

Q What was the Secretary's question on the census?

A He appeared to have asked whether undocumented people were counted in the census.

Q Okay. And how did he ask you that

question?

A I don't recall. Probably at a meeting, possibly following up on a census briefing. I don't know.

Q Have you checked your calendar for March 10, 2017 recently?

A I was going to say I probably haven't checked it from March 10, 2017 for that particular date.

Q Okay.

A By the way, I wanted to add one point. On the prior document, you need to understand that at that time, there were a number of questions that the prior administration had requested be placed, potentially, on the census that would have been involved in that notification. So that would have been a reason of why I would have been interested in that, on sexual orientation and gender identity. So that was an issue that was very at the forefront at the time of what to do about those requests.

Q So let's go back to Exhibit 2, your email

to Secretary Ross on Friday, March 10th. Do you know why the Secretary asked you whether undocumented people were counted?

A I have no idea.

Q Okay. Did he ask you whether noncitizen people were counted for apportionment purposes?

A Well, based on the answer, it appears he might have.

Q Appears he might have or appears he did?

A I couldn't tell you the answer on that.

Q Okay.

A I don't recall the question, so --

Q Okay. But you sent this email to the Secretary in response to a question?

A Yes.

Q And you would have presumably tried to make your answer responsive to his question?

A I generally do that, yes.

Q So you think it's likely that his question was about whether undocumented immigrants were counted for apportionment purposes?

A That's entirely possible, but he might

have also just asked do we count undocumented persons, and this is what I found on the Census website.

Q How do you think you found it on the Census website?

A By typing in census and going to their website and seeing what their FAQs say.

Q So you think you would have gone directly to the frequently asked questions page?

A That would not be unusual for me to do, yes.

Q This link you've identified at www.census.gov, that's the Census Bureau's frequently asked web page for Congressional apportionment; is that right?

A Again, without pulling it up, I couldn't tell you specifically what it says.

Q Okay. If I represent to you that if you pulled up that website, it would say frequently asked questions for Congressional apportionment, would that assist you?

A I'd be happy to take your word for it.

Q So does that assist you in recalling that the Secretary asked whether noncitizens were counted for apportionment purposes?

A And I have no recollection of the question, so I can only go by the answer.

Q Okay. The email also includes a blog post from the Wall Street Journal; is that right?

A Uh-huh.

Q Okay. And your email to the Secretary says that this blog post, quote, confirms that neither the 2000s, nor the 2010 census asked about citizenship?

A Correct.

Q So does that lead you to conclude that the Secretary asked about whether the decennial census asks about citizenship?

A That would be a reasonable supposition, based on the response.

Q And this blog post is called the pitfalls of counting illegal immigrants; is that right?

A Yep.

Q And were you concerned on March 10, 2017

about counting illegal immigrants?

A I -- no, not personally.

Q Was the Secretary concerned on March 10, 2017 about counting illegal immigrants?

A Again, I have no recollection of the question, so I couldn't speculate as to what his concern was.

Q But you testified that a significant part of your job function involves answering questions from the Secretary on issues that matter to him, right?

A Correct.

Q And if he asked you a question, you would try to be responsive?

A Generally, yes.

Q You wouldn't ordinarily send him information that wasn't responsive to a question he asked, would you?

A Not -- not characterized this way, no.

Q So you testified a minute ago that the Secretary -- that you first heard about the notion of adding a question about citizenship to the

census when the Secretary raised it with you shortly after his confirmation. Does this email indicate to you that it was by March 10th that the Secretary first raised it with you?

A I wouldn't necessarily draw that conclusion from this email.

Q Would you draw the conclusion that it was later than March 10?

A No, I wouldn't. Again, this -- this question does not directly address -- it's a question about how -- who do we count, not whether or not -- and whether there's a citizenship question. So I don't know at this point whether he indicated he was interested in such a question, other than getting the factual information.

Q Okay. Who would know when the Secretary was interested in adding a citizenship question?

MR. GARDNER: Objection. Calls for speculation.

BY MR. COLANGELO:

Q You can answer.

A My counsel just objected, so why can --

would I answer?

Q So let me -- an additional ground rule that I -- let's cover one additional ground rule. I will ask questions and your job is to answer them fully and truthfully.

A Okay.

Q Your counsel may state objections if he finds my questions objectionable for a range of reasons. If he states an objection, you can, nonetheless, answer the question unless he instructs you not to answer.

Do you understand?

A Well, you used the word "can," which means that I have the discretion.

Am I instructed to answer the question notwithstanding his objection or is it -- should I follow my counsel's objection?

MR. GARDNER: You should do your best to answer the question posed to the extent you understand.

THE WITNESS: Thank you for the clarification.

Again, you'd have to ask the Secretary.

BY MR. COLANGELO:

Q The -- the -- let's go back to Exhibit 2, subject line, your question on the census, and tell me how the Secretary's question was communicated to you?

A It appears orally.

Q Okay. Why do you say it appears orally?

A Well, we did a very extensive email search, including the Secretary's email, and so if you don't have an email from him to me asking about this, and normally I would reply back if he had sent me an email asking me about this. So, therefore, I would conclude that it was oral.

Q Okay. And you don't recall -- strike that.

Was that oral question in a meeting, on the telephone? How do you remember receiving that question?

A I have no recollection.

Q Okay. Your email says -- let me direct you to the first line of your message to the

Secretary. Quote, I was not able to catch anyone at their desk when I called the numbers I have for the Census Bureau from their briefing.

Do you see that?

A Yep.

Q Which briefing are you referring to?

A Apparently a briefing that we had with Census.

Q A briefing that you and the Secretary both had with the Census?

A Right.

Q Were you given any materials at that meeting?

A Quite possibly.

Q And was that briefing on March 10th?

A I have no idea.

Q Okay. If you -- if you -- would that briefing be reflected on your calendar?

A Again, it's possible. I -- I don't know.

Q Okay. Would it be reflected on the Secretary's calendar?

A Most likely, yes.

Q He does keep a calendar, correct?
A Well, he has somebody that keeps a calendar for him, yes.
Q And he had an assistant as of the day he started as Commerce Secretary, I assume?
A Correct.
Q Mr. Comstock, you sent your email to the Secretary on a Friday night after 8:30 p.m.; is that right?
A That appears to be the date stamp on here, yes.
Q Okay. And you sent it after you couldn't reach Census Bureau staff at their desks; is that right?
A Shocking at 8:30 that I could not reach them at their desk, yes.
Q So you got a question from the Secretary at the end of the work day; is that right?
A Quite possibly.
Q Was his question urgent?
A Again, I don't know. I don't recall when he asked me, and so this could have been something

I was catching up on at the end of the day. It could have been something that he had just called me on the phone about.

Q Okay. Who is Eric Branstad?

A Eric was the senior White House advisor at the time.

Q Tell me what senior White House advisor is.

A It's a position that basically helps with -- largely, with personnel coming over and also, ideally, was keeping us informed on what was going on at the White House side of things.

Q Is that the political appointee position?

A Yes, it is.

Q You said Mr. Branstad was the --

A Right.

Q -- senior White House advisor at the time?

A Correct.

Q Is he no longer in that role?

A That's correct.

Q Does he work at the Commerce Department

anymore?

A No. He does not.

Q Do you know when he left the Commerce Department?

A I think it was last spring. I think he worked there about a year.

Q Why did you copy Mr. Branstad on this email to the Secretary at 8:30 at night on a Friday about the census and citizenship?

A Because Eric was the, quote, senior political in the department at the time.

Q He was the senior political in the department at the time, okay.

Had Wendy Teramoto started in the office at that point?

A She had not.

Q Was Mr. Branstad in the Census Bureau briefing with you?

A I have no idea.

Q Did he -- tell me a little bit more about what you mean by he was the senior political in the Commerce Department at the time?

A He was somebody who had worked on the campaign and the transition and had been brought over as part of that. And so he was one of the -- there's a small group of folks that had been -- you know, the new politicals that had come in, and he was one of them and was -- not only the senior person in the group.

Q And did you generally keep him updated on anything that you would have been working with the Secretary on?

A Most likely, yes.

Q Do you recall whether he was present when the Secretary asked you the question that you were responding to?

A I have no idea.

Q Okay. Did he assist with the Secretary's confirmation?

A No.

Q Okay. Was anyone else on the transition team -- strike that.

Did anyone else on the transition team assist you in your function as confirmation

Sherpa?

A Yes, Israel Hernandez.

Q Anyone else?

A Nope.

Well, I mean, we had a press person, as well.

Q Who is the press person?

A You're going to tax my memory here. Really nice fellow, but he didn't come over so -- unfortunately, I can't recall his name, but we'd be happy to provide it.

Q Okay.

A If you -- there's a -- there's a -- I think it's a Washington Post picture that has the group, and he's sitting there, but we'll get you the name.

Q Thanks.

Was Mr. Branstad working on Census Bureau issues in March of 2017?

A Not that I recall, no.

Q Did you discuss the census citizenship question with him outside of this email in

March of 2017?

A Again, not that I recall.

Q Let me direct you to the highlighted line about three-quarters of the way down on the page that is stamped 2521 -- and we apologize for the copy quality.

A I was going to say --

Q This is how the document --

A Think you highlighted it so nobody could read it.

Q -- was produced to us.

A So this is not a redaction is what you're telling me?

Q Correct. This is not a redaction.

A If you can tell me what it says, I'd be happy to --

Q Sure. The highlighted line says, "No major government survey, including the decennial census now underway, asks Americans about their citizenship status."

And you see that this blog post is dated May of 2010, correct?

A Uh-huh.

Q So the decennial census now underway, do you understand we refer to --

A Would have been the 2010, yeah.

Q Remember to please wait for me to finish my question before you answer.

A Sure.

Q Did you highlight this line?

A Well, unless you did, then I'm assuming I did.

Q I can represent to you we did not highlight this line.

A Okay. Then I will assume that it was highlighted in the email.

Q And why did you highlight this line of the blog post before sending it to the Secretary?

A Well, it appears that the question was whether or not the citizenship question had been asked, at least on the 2010 census, and so I'm highlighting for him where in this article, so he doesn't have to read the whole thing that I found the information responsive to his question, which

is a statement by somebody in Wall Street Journal, which is, you know, in some circles considered a reasonably accurate paper. Stating that it was not collected in the 2010 census.

Q Okay. And take a look -- let's do that again. We had some interference from the conference line.

Take a look at the second page of Comstock Exhibit 2. This is the page marked 2522.

A Yep.

Q And, again, about two-thirds of the way down the page, there's another highlighted line.

Do you see that?

A I -- yep.

Q I'll represent to you this line was highlighted as the documents were produced to the plaintiffs in this lawsuits. We did not highlight.

A Okay.

Q That line reads --

A I can't read what it says.

Q -- "Many more foreign-born residents were

counted in 2000 than was expected based on annual estimates produced by the Bureau."

Do you see that line?

A Yep. I'm -- I see the highlighted line, but I'm taking it at your word that that's what it says.

Q Okay. The -- do you know why you highlighted that line when you sent this blog post to the Secretary?

A Again, it would appear to indicate that the census may have underestimated the number of undocumented folks.

Q Okay. So you told me that the Secretary first raised the idea of adding a citizenship question to the census shortly after he was confirmed. You've testified that on March 10th, you emailed him information showing that undocumented residents are included in the apportionment counts. You've testified on March 10th, you emailed him a blog post from the Wall Street Journal highlighting a line that no major government survey asks American's about

their citizenship status.

Does that help you remember when the Secretary first expressed interest in adding a citizenship question to the decennial census?

A No.

Q And does that help you remember that it was no later than March 10th that the Secretary first asked you that question?

A Again, you're speculating as to when he asked. But he appeared to have inquired about some relevant aspects of it --

Q Okay.

A -- on March 10th.

Q We'll mark this Comstock Exhibit 3. And, Mr. Comstock, is being handed Document Bates stamp 3685.

(Plaintiffs' Exhibit 3, Email, was marked.)

BY MR. COLANGELO:

Q Mr. Comstock, do you have Exhibit 3 in front of you?

A I do.

Q And this is an email from David Langdon to you on March 10, 2017; is that right?

A That's correct.

Q Looks like this email was sent at 7:50 p.m. on March 10th; is that right?

A That appears to be correct, yes.

Q And this was the same night you emailed the Secretary in response to, quote, your question on the census, unquote; is that right?

A Yeah. Yes.

Q Have you seen this email before?

A I would assume, since it was sent to me.

Q When's the last time you saw this email?

A Probably at 7:51 p.m. on March 10th.

Q Okay. Why did Mr. Langdon send you this email on the evening of March 10?

MR. GARDNER: Objection. Calls for speculation.

BY MR. COLANGELO:

Q You can answer the question.

A Well, again, as I mentioned earlier, there was -- we'd been told there was a

notification process that needs to go to Congress. And when you're not familiar with the details of this, one of the first things you do in my kind of position is try to get your arms around, okay, what are the things that have to happen? Particularly, what are the things that might prevent you from being able to make a policy change? And so when you're told we have to notify Congress about something at a certain time, that then becomes a deadline we have to decide if we need to take any action prior to. And in this case, there were a lot of other things potentially being added to the census that it was not clear that the administration was aligned with the prior administration on, including a question having to do with breaking out Middle Eastern North Africa [sic] people the so-called MENA question. There was the sexual orientation/gender identity questions. So there was an ongoing process to try to decide what, if anything, to do about these sort of pending things that were basically held over from the prior administration.

Q Okay. So --
A So I expect that's probably what Dave was emailing me about.
Q And was David in the conversation that you had with Secretary -- with Secretary Ross earlier that day about the census?
A I have no idea, because I don't recall the conversation.
Q And you don't recall telling him about that conversation?
A I don't, no.
Q Do you recall asking him to set up a briefing on that day?
A I -- it's entirely possible I did. I have no idea.
Q Okay. Do you think it's likely that it was a coincidence that on the same day you were emailing the Secretary about his question on whether noncitizens were included for apportionment purposes, that your employee was scheduling a briefing for you on the 2020 census topics?

A I think there's not, necessarily, linkage between the two. As I mentioned before, there were other things happening with respect to the census. We were also trying to get our arms around the budget of the census, all of which would be entirely plausible reasons why we would schedule a briefing.

Q And you mentioned one of the reasons you wanted, in general, to be briefed on Congressional notifications of the 2020 census topics was so that you had time to make policy decisions that the administration might support; is that right?

A No. To make sure we were -- had time to make any changes that needed to be made, based on prior administration recommendations that we knew were still pending.

Q Okay. And those prior recommendations were the sexual orientation and gender identity question and Middle Eastern North African issue; is that right?

A Those were two that I recall, yes.

Q Do you recall also being concerned at

this time about having enough time to add citizenship as a topic on the Congressional notification?

A I don't recall that being a concern at the time.

Q Let's have this marked as Comstock Exhibit 4.

(Plaintiffs' Exhibit 4, Email, was marked.)

BY MR. COLANGELO:

Q Handed the witness a document stamped 3686. And we've marked this as --

MR. COLANGELO: Is that Exhibit 4?

BY MR. COLANGELO:

Q Do you have Exhibit 4 in front of you, Mr. Comstock?

A I do.

Q And this is an email from David Langdon to you, Ellen Herbst and Dennis Alvord, is that how you pronounce his name?

A Yeah, Dennis Alvord.

Q Dennis Alvord.

Dated March 15th; is that right?

A Yes.

Q Of 2017?

A Yeah. We did a lot late at night.

Q So it seems.

Have you seen this email before?

A Again, apparently, if it was to me, yes, I probably saw it sometime around the 15th of March, 2017.

Q Do you recall seeing this email since the 15th of March, 2017?

A Absolutely not.

Q And this is an email from Mr. Langdon to you and Ms. Herbst that says, quote, I'd like to schedule a Census Bureau briefing on the 2020 census and ACS topics before the Census Bureau does its Hill notifications on March 31st.

Do you see that?

A Yeah.

Q And then he goes on to say the goal is for all to be on the same page for the notification process for the topics this year and

questions next year.

Do you see that?

A Yeah.

Q So Mr. Langdon is trying to schedule a briefing before the Census Bureau notifications to the Hill, correct?

A Yes.

Q And was this in follow-up to the March 10th email we just discussed?

A Again, I have no recollection of this exchange, but it appears to be likely, yes.

Q Okay. Did the briefing that Mr. Langdon was trying to schedule for you take place?

A No idea.

Q Would that be reflected on your calendar if it did?

A It's possible.

Q The Census Bureau is not in the same building that you work in; is that right?

A That's correct.

Q Okay. In fact, are they in the District of Columbia or are they in Maryland?

A I think they're actually just across the line in Maryland.

Q Okay. And when you are briefed by Census Bureau officials, are you typically briefed in person or by telephone or in some other way?

A Typically, they come over en masse and we have a briefing in the Secretary's conference room.

Q Okay.

A Or another conference room.

Q Does the Secretary's conference room have its own calendar?

A Good question. I don't know.

Q In order to make sure that meetings aren't double booked?

A I'm -- somebody may well maintain a calendar. I have no idea.

Q But, typically, when you meet with Census Bureau officials, you meet with them in person, right?

A Typically, yes.

Q And they aren't in the same building as

you, they're coming from somewhere else, right?

A Correct.

Q They come over en masse. By that, do you mean there's more than one of them?

A Typically, yes.

Q How many people typically come over from the Census Bureau?

A Well, a lot of the briefings have 15 or 20 people in them.

Q Okay. So would you typically invite 15 or 20 people to come over en masse from Maryland to meet with you in person and not include it on your calendar?

A I wouldn't have normally scheduled the meeting, so -- again, I would -- I might have it on my calendar if there's an invite, but I'm not -- I do a lot of meetings that I'm just pulled into, so I don't worry about putting them on a calendar.

Q But if people are coming from outside the building to meet with you on an important issue, you'd want to make sure you were available, right?

A Depends. I mean, if the Secretary's schedule interrupts that, then I'm not available, so --

Q Okay. So you don't remember if this briefing happened?

A I don't recall a particular briefing, no.

Q Okay. When the Census Bureau comes over en masse to meet with you in person, do they typically bring or send you materials?

A Sometimes they email things, yeah.

Q Not always?

A No. I mean, as you notice, Ellen, who is the deputy secretary, would be the person they'd be coming to brief. I would simply be an attendee at the meeting. So if I didn't show because something else conflicted on my schedule, then the meeting would occur any way, and that would be that.

Q Okay. Take a look -- do you still have Exhibit 3 in front of you?

A Yes.

Q Okay. Let's go back to Exhibit 3. This

is David Langdon asking you what your schedule --

A Right.

Q -- looks like to receive a briefing on the 2020 census --

A Right.

Q -- and ACS topics; is that right?

A Correct.

Q So is it your understanding that he was briefing the acting deputy secretary or that he was arranging everything for you?

A Again, I have no recollection of this exchange. So it's entirely possible that this briefing in the 3/10 email and briefing in the 3/15 email are one in the same or they could be different. I don't know.

Q Okay. Let's mark this Comstock 5. This is document Bates -- the witness has been handed Comstock Exhibit 5 stamped 1321.

(Plaintiffs' Exhibit 5, Memo, was marked.)

BY MR. COLANGELO:

Q Mr. Comstock, do you have Exhibit 5 in

front of you?

A I do.

Q Have you seen this document before?

A I have.

Q When's the first time you saw this document?

A Probably when we reviewed a draft in the Justice Department.

Q Okay. When was that?

A I couldn't tell you the date.

Q Was it near in time to the date below Secretary Ross's signature, which is June 21, 2018?

A I'd say that's likely, yes.

Q When's the last time you saw this document?

A Right now.

Q When's the last time before right now that you saw this document?

A I think maybe yesterday. I can't recall.

Q Okay. Did you draft this memo?

A I did not draft this memo, no.

Q Did you assist in drafting this memo?
A I provided some edits to this memo.
Q Okay. Who else assisted in providing edits to the memo?
A The Office of General Counsel.
Q Who in the Office of General Counsel?
A I believe Mike Walsh.
Q Anyone else?
A There may have been other counsel. I don't know.
Q Did Peter Davidson provide edits to this memo?
A It's entirely possible he did.
Q Did James Uthmeier provide edits to this memo?
A It's possible, yes.
Q The second sentence of this memo says, "Soon after my appointment as Secretary of Commerce, I began considering various fundamental issues regarding the upcoming 2020 census, including funding and content. Part of these considerations included whether to reinstate a

citizenship question, which other senior administration officials had previously raised."

A Yes.

Q Do you see that?

A I do.

Q Do you recall when -- strike that.

Do you know what time period the Secretary is referring to in this memo when he says, "Soon after my appointment, I began considering various fundamental issues"?

A Well, it appears that he would be talking about spring of 2017.

Q And the Secretary says in this memo, "My staff and I thought reinstating a citizenship question could be warranted."

Do you see that line?

A Yep.

Q Okay. Who is the Secretary referring to when he says my staff and I?

A That probably includes me and could include other staff.

Q Which other staff?

A Other staff involved in this process would include James Uthmeier, Mike Walsh, Wendy Teramoto, the Census staff. You know, again, the entire department that works for him, so --

Q Okay. He refers in that line to, "My staff and I thought reinstating a citizenship question could be warranted."

Is that right?

A Right. So he's likely talking about me. And, again, whether he discussed this with Eric Branstad, I have no idea. Izzy Hernandez was working on this for a while, so he might have talked to him about it. And then, obviously, James Uthmeier was working on this. Ellen Herbst, whether he discussed it with her, I don't know.

Q Let me ask you another question about your review of this memo. You mentioned that before today, the last time you saw it was yesterday; is that right?

A Right. Counsel showed it to me.

Q And who was present at that meeting?

A At the meeting yesterday?
Q Yes.
A Counsel sitting right here.
Q Can you identify them for the record, please?
A Josh, Kate, Mike Walsh, David.
Q Those four counsel?
A Yeah.
Q Okay. And when you saw this memo before June 21st, why were you shown this memo?
MR. GARDNER: Objection. Calls for speculation.
BY MR. COLANGELO:
Q You can answer.
A Well, I would be shown this memo because it involves an issue I worked on, so -- as one of the senior counsels for the Secretary, they would typically run something like this by me.
Q And did you meet to discuss it or were you shown the memo by email?
A Email. And I'm sure I discussed it with them, as well.

Q And who did you discuss it with when you were shown this -- the draft of this memo before June 21st?

A I would have discussed it with counsel.

Q The same counsel you just identified?

A No. Because I wasn't working with the Justice Department folks at the time. So this would have been internal at Commerce.

Q Okay. I thought you said it came over from the Justice Department.

A It did, the first draft.

Q Okay. What do you mean by I wasn't working with Justice Department folks at the time?

A I was not involved with direct interaction with the Justice Department --

Q Okay.

A -- I was seeing them through the Office of General Counsel.

Q So you discussed with your colleagues in OGC?

A Correct.

Q The same colleagues who are here today?

A Michael Walsh, I know I did. I don't recall if I discussed with David or not.

Q Anyone else?

A I likely talked to James Uthmeier.

Q Anyone else outside --

A Peter Davidson.

Q I'm sorry. Please answer.

A No. Peter Davidson. But those would have been the likely candidates. Again, I don't recall the exact discussions.

Q This was two months ago, correct?

A Correct.

Q Did you discuss the draft of this memo with anybody outside the Office of the General Counsel at Commerce?

A Other than when the Secretary signed it, no.

Q Okay. Tell me who you discussed it with when the Secretary signed it?

A The Secretary.

Q And what did you discuss with him when he signed it?

A Mr. Secretary, the Justice Department recommends that we file this supplemental memo, and so we recommend you sign it.

Q And did he read it when you showed it to him?

A I believe he did, yes.

Q Had you shown it to him before that conversation?

A I -- I don't know.

Q Do you know if OGC had shown it to him before that conversation?

A It's entirely possible, yes.

Q Do you know if the Justice Department showed it to him before that conversation?

A I don't believe the Justice Department came over to meet with them.

Q Did you talk with anyone other than the Secretary or your colleagues from the Office of General Counsel about this memo before June 21st?

A Not that I recall.

Q Did you discuss with it Karen Dunn Kelley?

A That's entirely possible, yeah.
Q Okay. Anyone else?
A Again, don't recall specific meetings on this. I think it was done largely in back and forth as people were available.
Q Did you discuss it with Wendy Teramoto?
A No. I don't believe I discussed it with Wendy.
Q Wendy is the chief of staff?
A Yes.
Q And you report to her?
A Yes.
Q Do you know why you wouldn't have discussed it with Wendy?
A Wendy doesn't get very involved in the policy matters, typically.
Q Why not?
A Because she's chief of staff. That's her call.
Q Got it.
You mentioned that you were likely one of the people the Secretary's referring to when he

says my staff and I thought reinstating a citizenship question could be warranted.

A Uh-huh.

Q Why did you think in the spring of 2017 that reinstating a citizenship question could be warranted?

A Because a citizenship question had previously been asked. It's asked by every other major democracy in the world, so why wouldn't we ask?

Q And why did you want a citizenship question?

A Again, I think it provides important information that's used for all kind of programs. And if you want a complete and accurate census, you would provide it.

Q What caused you to form a view on whether the citizenship question should or should not be added?

A When I was -- and I didn't really know that it wasn't included in the census, but once I became informed of that, it struck me as odd that

we don't ask the question.

Q And you testified earlier that the Secretary is the first person who raised it to you?

A In my employment at the Department of Commerce, yes.

Q Do you recall discussing it before you worked at the Commerce Department?

A Probably sometime in the last 30-odd years, I'm in -- you know, in political science and politics, so I'm sure I discussed at.

Q But the first time in 2017 that you recall considering this issue is when the Secretary raised it with you?

A Correct.

Q And this memo says the Secretary began considering it soon after his appointment?

A Correct.

Q And his appointment was February 28th we've established --

A That's correct.

Q -- of 2017?

A Again, assuming that's the correct date, yes.

Q I'm sure your counsel will advise us at the break if that's not the correct date.

A I could look it up if you need me to.

Q Okay. So you came to the view at some point in the spring of 2017 that a citizenship question ought to be included. What materials did you review in coming to that view?

A The fact that it's not on the census.

Q That's it?

A That's sufficient, from my point of view, yes.

Q You weren't concerned about any of the -- strike that.

Are you aware that in developing surveys and statistical instruments, the Census Bureau and other statistical agencies consider the impact of asking a question on a range of factors, including response rates?

A Absolutely. Yes.

Q And were you concerned about the

Census Bureau's processes for changing statistical instruments when you formed a view that the citizenship question should be added?

MR. GARDNER: Objection. Form.

BY MR. COLANGELO:

Q You can answer.

A Okay. Well, again, I think you need to separate this out. My decision or my belief that a -- a citizenship question should be included does not in any way change the process by which it might get included. So they're two separate things. I can hold the belief that a certain action might be warranted or should be taken independent of any analysis of whether or not that should be done. That's two separate things. So I think you're conflating the two.

The fact that I may think that as an objective, hypothetical question should one be added, I can form that belief quite quickly and hold that. That's, then, separate from is that the right decision to make for a variety of reasons, including some of the issues that you

just outlined.

Q And so in forming your view that a citizenship question should be added --

A Again, you're characterizing it in a way that I'm not. In forming my view that a citizenship question would be appropriate to include in a census, that's one thing.

Q Okay.

A Should be added is a separate --

Q Hang on a second. I haven't added a question yet.

The Secretary's memo says my staff and I thought reinstating a citizenship question could be warranted, right? And you've testified that you were among the people he was referring to when he says my staff and I.

A Right.

Q So you were of the view that the citizenship -- adding a citizenship question could be warranted?

A Yes.

Q And I'm asking in forming the view that

adding a citizenship question could be warranted, you relied only on common sense; is that what you testified?

MR. GARDNER: Objection. Mischaracterizes the witness's prior testimony.

BY MR. COLANGELO:

Q What did you rely on in forming that view?

A So, again, the key word is could. Could be warranted, meaning it is worthy of investigating further. That is what the document says.

Q What did you rely on in forming that view?

A The fact that other countries ask this information; the fact that we ask it on the ACS of a percentage of the population every year; the fact that as a citizen, most people wouldn't be concerned with answering that question. All of those things are relevant.

Q Did you research the statistical practices of other countries in the spring of

2017?

A No.

Q When did you -- did there come a time when you researched the statistical practices of other countries?

A Why would that be relevant?

Q Mr. Comstock, you just testified that in forming the view that adding a citizenship question could be warranted, among the things you considered was that other countries do. So I'm asking you --

A Okay.

Q -- did you research the practices of other countries?

A By that, you mean did I -- did I determine that other countries ask the question? Yes.

Q In the spring of 2017?

A Yeah. I think we did a quick Google search, you know.

Q So you Googled the census practices of other countries in order to determine that adding

a citizenship question could be warranted?

A Again, my formulation of a -- of a decision that it could be warranted is largely based on common sense.

Q Okay. I just want to make sure that I understand. That as to the part of your answer that related to the practices of other countries, in the spring of 2017, you formed that view by Googling it?

A I may have asked if other countries did it or I may have gotten online and looked. I don't recall.

Q Who would you have asked if you asked?

A I likely would have asked somebody from Census or I might have asked David Langdon.

Q And if you asked, would that be reflected in your -- in your email or your memo somewhere?

A If it was, you could have found the email. So I, obviously, did not send an email if I asked that question.

Q Okay. The --

MR. GARDNER: Matt, I'm sorry. I didn't

mean to break your line of questioning. Actually, we've been going about an hour and a half. Would now be an appropriate time for a break?

MR. COLANGELO: Yes.

MR. GARDNER: Let's take a break.

VIDEOGRAPHER: This concludes Media Unit Number 1. The time on the video is 10:32 a.m. We are now off the record.

(Off the record.)

VIDEOGRAPHER: This begins Media Unit Number 2. The time on the video is 10:45 a.m. We are on the record.

BY MR. COLANGELO:

Q Mr. Comstock, we were talking about the Secretary's June 21, 2018 memo which we marked as Exhibit 5. Do you still have that in front of you?

A I do.

Q Okay. That memo says that other senior administration officials had previously raised this question. Do you see that line?

A Yes.

Q Who are those other senior administration officials?

A You'd have to ask the Secretary.

Q You don't know yourself?

A I don't.

Q You have no idea which other senior administration officials raised this question, other than the Secretary?

A No.

Q You never asked him where the idea came from?

A Nope.

Q He never told you where the idea came from?

A Nope.

Q You spent a lot of time on this issue?

A Not relative to a lot of other things I work on, no.

Q How would you characterize the amount of time you spent on this issue?

A One one-hundredth of my time.

Q You agree that it's an important issue?

A Correct.
Q It was important to the Secretary?
A Correct.
Q He was motivated to get this done?
A He was working on a lot of different issues at the time.
Q But this one was important to him?
A Yes. Absolutely.
Q Okay. And when you saw the draft of this memo before June 21st and it refers to other senior administration officials, you didn't yourself have any view or understanding of who those other administration officials were?
A I did not, no.
Q You didn't ask the secretary who those other administration officials were?
A No.
Q Okay. When recommending that he sign the memo, he didn't say to you who are the other senior -- who the other senior administration officials were?
A We did not discuss that, no.

Q And you said this came over from the Justice Department?
A Correct.
Q Who sent it over, do you remember?
A I don't know.
Q Let's mark Exhibit 6.
(Plaintiffs' Exhibit 6, Email, was marked.)
MR. COLANGELO: The witness has been handed document stamped 2561. This has been marked Exhibit 6.
BY MR. COLANGELO:
Q Do you have Exhibit 6 in front of you?
A I do.
Q Have you seen this email before?
A I'm not on the email, so, no.
Q So this is the first time you've seen this message?
A Yeah. I -- I don't recall seeing this when it was sent.
Q Is today the first time you've seen this email?

A I think so, yes.

Q And you see this is an email from Brooke Alexander to Hillary Geary?

A Yes.

Q Who is Brooke Alexander?

A She is the Secretary's confidential assistant -- or at the time, she was. She's no longer.

Q And do you understand the recipient of this email to be the Secretary's wife?

A That appears to be who it's directed to, yes.

Q And this email is dated March 5th of 2017, correct -- I'm sorry. Strike that.

This email is dated April 5th of 2017; is that correct?

A That's what's on there, yes.

Q And you see that Ms. Alexander is emailing Ms. Ross and says, quote, do you have plans following Newseum? I'm asking because Steven Bannon has asked that the Secretary talk to someone about the census, and around 7:00 to

7:30 p.m. is the available time.

Do you see that?

A Yeah.

Q Okay. You know who Steven Bannon is?

A I do.

Q Who is Steve Bannon?

A He was an advisor to the President.

Q And he had that position at the time of this email, correct?

A I do not know.

Q And who did Mr. Bannon want the Secretary to talk to?

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

THE WITNESS: I have no idea.

BY MR. COLANGELO:

Q Do you understand that the second -- that -- strike that.

Do you understand that Mr. Bannon wanted the Secretary to talk to Kris Kobach?

A I wasn't part of this email or this conversation, so I don't know who he wanted him to

talk to.

Q Did the Secretary speak with Mr. Bannon that night?

A I don't know.

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

THE WITNESS: I do not know.

BY MR. COLANGELO:

Q Did the Secretary speak with Kris Kobach on April 7, 2017?

A No idea.

Q Did you join a call with the Secretary regarding the census on April 5th of 2017?

A I have no idea.

Q You don't know if you joined the call with the Secretary on April 5th of 2017?

A I don't know what I was doing on April 5, 2017 without looking at a calendar or something else that would remind me. I'd have to go through my emails that day. I could not tell you what I was doing on that day.

Q Do you know who Kris Kobach is?

A I believe he's somebody with State of Kansas maybe.

Q And have you spoken to Mr. Kobach before?

A I've never spoken to Mr. Kobach.

Q Have you emailed with Mr. Kobach?

A I've never emailed with Mr. Kobach.

Q And after the call that's referred to in this email, did the Secretary tell you what he discussed?

A No.

MR. GARDNER: Objection. Lack of foundation.

THE WITNESS: No.

BY MR. COLANGELO:

Q Who would know what was discussed on this phone call?

MR. GARDNER: Objection. Calls for speculation. Also, lack of foundation.

BY MR. COLANGELO:

Q You can answer.

A The parties to the call.

Q You were working on the census in the

spring of 2017, correct?

A Yes.

Q And the Secretary frequently asked you for updates on the census-related matters in the spring of 2017, right?

A I wouldn't characterize it as frequently.

Q Did the Secretary ever ask you for updates on census matters in the spring of 2017?

A Yes, he did.

Q Did he ever update you on developments that he was aware of regarding the census in the spring of 2017?

A It's unusual for the Secretary to update me on anything.

Q Would the Secretary have told you if he had a conversation with Steven Bannon about the census?

A Not necessarily.

Q Would he have told you if he had a conversation about the census with Kris Kobach?

A Not necessarily.

Q Why not?

MR. GARDNER: Objection. Form.

THE WITNESS: I wouldn't speculate, but he's the Secretary. He makes his own decisions.

BY MR. COLANGELO:

Q So has the Secretary ever told you about a conversation he had with someone else?

MR. GARDNER: Objection. Form.

THE WITNESS: Yes. He reports to me sometimes if he feels that it's essential that I know the substance of conversation.

BY MR. COLANGELO:

Q Okay.

MR. COLANGELO: Can we mark this Exhibit 7?

(Plaintiffs' Exhibit 7, Email, was marked.)

THE WITNESS: Thank you very much.

BY MR. COLANGELO:

Q Handed the witness a document stamped 763 and marked Exhibit 7.

Mr. Comstock, do you have Exhibit 7 in front of you?

A I do.
Q Have you seen this email before?
A No, I haven't.
Q This is the first you've ever seen this email?
A Yes.
Q Okay. If you turn to the second page --
A I'm sorry. I'm just reading the document.
Okay.
Q Do you see at the bottom of page -- of the first page of this exhibit, Mr. Comstock, there's an email from Kris Kobach to Wendy Teramoto --
A Right.
Q -- on July 21, 2017; is that right?
A That's what it says.
Q And the email says, "Wendy, nice meeting you on the phone this afternoon. Below is the email that I sent to Secretary Ross. He and I had spoken briefly on the phone about this issue at the direction of Steven Bannon a few months

earlier."

Do you see that?

A I see that.

Q Okay. That was the call on April 5th that we were just talking about, right?

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

THE WITNESS: Doesn't specify when the phone call took place.

BY MR. COLANGELO:

Q And did Wendy tell you she got this email from Kris Kobach in July of 2017?

A No.

Q You've never spoken to Wendy about Kris Kobach, at all?

A Not that I recall.

Q Is there anyone else that you're aware of that Steven Bannon directed the Secretary to talk to about the census, other than Kris Kobach?

MR. GARDNER: Objection. Lack of foundation.

THE WITNESS: I have no knowledge of any

conversations with Steven Bannon, so I wouldn't know who he might have suggested the Secretary talk to.

BY MR. COLANGELO:

Q Have you ever spoken to Steven Bannon yourself?

A I have never spoken to Steven Bannon myself.

MR. COLANGELO: Can we have this marked Exhibit 8?

(Plaintiffs' Exhibit 8, Email, was marked.)

BY MR. COLANGELO:

Q This is document stamped 3709.

A Uh-huh.

Q Do you have Exhibit 8 in front of you?

A Uh-huh.

Q Who's Mark Neuman?

A Mark Neuman is a former -- I think he was formally chair of a census advisory committee, and he was a member of the transition -- I don't know which aspect of transition but, basically,

advising on census.

Q How long have you known Mark Neuman?

A I think I met Mark Neuman probably in December or January of either December 2016 or January 2017. I don't recall which.

Q And did you meet him in your capacity as the confirmation Sherpa?

A Yes.

Q Did you discuss any Commerce Department policy matters with him during the transition?

A Not that I recall.

Q Did you discuss any Census Bureau policy matters with him during the transition?

A We discussed -- I mean, he basically briefed the Secretary on the Census operation, some of the challenges they face, the whole issue of hard-to-count populations, the challenges you face hiring temporary workers, concerns about the budget, whether they're properly funded. Those were the primary discussion points.

Q Where does Mr. Newman work right now?

A He is a senior VP at -- I don't know the

name of the organization, but I know they own Victoria's Secret.

Q He's not a government employee right now?

A No.

Q Okay. How often do you speak with him?

A I last saw him several months ago when we ran into each other at a party.

Q And over the course of your time at the Commerce Department, how often have you spoken with him?

A Maybe a dozen times.

Q By telephone?

A Yep.

Q Have you ever met with him in person?

A I have met with him in person.

Q How many times?

A I think he briefed the Secretary maybe two times, three times that I can recall, and he had me over for dinner one time at his house to meet a potential chief of staff of the Census Bureau.

Q What did he brief the Secretary on?

A Again, the whole operation of the Census, background on it. It's an area I was not familiar with, and he was one of the folks on the transition who was familiar with the Census.

Q Have you been present for briefings he gave the Secretary on the citizenship question?

A I've been present -- did we cover citizenship? He covered citizenship at one of the briefings.

Q When was that?

A I couldn't tell you the date.

Q What did he say about citizenship in the briefing that you attended with him?

A We talked about how citizenship could be -- what would it be useful for and in terms of a government agency. So the Voting Rights Act enforcement, that's what the ACS data has provided to the Justice Department.

Q When was that briefing?

A Again, sometime -- sometime in the spring. I can't -- couldn't tell you exactly when.

Q Is Mr. Neuman a lawyer?
A Good question. I don't know.
Q Does Mr. Neuman have a voting rights background?
A I couldn't tell you.
Q Take a look at Exhibit 8, which is an email from you to Mr. Neuman at the bottom of the page dated April 13, 2017. Do you see that?
A Uh-huh.
Q And the email says, "Hi, Mark. Quick question. When does Census need to notify Congress regarding the questions that will be on, A, the ACS and, B, the decennial census?"
A Correct.
Q Why were you asking Mark this question?
A Likely because Mark would know the answer.
Q Why didn't you ask the Office of General Counsel?
A Because at the time, there was nobody in the Office of General Counsel that I would -- would have been familiar with.

Q I'm not sure I understand what you mean by nobody in the Office of General Counsel that you would have been familiar with.

A Well, there was nobody in the Office of General Counsel that I was -- had easy access to that works on census issues.

Q You're the director of the office policy in the Office of the Secretary?

A Correct.

Q Okay. But you didn't think you could ask the General Counsel's office this question at the time?

A Well, if you note the date, the time of this email, it's 9:58 p.m.

Q Uh-huh.

A I'm trying to get an answer. And I'm pretty certain there's going to be nobody in the Office of General Counsel at 9:58 p.m.

Q Did you need an answer that night?

A I usually try to get answers as quickly as I can, yes.

Q Why were you asking this question?

A Probably because it was on my list of things to do, and I was working, trying to get those things done.

Q And how did it come to be on your list of things to do?

A Well, I may have been -- again, the Secretary might have asked me about when do we need to get questions, when do we need to notify the Congress?

Q Okay. So you asked Mr. Neuman this question in order to respond to a question from the Secretary?

A I don't know the genesis because I didn't say in the email why I need the information.

Q Why didn't you ask the Census Bureau this question?

A Because in April, I probably had no contracts over at the Census Bureau.

Q By April 13th of 2017, had you already discussed the citizenship question with Mr. Neuman?

A I have no idea.

Q Take a look at Mr. Neuman's reply to your email. This is at the top of Exhibit 8. He says, "I believe that the annual notification to the Congressional committee relating to the questionnaire content additions for 2020 census just take place."

And then do you see in the second paragraph he says, "There will be another opportunity next year"?

A Right.

Q What does Mr. Neuman mean by opportunity?

MR. GARDNER: Objection. Calls for speculation.

THE WITNESS: Again, if you notice the rest of his statement that you didn't read, plenty of questions relating to sexual orientation. So we were focused on the issue of what was going to be included in the questions. More precisely, what was not going to be added.

The prior administration had wanted to add, I might note, to the decennial census a question on sexual orientation and gender

identity. So for all the people that are raising an uproar right now about the addition of this question, apparently there was no concern about adding such a question on another sensitive topic last year.

So leaving that aside, I think he is simply pointing out to the extent there's -- we have some questions we'd like to see added, there will be an opportunity next year.

BY MR. COLANGELO:

Q So had you talked to Mr. Neuman about a question you'd like to see added?

A I don't recall.

Q Okay. But the sexual orientation and gender identity question was not included as a topic, right?

A Correct.

Q And that was because you came to the policy position you did not want to ask that question, correct?

A That was the administration's conclusion, yes.

Q So Mr. Neuman can't have been talking about the opportunity to put that question back on that you had just decided not to have included, right?

A That would be speculation. I don't know what he's referring to.

Q Okay. But you did testify he was referring to the opportunity to put a question on?

A He was noting that there would be another opportunity to place a question, should somebody decide to do that next year.

Q And then the next paragraph of his email says, "I recommend that you ask the Bureau to provide a list of their response rates on all demographic questions currently asked on the ACS. You will see whether certain demographic questions have lower response rates than others, especially among certain demographic groups. That is something that can be provided off the shelf."

A Yes.

Q Why is he recommending that you ask that information from the Bureau?

MR. GARDNER: Objection. Calls for speculation.

THE WITNESS: Again, to the extent we were discussing the possibility of adding the citizenship question, that would be a logical question to ask.

BY MR. COLANGELO:

Q When did you first discuss the possibility of adding a citizenship question with Mr. Newman?

A Again, for the umpteenth time, I don't recall the exact date.

Q But you agree that based on this email exchange, that you had already had that conversation before April 14th of 2017?

A Again, I have -- I don't recall when we first discussed it. It's entirely possible.

Q Not just possible, but likely, right? Why else would Mr. Newman be talking about the opportunity to add a question?

MR. GARDNER: Objection. Calls for speculation.

THE WITNESS: Again, if we were considering changing the questions, it would be important to know.

BY MR. COLANGELO:

Q And if you're considering adding a citizenship question, it would also be important to know the response rates on all demographic questions; is that right?

A That would be one of the questions you would ask, yes.

Q Okay. Did the Secretary discuss the citizenship question with Mr. Newman in the spring of 2017?

A You'd have to ask the Secretary.

MR. GARDNER: Objection. Lack of foundation.

BY MR. COLANGELO:

Q I'm sorry. You were both speaking at the same time.

MR. GARDNER: Objection. Lack of foundation.

BY MR. COLANGELO:

Q And now please answer.
A I would say you'd have to ask the Secretary.
Q Did he ever tell you that he spoke with Mr. Newman about the citizenship question?
A I'm fairly certain he was -- he did talk to him at some point.
Q Okay. When was that?
A I couldn't tell you.
Q Did Mr. Newman ever say to you that he had spoken to the Secretary about adding a citizenship question?
A It's possible, yeah.
Q Okay. When did he tell you?
A Again, I don't recall the exact date.
Q Try to place it, roughly.
A To your question, was there discussion of the possibility of adding a citizenship question in the spring? Yes. That does not mean any firm decision had been made. We were exploring the opportunity.
Q I'm not asking you about decisions. I'm

just asking when the Secretary spoke to Mr. Newman.

A Again, I keep telling you I don't know the exact dates he spoke to him.

Q Okay.

A I know he did speak to Mr. Newman. I don't know the exact dates.

Q And I'm not sure I got an answer, but forgive me if I did.

When did Mr. Newman tell you that he had spoken to the Secretary about this citizenship question?

A Again, I do not recall the exact dates of conversations.

Q Okay.

A If you don't have an email that specifies it, I can't tell you the date.

Q All right. Did you ask the Census Bureau to give you the information that Mr. Newman suggested in this email?

A Possibly. I don't recall.

In the decision memo we have such

information, so, clearly, at some point, it was asked. I cannot tell you.

Q Can you tell me what you mean by decision memo?

A The memo that the Secretary produced documenting his decision. There was a reference to other response rates and demographic. So, clearly, at some point, the information became available.

Q And you're referring to the March 26, 2018 from the Secretary to Karen Dunn Kelley?

A Yes.

Q But you don't recall seeing that information -- strike that.

MR. COLANGELO: Let's mark Exhibit 9.

(Plaintiffs' Exhibit 9, Email, was marked.)

BY MR. COLANGELO:

Q We have marked a document stamped 3694 as Exhibit 9. Do you have this email in front of you?

A I do.
Q Have you seen this email before?
A Yes.
Q Before today, when is the last time you saw this email?
A Yesterday.
Q And this is an email from Brooke Alexander to you with a copy to Wendy Teramoto; is that right?
A Correct.
Q Dated April 20, 2017?
A Yep.
Q And did you understand this to be a message from the Secretary?
A That's what Brooke's message says.
Q Brooke has access to the Secretary's email?
A Yes.
Q And is it -- okay. Withdrawn.
Are you familiar with the National Advisory Committee on Racial, Ethnic and Other Populations?

A No.

Q You have no idea what the National Advisory Committee is?

A I mean, I know it's an advisory committee to Census, but outside of that, I -- I couldn't tell you what they do, other than what their title suggests that they do.

Q So you're aware that there's a National Advisory Committee on Racial, Ethnic and Other Populations that advises the Census Bureau?

A I take that from this email that's correct, yes.

Q And what do you understand the role of the advisory committee to be?

A To provide advice to the Census Bureau.

Q Okay. The message from Brooke speaking for the Secretary to you says, "Earl, Census director has on April 29th a meeting of the National Advisory Committee. We must get our issue resolved before this" -- exclamation point, and the must is underlined.

Do you see that?

A I see that.
Q What is our issue?
A I couldn't tell you.
Q Our issue is the citizenship question, right?
MR. GARDNER: Objection. Calls for speculation. Lack of foundation.
THE WITNESS: I would say likely not, actually, given there's no reason to believe the National Advisory Committee on Racial, Ethnic and Other Populations would be advising on a citizenship question.
BY MR. COLANGELO:
Q Were there other issues that you'd been talking about with the Secretary involving the census in the spring of 2017 that would relate to the National Advisory's mandate?
A Certainly the SOGI question would, and the MENA question would.
Q But the notification date for the SOGI question was at the end of March in 2017 -- for the SOGI topics, I should say, correct?

A Correct.

Q So that was already resolved by April, right?

A I'm not certain of the timing, but MENA, I think, was not resolved until sometime in the spring or summer.

Q And sticking with the SOGI question -- and for the record, that' S-O-G-I. SOGI stands for sex orientation and gender identity.

A Correct.

Q Would you conclude if the Secretary referred to a National Advisory Committee on Racial and Ethnic, Populations that the SOGI question would be what he had in mind?

A I would guess. Again, this is speculation, but my best guess, based on this reference, is probably more like the MENA issue is what was in front of us.

Q Okay. And describe the MENA issue?

A The Middle Eastern North African question. There's a question as to whether you ask two questions or you ask one question. And

it's not a topic I spent a tremendous amount of time on, but it was something that the Census was very much discussing at the time.

Q And had you discussed that issue with the Secretary?

A We had a conversation or two about it. And, again, it was largely in the context of which way to go on that question.

Q And why would the Secretary have said that that issue must be resolved by April 29th?

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

BY MR. COLANGELO:

Q You can answer.

A You know, again, at that point -- this is shortly before a -- if I recall correctly, a Congressional hearing that was going to go into the census and probably wanted to have a position to recommend to Director Thompson as to what he should say to the advisory group. Again, I don't recall this reference or precisely what he was speaking to.

Q Okay. This isn't a topic you'd spent a lot of time on, right, the Middle Eastern North African question?

A Correct.

Q There's no reason the Secretary would have referred to it as our issue, is there?

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

THE WITNESS: Again, depending on if his perception was that there was an administration policy call to make on it, he would refer to it as our issue.

BY MR. COLANGELO:

Q He could also have referred to the citizenship issue as your issue, right?

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

THE WITNESS: Again, I would say looking at the context of the email, I would say that's an unlikely connection.

BY MR. COLANGELO:

Q And by April 20th of 2017, how many times

had you discussed the citizenship question with Secretary Ross?

A I have no idea.

Q More than a handful?

A Possibly.

Q Okay. Would you say he was extremely interested in the issue?

A Certainly, when he raised it, he was interested in it.

Q Okay. You wouldn't say he was extremely interested in the MENA question, right?

A When we discussed it, he was equally interested in that.

Q He didn't raise it with you with the same frequency he raised the citizenship question, right?

A That's correct.

Q Why was Wendy Teramoto copied on this email?

MR. GARDNER: Objection. Calls for speculation.

THE WITNESS: Couldn't tell you.

BY MR. COLANGELO:

Q Did you speak with her about this issue after you got this message?

A It's possible. I don't recall.

MR. COLANGELO: Can we mark this Exhibit 10?

(Plaintiffs' Exhibit 10, Email, was marked.)

BY MR. COLANGELO:

Q Handed the witness a document stamped 3710 and we've marked it as Exhibit 10.

A Okay.

Q Have you read this email?

A Yep.

Q Okay. You've seen this email before?

A I have.

Q When's the last time you saw this email?

A Yesterday.

Q When you saw this email yesterday, was it redacted as it is in the form I've shown it to you now or was it unredacted?

A It was redacted.

Q Okay. And you see that the Secretary has written you an email on May 2, 2017 that says, quote, worst of all, they emphasize they have settled with Congress on the questions to be asked. I am mystified why nothing has been done in response to my months' old request that we include the citizenship question. Why not?

Do you see that?

A I see that.

Q When did the Secretary make his months' old request to include the citizenship question?

A Again, sometime in the spring.

Q Probably on March 10th when you emailed him the Wall Street Journal blog post?

A Potentially. I don't recall.

Q Who does the "they" refer to in the line I just read you from the Secretary's email?

MR. GARDNER: Objection. Calls for speculation.

THE WITNESS: I don't know.

BY MR. COLANGELO:

Q You mentioned a minute ago the Census

director in the -- this time period, had an upcoming House appropriation hearing; is that right?

A I believe I said the Secretary had an upcoming House appropriation hearing.

Q Do you remember the date of that hearing?

A I don't.

MR. COLANGELO: Can we mark this Exhibit Number 11?

(Plaintiffs' Exhibit 11, Email, was marked.)

BY MR. COLANGELO:

Q Okay. This is -- have you had a chance to look at this email?

A Lot of black spots on it. Okay.

Q Have you seen this email before?

A Apparently I must have seen it when I wrote it.

Q When's the last time before today you saw this email?

A Probably May 1, 2017.

Q Okay. And does this email reflect that

you sent the Secretary, Director Thompson's House appropriation subcommittee written testimony?

A Yes.

Q And his testimony was for, quote, this Wednesday?

A Right. That's what it appears.

Q And if I told you that -- oh, if you look at the subject line it says, Wednesday, May 3rd; is that right?

A That's correct.

Q Okay. So let's refer back to Exhibit 10.

A Yep.

Q Now that you see the day before you had sent the Secretary Mr. Thompson's written testimony for the House appropriation subcommittee hearing --

A Right.

Q -- what do you understand, worst of all they emphasize they have settled with Congress to mean?

MR. GARDNER: Same objection. Calls for speculation.

THE WITNESS: Again, I'm not sure without further context who they is. He could be referring to that advisory committee that you had had in a previous email. He could be referring to Census.

BY MR. COLANGELO:

Q Does the advisory committee establish the content for the census?

A Again, the context of this email is that somebody appears to be emphasizing that they've settled with Congress on the questions. That clearly is not the case, because questions aren't due until March of 2018. So they couldn't have settled on the questions.

Q And you see that at the top of Exhibit 10, you email the Secretary saying, "On the citizenship question, we will get that in place"?

A Uh-huh.

Q Do you see that?

A Yep.

Q What did you mean by that?

A Well, it means that we're, as instructed, going to continue to work on developing a citizenship question, and that process -- again, it's probably helpful at this point to explain on the policy side, right, you formulate -- you formulate something that you think you would like to do, and then you go explore that. That's my job, is to go. Secretary says, I think this might be a good idea, you run it down, and you track down the issues, and you say -- you know, first question I usually ask is, okay, is this something that Department of Commerce does? Do we have legal authority to do this? Once you clear those two thresholds, now you get to work.

But I don't spend a lot of time chasing down things that people are not planning on doing.

Q So you --

A So there has to be some initial threshold decision that this is worth pursuing.

Q Now, let me stop you there, because you said a minute ago, as instructed. And you're referring to instructions from the Secretary,

correct?

A To pursue, exploring the question.

Q This was instructions to add the question in response to my months' old request that we include the citizenship question, correct?

A This would be instructions to review and consider and present to him information that would allow him to make a decision on whether or not to take final action.

Q Mr. Comstock, I'm just asking you what you understood on May 2nd --

A And that's what I'm telling you I understood on May 2nd.

Q Hold on one second. Let me finish the question.

A Uh-huh.

Q The Secretary wrote, "I am mystified why nothing has been done in response to my months' old request that we include the citizenship question."

And you responded, "On the citizenship question, we will get that in place"?

A Correct.

Q Okay. So my question is: By we will get that in place, what did you mean?

A I meant that I will present to you the information and the process necessary for you to decide if you would like to pursue this question.

Q Your email says we will get that in place, correct?

A I mean, we will get in front of you the necessary information for you to make a decision. Part of my role in this process is explaining to people who have never worked in government before that there are processes that you have to follow in order to make an action happen. You're dealing with people who are used to being able to make a decision and it simply goes into effect.

Q Okay.

A That's not the way the U.S. government works.

Q So the process that you then go on to tell the Secretary he has to follow is later in your message; is that right?

A That part of the process, yes.

Q And that email says we need to work with Justice to get them to request that citizenship be added back as a census question; is that right?

A That's right.

Q Why would you say you needed to work with the Justice Department to get them to request that citizenship be added back?

A Because based on a very preliminary review, they appeared to be the most likely government body that would have a specific need for the information that would support adding a citizenship question to the decennial census.

Q Who conducted that preliminary review?

A We were told by the Census Bureau that the Justice Department was the person that had requested the citizenship question on the ACS and that they utilized the ACS data for Voting Rights Act information.

Q Who in the Census Bureau told you that?

A I couldn't tell you.

Q And why did you need a request from

Justice?

A Again, based on the preliminary review, the understanding we had was questions are added, based on requests from a government agency. There is such a thing as the Paperwork Reduction Act where you have to justify to OMB why do I need this information? That has to get cleared. So there are certain hurdles you have to get through. So if at the end of the day the Secretary decided to pursue this question, we would need to clear certain legal thresholds.

Q Why not just tell the Census Bureau to add the citizenship question and say the Secretary wanted it?

A Because I'm not sure that that would be the process they would necessarily agree to follow.

Q So you had to have it come from DOJ in order for the Census Bureau to agree to follow it?

A Again, that was a preliminary conclusion based on a cursory analysis.

Q Your email then says, "We have the court

cases to illustrate that DOJ has a legitimate need for the question to be included."

What court cases were your referring?

A I don't recall the exact court cases.

Q Did you research those court cases?

A I did research a court case where there was a scenario in which you would need -- it would be important to have Citizen Voting Age Population data in order to make a Voting Rights Act claim.

Q How did you identify that case?

A By a legal research.

Q What do you mean by legal research?

A Well, I think I talked to -- I'm trying to think -- I think Mark Neuman may have provided a case name. I talked to James Uthmeier, who looked at some cases. Basically said, okay, if this is the question -- I mean, it's what you do as an attorney all day long, is to go find cases to support what you're looking for.

Q So Mark Neuman identified for you a case that would support DOJ's need for this information?

A Yeah. I said I may have spoken to Mark Neuman on that. I think he may have provided it. I don't recall. I know James Uthmeier looked at some cases.

Q Would he have provided that case for you on a phone call or by email?

A James?

Q Pardon me?

I'm sorry. Withdraw that question.

Would Mr. Newman have provided that case to you by email or on the phone?

A Well, if he provided it by email, you'd have it. I don't have the emails in front of me, so I can't tell you.

Q So by May of 2017, you'd come to the view that you needed another agency to request a citizenship question on the census?

A That was based on the preliminary analysis, yes.

Q You then say in your email, "I will arrange a meeting with DOJ staff this week to discuss."

Do you see that?

A Yes.

Q Okay. So before May 2, 2017, you had not had any discussions with the Department of Justice about the citizenship question, right?

A Not to my knowledge.

Q What did you do to arrange a meeting with DOJ staff to discuss?

A I asked Eric Branstad for a name over at DOJ, and he provided me the name of Mary -- Mary Jane [sic] Hankey I think it was, whom I then contacted.

Q Okay. Your email refers to the court cases to illustrate that DOJ has a legitimate need for the question to be included.

A That's what it says, yes.

Q What were the other needs that you had talked about for including the citizenship question?

A I don't recall.

Q Okay. And by legitimate need, were you concerned that other needs that didn't come from

DOJ would not be legitimate needs?

A No. I think that's just an imprecise -- the use of the term legitimate, something to say that it would be a need that would be considered a government need for the information.

MR. COLANGELO: Counsel, five-minute break. Let's go off the record.

VIDEOGRAPHER: Going off the record. The time on the video is 11:31 a.m.

(Off the record.)

VIDEOGRAPHER: This begins Media Unit Number 3. The time on the video is 11:45 a.m. We are on the record.

BY MR. COLANGELO:

Q Okay. Let's mark as Exhibit 11 --

MR. GARDNER: No. I think 12.

MR. COLANGELO: 12. Sorry. Thank you.

(Plaintiffs' Exhibit 12, Email, was marked.)

BY MR. COLANGELO:

Q This is document stamped 3699.

Mr. Comstock, do you have Exhibit 12 in front of you?

A Uh-huh.

Q Have you seen this email before?

A No. I mean, part of it I clearly did, because it's to me, but -- oh, that's the previous email. So I haven't seen the upper part of this document.

Q Okay. So this is an -- an email chain from Brooke Alexander forwarding to Wendy Teramoto the May 2nd email that the Secretary wrote to you where he says I'm mystified why nothing has been done in response to my months' old request; is that right?

A Yeah. Appears to be, yeah.

Q So it looks like Brooke forwarded the Secretary's email to Wendy?

A Correct.

Q Is that her regular practice?

MR. GARDNER: Objection. Calls for speculation.

THE WITNESS: Yeah. I couldn't tell you.

BY MR. ADAMS:

Q Do you know why she did in this case?

A I don't know.

Q It's because the Secretary was expressing frustration and one concern was that one of his priorities had not yet been accomplished and she wanted the chief of staff to know?

A I don't know.

Q Would that be your surmise?

MR. GARDNER: Objection. Form.

THE WITNESS: It's certainly a possibility.

BY MR. COLANGELO:

Q And then the -- strike that.

Wendy, from this chain, it appears, sends an email to the Secretary and says, "I continue to talk frequently with Mark Neuman, and we often have dinner together. He will not leave L-E-S" or "LES, but is in love with the census and talks about it nonstop."

Do you see that?

A Yes.

Q Why would the Secretary's concern about the citizenship question prompt Wendy to bring up Mark Neuman?

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

THE WITNESS: Again, he was the primary transition team person advising us on Census.

BY MR. COLANGELO:

Q Okay. And the email also says, "Do you want me to set up another meeting?"

Do you see that?

A I see that.

Q What's the earlier meeting that she's referring to?

MR. GARDNER: Objection. Calls for speculation.

THE WITNESS: I don't know.

BY MR. COLANGELO:

Q Had you attended the meetings with the Secretary and Mr. Neuman on the citizenship question before May 2, 2017?

A I don't know. I had attended meetings

with the Secretary and Mr. Newman on the census.

Q Before May 2017?

A Yes.

Q How many times?

A I don't know. Two times, three times. I'd -- you'd have to check his count.

Q Okay. And the citizenship question was discussed in those earlier meetings?

A I don't recall.

Q And you see the Secretary writes back and says, "Let's try to stick him in there for a few days to fact find."

A Yes.

Q Do you see that?

Were you aware of that request?

A I was aware that the Secretary was distressed with Director Thompson who had just told us that he had massively overrun the CEDCaP budget and failed to warn us that that was coming. So the Secretary was not happy with the Census leadership at the time and was trying to find someone who could be -- provide us better

information about what was going on at Census.

Q Okay. This email refers to the citizenship question; is that right?

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

THE WITNESS: I know the forwarded email refers to the citizenship question. There's nothing in Ms. Teramoto's email that refers to citizenship.

BY MR. COLANGELO:

Q But she's not forwarding any other information there, correct?

A Well, I can't see what's blacked out, so I have no idea what else is discussed there. But I know that there is a large amount of black out, so presumably quite a number of other things were discussed.

Q And was Mark Neuman placed in Census Bureau to fact find?

A No.

Q Why not?

A I imagine because he had a much better

paying job where he's at.

Q Okay. And did Wendy or the Secretary convey this request to you at the time?

A Wendy and the Secretary discussed with me the possibility of putting Mark Newman in Census so that we could get a handful of what's going on with the budget, yes.

Q And did you discuss putting Mark Neuman in Census so he could help facilitate the inclusion of a citizenship question?

A That was never discussed -- or not to my knowledge.

MR. COLANGELO: Let's mark as Exhibit 13.

(Plaintiffs' Exhibit 13, Email, was marked.)

BY MR. COLANGELO:

Q Do you have the document that has been marked Exhibit 13?

A Yes.

Q For the record, this is Bates stamp 3071 and this email from Eric Branstad to Matthew Flynn, Subject Line DOJ contact, "Who is the best

counterpart to reach out to at DOJ regarding census and legislative issues?"

Have you seen this before?

A Yes.

Q When was the last time you saw it before today?

A Yesterday.

Q Do you know who Matthew Flynn is?

A I have no idea who Matthew Flynn is.

Q You testified before our last break that you asked Eric to get you a point of contact at the Justice Department, right?

A Correct.

Q So does this email exchange reflect Eric followed up on that request?

A Yes.

Q And he forwards it to you on May 3; is that right?

A It looks like he forwarded it to me --

(Conference call interruption.)

THE WITNESS: It looks like he sent it to me on May 4th and I -- May 3rd and I replied

May 4th early in the morning.
BY MR. COLANGELO:
Q Saying, "Thanks, Eric. Earl."
Correct?
A Yes.
Q So on May 2nd, the Secretary asked you why nothing had been done in response to his months' old request. You told him you needed to get the Justice Department to request the question. You also told him that you would set up meetings with the Justice Department to discuss. And then after that, you asked Eric Branstad to get you a point of contact at the Justice Department and he did, right?
MR. GARDNER: Objection. Form.
THE WITNESS: That appears to be the sequence.
BY MR. COLANGELO:
Q Okay. And you testified earlier that you hadn't ever spoken to the Justice Department before that on the citizenship issue?
A That's correct.

MR. COLANGELO: Let's mark Exhibit 14.

(Plaintiffs' Exhibit 14, Email, was marked.)

BY MR. COLANGELO:

Q Exhibit 14 is document stamped 2462. You have Exhibit 14 in front of you?

A I do.

Q And why were you contacting Mary Blanche? Her surname is redacted on this email, I assume for personal privacy reasons. But this is Mary Blanche Hankey, correct?

A Yes.

Q Why were you contacting Mary Blanche Hankey?

A That was the name that Eric Branstad said he'd provide me.

Q Okay. And do you know where in the White House -- strike that.

Do you know where in the Justice Department she worked?

A She was advisor for -- to Attorney General Sessions.

Q So she worked for the Attorney General?
A Correct.
Q And you reached out to her to talk about the citizenship question, right?
A Amongst other things, yes.
Q And you reached out to her and asked her for times for a call that day, right?
A That's what I'm asking for, yes.
Q Okay. Is that because this was an urgent priority for the Secretary?
A I think you can divine from his prior email that he was hoping I might take a quick action on this, so I was trying to be responsive.
Q So the answer is yes?
A I'm not going to speculate as to whether he thought it was urgent or not, but he was conveying he would like me to get moving.
Q You were treating it as an urgent matter?
A Correct.
Q And then you -- did you speak to Ms. Hankey?
A I did speak to Ms. Hankey.

Q How many times?
A I met with her -- I think I spoke with her by phone and then met with her in her office.
Q When did you speak with her by phone?
A I couldn't tell you.
Q Was it on May 4th?
A It's possible.
Q And then you met with her in her office, you said?
A Yes.
Q When was that meeting?
A I don't know the exact date.
Q When you spoke to her on the phone, was anyone else on the call with you?
A No.
Q Was anyone else on the call on her end?
A Not that I was aware of, no.
Q When you met with her in person, did anyone from the Commerce Department go with you?
A No.
Q Did anyone from the Census Bureau go with you?

A No.

Q Was there anyone else in the meeting that she brought?

A No.

Q What did you say to her when you spoke to her on the phone?

A That I'd like to come over and discuss what issues the Justice Department might have with Commerce that I could be helpful on and talk to her about an issue that we were interested in.

Q And that issue was the citizenship question?

A Correct.

Q And what did she say about that?

A Let's get together and meet.

Q So then you went over to meet with her. Did she have any issues that she wanted to raise with you?

A I don't recall that Justice had any particular Commerce issues, no.

Q So this was a meeting about the citizenship question?

A I'd say that was the primary topic.

Q Okay. And what did you say to her when you met with her in person?

A That we -- the Secretary had asked us to look into the possibility of adding a citizenship question, and that since the Justice Department was the agency that had sponsored the question for the ACS, it seemed that that was a logical place to start, and was there someone in the Justice Department with whom I should speak about that.

Q And what did she say?

A Let me look into it.

Q How long was the meeting?

A Well, we met for about 20 minutes.

Q Did you explain why the Secretary wanted the citizenship question?

A No.

Q Did you have an understanding at that point as to why the Secretary wanted the citizenship question?

A I've never asked the Secretary why he

wanted a citizenship question.

Q Did she ask you why it was important to Commerce Department to add a citizenship question? She being Ms. Hankey.

A No.

Q You mentioned earlier that you did some legal research or that Mark Neuman or others may have identified cases for you. Did you identify those cases to Ms. Hankey in that conversations?

A I don't recall.

Q Did you bring any paper with you to that meeting?

A Not that I recall.

Q Did you take notes?

A No.

Q After the meeting, did you update anyone at the Commerce Department and your discussion?

A I don't recall.

Q Did you speak to the Secretary to tell him that -- on an issue that you understand to be a priority, you'd gone over to the Justice Department to make some progress on his

request?

A I might have mentioned I had a meeting over there.

Q Did you mention it to Wendy?

A I might have.

Q Did you talk about it with anyone else in the Office of Policy?

A I might have told Eric that I met with the person he recommended.

Q Eric Branstad?

A Yes.

Q Is the senior White House advisor position in Office of Policy?

A No.

Q My question was: Did you talk to anyone in the Office of Policy about the meeting?

A Not that I recall.

Q Other than the Secretary, Wendy and Eric, did you talk to anyone else at the Commerce Department about that meeting?

A Not that I recall.

Q Did you talk to Mark Neuman about it?

A Not that I recall.

Q And after you met with Ms. Hankey and she said she'd look into it, what was the next that you heard from the Justice Department on this issue?

A I think when she contacted me, provided a name.

Q How long after your meeting did she contact you and provide a name?

A There's an email that documents it, you could tell from that, but otherwise, I have no idea.

Q Okay.

A I mean, it was sometime in the next couple weeks, but --

Q And what name did she give you?

A I -- I know I put it in a memo to the Secretary later on, so you'd have to look at that memo.

Q Is it James McHenry?

A That sounds like the right name.

Q When she spoke to you to pass along

James McHenry's name, what did she say about why she was directing you to him?

A She didn't say much. Just said this would be the best guy to talk to.

Q Okay. Had you spoken to James McHenry before?

A Never talked to him before.

Q Did she tell you what his position was in the Department of Justice?

A She might have.

Q What was his position?

A I don't know, actually.

Q After she gave you Mr. McHenry's name, what did you do next to contact him?

A I called him on the phone.

Q And when you spoke to him on the phone what did you say?

A I outlined that we were interested in seeing what kind of level of interest the Justice Department would have in requesting the citizenship question be asked -- added to the decennial census.

Q And did you tell him why the Commerce Department wanted the Justice Department to make that request?

A Because that was our understanding of the process. They were the people that needed it for ACS, and our understanding was that it might be useful for them to have it at a more granule level, which would be needed -- you'd need to put it on the decennial census to do that.

Q So you were -- you told him that the Commerce Secretary wanted the question and wanted to know if DOJ would ask for the Census Bureau to add the question; is that right?

A Those are your words.

Q Well, I'm asking you to tell me yes or no.

A Well, if the question is yes or no, then the answer is no.

Q Okay. How would you put it in your words?

A In my words, what I told him was that we were exploring the possibility and wanting to know

the level of interest at the Justice Department in making such a request, would this be information they could use?

Q So this is the shortly -- this is shortly after the Secretary of Commerce emailed you and said I am mystified why nothing had been done in response to my months' old request?

A Right.

Q But your testimony is that you conveyed to the Justice Department that you were exploring the issue?

A As I explained before, when -- when the Secretary says he would like to do something, there's a presumption that we will attempt to do that. That's subject to revision as more information is made available. So I'm exploring what is necessary to follow through on the Secretary's request. That request may be modified or changed, based on the information that I provide.

Q Okay. How many times did you speak to Mr. McHenry?

A I think three or four times.

Q And what was the next time you spoke to him after the initial phone call?

A Maybe a week later.

Q Okay. And what did he say when he -- did he call you or did you call him?

A I don't recall.

Q And what did you discuss on that conversation?

A That he was still exploring the question.

Q How long was that conversation?

A Five minutes.

Q Okay. So he didn't have anything new to report?

A Right.

Q Okay. And you said you spoke to him at least a couple more times; is that right?

A Again, I don't recall the exact number of times, but somewhere in the vicinity of three or four times.

Q So after the second call where he said he was still exploring it, tell me about the next

conversation?

A Memory serves, I think the next conversation was a similar one. He was still looking into the matter and then -- and then the last conversation he and I had, he directed me to somebody at the Department of Homeland Security.

Q Okay. And over what period of time were you talking to Mr. McHenry on the phone?

A Probably over the course of a month.

Q So this was primarily in May of 2017?

A I honestly don't recall, but sometime in May, early June.

Q And who did he direct you to at the Department of Homeland Security?

A I don't remember the person's name.

Q Was it Gene Hamilton?

A Again, I know I prepared a memo for the Secretary that had the name. So if that's the name that was on the memo, then, yes, that would be the person I spoke with.

Q How many times did you speak to your point of contact at the Department of

Homeland Security?

A Again, I think it was -- I think this was like two or three times.

Q And what did you say when you first spoke to Mr. Hamilton?

A Same -- same basic message, we're looking into the -- exploring the possibility of putting a census question on -- a citizenship question on the decennial census, would this be information that the Department of Homeland Security would need or use, and could he answer that, and his response was, let me look into it.

Q Now, the Department of Homeland Security wasn't the original requester for the ACS citizenship question, to your understanding, correct?

A Correct.

Q Was it your view that the Department of Homeland Security would also be a legitimate requester of this information?

A Legitimate is not the right word, but the -- I think my view was, let me see if

there's -- what their explanation would be, but they were obviously not our first choice.

Q So you were looking for an agency to make this ask?

A Again, my understanding of the process, based on the research I've been able to do, and consequently was advising the Secretary was an agency needed to make the request; therefore, you have to find an agency that would have a reason to be using this information. And Justice, obviously, was the primary recipient of the CVAP data from the ACS, so they were the logical place to start. Justice then says go to Homeland Security, and I say, okay, maybe there's something about Homeland Security that I don't know about that might justify this data. So you follow up on a call, get more information, informs your decision, you might change it.

Q And so my question was: So you were looking for an agency to make this ask and --

A Correct. In order to implement the process that had been outlined to us, you needed

an agency. So that was my task at the time.

Q Thank you.

MR. COLANGELO: Let's mark this Exhibit --

MR. GARDNER: 15.

MR. COLANGELO: -- 15.

(Plaintiffs' Exhibit 15, Memo, was marked.)

THE WITNESS: The very memo I was speaking of.

BY MR. COLANGELO:

Q Exhibit 15 is document stamped 9834.

Mr. Comstock, do you have Exhibit 15 if front of you?

A I do.

Q Is this the very memo you were just speaking about?

A It's the very memo I was just speaking about.

Q And what's the date on this memo?

A September 8th.

Q And you see in the second paragraph of

this memo, the sentence that says, "James directed me to Gene Hamilton at the Department of Homeland Security."

A Correct.

Q So the person you were speaking to at DHS was Gene Hamilton, right?

A Apparently so, yes.

Q The -- in that paragraph -- strike that.

This is a memo from you to the Secretary dated September 8th of 2017, correct?

A Correct.

Q Why did you prepare this memo?

A Because the Secretary was asking about the lack of progress and said he was prepared to call the Attorney General, and so he needed the timeline of who I had spoken to.

Q Okay. What do you mean by lack of progress?

A Well, obviously, we're now September 8th, and he inquired on May -- May whatever the date was, 2nd, 5th, whatever it was, saying how come we haven't made more progress? Three months later we

don't have any response from the Justice Department, so --

Q In his May 2nd email it said, why has nothing been done in response to my months' old request?

A That is what it says, yes.

Q So the Secretary had been asking about this since the early spring of 2017?

A Yes.

Q And you testified and this memo says you met in person with Mary Blanche and she said what?

A Well, as I said, she directed me to James McHenry.

Q And then after speaking with Mr. McHenry, he told you what?

A He directed me to Gene Hamilton.

Q Okay. And then after several phone calls with Gene Hamilton, according to this memo, he relayed that, "After discussion, DHS really felt it was best handled by the Justice Department."

Do you see that?

A I see that.

Q Why did Mr. Hamilton feel this was best handled by the Justice Department?

A As relayed to me, DHS felt the agency that would most utilize this data was Department of Justice, which was our original conclusion.

Q So DHS said they were not going to make this request, right?

A Well, Gene never made a commitment, one way or the other, for the department. He simply directed me back to the other department. It's not an uncommon experience in the federal government.

Q Tell me what's not uncommon in the federal government.

A Being directed to somebody.

Q Your memo then says at that point the conversation ceased.

A Correct.

Q What do you mean by that?

A Means that I did not talk to Mary Blanche, James McHenry or Gene Hamilton after

that point in time.

Q You didn't, at this point, have a request from the Justice Department, right?

A That's correct.

Q Okay. And what did you ask James Uthmeier after that point?

MR. GARDNER: Objection. Calls for information --

(Thereupon, the court reporter clarified.)

MR. GARDNER: Sorry. I have a cold.

Objection. Calls for information that's subject to privilege. I'll instruct the witness not to answer.

MR. GERSCH: What privilege?

MR. GARDNER: Attorney -- thank you. I thought we were doing one at a time.

Attorney-client privilege.

MR. GERSCH: Sorry.

BY MR. COLANGELO:

Q Did you identify any facts for Mr. Uthmeier?

MR. GARDNER: Objection. Form.

THE WITNESS: Can you restate the question?

BY MR. COLANGELO:

Q Sure. When you -- was this your first contact with Mr. Uthmeier on the topic of the citizenship question?

A Well, you mean this memo or this reference?

Q This reference.

A Well, it says -- at this -- at that point, the conversation ceased, and I asked James Uthmeier, who had by then joined -- this is referring back in time. I don't know exactly when James joined OGC, but it was before September, so I think he joined -- I don't know -- in June maybe. I don't know.

Q I understand this memo to be a reference to discussions you had with the Justice Department in May; is that right?

A It doesn't exactly specify the time frame, but, yes, from early May when I met with

Mary Blanche, through when my conversations with Gene Hamilton ceased, I don't know exactly what that time frame was. It was four or six weeks.

Q So I'm asking before May of 2017, had you ever discussed the citizenship question with James Uthmeier?

A And I cannot answer that directly, because I don't recall when James Uthmeier joined the department.

Q Okay. So you do recall discussing the citizenship question with him, but you don't remember when it was?

A Yes.

Q And you don't remember if it was before May or June of 2017?

A Well, it couldn't have been before he joined the department, so whenever that was.

Q Is it your understanding that Mr. Uthmeier had a position in the Department of Commerce that was not within the Office of General Counsel and he was then moved into a position in the Office of General Counsel?

MR. GARDNER: Objection to form.

THE WITNESS: To my knowledge, the first time I interacted with James, he was in the Office of General Counsel.

MR. COLANGELO: Okay. Okay. Let's mark Exhibit 16.

(Plaintiffs' Exhibit 16, Memo, was marked.)

BY MR. COLANGELO:

Q Exhibit 16 is document stamped 2458.

Do you have Exhibit 16 in front of you, Mr. Comstock?

A I do.

Q Have you seen this email before?

A Not since I've sent it to Wendy on Saturday the 16th of September.

Q Why did you send Ms. Teramoto your September 8th memo on September 16, 2017?

A I don't recall exactly, but, likely, because she may have been setting up the call with the Attorney General.

Q And which call with the Attorney General

was that?

A A call from the Secretary to talk to the Attorney General about whether or not Justice would be interested in a citizenship question.

Q And why was the Secretary talking to the Attorney General about whether or not Justice would be interested in the citizenship question?

A Again, if -- if the -- if the Justice Department was not going to request the question, had no use for the information, then that would probably put an end to the citizenship question.

Q And the Secretary wanted the citizenship question?

A I think he felt -- well, I don't know what he felt. Yes. He was continuing to explore that possibility.

MS. BOUTIN: I'm sorry. Can you speak up?

THE WITNESS: I don't know what he felt, but he was continuing to explore the possibility.

BY MR. COLANGELO:

Q And when did the Secretary speak with the Attorney General?
A I don't know that.
Q Were you on that call?
A I don't recall being on the call.
Q Who else was on the call?
A I don't know.
Q Okay. Did -- did Wendy ask to see this memo, or did you send it to her without her asking?
A Again, I don't recall the context, but based on what the memo says, it appears she might have asked --
(Thereupon, the court reporter clarified.)
THE WITNESS: For it.
BY MR. COLANGELO:
Q Okay. I want to go back for a second here, May 2nd email --
MR. GARDNER: Which exhibit number?
MR. COLANGELO: This is Exhibit --
MR. GARDNER: Oh, the 12 --

MR. COLANGELO: This is Exhibit -- no. I was thinking of Exhibit 10.

BY MR. COLANGELO:

Q How did you come to the view before ever talking to DOJ that DOJ should request this information?

A Again, if DOJ was the governmental organization that had questioned the information on the ACS, then it would stand to reason that they would be the people that would also be interested in the information on the decennial, and they're also the party responsible for enforcing the voting rights.

Q And how did you come to the view before ever talking to DOJ that DOJ had a legitimate need for the question to be included?

A If they enforced the Voting Rights Act -- if you're going to make a Voting Rights Act case, then they would be the people that would have -- need the information.

Q And you researched those Voting Rights Act cases or that Voting Rights case on your own?

A Again, I think in doing some basic research on it, it was pointed out there was a case where the Court had said you could -- you would need more granule information to answer this question, which would then support a citizenship question.

Q And you told me before that you're not a voting rights lawyer, right?

A Again, what do you mean by a voting rights lawyer?

Q Have you ever practiced voting rights law?

A No.

Q Have you ever tried a voting rights case?

A No.

Q Have you ever advised a client on a voting rights matter?

A No.

Q Have you ever practiced redistricting law, tried a redistricting case --

A No.

Q -- or advised a client on a redistricting

matter?

A No.

MR. GARDNER: Make sure he finishes his question before you answer.

THE WITNESS: No.

BY MR. COLANGELO:

Q Have you ever litigated a case under the Voting Rights Act?

A No.

Q Have you ever litigated a redistricting case?

A No.

MR. COLANGELO: Let's mark as Exhibit 17 a document Bates-stamped 3705.

(Plaintiffs' Exhibit 17, Meeting notification, was marked.)

BY MR. COLANGELO:

Q Mr. Comstock, do you have 3705 in front of you?

A I do.

Q And what is this?

A It appears to be some kind of meeting

notification.

Q Okay. Does this help you date your interactions with Mr. Uthmeier regarding the citizenship question?

A Well, it appears that we might have had a meeting on the 28th of June, 2017.

Q And does this help you answer my earlier question regarding whether this was your earliest discussion with Mr. Uthmeier on the citizenship question or whether you, in fact, spoke to him before that?

MR. GARDNER: Objection. Form.

THE WITNESS: Again, I don't recall when James started working for the department. I don't recall when we had our first conversation on the citizenship question.

BY MR. COLANGELO:

Q And what did you tell Mr. Uthmeier in that conversation?

MR. GARDNER: Objection to the extent it calls for disclosure of information subject to the attorney-client privilege. To the extent it does,

I would instruct the witness not to answer.

Can you answer the question without disclosing confidential communications?

THE WITNESS: I have no recollection of this meeting, so I couldn't tell you what we discussed.

MR. GARDNER: Problem solved.

BY MR. COLANGELO:

Q Easy enough.

Was this your first interaction with the Office of General Counsel on this issue?

A Again, I have no idea.

Q As you were talking to Ms. Hankey at the Justice Department, Mr. McHenry at the Justice Department and Mr. Hamilton at DHS --

A Yeah.

Q -- in the spring of 2017, were you keeping the Secretary informed of those conversations?

A I might have mentioned them.

Q In what context would you have mentioned them?

A Mr. Secretary, I contacted the Justice Department today. I would not have given -- I mean, there was nothing to report. So I hadn't made any progress.

Q Well, he was frustrated there was no request yet?

A Right.

Q So one of the things to report might have been --

A That I contacted them, yes.

Q Okay. And did you keep Ms. Teramoto informed during that time period?

A Again, I might have. At that time period, we operated in bullpens, so we were all -- there were five people in the same room. So it's entirely possible I might have mentioned I was going to the Justice Department or I had spoken with the Justice Department, yes.

Q I'm sorry. If you were not finished.

A Nope.

Q Who was sitting in the bullpen with you?

A Wendy Teramoto, Eric Branstad,

James Rockas, me, and occasionally Izzy Hernandez.

Q Who is James Rockas?

A He was acting press secretary at the time.

Q And who is Izzy Hernandez?

A Israel Hernandez, he was the acting -- or I'm not sure what his formal title was. I think he was deputy chief of staff.

Q And where was the bullpen you referred to?

A It was the -- what is now the chief of staff.

Q And there were five of you working in the office?

A Correct.

Q How long were the five of you working in that office together?

A Maybe nine months.

Q So from January of 2018 through the end -- strike that.

From January 2017 through the end of the --

A No.

Q -- summer --

A No. The bullpen was set up, I think, in March through the end of the year.

Q Why did you work in a bullpen?

A Because that was the form that the Secretary and Ms. Teramoto felt was most effective.

Q And was it near the Secretary's office?

A It's located -- there's the Secretary's office, there's the anteroom to the Secretary's office, and it's located right next to that.

Q And at some point, you stopped working in a bullpen?

A Yes.

Q Did it become less effective?

A I think that was the chief of staff's determination, yes.

MR. COLANGELO: Let's mark Document 3702 as Exhibit 18.

(Plaintiffs' Exhibit 18, Email, was marked.)

BY MR. COLANGELO:

Q Mr. Comstock, do you have Exhibit 18 in front of you?

A I do.

Q Have you seen this document before?

A No.

Q Okay. And you testified before that Mr. Langdon works for you in the Office of Policy and Strategic Planning, correct?

A Yes.

Q His -- if you go to the second page of this exhibit, the page stamped 3703, Mr. Langdon says, "I apologize for not answering sooner, but I honestly have been in meetings with SWR all afternoon."

Do you see that?

A Yes.

Q And do you understand SWR to refer to Secretary Wilbur Ross?

A Yes.

Q What meetings was he referring to?

MR. GARDNER: Objection. Calls for

speculation. Lack of foundation.

THE WITNESS: I don't know.

BY MR. COLANGELO:

Q Were you in meetings with the Secretary and David Langdon on May 24th of 2017?

A It's entirely possible.

Q Is it common for staff in the Office of Policy to attend meetings with the Secretary that you wouldn't be in?

A Not common, but it would -- at that time frame, it would depend on what else I was working on. I might have been off working on sugar negotiations, saw-fit lumber --

(Thereupon, the court reporter clarified.)

THE WITNESS: I said I might have been working on sugar negotiations, which were going on at the time. We have a saw-fit lumber case. We were beginning work on steel 232 investigation. We had fisheries issues. So any number of things could have kept me from the meeting.

BY MR. COLANGELO:

Q Okay. And if you weren't in the meeting, would it be typical for Ms. Teramoto to be there?

A Again, it would depend on what her schedule was.

Q Okay. You'll see from this email at the top of Page 3702, that David Langdon is reporting to several people, quote, the Secretary seemed interested on subjects and puzzled why citizenship is not included in 2020.

Do you see that?

A Yes.

Q Okay. Do you remember a meeting where the Secretary was puzzled why citizenship was not included?

A I don't recall such a meeting, but --

Q And why does Mr. Langdon say the Secretary seemed puzzled why citizenship is not included?

MR. GARDNER: Objection. Calls for speculation.

THE WITNESS: Again, the Secretary was clear. He did not understand why a citizenship

question was not included, so he asked us to look into the matter.

BY MR. COLANGELO:

Q Okay. And then you see that Mr. Langdon sent the email to Lisa Blummerman. Am I saying that right?

A I think it's pronounced Blummerman.

Q Okay. Mr. Langdon sent the email to Lisa Blummerman at 10:51 p.m. on May 24.

Can you tell me who Ms. Blummerman is?

A She was -- I believe at the time, in some kind of acting capacity. I don't know if she was the acting deputy director or whether she was the person in charge of budget. If you notice further down in the conversation, Lisa and I are happy to discuss the lifecycle stuff, which was beginning to become an issue. So Lisa, to my recollection, is largely budget side.

Q Is it your understanding that at the time, Ms. Blummerman was the associate director for decennial programs?

A That's entirely possible.

Q And is the associate director for decennial programs effectively the head of 2020 census?

A I believe that's correct, yes.

Q And you see that Mr. Langdon has asked Ms. Blummerman for an answer on the citizenship question ideally this evening?

A That's what his mail says.

Q Okay. It's fair to say that this was a matter of some urgency?

MR. GARDNER: Objection. Form.

THE WITNESS: Again, one of the biggest roles that I play is expediting things along. Because you have people from the private sector who are used to a much faster speed than the government usually operates at. So we spend a lot of time expediting things to get things back in place. So this is not uncommon for us to say everything the Secretary is requesting is urgent.

BY MR. COLANGELO:

Q Let's go back to Exhibit 7. Do you have that in front of you?

A Just a minute.

Yes.

Q Okay. And Exhibit 7 is the email exchange with Kris Kobach; is that right?

A It's an email exchange between Kris Kobach and Wendy Teramoto.

Q And the Secretary, correct, on the second page?

A Yes. Appears to be one to the Secretary on the second page.

Q Okay.

A Though it's blanked out as to who it goes to.

Q If I represent to you that the government has represented to us that this was an email to the Secretary and that they've blanked out his name for personal privacy reasons, can we agree that it's an email to the Secretary on July 14th?

A I'll stipulate to that, yes.

Q And Mr. Gardner will tell me after lunch if that's wrong.

The -- so you see that the -- that

Mr. Kobach, who identifies himself as the Kansas Secretary of State, emailed the Secretary on July 14, 2017, correct?

A Correct.

MR. GARDNER: Objection. Lack of foundation.

BY MR. COLANGELO:

Q And you'll see that it says I'm following up on our telephone discussion from a few months ago, correct?

MR. GARDNER: Objection. Lack of foundation.

THE WITNESS: And you're reading from the email. So I have no idea if the email is correct or not.

BY MR. COLANGELO:

Q Did the Secretary ever tell you that he spoke to Kris Kobach?

MR. GARDNER: Objection. Asked and answered.

BY MR. COLANGELO:

Q You can still answer.

A No.

Q Sorry. We were speaking at the same time.

A I don't recall him ever telling me that he spoke to Kris Kobach.

Q This email reads, "As you may recall, we talked about the fact that the U.S. Census does not currently ask respondents their citizenship."

Do you see that?

A I see that.

Q The email also reads, "It also leads to the problem that aliens who do not actually reside in the United States are still counted for Congressional apportionment purposes."

Do you see that?

A I see that.

Q Did the Secretary ever tell you he was concerned about the problem that aliens who do not reside in the United States are still counted for Congressional apportionment purposes?

A He never expressed an opinion on that.

Q And when the Secretary asked you on

March 10, 2017 about the census and the citizenship question, did he ask you in the context of whether noncitizens should be included for Congressional apportionment purposes?

A He discussed Congressional apportionment purposes. If asked were the noncitizens counted, and we answered the question, which is they are counted.

Q Well, you testified the link you sent him was the link to the Census Bureau's web page on whether noncitizens are counted for apportionment?

A That's correct. Well, I don't believe you can find a web page on the Census that doesn't speak to it in that context, whether noncitizens are counted other than for apportionment. That's the question that we asked. Do we count noncitizens? The answer is yes. What is the Census used for? It's used for apportionment. That's its primary function.

Q And you'll see that -- going back to the first page of Exhibit 7, Ms. Teramoto has written to Mr. Kobach, "Kris, can you do a call with the

Secretary and Izzy tomorrow at 11:00 a.m.?"

A Correct.

Q And that's Izzy Hernandez, correct?

A I would believe that's the reference she's making, yes.

Q And he's copied at the top of this page, correct?

A Yes, he is.

Q Did you ever discuss with Izzy Hernandez a call with Mr. Kobach and the Secretary?

A I did not.

Q Did you ever discuss the citizenship question with Mr. Hernandez, at all?

A I think we discussed it once or twice.

Q And when were those conversations?

A I don't recall exactly.

Q Was it in the summer of 2017?

A It was sometime in the spring/summer of 2017.

Q Okay. So you had been working on the citizenship question for some number of months by late July of 2017; is that right?

A Correct.

Q Okay. But your testimony is that the Secretary had a phone call with Kris Kobach on that issue and nobody told you about it?

MR. GARDNER: Objection. Mischaracterizes the witness's testimony.

THE WITNESS: My testimony is he did not discuss it with me.

BY MR. COLANGELO:

Q Did anyone tell you that the Secretary spoke to Kris Kobach about this issue?

A Wendy might have mentioned it.

Q And what do you remember Wendy said about it?

A That the Secretary had a conversation with Kris Kobach.

Q What did she describe about that phone call?

A She didn't.

Q And did you ask for any other information on it?

A I didn't.

Q On an issue that you'd been working on for five months?

A It's not really relevant to the process I was working on.

MR. COLANGELO: Mr. Gardner, is now a good time for a lunch break? I have another --

THE WITNESS: Or you can keep going.

MR. COLANGELO: -- feeling this might be a good time to stop.

MR. GARDNER: How much -- how much more time do you think you have, because I think the witness is fine to keep going if you-all are?

MR. COLANGELO: Well, we have a lot of people here, and a court reporter and a videographer. So I'd rather take a short break and then -- I probably have -- why don't you let me look at my notes, I'll tell you once we're off the record --

MR. GARDNER: Sure.

MR. COLANGELO: -- how much time we left.

MR. GARDNER: Sure.

VIDEOGRAPHER: This concludes Media

Unit 3. The time is 12:32 p.m. We are off the record.

(Off the record.)

VIDEOGRAPHER: This begins Media Unit Number 4. The time on the video is 1:19 p.m. We are on the record.

BY MR. COLANGELO:

Q Welcome back.

A Good to be back.

MR. COLANGELO: Let's mark Document 4004 as Exhibit 18.

MR. GARDNER: I think 19.

MR. COLANGELO: 19. Thank you.

(Plaintiffs' Exhibit 19, Email, was marked.)

BY MR. COLANGELO:

Q Mr. Comstock, do you have Exhibit 19 in front of you?

A I do.

Q And do you recognize this email?

A I sent it, so --

Q Have you seen it before today?

A Well, obviously, when I wrote it.

Q Okay. This is an email from the Secretary to you on August 8, 2017, and the Secretary asks were you on the call this morning about census?

Do you see that?

A Uh-huh.

Q What call is he referring to?

A I don't know. I'm not sure I was on it.

Q Okay. Did you hear from anybody about a call on the census on August 8th?

A I have no idea.

Q And you'll see that later in the email, the Secretary says, "Where is the DOJ in their analysis? If they still have not come to a conclusion, please let me know your contact person and I will call the AG. Wilbur Ross."

Do you see that?

A I see that.

Q And what analysis is the Secretary referring to?

A Again, this pre-dates the memo I wrote

outlining my contacts with the DOJ. So this is a question about where are we with the DOJ?

Q Okay. And you wrote back that evening saying, "We'll be back shortly with an update on the census question."

A Yes.

Q I have two attorneys in the DOC's general counsel's office working on it?

A Yes.

Q And you testified one of those two attorneys was James Uthmeier; is that right?

A That's correct.

Q And who was the other?

A I don't recall.

Q Okay. Going back to the Secretary's email where he says, "If they still have not come to a conclusion, please let me know your contact person and I will call the AG."

A Yes.

Q Did you understand that to mean that the Secretary was concerned this was not done yet?

A He was concerned that we had not made

more progress.

Q Okay. How did he communicate that concern to you?

A By saying let me know who your contact person is and I will call the AG.

Q This email that you sent in your response doesn't identify your contact person; is that right?

A That -- well, at least not in the part that's not blacked out.

Q Okay. Do you recall identifying for the Secretary before the September 8, 2017 memo who your contact person was at DOJ?

A I might have. I probably would have had to go back and look and see who I spoke to.

Q Okay.

MR. COLANGELO: Let's mark Document 3984 as Exhibit 20.

(Plaintiffs' Exhibit 20, email, was marked.)

THE WITNESS: Thank you.

BY MR. COLANGELO:

Q Mr. Comstock, have you seen this email before?

A It's to me, so, yes.

Q Okay. And this is in further response to the Secretary's August 8th question; is that right?

A Would appear to be, yes.

Q Okay. And it says, "Mr. Secretary, we are preparing a memo and full briefing for you on the citizenship question. The memo will be ready by Friday, and we can do the briefing whenever you are back in the office."

Do you see that?

A Yes.

Q And at this point, you had not received any information from the Justice Department; is that right?

A That's correct.

Q Okay. So the memo that you're referring to is a memo on the citizenship question that includes no input from DOJ; is that right?

A I -- I don't know. I had not spoken to

DOJ, no.

Q You're not aware that anyone else had spoken to DOJ on it?

A Actually, I believe counsel might have been talking to DOJ, but I don't know who they were talking to.

Q And which counsel is that?

A James Uthmeier.

Q And did he tell you he was talking to DOJ?

A I don't recall.

Q So you're not aware that anybody had been in touch with DOJ in order to get information for this memo going to the Secretary?

A I -- I'm not sure exactly the contents of the memo to which you're referring, so I don't know if it contained information from DOJ or not.

Q And the Secretary responded by saying, "I would like to be briefed on Friday by phone."

A Yes.

Q So it's fair to say that this reflects the Secretary's continued impatience about getting

an answer to his question?

A I would say he clearly wanted to keep moving forward.

MR. COLANGELO: Let's mark as 21 Document 3983.

(Plaintiffs' Exhibit 21, email, was marked.)

THE WITNESS: Thank you very much.

BY MR. COLANGELO:

Q Do you have Exhibit 21 in front of you?

A Yes.

Q Okay. And this is an email from you to the Secretary passing along the draft memo on the citizenship question?

A Correct.

Q Okay. And you'll see that Wendy Teramoto responded a few days later saying, "Peter Davidson and Karen Dunn Kelley will both be here Monday. Let's spend 15 minutes together and sort this out."

A Right.

Q And who is Peter Davidson?

A He is the Department of Commerce general counsel who was arriving about that time, so --

Q Who is Karen Dunn Kelley?

A She is -- well, she would have been coming in as the Under Secretary for economic and statistics or whatever the name of the bureau is. So she would have been arriving about that time, as well. She -- I think they got confirmed around the same time.

Q And this is the transmittal of the memo that you described in the earlier emails we talked about that you and OGC were preparing on the citizenship question for the Secretary?

A That's [sic] appears to be what it is referencing, but I don't have the draft memo so I can't tell you for sure.

MR. COLANGELO: Okay. Let's mark as Exhibit 22 Document 1411.

(Plaintiffs' Exhibit 22, Email, was marked.)

BY MR. COLANGELO:

Q Do you have Exhibit 22 in front of you?

A I do. I'm reading it.
Q Do you need a moment to look it over?
A Yeah.
Okay.
Q Okay. And have you seen this document before?
A Again, I sent the email, so yes.
Q And can you tell me what this document reflects?
A It reflects an email exchange about setting up a meeting.
Q Okay. And this was a meeting on the citizenship question, right?
A This was a meeting on key legal questions.
Q Regarding the census?
A It actually -- well, the subject matter is census, so presumably.
Q And it involves you, Ms. Teramoto, Mr. Hernandez, Mr. Uthmeier, Ms. Davidson, Ms. Kelley, correct?
A That's the list, yes.

Q And we just saw an email from a few weeks earlier where Ms. Teramoto says let's keep Mr. Davidson and Ms. Kelley involved in a conversation about this, right?

A I wouldn't say keep, but --

Q Introduce them to this conversation?

A Introduce, yes.

Q So to your understanding, this was a meeting to discuss the citizenship question?

A Again, my understanding of this was to discuss key legal issues regarding the census.

Q Do you remember this meeting?

A Not specifically, no.

Q Do you remember any meetings with the Secretary and with this group on the census?

A Again, not specifically, no.

MR. COLANGELO: Okay. Let's have this marked as Exhibit 23. It's Document 2424.

(Plaintiffs' Exhibit 23, Email, was marked.)

BY MR. COLANGELO:

Q Do you have Exhibit 23 in front of you,

Mr. Comstock?

A I do.

Q And do you recognize this document?

A Again, it's an email from the Secretary to me, so presumably I saw it then. There's a lot blanked out.

Q And you understand that the Justice Department has applied those redactions, correct?

A I do.

Q And in this email dated September 1, 2017, the Secretary says, "I have received no update, nor has there been an updated," -- blocked out -- "nor the issue of the census question, nor whether KDB thinks we have our arms around the census cost data."

Do you see that?

A Yes.

Q And by KDB, do you think he meant KDK?

A I believe that would be who he would be referring to, yes.

Q Referring to Karen Dunn Kelley?

A Yes.

Q And did you understand this to be a request for information on the status of the citizenship question?

A Well, I understood this to be a request for information on a whole series of information that were presented in the census.

Q Including the citizenship question?

A Including the citizenship. He mentions that.

Q And the Secretary is frustrated, right?

A That would appear so, yes.

Q He's frustrated because he's asked for it repeatedly and hasn't seen anything yet telling him that it's done; is that right?

A Well, I would not agree with your characterization. I think what this memo -- this email shows is that there were a tremendous number of issues connected to Census. At this time, we were working a tremendous amount on the lifecycle cost estimate.

So we -- I mean, we had a huge issue.

They were $3 billion -- basically, 25 percent of their budget off, which is a shocking figure --

Q Does the Secretary --

MR. GARDNER: Let him finish his answer.

THE WITNESS: -- that does not inspire confidence in the Census Bureau or its current leadership at the time. So we were dealing with quite a few issues connected with Census, primarily related to the budget, trying to find people to run the Census that we could count on.

So, yes, citizenship was one small piece of this, but it was by no means the driving piece.

Q Thank you.

MR. COLANGELO: Let's mark Document 2034 as Exhibit 24.

(Plaintiffs' Exhibit 24, Email, was marked.)

BY MR. COLANGELO:

Q Mr. Comstock, do you have Exhibit 24 with you?

A I do.

Q Have you seen this email before?

A Again, it's an email from me to Peter and -- Davidson and James Uthmeier, it looks like, yes.

Q And when's the last time you saw this email before today?

A Probably when I sent it on September 7, 2017.

Q And you are advising Peter and James, quote, as I discussed with James a little while ago, the Secretary would like an update on progress since the discussion yesterday regarding the citizenship question.

A That's what it says.

Q And do you recall the discussion the day before with the Secretary regarding the citizenship question?

A I don't recall the specifics of that discussion, no.

Q There was a discussion on September 6th regarding the citizenship question?

MR. GARDNER: Objection. Form.

THE WITNESS: Again, based on the email,

it appears there might have been.
BY MR. COLANGELO:
Q And why would the Secretary have asked for an update by the next day?
MR. GARDNER: Objection. Calls for speculation.
THE WITNESS: As I've mentioned before, we like to get things done. We're not here to do this all year long. So I was asked similar questions on numerous other issues I was working on.
BY MR. COLANGELO:
Q But it's fair to say the Secretary wanted an answer quickly?
A He always wants an answer quickly.
MR. COLANGELO: Let's mark Document 2395 as Exhibit 25.
(Plaintiffs' Exhibit 25, Email, was marked.)
BY MR. COLANGELO:
Q Mr. Comstock, do you have Exhibit 25?
A I do.

Q Okay. Have you seen this document before?

A Yes.

Q When's the last time you saw it before today?

A Yesterday counsel pointed it out to me.

Q And did you review a version yesterday that was redacted like this or unredacted?

A I did.

Q Pardon me?

A It was redacted.

Q Okay. Like this?

A Exactly like this.

Q And this is an email from Mr. Uthmeier to you on the evening of September 7th saying, "Earl, I touched base with Peter," redacted, "He spoke with Kassinger this evening."

Do you see that?

A Yes.

Q Who is Kassinger?

A That would be Ted Kassinger, former general counsel for the Department of Commerce.

Q And where does Mr. Kassinger work now?
A He works at O'Melveny & Myers.
Q A law firm?
A Correct.
Q In Washington?
A Yes.
Q And what did Mr. Davidson and Mr. Kassinger discuss?
MR. GARDNER: Objection -- sorry. Restate that one more time.
BY MR. COLANGELO:
Q What did Mr. Davidson and Mr. Kassinger discuss?
A I don't know.
Q Did Mr. Davidson tell you what he and Mr. Kassinger discussed?
A Not to my knowledge.
Q Did Mr. Uthmeier tell you what he and Mr. Kass- -- what Mr. Davidson and Mr. Kassinger discussed?
A Well, it appears he might have, but it's blanked out.

Q And Mr. Kassinger doesn't work for the government, correct?

A Correct.

Q And did not at the time, correct?

A Correct.

I would just observe, based on the all blanked out here, we really have no idea what this email is referring to. It says a Census matter, but it could have been any number of things, including the numerous budget issues we were talking about. So let's make clear I don't know what this email was in reference to.

Q Okay. Let's take a look at Exhibit 24.

A Uh-huh.

Q So this appears to be an unredacted version --

A Of the last part.

Q -- of the last part --

A Right.

Q -- which appears to be redacted on 2396; is that correct?

A That certainly seems to be the case, yes.

Q They're both dated the same date, correct?

A Same date, same time.

Q So --

A Just to be precise.

Q Thank you. Same date and same time, to be precise.

So on an email chain that you commenced by saying the Secretary would like an update on progress since the discussion yesterday regarding the citizenship question. Is it your understanding that the reference to the Census matter in the subject line, in fact, refers to the citizenship question?

A That would appear to be the case.

Q Okay. So it would also be your conclusion that Mr. Davidson and Mr. Kassinger were talking about the citizenship question; is that right?

A No. It would not.

Q Why not?

A Because I get lots of email that start on

one chain that go to another matter. So it's possible, but it's also possible it was discussing something else.

Q And did the general counsel talk to Mr. Kassinger about a lot of issues you were updated on?

A I have no idea what Mr. Davidson and Mr. Kassinger discussed.

Q Do you see the email below the Kassinger reference?

A Uh-huh.

Q There's a message from you to Mr. Davidson, Mr. Uthmeier and Ms. Teramoto that says, "I suggest setting up a call for tomorrow. The Secretary is asking for progress on this."

A Correct.

Q And that's a reference to the citizenship question, correct?

A Without seeing the blanked out matter below that from Peter Davidson, I don't know if the email chain switched subjects or not.

Q Okay. So your -- your testimony is that

even though you emailed Mr. Davidson and Mr. Uthmeier about the citizenship question, and they email you within an hour, and then you said the Secretary is asking for progress on this, you're not prepared to say it was about citizenship question?

A Without seeing the redacted material, I can't confirm whether it's about the citizenship question or whether we switched gears to another topic. That happens frequently.

Q Were there a lot of -- strike that.

And the next day is the day that you sent the Secretary your memo on DOJ contacts; is that correct?

It's Exhibit 15, if that helps.

A Yes. The next day I sent him on my discussions DOJ.

Q And so the Secretary was asking for updates on the citizenship question, you prepared a memo on your contacts with DOJ, and you asked the general counsel's office to prepare their own data; is that right?

A Again, I think -- I would agree that I sent an email on the 7th asking for an update on progress regarding the citizenship question, and I would agree that I sent a memo to the Secretary updating him on who I had spoken to at Justice. But that's all I would know about what the substance of the conversations were.

Q And then after that exchange, did there come a time when the Secretary and Attorney General spoke about this issue?

A Correct.

Q And about how long after was that?

A I don't recall.

Q Was it about a week after?

A Possibly. I would imagine it was on the Secretary's calendar.

Q And after the Secretary spoke with the Attorney General, was the substance of that conversation relayed to you?

A Beyond -- beyond the fact that they had spoken and that the Attorney General was going to look into the matter, no.

Q Beyond that they had spoken and the Attorney General would look into it --

A Correct.

Q -- nothing else was conveyed to you?

A Right.

Q This was an issue you had been working on for eight, nine months at this point?

A Along with about 60 other issues.

Q But this was one issue that you'd been working on for eight or nine months, correct?

A Let's see, September -- no. I had not been working on it for eight or nine months. That's an overcharacterization. I'd been working on it for no more than seven months.

Q Since very shortly after the Secretary was confirmed, correct?

A Correct.

MR. COLANGELO: And let's mark as Exhibit 26 document stamped 2651.

(Plaintiffs' Exhibit 26, Email, was marked.)

BY MR. COLANGELO:

Q You have 2651 in front of you?
A I do. I'm reading it.
Okay.
Q Have you seen this email before?
A No.
Q Do you see on the first page the email from Danielle Cutrona, Wendy Teramoto dated September 17, 2017 at 12:10 p.m.?
A Yes.
Q Do you know who Danielle Cutrona is?
A I don't.
Q Do you know what OAG stands for?
A Office of the Attorney General.
Q Okay. So is your understanding that Danielle Cutrona, as of September 17, 2017, worked in the Office of Attorney General?
MR. GARDNER: Objection. Lack of foundation.
THE WITNESS: Again, based on the email, that would appear to be the case.
BY MR. COLANGELO:
Q Okay. And Ms. Cutrona says to

Ms. Teramoto, quote, from what John told me, it sounds like we can do whatever you-all need us to do, and the delay was due to a miscommunication.

Do you see that?

A I see that.

Q And then Ms. Teramoto writes back, "They connected. Thanks for the help. Wendy."

Do you see that?

A I see that.

Q And you mentioned that you got an update after this call. Who did you get that update from?

A I said I think the Secretary mentioned they had a discussion and the Attorney General was looking into it.

Q Well, this email doesn't say the Attorney General was looking into it. It says, "We can do whatever you-all need us to do and the delay was due to a miscommunication. The AG is eager to assist."

A That is what the email says. That is not what was communicated to me, so --

Q So the Secretary said to you the AG will look into it?

A I don't recall the exact words, but the AG is looking into the matter.

Q When did the Secretary describe to you the conversation with the Attorney General?

A I have no idea. Some time in this time frame.

Q And what did he say when conveying the substance of the call to you?

A I already relayed that. He said something to the effect of the AG is working on it.

Q Okay. So this was in September of 2017. At some subsequent point, did the acting director of the Census Bureau receive a memo from the Justice Department requesting inclusion of a citizenship question?

A Acting director receive a memo? I'm not aware of a memo. I think -- I think there was a letter that was sent.

Q Okay. And do you remember the date of

that letter?

A I don't.

Q Have you seen that letter?

A I believe I saw a letter from the Justice Department.

Q It came in around December of 2017, does that sound right?

A That sounds like the right ballpark.

Q Did you see that letter before it was transmitted to Mr. Jarmin -- to Dr. Jarmin? Sorry.

A I had not, no.

Q And did you know the date that that letter was going to be transmitted before it was transmitted?

A I did not, no.

Q And did you read the letter when it came in?

A I imagine I did.

Q And did you discuss that letter with the Secretary when it came in?

A I -- I might well have. I don't know.

Q Okay. What did you say to the Secretary about the December 2017 letter when it came in?

A Justice Department has requested this, so now we can start the formal process.

Q And what formal process are you referring to?

A Well, as I've outlined before, in order for the government to take an action, you have to, basically, create a record and make your decision on the basis of that record. So without a request from an agency to ask for the inclusion of citizenship, you were -- this was, basically, a hypothetical question.

Q Okay. But you had told the Secretary in May, we will get the Justice Department to request the question?

A I am going to do everything I can to carry out the Secretary's wishes, if they are legal, and so I will do my best. I can't promise things.

Q You mentioned in reference to your May 2nd email that you'd identified a case or

cases supporting the --

A Right.

Q -- need for a citizenship question?

A Correct.

Q Is that case the Evanwell decision?

A I have no idea.

MR. COLANGELO: Give me one second, Counsel.

MR. GARDNER: Sure.

MR. COLANGELO: I think I'm done, so we will hand over to other counsel.

Do you want a short break, David, to do that?

MR. GERSCH: I could do some questioning before we break and then we can break.

MR. COLANGELO: Sure.

Let's go off the record.

VIDEOGRAPHER: Going off the record. The time on the video is 1:49 p.m.

(Off the record.)

VIDEOGRAPHER: We're back on the record. The time on the video is 1:50 p.m.

EXAMINATION BY MR. GERSCH:

Q Good afternoon, Mr. Comstock. My name is David Gersch, and I represent the New York Immigration Coalition plaintiffs.

A Okay.

Q And I'm going to ask you some questions.

A Sounds fine.

Q All right. At some point in March, the Secretary -- and when I secretary, you'll understand I mean Secretary Ross?

A Yes.

Q At some point in March, the Secretary issues what's called a decisional memorandum explaining his decision to add a question regarding citizenship to the census?

A You're referring to March 2018?

Q I'm sorry?

A You're referring to March 2018, not 2017?

Q I'm referring to March 26th.

A Right. In the year 2018 --

Q Correct.

A -- not the year 2017.

Q Ah. If I said --
A The prior questions were very focused on March 2017, so I want to be clear we're now talking about the following year.
Q Absolutely. Sorry. Yes. These questions -- the question I'm going to ask you now is about 2018.
You recall there was a time, March 26, 2018, when the Secretary issued a decisional memorandum regarding his decision to add a citizenship question?
A Yes.
Q You worked on that memorandum?
A Yes.
Q Okay. Were you the principal drafter?
A I was one of the principal drafters.
Q Who were the other principal drafters?
A James Uthmeier was the primary other drafter.
Q Did you have a division of responsibility between the two of you?
A No. I believe he did the first draft.

Q He did the first draft?
A Well, the Secretary actually probably made -- indicated what he wanted in a draft and then James would have put it together.
Q And then you would have worked on it after James?
A Correct.
Q All right. Was that a typical way in which the two of you worked?
A Sure. I edit lots of documents.
Q I mean --
(Thereupon, the court reporter clarified.)
THE WITNESS: I edit lot of documents.
BY MR. COLANGELO:
Q I meant with you and Mr. Uthmeier?
A Yeah. It would be unusual for me to prepare the first draft and him to edit it, yes.
Q That's what I'm getting at. All right. Thank you.
And did anyone else work on the draft besides you, the Secretary and Mr. Uthmeier?

A Yes. I think numerous other people reviewed the draft, and --

Q How about people who contributed to the language?

A Again, without seeing various drafts, it would be hard to say who contributed to which language.

Q Okay. Okay. Couple more questions before we take our break.

You were shown earlier today a supplement to the decisional memorandum --

A Yes.

Q -- issued by Secretary Ross in June of this year.

You recall that?

A Right. You're referring to Exhibit 5?

Q Yes. And there's language in Exhibit 5 -- get the exact language -- there's language in Exhibit 5 that says referring to fundamental issues regarding the upcoming 2020 census, "part of these considerations included whether to reinstate a citizenship question which

other senior administration officials had previously raised."

Was that language in the original memo you received -- original versions of this memo you received from the Department of Justice?

A I have no idea.

Q Did you add that language?

A No.

Q Do you have any idea who put that language in there?

A I don't.

Q Who at the Department of Justice recommended that the Secretary sign this memo memorandum?

A I don't know exactly. I mean, I was told --

Q Who were you dealing with at the Department of Justice?

A Well, I wasn't dealing directly with them. It was the Office of General Counsel at Department of Commerce that was dealing with them.

Q All right. If I understood your

testimony this morning -- and correct me if I'm wrong -- you received a draft from Department of Justice and you made edits to it; is that right?

A Well, Department of Commerce received the draft, which I made some edits to.

Q Who did you receive the document from?

A I would have either gotten it from James Uthmeier or Mike Walsh.

Q And is it your testimony you don't know who at Department of Justice were -- well, withdrawn.

You made recommendation to the Secretary that he sign the memorandum, correct?

A Based on the advice I'd been given by the Office of General Counsel, yes.

Q This morning I understood you to testify that it was based on the advice from the Department of Justice. Do --

MR. GARDNER: Objection.

BY MR. GERSCH:

Q -- you recall that testimony?

MR. GARDNER: Objection. Mischaracterizes the witness's previous testimony.

THE WITNESS: My previous testimony was the Department of Justice sent to the Department of Commerce, from the Justice Department to the Office of General Counsel, a draft document suggesting that the Secretary needed to sign this. That document was reviewed by the Office of General Counsel and myself, edits were made, the document produced, and the Secretary then signed it.

BY MR. GERSCH:

Q Yeah. My question was a little different.

My understanding of your testimony this morning was you recommended that the Secretary sign this supplemental memorandum based on advice you received from the Department of Justice; is that correct?

MR. GARDNER: Objection. Mischaracterizes the witness's previous testimony.

THE WITNESS: Once again, the

Department of Justice, who are our counsel, suggested that a supplemental memorandum was needed. This was not something Department of Commerce generated. This was something the Department of Justice, as our counsel, recommended be provided. Following up on that advice, we worked on the document and then had the Secretary sign it. We were following advice of counsel.

BY MR. GERSCH:

Q Well, again, I'm not sure I've got an answer to my question.

My understanding -- well, I'll put it -- without respect to what you testified to this morning, is it correct that you advised the Secretary to sign the supplemental memorandum based, in part, on advice from the Department of Justice?

A Again, I'm not sure I'm following the logic of your question. But, once again, this document was produced initially by the Department of Justice, who sent it to the Department of Commerce with the recommendation

that the Secretary, for purposes of this litigation, needed to submit this supplemental memorandum.

So we reviewed it, made a few edits, and then we had the Secretary sign it. We were following the advice of our counsel. I'm not sure which part of that answer you're not following.

Q I just asked whether part of the basis for your advice to the Secretary to sign it was the advice you got from the Department of Justice?

A Obviously.

Q Thank you.

Did you talk to the Department of Justice about why it was a good idea for the Secretary to sign this memorandum?

A No.

Q Did anyone?

A You'd have to ask our Office of General Counsel.

Q And it's your testimony that you had no dealings with the Department of Justice about this memorandum?

A That's correct.

Q Okay.

MR. GERSCH: Let's take our short break here.

MR. GARDNER: How long?

MR. GERSCH: Ten minutes or so.

VIDEOGRAPHER: This is the end of Media Unit Number 4. The time on the video is 1:58 p.m. We are off the record.

(Off the record.)

VIDEOGRAPHER: This begins Media Unit 4. The time on the video is 2:14 p.m. We are on the record.

BY MR. GERSCH:

Q Mr. Comstock, we're back on the record. Before the break, I was asking some questions about 2018. Now I want to go back to 2017.

A Okay.

Q You with me?

A I'm with you.

Q All right. I want to go back to the spring of 2017 when Secretary Ross requests the

inclusion of a citizenship question on the census. At that point in time, the Department of Justice had made no request to Commerce for the addition of a citizenship question, correct?

A That's correct.

Q And they certainly hadn't asked -- withdrawn.

The Department of Justice certainly hadn't asked Commerce to add a citizenship question because of the VRA. That's also correct; isn't it?

A Well, they didn't ask us to add a citizenship question at that point. So speculating as to why they would ask is irrelevant.

Q I'm not asking you to speculate. The one thing we can be sure of is they didn't ask about the VRA is because they didn't ask at all?

A Correct.

Q All right. And when Secretary Ross says to you in the spring, in whatever words he used, that he wants a citizenship question added to the

census, wouldn't you have had a discussion with him at the time about why he wants that?

MR. GARDNER: Objection. Asked and answered.

THE WITNESS: Again, the answer is no, I would not have a discussion. My boss, if he asked me to investigate something, I investigate it and report back the results.

BY MR. GERSCH:

Q Is your testimony you did not have a discussion?

A I did not.

Q And you're not saying -- well, withdrawn.

Wouldn't it be helpful to you in your job to assist the Secretary to have an understanding of why he wanted the citizenship question?

MR. GARDNER: Objection. Form.

BY MR. GERSCH:

Q You can answer.

A Again, I didn't have any particular doubts about why a citizenship question would be useful, so, no, it would not have hurt me to ask.

Q I'm not asking whether you had doubts. My question to you is a little bit --

A I understand your question.

Q My question, sir, is: Wouldn't it be helpful to you in your job of assisting the Secretary to have a complete understanding of why the Secretary wants to add a citizenship question?

MR. GARDNER: Objection. Form.

THE WITNESS: Again, it's not relevant to the question of whether or not he needs -- of whether or not a question should be added, so, no.

BY MR. GERSCH:

Q Is it your testimony that why he wants a citizenship question to be added is not relevant to whether it should be added? Did I -- did I hear that right?

MR. GARDNER: Objection. Mischaracterizes the witness's prior testimony.

THE WITNESS: My test- --

MR. COLANGELO: That's exactly what he said, Counsel.

THE WITNESS: No. My testimony is: The

rationale for why he would want it added is not relevant to my initial inquiry as to whether or not a question can be added.

BY MR. GERSCH:

Q Yeah. My question was a little different. The question I am trying to get you to focus on is: In your work for the Secretary, wouldn't it be helpful to you to understand as fully as possible why he thinks it's a good idea to add a citizenship question?

A And let --

MR. GARDNER: Objection. Asked and answered.

THE WITNESS: And let me get you to understand my answer, which is, no, it would not make a difference, because I don't need that information to investigate the question.

BY MR. GERSCH:

Q Anyone ever say anything to you about why the Secretary thought it was a good idea -- withdrawn.

Am I right that your testimony is that

you've never had a discussion with the Secretary about why he thought it was a good idea to have a citizenship question added?

A That's correct. I have not had a conversation with him, no.

Q Okay. And did anyone else say anything to you about why the Secretary thought it was a good idea to have a citizenship question added?

MR. GARDNER: Objection. Form.

THE WITNESS: Again, no.

BY MR. GERSCH:

Q All right. If I remember correctly, you testified you worked in a bullpen area?

A Correct.

Q Outside the Secretary's office?

A Yes.

Q I'm not sure I've got all the people who were there, but Wendy Teramoto was there, right?

A Correct.

Q James Uthmeier was there?

A No.

Q I'm sorry.

You were there?
A Yes.
Q Eric Branstad, was he there?
A Yes.
Q That's three.
Izzy Hernandez, that's four. Was he there?
A Yes.
Q Who was the fifth?
A James Rockas.
Q And I'm right that there were five?
A Correct.
Q Okay.
A At times.
Q So you're all sitting there -- and are -- do you work in cubicles, open desks, how does it work?
A Wendy Teramoto had a seated desk. I had a standing desk. Izzy had a standing desk with a stool. James had a standing desk with a stool. Eric Branstad had a standing desk with a stool.
Q Are there walls? Are there partitions?

Are you all in an open space?

A I'm facing -- I was facing Wendy. Izzy, who was rarely there, but his desk was next to mine, facing Eric, and then James was on the end.

Q And there are no walls, correct?

A No walls.

Q No partitions?

A No partitions.

Q Okay. In all the time that you're sitting there and you're all working together, no one says, why does the Secretary want to add a citizenship question -- citizenship question?

A That's correct. Because, again, this was one of well over 100 different items we were working on. All of us were working on different things. I'm primarily tasked with policy. James is primarily tasked with press. And so you're dealing with all of these other issues. There's no reason to discuss it.

Q I'm not even talking about discussing it. No one mentioned? Did anyone mention it?

A Not that I recall.

Q No one says the reason the Secretary wants to add a citizenship question is whatever the reason is, no one ever said anything like that?

A No.

MR. GARDNER: Objection to form.

THE WITNESS: Not to my recollection.

BY MR. GERSCH:

Q Okay. Did you ever have a discussion with people from the Office of General Counsel at Commerce about why the Secretary wanted to add a citizenship question?

A No.

Q And in your time there, did you never see a document analyzing why it was a good idea for Census to add a citizenship question?

A Again, you're -- we have a fundamental disagreement on the premises of your question. Your premise is that somehow a reason needs to be provided. The question before us is the Secretary has the legal authority to add questions to the census. Is there a governmental need? And if

there is, then you're off to the races.

Q My question was a little different. My question was --

A I understand your question.

Q Sir, I'll repeat it for you.

My question is: In all the time you're there, did you never see a document spelling out the reasons why it would be a good idea to add a citizenship question? Why it would be good from Commerce's perspective?

MR. GARDNER: Objection. Form.

THE WITNESS: Again, that's not the question. Commerce --

BY MR. GERSCH:

Q Excuse me, sir. That is my question. Could you answer my question?

A Okay. No.

Q Not even a scrap of paper, right?

A Nope.

Q No memoranda, right?

A No.

Q No emails?

A Not that I recall.

Q And I just want to be straight on my understanding. I think I got you correctly, but I just want to make sure and test that I'm right.

It couldn't possibly assist you in your work, in any way, to know why the Secretary wanted to add a citizenship question? Do I understand that correctly?

A It's not relevant to my analysis.

Q And so it couldn't possibly help you in any way in your work?

A I'm not going to agree with your statement that way, no.

Q Well, that's my question -- withdrawn.

Well, is there any way in which knowing what the Secretary's reason was for wanting to add a citizenship question, is there any way that could assist you in your work at Department of Commerce?

A Assist me on my work at the Department of Commerce, no.

Q Is there any way that it could help you

help the Secretary add a citizenship question?

A If I had found it difficult or challenging, yes. Knowing more about why he wanted it would have been helpful, but I didn't say that there was an issue. It had been asked for hundreds of years, and it had been asked on the ACS. So, clearly, there's a need for it. And so, no, that was not a particularly troublesome aspect of the question I was being asked to look into.

Q When you said if I had found it difficult or challenging, what did you mean? What's the it?

A If -- if what I had been requested to do seemed to have significant legal obstacles to the ability to do that question or take that action, then I would probably inquire more fully to see if there's an alternative way to address what the Secretary is trying to get to. In this particular case, you have something that has been on the decennial census before that is currently being asked on the ACS. There's clear legal authority for him to add the question. So, frankly, the

reasons that he wants to add it doesn't add anything to the analysis. There is a governmental need for this information. That's a question that's already established, so I don't need to inquire further as to what his personal beliefs regarding this question might be.

Q What's the governmental need for the question?

A Enforcement to the Voting Rights Act, determining how many undocumented citizens there are. You name it, there's a whole bunch of reasons. That's why every government in the world collects this information.

Q Well, correct me if I'm wrong, we're talking about at a period in the spring of 2017 when the Voting Rights Act hadn't come up, the Department of Justice hadn't made a request for it. What does the Voting Rights Act got to do with it in the spring of 2017?

A When you inquire as to what does the Department of Justice use the citizenship data on --

Q That wasn't my question. My question is --

A I'm answering your --

Q -- why is it a good idea, why does the government need it back in the spring of 2017?

A Finished with your question?

Q That's my question.

A The answer is for the same reason they've been collecting it for the last 200-plus years.

Q What's the government need in the spring of 2017?

A I already answered that question. If they collect the data under the ACS for Voting Rights Act enforcement, that is one of the primary reasons they collect the data.

Q Okay. It's on the ACS. What's the need -- governmental need for it to be on the census?

MR. GARDNER: Objection. Asked and answered.

THE WITNESS: The governmental need is, again, if you're going to get more detailed

information, then you need that information.

BY MR. GERSCH:

Q Who said in the spring of 2017 that the government needed more detailed information?

A Again, I'm presented with a request by the Secretary to say, can we add this question to the census? I inquire about that, and I looked at it. One of the reasons you would need it is voting rights. If you're going to do voting allocations on the basis of census allocations, that's the reason it's perfectly sufficient.

Q Who said that in the spring of 2017?

A That was -- that was determined after taking a quick look at the issue. I don't need more than that to continue to pursue the question.

Q Who told you that the government needed, in the spring of 2017, more detailed information about citizenship than was contained in the ACS?

A Nobody.

Q You came to that decision on your own; is that right?

A Correct.

Q But you're not a voting rights lawyer, right?

A Irrelevant to the question.

Q That's not my question. You're not a voting rights lawyer, right?

A I've already said that.

Q So you decided on your own in the spring of 2017 that it would be a good idea for the government to have more information than was available from the ACS about citizenship to enforce the Voting Rights Act, even though you're not a voting rights lawyer?

A I don't agree with that characterization, at all. I decided that there was sufficient information for me to pursue the Secretary's request to consider placing a citizenship question on the decennial census and that there was sufficient potential reason to collect that information to warrant moving forward. If I'd come to an opposite conclusion that there was not sufficient potential reason or that there was some insurmountable legal bar, then I would have

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

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

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

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

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

if they would like to accomplish an objective, I see if there's a way to do that. And, again, if it's not legal, you tell them that. If it can't be done, you tell them that. If there's a way to do it, then you help them find the best rationale to do it. That's what a policy person does.

And so, again, if I came up with a rationale that the Secretary didn't agree with or didn't support, then he was going to tell me that. I have no doubt about that. But in the meantime, he doesn't -- I don't need to know what his rationale might be, because it may or may not be one that is -- that is something that's going to a legally-valid basis.

So, again, he's got -- he's asked, can we put -- can we put a question on? The job of a policy person is go out and find out how you do that. Whether that decision is going to be made ultimately to do it or not, that's up to the decision-maker.

Q Are you saying you're better off not knowing what the Secretary's own rationale is for

wanting the citizenship question?

A The Secretary, as you would point out, is not a voting rights lawyer, so I would not expect him to necessarily come up with a rationale. That's the job of the staff at work.

Q You certainly wouldn't expect the Secretary to have come up with the idea that the reason he should want the citizenship question is the Voting Rights Act; you wouldn't expect him to come up that on his own?

A I -- he might well. I don't know.

Q You have no reason to believe that he did, right?

MR. GARDNER: Objection. Calls for speculation.

THE WITNESS: I'm not going to speculate about what his rationale was. You'd have to --

BY MR. GERSCH:

Q Because --

A -- ask him.

Q -- because you have no idea what his rationale is?

A That's correct.

Q Counsel asked you about contact you made with the Department of Justice --

A Correct.

Q -- starting with a Ms. Haney [sic], I believe.

Do you recall that?

A Yes. I believe her name is Hankey, but --

Q Hankey. I apologize.

What was the full name? I can get it out if you don't know it offhand.

A Mary Blanche, but --

Q I'll find it in here.

A It's in one of these exhibits, the memo that I wrote. Here.

Q Mary Blanche --

A Yep.

Q -- Hankey; is that right?

A Yeah.

Q All right. So you went -- you called Mary Blanche Hankey --

A Correct.

Q -- with regard to adding a citizenship question to the census, right?

A Correct.

Q And you wanted to see if the Department of Justice would sponsor the question?

A Correct.

Q And you had a phone call with her, and you had at least a meeting with her, right?

A Right.

Q So at least two contacts?

A Three, when she called me back with somebody else's name.

Q Fair enough.

Didn't -- didn't Ms. Hankey say, why do you want to have a citizenship question?

A No, she didn't.

Q Didn't come up, at all?

A Nope.

Q She referred you to a Mr. McHenry; is that right?

A Correct.

Q And he's not a voting rights guy, right?
A I don't actually know what his background is.
Q Well, you went ahead, back and forth with him over about a month; is that right?
A I mean, we spoke on the phone probably three or four times, yeah.
Q Going from, I think, the period you mentioned was --
A Yeah. It was --
Q -- early May to early June, roughly?
A Approximately a month, yeah.
Q And didn't you learn in that time that he's not a voting rights guy?
A No.
Q Never came up?
A We didn't get into great detail on the rationale.
Q You did ask him would you sponsor a census question for -- I'm sorry. Withdrawn.
You did ask Mr. McHenry if he would be willing to sponsor a request for the addition of a

citizenship question on the census, right?

A I didn't ask Mr. McHenry if he would. I asked if the Department of Justice would be inclined to send a letter asking us to add the citizenship question.

Q Fair enough.

And when you did that, you didn't explain to Mr. McHenry why the Secretary wanted a citizenship question?

A I would have no reason to.

Q And Mr. McHenry never asked, hey, you want me to do this? Why do you need it? He never asked you that?

A I think I explained at the outset that the department currently got a report from the ACS on citizenship level -- I mean, on census -- certain census size, Citizen Voting Age Population, and if they were to get it from the decennial, that would allow them a greater granularity and would that be useful to them, and he said he would inquire.

Q You asked Mr. McHenry if the

Department of Justice would find it useful to have more granularity about citizenship?

A Correct.

Q But at no point did Mr. McHenry say, look, if we want it, we'll ask for it, but how come you want it? Didn't he ask you something like that?

A No.

Q When people call you and say, hey, will the Department of Commerce do this or do that, don't you say, why do you want that, why do you need that?

A I usually say is there a reason that you think the Department of Commerce would need that -- and if they have a reason, then I'll look into it. I don't say, hey, why does your boss want this? That's not part of lexicon.

Q No. No. If another agency calls and says --

A I don't --

Q Let me finish the question and you can answer any way you want.

If another agency calls and says, will the Department of Commerce do such and such, whatever it is --

A Right.

Q -- don't you say to them in some form or another, why do you want this?

MR. GARDNER: Objection. Hypothetical.

BY MR. GERSCH:

Q Why does your agency need this?

MR. GARDNER: Objection. Hypothetical.

THE WITNESS: Again, I don't question why their boss might want it. I might say, what is it you think we can provide or why do you think the Department of Commerce is the right agency for this? But if they say we need this data because we're negotiating a trade agreement, whatever, that's fine. I don't question their basis.

BY MR. GERSCH:

Q Okay. But if I understood your last answer, you added something important, you said, if they call and say we need this for the trade ag- -- trade agreement, you say I don't question

them. But if they don't give a reason, sir, don't you say to them, why do you want it?

MR. GARDNER: Objection. Calls for a hypothetical.

THE WITNESS: Again, I already provided the reason for Department of Justice. I said, would it be useful for you to have more granular voting data at the census lock level? He said he would inquire. That answers your question. I'd already provided the answer.

BY MR. GERSCH:

Q Mr. McHenry comes back at some point and he says he's not interested, right, in words or substance?

A He suggested that I contact the Department of Homeland Security.

Q But I take it he makes it clear to you in some fashion -- withdrawn.

Let's start with this. What did he say to you?

A He suggested I talk to the Department of Homeland Security.

Q Did he also say, listen, I don't really need that information, or my guys don't need that information, or my department doesn't need that information or something like that?

MR. GARDNER: Objection to form.

THE WITNESS: Again, no, he did not indicate that they did not need the information. He simply suggested that they were rather busy and why don't I talk to the Department of Homeland Security.

BY MR. GERSCH:

Q It's your testimony that he said they were too busy to do it?

A Unfortunately, that's not an uncommon response from other agencies. They don't necessarily look for extra work.

Q Okay. So they were too busy to ask for it, that's what you understood them to say?

A Yeah. Their inclination was they weren't inclined to do the work, to ask for it, yeah.

Q Okay. Okay. So Mr. McHenry let's you know he's not inclined or the department is not

inclined to do the work, to ask for it, and he refers you to Homeland Security, correct?

A Correct.

Q And you speak to a Mr. Hamilton, right?

A Right.

Q And Mr. Hamilton, he's not a VRA guy, right?

A I have no idea what his background is.

Q Certainly, it's your understanding that the Department of Homeland Security has nothing to do with enforcing the Voting Rights Act?

A It would not normally be something I would think they would do, no.

Q And you talked to Mr. Hamilton how many times?

A I don't know, three or four times.

Q Over what period?

A Again, two weeks. I don't know.

Q And don't you say to Mr. Hamilton, here's why we want the information, here's why we want you to ask for the citizenship question?

A Again, it was the same explanation as I

gave the Department of Justice. And as you pointed out, DHS doesn't really do that. So I was simply following up on the suggestion that Mr. McHenry had made, and perhaps there was something that DHS did that I was unaware of that would have them -- have the need for this information. Turns out they didn't, so back to Square 1.

Q Yeah. My question is -- and maybe I didn't phrase it exactly right.

Did you explain to Mr. McHenry [sic] in any of these several calls, here's why it's important to the Department of Commerce, or your boss or whomever, here's why it's important that -- to get a citizenship question added?

MR. GARDNER: I think you mean Mr. Hamilton. You said Mr. McHenry.

MR. GERSCH: Withdrawn. Let me rephrase. Thank you, Counsel.

BY MR. GERSCH:

Q In any of these several calls, you say to Mr. Hamilton, here's why it's important to

Department of Commerce to have you folks request the addition of a citizenship question.

A No. I never explained that to him.

Q And is it your testimony that in your several conversations with Mr. Hamilton, he never says, hey, why do you want this?

A That's correct.

Q He never says, why do you want a citizenship question added?

A Again, when somebody calls up and says -- my boss, you know, Secretary Ross, AG Sessions, whomever has asked us to pursue this, I don't typically question back and say, well, why do you think -- does your boss think this is needed? I just don't do that. It's kind of discourteous to other staff. So no, he took me at face value. I'm calling to inquire, would they find this useful? He gets back to me, no.

Q I just want to make sure I caught part of what you're saying correctly.

Are you saying it would have been discourteous for Mr. Hamilton at Homeland Security

to say, hey, why do you guys at Commerce want us to ask for a citizenship question?

A For him to challenge why my boss might ask for it.

Q I didn't say challenge.

Is it your testimony it would be discourteous for him to say, hey, you're asking me to do something --

A Uh-huh.

Q -- something which involves some work --

A Uh-huh.

Q -- would you just explain to me why it's important for you to have me ask for a citizenship question?

MR. GARDNER: Objection. Form.

THE WITNESS: No such conversation occurred.

BY MR. GERSCH:

Q Yeah. My question is: Would that have been discourteous for him to say that to you?

A Depends on how he phrased it.

Q He could have phrased it in a way that

was properly respectful, right?

A Theoretically, yes.

Q In the time that you were dealing with Mr. McHenry or getting ready to deal with Mr. McHenry -- this is back at the Justice Department now -- did you ever learn that he was director of the Executive Office of Immigration Review?

A I never learned that, no.

Q How about Ms. Hankey, did she say why she was going to refer you to Mr. McHenry?

A No, she didn't.

Q Is it common for you to call people like Mr. McHenry without knowing what their position is?

A Certainly at that time, yes.

Q What was it about that time?

A Well, it was shortly into the administration, and titles are not necessarily informative of what people do, so --

Q Did you have an understanding of what Mr. McHenry's portfolio was, independent of his

title?

A No.

Q About what his expertise was independent of his title?

A No.

Q You didn't know -- withdrawn.

You're trying to accomplish something for your boss, right?

A Correct.

Q And you're calling another agency and you're going to ask them to do some work, right?

A Right.

Q And you know from your vast experience that sometimes people just say no because they just don't want to do the work, right?

A Correct.

Q That's not uncommon, right?

A It's been my experience.

Q So in order to have the best possible chance of persuading a person like Mr. McHenry, don't you want to do a little research beforehand?

A Again, I was dealing with, literally,

hundreds of issue, as well as clearing correspondence, clearing Federal Register notices, no. I did not have time to research this guy's background. That's why I went through Eric Branstad to say, hey, get me somebody over at DOJ who I can talk to. I want to Hankey -- and I don't know her from Adam, but relying on the fact that she was recommended by folks over at the White House as somebody who was connected with AG Sessions, I'm assuming she's going to steer me in the right direction. So I take on faith who she suggested I talked to. Turned out they weren't the right person, so we didn't get anywhere.

Q Did you have an assistant during this period?

A No.

Q Any staff?

A I had my OPSP staff.

Q Who's that?

A Office of Policy and Strategic Planning. They were the detailees I discussed earlier.

Q Got it.

You couldn't ask one of them, hey, I'm supposed to have a call with Mr. McHenry, can one of you figure out what he is and why --

A No.

Q Excuse me. I got to -- just a second. I've got to finish the question. You can answer it any way you want.

Didn't you want to call -- talk to one of your staff people and say, listen, I got a call with Mr. McHenry, I got to persuade him to do some work he's not going to want to do, to help out our boss, Mr. Ross, Secretary Ross, and can one of your look up and tell me who he is and what levers we might be able to pull to persuade him to do this work for us?

MR. GARDNER: Objection.

BY MR. GERSCH:

Q You didn't want to ask someone on your staff to do some work like that for you?

MR. GARDNER: Objection. Form.

THE WITNESS: Again, that's a view of

both the workload I was under and the workload that they're under that I think is misinformed.

In fact, several of my calls with Mr. McHenry were made while I was driving into work, so there was no opportunity to call somebody and do that research.

And, besides, this wasn't about getting leverage on Mr. McHenry. This was simply to ask -- following up on the person I'd been directed to, who, based on the fact that it was recommended by an assistant to the AG, I'm assuming is going to at least be somewhat receptive. Probably an error on my part, but that's -- I've got a dozen other things I'm dealing with at the same time. So, no, I'm not going to spend a lot of time researching this guy.

BY MR. GERSCH:

Q You didn't spend any time researching this guy?

A Correct. I didn't.

Q Secretary Ross certainly knows why he wanted a citizenship question back in the spring

of 2017, right?

A You'd have to ask him.

Q Is there anyone besides Secretary Ross who we could go to who would have that information?

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

THE WITNESS: I'm not aware of anybody.

BY MR. GERSCH:

Q Do you have any reason to believe that Secretary Ross's rationale for wanting to add a citizenship question is some kind of supersecret?

A No.

Q Doesn't involve national security, right?

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

THE WITNESS: I don't know what the Secretary's rationale is. You'd have to ask him.

BY MR. GERSCH:

Q But you don't think it involves national security?

MR. GARDNER: Same objections.

THE WITNESS: I'm not going to speculate on that.

BY MR. GERSCH:

Q You heard about this suit back when it was filed, right, this lawsuit?

A Yeah.

Q Okay. And there's several lawsuits, right?

A Lost count, but yes.

Q And you've known that you were going to sit for a deposition for a while, also?

A Maybe for two weeks or so.

Q Okay. Well, at any time since these lawsuits started to get filed, did you have a discussion with anyone about why it is the Secretary wanted a citizenship question added?

A No.

Q Secretary Ross gave Congressional testimony in March of 2018 in advance of his decisional memorandum. Do you remember that?

A I'll take your word for it.

Q Testified before committees of both --

both House, right?

A Again, I'd have to look at a calendar to refresh my memory as to when he testified. But, yes, he testified to Congress during the course of the year.

Q Fair enough.

And he was asked questions about a citizenship question?

A I believe that's correct.

Q Who prepared him to testify on that subject?

A He -- he does a lot of his own hearing prep, but we would have -- I would have been involved, as well as James Uthmeier, Peter Davidson, of course, Karen Dunn Kelley. I mean, this was not a hearing specifically on the citizenship question, so we mostly would have been preparing for the broad range of questions on whatever the topic was. We were going up and testifying on the steel tariffs. We were going up and testifying on the lifecycle cost estimate, a whole series of things, so --

Q Sure. You want to get him prepped on everything, though, right?

A Yeah.

Q And one of the things that you anticipated would come up was the question about the citizenship question, right?

A Seems reasonable if that was the time frame, yes.

Q And were you the one who worked with Secretary Ross on how he was going to answer those questions?

A I would have been one of the people, yes.

Q Was there a division of responsibility between the folks you mentioned just a minute ago, the people who helped prepare him?

A Not per se. I think he's fairly open to suggestions from staff of what to consider. So if somebody had an idea, he would consider it.

Q Did you tell the Secretary, listen, you can expect that someone is going to ask whether -- whether you're going to add a citizenship question? Did you have that

discussion with him? That would have been normal, right?

A Well, again, if this is in the time period after we received the DOJ letter and while he was considering making his decision, then, yes, we might have anticipated. But the answer would have been fairly straightforward, which is we have that matter under review, and I'm considering all -- all information. So there would have been very little we're prepping for on that.

Q Didn't you discuss with the Secretary -- withdrawn.

First of all, I'll represent that he did -- the Secretary did, in fact, testify before multiple committees after the Department of Justice request came in in December of 2017 and before the issuance of the March decisional memorandum.

A Okay.

Q And my question to you is: In those discussions that you had with the Secretary to prepare him, wasn't it discussed whether the

Secretary was going to reveal the reasons he had wanted to the addition of a citizenship question?

A No.

Q Subject never came up?

A Never came up.

Q Didn't it come up whether the Secretary would reveal that the reason that Commerce had received a request from DOJ to add a citizenship question is because Commerce had gone to DOJ and asked DOJ to make that request?

A No.

Q Never came up?

A Never came up.

(Conference call interruption.)

THE WITNESS: In case we were falling asleep.

BY MR. GERSCH:

Q You testified with respect to the citizenship question; isn't that right?

A That's correct.

Q You gave testimony before the House Committee on Oversight and Government Reform?

A Correct.
Q After the decisional memorandum was issued?
A Uh-huh.
Q May 8th of this year?
A Okay.
Q Sound right?
A Somewhere in that ballpark, yeah.
Q Yeah?
A I'll take your word for it on the date.
Q You were asked questions by Representative Eleanor Holmes Norton about citizenship questions. Do you remember?
A I recall the exchange, yes.
Q She asked why did this question, which was dropped for 70 years, suddenly appear on the decennial census, what was the point, didn't she?
A I -- I would have to refer to her testimony. I don't have it in front of me.
MR. GERSCH: What are we up to?
MR. GARDNER: 27.
MR. GERSCH: Let's mark this 27.

(Plaintiffs' Exhibit 27, Testimony from Committee on Oversight and Government Reform, was marked.)

BY MR. GERSCH:

Q I'm showing you a transcript of your testimony before the Committee on Oversight and Government Reform on May 2018.

Mr. Comstock, I want to be clear. This is not a transcript made by the committee. Do you understand me?

A I understand what you're saying.

Q Okay.

A I'm not sure why it's not a transcript made by the committee, but that's all right.

Q We had this transcript --

A Okay.

Q -- made by a reporter who watched your testimony.

A Okay.

Q So let me direct you to Page 37, Line 12. See where it says, Ms. Norton?

A Uh-huh.

Q All right. And this is where she asks you -- withdraw this. Isn't what I want --

Let me direct your attention to Lines 2 through 5, okay.

A All right. Let me read the context of which Lines 2 through 5 appear.

Q Let me ask your question and then you can read whatever you need.

A All right. Very good.

Q On Lines 2 through 5, Ms. Norton asked you, "My question to the two of you" -- and you were there with Mr. Jarmin; is that right?

A Correct.

Q She says, "My question to the two of you is: Why did this question, which was dropped for 70 years, suddenly appear on the decennial census? What was the point?"

And then you answered, "Thank you very much, Congresswoman, for the question. We received a request from the Department of Justice for this, and their rationale was that the level of the information that they needed to enforce the

Voting Rights Act was not available."

That's the testimony you gave, correct?

A Again, this is not the official transcript, but presuming your person transcribed this correctly, that appears to be what I said.

Q And this squares with your memory of what you said, right?

A Correct.

Q And when she says, why did this question get added, and you say, we received a request from the Department of Justice, that's not the whole truth; is it?

A That's a -- that's a factual statement.

Q It's a factual statement that you received a request from Department of Justice, right?

A Correct.

Q But the reason the Department of Justice made the request is because you guys at the Department of Commerce put them up to it; isn't that right?

A I don't agree with that characterization.

But, again, the Department of Justice decided that this was information they could use and they made the request. That starts the formal process for us to review the question. Had they decided they did not need that information and not made the request, then the Commerce Department would have had to decide if there was some rationale that the Commerce Department needed this information.

Q Sure. But the reason the Department of Justice made this request of the Department of Commerce was that the Department of Commerce went to the Justice Department and said, will you please make this request of us, right?

A We asked them if they could use this information. That was an independent decision on their part.

Q You asked them if they could use information from a citizenship question, right?

A At the block level, which is not currently available.

Q And you asked them if they would be willing to request that from the

Department of Justice [sic]?

A If that was information that they found useful, then they could request it, yes.

Q You asked them to request it from the Department of Justice, correct?

A Again, what we asked them was if they could use this information, and if so, then they would need to request it.

Q Do you deny that you personally went to representatives in the Department of Justice and asked them if they would request the addition of a citizenship question?

MR. GARDNER: Objection. Asked and answered.

THE WITNESS: To answer, once again, I went to representatives of the Department of Justice and asked them if this would be information that they would find useful, and if so, they could request it.

BY MR. GERSCH:

Q Yeah. I got that part, and I'm asking a slightly different question now.

A Okay.

Q Didn't you say to the Department of Justice when you were talking to them, in words or substance, we would appreciate it if you would ask us to include a citizenship question?

A I never made such a request.

Q And I take it, based on your prior testimony, you don't know what conversation occurred between the Secretary and the Attorney General?

A That's correct.

Q Did you understand that Ms. Teramoto was on that call between the Secretary and the Attorney General?

A I don't know who was on the call.

Q In any case, however we word it, you didn't tell Representative Norton when she asked why is this question being added, that you had gone to the Department of Justice and suggested that this might be something they'd be interested in?

A That's correct.

Q Why is that?

A Again, because until the department makes its independent decision to request this information, that was the -- there was no question that was going to be added.

Q When Representative Norton says, why is the question being added? Don't you think it's relevant that the Secretary of Commerce wanted this question added independent of the Department of Justice's request?

MR. GARDNER: Objection. Form.

THE WITNESS: Again, now --

MR. GARDNER: What's your -- withdrawn.

MR. GERSCH: What's your objection?

MR. GARDNER: I didn't understand that question. Is it relevant to Secretary -- or I'm sorry -- Representatives Norton Holmes question that the Secretary had requested DOJ to ask? I didn't even --

MR. GERSCH: I got it.

BY MR. GERSCH:

Q Let me put a different question to you.
A Sure.
Q When Representative Norton asks you the why question, don't you think it's responsive to the why question that the Secretary of Commerce wanted to add a citizenship question independent of the Department of Justice's request?
A No. I don't think it's relevant. His decisional memo laid out very clearly the rationale that was the basis of his decision. Whatever his personal feelings may have been are irrelevant to that decision.
Q It laid out a rationale. We can agree on that, right?
A That's what he's required to do under the law, is lay out a rationale. That is the rationale for his decision and that's what he's standing on.
Q Okay. He laid out a rationale. Is it your understanding, under the law, that if the rationale is not his real reason for doing it, we should ignore the real reason, and we should only

focus on the pretextual reasons that he offers up?

MR. GARDNER: Objection. Calls for a legal conclusion.

THE WITNESS: The Secretary's decision memo lays out a valid reason that's consigned to his discretion under the law, and that is the rationale he provided to staff, and that is the rationale that we placed in the record. So that is his reason for having the question.

BY MR. GERSCH:

Q My question is a little different. If the Secretary's real rationale is something different than the rationale he lays out in his decisional memo, is it your understanding, under the law, that we're to ignore the real reason and only focus on what's in the decisional memorandum?

MR. GARDNER: Objection. Calls for a legal decision.

THE WITNESS: Your hypothetical is premised on the false conclusion that there is some illegal rationale that would be provided and be exposed and be referenced. There is none.

It's committed to his discretion to add a question, as long as you make it through the other things, Paperwork Production Act, et cetera. So it's -- I don't understand the basis for your question. But there's -- at the base of your question is this hypothetical that there's some supposed illegal reason that would be -- that would nullify a perfectly valid decision. I don't agree with that assessment.

BY MR. GERSCH:

Q Mr. Comstock, I want you to listen to my question carefully, because there was no reference to any illegal rationale, and I'm going to put it to you again and there will be no reference to an illegal rationale. And my only question -- and, by the way, I'm happy if you want to take this as a hypothetical.

My only question is: If the Secretary lays out a rationale in his decisional memorandum which is different than his real rationale, is it your understanding that we're supposed to ignore the real rationale and only focus on what's in the

decision memo?

MR. GARDNER: Given your introductory clause, objection. Calls for a hypothetical. Objection. Calls for a legal conclusion.

THE WITNESS: Again, a decision is valid if a valid reason has been spelled out, and that is what we did.

BY MR. GERSCH:

Q Could you answer my question?

A Again, I don't accept the premise of your question, which is that there's some other reason besides what was provided in the memo.

Q It's a hypothetical question, sir. The question is --

A I'm not going to answer a hypothetical on that basis.

Q I'm asking you to answer it, and you're here to answer questions, and I think I'm fairly following up on your testimony.

My question to you is real simple: If the Secretary lays out a rationale in his decisional memorandum and it's not his real

rationale, is it your understanding that what we're supposed to focus on is what's in the decisional memorandum and we're not supposed to look at the rationale?

MR. GARDNER: Objection. Calls for hypothetical. Objection. Calls for legal conclusion.

THE WITNESS: Again, we're at loggerheads here because you keep spelling out something that is -- that presupposes there is some other rationale that would be sufficient to outweigh a legitimate rationale and, therefore, must be noticed and taken care of. I mean, the government makes decisions all the time and spells out a rationale. Do some of decision-makers have, perhaps, other reasons, maybe, but it's not relevant to the legal analysis.

Q We shouldn't know what Secretary -- withdrawn.

We shouldn't know what the real rationale is; is that testimony?

A I --

MR. GARDNER: Objection. Calls for a legal conclusion.

THE WITNESS: Again, I have no reason to believe that the rationale is anything other than what's in the memo.

BY MR. GERSCH:

Q Well, sir, actually, you testified previously that the Secretary had a rationale for asking this question, which he didn't reveal to you and had nothing to do with the Department of Justice's request.

A I disagree with that statement.

Q Let's try this one other way. You don't disagree with the proposition that a decision-maker could have a rationale that is different than what he chooses to spell out in his decisional memorandum, right?

MR. GARDNER: Objection. Calls for hypothetical.

THE WITNESS: Again, I don't know -- I don't -- it's impossible to answer that question, because you -- I'm not sure where you're going

with it.
BY MR. GERSCH:
Q I'm not asking you to know where I'm going with it. I'm asking you to answer the question. I'll put it to you again.
You don't disagree with the proposition that it's possible for the decision-maker to have one rationale which he puts in the decisional memorandum and a completely different rationale which is the real reason he wants the decision done?
MR. GARDNER: Objection. Calls for a hypothetical.
THE WITNESS: Again, in the context we're dealing with, I don't agree with that statement.
BY MR. GERSCH:
Q It's not possible for that to happen, it's not possible for the decision-maker to put one rationale in the decisional memo and have a completely different rationale for why he wants the decision?
MR. GARDNER: Objection. Calls for a

hypothetical.

THE WITNESS: In my experience with the federal government service across 30 years, both Democrat and Republican, I'm not aware of decision-makers who would do such a thing.

BY MR. GERSCH:

Q This would never happen, in your view, right?

A I'm not going to use the word never. Clearly, in the course of human history, things like that do happen. That's not been my experience that it generally is the case.

Q That's fine. Put aside your experience. I'm just asking you conceptually, you don't have difficulty understanding that a decision-maker could say I'm doing this for one reason without revealing that he is actually doing it for a different reason. You understand that concept, right?

MR. GARDNER: Objection. Calls for a hypothetical.

THE WITNESS: Yeah. It's a hypothetical

to which the answer is always going to be yes. So to the extent that makes you happy, sure.

BY MR. GERSCH:

Q Okay. So you do understand that concept. So when that occurs, when it is the case that the decision-maker puts forth a stated rationale, which is, in fact, not his real rationale, is it your understanding that we should pay no attention to his real rationale and focus only on his stated rationale?

MR. GARDNER: Objection. Calls for hypothetical objection. Calls for a legal conclusion.

THE WITNESS: I'm not going to answer that question.

MR. GARDNER: Would now be a good time for a break? We've been going about an hour.

VIDEOGRAPHER: This concludes Media Unit Number 5. The time on the video is 3:11 p.m. We are off to record.

(Off the record.)

VIDEOGRAPHER: This begins Media Unit

Number 6. The time on the video is 3:37 p.m. We are on the record.

(Plaintiffs' Exhibit 28, Memo, was marked.)

BY MR. GERSCH:

Q Mr. Comstock, we're back on the record.

After the Department of Justice made their formal request for the addition of a citizenship question in December of 2017, you understand that the Census Bureau did some analysis with respect to that request, right?

A Correct.

Q All right. And one of the things that the Census Bureau produced is a document that's been marked Exhibit 28.

A Okay.

Q Is that fair to say?

A It appears to be a memo from John Abowd to the Secretary, so will -- oh, it's marked draft, so --

Q Dated January 19, 2018, as you say, from John Abowd, Chief Scientist at the Census Bureau,

to Secretary Ross through Karen Dunn Kelley.

You've seen this before, haven't you?

A I don't know that I've seen this particular draft. It's marked draft, so I don't know that this document ever made it up to the Secretary's office.

Q Did you see a form of this document, whether it was this one or not?

A I saw some form of this document, yes.

Q I want to direct your attention to the one, two, three -- third full paragraph, last sentence, and in it Mr. Abowd addresses Alternative B -- and, by the way, you understand Alternative B is adding a citizenship question to the census, right?

A That appears to be what the memo says, yeah.

Q So what Mr. Abowd reports is Alternative B -- that is adding a citizenship question -- is, quote, very costly, harms the quality of the census count, and would use substantially-less active citizenship status data

that are available from administrative sources.

You knew that that is what the Census Bureau had concluded, right?

A Well, again, that's a -- this is a draft pre-decisional memo. So I'm not sure if this was the final document that was sent to us or not.

Q I'll represent to you that this is -- that the record made in this case so far is that this is the last draft produced. Does that help you --

A Is that -- okay.

Q I'm happy if you want to consult with your counsel.

MR. GARDNER: If you -- you can answer the question, yes.

THE WITNESS: Sure. Assuming this is the final version, then that's what the document says, yes.

BY MR. GERSCH:

Q That's not my question. You came to understand, isn't that right, that the view of the Census Bureau was that asking the citizenship

question is very costly, harms the quality of the census count and would use substantially-less citizenship status than are available from administrative sources?

A I would agree that that's the summary statement here. That it overstates the case they made further in the document. But that is not an accurate representation of what's actually reflected in the document.

Q I want to make sure I understand your testimony. You're saying you disagree with their conclusion?

A I disagree with that characterization as being the final conclusion of the Census Bureau, yes.

Q Ah. Okay. So you think that what I just read to you doesn't fairly reflect the view of the Census Bureau; is that right?

A I think that reflects the view of Dr. Abowd and that it's very imprecisely stated. If you read the rest of the memo, it provides more detail, and so I would not agree with the

statement, because it's not backed up in the document that it would be very costly. That's a relative term. And that it would use substantially-less accurate, I disagree with those statements.

Q Yeah. I understand, and I stipulate that you disagree with them. My question is a little different. I'm asking if you understand this is the position of the Census Bureau, whether you agree with it or not, and I stipulate that you don't.

A And just, again, I'm being very clear that this sentence taken out of context, I would say is not the position of the Census Bureau. The position of the Census Bureau is reflected in this full memo, which provides greater detail, which is not, I would say, accurately characterized in this summary statement at the front.

Q Did you ever meet with the folks at the Census Bureau about this analysis?

A Yes, we did.

Q Okay. When did you do that?

A I couldn't tell you the exact date.
Q Who did you meet with?
A Dr. Abowd, Dr. Jarmin. It was a large meeting.
Q And Dr. Abowd and Dr. Jarmin, they stood by this analysis, right, the analysis in Exhibit 28?
A I'd say that, yeah, they stood by the entire analysis, not necessarily that statement.
Q And the entire analysis includes the statement that I read to you, right?
A Again, you're -- I think you're taking a single statement out of context.
Q My question is a little different. I'm saying when you said, they stood by the entire analysis, that includes the statement that I read you?
A And, again, I will say that I think you're trying to get me to say that particular statement represents the view of the Census Bureau, and that is not my understanding.
Q Okay. When you say it's not your

understanding, at no point did Dr. Jarmin or Dr. Abowd say, no, we don't believe that Alternative B is very costly, harms the quality of the census count and would use substantially-less accurate citizenship status data that are available from administration sources; isn't that right? They never took it back?

A We never asked them to take it back.

Q And they never did?

A I don't know if they took it back or not.

Q In your presence, sir.

A Again, they were never asked, to my knowledge, to take that statement back, so there would be no reason for them to take it back.

Q And they didn't take it back, did they?

A I don't know whether they took it back.

Q In your presence, they didn't take it back?

A Again, I look at their entire memo, not that statement.

Q I'm not asking that question. They didn't take this statement back that I just read

to you three times?

A Again, my point is, they were never asked to take it back, so there would be no reason for them to take it back.

Q I just want there to be no misunderstanding, Mr. Abowd [sic], if at trial you're going to say they took it back, I want to hear that right now.

MR. GARDNER: He's not Mr. Abowd.

BY MR. GERSCH:

Q I'm sorry, Mr. Comstock. It's late in the day.

Mr. Comstock, if you're going to say at trial that Dr. Abowd or Dr. Jarmin took this statement back, I want to hear that right now. Can we agree on that, that you'll tell me right now?

A I will agree -- I will agree that I would say that is not representative of the data that was presented to us in the course of extensive discussions. That that statement is an early statement that mischaracterizes the final

conclusions that we understood.

Q When you say earlier, it's the statement as of the January 19th memo, you don't disagree with that?

A Again, I'm not contesting they provided this investigation.

Q Focus on timing. You said this was an early statement and you don't think it was reflective of their final conclusions.

My question is: You're not saying it doesn't reflect their position as of January 19th, are you?

A I am saying, again, that I think you're taking a single statement out of context and trying to represent it has the position of the Bureau as conclusive, and I'm saying I disagree with that statement.

Q Let me show you -- let's mark this as Exhibit 29.

(Plaintiffs' Exhibit 29, Memo, was marked.)

BY MR. GERSCH:

Q You see what's been marked as Comstock Exhibit 29, it is a March 1, 2018 memo from Dr. Abowd for Secretary Ross, Bates stamp first Page 001308.

Do you have that in front of you?

A I do.

Q Have you seen this document before?

A I believe I've seen this document.

Q Okay. And this document relates to an Alternative D, right?

A Correct. But I'll note, again, it's marked draft, and I'm just mystified as to why we keep getting draft documents as opposed to finals. Certainly draft documents don't normally come to us.

MR. WALSH: Counsel, would it be possible to hand out --

MR. GERSCH: Oh, I'm sorry.

MR. WALSH: Thanks.

BY MR. GERSCH:

Q This is about Alternative D; is that right?

A That's correct. But I'm still asking a question, why am I getting a draft version of this instead of a final?

Q I don't get to testify. All I can do is ask the questions.

And Alternative D was the idea of Secretary Ross, that perhaps you could combine Alternative B, which is asking the citizenship question of every household in the decennial census, and Alternative C, which was don't ask the question but use administration data to figure out citizenship status, correct?

A Correct.

Q And at the back of this memo, the last sentence says, "In sum, Alternative D would result in poorer quality citizenship data than Alternative C. It would still have all the negative cost and quality implications of Alternative B outlined in the draft January 19th memo to the Department of Commerce."

You saw this at the time, right?

A Again, I can't say that this was the

document I saw, because I did not see something marked draft pre-decisional V10.

Q You think you saw a version of it that didn't have draft on it?

A I have no idea. But we don't typically see documents that say draft.

Q I'll represent that we've never seen a version of either of these documents that aren't marked draft. If there is one -- if there are versions, I would like them right now.

MR. GARDNER: I represent we've produced what we have.

BY MR. GERSCH:

Q Regardless of the format, you became acquainted with the views of Census that Alternative B would result in poorer quality citizenship data than Alternative C and still have all the cost and quality implications of Alternative B outlined in the draft January 19th memo to the Department of Commerce; you became acquainted with that conclusion of theirs, right?

A I did.

Q Okay. By the way, you'll notice it says -- this refers to the January 19th memo as being a draft.

A Okay. Like I said --

Q Do you see that?

A I see it. That it says that, yes. Perhaps that is what they provided to us. I don't know. We produced whatever is in the record, so if this is what's in the record -- as long as I'm being given the final version, then okay.

Q All right. You're not saying that the Census Bureau took back the conclusion reflected in this last paragraph that I've read you from Exhibit 29, are you?

A Again, I think there was iterative exchange in which the conclusions of the Census Bureau to staff and some of their assertions did not hold up under cross-examination.

Q Whether you think they held up or not, my question to you is: Did the Census Bureau ever take back the conclusion that's in the last

paragraph of this March 1 memo?

A You'd have to ask them.

Q In your presence, did they say any such thing?

A I didn't ask them to take it back.

Q I'm not asking whether you asked them. I'm asking -- withdrawn.

There were other people in the meeting besides you, right?

A There were a series of meetings, so --

Q How many meetings did you have about this memo, this March 1 memo?

A I couldn't tell you.

Q About?

A Might have met once or twice. I really couldn't tell you.

Q And who did you remember being there besides Dr. Abowd and Dr. Jarmin?

A Again, I don't know if it was specifically on this memo or this presentation or whether they sent it to us. There were multiple meetings on the question. Who was at each

meeting, I couldn't tell you.

Q I think it would be fair to say there were multiple meetings about Census Bureau's analysis of the citizenship question, right?

A Yes.

Q Okay. And what's your best recollection of how many meetings there were?

A I don't know. Two or three.

Q And if this memo is dated March 1 and the decisional memo is dated March 26th. What's your best recollection about when the last -- the last meeting was, the last of these two or three meetings?

A Probably somewhere in the vicinity of March 20th.

Q Okay. And my question simply to you is, sir: Did the Census Bureau people ever say we're taking it back, you've convinced us, we don't agree with the conclusion we put forth in the last paragraph?

A No.

Q And did you ever have -- withdrawn.

Did you have a meeting about the wording of the March 26th memo with the Census Bureau?

A I don't believe so.

Q You didn't have a meeting with Dr. Abowd with Secretary Ross there on the morning of the 26th or thereabouts?

A No, not to my recollection. But it's entirely possible.

Q So it's your -- and all I can ask for is your best recollection.

It's your best recollection that you never had a meeting with the Census Bureau about the wording of the March 26 decisional memo?

A Not that I recall, no.

Q Did you ever have any analysis of the citizenship question prepared by experts other than the folks at the Census Bureau?

A Not that I know of, no.

Q Did you ever get any input from somebody with technical expertise with respect to the Census Bureau's analysis of the citizenship question who was not from the Census Bureau?

A No.

Q Did anyone review the Census Bureau's analysis of what was wrong with the citizenship question who was not a lawyer?

A The Secretary.

Q Other than the Secretary?

A Karen Dunn Kelley.

Q Other than the Secretary and Karen Dunn Kelley?

A Obviously, Dr. Jarmin, Dr. Abowd.

Q I'm talking about people outside the Census Bureau.

A Census Bureau.

Well, let's see -- well, Wendy Teramoto might have. But, no, primarily would have been Office of General Counsel doing the review.

Q And you?

A And me.

Q And you're a lawyer?

A Yes, I am a lawyer.

Q All right. Let's mark the decisional memorandum as Exhibit 30.

(Plaintiffs' Exhibit 30, Decisional memorandum, was marked.)

BY MR. GERSCH:

Q Mr. Comstock, I show you what's been marked as Exhibit 30. This is Secretary Ross's March 26, 2018 decisional memorandum with his signature affixed to it, correct?

A Yes.

Q I just have a few questions on that.

I may have fewer than I thought.

Let me just drop back to Exhibits 28 and 29. The Census Bureau analysis for a second --

A Uh-huh.

Q -- and then we'll get to Exhibit 30.

With respect to the Census Bureau analysis, you understood that they researched the question about the citizenship question, they researched that by looking at information from the decennial -- past decennial censuses, right?

A Mostly the long form, yes.

Q And past ACS --

A Correct.

Q -- surveys, right?
A Yes.
Q You said mostly the long form, but also the short form, right? They did a comparison between response rates from the short form and response rates on the long form, right?
A Right.
Q And the long form, we're talking about something that's filled out by on the order of 300 million people or something -- withdrawn.
It reflects data on 300 million people?
A Well, the long form is --
Q I should have said the short form. You're right. Let me put it to you again.
The short form reflects data on approximately 300 million people?
A That would be about right, yeah.
Q And it's filled out by over 100 million people, right?
A I couldn't answer that question. I don't know.
Q It's a larger number.

A I think it's 169 million households or something.

Q And the ACS, roughly, how many people fill out the ACS in rough terms?

A My recollection is it's about two to three -- two and half to three percent per year.

Q Two and half to three percent of the total population?

A Total number of households.

Q And the number of households you think are 160 million?

A You'd have to look at the data.

Q But that's --

A In the ballpark, yeah.

Q So the 2 or 3 percent that fill out the ACS, those are millions of people, right?

A Oh, yeah. Right.

Q Okay. And you'd call -- withdrawn.

When the Census Bureau does analyses based on their findings from the decennial census and the ACS --

A Uh-huh.

Q -- those are empirical analyses, right, they count?

MR. GARDNER: Objection. Form.

THE WITNESS: You'd have to ask the Census Bureau how they do their analysis.

BY MR. GERSCH:

Q Right. But you understand what empirical means, right?

A I understand the use of the term, but I don't know if all of their analyses are based on empirical or some other method.

Q Certainly, some of their analyses are empirical, right?

A Sure. And some are sampling and some of them are imputation. They use a variety of statistical methods.

Q Just a few more questions. Now, turn to Exhibit 30 if you would and turn to Page 7.

A Yeah.

Q Last paragraph, first sentence reads, "The Department of Commerce is not able to determine definitively how inclusion of a

citizenship question on the decennial census will impact responsiveness."

You saw that, right?

A Yep.

Q It says the Department of Commerce is not able to determine definitively. What does that mean, determine definitively?

A What it says. In other words, the evidence presented to us was not determinative, and it was not definitive that there would be a drop in response rate. There was a widely-held belief that there would be a drop in response, but many of those same people that they were not answering the citizenship question, were already not answering the census because of distrust of government, because of whatever the other reasons may be.

So they could not identify with any specificity that the addition of a citizenship question would, in fact, cause a decrease in response rate. They estimated there could be a decrease of a certain number of households, which

was less than half a percent. And based on the size and volume of the exercise we were undertaking, that is not sufficient to say it's an insurmountable obstacle.

MR. GERSCH: I'll move to strike it as nonresponsive.

BY MR. GERSCH:

Q My question --

A It was responsive.

Q What do you mean by definitively?

MR. GARDNER: Objection. Asked and answered.

THE WITNESS: What I mean by definitive is they did not provide evidence that you could draw a straight line and say if you do this, this will happen. They speculated it, and they drew some conclusions based on other information, but logical people can look at that information and say, yes, but that's not a necessary conclusion that, in fact, as was pointed out, the same hard-to-count populations who were already not responding to the census were likely the very same

ones that might not answer the census.

And just to your point, just to illustrate this, we do know from the ACS that 70 percent of the people who are presented with the citizenship question answer it correctly, who are, in fact, noncitizens and 30 percent don't. So it doesn't necessarily mean that you add a citizenship question and people refuse to answer. We have a population that does answer.

I know that's not the answer you wanted.

BY MR. GERSCH:

Q Mr. Comstock, we're missing each other, so let me try it a little differently.

I'm not asking you whether you didn't think the Census Bureau's answer was definitive. I'm asking what is -- what would be -- let's try it this way, what would you consider to be definitive evidence?

A If they had evidence that showed that the addition of a citizenship question would cause a number of people that otherwise would have responded to the census to not respond.

Q And what would they need to show you that?

A They would problem have to put the question on the decennial census and compare it to prior decennial censuses and eliminate for the errors. And, unfortunately, they don't have that data from when they were asking that question, so they couldn't make the comparisons.

Q Well, they could have done it on a test basis for the 2020 census, right?

A They already asked the ACS to 43 million households. So we'd asked and answered that question already.

Q My question --

A It's been well tested.

Q My question is: They could do it on the 2020 census on a trial basis, right?

A And that's, basically, what the Secretary has determined to do.

Q No. The Secretary has not decided to do it on a trial basis. He wants everyone asked, right?

A Well, that would be a trial basis.

Q Let me do it differently. You could do it on the 2020 census as a test where it's being asked as a sample of the people, right?

A That would not give you -- actually, that would give you no more information than you get from the ACS, so we already have that information.

Q You think asking the question on the decennial census is the same thing as asking on the ACS?

A No, I don't.

Q Okay. How about a randomized control study of some kind, randomized controlled testing?

A We already have that.

Q You think you already have that?

A Sure, through the ACS.

Q Okay. Was a proposal to do a randomized controlled test in May of this year from the Census Bureau?

MR. GARDNER: Objection. Lacks foundation.

THE WITNESS: Not that I'm aware of.

BY MR. GERSCH:

Q You never heard that Victoria Velkoff proposed conducting a randomized controlled test in May of this year?

A No.

Q This is the first time you're hearing this?

A Yes.

MR. GERSCH: Okay. We can go off for a second.

VIDEOGRAPHER: We're going off the record. The time on the video is 4:02 p.m.

(Off the record.)

VIDEOGRAPHER: We're back on the record. The time on the video is 4:04 p.m.

MR. GERSCH: Mr. Comstock, thank you very much. Those are all the questions I have at this time.

Our view is there is certain information we haven't received from the government, and to that extent, we are keeping the deposition open, but this concludes my questions for today.

MR. GARDNER: And our position is the deposition is concluded after today.

THE WITNESS: Thank you for your questions.

EXAMINATION BY MR. ROSENBERG:

Q And good afternoon, Mr. Comstock. My name is Ezra Rosenberg. I think I introduced myself to you. Although I might have used your wrong name when I first introduced myself.

A That's okay.

Q I represent the City of San Jose and Black Alliance for Just Immigration in the case that's been venued in the North District of California.

A Okay.

MR. ROSENBERG: And can everyone hear me down -- can you hear me?

MS. BOUTIN: Little louder, please.

BY MR. ROSENBERG:

Q And I'll try to be short and sweet. Let me just back up a bit.

A Okay.

Q The initial impetus for putting the citizenship question on the 2020 census was not DOJ's idea; is that correct?

A That's correct.

Q It was Secretary Ross's idea, I think you've testified to that, correct?

A He was the one who asked me to investigate it, yes.

Q He told you sometime shortly after he was confirmed that he wanted the question on the 2020 census, correct?

A He asked me to explore putting it on, yes.

Q Well, he actually said he requests the question be put on the census, correct?

A That was the way he phrased it, yes.

Q You said you would make that happen, correct?

A I said I would do my best.

Q And you would get the citizenship question in place, I think was -- were your words?

A I said I would work to get that in place.

Q And he asked you several times during the year what progress you were making on this; is that correct?

A That's correct.

Q And you met with Mary Blanche Hankey at DOJ as a result of that, correct?

A Correct.

Q And you wouldn't have met with her if Secretary Ross hadn't ask you to do what you can to put this citizenship question on the census, correct?

A That's correct.

Q And the only subject that you talked to Ms. Hankey about at that meeting was the citizenship question, correct?

A No. I'm not sure that's the case.

Q What else did you talk to her about?

A I think we talked generally about what the Department of Commerce and Department of Justice overlap on, what we work on. So it was just broader conversation, but the primary focus was on the citizenship question.

Q And then you memorialized or at least you summarized your discussion with her in the memo that you sent to Secretary Ross on September 8th, correct?

A That's correct.

Q And take a look at what's been marked as C15, please. That's it. Yep.

The first paragraph you see that there's a sentence -- well, it reads, starting with the third sentence, "We" -- meaning you and Ms. Hankey --

A Uh-huh.

Q -- met in person to discuss the citizenship question."

A Right.

Q "She said she," and then it's blocked out, right?

A Yes.

Q Now, this is something that you wrote that's been blocked out, correct?

A Correct.

Q Do you know why it's been blocked out?

A You'd have to ask the Justice Department redactors.

Q Do you -- without saying what is said there, do you know what you wrote there that's been blocked out?

A I don't recall.

Q You did not ask her for legal advice, did you?

A No.

Q Do you have any reason to believe there is some privileged information in what's been blocked out?

MR. GARDNER: Objection. Calls for a legal conclusion.

MR. ROSENBERG: He's always the client, and the client holds the privilege.

THE WITNESS: I don't know what it says, so I trust the folks who redacted it believe there's a conclusion of some kind that is relevant to the investigation.

BY MR. ROSENBERG:

Q Anyone at Commerce who was more involved

in the citizenship question other than you during the period from the time you came to Commerce until the citizenship question issue was resolved?

A Probably not, no.

Q Let me -- take a look at C5 that's been marked, which is the supplemental memorandum.

A Uh-huh. I've got it somewhere. It's a supplemental memorandum.

Q It's dated June 21 --

MR. GARDNER: You want to look at my copy?

THE WITNESS: Okay. All right. Go ahead.

BY MR. ROSENBERG:

Q When did you first hear that this document was going to be created?

A Sometime shortly before June 21st.

Q Do you recall approximately how many days before June 21st?

A I don't.

Q But before you got a copy of the document; is that correct?

A No. I think, actually, the first time I knew about it was when I was handed a copy of the document.

Q So all of a sudden, it popped up on your desk one morning, our your computer?

A Right. Again, as I think I stated before, this was Office of General Counsel with Commerce was handling the litigation in conjunction with Department of Justice who represents us. So they were having conversations on this matter. I would have been called in simply to the point of saying, okay, this is being requested, do you have any thoughts or edits on it?

Q So just so it's clear, you did not know that it was being prepared until you saw the first draft?

A That's correct.

Q Were you surprised to see it?

A I didn't think it was necessary, but if that's the advice of counsel, we follow it.

Q You understood that this was a supplement

to the March 26th determination by Secretary Ross?

A I understand that it's a supplement to the administration record.

Q And you --

A I don't think it supplements the decision by Secretary Ross.

Q You understood it supplements the administrative record and you understood this was a pretty important document, did you not?

A Not being experienced in this litigation, I couldn't say exactly how important this was or not.

Q Do you have an understanding as to the reason that this document was created?

A My understanding was the reason this document was created was the Department of Justice felt it would be advisable in this litigation.

Q Was there anything in the supplemental memorandum that was not known at the time that the Secretary issued his March 26th determination?

MR. GARDNER: Objection. Form.

THE WITNESS: No. I don't think there's

anything in this memorandum that was not done at the time of the decision.

BY MR. GERSCH:

Q After you received the draft of the memorandum, did you discuss it with anyone within Commerce, other than attorneys?

A Just the attorneys.

Q You did not discuss, at all, with Secretary Ross?

A Other than advising him that we -- this has been recommended to sign and that we've reviewed it and made a few edits, no.

Q Did he ask you why it was being recommended?

A I'd already provided that explanation. DOJ was suggesting that we needed it for litigation. He's not a litigator, so he's not going to question that.

Q Was he surprised when he saw this? Did he express surprise to you?

A Not particularly. I mean, he just said, if that's what they recommend, fine.

Q Now, I think you testified that you were one of the two persons who were principally involved in the drafting of the March 26th determination; is that correct?

A I was one of the two principal staff. There were a number -- quite a number of other people who reviewed it.

Q Right. But you were one of the principal draft persons; is that correct?

A I was principal -- James Uthmeier, I think, did the bulk of the drafting, and I did a lot of the editing.

Q During the course of your preparation of the March 26th determination, did you consider including in the March 26th determination any of the information that's in the supplemental memorandum that's identified as C5?

MR. GARDNER: I'm going to object on the grounds that calls for disclosure of information subject to deliberative process by which I instruct the witness not to answer.

BY MR. ROSENBERG:

Q Are you going to follow counsel's advice?
A I'll follow my counsel's advice, yes.
Q By the way -- by the way, I think you testified that you made some edits to C5, the June 21st supplemental memorandum; is that correct?
A I think I may have suggested a wording change or two.
Q Do you know what wording change or two you made?
A I have no recollection of that.
Q Did you maintain the original draft of the June 21st memorandum?
A I imagine I made it -- my edits in electronic form, but that would be, probably, privileged, under the administrative record.
Q Let's turn to C30, which is the March 26th memo. Now, is it stated anywhere in this memorandum that the Secretary had begun, considering the question of adding the citizenship question to the census almost a year prior or more than a year prior to the March 26th memorandum?
A It wouldn't be relevant to the

memorandum.

Q So you don't think that's important information?

A The government has lots of processes where -- and I've been involved in lots of processes throughout the government where things have been under consideration for months, years, decades, even, prior to an administrative record, and that's not usually included in the decision.

The question is once you began the formal action of considering this decision and in which you're presented with a situation where you need to make a decision, you document at how you arrive at your conclusion.

Q It's your testimony that the formal action is when?

A When we received the letter from the Department of Justice. Because prior to that, this was all speculation.

Q Well, but prior to that, you had been directed by the Secretary of the Commerce to put the citizenship question on the census --

A I'd --

Q -- isn't that correct?

A I'd been directed to explore putting a citizenship question on the census.

Q He said he wanted it on the census, correct?

A That was certainly his expressed interest.

Q It was an expressed statement, was it not?

A That's the way he phrased it. But, again, he can't put something on the census without having the legal authority or process in place to do so.

Q You agree it would have been more accurate if the first sentence of C30 said, as you know, pursuant to my request on December 12, 2017, the Department of Justice requested that the Census Bureau reinstate a citizenship question; isn't that more accurate?

A I wouldn't agree that's more accurate.

Q Isn't that what happened?

A Again, the Department of Justice decision to ask -- send a letter requesting this is a decision they made independently. We cannot compel them to make that request.

Q By the way, what does Section 2 of the Voting Act provide?

A Well, my understanding of it -- and, again, it's been established that I'm not a Voting Rights Act expert -- is that there are cases in which you might have a population where as they set up a district, you have two minority populations. If one of those minority populations, for example, Hispanics population, has a large under of undocumented people, they might appear on paper to have a majority. When, in fact, they can never actually execute that majority because they don't have enough Citizen Voting Age Population people to carry that out.

Now, under the census, we already ask about age and we ask about race, so we can determine those two questions. What you can't determine is how many people of that population

are, in fact, eligible to vote.

Now, using the ACS data, the census provides estimates that the Justice Department uses for that very purpose. We know, in fact, as a result of this analysis, in the Census Bureau's efforts to promote Alternative C, they, in fact, did an analysis of that ACS data, and lo and behold, it came back that the data that we've been providing to the Justice Department is, in fact, at a fairly significant error. It's off by a factor of about a third. And so in light of that information, you'd absolutely want to go forward with this.

Q But the Census Bureau, nevertheless, recommended from a standpoint of accurate and completeness and quality of the census that there should not be a citizenship question added to the census, as opposed to continuing to rely on ACS data supplemented by the administrative records?

A No. In the process of this memorandum, back and forth, they could not articulate a rationale to support their belief that there would

be this decline in this response rate. Their entire analysis relied on the assumption that there would be this decline in response rate of a certain percentage and that that would, therefore, make the data less reliable.

What they couldn't refute was the fact that under their proposed approach, they would have had to impute -- again, based on statistical models -- the citizenship of 25 million voting age citizens. That was not a complete and accurate picture as far as the Secretary was concerned. So the Secretary said this is why we need to look at combining the two approaches, B and C, to come up with Alternative D. Because in the absence of that, we don't have good enough data on which to build the formula to impute those people that we would have to because we don't have answers on what their citizenship is. So that's the rationale that's laid out in this memo, and as far as I know, that's been the rationale that's been the Secretary's all along.

Q But not the rationale that was accepted

by the Census Bureau, which nevertheless, rejected as -- from a technical perspective, the Secretary's rationale; isn't that correct?

A I disagree that they rejected it from a technical perspective. They made some assumptions in making their recommendation -- and that's exactly what it is, it's a recommendation -- that this would be the case.

Q Let me turn your attention to C30, Page 001314, which is Page 2 of the March 26th memo. And turning your attention to the Option A, the third line in the sentence that says, "Additionally, the block group levels CVAP data currently obtained through the ACS has associated margins of error" --

A Correct.

Q -- "because the ACS is extrapolated based on the sample servers of the population."

A That's correct.

Q Do you know what the margins of errors are that are referred to in this sentence?

A I think you go on and see, you'll see it

described later in the same memo, which is that they have an error of approximately 30 percent, 28 to 34, I believe, is the range.

Yeah. If you look on Page 4, "Census Bureau analysis showed that between 28 and 34 percent of citizenship self-responses for persons with administrative records show are noncitizen were inaccurate. In other words, when noncitizens respond to long form or ACS questions on citizenship, they inaccurately mark citizen about 30 percent of the time. However, the Census Bureau is still evolving its use of administrative records. The Bureau does not have" --

(Thereupon, the court reporter clarified.)

THE WITNESS: This is in the -- under Option C of Page 4.

MR. GARDNER: You're going to have to slow down for the court reporter.

THE WITNESS: "So they inaccurately mark noncitizen about 30 percent of the time. However,

the Census Bureau is still evolving its use of administrative records, and the Bureau does not yet have a complete administrative record set for the entire population. Thus, using administrative records alone would provide DOJ data with CVAP data that was not a" -- "that would provide an incomplete picture."

BY MR. ROSENBERG:

Q And that's your understanding of what margins of error means as used on Page 01314?

A Well, yes. They're referring to that -- that margin of error they're referring to is the 28 to 34 percent they were off.

Q Do you know whether the data that would be provided to DOJ if a citizenship question were added to the 2020 census would also have margins of error associated with that data?

A It would almost certainly have some small margin of error, yes.

Q When you say a small margin of error, can you quantify that?

A Well, yeah. I think if you look at the

decision memo, it spells out that by providing the question on the census, you'll give 100 percent of the population to answer that question. For 90 percent of the people that are citizens, that is not a problem. For the remaining 10 percent, approximately, again, based on -- again, on the ACS error rate, you can expect that approximately 70 percent of those people will also answer that data correctly. So you're looking at, basically, what is the situation with the remaining 30 percent? And based of the data we get from the actual responses, comparing that with the administrative records, which we're also working to improve, so that that 88.6 from the 2010 census is expected to go up, should be closer to 90 to 95, we'll be able to narrow to down to about a 5 percent of the population that we'll have to impute. It's a much smaller number than the number that's being --

Q And that's your understanding of how the phrase margins of error is used in the Secretary's memo?

A Well, I'm not sure -- you're focused on the words margins of error.

Q Right. All of my questions had to do with the phrase margins of error.

A And you're saying --

Q I'm just trying to get your understanding of the phrase.

A No. I was focusing on the ACS. I mean, you're isolating the term margins of error.

Q Yes.

A When you do sampling or other things, there is a margin of error associated with that, and that margin of error can be larger or it can be smaller. And so they would provide, typically, a confidence interval connected with their data, and, again, depending on how the survey is conducted, it could be large or small.

Q Well, that sounds a little bit different than what you testified to earlier, when I asked you about the phrase margins of error as used in the sentence I read to you from C003134.

A You'll have to remind me what the

sentence is again --

Q Sure. "The Census was additionally" --

A -- because I focused on the ACS.

Q -- "block group level CVAP data currently obtained through the ACS has associated margins of error because the ACS is extrapolated, based on sample surveys of the population."

A And I believe that reference in the context of this memo may be scientifically incorrect, but it's referring to the fact that there's this error in the data of roughly 30 percent. So this was not drafted by, quote, scientists. So we may have inaccurately used the term margin of error. But what the Secretary was referring to was the fact that we had now learned that the ACS data was fairly significantly inaccurate.

Q Do you know whether the Census Bureau's use of margins of error, quote, end quote, is the same as you have just described?

A I have no idea. I mean, I would guess that in other context, that the Census Bureau uses

the term margin of error differently. I'm saying in the context of this memo, I think the reference of margin of error is referring to that margin of inaccurate information in the ACS. That is what the Secretary was focused on in making his decision.

Q I'd like to turn your attention to 001315, Page 3, the second full paragraph that begins "the Census Bureau."

A Uh-huh.

Q And the Census -- I'm sorry -- the sentence that reads, "However, neither the Census Bureau, nor the concerned stakeholders could document that the response rate would, in fact, decline materially."

Do you see that?

A I see that.

Q Can you tell me what you understand the word materially to mean?

A Yes. In that context, it's, basically, saying they could not, as I explained earlier, demonstrate that the decline because of the

addition of a citizenship question would be any greater than the decline that we already anticipated we would face because of the current political climate and people's concerns about government.

And, frankly, the folks bringing this lawsuit are contributing to that. We already anticipated this was going to be -- this census was going to be more difficult than other censuses, and that was a lot of the reasons behind some of the changes that were made in the lifecycle cost estimate. So we anticipated there were going to be hard-to-count populations, and many -- many of the same hard-to-count populations would have been disinclined to answer the census with or without a citizenship question.

Q When you say that the -- when you talk about the material decline, are you talking about the decline overall or are you talking about a differential decline depending on what demographic group is being discussed?

A If the data had shown conclusively that

the addition of a citizenship question would cause a material -- in other words, significant and major decline in any particular group, I'm sure the Secretary would have considered that quite carefully.

Q When the Secretary used the word material or phrase material decline, was he referring to any decline of any demographic group or was he referring to a decline across the board?

A Again, based on the subject of the discussion here, would there be a significant increase in the number of nonresponse follow-ups that we had to go do because people failed to respond? The data that was being presented did not isolate the citizenship question as being a material source of potential decline. There were a lot -- there was a lot of speculation that would, there was a lot of assertions it would. And upon review and analysis, it appears that many of the same populations that were already going to be difficult to count for lots of other reasons would be the same people who might be disinclined

because of citizenship. So you cannot say that adding citizen is going to materially increase the nonresponse follow-up rate.

Q Can you quantify what you mean by a material decline?

A Well, I mean, the Census Bureau, basically, under their best analysis, was saying that there might be a decline that would cause an increase of $27 and a half million. In a $15.6 billion budget, that is -- I mean, that's so far within the margin of error it's not even a fact.

Q Well --

A We could have a bad snow day that would cause bigger damage than that.

Q Was -- do you consider an undercount resulting from the addition of any question to the census of a quarter of a percentage point in a specific population to be material?

A I have no reason to believe the addition of a citizenship question would cause such a thing.

Q Whether it does or not, I'm trying to quantify what you mean by material decline. How --

A And, again, you're postulating a hypothetical. And my point is that in the absence of the context, would a quarter percent decline in response because we added a question that, for example, asked somebody their ethnicity, again, that's a weighing thing that the decision-maker has to make and say there may be a quarter percent decline, but it's important that we get ethnicity data.

Q But I'm --

A Same thing with gender, same thing with race, same. You know, lots of questions are added that may, in fact, result in a few people not answering the census.

Q Well, now you're using the word a few people not answering the census. I'm looking at your language of material decline.

A Uh-huh.

Q Is a quarter percent decline in a

response of a demographic group a material decline in your estimation?

A Again, without context, I can't give you an answer. If that demographic group is composed of 100 people, it may not be --

Q What if the demographic is Hispanics?

A I don't know that -- well, again, no. That's a weighing question that the decision-maker is free to make.

Q Again, you're going back to weighing. I'm talking about the phrase declining material -- materially. I'm not weighing it yet. You can weigh it later if you want. I'm just talking about one side of the balance that I think you're suggesting is being applied.

Is a quarter decline in response to the census among Hispanics a material decline in your estimation?

A The -- the -- I think the short answer is, the decline identified by -- the potential decline identified by the Census Bureau was not material enough to outweigh the benefits the

Secretary saw in adding the question.

Q It still doesn't answer my question.

A You're asking me to answer in a hypothetical, which I'm not going to do because I don't have the number of Hispanic voters. I don't know what 4 percent decline would represent. I -- it's impossible for me to evaluate. I've never looked at the population numbers of Hispanics versus any other.

Q Well, you know that the number of Hispanics in American is in the tens of millions; is that correct?

A I honestly haven't really given it much thought.

Q Do you know if it's more than a million?

A I think it safe to say it's more than a million.

Q More than five million?

A I think so.

Q More than ten million?

A Let's see. If the population of the United States is 360 million, and I believe

Hispanic are somewhere in the 10, 12, 15 percent range, they're, obviously, well above that. They're like -- I don't know, like -- 79 million.

Q Of how many did you say?

A 70 -- I can't do the math that quickly, so let's say, whatever, 70 million. I don't know.

Q Let's use 70 million. So if there were -- let's make it easier, for my head. Let's say there was a 1 percent decline in response rate among Hispanics due to the inclusion of a question on the census, would you consider that a material decline?

A I would consider that a factor that you need to take into account.

Q And if it were a 3 percent decline, would you consider that even more of a factor?

A Three percent is greater than 1 percent, so, presumably, it would be greater. But, again, it depends on, again, what I'm deciding against.

Q Would you consider that material?

A That depends on the context.

Q The context of adding a question to the

census resulting in a 3 percent decline in responsiveness among Hispanics?

A All of the factors outlined in this memo are material. It's a question for the decision-maker to decide which are -- which to give greater or lesser weight to.

Q But the phrase here was material decline --

A And, again --

Q -- correct?

A -- in the context of conducting a nationwide census, the half percent change in response rates for NRFU was not something we considered material because there were lots of other factors that would cause an even greater decline.

Q And if the response rate was shown to be greater than a half percent decline, if it was shown to be a 3 percent decline?

MR. GARDNER: Objection. Calls for hypothetical.

THE WITNESS: I understand you're trying

to get a certain answer, but I'm just telling you in the context of this, in the context of this memo, the half percent increase in NRFU response rate was not material.

BY MR. ROSENBERG:

Q By the way, earlier you said that 30 percent of noncitizen citizens answering the ACS citizenship question responded accurately. Do you recall that?

A That was data provided by the Census Bureau.

Q Okay. What, if any, evidence is there that noncitizens would respond to a citizenship question on the 2020 census questionnaire at a more accurate rate than they currently do on the ACS?

A That's -- I think we assumed in doing this that they would continue at that potential rate.

Q At a 30 percent inaccurate rate?

A Which is why you have to do both administrative records and put the question on.

You can't do just one or the other.

Q But the administrative records could be used with ACS; isn't that correct?

A No, they couldn't.

Q They could not be used --

A Because you can't extrapolate from the ACS to the whole population.

Q No. That wasn't my question.

The administrative records could be used in conjunction with the information from ACS?

A Again, you don't get an accurate sampling because you're extrapolating from the ACS to the larger population, so you can't apply your administrative records across in the same way. That's why the census was proposing to just use administrative records and they were prepared, apparently, to have to impute 25 million voting age citizen citizenship records. Now, on what basis, they would do that, we weren't sure.

Q But both Options C and D require some imputation; isn't that correct?

A Potentially, to get a complete and

accurate count, because we don't have 100 percent matching between the administrative records and the respondents. Yes. That's correct.

Q Let me draw your attention to the period around January 2018. Do you recall taking part in the signing of the list of 35 questions to the Census Bureau to answer?

A Yes. I helped prepare that list.

Q Do you -- who else helped prepare that list?

A The Secretary, Karen Dunn Kelley, James Uthmeier, myself. There may have been others.

Q Were you the prime drafter?

A Of that particular list, I may have been the prime assembler. I was not necessarily the prime drafter of all the questions.

Q And what was your purpose -- what was the purpose in proposing those questions?

A Basically, it has -- I think it was pointed out earlier we got an analysis from the Census Bureau that seemed to have a particular

viewpoint, and it wasn't well supported in some cases. So those are the questions that arose after reviewing their memo.

Q And when you -- after the questions were formulated, whom did you send them to?

A I believe they were sent to the Census Bureau.

Q And the idea was the Census Bureau would answer the questions; is that correct?

A They would provide that input, yes.

Q And you gave them a deadline, did you not?

A I imagine we did, yeah.

Q Four days; is that correct?

A I don't recall.

Q Was it your understanding that the answers were going to be provided solely by the Census Bureau to those questions?

A I believe all the questions were directed to the Census Bureau, but if they were directed to somebody else, then, obviously, they would provide them.

Q But it was your understanding that the Census Bureau would answer them; is that correct?

A Again, without going back and looking at the documents and the accompanying emails, I can't tell you exactly who it was. But my understanding was, yes, they were drafted for the Census Bureau.

Q Did there come a time when you reviewed the answers for the questions?

A I imagine there was.

Q Well, was there?

A Again, I know all of you are focused on this case and everything else. This was one small fraction of the work I was doing at that time. So I'm quite certain I reviewed the answers. Exactly when, I can't tell you. But, clearly, they went -- the responses to those questions were considered in the decision memo. So I, obviously, reviewed them at some point.

Q Do you recall whether you reviewed those responses all at once or some kind of rolling basis?

A If memory serves, I believe the Census

responded back to some, and then provided follow-up answers to others that took more time.

Q Do you recall whether in connection with any of the questions the Census Bureau was asked to change their answers to any questions?

A I believe -- well, I believe in one case, they provided a response that indicated that there was a very set format for putting questions on the census. And we went back to them and said, how can that be? You haven't -- there hasn't been a question added to the long form? They went back and reviewed and said, yes, that's correct. This was the process we used for the ACS.

Q Let me -- let's have this marked as 31.

(Plaintiffs' Exhibit 31, Questions on draft Census memo, was marked.)

BY MR. ROSENBERG:

Q Showing you what's been marked as --

MR. GARDNER: Ezra, we need a --

MR. ROSENBERG: Can you give me one more copy?

I just need one. Thank you.

BY MR. ROSENBERG:

Q Showing you what's been marked as Exhibit 31, have you ever seen this document before?

A Again, I'd have to go back and check emails. It appears to be an incomplete response to the 35 questions.

Q And when you say it's an incomplete response to the 35 questions, why do you say that?

A Well, Question 4 is not answered. Question 9 is not answered. Question 11 is not answered. Question 15 is not answered. Question 20 is not answered. Question 27 is not answered. It appears to be -- I'm not sure that's the entire list, but some of that -- some of these -- obviously, it's not a final, because at least five questions are unanswered, so --

Q Let's have this marked as -- one question on that. Turning our attention to Question 31 --

A Okay.

Q -- is that the question you were referring to before as a question whose answer was

changed at some point?

A Yeah. Because this was -- as I said, when we explored the question further, it became evident that this was not, in fact, an accurate representation for the process for the decennial.

Q Do you know when that answer was changed?

A I don't.

Is there a date on this?

Q We just give you them as we got them.

A No. Well, no, unfortunately nobody dated this. So I don't know -- is there a -- do you have a final --

Q Well --

A -- with all the questions answered?

Q You're going to have to tell me.

A I believe there was one where they managed to answer all the questions.

Q Okay. Let's have this marked as the next exhibit.

(Plaintiffs' Exhibit 32, Memo, was marked.)

BY MR. ROSENBERG:

Q Can you identify -- first of all, have you ever seen what's been marked as Exhibit 32?

A I'm flipping through it here. I believe I've seen -- I can't recall for certain whether this was the document, but I've seen, certainly, something similar to the document, yes.

Q And the last part of this document, I know it's a multi-document document --

A Right.

Q -- does have the 35 questions, all of which are answered; is that correct?

A On a quick review, it looks like you're correct, that they're all answered.

Q And the answer to Question 31 is the same answer as was in Comstock Exhibit 31; is that correct?

A Correct. But I note this is also marked draft and predecision, so --

Q So -- well, let's deal with that, also. We can represent to you that this is the only version of the March -- of a document dated March 1, 2018 that is -- and it's -- and they're

all marked draft for decisional -- I can't read the whole watermark.

A Right.

Q Are you aware whether there was a document that does not contain that stamp or watermark?

A I don't recall.

Q And that is dated March 1, 2018; is that correct?

A Correct.

Q Now, let me show you -- let me get this marked as Exhibit 33.

(Plaintiffs' Exhibit 33, Questions on draft Census memo, was marked.)

BY MR. ROSENBERG:

Q Have you seen that document before?

A Again, possible. I can't tell from the -- without the accompanying emails to show the traffic back and forth. I honestly can't tell you when I would have seen which of these documents.

Q Now, do you know whether what's been marked as Document 33 is the final iteration of

the answers to the questions?

A I don't honestly know that.

Q Now, turning your attention to the answer to 31 --

A Uh-huh.

Q -- does that answer reflect a change in the answer from the previous documents I've shown you?

A Yes. It reflects a more accurate statement of the response to the question.

Q Who drafted that answer?

A I don't know.

Q Do you know if the Census Bureau drafted that answer?

A It would appear to be since it's a Census document.

Q Who is Christa Jones?

A She's is the chief of staff for the Census Bureau.

Q Who is Sahra Park-Su?

A Sahra Park-Su works in the Office of Policy and Strategic Planning -- or actually did.

She is now at Bureau of Industry and Security.

Q Did she work for you, report to you, I should say?

A Yes.

Q What was her title?

A She doesn't really have a title. She's one of the staff that covers an area in the Office of Policy Planning.

Q Was she involved in review of the answers to 35 -- to the 35 questions?

A I don't know.

Q Did you task her with that?

A I did not, no.

Q Do you know if anyone did task her with that?

A I don't know.

Q Let's have this exhibit marked as 34.

(Plaintiffs' Exhibit 34, Email, was marked.)

BY MR. ROSENBERG:

Q Looking at what's been marked as Exhibit 34, have you ever seen this document

before?

A No. I haven't.

Q And does it appear to be an email from Sahra that contains the Question 31, "What was the process that was used in the past to get questions added to the decennial census or do we have something similar where precedent was established"?

Do you see that?

A That appears to be Question 31.

She pronounces her name Sahra, by the way.

Q I'm sorry?

A She pronounces her name Sahra.

Q Sahra?

A Yes.

Q Okay. Do you see what has been blocked out below that question?

A I see that there is a block of black below the question, yes.

Q And do you see that that block, if you compare it to the Exhibit C33, the answer, that

that block seems to be about the same size as the amended answer in C -- in C34?

A You're comparing -- I don't know. It depends on the font size being used.

Q Do you doubt that Sahra Park-Su may have been the one who wrote the answer to Question 31?

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

THE WITNESS: I was -- as you'll note, I'm not on this email chain, so I don't know who was involved in the drafting change.

BY MR. ROSENBERG:

Q Can you deny the possibility that she wrote the answer to 31?

A I -- that's certainly possible.

MR. ROSENBERG: We'll go off the record.

VIDEOGRAPHER: This concludes Media Unit Number 6. The time on the video is 4:48 p.m. We are off the record.

(Off the record.)

VIDEOGRAPHER: This begins Media Unit Number 7. The time on the video is 5:05 p.m. We

are on the record.

EXAMINATION BY MS. SENTENO:

Q Good afternoon, Mr. Comstock. My name is Andrea Senteno and I'm counsel for the plaintiffs in the LUPE v. Ross. That's in the Federal District court in Maryland 8:18-CV-01570. And LUPE stands for La Unión Del Pueblo Entero.

So I know we've talked a bit today about your interactions with Mary Blanche Hankey and with James McHenry, so I just have a couple questions on that.

Do you understand correctly that it was based on your description of -- of the Department of Commerce's request to add the citizenship question that Ms. Hankey told you that it would be best appropriate to speak to Mr. McHenry?

MR. GARDNER: Objection. Form.

THE WITNESS: Yes. I don't know that I went into great detail with her as to the nature of the citizenship question, but as to who in the department would handle Voting Rights Act and

citizenship questions.

BY MS. SENTENO:

Q So you did specifically ask who would best be the appropriate -- who would be the most appropriate person if you wanted to talk about the Voting Rights Act and citizenship data?

A The use of the citizenship data by the Justice Department, yes.

Q And based on that interaction, she referred you to Mr. McHenry?

A Correct.

Q Okay. And do you understand correctly that it was based upon that conversation or that explanation with respect to the Department of Commerce's request with Mr. McHenry that he then referred you to the Department of Homeland Security?

A I don't know why he referred me to the Department of Homeland Security. He simply -- I think, as I indicated before, indicated that the Justice Department was a little busy on other issues right now, and so this was not something

that high on their priority list.

Q And I know we've talked about this before, but when you spoke with Mr. McHenry, did you relay the same information that you'd relayed to Ms. Hankey about wanting to talk about the voting rights after voting rights enforcement and citizenship -- and the use of citizenship data?

A In both cases, I spoke to them about adding a citizenship question to the decennial census. I don't recall whether we went into any great detail about the rationale.

Q Did you ever have a conversation with Donald Trump regarding the addition of the citizenship question to the decennial census form?

A No.

Q And that includes during any transition period?

A Correct.

Q I want to introduce Exhibit -- I believe we said 35, Plaintiff's Exhibit 35 for the record.

(Plaintiffs' Exhibit 35, Trump campaign email, was marked.)

BY MS. SENTENO:

Q This is Bates number 2643. And this is an email that contains a Trump campaign email from March 2008.

Have you been shown this email prior to today?

A No. I'm not on this email.

Q Okay. Can I refer you to Page 2644? It's the second page of this document.

A Okay.

Q Okay. And do you see what it has included in the original email chain. This is an image of a campaign email from the Trump campaign, correct?

MR. GARDNER: Objection. Lack of foundation.

THE WITNESS: It's rather small print, but it appears to be something from the campaign, yes.

BY MS. SENTENO:

Q Okay. And I'm going to recognize it's small print, but I'm going to draw your attention

to the first sentence here of the campaign email, quote, the President wants the 2020 United States census to ask people whether or not they are citizens.

In continues, in another era this would be common sense. And common sense is in all capital letters.

Do you see that?

A I do see that.

Q And you said you were never made aware of this campaign email; is that correct?

A No. I said I had not seen this email.

Q You had not seen this particular chain?

A I had not seen this chain or the substance of this -- whatever it is.

Q Prior to today?

Okay. So no one -- so this was looking at 2643 --

A Okay.

Q -- this image, this stamp of the campaign email was sent to Kevin Manning. Who is Kevin Manning?

A Kevin Manning works in our office of -- Office of Public Affairs.

Q Okay. And Kevin Manning has forwarded this email to James Rockas; is that correct?

A Correct. Well, yes. Based on the email chain, correct.

Q And I believe we've already established who James Rockas is, but perhaps, again, just remind us.

A Well, as his title at the bottom says, press secretary, deputy director public affairs.

Q Okay. So were you ever made aware of this email by either Mr. Manning or Mr. Rockas?

A Mr. Rockas mentioned to me there had been a campaign email, yes.

Q Okay. And did you ever -- did anyone else make you aware of this email?

A I think James Uthmeier or Peter Davidson may have mentioned it. We were all surprised to see this email.

Q Okay. When were you made aware of the email?

A Shortly after Mr. Rockas received a copy.

Q Okay. And why were you made aware of this particular email?

A Well, as you notice, the email is from somebody at Federal Computer Week who apparently got a copy of this and sent it to us to ask for comment, does Commerce have any response to this, and this was, to my knowledge, the first we'd ever seen it.

Q You said you were surprised or everyone was surprised to have seen or made aware of this campaign email. Can you describe for me why you were surprised?

A Because we've never spoken to the campaign about the Secretary's thinking or decision, so -- I'm not sure what the date of this is, but, 3/19.

Q After you all were made aware of this email, did you discuss the campaign email with anyone else inside the Department of Commerce?

A No.

Q Did you discuss this email with anyone at

the White House?

A No.

Q Did you discuss this email with anyone at Trump campaign?

A No.

Q Did you discuss this email with anyone at the Department of Justice?

A No.

Q Did you discuss this email with anyone at the Census Bureau?

A No.

Q The flyer also refers to -- and this is on 2644 -- "19 attorney generals who said they will fight Trump if the President dares to ask people if they are citizens."

Do you know who those 19 attorney generals are?

A I have no idea.

Q And do you know what, quote, unquote, era this campaign email is referring to when he says in another era?

A I have no knowledge, other than reading

this email now what the campaign was thinking about.

Q Okay. Do you agree with the sentiments in this campaign email?

A Do I agree that asking citizenship -- a citizenship question makes sense? Is that your question?

Q If that's what you understand the sentiment of this email to be? What do you understand the sentiment of this email to be?

A I said I worked on the Secretary's decision to do this, and I am comfortable with the Secretary's decision.

Q So this was a request for media comment, and you stated earlier that after you all were made aware of this email and you all expressed your surprise that the email existed, you didn't discuss it any further?

A I mean, I'm not sure what our final response to press was, but I think we had no comment.

Q Who would know what the final response to

the press was?

MR. GARDNER: Objection. Lack of foundation.

THE WITNESS: Well, I'd say if it's not on -- if it's not published on our website and it's not quoted in media paper anywhere, then it appears we did not respond.

BY MS. SENTENO:

Q Would this be something that would be raised to Secretary Ross directly?

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

THE WITNESS: Certainly the answer would be that the Secretary would probably be made aware that the press were inquiring on this, yes.

BY MS. SENTENO:

Q Would he be made aware of the fact that this email existed?

A Sure. I mean, he would be made aware of the fact we had received an inquiry from the press with the following email on it.

Q Do you know if Secretary Ross saw this

campaign email?

A I can't say for certain.

Q Do you know of anyone else at Department of Commerce or the Census Bureau that discussed this campaign email?

A Well, James Rockas, I image, would have presented to it the Secretary and asked him if he had a response or further we'd make no response.

Q So would the best person to ask about the Secretary's knowledge about this particular email be the Secretary?

A That would be the person that could probably best answer your question, yes.

Q Do you know if anyone in Department of Commerce or the Census Bureau discussed this email with the White House?

A Again, I don't know. You'd have to ask James Rockas. But absent something else in the administrative record that shows that there was correspondence with the White House, I think we'd probably just ignored this.

Q And so do you know of anyone at the

Department of Commerce or the Census Bureau who discussed this with the Trump campaign?

A I don't, no.

Q And what was your understanding when you were made aware of this email of the President's rationale for needing a citizenship question on the decennial census?

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

THE WITNESS: I have no knowledge of the President's interest or rationale on this question.

BY MS. SENTENO:

Q What was your understanding of President Trump's directive to the Department of Commerce based on this email?

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

THE WITNESS: And to my knowledge, President Trump never gave any directive to the Department of Commerce.

BY MS. SENTENO:

Q And what was your understanding, sorry, of the President's role in the determination of whether or not to add a citizenship question to the decennial census form?

A My understanding was the President had no role.

Q Did you ever discuss -- did you ever discuss with anyone in the White House other topics outside of the census, such as immigration enforcement?

A I did not, no.

Q Have you ever discussed immigration enforcement with President Trump, the issue of voter fraud?

A No.

Q Have you ever discussed with him the issue of an undercount as a result of the citizenship question?

A No.

Q How about Congress apportionment?

A No.

Q How about redistricting?

A No.
Q Section 2 of the VRA?
A No.
Q Okay. Did you ever have a conversation with Reince Priebus?
A No.
Q Are you aware of anyone in the Department of Commerce or the Census Bureau that had a conversation with Mr. Priebus?
A Regarding?
Q Regarding the census.
A I'm not aware of any specific conversation regarding the census, no.
Q Are you aware of anyone at the Department of Commerce or the Census Bureau that had a conversation with Mr. Priebus about immigration enforcement?
A Not that I'm aware of.
Q About voter fraud?
A Not that I'm aware of.
Q About an undercount as a result of a citizenship question?

A Not that I'm aware of.
Q About Congress apportionment?
A Not that I'm aware of.
Q About redistricting?
A Not that I'm aware of.
Q About Section 2 of the VRA?
A Not that I'm aware of.
Q Did you ever have a conversation with White House Chief of Staff John Kelly about the census?
A No.
Q Are you aware of anyone else at the Department of Commerce or the Census Bureau that had a conversation with Chief of Staff John Kelly about the census?
A No.
Q About immigration enforcement?
A No.
Q About voter fraud?
A No.
Q About an undercount as a result of a potential citizenship question?

A No.
Q About Congressional apportionment?
A No.
Q Redistricting?
A No.
Q Or about Section 2 of the VRA?
A No.
Q Did you ever have a conversation with Arthur Gary regarding the addition of the citizenship question to the decennial census form?
A No.
Q Are you aware of anyone else at the Department of Commerce or the Census Bureau that had conversations with Mr. Gary?
A I believe Peter Davidson may have.
Q And are you familiar with who Mr. Gary is?
A I believe he's the person that wrote the letter.
Q When did you learn about your -- about the conversations between Mr. Davidson and Mr. Gary?

A I believe I would have heard -- to the extent they occurred, I likely would have heard about it when he was telling -- informing the Secretary he spoke with Mr. Gary.

Q A general time frame?

A I couldn't tell you.

Q Would it have been before the December 2017 letter?

A I don't -- I don't recall.

Q Would it have been after the December 2017 letter?

A Possibly. Because I know there were discussions about trying to get a meeting between the Census Bureau and the DOJ, and DOJ was not interested in that letter.

Q So you're not aware of anyone other than, potentially, Mr. Davidson that had a conversation with Mr. Gary prior to his letter to the Census Bureau?

A No.

Q Do you know if the conversations between Mr. Davidson and Mr. Gary took place in person or

by phone?

A Again, I -- there may have been conversations between Mr. Davidson and Mr. Gary. I'm not certain that there were.

Q Who would know that there were?

A Mr. Gary.

Q And what was your understanding of what the conversations between Mr. Davidson and Mr. Gary were about?

A Again, I'm not certain that conversations occurred. If they occurred, as I said, my recollection would be it came up in the context of trying to get the meeting that Census Bureau was asking.

Q And did those meetings ever occur?

A Not to my knowledge.

Q Do you know why?

A I don't know why. The Justice Department did not want to do the meetings.

Q When you say the department -- I'm sorry could you repeat?

A I said I do not know why the

Justice Department was unavailable for those meetings.

Q Was there ever any follow-up to inquire why Department of Justice was not available for meetings with the Census Bureau?

A As I said, that's why I believe Peter Davidson may have spoken with Mr. Gary.

Q Have ever you discussed with Mr. Gary the issue of immigration enforcement?

A No.

Q Have you ever -- has -- have you or anyone else in the Department of Commerce discussed with Mr. Gary the issue of voter fraud?

A No.

Q The issue of an undercount as a result of the citizenship question?

A Again, not to my knowledge.

Q The issue of Congressional apportionment?

A Again, not to my knowledge.

Q Issue of redistricting?

A Not to my knowledge.

Q Section 2 of the VAR?

A Again, that's the section that they would need the information for, so I think any conversation with the Justice Department -- to the extent it reached the Voting Rights Act, would have been referring to Section 2.

Q Forgive me if you answered this question earlier, but did you -- did you yourself ever have a conversation with the Attorney General -- with Attorney General Jeff Sessions -- sorry -- regarding the addition of a citizenship question to the decennial census?

A I personally did not speak to him directly about that matter.

Q Did you speak to him through other individuals?

A No.

Q Have you -- did you say that you -- is it my understanding from your testimony that you didn't speak directly to the Attorney General about the citizenship question?

A I've never spoken directly to the Attorney General about the citizenship question.

Q Okay. Have you ever spoken with the Attorney General about immigration enforcement?

A No.

Q About voter fraud?

A No.

Q About an undercount as a result of the citizenship question?

A No.

Q About Congressional apportionment?

A No.

Q About redistricting?

A No.

Q About Section 2 of the VRA?

A No.

Q Okay. Are you aware of anyone in the Department of Commerce who has had direct conversation with the Attorney General, notwithstanding Secretary Ross?

A Other than Secretary Ross, I'm not sure that anybody has spoken directly with the Attorney General.

Q Okay. Are you aware of the

Attorney General's views on asking a citizenship question on the decennial census?

A I'm not aware of the Attorney General's view -- Attorney General's views.

Q On?

A On a citizenship question on the census.

Q Are you aware of his views on immigration enforcement?

A Other than what you read in the press, no.

Q Are you aware of his views on the program called Deferred Action For Childhood Arrivals?

A Again, other than what's in the press, I don't know anything about what his views are.

Q So the views that you do know of the Attorney General, you learned through the media?

A Media reports, yes.

Q And approximately when are you learning those? When did you begin reading media reports about the Attorney General's specific viewpoints?

A I stay abreast in most papers, so the Washington Post, the Wall Street Journal. I have

a general knowledge of the issue, but no specific interests. The Department of Commerce doesn't do immigration enforcement, so --

Q Did you believe at the time of the DOJ letter to the Census Bureau that the Attorney General was committed to the enforcement of the Voting Rights Act but that his hindrance or the hindrance of the DOJ was the availability of data?

MR. GARDNER: I'm sorry. Can you repeat that question?

MS. SENTENO: Yeah.

BY MS. SENTENO:

Q Did you believe at the time of the DOJ letter, that the Attorney General was committed to the enforcement of the Voting Rights Act but that what was holding them up was -- were data issues?

A Their letter communicated that they could use census block-level data, which they currently don't get for that, and if, therefore, we would add a question to the decennial census that would provide that data.

Q Have you ever had a conversation with Stephen Miller regarding the addition of the citizenship question to decennial census?

A No.

Q Do you know who Stephen Miller is?

A I do know who Stephen Miller is.

Q Could you tell us who that is?

A He's a policy advisor to the President.

Q And have you ever asked -- have you ever had a discussion with Mr. Miller about immigration enforcement, voter fraud, and undercount as a result of the citizenship question, Congressional apportionment, redistricting or Section 2 of the VRA?

MR. GARDNER: Objection. Form.

THE WITNESS: No. I have not.

BY MS. SENTENO:

Q Are you aware of anyone at the Department of Commerce who has had conversations with Mr. Miller about those topics?

A No.

Q Are you aware of Mr. Miller's views on

immigration?

A Not specifically, no.

Q The census?

A Not specifically, no.

Q On apportionment?

A Not specifically, no.

Q On Deferred Action for Childhood Arrivals?

A Not specifically, no.

Q Have you ever had a conversation with Alabama Attorney General Steve Marshall regarding the addition of a citizenship question to the decennial census form or about the census generally?

A No.

Q Do you know of anyone at the Department of Commerce or the Census Bureau who has had a conversation with Attorney General Steve Marshall?

A Are they --

Q Alabama. Sorry.

A Are they the ones bringing the lawsuit

against us?

Q Yes.

A No. I don't think so.

Q And you've never -- have you ever had a conversation with Mr. Marshal about voter fraud, undercount as a result of the citizenship question, Congressional apportionment, redistricting or Section 2 of the VRA?

A I've never spoken to Mr. Marshall.

Q Are you aware of anyone at the Department of Commerce who has?

A Not that I know of.

Q Have you ever had a conversation with Alabama Congress member Mo Brooks?

A No.

Well, I take that back. Unless he's been on some panel that's -- that I testified in front of. It's entirely possible, in that case, I would have had a conversation with him.

Q Okay. So you've never had a conversation with him outside of a potential panel about anything generally or just about the census or the

citizenship question?

A I feel fairly confident I have not spoken with Mr. Brooks about any subject matter.

Q Are you aware of anyone at the Department of Commerce or Census Bureau who has --

A Again, no.

Q -- had a conversation?

A No.

Q Okay. Outside of the Department of Commerce and the Census Bureau and individuals that I just ran through, have you or anyone else at the Department of Commerce spoken to anyone outside of your agency prior to the DOJ letter about the citizenship question?

MR. GARDNER: Objection. Lack of foundation.

THE WITNESS: Again, I can only answer for myself. So I wouldn't know what other people might or might not have spoken to people outside the department on.

BY MS. SENTENO:

Q Did you ever speak to anyone from the

Heritage Foundation?

A No.

Q You never spoke to anyone at the Heritage Foundation about the census?

A Not that I recall.

Q And you never spoke to anyone at the Heritage Foundation about the potential -- about apportionment?

A Not that I recall, no.

Q How about voter fraud?

A No.

Q Congressional apportionment -- sorry. I just said that.

Section 2 of the VRA?

A No.

Q Okay. Are you aware of anyone else at the Department of Commerce or the Census Bureau that at any point, either before or after the DOJ letter -- the DOJ letter, who had a conversation with someone we had not already discussed about the purpose of adding a citizenship question for immigration enforcement?

MR. GARDNER: Objection. Form.

THE WITNESS: I'm not aware of any conversations regarding adding a citizenship question for immigration enforcement.

BY MS. SENTENO:

Q How about voter fraud?

A No.

Q Congressional apportionment?

A No.

Q Redistricting?

A No.

I mean, I will note there was an earlier conversation about that Wall Street Journal article that mentioned -- that referenced apportionment. So outside of that response with the Secretary, there's never been a discussion of it.

Q Have you spoken to anyone at Department of Justice's voting rights section?

A Not to my knowledge.

Q So you were never referred to anyone or you never inquired from anyone, a contact within

the voting rights section, to discuss this request --

MR. GARDNER: Objection. Form.

BY MS. SENTENO:

Q -- for a citizenship question?

MR. GARDNER: Sorry. Objection to form.

THE WITNESS: No. Again, as I think we established in the earlier testimony, I was referred to Mary Blanche Hankey by someone in the Department of Commerce, by Eric Branstad, who I think got her name from a contract of his at the White House. She referred me to -- I'm already blanking on his name -- John McHenry. I did not investigate John McHenry's position in the department. I just took it on face value he would be the right person to talk to and those are the two people I spoke to at Department of Justice, so -- outside of litigation counsel, obviously.

BY MS. SENTENO:

Q You testified earlier in the memo that you drafted for the Secretary that stated that once you had been told by DHS that your request

would be more appropriately handled by the Department of Justice, you said that the interaction ceased; is that correct?

A Well --

Q From you?

A My efforts at that point to track down somebody ceased because they had run into a dead end. I mean, our initial conclusion was that Department of Justice was the right place to go. They seemed occupied on other matters, so they referred us to DHS. DHS referred us back, so now I'm back to where I started.

Q So once you were referred back to DOJ, you didn't ask another follow-up as to who in the voting section would be more appropriate to talk about this particular issue?

A Again, I was working on literally dozens of issues that consumed a lot of time. And so I had put the time into it that I could afford to put into it and had come up empty. So I reported that to my boss, and basically, said if absent some instruction from higher up, it appears that

the DOJ staff is not particularly interested in expending resources on this right now.

Q Did you or Secretary Ross consider having anyone else, any other governmental department or any other jurisdiction make a request to the Census Bureau to add a citizenship question --

MR. GARDNER: Objection.

BY MS. SENTENO:

Q -- other than the DOJ and DHS?

MR. GARDNER: Objection. Form. And objection. Foundation.

THE WITNESS: Again, nobody would make a request to the Census Bureau to add it because the statute commits that discretion to the Secretary, not the Census Bureau. So it's not their decision to make. It's the Secretary's decision to make. So we would not seek someone else to contact the Census Bureau about the question, no.

BY MS. SENTENO:

Q But the DOJ letter was directed to the Census Bureau requesting an addition of the question?

A I did not draft that letter, so I -- but their choice of who to send the request to was dictated by the Department of Justice, not by us.

Q Did you or Secretary Ross consider having anyone else make -- anyone else, other than the DOJ to DHS, to make that request to Commerce?

MR. GARDNER: Objection. Lack of foundation.

THE WITNESS: No. I think upon further analysis, we determined that the Secretary probably could determine that Commerce had a need for it, but that was not before us at the time, so --

BY MS. SENTENO:

Q Can you explain your subsequent research?

A Well, as I mentioned, the United Nations recommends that all countries ask, frankly, rather detailed questions about citizenship, naturalization, et cetera. So it's considered good practice, good demographic information to have. It was asked for 150-plus years without any problem. So -- and every other major democracy

inquires of all their citizens on a regular basis of it. So it's -- I think there's a perception out there -- where it came from, I don't know -- that somehow asking a citizenship question is a problem.

And I would, again, refer you back to the fact that 70 percent of the noncitizens in the ACS actually answer the question correctly. So, apparently, those people don't consider it a problem. So it appears to be a rather small demographic that is concerned about this. And again, I would point out that when you understand that the data that is being protected by law, cannot be used for any enforcement purpose, cannot be used to identify an individual, there's absolutely no reason I can think of why someone would not answer the census honestly on that, citizen or noncitizen. It's demographic information.

Q So based on that, was it your understanding that if the DOJ did not make this request to the Department of Commerce or the

Census Bureau, whoever was the most appropriate point of contact for that request, was it your understanding that the Department of Commerce might move forward with a plan to add the citizenship question based on --

MR. GARDNER: Objection.

BY MS. SENTENO:

Q -- that rationale?

MR. GARDNER: Sorry. Objection. Hypothetical.

THE WITNESS: Right. It's a hypothetical question that was not before us.

BY MS. SENTENO:

Q Okay. Did Secretary Ross tell you or anyone else whether he would have pursued other justifications for adding the citizenship question?

MR. GARDNER: Objection.

THE WITNESS: We had a request --

MR. GARDNER: Lack of foundation.

THE WITNESS: -- from the Justice Department, so there was no need to

speculate on that.
BY MS. SENTENO:
Q Okay. Are you aware of any VRA cases that the Department of Justice declined to bring, only because they needed block-level citizenship data?
A I'm not aware of that, but I didn't research that either.
Q So no -- neither yourself or anyone else at the Department of Commerce asked DOJ for this information?
A I did not. I can't say whether anybody else did.
Q So -- just a couple more questions.
The ACS is not a head count, correct?
A That's right. It's a sample.
Q But the decennial census is a head count, correct?
A That's correct. Counts all persons.
Q And a decrease in the response rate in the citizen question on the 2016 ACS caused an underestimate of the percent of noncitizens; is

that correct?

A No. That's not correct.

Q Can you explain?

A Well, you're asserting that it's because of the citizenship question, and I'm not sure that the data supports that statement.

Q What are you -- what do you believe the data supports?

A Again, without the data sitting in front of me, it would be hard to make an analysis. But basically, the Census Bureau has reported that certain number of people may drop off at certain questions. It's not dissimilar for citizenship versus other questions. There was not a major statistical variation. So, yes, a certain percent of people do not complete the 45, 48 or 70 questions that are on the ACS or the long form, and they have various break-off rates under the Internet thing to tell where they stopped.

But, again, whether citizenship was a determinative factor in any of those cases, it's hard to determine.

Q But the data suggests -- the data that the Census Bureau provided suggests that the break-off rate for noncitizens was higher with respect to a citizen question; is that correct?

A Higher than noncitizen?

Q Yes.

A Yes. That's true.

Q Okay. So if the same people who did not respond to the citizen question on the ACS also didn't respond to the short form of the decennial census, that would cause a drop in the total head count, correct?

A No. It would not.

Q Could you explain?

A Secretary Ross placed the question at the end of the census so they would be able to not answer that and still complete the census. We also have administrative records and Secretary Ross directed we use administrative records, which we're actively doing for a variety of reasons, not just citizenship.

So we have every confidence between the

increased outreach that's planned, the additional money and resources that are to be put into the advertising and other things, that we will more than compensate -- in fact, our objection is to have a complete and accurate count above and beyond the count that was done in 2010.

Q But every individual is required to answer the census fully and completely, including all questions; is that not right?

A That's correct. Yes.

Though I would note, we've never prosecuted anybody for failure to do so.

MS. SENTENO: Okay. Go off the record.

VIDEOGRAPHER: We're going off the record. The time on the record is 5:46 p.m.

(Off the record.)

VIDEOGRAPHER: We're back on the record. The time on the video is 5:43 p.m.

EXAMINATION BY MS. BOUTIN:

Q Sir, I'd like to talk about the time period between the December 12th DOJ letter requesting the citizenship question and before

Secretary Ross issued the March 26 memo -- decision memo.

A I'm sorry. Could you tell me who you're with?

Q Sure. My name is Gabrielle Boutin. I'm with the Attorney General's of the State of California, and I represent plaintiffs, the State of California -- excuse me -- State of California v. Ross in the Northern District of California.

A Okay. Thank you.

Q So during the time period between the December 12th DOJ letter and the issuance of Secretary Ross's March 26th memorandum, that's what we're talking about.

A I understand.

Q Do you understand?

A So far so good.

Q Good.

During that time period, did the Department of Commerce ever inform the Department of Justice that the Census Bureau

recommended using administrative records alone to meet Justice's December 12th request rather than adding the citizenship question to the census?

A I believe that was part of the purposes of the meeting they were seeking with the -- the Census Bureau was seeking with the Justice Department.

Q Okay. My question is: Did the Commerce Department ever inform DOJ that the Census Bureau recommended using administrative records alone to meet their requests, rather than adding a citizenship question to the census?

A Again, I'm not privy to all the conversations with the Justice Department, so --

Q Do you --

A -- I was not --

Q -- know --

A I was not involved in such a discussion, no.

Q Okay. But you were one of the primary people working on this at Commerce; isn't that right?

A Yes.

Q Do you think you would have known if someone from Commerce conveyed that information to the Department of Justice?

MR. GARDNER: Objection. Calls for speculation.

BY MS. BOUTIN:

Q Do you think it's likely you would have known?

A It's possible, yes.

Q Did the Department of Commerce ever transmit to the Department of Justice any of the Census Bureau memos analyzing options for providing block-level -- excuse me -- block-level citizenship data to the Department of Justice?

MR. GARDNER: Objection. Lack of foundation.

BY MS. BOUTIN:

Q That was repetitive. Let me rephrase.

A All right.

Q Did Commerce ever transmit to Department of Justice any of the Census Bureau's

memos that analyzed the options for providing to DOJ block-level citizenship data?

MR. GARDNER: Objection. Lack of foundation.

THE WITNESS: I would just note it's the Secretary of Commerce's decision as to whether this goes forward. His focus is on a complete and accurate count.

And as explained earlier, the Option C alternative, which was to use the administrative records only, would have inquired us to impute -- so, in other words, fill in the blanks -- for 25 million voting age citizens. That was not something Secretary Ross was prepared to have the department do.

BY MS. BOUTIN:

Q Mr. Comstock, I understand that. Your counsel is -- wants us to limit the amount or time that we're here today, and the best way to do that is if you would answer my questions directly. So I'll ask you again.

Did the Department of Justice ever --

A Not to my knowledge.

Q Okay. Thank you.

And again, we're talking about between December 12th and the March 26th.

A Right.

Q Did the Department of Commerce ever inform DOJ that the Census Bureau believed that administrative records alone would be more complete -- would create more complete and accurate citizenship data than asking a citizenship question on the census and then combining the data from that question with administrative records?

MR. GARDNER: Objection. Form. Objection. Lack of foundation.

BY MS. BOUTIN:

Q Do you want me to re-ask that question?

A Sure.

Q Did the Department of Commerce ever inform Justice that the Census Bureau believes that admin -- using administrative records alone would provide more complete and accurate data than

instead of doing that asking the citizenship question on the census and then combining that with the use of administrative records?

MR. GARDNER: Same objection.

THE WITNESS: Again, I think you mischaracterize the Census Department's -- Census Bureau's analysis. But, again, it's the Secretary of Commerce's decision as to what to make, and so he would only transmit to the Justice Department what he considered that would provide complete and accurate data.

BY MS. BOUTIN:

Q But the Commerce Department did inform the Department of Justice about that belief by the Census Bureau?

MR. GARDNER: Same objections.

THE WITNESS: Again, not to my knowledge.

BY MS. BOUTIN:

Q Okay. But did the Commerce Department ever inform Justice that the Census Bureau believed that 30 percent of responses by noncitizens as to citizen status are incorrect?

MR. GARDNER: Objection. Lacks foundation.

THE WITNESS: Again, I believe we have told the Justice Department that is now the case with the ACS data, yes.

BY MS. BOUTIN:

Q And was that conveyed between December 12th and March 26?

A I don't know.

Q Did Commerce ever communicate to Justice any of the substance of the Census Bureau's technical review of the -- of the Justice Department's request for a citizen question?

MR. GARDNER: Same objection.

THE WITNESS: Again, the Justice Department asked us to provide block-level -- block-level census data. How we do that is a decision of Department of Commerce, not the Department of Justice.

BY MS. BOUTIN:

Q But is the answer to that question yes or

no?

A I forget the question.

Q Okay. I have to, so I'll say it again.

Did Commerce ever communicate to DOJ any of the substance of the Census Bureau's technical review to have DOJ's request for a citizenship question?

MR. GARDNER: Same objection.

THE WITNESS: Again, it's -- the technical review was how do we provide data that would respond to this, and that would not be relevant -- why would we communicate that to the Justice Department is not --

BY MS. BOUTIN:

Q Well, isn't -- didn't the Justice Department, isn't that ultimately the goal, according to that letter, getting block-level data for Voting Rights Act enforcement?

A Correct. But they --

Q Hold on. Hold on. And isn't -- don't you think they would want the most accurate data

of which to do that?

A And that's a determination of the Secretary, not the Justice Department, so --

Q But you don't think the Justice Department would want to know the Census Bureau's opinion on what would be best way to do that?

MR. GARDNER: Objection. Calls for speculation.

THE WITNESS: I don't think it would be relevant if I'm the Justice Department, at all.

BY MS. SENTENO:

Q Okay. I'd like to turn to the March 26th memo.

Was that Exhibit 30?

MR. GARDNER: No. I think --

THE WITNESS: I think it is. Yes.

BY MS. BOUTIN:

Q Okay. So I'd like to turn to Page 5, which is Bates number 1317.

A Okay.

Q And I'd like to avoid having to read a

full paragraph, but I also want you to understand the context, so let's start at the top of the first paragraph.

A Okay.

Q It says, "In my judgment that Option D will product DOJ with the most complete and accurate CVAP" -- excuse me. Let me start again.

"It is my judgment that Option D will provide DOJ with the most complete and accurate CVAP data in response to its request."

The paragraph then goes on to give a few reasons why Option D would be the best option in his opinion and then about in the middle of the paragraph, it gives one final reason starting with the word "finally," so I'm going to read that portion.

A Okay.

Q It says, "Finally placing the question on the decennial census and directing the Census Bureau to determine the best means to compare the decennial census responses with administrative records will permit the

Census Bureau to determine the inaccurate response rate for citizens and noncitizens alike using the entire population. This will enable the Census Bureau to establish, to the best of its ability, the accurate ratio of citizen to noncitizen responses to impute for that small percentage of cases where it is necessary to do so."

A Yes.

Q So with respect to those two sentences starting with the word finally, who wrote that language?

A I couldn't say for certain, but I likely had a hand in drafting that.

Q Okay. Can you explain, how does adding a citizenship question to the census and determining the incorrect response rate for citizens and noncitizens help the Census Bureau impute with respect to people who did not respond at all and did not have administrative records?

A I mean, you could ask the Census Bureau for a fuller explanation of imputation, but

basically, they do a formula that looks at data that they have. And so if they know for the people -- let's say 95 percent of the population that they have accurate records for and which they have responses for, if they discover that -- pick a number -- it's now 10 percent of the people who aren't citizens, are, in fact, noncitizens, then they would probably apply that to 5 percent remaining. So they would take whatever number of people who are citizens, multiply that by that 5 percent, and then they would take the noncitizens and say, okay, we now know the accurate count, based on the entire population of what we have, there's a 10 percent error rate, 10 percent of the people that might say they're citizens are noncitizens, so we're going to multiply that number out. That's going to give you the most accurate count that you can get.

Q So what's your source of that explanation?

A Based on the briefings.

Q So you're saying that the Census Bureau

supports this statement here?

A This is the Secretary's statement. Whether the --

Q But did the Census Bureau explain, say -- explanation you just offered me -- did they -- did they explain it that way to you?

A More or less, yeah.

Q And do you believe they support this statement in this memo?

A I'm going to make no representations about what the Census Bureau would or would not support.

Q Would it surprise you if you learned that they did not support that statement, that they did not ever represent to you or the Secretary that establishing that ratio would help impute for nonresponders?

A I would not be surprised if that was the opinion of Dr. Abowd, no.

Q Do you believe that Dr. Abowd wrote this memos on his own?

A I believe he had the help of lots of

staff. I have no --

Q Do you believe he acted against the opinions of his staff when he wrote the memos?

A I have no idea.

Q So -- but you believe that it was his opinion alone that contributed to -- that was reflected in those memos?

A No. Dr. Abowd is the head of the division that does that, so at the end of the day, he gets the final call, so --

And, again, just to be clear, do I think that there may be other opinions in the Census Bureau? Absolutely.

Q So do you have any source, other than the Census Bureau, for believing in the scientific empirical accuracy of these last two sentences of this paragraph?

MR. GARDNER: Objection. Form.

THE WITNESS: Yes. My experience, my knowledge and other people who also, including the Secretary, who is a very smart man, who also came to a similar conclusion.

BY MS. BOUTIN:

Q Do you believe you have more expertise in the science of imputation than the experts at the Census Bureau?

A I'm not going to get caught in making such a statement, but I'm perfectly capable of looking at the analysis they provided and deciding whether or not I agreed with that analysis.

Q What's your background in statistical imputation?

A I --

(Conference call interruption.)

BY MS. BOUTIN:

Q What is your background in statistical imputation?

A I don't have one.

Q Okay. Switching gears. Did you ever ask anyone at the Census Bureau whether placing the citizenship question on the census could affect the apportionment of the Congressional representatives to the state?

A I never asked that question.

Q Are you aware of whether anyone else at Commerce ever asked that question to the Census Bureau?

A Not to my knowledge.

Q Okay.

MS. BOUTIN: I believe that's all I have.

MS. GOLDSTEIN: Let's go off the record.

MS. BOUTIN: Yeah. Let's go off the record.

VIDEOGRAPHER: We're going off the record. The time on the video is 5:56 p.m.

(Off the record.)

VIDEOGRAPHER: We're back on the record. The time on the video is 6:02 p.m.

MS. BOUTIN: We have completed our questions for today. However, based on the fact that there are still outstanding discovery responses and discovery documents, we are keeping the deposition open at this time.

MR. GARDNER: We oppose that, of course. You had the option to put this off, if you wanted to, knowing there were outstanding issues and

chose to go forward anyway, but we don't have to resolve this here and now.

The witness will read and sign.

VIDEOGRAPHER: This concludes today's video deposition. The time on the video is 6:02 p.m. We are off the record.

(Whereupon, at 6:04 p.m., the deposition of EARL COMSTOCK was concluded.)

* * * * *

CERTIFICATE OF REPORTER

I, KAREN LYNN JORGENSON, RPR, CSR, CCR the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me in stenotype and thereafter reduced to typewriting under my direction; that the said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

Karen Lynn Jorgenson

_____

KAREN LYNN JORGENSON, RPR, CCR, CSR

Dated this 3rd day of September, 2018.

ACKNOWLEDGEMENT OF DEPONENT

I, EARL COMSTOCK, do hereby acknowledge I have read and examined the foregoing pages of testimony, and the same is a true, correct and complete transcription of the testimony given by me, and any changes or corrections, if any, appear in the attached errata sheet signed by me.

_____ _____

Date EARL COMSTOCK

Joshua E. Gardner, Esquire
U.S. DEPARTMENT OF JUSTICE
20 Massachusetts Avenue
Washington, D.C. 20530
IN RE: New York Immigration Coalition, et al., v. United States Department of Commerce, et al.

Dear Mr. Gardner:

Enclosed please find your copy of the deposition of EARL COMSTOCK, along with the original signature page. As agreed, you will be responsible for contacting the witness regarding signature.

Within 21 days of receipt of transcript, please forward errata sheet and original signed signature page to counsel for, John Freedman and all counsel of record.

If you have any questions, please do not hesitate to call. Thank you.

Yours,

Karen Lynn Jorgenson, RPR, CCR, CSR
Capital Reporting Company
1821 Jefferson Place, Northwest
3rd Floor
Washington, D.C. 20006
(202) 857-3376

cc: All counsel of record

E R R A T A  S H E E T

Case Name: New York Immigration Coalition, et al., v. United States Department of Commerce, et al.,

Witness Name: EARL COMSTOCK

Deposition Date: Thursday, August 30, 2018

| Page No. | Line No. | Change/Reason for Change |
|---|---|---|

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Signature Date

**&**

**&** 1:15 4:4,11,20 6:15 8:21 47:1 228:2

**0**

**001308** 318:4
**001314** 352:10
**001315** 358:8
**01314** 354:10
**01570** 381:6
**05025** 1:5

**1**

**1** 2:9 8:13 55:22 56:1,2 111:7 147:21 222:11 278:8 318:2 322:1 322:12 323:9 365:9,17 375:22 376:8
**10** 2:13 64:6,8 67:22 68:4 69:8 83:2,16 145:6,7,11 148:11 149:16 192:2 208:1 355:5 365:1 431:6,14,14
**100** 5:3 257:14 327:18 355:2 363:5 369:1
**10005** 6:5
**1004** 4:8
**1016** 5:2
**1050** 5:7
**10:32** 111:7
**10:45** 111:11
**10:51** 203:9
**10th** 65:1 69:3 72:15 81:16,20 82:7,13 83:5,14 89:9 146:13
**11** 2:14 147:9,10 158:16 373:11
**114** 2:11
**115** 4:16
**11:00** 209:1
**11:31** 158:10
**11:45** 158:13
**12** 2:14 158:17,18 158:19 159:1 191:22 293:20 348:17 365:1
**120** 2:12
**123** 2:12
**125** 4:8
**1250** 3:18
**12:10** 235:8
**12:32** 212:1
**12th** 419:21 420:13 421:2 424:4 426:8
**13** 2:15 127:8 164:13,14,18
**1300** 5:18
**1317** 428:20
**1321** 93:18
**137** 2:13
**13th** 129:19
**14** 2:15 167:1,2,5,6 206:3
**1401** 5:12 6:16,20
**1410** 56:5
**1411** 219:18
**145** 2:13
**147** 2:14
**14th** 133:15 205:18
**15** 2:16 91:8,10 182:5,6,7,12,13 218:19 232:15 365:1 373:12
**15.6** 361:10
**150** 413:21
**158** 2:14
**15th** 88:1,8,11
**16** 2:16 189:6,7,10 189:11,18
**160** 328:11
**1620** 5:7
**164** 2:15
**167** 2:15
**169** 328:1
**16th** 5:2 189:16
**17** 2:17 194:13,15 235:8,15
**17388** 437:18 439:13
**18** 2:18 27:17 199:20,21 200:2 212:11
**182** 2:16
**1821** 439:15
**189** 2:16
**18th** 28:18 29:6,10 31:20 33:3
**19** 2:18 212:12,13 212:14,17 309:21 388:13,16
**194** 2:17
**199** 2:18
**1992** 12:21,22
**19th** 317:3,11 319:19 320:19 321:2
**1:18** 1:5
**1:19** 212:5
**1:49** 240:19
**1:50** 240:22
**1:58** 250:8

**2**

**2** 2:9 59:6,11 62:2 62:3,6 64:22 71:3 80:9 111:11 146:2 157:3 161:21 294:3,6,10 328:15 349:5 352:10 394:2 395:6 396:6 399:22 400:5 401:13 404:13 406:8 408:14
**20** 2:19 6:10 91:9 91:11 138:11 171:15 215:18,19 373:13 438:16
**200** 263:9
**2000** 81:1
**20001** 4:5,12 8:22
**20005** 3:19 5:13
**20006** 439:16
**2000s** 67:11
**20036** 5:3,8
**2008** 384:4
**2010** 67:11 78:22 79:4,19 80:4 355:14 419:6
**2016** 15:16 17:16 27:6 124:4 416:21
**2017** 15:17 27:17 33:16,17 34:10 35:5,9,17 36:10 37:7 39:18 40:2 55:2 56:21 58:15 59:6,11 64:6,8 67:22 68:4 77:19 78:1 83:2 88:3,9 88:11 96:12 103:4 104:12,22 105:7 109:1,18 110:8 115:14,15 117:10 117:13,16,18

119:1,5,8,12 121:16 122:12 124:5 127:8 129:19 133:15 134:13 138:11 140:16,21 143:22 146:2 147:21 156:15 157:3 161:21 162:2 179:10 183:10 184:8 188:4,15 189:18 195:6 196:17 198:21 201:5 206:3 208:1 209:17,19,22 213:3 215:12 222:12 225:7 235:8,15 237:14 238:6 239:2 241:18,22 242:3 250:17,22 262:15 262:19 263:5,11 264:3,12,17 265:8 286:1 290:17 309:9 348:17 397:8,11

**2018** 1:10 8:5 35:18 39:22 40:1 94:13 111:15 137:11 149:13 198:19 241:16,18 241:20 242:7,9 250:17 287:19 293:7 309:21 318:2 326:6 369:5 375:22 376:8 437:22 440:6

**202** 4:5,13 5:4,8,13 6:11,17,21 439:16

**2020** 21:16 85:21 86:10 88:15 93:4 95:20 130:5 202:9 204:2 244:20 333:10,17 334:3 337:2,10 354:16 367:14 385:2

**20230** 6:17,21

**2034** 224:14

**20530** 6:11 438:17

**20th** 27:20 34:12 35:5,8 143:22 323:15

**21** 2:19 94:12 111:15 121:16 218:4,6,10 341:9 439:7

**210-6053** 5:19

**212** 2:18 4:9 6:5

**215** 2:19

**218** 2:19

**219** 2:20

**21st** 98:10 99:3 101:19 113:10 341:17,19 346:5 346:12

**22** 2:20 56:21 219:18,19,22

**221** 2:20

**224** 2:21

**226** 2:21

**23** 2:20 221:18,19 221:22

**232** 50:14 201:19

**234** 2:22

**2395** 226:16

**2396** 229:20

**24** 2:21 203:9 224:15,16,19 229:13

**241** 2:3

**2424** 221:18

**2458** 189:10

**2462** 167:5

**24th** 201:5

**25** 2:21 224:1 226:17,18,21 351:9 368:17 423:12

**2521** 62:7 78:5

**2522** 80:9

**2561** 114:10

**26** 2:22 137:11 234:19,20 242:9 324:13 326:6 420:1 426:8

**2643** 384:2 385:18

**2644** 384:8 388:13

**2651** 234:19 235:1

**26th** 241:19 323:10 324:2,6 343:1,20 345:3,14 345:15 346:17,21 352:10 420:14 424:4 428:13

**27** 2:22 292:21,22 293:1 361:9 373:13

**28** 3:3 6:4 55:2 309:3,15 314:7 326:11 353:2,5 354:13

**2800** 4:20

**28th** 16:7 37:4,7 63:8 104:19 195:6

**29** 3:3 317:19,20 318:2 321:14 326:12

**293** 2:22

**293-2828** 5:4

**296-2300** 5:8

**29th** 139:18 142:10

**2:14** 250:12

**2nd** 58:15 151:11 151:13 159:11 166:6 183:21 184:3 191:19 239:22

**3**

**3** 2:10 82:14,17,20 92:20,22 158:13 165:17 212:1 224:1 328:15 358:8 365:15 366:1,19

**3/10** 93:13

**3/15** 93:14

**3/19** 387:17

**30** 1:10 3:4 8:5 22:21 27:6 34:10 35:17 36:10 104:9 266:21 307:3 325:22 326:1,5,14 329:18 332:6 353:2,11,22 355:11 357:12 367:6,20 425:21 428:15 440:6

**300** 327:9,11,16

**305-9802** 6:11

**3071** 164:20

**309** 3:3

**30th** 33:20 34:2,13 35:5,9 37:6

**31** 3:5 33:17 372:14,15 373:3 373:19 375:14,15 377:4 379:4,10 380:6,14

**317** 3:3

**31st** 16:2,3 33:14 33:15,20 88:17

**32** 3:6 374:20 375:2
**326** 3:4
**33** 3:7 376:12,13 376:22
**336** 2:4
**34** 3:8 353:3,6 354:13 378:17,18 378:22
**35** 3:9 23:12 369:6 373:7,9 375:10 378:10,10 383:20 383:20,21
**350** 3:18
**360** 364:22
**366-8500** 4:17
**3685** 82:16
**3686** 87:12
**3694** 137:20
**3699** 158:22
**37** 293:20
**3702** 199:19 202:6
**3703** 200:12
**3705** 194:14,18
**3709** 123:14
**3710** 145:11
**372** 3:5
**374** 3:6
**376** 3:7
**378** 3:8
**381** 2:4
**383** 3:9
**3983** 218:5
**3984** 215:17
**3:11** 308:19
**3:37** 309:1
**3rd** 148:8 165:22 437:21 439:15

**4**

**4** 2:10 87:7,8,13,15 212:5 250:8,11 353:4,18 364:6 373:10
**400** 5:12
**4004** 212:10
**415** 4:21
**416-8441** 6:5
**419** 2:5
**43** 333:11
**45** 417:16
**47,000** 42:2
**48** 417:16
**482-4772** 6:21
**482-5395** 6:17
**4:02** 335:12
**4:04** 335:15
**4:48** 380:18
**4th** 165:22 166:1 169:6

**5**

**5** 2:11 93:16,18,19 93:22 111:16 117:18 244:16,18 244:19 294:4,6,10 308:19 355:16 428:19 431:8,10
**50** 4:20
**500** 4:16
**56** 2:9
**562** 4:17
**5890** 6:16
**5:05** 380:22
**5:43** 419:18
**5:46** 419:15
**5:56** 435:11
**5th** 115:13,15 117:13,16 122:4 183:21

**6**

**6** 2:11 114:6,7,11 114:13 309:1 380:18
**60** 234:8
**601** 1:15 4:4 8:21
**607-3300** 4:9
**62** 2:9
**662-5458** 4:13
**662-8345** 5:13
**6:02** 435:14 436:6
**6:04** 436:7
**6th** 225:19

**7**

**7** 2:12 117:10 120:14,15,20,21 204:21 205:3 208:21 225:6 329:18 380:22
**70** 292:16 294:16 332:4 355:8 365:5 365:6,7 414:7 417:16
**743-6909** 4:21
**763** 120:19
**79** 365:3
**7:00** 115:22
**7:30** 116:1
**7:50** 83:5
**7:51** 83:14
**7th** 227:15 233:2

**8**

**8** 2:12 123:10,11 123:16 127:6 130:2 213:3 215:12
**82** 2:10
**850** 4:12
**857-3376** 439:16
**87** 2:10
**88.6** 355:14
**8:18** 381:6
**8:30** 73:8,15 75:8
**8th** 182:21 183:10 183:19 189:18 213:11 216:5 292:5 339:3

**9**

**9** 2:2,3,13 137:16 137:17,21 373:11
**90** 355:4,15
**90802** 4:17
**916** 5:19
**93** 2:11
**94111** 4:21
**942-5316** 4:5
**94244** 5:19
**944255** 5:18
**95** 355:16 431:3
**9834** 182:12
**9:01** 8:4
**9:08** 1:18
**9:58** 128:14,18

**a**

**a.m.** 1:18 8:4 111:7,11 158:10 158:13 209:1
**aajc.org** 5:9,9
**ability** 15:5,6 261:15 430:5
**able** 15:10 20:4 72:1 84:7 152:15 181:6 284:15 329:21 330:6 355:16 418:16
**abowd** 309:18,22 310:12,18 312:20 314:3,5 315:2 316:6,9,14 318:3

322:18 324:4 325:10 432:19,20 433:8
**abreast** 402:21
**absence** 351:14 362:5
**absent** 391:18 411:21
**absolutely** 46:11 88:12 105:21 113:8 242:5 350:12 414:16 433:13
**accept** 303:10
**accepted** 351:22
**access** 128:5 138:16
**accompanying** 371:4 376:18
**accomplish** 266:3 267:1 282:7
**accomplished** 160:6
**account** 365:14
**accounting** 13:21
**accuracy** 433:16
**accurate** 80:3 103:15 312:8 313:4 315:5 348:16,20,21 350:15 351:10 367:15 368:11 369:1 374:4 377:9 419:5 423:8 424:10,22 425:11 427:22 429:7,9 430:5 431:4,12,18
**accurately** 313:17 367:8
**acknowledge** 438:2
**acknowledgement** 438:1
**acquainted** 320:15 320:21
**acs** 57:20 58:20 88:16 93:6 108:16 126:17 127:13 132:15 153:17,18 171:8 176:6 180:14 181:12 192:9 261:7,21 263:13,16 264:18 265:10 272:15 326:21 328:3,4,16 328:21 332:3 333:11 334:7,10 334:16 350:2,7,18 352:14,17 353:9 355:7 356:8 357:3 357:5,6,16 358:4 367:7,16 368:3,7 368:10,12 372:13 414:7 416:15,21 417:17 418:9 426:5
**act** 126:16 153:19 154:5 155:9 192:17,18,22 194:8 262:9,16,18 263:14 265:11 268:9 277:11 295:1 302:3 349:6 349:9 381:22 382:6 400:4 403:7 403:16 427:18
**acted** 433:2
**acting** 36:17 57:5 93:9 198:3,6 203:12,13 237:15 237:19
**action** 9:7 84:11 106:13 151:9 152:14 168:13 239:8 261:15 347:11,16 402:12 405:7 437:13,18
**actions** 10:3
**active** 13:5,6 310:22
**actively** 418:20
**actual** 355:12
**ad** 39:1
**adam** 283:7
**adams** 160:1
**adc** 4:2
**add** 64:11 87:1 130:21 133:20 151:3 154:13 172:3 176:13 241:14 242:11 245:7 251:9,12 253:7 254:10 257:11 258:2,11 258:16,21 259:8 260:7,16 261:1,22 262:1,1 264:6 272:4 286:11 289:21 291:8 300:6 302:1 332:7 381:14 393:3 403:21 412:6,13 415:4
**added** 39:5 84:13 103:19 106:3,19 107:3,9,10 130:19 131:8,12 153:4,8 154:3 175:21 251:22 253:11,14 253:15 254:1,3 255:3,8 274:20 278:15 279:9 287:16 295:10 298:19 299:6,8,10 350:17 354:16 362:7,15 372:11 379:6
**adding** 54:17 55:6 59:13 68:22 69:17 81:14 82:3 107:19 108:1 109:8,22 131:4 133:4,9 134:5 135:11,18 153:12 171:5 270:2 310:14,19 346:19 361:2 364:1 365:22 383:9 408:21 409:3 415:16 421:3,12 430:15
**addition** 18:20 131:2 251:3 271:22 279:2 291:2 297:11 309:8 330:19 332:20 359:1 360:1 361:17,20 383:13 396:9 400:10 404:2 405:12 412:21
**additional** 70:2,3 419:1
**additionally** 352:13 357:2
**additions** 130:5
**address** 9:19 69:10 261:17
**addresses** 310:12
**adds** 61:12
**admin** 424:21
**administer** 9:5
**administration** 19:3 42:18 44:5

47:2 64:14 84:14 84:15,22 86:12,15 96:2 111:20 112:1 112:7 113:11,13 113:16,20 130:20 143:10 245:1 281:19 315:6 319:11 343:3
**administration's** 37:20 42:7 131:21
**administrative** 311:1 312:4 343:8 346:15 347:8 350:19 353:7,13 354:2,3,4 355:13 367:22 368:2,9,14 368:16 369:2 391:19 418:18,19 421:1,10 423:10 424:8,13,21 425:3 429:22 430:20
**admitted** 13:1,8 13:10
**advance** 20:18 41:1 287:19
**advancing** 5:6
**advancingjustice** 5:9,9
**advertising** 419:3
**advice** 39:4,9 139:15 246:15,18 247:17 248:6,8,16 249:6,9,10 340:7 342:21 346:1,2
**advisable** 343:17
**advise** 16:20 37:18 105:3
**advised** 193:16,22 248:14
**advises** 139:10
**advising** 17:22 124:1 140:11 161:7 181:7 225:8 344:10
**advisor** 74:5,7,17 116:7 167:21 173:12 404:8
**advisors** 50:20
**advisory** 123:20 138:21 139:3,4,9 139:14,19 140:10 141:12 142:20 149:3,7
**advisory's** 140:17
**affairs** 25:17 386:2,11
**affect** 434:19
**affixed** 326:7
**afford** 411:19
**africa** 84:16
**african** 86:19 141:20 143:3
**afternoon** 38:17 121:19 200:15 241:2 336:6 381:3
**ag** 213:17 214:18 215:5 236:19 237:1,4,12 274:22 279:11 283:10 285:11
**ag.ny.gov** 6:6,6,7 6:7
**age** 155:8 272:17 349:18,20 351:9 368:18 423:13
**agencies** 43:20 51:11,18 105:18 276:15
**agency** 126:16 154:4 156:16 171:7 181:3,8,9,20 182:1 185:3 239:11 273:18 274:1,9,14 282:10 407:13
**ago** 9:22 68:20 100:11 125:6 146:22 150:21 206:10 225:10 289:14
**agree** 8:11 112:22 133:13 154:16,19 205:17 223:16 233:1,4 260:12 265:13 267:8 295:22 300:13 302:9 306:15 312:5,22 313:10 316:16,18,18 323:19 348:15,21 389:3,5
**agreed** 63:8 434:8 439:4
**agreement** 52:10 274:16,22
**agriculture** 52:11
**ah** 242:1 312:16
**ahead** 271:4 341:13
**al** 1:3,6 8:16,17 438:18,18 440:3,4
**alabama** 405:11 405:21 406:14
**alaska** 11:21,22 13:10 19:19 20:8
**alerting** 44:21
**alex** 6:3
**alexander** 115:3,5 115:18 138:8 159:10
**alexfinkelstein** 6:7
**aliens** 207:12,18
**aligned** 84:14
**alike** 430:2
**alliance** 336:12
**allocations** 264:10 264:10
**allow** 151:8 272:19
**allowed** 31:8
**alternative** 261:17 310:13,14,19 315:3 318:10,21 319:6,8,10,15,17 319:19 320:16,17 320:19 350:6 351:14 423:10
**alvord** 87:19,21,22
**amended** 380:2
**american** 4:2 364:11
**american's** 81:22
**americans** 5:6 78:19
**amount** 112:19 142:1 163:15 223:20 423:18
**analyses** 328:19 329:1,10,12
**analysis** 106:14 154:21 156:19 213:15,20 260:9 262:2 304:17 309:11 313:20 314:6,6,9,10,16 323:4 324:15,21 325:3 326:12,16 329:5 350:5,7 351:2 353:5 360:19 361:7 369:21 413:10 417:10 425:7

434:7,8
**analyzed** 423:1
**analyzing** 258:15 422:13
**andrea** 5:1 381:4
**angeles** 4:14,19
**annual** 81:1 130:3
**answer** 10:10,22 12:12 43:12 55:17 62:16,18 65:7,10 65:17 67:5 69:21 70:1,4,10,11,15,19 79:6 83:20 98:14 100:7 106:6 110:6 118:20 127:17 128:16,19 135:1 136:8 142:14 168:14 176:18 180:11 186:14 188:7 193:4 194:4 195:7 196:1,2 204:6 206:22 208:17 218:1 224:4 226:14,15 248:11 249:7 252:5,19 254:15 259:16 263:8 273:22 274:20 275:10 284:7 289:10 290:6 297:15 303:9,15 303:17,18 305:21 306:4 308:1,14 311:14 327:20 332:1,5,8,9,10,15 345:21 355:3,8 359:15 363:4,19 364:2,3 367:1 369:7 370:9 371:2 373:22 374:6,17 375:14,15 377:3,6 377:7,11,14 379:22 380:2,6,14 390:13 391:13 407:17 414:8,17 418:17 419:8 423:20 426:22
**answered** 28:22 206:20 208:7 252:4 254:13 263:12,20 294:18 297:14 331:12 333:12 373:10,11 373:12,12,13,14 374:14 375:11,13 400:6
**answering** 28:12 68:9 108:19 200:13 263:3 330:14,15 362:17 362:19 367:7
**answers** 10:19 11:1 128:20 275:9 351:17 370:17 371:8,14 372:2,5 377:1 378:9
**anteroom** 199:11
**anti** 4:2
**anticipated** 289:5 290:6 359:3,8,12
**anybody** 42:15,20 100:14 213:10 217:12 286:8 401:20 416:12 419:12
**anymore** 75:1
**anyway** 436:1
**apart** 266:5
**apologize** 78:5 200:13 269:10
**apparently** 72:7 88:7 131:3 147:17 183:7 368:17 387:5 414:9
**appear** 56:14 61:19 81:10 216:7 223:12 230:15 235:20 266:2 292:16 294:6,16 349:15 377:15 379:3 438:6
**appearances** 9:9
**appeared** 63:20 82:10 153:10
**appears** 65:7,9,9 71:7,8 73:10 79:17 83:6 89:11 96:11 115:11 148:6 149:10 159:15 160:15 166:16 191:12 194:22 195:5 205:9 219:14 226:1 228:21 229:15,20 295:5 309:18 310:16 360:19 373:6,14 379:10 384:18 390:7 411:22 414:10 437:6
**applied** 222:8 363:15
**apply** 368:13 431:8
**appointee** 58:8 74:13
**appointment** 95:18 96:9 104:17 104:19
**apportionment** 65:6,21 66:15,20 67:3 81:19 85:20 207:14,20 208:4,5 208:11,15,18 393:20 395:2 396:2 399:18 401:9 404:13 405:5 406:7 408:8 408:12 409:8,15 434:20
**appreciate** 298:4
**approach** 351:7
**approaches** 351:13
**appropriate** 107:6 111:3 381:16 382:4,5 411:15 415:1
**appropriately** 411:1
**appropriation** 147:2,5 148:2,15
**approximately** 63:14 271:12 327:16 341:18 353:2 355:6,7 402:18
**april** 35:16,18 115:15 117:10,13 117:16,18 122:4 127:8 129:17,19 133:15 138:11 139:18 141:2 142:10 143:22
**arab** 4:2
**arcane** 18:5
**area** 20:6 44:21 126:2 255:13 378:7
**areas** 18:3,6 46:14
**arms** 84:4 86:4 222:15
**army** 43:15,15

**arnold** 1:15 4:4 8:21
**arnoldporter.com** 4:6
**arose** 370:2
**arrange** 156:21 157:7
**arranging** 93:10
**arrival** 41:9
**arrivals** 402:12 405:8
**arrive** 347:13
**arriving** 219:2,7
**arthur** 396:9
**article** 79:20 409:14
**articulate** 350:21
**asenteno** 5:4
**asian** 5:6
**aside** 131:6 307:13
**asked** 10:12 17:4 22:5 51:15 63:20 65:2 66:1,9,14,20 67:2,11,15 68:13 68:18 73:22 76:13 79:19 82:8,10 103:8,8 110:10,13 110:13,14,15,16 110:20 112:10 115:21 119:3 129:7,10 132:15 137:2 146:5 157:9 165:11 166:6,12 168:6 171:4,22 175:21 187:12 191:13 203:1 204:5 206:19 207:22 208:6,16 223:13 226:3,9 232:20 249:8 251:7,9 252:3,6 254:12 261:5,6,9 261:21 263:19 267:15 269:2 272:3,11,13,22 279:12 288:7 291:10 292:11,15 294:10 296:14,17 296:21 297:4,6,11 297:13,17 298:18 315:8,12 316:2 322:6 331:11 333:11,12,21 334:4 337:7,12 338:1 356:19 362:8 372:4 391:7 404:9 413:21 416:10 426:17 434:22 435:2
**asking** 10:21 62:20 71:11,13 85:12 93:1 105:19 107:22 109:11 115:20 127:15 128:22 135:22 136:1 151:10 168:8 176:15 183:13 184:7 188:4 191:10 231:15 232:4,18 233:2 250:16 251:16 253:1 266:5 272:4 280:7 297:21 303:17 305:9 306:3,4 307:14 311:22 313:8 315:21 319:1,8 322:6,7 332:14,16 333:7 334:8,9 364:3 389:5 398:14 402:1 414:4 424:10 425:1
**asks** 57:8 67:16 78:19 81:22 213:4 266:8 294:1 300:3
**asleep** 291:16
**aspect** 123:22 261:9
**aspects** 82:11
**assembler** 369:16
**asserting** 417:4
**assertions** 321:18 360:18
**assessment** 302:9
**assigned** 38:1 46:17
**assignments** 40:13
**assist** 30:19 41:11 66:21 67:1 76:16 76:22 95:1 236:20 252:15 260:5,18 260:20
**assistant** 6:3,15 61:12,15,16 73:4 115:7 283:15 285:11
**assisted** 28:2 29:12 95:3
**assisting** 26:11 253:5
**associate** 203:20 204:1
**associated** 352:14 354:17 356:12 357:5
**assume** 58:2 73:5 79:13 83:12 167:9
**assumed** 367:17
**assuming** 79:9 105:1 283:10 285:12 311:16
**assumption** 351:2
**assumptions** 352:5
**atlantic** 3:18
**atmospheric** 44:4
**attached** 3:11 438:7
**attempt** 177:14
**attend** 40:9 47:21 54:11 60:11 201:8
**attended** 23:15 33:3 126:13 161:19,22
**attendee** 92:14
**attention** 59:8 294:3 308:8 310:10 352:9,11 358:7 369:4 373:19 377:3 384:22
**attorney** 5:17 6:3 10:2 15:4,6 62:17 155:18 167:22 168:1 183:15 186:16,18 189:21 189:22 190:3,6 191:2 195:22 233:9,18,21 234:2 235:13,16 236:14 236:16 237:6 298:10,15 388:13 388:16 400:8,9,19 400:22 401:2,17 401:20 402:1,3,4 402:16,20 403:6 403:15 405:11,18 420:6 437:16
**attorneys** 214:7,11 344:6,7
**audio** 8:10,10
**august** 1:10 8:5 39:22 213:3,11

216:5 440:6
**authority** 150:13 258:21 261:21 348:13
**authorized** 9:5
**availability** 403:8
**available** 39:8 91:22 92:2 102:5 116:1 137:9 177:16 265:10 295:1 296:20 311:1 312:3 315:6 399:4
**avenue** 1:15 4:4,16 5:12 6:10,16,20 8:21 438:16
**aviation** 18:10
**avoid** 428:22
**aware** 42:22 53:10 58:4 105:16 119:11 122:17 139:8 162:15,16 169:17 217:2,12 237:20 286:8 307:4 334:22 376:4 385:10 386:12,17,21 387:2,11,18 389:16 390:14,17 390:19 392:5 394:7,12,14,18,20 395:1,3,5,7,12 396:12 397:16 401:15,22 402:3,7 402:11 404:18,22 406:10 407:4 408:16 409:2 416:3,7 435:1
**awkward** 30:14 31:14

**b**

**b** 127:13 310:13 310:14,19 315:3 319:8,19 320:16 320:19 351:13
**bachelor's** 12:10
**back** 12:7 25:2 30:21 44:12 46:11 47:22 50:15 56:10 64:22 71:3,12 92:22 102:4 132:2 148:11 153:4,8 162:10 185:11 187:14 191:18 204:17,21 208:20 212:8,9 214:3,4,15 215:15 216:12 236:6 240:21 250:15,17,21 252:8 263:5 266:1 270:12 271:4 275:12 278:7 279:13,18 281:5 285:22 287:4 309:6 315:7,8,10 315:13,14,15,16 315:18,22 316:3,4 316:7,15 319:14 321:12,22 322:5 323:18 326:11 335:14 336:21 350:8,21 363:10 371:3 372:1,9,11 373:5 376:19 406:16 411:11,12 411:13 414:6 419:17 435:13
**backed** 313:1
**background** 11:17 18:17 42:9 46:22 126:2 127:4 271:2 277:8 283:4 434:9 434:14
**bad** 361:14
**bailey** 6:9
**balance** 363:14
**ballpark** 49:13 238:8 292:8 328:14
**bannon** 115:21 116:4,6,11,19 117:2 119:16 121:22 122:18 123:1,5,7
**bar** 265:22
**barbara** 11:20
**base** 227:16 302:5
**based** 20:21 65:7 67:18 81:1 86:14 110:4 133:13 141:16 153:9 154:2,4,21 156:18 177:19 181:6 191:12 225:22 229:6 235:19 246:15,18 247:17 248:16 285:10 298:8 328:20 329:10 331:1,17 351:8 352:17 355:6,11 357:6 360:10 381:13 382:9,13 386:5 392:16 414:20 415:5 431:13,21 435:16
**basic** 14:13 32:3 180:6 193:1
**basically** 16:17 18:9 21:7 22:3 74:9 84:21 123:22 124:14 155:16 224:1 239:9,12 333:18 355:9 358:20 361:7 369:20 411:21 417:11 431:1
**basis** 38:12 47:16 47:20 239:10 249:8 264:10 266:11 267:14 274:17 300:10 302:4 303:16 333:10,17,21 334:1 368:19 371:21 414:1
**bates** 56:5 62:7 82:15 93:17 164:20 194:14 318:3 384:2 428:20
**beach** 4:17 31:9
**began** 15:20 95:19 96:9 104:16 347:10
**beginning** 1:18 34:6 201:19 203:16
**begins** 111:10 158:12 212:4 250:11 308:22 358:9 380:21
**begun** 346:18
**behalf** 1:19 4:1,10 4:14,19 5:1,15 6:1 6:8
**behold** 350:8
**belief** 106:8,12,19 330:12 350:22 425:14
**beliefs** 262:5
**believe** 13:6 16:2 27:16 45:9 55:20

57:21 95:7 101:6 101:15 102:7 118:1 130:3 140:9 147:4 203:11 204:4 208:12 209:4 217:4 222:20 238:4 242:22 266:19,20 268:12 269:6,8 286:10 288:9 305:4 315:2 318:8 324:3 340:10,18 353:3 357:8 361:20 364:22 370:6,19 371:22 372:6,6 374:16 375:3 383:19 386:7 396:15,18 397:1 399:6 403:4 403:14 417:7 421:4 426:3 432:8 432:20,22 433:2,5 434:2 435:6
**believed** 424:7 425:21
**believes** 424:20
**believing** 433:15
**benefits** 363:22
**best** 37:19 70:18 141:16 164:22 175:4 184:20 185:1 239:19 267:5 282:19 323:6,11 324:10 324:11 337:19 361:7 381:16 382:4 391:9,13 423:19 428:6 429:12,20 430:4
**better** 162:22 163:22 267:21
**beyond** 233:20,20 234:1 419:6
**big** 41:3
**bigger** 361:15
**biggest** 204:12
**billion** 224:1 361:10
**biology** 14:3
**bit** 17:19 31:13 47:13 53:1 75:20 253:2 336:21 356:18 381:8
**black** 147:15 163:15 336:12 379:19
**blacked** 163:13 215:10
**blanche** 167:8,11 167:13 184:11 185:22 188:1 269:13,17,22 338:5 381:9 410:9
**blanked** 205:12,16 222:6 228:22 229:7 231:19
**blanking** 410:13
**blanks** 423:12
**block** 296:19 352:13 357:4 379:19,21 380:1 403:19 416:5 422:14,14 423:2 426:17,18 427:18
**blocked** 222:13 339:16,20,22 340:5,12 379:17
**blog** 67:6,10,19 78:21 79:16 81:8 81:20 146:14
**blummerman** 203:5,7,9,10,20 204:6
**board** 18:16 27:4 27:9 32:4 36:14 37:1 360:9
**body** 153:11
**booked** 90:15
**born** 80:22
**boss** 252:6 266:8 273:16 274:12 278:14 279:11,14 280:3 282:8 284:13 411:21
**bottom** 121:11 127:7 386:10
**boutin** 2:5 5:16 190:18 336:18 419:19 420:5 422:7,18 423:16 424:16 425:12,18 426:6,21 427:14 428:18 434:1,13 435:6,8,15
**box** 5:18
**bpark** 4:18
**brady** 53:2
**branstad** 74:4,15 75:7,17 77:18 97:12 157:9 164:21 166:12 167:15 173:10 197:22 256:3,21 283:5 410:10
**break** 105:4 111:1 111:3,5 158:8 165:10 211:6,15 240:12,15,15 244:9 250:3,16 308:17 417:18 418:3
**breaking** 84:16
**brian** 4:15
**brief** 22:7,8 47:20 92:14 125:22
**briefed** 18:14 19:16 86:9 90:3,4 124:15 125:17 217:19
**briefing** 40:14,17 57:9,12 59:1,19,20 60:2 61:1,2,5 64:3 72:3,6,7,9,15,18 75:18 85:13,21 86:7 88:15 89:5 89:12 90:7 92:5,6 93:3,9,13,13 126:13,19 216:9 216:11
**briefings** 21:22 48:1 91:8 126:5,9 431:21
**briefly** 121:21
**bring** 92:9 161:2 172:11 416:4
**bringing** 32:4 359:6 405:22
**broad** 4:8 288:18
**broader** 338:21
**brooke** 115:3,5 138:8,16 139:16 159:10,16
**brooke's** 138:15
**brooks** 406:14 407:3
**brought** 27:11 76:2 170:3
**budget** 20:20 44:6 52:3,7 86:5 124:19 162:19 164:7 203:14,18 224:2,9 229:10 361:10

**build** 351:16
**building** 89:19 90:22 91:21
**bulk** 345:11
**bullpen** 197:21 198:9 199:3,5,14 255:13
**bullpens** 197:14
**bunch** 262:11
**bureau** 6:4 19:16 42:16,19,21 44:1 45:6 46:18 47:10 47:18 51:7 57:9 57:12 59:21 72:3 73:13 75:17 77:18 81:2 88:15,16 89:5,18 90:4,19 91:7 92:7 105:17 124:12 125:21 129:15,18 132:13 132:22 136:18 139:10,15 153:15 153:20 154:12,19 163:19 169:21 176:12 219:6 224:6 237:16 309:10,14,22 311:3,22 312:14 312:18 313:9,14 313:15,20 314:21 317:16 321:12,17 321:21 323:17 324:2,12,17,22 325:12,13 326:12 326:15 328:19 329:5 334:19 348:19 350:14 352:1 353:5,12,13 354:1,2 357:22 358:9,13 361:6 363:21 367:11 369:7,22 370:7,8 370:18,20 371:2,6 372:4 377:13,19 378:1 388:10 391:4,15 392:1 394:8,15 395:13 396:13 397:14,19 398:13 399:5 403:5 405:17 407:5,10 408:17 412:6,13,15,18,21 415:1 417:11 418:2 420:22 421:6,10 422:13 424:7,20 425:15 425:20 429:20 430:1,4,18,21 431:22 432:4,11 433:13,15 434:4 434:18 435:3
**bureau's** 66:13 106:1 208:10 323:3 324:21 325:2 332:15 350:5 357:18 422:22 425:7 426:11 427:5 428:6
**bureaus** 41:15 43:20 44:8,22 45:3,4,16,18 46:10 46:12 49:6
**burlington** 4:11
**busy** 276:8,13,17 382:21

**c**

**c** 4:1 5:6 8:1 25:10 25:11,11,11 319:10,17 320:17 350:6 351:13 353:18 368:20 380:2 423:9
**c003134** 356:21
**c15** 339:7
**c30** 346:16 348:16 352:9
**c33** 379:22
**c34** 380:2
**c5** 341:5 345:17 346:4
**cabinet** 51:11,18
**calendar** 60:7,8,10 60:16,18 61:8,13 61:20,21 64:5 72:18,21 73:1,3 89:15 90:12,17 91:13,16,19 117:18 233:16 288:2
**california** 4:17,20 4:21 5:15,19 11:20 336:14 420:7,8,9,10
**call** 31:9 53:4 102:19 117:12,15 118:7,16,21 122:4 122:9 143:11 156:6 165:20 168:7 169:14,16 178:3,6,6,21 181:17 183:15 189:20,22 190:2 191:4,5,6 208:22 209:10 210:3,18 213:4,8,11,17 214:18 215:5 231:14 236:11 237:10 270:8 273:9 274:21 281:13 284:3,9,10 285:5 291:14 298:14,16 328:18 433:10 434:12 439:12
**called** 1:13 9:15 53:5 67:19 72:2 74:2 84:17 175:15 241:13 269:21 270:12 342:11 402:12
**calling** 279:17 282:10
**calls** 69:18 83:17 98:11 116:13 117:5 118:17 122:7 130:12 133:1,21 140:6 142:11 143:7,16 144:20 146:18 148:21 159:20 161:5,15 163:4 184:17 186:7,12 195:21 200:22 202:19 226:5 268:14 273:18 274:1 275:3 278:12,21 279:10 285:3 286:7,16 301:2,17 303:3,4 304:5,6 305:1,18 306:12,22 307:20 308:11,12 340:13 345:19 366:20 380:7 390:12 392:8,17 422:5 428:8
**campaign** 3:9 17:15,16 76:2 383:21 384:3,13 384:13,18 385:1 385:11,20 386:15 387:12,15,19 388:4,20 389:1,4

391:1,5 392:2
**candidates** 100:9
**cannon** 6:13
**capable** 434:6
**capacity** 124:6 203:12
**capital** 1:17 385:7 439:14
**care** 16:22 304:13
**career** 36:18 37:18 37:19 41:10,10
**carefully** 302:12 360:5
**cares** 18:3
**carry** 239:18 266:8 349:18
**casa** 4:2
**case** 1:5 8:18 16:18 23:16 84:12 149:12 155:6,10 155:15,20 156:5 156:10 160:2 192:18,22 193:3 193:14,20 194:7 194:11 201:18 229:22 230:15 235:20 239:22 240:5 261:19 291:15 298:17 307:12 308:5 311:8 312:6 336:12 338:16 352:8 371:12 372:6 406:18 426:4 440:2
**cases** 155:1,3,4,5 155:16,18 156:4 157:14 172:8,9 192:22 240:1 349:9 370:2 383:8 416:3 417:21 430:7
**catch** 72:1
**catching** 74:1
**caught** 59:7 279:19 434:5
**cause** 330:20 332:20 360:1 361:8,15,21 366:15 418:11
**caused** 103:17 416:21
**cc** 439:17
**ccr** 1:17 437:3,20 439:14
**cea** 50:17,19
**ceased** 185:18 187:12 188:2 411:3,7
**cedcap** 162:18
**cell** 8:8
**cellular** 8:7
**census** 3:5,7 10:5 18:17 19:16,18,20 20:2,2,5,9,17 21:5 21:16 42:16,19,21 46:18 47:10,13,18 51:4,7 54:18 55:7 55:14 57:9,12,19 59:1,14,21 60:14 60:18 63:5,16,19 63:21 64:3,15 66:2,5,6,13 67:11 67:16 69:1 71:4 72:3,8,10 73:13 75:9,17 77:18,21 78:19 79:2,19 80:4 81:11,15 82:4 83:9 84:13 85:6,21 86:4,5,10 88:15,16,16 89:5 89:18 90:4,19 91:7 92:7 93:4 95:20 97:3 103:15 103:21 105:10,17 106:1 107:7 109:21 110:15 115:22 117:13 118:22 119:4,8,11 119:17,20 122:19 123:20 124:1,12 124:15 125:21 126:1,4 127:11,13 128:6 129:15,18 130:5,21 136:18 139:5,10,15,17 140:16 142:2,18 146:22 149:5,8 153:4,13,15,20 154:12,19 156:17 160:19 161:7 162:1,20 163:1,19 164:5,9 165:2 169:21 175:22 176:9,12 180:8,9 204:3 207:7 208:1 208:10,13,18 213:5,11 214:5 220:16,18 221:11 221:15 222:14,16 223:7,19 224:6,8 224:10 229:8 230:12 237:16 241:15 244:21 251:1 252:1 258:16,22 261:20 263:18 264:7,10 265:17 270:3 271:20 272:1,17 272:17 275:8 292:17 294:16 309:10,14,22 310:15,21 311:3 311:22 312:2,14 312:18 313:9,14 313:15,20 314:21 315:4 319:10 320:15 321:12,17 321:21 323:3,17 324:2,12,17,21,22 325:2,12,13 326:12,15 328:19 328:20 329:5 330:1,15 331:22 332:1,15,22 333:4 333:10,17 334:3,9 334:19 337:2,11 337:15 338:10 346:20 347:22 348:4,5,12,19 349:19 350:2,5,14 350:16,18 352:1 353:5,12 354:1,16 355:2,14 357:2,18 357:22 358:9,11 358:13 359:8,15 361:6,18 362:17 362:19 363:17,21 365:11 366:1,12 367:10,14 368:15 369:7,22 370:7,8 370:18,20 371:2,6 371:22 372:4,9,16 376:14 377:13,15 377:19 379:6 383:10,14 385:3 388:10 391:4,15 392:1,7 393:4,9 394:8,11,13,15 395:10,13,15 396:10,13 397:14 397:19 398:13 399:5 400:11 402:2,6 403:5,19

403:21 404:3 405:3,13,13,17 406:22 407:5,10 408:4,17 412:6,13 412:15,18,21 414:17 415:1 416:17 417:11 418:2,11,16,17 419:8 420:22 421:3,6,10,12 422:13,22 424:7 424:11,20 425:2,6 425:6,15,20 426:11,18 427:5 428:6 429:19,20 429:21 430:1,4,16 430:18,21 431:22 432:4,11 433:13 433:15 434:4,18 434:19 435:3
**censuses** 326:19 333:5 359:10
**ceo** 12:5
**certain** 20:21 84:9 106:12 128:17 132:16,18 135:6 141:4 154:8,11 272:17 330:22 335:19 351:4 367:1 371:14 375:4 391:2 398:4 398:10 417:12,12 417:15 430:13
**certainly** 58:6 140:18 144:8 160:11 229:22 251:6,8 268:6 277:9 281:16 285:21 318:14 329:12 348:7 354:18 375:5 380:15 390:13
**certificate** 437:2
**certify** 437:5
**cetera** 44:12 302:3 413:19
**cf** 1:5
**chain** 159:9 160:15 230:8 231:1,21 380:10 384:12 385:13,14 386:6
**chair** 123:20
**chairman** 25:18 53:2
**challenge** 280:3,5
**challenges** 124:16 124:17
**challenging** 10:3 261:3,12
**chance** 147:13 282:20
**change** 18:11 84:8 106:10 181:18 346:7,8 366:12 372:5 377:6 380:11 440:7,7
**changed** 177:19 374:1,6
**changes** 86:14 359:11 438:6
**changing** 106:1 134:2
**characterization** 223:17 265:13 295:22 312:13
**characterize** 112:19 119:6 266:18
**characterized** 68:19 313:17
**characterizing** 107:4
**charge** 36:19 203:14
**chasing** 150:15
**check** 13:7 55:17 162:6 373:5
**checked** 64:5,8
**chemistry** 14:3
**chief** 33:8,10 35:13,14 36:7,9,12 37:10 39:11,13,15 39:17,20,21 102:9 102:18 125:20 160:7 198:8,11 199:17 309:22 377:18 395:9,14
**childhood** 402:12 405:7
**choice** 181:2 413:2
**chooses** 305:16
**chose** 436:1
**christa** 377:17
**christine** 25:8,10 25:12
**ciccone** 25:8,11,12
**circles** 80:2
**circulate** 48:7,9
**circulated** 48:15
**circulating** 48:12
**citizen** 108:18 155:8 272:17 349:17 353:10 361:2 368:18 414:18 416:21 418:4,9 425:22 426:13 430:5
**citizens** 262:10 351:10 355:4 367:7 385:4 388:15 414:1 423:13 430:2,17 431:7,10,15
**citizenship** 10:4 21:12,14,16 24:3,5 24:9,15,17,21 31:17 47:14 51:4 53:8,12,18 54:9,12 54:17 55:6,13 59:13 67:12,16 68:22 69:12,17 75:9 77:21 78:20 79:18 81:14 82:1 82:4 87:2 96:1,14 97:7 103:2,5,7,11 103:18 105:7 106:3,9 107:3,6,13 107:19,19 108:1 109:8 110:1 126:6 126:8,8,12,14 129:20 133:5,9 134:6,12 135:5,12 135:18 136:11 140:4,12 143:15 144:1,15 146:7,11 149:17 150:3 151:5,19,21 153:3 153:8,13,17 154:13 156:17 157:5,18 161:2,20 162:7 163:3,7,9 164:10 166:21 168:4 170:11,22 171:5,17,21 172:1 172:3 175:21 180:8,15 187:7 188:5,11 190:4,7 190:11,13 193:5 195:4,9,16 202:8 202:13,17,22 204:6 207:8 208:2 209:12,21 216:10

216:20 218:14 219:13 220:13 221:9 223:4,8,9 224:11 225:12,16 225:20 230:11,14 230:18 231:17 232:2,6,8,19 233:3 237:18 239:12 240:3 241:15 242:11 244:22 251:1,4,9,13,22 252:16,21 253:7 253:14 254:10 255:3,8 257:12,12 258:2,12,16 259:9 260:7,17 261:1 262:21 264:18 265:10,16 268:1,8 270:2,16 272:1,5,9 272:16 273:2 277:21 278:15 279:2,9 280:2,13 285:22 286:12 287:16 288:8,17 289:6,22 291:2,8 291:19 292:13 296:18 297:12 298:5 300:6 309:9 310:14,19,22 311:22 312:3 315:5 319:8,12,16 320:17 323:4 324:16,21 325:3 326:17 330:1,14 330:19 332:5,8,20 337:2,20 338:10 338:15,22 339:14 341:1,3 346:19 347:22 348:4,19 350:17 351:9,18 353:6,10 354:15 359:1,16 360:1,15 361:1,21 367:8,13 368:18 381:15,21 382:1,6,7 383:7,7 383:9,14 389:5,6 392:6 393:3,18 394:22 395:22 396:10 399:16 400:10,20,22 401:7 402:1,6 404:3,12 405:12 406:6 407:1,14 408:21 409:3 410:5 412:6 413:18 414:4 415:5,16 416:5 417:5,13,20 418:21 419:22 421:3,12 422:15 423:2 424:10,11 425:1 427:6 430:16 434:19

**city** 336:11

**civil** 4:7 5:11

**claim** 155:9

**clarification** 70:22

**clarified** 13:13 26:14 186:10 191:15 201:15 243:13 353:16

**clarity** 20:16

**clause** 303:3

**clear** 10:20 48:7,9 48:20,21 49:4,9,15 50:8 84:13 150:13 154:10 202:22 229:11 242:3 261:21 275:17 293:8 313:12 342:15 433:11

**cleared** 48:15 154:7

**clearing** 48:12 283:1,2

**clearly** 137:1,8 149:12 159:5 218:2 261:7 300:9 307:10 371:15

**client** 186:18 193:16,22 195:22 340:15,16

**clients** 266:22

**climate** 18:11 359:4

**closer** 355:15

**coalition** 1:3 4:2 8:16 241:4 438:18 440:2

**coincidence** 85:17

**colangelo** 2:3 6:2 9:18 10:1 13:14 26:17 55:22 56:4 56:6 62:5,22 69:20 71:2 82:19 83:19 87:10,13,14 93:21 98:13 106:5 108:6 111:4,13 114:9,12 116:16 117:8 118:14,19 120:4,11,13,18 122:10 123:4,9,13 131:10 133:7 134:4,17,22 137:16,19 140:13 142:13 143:13,21 145:1,5,9 146:21 147:8,12 149:6 158:7,15,18,21 160:13 161:8,18 163:10 164:13,16 166:2,18 167:1,4 182:3,6,11 186:20 187:4 189:5,9 190:22 191:17,21 192:1,3 194:6,13 194:17 195:17 196:8 199:19 200:1 201:3,22 203:3 204:20 206:7,16,21 210:9 211:5,8,13,20 212:7,10,13,16 215:17,22 218:4,9 219:17,21 221:17 221:21 224:14,18 226:2,12,16,20 228:11 234:18,22 235:21 240:7,10 240:16 243:15 253:20

**cold** 186:11

**colleague** 25:5,13

**colleagues** 99:19 99:22 101:18

**collect** 263:13,15 265:18

**collected** 80:4

**collecting** 263:9

**collects** 262:13

**college** 13:15

**colloquial** 16:16

**columbia** 89:22

**combine** 319:7

**combining** 351:13 424:12 425:2

**come** 25:3 29:9 37:1 39:7 47:19 47:22 50:9 76:5 77:9 90:6 91:3,6 91:11 109:3 129:4 154:18 156:15 157:22 170:7

183:21 192:4,14 213:15 214:16 233:9 262:16 265:20 266:4,14 268:4,7,10 270:18 273:6 289:5 291:6 318:14 351:13 371:7 411:20
**comes** 41:14 43:16 44:1 92:7 275:12
**comfortable** 389:12
**coming** 44:22 74:10 91:1,20 92:14 105:9 162:19 219:5
**command** 43:15
**commenced** 230:8
**comment** 387:7 389:14,21
**commerce** 1:6 6:14 8:17 9:21 15:21 16:1,11,13 16:20 17:6 18:2,6 22:2 26:3,6,8 30:11,12 31:1,22 32:19 33:18 34:14 34:17 35:4 42:2 43:21 48:15 53:11 63:13 73:5 74:22 75:4,22 95:19 99:8 100:15 104:6 104:8 124:9 125:9 150:12 169:19 170:9,20 172:3,17 173:20 176:2,11 177:5 188:20 219:1 227:22 245:21 246:5 247:5 248:4,22 251:3,9 258:11 259:13 260:19,21 273:10,14 274:2 274:14 278:13 279:1 280:1 291:7 291:9 295:20 296:6,8,11,12 299:9 300:5 319:20 320:20 329:21 330:5 338:19 340:22 341:2 342:8 344:6 347:21 387:7,20 391:4,15 392:1,15 392:21 394:8,15 395:13 396:13 399:12 401:16 403:2 404:19 405:17 406:11 407:5,10,12 408:17 410:10 413:6,11 414:22 415:3 416:10 420:21 421:9,21 422:3,11,21 424:6 424:19 425:13,19 426:10,19 427:4 435:2 438:18 440:3
**commerce's** 259:10 381:14 382:15 423:6 425:8
**commitment** 185:9
**commits** 412:14
**committed** 302:1 403:6,15
**committee** 3:1 4:2 5:11 12:1 16:11 16:20 17:1,3,7,22 18:3,10 22:20,22 23:1,7,9,14 25:17 26:3,6 28:13,19 53:3 123:20 130:4 138:21 139:3,4,9 139:14,19 140:10 141:12 149:3,7 291:22 293:2,6,9 293:14
**committees** 18:6 287:22 290:15
**common** 108:2 110:4 201:7,10 281:13 385:6,6
**communicate** 51:14 215:2 426:10 427:4,12
**communicated** 71:6 236:22 403:18
**communications** 196:3
**company** 1:17 439:14
**compare** 333:4 379:22 429:21
**comparing** 355:12 380:3
**comparison** 327:4
**comparisons** 333:8
**compel** 349:4
**compensate** 419:4
**complete** 28:12 103:15 253:6 351:10 354:3 368:22 417:16 418:17 419:5 423:7 424:9,9,22 425:11 429:6,9 438:5
**completed** 435:15
**completely** 10:10 306:9,20 419:8
**completeness** 350:16
**composed** 363:4
**computer** 342:5 387:5
**comstock** 1:12 2:2 2:7 8:14 9:14,20 33:6 56:1,10,12 62:1,6,8 63:2 73:7 80:9 82:14,15,20 87:6,16 93:16,18 93:22 109:7 111:14 120:21 121:12 151:10 159:1 182:13 189:12 194:18 200:2 212:17 216:1 222:1 224:19 226:21 241:2 250:15 293:8 302:11 309:6 316:11,13 318:1 326:4 332:12 335:16 336:6 375:15 381:3 423:17 436:8 438:2,14 439:3 440:5
**concept** 307:18 308:4
**conceptually** 307:14
**concern** 68:7 87:4 131:3 160:5 161:1 215:3
**concerned** 67:22 68:3 86:22 105:14 105:22 108:19

157:22 207:18 214:21,22 351:11 358:13 414:11
**concerning** 41:17
**concerns** 124:18 359:4
**conclude** 67:14 71:14 141:11
**concluded** 311:3 336:2 436:8
**concludes** 111:6 211:22 308:18 335:22 380:17 436:4
**conclusion** 69:6,7 131:21 154:20 185:6 213:16 214:17 230:17 265:20 301:3,20 303:4 304:7 305:2 308:13 312:12,14 320:21 321:12,22 323:19 331:19 340:14,19 347:14 411:8 433:22
**conclusions** 317:1 317:9 321:16 331:17
**conclusive** 317:16
**conclusively** 359:22
**concurred** 30:5
**conducted** 20:21 153:14 356:17
**conducting** 21:5 335:3 366:11
**conference** 80:7 90:7,10,11 165:20 291:14 434:12
**confidence** 224:6 356:15 418:22
**confident** 407:2
**confidential** 115:6 196:3
**confirm** 37:5 55:3 232:8
**confirmation** 16:11,13 20:19 23:22 27:15 28:16 29:2 31:16,19 32:8,11,22 33:4 37:3 54:20 55:8 69:2 76:17,22 124:7
**confirmed** 28:12 29:1 32:8 55:1 63:7 81:16 219:8 234:16 337:10
**confirms** 67:10
**conflating** 106:16
**conflicted** 92:16
**congress** 53:15,18 59:8 84:1,9 127:12 129:9 146:4 148:19 149:11 288:4 393:20 395:2 406:14
**congressional** 52:16,19 53:8,12 57:19 58:20 61:6 66:14,20 86:9 87:2 130:4 142:17 207:14,20 208:4,5 287:18 396:2 399:18 401:9 404:12 406:7 408:12 409:8 434:20
**congresswoman** 294:19
**conjunction** 342:9 368:10
**connected** 223:19 224:8 236:7 283:9 356:15
**connection** 143:20 372:3
**consequently** 181:7
**consider** 105:18 151:7 265:16 289:17,18 332:17 345:14 361:16 365:11,13,16,20 412:3 413:4 414:9
**consideration** 347:7
**considerations** 95:22 244:21
**considered** 16:19 80:2 109:10 158:5 360:4 366:14 371:17 413:19 425:10
**considering** 95:19 96:10 104:13,17 134:2,5 290:5,8 346:19 347:11
**consigned** 301:5
**consistent** 42:6
**constitution** 6:16 6:20
**consult** 311:12
**consulting** 12:6
**consumed** 411:18
**contact** 48:11 164:22 165:11 166:13 174:9 175:14 179:22 187:6 213:16 214:17 215:4,7,13 269:2 275:15 409:22 412:17 415:2
**contacted** 25:5 48:6 157:12 174:6 197:1,10
**contacting** 167:8 167:13 439:5
**contacts** 214:1 232:13,20 270:11
**contain** 376:5
**contained** 217:17 264:18
**contains** 379:4 384:3
**content** 2:1 95:21 130:5 149:8
**contents** 217:15
**contesting** 317:5
**context** 142:7 143:19 149:2,9 191:11 196:21 208:3,14 294:5 306:14 313:13 314:13 317:14 357:9,22 358:2,20 362:6 363:3 365:21,22 366:11 367:2,2 398:12 429:2
**continue** 8:11 150:2 160:16 264:15 266:18 367:18
**continued** 217:22
**continues** 385:5
**continuing** 190:16 190:21 350:18
**contract** 410:11
**contracts** 129:18

**contributed** 244:3 244:6 433:6
**contributing** 359:7
**control** 334:12
**controlled** 334:13 334:18 335:3
**conversation** 51:16 55:7,10 85:4,8,10 101:8,11 101:14 116:22 119:16,20 120:6 120:10 133:15 142:6 178:9,11 179:1,3,5 185:18 187:12 195:15,19 203:15 210:15 221:4,6 233:19 237:6 255:5 280:16 298:9 338:21 382:13 383:12 394:4,9,13 394:16 395:8,14 396:8 397:17 400:3,8 401:17 404:1 405:10,18 406:5,13,19,20 407:7 408:19 409:13
**conversations** 8:7 24:6,10 34:16 35:2,7 123:1 136:14 172:9 188:1 196:19 209:15 233:7 279:5 342:10 396:14,21 397:21 398:3,8,10 404:19 409:3 421:14
**convey** 164:3
**conveyed** 177:9 234:4 422:3 426:7
**conveying** 168:17 237:9
**convinced** 323:18
**copied** 56:15 144:18 209:6
**copy** 56:11 75:7 78:6 138:8 341:11 341:21 342:2 372:21 387:1,6 439:2
**correct** 12:11 14:7 19:11 21:21 22:12 25:14 26:9 29:11 29:14 34:11 35:19 36:3 37:14 39:19 40:5 42:21 45:19 46:16 48:10 56:22 57:3 58:9 61:22 67:13 68:12 73:1 73:6 74:19,21 78:14,22 83:3,6 89:6,20 91:2 93:7 99:21 100:11,12 104:15,18,21 105:1,4 113:1,3 114:3 115:14,16 116:9 119:1 127:14 128:9 131:17,20 138:10 139:12 140:22 141:1,10 143:4 144:17 148:10 151:1,5 152:1,8 159:18 163:12 165:13 166:4,22 167:11 168:2,19 170:13 180:16,17 181:21 183:4,10 183:11 185:19 186:4 198:15 200:9 204:4 205:7 206:3,4,10,14 208:12 209:2,3,7 210:1 214:12 216:18 218:15 220:21 222:9 228:4 229:2,3,4,5 229:21 230:2 231:16,18 232:14 233:11 234:3,10 234:16,17 240:4 241:21 243:7 246:1,14 247:19 248:14 250:1 251:4,5,10,19 255:4,14,19 256:12 257:5,13 262:14 264:22 266:19,20 269:1,4 270:1,4,7,22 273:3 277:2,3 279:7 282:9,16 285:20 288:9 291:20 292:1 294:13 295:2,8,17 297:5 298:12 299:1 309:12 318:11 319:1,12,13 326:7 326:22 337:3,4,6 337:11,15,18 338:3,4,6,7,11,12 338:15 339:4,5,20 339:21 341:22 342:18 345:4,9 346:5 348:2,6 352:3,16,19 364:12 366:10 368:3,21 369:3 370:9,14 371:2 372:12 375:11,13 375:16,17 376:9 376:10 382:11 383:18 384:14 385:11 386:4,5,6 411:3 416:15,18 416:19 417:1,2 418:4,12 419:10 427:20 438:4
**corrections** 438:6
**correctly** 33:19 142:16 255:12 260:3,8 279:20 295:5 332:5 355:9 381:12 382:12 414:8
**correspondence** 41:14 283:2 391:20
**cost** 47:12 222:16 223:21 288:21 319:18 320:18 359:12
**costly** 310:20 312:1 313:2 315:3
**council** 50:2,3 51:1
**counsel** 1:13 6:15 6:20 8:15 9:9 11:7 12:8 39:5,10 50:16,20 56:4 62:20 69:22 70:7 95:5,6,9 97:21 98:3,7 99:4,5,18 100:15 101:19 105:3 127:19,21 128:2,5,18 158:7 188:21,22 189:4 196:11 217:4,7 219:2 227:6,22 231:4 240:8,11 245:20 246:16

247:6,9 248:1,5,8 249:6,19 253:21 258:10 269:2 278:19 311:13 318:16 325:16 342:7,21 381:4 410:18 423:18 437:12,15 439:9 439:10,17
**counsel's** 70:17 128:11 214:8 232:21 346:1,2
**counsels** 98:17
**count** 66:1 69:11 124:17 162:6 208:16 224:10 287:9 310:21 312:2 315:4 329:2 331:21 359:13,14 360:21 369:1 416:15,17 418:12 419:5,6 423:8 431:12,18
**counted** 63:21 65:3,6,21 67:3 81:1 207:13,19 208:6,8,11,15
**counterpart** 165:1
**counting** 67:20 68:1,4
**countries** 108:15 108:22 109:5,10 109:14,16,22 110:7,10 413:17
**counts** 81:19 416:19
**county** 4:19
**couple** 11:21 18:19 23:2 31:7 174:15 178:17 244:8 381:10 416:14
**course** 13:22 14:17 28:7 48:12 125:8 179:9 288:4 288:15 307:10 316:20 345:13 435:20
**courses** 14:3
**court** 1:1 8:18 9:3 9:12 13:12 26:13 154:22 155:3,4,5,6 157:13 186:9 191:14 193:3 201:14 211:14 243:12 353:15,20 381:6
**cov.com** 4:13
**cover** 70:3 126:7
**covered** 18:9 126:8
**covers** 14:17 18:16 378:7
**covington** 4:11
**create** 239:9 424:9
**created** 341:16 343:14,16
**cross** 321:19
**csr** 1:17 437:3,20 439:14
**cubicles** 256:16
**current** 33:7 43:9 224:6 359:3
**currently** 13:1 39:15 41:4 132:15 207:8 261:20 272:15 296:20 352:14 357:4 367:15 403:19
**cursory** 154:21
**cutrona** 235:7,10 235:15,22
**cv** 381:6
**cvap** 181:11 352:13 354:5 357:4 429:7,10

**d**

**d** 8:1 318:10,21 319:6,15 351:14 368:20 429:5,8,12
**d.c.** 1:9,16 3:19 4:5,12 5:3,8,13 6:11,17,21 8:22 13:4 438:17 439:16
**daily** 38:12,13,19 38:22 49:1
**damage** 361:15
**dan** 7:1 9:1
**daniel** 4:11
**danielle** 6:1 235:7 235:10,15
**danielle.fidler** 6:6
**daniels** 4:15
**dares** 388:14
**data** 126:17 153:18 155:9 181:12,16 185:4 222:16 232:22 262:21 263:13,15 274:15 275:8 310:22 315:5 316:19 319:11,16 320:17 327:11,15 328:12 333:7 350:2,7,8,19 351:5 351:15 352:13 354:5,6,14,17 355:9,11 356:15 357:4,11,16 359:22 360:14 362:12 367:10 382:6,7 383:7 403:9,17,19,22 414:13 416:6 417:6,8,9 418:1,1 422:15 423:2 424:10,12,22 425:11 426:5,18 427:10,18,22 429:10 431:1
**date** 55:4,4 59:11 63:10 64:9 73:10 94:10,11 105:1,4 126:11 128:13 133:12 135:15 136:17 140:20 147:6 169:12 182:20 183:20 195:2 230:1,3,6 237:22 238:13 292:10 314:1 374:8 387:16 438:14 440:6,19
**dated** 56:20 78:21 88:1 115:13,15 127:8 138:11 183:10 222:11 230:1 235:7 309:21 323:9,10 341:9 374:10 375:21 376:8 437:21
**dates** 136:4,7,13 213:22
**dave** 85:2
**david** 4:3,19 6:14 46:21,22 56:20 57:1 83:1 85:4 87:18 93:1 98:6 100:2 110:15 201:5 202:6 240:12 241:3

**david.gersch** 4:6
**david.holtzman** 4:22
**davidson** 95:11 100:6,8 218:17,22 220:20 221:3 225:2 228:7,12,15 228:19 230:17 231:7,13,20 232:1 288:15 386:18 396:15,21 397:17 397:22 398:3,8 399:7
**day** 20:2 31:3 33:18 34:10,12 42:3 48:22 58:16 63:12 73:4,18 74:1 85:6,13,17 117:20,21 148:13 154:9 155:18 168:7 225:14 226:4 232:12,12 232:16 316:12 361:14 433:9 437:21
**days** 162:12 218:17 341:18 370:14 439:7
**ddewhirst** 6:18
**de** 4:2
**dead** 411:7
**deadline** 84:10 370:11
**deal** 281:4 375:19
**dealing** 152:14 224:7 245:17,19 245:21 257:18 281:3 282:22 285:15 306:15
**dealings** 249:21
**dealt** 52:11
**dear** 439:1
**decades** 347:8
**december** 124:4,4 238:6 239:2 290:16 309:9 348:17 397:8,11 419:21 420:13 421:2 424:4 426:8
**decennial** 10:5 54:18 57:19 58:20 59:5 61:7 67:15 78:18 79:2 82:4 127:13 130:21 153:13 175:22 176:9 180:9 192:11 203:21 204:2 261:20 265:17 272:19 292:17 294:16 319:9 326:19,19 328:20 330:1 333:4,5 334:9 374:5 379:6 383:9 383:14 392:7 393:4 396:10 400:11 402:2 403:21 404:3 405:13 416:17 418:10 429:19,21
**deception** 38:5
**decide** 40:16 84:10 84:20 132:11 152:6 296:7 366:5
**decided** 132:3 154:9 265:7,14 296:1,4 333:20
**decides** 38:2
**deciding** 365:19 434:7
**decision** 106:8,21 110:3 135:20 136:22 137:3,6 150:19 151:8 152:10,16 181:18 239:9 240:5 241:14 242:10 264:20 266:12 267:18,20 290:5 296:15 299:4 300:10,12,17 301:4,18 302:8 303:1,5 304:15 305:15 306:7,10 306:18,21 307:5 307:15 308:6 343:5 344:2 347:9 347:11,13 349:1,3 355:1 358:6 362:9 363:8 366:5 371:17 387:16 389:12,13 412:15 412:16 420:2 423:6 425:8 426:19
**decisional** 3:4 241:13 242:10 244:11 287:20 290:18 292:2 300:9 301:14,16 302:19 303:22 304:3 305:17 306:8,19 311:5 320:2 323:10 324:13 325:21 326:1,6 376:1
**decisions** 36:19 37:17 86:11 120:3 135:22 304:14
**decline** 351:1,3 358:15,22 359:2 359:18,19,20 360:3,7,8,9,16 361:5,8 362:2,6,11 362:20,22 363:1 363:16,17,20,21 364:6 365:9,12,15 366:1,8,16,18,19
**declined** 416:4
**declining** 363:11
**decrease** 330:20 330:22 416:20
**defendants** 1:7 6:8
**deferred** 402:12 405:7
**defined** 30:20
**definitive** 330:10 331:13 332:15,18
**definitively** 329:22 330:6,7 331:10
**degree** 12:9,10,14 13:15 14:6
**del** 381:7
**delay** 236:3,18
**deliberative** 345:20
**democracy** 103:9 413:22
**democrat** 307:4
**democratic** 28:9
**demographic** 132:15,16,18 134:7 137:7 359:20 360:8 363:1,4,6 413:20 414:11,18
**demography** 14:12,14,17
**demonstrate** 358:22

**dennis** 87:19,21,22
**deny** 297:9 380:13
**department** 1:6 5:17 6:10,14 8:17 9:20 15:21 16:1 18:2,16 22:2 30:11,12 31:1,22 32:19 33:18 34:14 34:17 35:4 36:20 41:13 42:2,14 43:21 48:16 51:16 52:8,11 53:11 58:5 74:22 75:4 75:11,13,22 94:8 97:4 99:7,10,13,15 101:1,13,15 104:5 104:8 114:2 124:9 125:9 126:18 150:12 153:7,16 157:4 165:12 166:9,11,14,20 167:20 169:19 170:8 171:6,10 172:3,17,22 173:20 174:4 175:9,20 176:2,2 177:1,10 179:6,14 179:22 180:10,13 180:18 183:2 184:2,20 185:2,5 185:10,11 186:3 187:19 188:9,17 188:19 190:9 195:14 196:14,15 197:2,17,18 216:16 219:1 222:8 227:22 237:17 238:5 239:3,15 245:5,12 245:18,21 246:3,5 246:11,19 247:4,5 247:6,18 248:1,3,5 248:17,21,22 249:10,13,21 251:2,8 260:19,20 262:17,21 269:3 270:6 272:3,15 273:1,10,14 274:2 274:14 275:6,16 275:21 276:3,9,22 277:10 278:1,13 279:1 281:6 290:16 294:20 295:11,15,18,20 296:1,6,8,10,11,11 296:12 297:1,5,10 297:17 298:3,20 299:3,11 300:7 305:11 309:7 319:20 320:20 329:21 330:5 338:19,19 340:1 342:9 343:16 347:18 348:18 349:1 350:3,9 381:14,22 382:8 382:14,16,19,21 387:20 388:7 391:4,14 392:1,15 392:21 394:7,15 395:13 396:13 398:18,20 399:1,4 399:12 400:3 401:16 403:2 404:19 405:17 406:10 407:5,9,12 407:20 408:17 409:19 410:10,15 410:17 411:2,9 412:4 413:3 414:22 415:3,22 416:4,10 420:21 420:22 421:7,9,14 422:4,11,12,15,22 423:15,22 424:6 424:19 425:10,13 425:14,19 426:4 426:17,19,20 427:13,16 428:3,5 428:11 438:16,18 440:3
**department's** 425:6 426:13
**departments** 42:12 51:14
**depend** 60:15 201:11 202:3
**depending** 52:20 143:9 356:16 359:20
**depends** 40:19 46:3 47:11 50:17 52:13 53:5 92:1 280:21 365:19,21 380:4
**deponent** 438:1
**deposed** 10:7
**deposition** 1:11 2:7 8:10,14,20 10:5,18 11:6 56:17 62:14 287:11 335:21 336:2 435:19 436:5,7 437:4,6,10 437:14 439:3 440:6
**deputy** 6:20 17:9 20:12 21:20 22:1 22:1,6,14 24:13,20 26:8 33:8,10 35:13,14 36:8,17 57:5 92:13 93:9 198:8 203:13 386:11
**describe** 28:5 141:19 210:17 237:5 387:12
**described** 17:13 219:11 353:1 357:20
**description** 38:4,6 381:13
**desk** 72:2 73:16 256:18,19,19,20 256:21 257:3 342:5
**desks** 73:13 256:16
**detail** 271:17 312:22 313:16 381:20 383:11
**detailed** 42:11,16 42:20 263:22 264:4,17 413:18
**detailee** 43:15
**detailees** 283:22
**details** 43:20 55:12 84:2
**determination** 199:18 343:1,20 345:4,14,15 393:2 428:2
**determinative** 330:9 417:21
**determine** 109:16 109:22 329:22 330:6,7 349:21,22 413:11 417:22 429:20 430:1
**determined** 264:13 333:19 413:10
**determining** 262:10 430:16

**develop** 45:6,21 46:6
**developed** 46:7
**developing** 19:2 19:10 45:2,7,16 105:16 150:2
**development** 44:9
**developments** 119:10
**dewhirst** 6:14
**dgrant** 4:13
**dhs** 183:5 184:19 185:3,7 196:15 278:2,5 410:22 411:11,11 412:9 413:6
**dictated** 413:3
**difference** 22:4 254:16
**different** 16:21 19:7 41:14 42:12 43:20 93:15 113:5 247:14 254:6 257:14,15 259:2 297:22 300:1 301:11,13 302:20 305:16 306:9,20 307:18 313:8 314:14 356:18
**differential** 359:20
**differently** 19:19 332:13 334:2 358:1
**difficult** 261:2,11 359:9 360:21
**difficulty** 307:15
**dinner** 125:19 160:18
**direct** 71:21 78:3 99:14 179:13 293:20 294:3 310:10 401:16
**directed** 115:11 122:18 179:5 183:1 184:12,16 185:11,16 285:10 347:21 348:3 370:19,20 412:20 418:19
**directing** 175:2 429:19
**direction** 121:22 283:11 437:10
**directive** 392:15 392:20
**directly** 36:6 47:11 49:20 50:2 50:3 66:8 69:10 188:7 245:19 390:10 400:13,19 400:21 401:20 423:20
**director** 18:8 33:9 33:10,12 35:13,18 35:20 36:1 37:7 37:22 43:8 48:2 52:15 53:15,21 59:22 60:14,19 128:7 139:18 142:19 147:1 148:1 162:17 203:13,20 204:1 237:15,19 281:7 386:11
**directors** 44:6
**disagree** 305:12 305:14 306:6 312:11,13 313:4,7 317:3,16 352:4
**disagreement** 258:18
**disclosing** 196:3
**disclosure** 195:21 345:19
**discourteous** 279:15,22 280:7 280:20
**discover** 431:5
**discovery** 435:17 435:18
**discretion** 70:14 301:6 302:1 412:14
**discrimination** 4:2
**discuss** 77:21 98:19 99:1 100:13 100:21 101:21 102:6 113:22 124:9,12 133:8 134:11 156:22 157:8 164:8 166:11 170:7 178:8 203:16 209:9,12 210:8 221:9,11 228:8,13 238:20 257:19 290:11 339:13 344:5,8 387:19,22 388:3,6,9 389:18 393:7,8 410:1
**discussed** 26:7 89:9 97:11,16 98:21 99:4,19 100:2,18 102:7,14 104:11 118:9,15 124:14 129:20 133:17 142:4 144:1,12 162:8 163:14,17 164:4 164:11 188:5 196:6 208:5 209:14 225:9 228:16,20 231:8 283:22 290:22 359:21 391:5,15 392:2 393:12,16 399:8,13 408:20
**discussing** 104:7 133:4 142:3 188:10 231:2 257:20
**discussion** 21:10 32:6 59:15 124:20 135:17 172:17 184:19 195:9 206:9 225:11,14 225:18,19 230:10 236:14 252:1,6,11 255:1 258:9 287:15 290:1 339:2 360:11 404:10 409:16 421:18
**discussions** 19:7 31:21 32:9 59:12 100:10 157:4 187:19 232:17 290:21 316:21 397:13
**disinclined** 359:15 360:22
**dissimilar** 417:13
**distressed** 162:17
**district** 1:1,2 4:14 8:18,19 13:3 89:22 336:13 349:11 381:6 420:9
**distrust** 330:15
**divine** 168:11
**division** 242:20 289:13 433:9

**doc's** 214:7
**doc.gov** 6:18,18,22
**document** 48:6,8 48:12,20 49:3,8,14 50:1,4 56:5,7 62:6 62:19 63:2 64:12 78:8 82:15 87:11 93:17 94:3,6,16,19 108:11 114:10 120:19 121:9 123:14 137:20 145:10 158:22 159:8 164:17 167:5 182:12 189:10 194:14 199:19 200:5 212:10 215:17 218:5 219:18 220:5,8 221:18 222:3 224:14 226:16 227:1 234:19 246:7 247:7,8,10 248:7 248:20 258:15 259:7 309:14 310:5,7,9 311:6,17 312:7,9 313:2 318:7,8,9 320:1 341:16,22 342:3 343:9,14,16 347:13 358:14 373:3 375:5,6,7,8 375:8,21 376:5,16 376:22 377:16 378:22 384:9
**documenting** 137:6
**documents** 11:8 11:10,13 48:14,22 50:8 55:19 62:20 80:16 174:10 243:10,14 318:13 318:14 320:6,8 371:4 376:20 377:7 435:18
**doing** 19:18 31:13 40:12 42:5,6 44:4 45:4,18 47:12,13 117:17,21 150:16 186:17 193:1 266:21 300:21 307:16,17 325:16 367:17 371:13 418:20 425:1
**doj** 154:18 155:1 156:21 157:8,10 157:14 158:1 164:22 165:1 176:12 192:5,5,7 192:15,15 213:14 214:1,2 215:13 216:21 217:1,3,5 217:10,13,17 232:13,17,20 283:6 290:4 291:8 291:9,10 299:19 338:6 344:16 354:5,15 397:14 397:14 403:4,8,14 407:13 408:18,19 411:13 412:1,9,20 413:6 414:21 416:10 419:21 420:13 421:9 423:2 424:7 427:4 429:6,9
**doj's** 155:21 337:3 427:6
**doj.ca.gov** 5:20,20
**domestic** 50:2
**donald** 383:13
**dorian** 5:11
**double** 13:7 90:15
**doubt** 267:10 380:5
**doubts** 252:21 253:1
**dozen** 125:11 285:14
**dozens** 411:17
**dr** 238:10 312:20 314:3,3,5,5 315:1 315:2 316:14,14 318:3 322:18,18 324:4 325:10,10 432:19,20 433:8
**draft** 3:5,7 94:7,21 94:22 99:2,11 100:13 113:9 218:13 219:15 242:22 243:1,3,18 243:21 244:2 246:2,6 247:7 309:20 310:4,4 311:4,9 318:12,13 318:14 319:2,19 320:2,4,6,9,19 321:3 342:17 344:4 345:9 346:11 372:16 375:18 376:1,14 413:1
**drafted** 357:12 371:6 377:11,13 410:21
**drafter** 242:15,19 369:14,17
**drafters** 242:16,17
**drafting** 95:1 345:3,11 380:11 430:14
**drafts** 244:5
**draw** 69:5,7 331:15 369:4 384:22
**drew** 331:16
**driving** 224:12 285:4
**drop** 326:11 330:11,12 417:12 418:11
**dropped** 292:16 294:15
**dspence** 5:14
**due** 149:13 236:3 236:19 365:10
**duly** 9:15 437:7
**dunn** 101:22 137:12 218:18 219:3 222:22 288:15 310:1 325:7,8 369:11
**dwkesq.com** 4:18

**e**

**e** 4:1,1 8:1,1 25:10 25:11 160:18 438:15 440:1,1,1
**eager** 236:19
**earl** 1:12 2:2 8:14 9:14,20 40:8 57:9 58:3,4,6,10 139:17 166:3 227:15 436:8 438:2,14 439:3 440:5
**earl's** 57:20,21
**earlier** 83:21 85:6 104:2 122:1 161:13 162:8 166:19 172:6 195:7 219:11 221:2 244:10 283:22 317:2

356:19 358:21 367:6 369:21 389:15 400:7 409:12 410:8,20 423:9
**earliest** 195:8
**early** 27:16 166:1 179:12 184:8 187:22 271:11,11 316:21 317:8
**earn** 12:20
**earned** 12:13
**easier** 365:8
**eastern** 84:16 86:19 141:20 143:2
**easy** 128:5 196:9
**economic** 47:1 50:3,20 51:1 219:5
**economics** 13:21 42:17
**economist** 43:2
**edit** 243:10,14,18
**editing** 345:12
**edits** 95:2,4,11,14 246:3,6 247:9 249:4 342:13 344:12 346:4,13
**eds** 48:17
**education** 13:18 14:8,11,18,21 15:2
**educational** 11:17
**effect** 152:16 237:12
**effective** 199:8,16
**effectively** 204:2
**efforts** 350:6 411:6
**eight** 234:7,10,12
**either** 11:1 23:6 50:9 52:22 124:4 246:8 320:8 386:13 408:18 416:8
**eleanor** 292:12
**election** 15:3,12,13 15:14
**electronic** 60:8 346:14
**elena** 6:2
**elena.goldstein** 6:6
**eleventh** 63:12
**eligible** 350:1
**eliminate** 333:5
**ellen** 36:22 56:20 57:4 87:19 92:12 97:15
**else's** 270:13
**email** 2:9,9,10,10 2:11,12,12,13,13 2:14,14,15,15,18 2:18,19,19,20,20 2:21,21,22 3:8,9 40:14,17 49:17 55:21 56:2,12,16 56:19 57:7,17 59:17 60:3,22 62:3,8,9,13 63:5 63:15 64:22 65:13 67:6,9 69:2,6 71:9 71:10,11,13,21 73:7 75:8 77:22 79:14 82:17 83:1 83:4,11,13,16 87:8 87:18 88:6,10,13 89:9 92:10 93:13 93:14 98:20,21 110:17,19,19 114:7,15,16,22 115:2,10,13,15 116:9,21 118:8 120:15 121:2,5,13 121:18,20 122:11 123:11 127:7,10 128:14 129:14 130:2 132:12 133:13 136:16,20 137:17,21 138:2,5 138:7,17 139:11 143:19 144:19 145:7,13,15,17,19 146:2,17 147:10 147:14,16,20,22 149:4,9,16 152:7 153:2 154:22 156:6,11,12,20 157:13 158:19 159:4,7,9,11,17 160:16 161:9 163:2,6,8 164:14 164:21 165:14 167:2,9 168:12 174:10 184:3 189:14 191:19 199:21 202:5 203:5,8 205:3,5,15 205:18 206:14,14 207:6,11 212:14 212:20 213:2,13 214:16 215:6,19 216:1 218:6,12 219:19 220:7,10 221:1,19 222:4,11 223:18 224:16,22 225:1,5,22 226:18 227:14 229:8,12 230:8,22 231:9,21 232:3 233:2 234:20 235:4,6,19 236:16,21 239:22 378:18 379:3 380:10 383:22 384:3,3,5,7,12,13 385:1,11,12,21 386:4,5,13,15,17 386:20,22 387:3,4 387:12,19,19,22 388:3,6,9,20 389:1 389:4,9,10,16,17 390:18,21 391:1,5 391:10,15 392:5 392:16
**emailed** 81:17,20 83:7 118:5,6 146:13 177:5 206:2 232:1
**emailing** 85:3,18 115:19
**emails** 117:20 156:13 219:11 259:22 371:4 373:6 376:18
**emphasize** 146:3 148:19
**emphasizing** 149:10
**empirical** 329:1,7 329:11,13 433:16
**employed** 437:13 437:16
**employee** 85:20 125:3 437:15
**employees** 30:11 31:1
**employment** 104:5
**empty** 411:20
**en** 90:6 91:3,11 92:8
**enable** 430:3
**enclosed** 439:2

**enforce** 265:11 294:22
**enforced** 192:17
**enforcement** 126:17 262:9 263:14 383:6 393:10,13 394:17 395:17 399:9 401:2 402:8 403:3 403:6,16 404:11 408:22 409:4 414:14 427:19
**enforcing** 192:13 277:11
**entered** 61:9
**entero** 381:7
**entire** 97:4 314:9 314:10,15 315:19 351:2 354:4 373:15 430:3 431:13
**entirely** 65:22 85:14 86:6 93:12 95:13 101:12 102:1 133:17 197:16 201:6 203:22 324:8 406:18
**environmental** 6:4 14:1,6
**equally** 144:12
**era** 385:5 388:19 388:21
**eric** 74:4,5 75:10 97:12 157:9 164:21 165:11,14 166:3,12 167:15 173:8,10,18 197:22 256:3,21 257:4 283:5 410:10
**erosenberg** 5:14
**errata** 438:7 439:8
**error** 285:13 350:10 352:15 353:2 354:10,12 354:17,19,20 355:7,21 356:2,4,9 356:12,13,20 357:6,11,14,19 358:1,3 361:11 431:14
**errors** 333:6 352:20
**esa** 43:1
**especially** 132:17
**esquire** 4:3,7,11 4:15,19 5:1,5,6,10 5:11,16,16 6:1,2,2 6:3,9,9,13,14,19 438:15
**essential** 120:9
**essentially** 18:15 41:9 44:2
**establish** 149:7 430:4
**established** 104:20 262:4 349:8 379:8 386:7 410:8
**establishing** 432:16
**estimate** 47:12 223:21 288:21 359:12
**estimated** 330:21
**estimates** 81:2 350:3
**estimation** 363:2 363:18
**et** 1:3,6 8:16,17 44:12 302:3 413:19 438:18,18 440:2,3
**ethnic** 138:21 139:9 140:10 141:13
**ethnicity** 362:8,11
**evaluate** 364:7
**evanwell** 240:5
**evening** 83:16 204:7 214:3 227:15,17
**events** 11:15
**everybody** 43:10
**everybody's** 42:5
**evidence** 330:9 331:14 332:18,19 367:12
**evident** 374:4
**evolving** 353:12 354:1
**exact** 55:9 100:10 133:12 135:15 136:4,7,13 155:4 169:12 178:18 237:3 244:18 314:1
**exactly** 126:21 187:14,21 188:2 189:19 209:16 217:15 227:13 245:15 253:20 278:10 343:11 352:7 371:5,14
**examination** 1:13 2:3,3,4,4,5 9:18 241:1 321:19 336:5 381:2 419:19
**examined** 9:16 438:3
**example** 19:18 43:14 44:3 50:12 52:7 53:1 349:13 362:8
**exchange** 55:21 89:11 93:12 133:14 165:14 205:4,5 220:10 233:8 292:14 321:16
**exclamation** 139:20
**exclusively** 51:22 52:2
**excuse** 259:15 284:6 420:8 422:14 429:7
**execute** 349:16
**executive** 48:18 281:7
**exercise** 331:2
**exhibit** 2:8,9,9,10 2:10,11,11,12,12 2:13,13,14,14,15 2:15,16,16,17,18 2:18,19,19,20,20 2:21,21,22,22 3:3 3:3,4,5,6,7,8,9 55:22 56:1,2 62:1 62:2,3 64:22 71:3 80:9 82:14,17,20 87:7,8,13,15 92:20 92:22 93:18,19,22 111:16 114:6,7,11 114:13 120:14,15 120:20,21 121:12 123:10,11,16 127:6 130:2 137:16,17,21 145:6,7,11 147:8 147:10 148:11 149:16 158:16,19 159:1 164:13,14

164:18 167:1,2,5,6 182:4,7,12,13 189:6,7,10,11 191:20,21 192:1,2 194:13,15 199:20 199:21 200:2,12 204:21 205:3 208:21 212:11,14 212:17 215:18,19 218:6,10 219:18 219:19,22 221:18 221:19,22 224:15 224:16,19 226:17 226:18,21 229:13 232:15 234:19,20 244:16,18,19 293:1 309:3,15 314:7 317:19,20 318:2 321:14 325:22 326:1,5,14 329:18 372:15 373:3 374:19,20 375:2,15 376:12 376:13 378:17,18 378:22 379:22 383:19,20,21 428:15
**exhibits** 2:7 3:11 269:15 326:11
**existed** 41:8 389:17 390:18
**expect** 85:2 268:3 268:6,9 289:20 355:7
**expected** 81:1 355:15
**expediting** 204:13 204:17
**expending** 412:2
**experience** 13:19 14:9,12,19,22 15:3 42:13 185:12 282:13,18 307:2 307:12,13 433:19
**experienced** 343:10
**expert** 349:9
**expertise** 18:4 39:4 42:13 282:3 324:20 434:2
**experts** 324:16 434:3
**explain** 41:22 46:2 150:4 171:16 272:7 278:11 280:12 413:15 417:3 418:14 430:15 432:4,6
**explained** 177:12 272:14 279:3 358:21 423:9
**explaining** 152:11 241:14
**explanation** 181:1 277:22 344:15 382:14 430:22 431:20 432:5
**explore** 150:7 190:16,21 337:12 348:3
**explored** 374:3
**exploring** 135:20 151:2 176:22 177:10,16 178:10 178:22 180:7
**exposed** 301:22
**express** 344:20
**expressed** 82:3 207:21 348:7,9 389:16
**expressing** 160:4
**extensive** 40:21 71:9 316:20
**extent** 18:17 37:16 70:19 131:7 133:3 195:20,22 308:2 335:21 397:2 400:4
**extra** 276:16
**extrapolate** 368:6
**extrapolated** 352:17 357:6
**extrapolating** 368:12
**extremely** 144:6 144:10
**eye** 3:18
**ezra** 5:10 336:7 372:19

**f**

**face** 124:16,18 279:16 359:3 410:15
**facilitate** 164:9
**facing** 257:2,2,4
**fact** 20:20 89:21 105:10 106:17 108:15,16,18 162:12 163:19 195:10 207:7 230:13 233:20 283:7 285:3,10 290:14 308:7 330:20 331:20 332:6 349:16 350:1,4,6,9 351:6 357:10,15 358:15 361:12 362:16 374:4 390:17,20 414:7 419:4 431:7 435:16
**factor** 350:11 365:13,16 417:21
**factors** 105:19 366:3,15
**facts** 186:21
**factual** 69:15 295:13,14
**failed** 162:19 360:13
**failure** 419:12
**fair** 43:18 204:9 217:21 226:13 270:14 272:6 288:6 309:17 323:2
**fairly** 47:15 135:6 289:16 290:7 303:18 312:17 350:10 357:16 407:2
**faith** 283:11
**falling** 291:15
**false** 301:20
**familiar** 17:2 84:2 126:2,4 127:22 128:3 138:20 396:16
**faqs** 66:7
**far** 311:8 351:11 351:19 361:11 420:18
**fashion** 275:18
**faster** 204:15
**february** 15:17 37:4,7 55:2 56:21 58:15 59:6,11 63:8 104:19
**federal** 34:9 185:12,15 283:2 307:3 381:5 387:5

**feel** 185:1 407:2
**feeling** 211:8
**feelings** 300:11
**feels** 120:9
**fellow** 77:9
**felt** 184:19 185:3 190:15,16,20 199:7 343:17
**fewer** 326:10
**fidler** 6:1
**field** 13:16
**fifth** 256:9
**fight** 388:14
**figure** 32:3 41:18 42:5 224:2 266:7 284:4 319:11
**file** 101:2
**filed** 8:18 287:5,14
**fill** 328:4,15 423:12
**filled** 37:13 327:9 327:18
**filling** 54:5
**final** 36:19 151:9 311:6,17 312:14 316:22 317:9 319:3 321:10 373:16 374:12 376:22 389:19,22 429:14 433:10
**finally** 61:16 429:15,18 430:11
**finals** 318:13
**finance** 6:15
**financially** 9:7 437:17
**find** 155:18 162:12 162:21 163:19 181:9 208:13 224:9 266:9 267:5 267:17 269:14 273:1 279:17 297:18 439:2
**findings** 328:20
**finds** 70:8
**fine** 211:12 241:7 274:17 307:13 344:22
**finish** 20:16 45:13 79:5 151:14 224:4 273:21 284:7
**finished** 197:19 263:6
**finishes** 194:3
**finkelstein** 6:3
**firewalls** 31:4
**firm** 9:1 12:4,6,7 135:19 228:3
**first** 9:15 26:22 30:2 33:17 34:10 54:16 55:7 68:21 69:4 71:22 81:14 82:3,8 84:3 94:5 99:11 104:3,12 114:17,21 121:4 121:12 133:8,17 150:10 180:4 181:2 187:5 189:2 195:15 196:10 208:21 235:6 242:22 243:1,18 290:13 318:3 329:20 335:6 336:9 339:8 341:15 342:1,16 348:16 375:1 385:1 387:8 429:3
**fisheries** 18:4 201:20
**fit** 201:13,18
**five** 158:7 178:12 197:15 198:13,16 211:2 256:11 364:18 373:17
**fixed** 43:22 44:2
**flag** 41:16,16
**flexible** 44:3
**flipping** 375:3
**floor** 439:15
**flyer** 388:12
**flynn** 164:22 165:8 165:9
**focus** 254:7 301:1 301:16 302:22 304:2 308:9 317:7 338:21 423:7
**focused** 130:17 242:2 356:1 357:3 358:5 371:11
**focusing** 356:8
**folks** 76:4 81:12 99:7,13 126:3 279:1 283:8 289:14 313:19 324:17 340:18 359:6
**follow** 23:3 28:8 28:10 30:2 40:10 59:20 60:22 61:2 61:5 70:17 89:8 152:13,21 154:17 154:19 177:17 181:17 342:21 346:1,2 360:12 361:3 372:2 399:3 411:14
**followed** 165:15
**following** 64:3 115:20 206:8 242:4 248:6,8,18 249:6,7 278:3 285:9 303:19 390:21
**follows** 9:16
**font** 380:4
**forefront** 64:20
**foregoing** 437:4,6 438:3
**foreign** 80:22
**forget** 31:9 427:2
**forgive** 136:9 400:6
**form** 103:17 106:4 106:19 120:1,7 145:20 160:10 166:15 187:1 189:1 195:12 199:6 204:11 225:21 252:17 253:8 255:9 258:6 259:11 274:5 276:5 280:15 284:21 299:12 310:7,9 326:20 327:3,4,5,6,8,12 327:13,15 329:3 343:21 346:14 353:9 372:11 381:18 383:14 393:4 396:10 404:15 405:13 409:1 410:3,6 412:10 417:17 418:10 424:14 433:18
**formal** 198:7 239:4,5 296:3 309:8 347:10,15
**formally** 123:20
**format** 320:14 372:8
**formed** 106:2 110:8

**former** 17:1 18:8 25:5,13 123:19 227:21
**forming** 107:2,5 107:22 108:7,13 109:8
**formula** 351:16 431:1
**formulate** 150:5,6
**formulated** 370:5
**formulation** 110:2
**forth** 30:21 46:11 50:15 102:5 271:4 308:6 323:19 350:21 376:19
**forward** 218:3 265:19 266:9 350:12 415:4 423:7 436:1 439:8
**forwarded** 159:16 163:6 165:19 386:3
**forwarding** 159:10 163:11
**forwards** 165:17
**found** 66:2,4 79:21 110:18 261:2,11 297:2
**foundation** 116:14 117:6 118:12,18 122:7,21 134:16 134:21 140:7 142:12 143:8,17 161:5 163:5 201:1 206:6,12 235:18 286:7,16 334:21 380:8 384:16 390:3,12 392:9,18 407:16 408:1,4,7 412:11 413:8 415:20 422:17 423:4 424:15 426:2
**four** 98:7 178:1,20 188:3 256:6 271:7 277:16 370:14
**fourth** 58:16
**fraction** 371:13
**frame** 27:13 40:19 55:9 187:22 188:3 201:11 237:8 289:8 397:5
**francisco** 4:21
**frankly** 261:22 359:6 413:17
**fraud** 393:14 394:19 395:19 399:13 401:4 404:11 406:5 408:10 409:6
**free** 363:9
**freedman** 439:9
**frequency** 144:15
**frequent** 47:15
**frequently** 52:21 53:4 66:9,14,19 119:3,6 160:17 232:10
**friday** 65:1 73:8 75:9 216:11 217:19
**front** 18:10 82:21 87:15 92:20 94:1 111:16 114:13 120:22 123:16 137:21 141:18 152:9 156:13 159:2 167:6 182:14 189:11 194:18 200:3 204:22 212:18 218:10 219:22 221:22 235:1 292:19 313:18 318:5 406:17 417:9
**frustrated** 197:5 223:11,13
**frustration** 160:5
**full** 216:9 269:11 310:11 313:16 358:8 429:1
**fuller** 430:22
**fully** 70:5 254:9 261:16 419:8
**function** 41:11 45:1 53:20 68:9 76:22 208:19
**functions** 26:5,6 41:7 44:17
**fundamental** 95:19 96:10 244:20 258:17
**funded** 124:19
**funding** 95:21
**further** 108:11 149:2 203:14 216:4 262:5 312:7 374:3 389:18 391:8 413:9 437:14
**future** 20:18

**g**

**g** 8:1 141:8
**gabrielle** 5:16 420:5
**gabrielle.boutin** 5:20
**gardner** 6:9 62:15 69:18 70:18 83:17 98:11 106:4 108:4 110:22 111:5 116:13 117:5 118:11,17 120:1,7 122:6,20 130:12 133:1,21 134:15 134:20 140:6 142:11 143:7,16 144:20 146:18 148:21 158:17 159:20 160:10 161:4,15 163:4 166:15 182:5 186:7,11,16 187:1 189:1 191:20,22 194:3 195:12,20 196:7 200:22 202:19 204:11 205:20 206:5,11 206:19 210:5 211:5,10,19,21 212:12 224:4 225:21 226:5 228:9 235:17 240:9 246:20 247:1,20 250:5 252:3,17 253:8,17 254:12 255:9 258:6 259:11 263:19 268:14 274:7,10 275:3 276:5 278:16 280:15 284:17,21 286:6,15,22 292:21 297:13 299:12,14,16 301:2,17 303:2 304:5 305:1,18 306:12,22 307:20 308:11,16 311:14 316:9 320:11 329:3 331:11 334:20 336:1 340:13 341:10

343:21 345:18 353:19 366:20 372:19 380:7 381:18 384:15 390:2,11 392:8,17 403:10 404:15 407:15 409:1 410:3,6 412:7,10 413:7 415:6,9,18 415:20 422:5,16 423:3 424:14 425:4,16 426:1,15 427:8 428:8,16 433:18 435:20 438:15 439:1
**gary** 396:9,14,16 396:22 397:4,18 397:22 398:3,6,9 399:7,8,13
**gauge** 57:20
**gears** 232:9 434:17
**geary** 115:3
**gender** 64:19 84:18 86:18 130:22 131:15 141:9 362:14
**gene** 179:16 183:2 183:6 184:16,18 185:9,22 188:2
**general** 5:17 6:3 6:15,20 10:2 16:22 46:6 86:9 95:5,6 99:18 100:14 101:19 127:18,21 128:2,5 128:11,18 167:22 168:1 183:15 188:21,22 189:4 189:21,22 190:3,6 191:2 196:11 214:7 219:1 227:22 231:4 232:21 233:10,18 233:21 234:2 235:13,16 236:14 236:17 237:6 245:20 246:16 247:6,9 249:18 258:10 298:11,15 325:16 342:7 397:5 400:8,9,19 400:22 401:2,17 401:21 402:16 403:1,6,15 405:11 405:18
**general's** 402:1,3 402:4,20 420:6
**generally** 46:7 60:12 65:18 68:15 76:8 307:12 338:18 405:14 406:22
**generals** 388:13 388:17
**generated** 248:4
**genesis** 129:13
**gentleman** 34:19
**george** 13:20
**gersch** 2:3 4:3 186:15,19 240:14 241:1,3 246:21 247:12 248:9 250:3,6,14 252:9 252:18 253:12 254:4,18 255:11 258:8 259:14 264:2 268:18 274:8,18 275:11 276:11 278:18,20 280:18 284:18 285:17 286:9,19 287:3 291:17 292:20,22 293:4 297:20 299:15,21 299:22 301:10 302:10 303:8 305:6 306:2,16 307:6 308:3 309:5 311:19 316:10 317:22 318:18,20 320:13 326:3 329:6 331:5,7 332:11 335:1,9,16 344:3
**getting** 16:10,12 30:20 59:1 69:15 217:22 243:19 281:4 285:7 318:13 319:2 427:17
**give** 50:12 56:11 63:13 136:19 174:16 240:7 275:1 334:5,6 355:2 363:3 366:6 372:20 374:9 429:11 431:17
**given** 30:16 40:13 72:12 140:9 197:3 246:15 303:2 321:10 364:13 437:11 438:5
**gives** 429:14
**go** 13:6 22:22 25:2 31:8 39:8 46:11 64:22 67:5 71:3 84:1 92:22 117:20 142:8,17 150:7,8 152:20 155:18 158:8 169:19,21 181:13 191:18 200:11 204:21 215:15 231:1 240:17 250:17,21 266:8 267:17 286:4 335:9 341:12 350:12 352:22 355:15 360:13 373:5 380:16 411:9 419:13 435:7,8 436:1
**goal** 88:20 427:17
**goes** 88:20 152:16 205:12 423:7 429:11
**going** 8:4,12 16:21 22:17 30:18 32:17 40:16 62:15 64:7 66:6 74:12 77:8 78:7 111:2 128:17 130:17,19 142:17 150:2 158:9 163:1 164:6 168:15 185:7 190:9 192:18 197:17 201:17 208:20 211:7,12 214:15 217:14 233:21 238:14 239:17 240:18 241:6 242:6 260:12 263:22 264:9 266:11 267:9,13 267:18 268:16 271:8 281:11 282:11 283:10 284:12 285:12,16 287:1,10 288:19 288:20 289:10,20 289:21 291:1 299:6 302:13 303:15 305:22

306:4 307:9 308:1 308:14,17 316:7 316:13 335:11 341:16 344:18 345:18 346:1 353:19 359:8,9,13 360:20 361:2 363:10 364:4 370:17 371:3 374:15 384:21,22 419:14 429:15 431:16,17 432:10 434:5 435:10
**goldstein** 6:2 435:7
**good** 8:3 11:2 43:3 44:8 90:13 127:2 150:9 211:6,9 212:9 241:2 249:14 254:9,20 255:2,8 258:15 259:8,9 263:4 265:8 294:9 308:16 336:6 351:15 381:3 413:20,20 420:18 420:19
**google** 109:19
**googled** 109:21
**googling** 110:9
**gotten** 110:11 246:8
**government** 3:2 78:18 81:22 125:3 126:16 152:12,18 153:11 154:4 158:5 185:13,15 204:16 205:14 229:2 239:8 262:12 263:5,10 264:4,16 265:9 266:22 291:22 293:2,7 304:13 307:3 330:16 335:20 347:4,6 359:5
**governmental** 25:16 192:7 258:22 262:2,7 263:17,21 412:4
**grant** 4:11
**granular** 275:7
**granularity** 272:20 273:2
**granule** 176:7 193:4
**great** 11:4,12 26:20 42:4 51:2 271:17 381:20 383:11
**greater** 272:19 313:16 359:2 365:17,18 366:6 366:15,18
**grossman** 4:7
**ground** 70:2,3
**grounds** 62:16 345:19
**group** 76:4,7 77:15 142:20 221:15 352:13 357:4 359:21 360:3,8 363:1,4
**groups** 54:15 132:18
**guess** 37:19 141:15,16 357:21
**guy** 175:4 271:1 271:14 277:6 285:16,19
**guy's** 283:3
**guys** 276:2 280:1 295:19

**h**

**h** 25:10 440:1
**half** 12:7 21:7 49:11 111:2 328:6 328:7 331:1 361:9 366:12,18 367:3
**hamilton** 179:16 180:5 183:2,6 184:16,18 185:1 185:22 188:2 196:15 277:4,6,14 277:19 278:17,22 279:5,22
**hand** 56:7 240:11 318:17 430:14
**handed** 82:15 87:11 93:17 114:10 120:19 145:10 342:2
**handful** 144:4 164:6
**handing** 56:4
**handle** 381:22
**handled** 19:19 184:20 185:2 411:1
**handles** 18:2
**handling** 19:8 342:8
**haney** 269:5
**hang** 45:13 107:10
**hankey** 157:11 167:11,14 168:21 168:22 172:4,9 174:2 196:13 269:8,10,19,22 270:15 281:10 283:6 338:5,14 339:11 381:9,15 383:5 410:9
**happen** 84:5 152:14 306:17 307:7,11 331:16 337:17
**happened** 60:5 92:5 348:22
**happening** 86:3
**happens** 232:10
**happy** 62:18 66:22 77:11 78:16 162:20 203:15 302:16 308:2 311:12
**hard** 124:17 244:6 331:21 359:13,14 417:10,22
**harms** 310:20 312:1 315:3
**head** 31:9 204:2 266:6 365:8 416:15,17 418:11 433:8
**hear** 54:16,21 213:10 253:16 316:8,15 336:16 336:17 341:15
**heard** 68:21 174:4 287:4 335:2 397:1 397:2
**hearing** 19:1 20:19 26:19,22 27:15 28:8,16 29:6,10 31:16,20 32:8,12,22 33:4 142:17 147:2,5,6 148:16 288:12,16 335:6
**heavily** 52:11
**held** 8:20 84:21 321:20 330:11

**help** 34:1 41:18 82:2,6 164:9 195:2,7 236:7 260:10,22 261:1 267:5 284:12 311:10 430:18 432:16,22
**helped** 289:15 369:8,9
**helpful** 40:22 150:4 170:9 252:14 253:5 254:8 261:4
**helping** 34:19
**helps** 16:17 74:9 232:15
**herbst** 36:22 56:20 57:4,8 87:19 88:14 97:15
**hereto** 437:16
**heritage** 408:1,4,7
**hernandez** 77:2 97:12 198:1,5,6 209:3,9,13 220:20 256:6
**hesitate** 439:12
**hey** 272:11 273:9 273:16 279:6 280:1,7 283:5 284:2
**hi** 127:10
**high** 11:18,19 383:1
**higher** 411:22 418:3,5
**highlight** 79:8,12 79:15 80:18
**highlighted** 78:3,9 78:17 79:14 80:12 80:16 81:4,8
**highlighting** 79:20 81:21
**highly** 30:17
**hill** 12:3 22:11,16 32:17 88:17 89:6
**hillary** 115:3
**hindrance** 403:7,8
**hire** 21:7 47:4
**hiring** 124:18
**hispanic** 364:5 365:1
**hispanics** 349:13 363:6,17 364:8,11 365:10 366:2
**history** 307:10
**hklaw.com** 4:22
**hoc** 39:1
**hold** 106:12,20 151:14 321:18 427:21,21
**holding** 403:17
**holds** 340:16
**holland** 4:20
**holmes** 292:12 299:18
**holtzman** 4:19
**homeland** 179:6 179:14 180:1,10 180:13,19 181:14 181:15 183:3 275:16,22 276:10 277:2,10 279:22 382:16,19
**honestly** 10:10 179:11 200:14 364:13 376:19 377:2 414:17
**hoping** 168:12
**hour** 111:2 232:3 308:17
**hours** 49:10
**house** 48:4,8,16,19 49:4,9,15,21 50:9 50:11,15,16,16 51:4,7 74:5,7,12 74:17 125:19 147:2,5 148:1,15 167:18 173:12 283:9 288:1 291:21 388:1 391:16,20 393:8 395:9 410:12
**household** 319:9
**households** 328:1 328:9,10 330:22 333:12
**huge** 223:22
**huh** 31:11 67:8 79:1 103:3 123:15 123:17 127:9 128:15 149:19 151:16 159:3 213:7 229:14 231:11 280:9,11 292:4 293:22 326:13 328:22 339:12 341:7 358:10 362:21 377:5
**human** 307:10
**hundreds** 261:6 283:1
**hundredth** 112:21
**hurdles** 154:8
**hurt** 252:22
**hypothetical** 106:18 239:13 274:7,10 275:4 301:19 302:6,17 303:3,13,15 304:6 305:19 306:13 307:1,21,22 308:12 362:5 364:4 366:21 415:10,11

**i**

**idea** 55:6 65:4 72:16 75:19 76:15 81:14 85:7,15 89:14 90:17 97:12 112:6,10,13 116:15 117:11,14 129:22 139:2 144:3 150:9 163:14 165:9 174:12 196:12 206:14 213:12 229:7 231:7 237:7 240:6 245:6,9 249:14 254:9,21 255:2,8 258:15 259:8 263:4 265:8 268:7,21 277:8 289:18 319:6 320:5 337:3,5 357:21 370:8 388:18 433:4
**ideally** 74:11 204:7
**identified** 66:12 99:5 155:20 172:8 239:22 345:17 363:20,21
**identifies** 206:1
**identify** 36:21 39:13 40:6 41:15 98:4 155:10 172:8 186:21 215:7 330:18 375:1 414:15
**identifying** 41:12 215:11

**identity** 64:19 84:18 86:18 131:1 131:15 141:9
**ignore** 300:22 301:15 302:21
**ignored** 391:21
**illegal** 67:20 68:1 68:4 301:21 302:7 302:13,15
**illustrate** 155:1 157:14 332:3
**image** 384:13 385:20 391:6
**imagine** 32:14 60:4 163:22 233:15 238:19 346:13 370:13 371:9
**immigrants** 65:20 67:20 68:1,4
**immigration** 1:3 4:1 8:16 241:4 281:7 336:12 393:9,12 394:17 395:17 399:9 401:2 402:7 403:3 404:10 405:1 408:22 409:4 438:18 440:2
**impact** 105:18 330:2
**impassable** 20:3
**impatience** 217:22
**impetus** 337:1
**implement** 181:21
**implications** 319:18 320:18
**importance** 17:3
**important** 18:6 40:12 91:21 103:13 112:22 113:2,7 134:3,6 155:8 172:2 274:20 278:13,14 278:22 280:13 343:9,11 347:2 362:11
**impossible** 305:21 364:7
**imprecise** 158:3
**imprecisely** 312:20
**improve** 355:14
**imputation** 329:15 368:21 430:22 434:3,10,15
**impute** 351:8,16 355:18 368:17 423:11 430:6,18 432:16
**inaccurate** 353:8 357:17 358:4 367:20 430:1
**inaccurately** 353:10,21 357:13
**inactive** 13:5,11
**inaugural** 27:19
**inauguration** 26:1 27:21 28:1 31:3 34:12
**inclination** 276:19
**inclined** 272:4 276:20,22 277:1
**include** 17:12 91:12 96:21 97:2 107:7 146:7,11 151:5,19 298:5
**included** 26:6 81:18 85:19 95:22 103:21 105:8 106:9,11 130:18 131:15 132:3 155:2 157:15 192:16 202:9,14 202:18 203:1 208:3 244:21 347:9 384:12
**includes** 67:6 96:20 216:21 314:10,16 383:16
**including** 18:16 54:11 71:10 78:18 84:15 95:21 105:19 106:22 157:18 223:8,9 229:10 345:15 419:8 433:20
**inclusion** 10:4 21:15 164:10 237:17 239:11 251:1 329:22 365:10
**incoming** 19:3
**incomplete** 354:7 373:6,8
**incorrect** 357:10 425:22 430:17
**increase** 360:12 361:2,9 367:3
**increased** 419:1
**independent** 54:4 106:14 281:22 282:3 296:15 299:4,10 300:6
**independently** 349:3
**indicate** 69:3 81:10 276:7
**indicated** 69:14 243:3 372:7 382:20,20
**individual** 43:1 414:15 419:7
**individuals** 41:6 46:13 400:15 407:10
**industry** 378:1
**inform** 420:21 421:9 424:7,20 425:13,20
**information** 28:13 30:5,21 40:22 68:17 69:15 79:22 81:17 103:14 108:16 129:14 132:22 136:19 137:1,8,15 151:7 152:5,10 153:12 153:19 154:7 155:22 158:6 163:1,12 177:2,16 177:19 180:9,20 181:10,17 186:8 186:12 190:10 192:6,8,11,20 193:4 195:21 210:20 216:16 217:13,17 223:3,6 223:6 254:17 262:3,13 264:1,1,4 264:17 265:9,15 265:19 276:2,3,4,7 277:20 278:7 286:5 290:9 294:22 296:2,5,8 296:15,18 297:2,7 297:18 299:5 326:18 331:17,18 334:6,7 335:19 340:11 345:16,19 347:3 350:12 358:4 368:10 383:4 400:2 413:20 414:19

416:11 422:3
**informative** 281:20
**informed** 40:12 74:11 103:22 196:18 197:12
**informing** 397:3
**informs** 181:17
**initial** 150:18 178:3 254:2 337:1 411:8
**initially** 248:20
**input** 46:8,8,10 49:6 216:21 324:19 370:10
**inquire** 261:16 262:5,20 264:7 272:21 275:9 279:17 399:3
**inquired** 55:12,16 82:10 183:20 409:22 423:11
**inquires** 414:1
**inquiring** 390:15
**inquiry** 254:2 390:20
**inside** 387:20
**inspire** 224:5
**institute** 4:3
**institutes** 44:11
**instruct** 62:16 186:13 196:1 345:21
**instructed** 70:15 150:1,21
**instruction** 411:22
**instructions** 150:22 151:3,6
**instructs** 70:11
**instruments** 105:17 106:2
**insurmountable** 265:22 331:4
**interact** 47:9 52:18 53:14,17,21
**interacted** 47:14 189:3
**interacting** 48:3 51:10,18
**interaction** 30:22 50:15 51:3,6 52:10,16 53:2,7,11 55:18 99:15 196:10 382:9 411:3
**interactions** 195:3 381:9
**interest** 57:20,21 82:3 175:19 177:1 348:8 392:11
**interested** 9:7 58:11,19 59:1,5 64:18 69:14,17 144:7,9,11,13 170:10 175:18 190:4,7 192:11 202:8 275:13 298:21 397:15 412:1 437:17
**interests** 403:2
**interface** 41:18
**interfere** 8:9
**interference** 8:7 80:6
**internal** 99:8
**internet** 417:19
**interrupt** 11:1
**interruption** 165:20 291:14 434:12
**interrupts** 92:2
**interval** 356:15
**introduce** 221:6,7 383:19
**introduced** 10:17 336:7,9
**introduction** 14:13,15
**introductory** 303:2
**investigate** 252:7 252:7 254:17 337:8 410:14
**investigating** 108:11
**investigation** 201:19 317:6 340:20
**invite** 60:16,18 61:21 91:10,16
**involve** 286:14
**involved** 11:15 17:21 19:6,10 21:19 52:7,8,10 64:16 97:1 99:14 102:15 221:3 288:14 340:22 345:3 347:5 378:9 380:11 421:18
**involves** 68:9 98:16 220:19 280:10 286:20
**involving** 140:15
**irrelevant** 251:15 265:3 300:12
**isolate** 360:15
**isolating** 356:9
**israel** 77:2 198:6
**issuance** 290:17 420:13
**issue** 20:9 47:11 50:18 51:12 52:13 52:20 53:4,6 64:19 86:19 91:21 98:16 104:13 112:16,20,22 121:21 124:16 130:17 139:20 140:2,4 141:17,19 142:4,10 143:6,12 143:15,15 144:7 145:2 166:21 170:10,11 172:20 174:5 177:11 196:11 203:17 210:4,11 211:1 222:14 223:22 233:10 234:6,9 261:5 264:14 283:1 341:3 393:13,17 399:9 399:13,15,18,20 403:1 411:16
**issued** 242:9 244:13 292:3 343:20 420:1
**issues** 16:22 17:2 18:10,11,13 20:8 20:17 41:16 44:21 54:6 68:10 77:19 95:20 96:10 106:22 113:6 128:6 140:14 150:10 165:2 170:8,17,20 201:20 221:11 223:19 224:8 226:10 229:10 231:5 234:8 241:13 244:20 257:18 382:22 403:17 411:18 435:22

**items** 257:14
**iteration** 376:22
**iterative** 321:15
**izzy** 97:12 198:1,5 209:1,3,9 256:6,19 257:2

**j**

**j.d.** 12:20
**james** 95:14 97:2 97:15 100:4 155:15 156:3,7 174:20 175:1,5 183:1 184:13 185:22 186:6 187:13,15 188:6,8 189:3 195:14 198:1,2 214:11 217:8 225:2,8,9 242:18 243:4,6 246:8 255:20 256:10,20 257:4 257:16 288:14 345:10 369:12 381:10 386:4,8,18 391:6,18
**jane** 157:11
**january** 16:2 19:22 27:16,17 31:20 33:14,15,17 33:22 34:10 35:5 35:5,8,9,17 36:10 37:6 39:18 124:4 124:5 198:19,21 309:21 317:3,11 319:19 320:19 321:2 369:5
**jarmin** 238:10,10 294:12 314:3,5 315:1 316:14 322:18 325:10
**jeff** 400:9
**jefferson** 439:15
**jim** 57:18
**jmf** 1:5
**job** 17:4 38:4,5,6 42:4 43:17 48:2 58:16 63:12 68:9 70:4 150:8 164:1 252:14 253:5 266:7,20 267:16 268:5
**john** 5:6 59:18 236:1 309:18,22 395:9,14 410:13 410:14 439:9
**join** 16:4 25:4 117:12
**joined** 25:3 31:2 117:15 187:13,15 187:16 188:8,17
**jones** 377:17
**jorgenson** 1:16 9:4 437:3,20 439:14
**jose** 336:11
**josh** 98:6
**joshua** 6:9 438:15
**joshua.gardner** 6:12
**journal** 67:7 80:1 81:21 146:14 402:22 409:13
**jr** 6:19
**judgment** 429:5,8
**july** 121:16 122:12 205:18 206:3 209:22
**june** 94:12 98:10 99:3 101:19 111:15 113:10 179:12 187:16 188:15 195:6 244:13 271:11 341:9,17,19 346:4 346:12
**jurisdiction** 18:7 412:5
**justice** 5:6,17 6:10 94:8 99:7,10,13,15 101:1,13,15 114:2 126:18 153:3,7,16 154:1 157:4 165:12 166:9,11 166:13,20 167:20 170:8,19 171:6,10 172:22 174:4 175:9,20 176:2 177:1,10 181:10 181:13 184:2,20 185:2,5 186:3 187:19 190:3,6,9 196:14,15 197:2 197:17,18 216:16 222:8 233:5 237:17 238:5 239:3,15 245:5,12 245:18 246:3,11 246:19 247:4,5,18 248:1,5,17,21 249:10,13,21 251:2,8 262:17,21 269:3 270:6 272:3 273:1 275:6 278:1 281:5 290:16 294:20 295:11,15 295:18 296:1,10 296:12 297:1,5,10 297:17 298:3,20 309:7 338:20 340:1 342:9 343:16 347:18 348:18 349:1 350:3,9 382:8,21 388:7 398:18 399:1,4 400:3 410:17 411:2,9 413:3 415:22 416:4 420:22 421:7,14 422:4,12 422:15,22 423:22 424:20 425:10,14 425:20 426:4,10 426:13,16,20 427:13,16 428:3,5 428:11 438:16
**justice's** 299:11 300:7 305:11 409:19 421:2
**justifications** 415:16
**justify** 154:6 181:16
**jyang** 5:9

**k**

**kansas** 118:2 206:1
**karen** 1:16 9:3 10:17 101:22 137:11 218:18 219:3 222:22 288:15 310:1 325:7,8 369:11 437:3,20 439:14
**kass** 228:19
**kassinger** 227:17 227:20,21 228:1,8 228:12,16,19 229:1 230:17 231:5,8,9
**kate** 6:9 98:6
**kate.bailey** 6:12
**kdb** 222:15,19
**kdk** 222:19

**keep** 40:11 60:7 73:1 76:8 136:3 197:11 211:7,12 218:2 221:2,5 304:9 318:13
**keeping** 45:3,17 45:21 74:11 196:18 335:21 435:18
**keeps** 73:2
**kelley** 4:15 101:22 137:12 218:18 219:3 220:21 221:3 222:22 288:15 310:1 325:7,9 369:11
**kelly** 395:9,14
**kept** 201:21
**kevin** 385:21,22 386:1,3
**key** 108:9 220:14 221:11
**kind** 48:14 84:3 103:14 175:19 194:22 203:12 279:15 286:12 334:13 340:19 371:20
**kinds** 50:14
**knew** 86:15 311:2 342:2
**knight** 4:20
**know** 10:12 16:21 22:21 23:7,12 32:4 40:21 41:15 43:3 52:9 55:17 60:21 61:11 64:4 65:2 69:13,16 72:19 73:21 75:3 76:5 80:2 81:7 90:13 93:15 95:10 96:7 97:3,16 100:1 101:9,10,13 102:13 103:20 104:10 109:20 112:4 114:5 116:4 116:10,22 117:4,7 117:15,17,22 118:15 120:10 123:2,21 124:22 125:1 127:2,16 129:13 132:5 134:3,7 136:3,6,7 139:4 142:15 146:20 150:10 156:3 160:2,3,7,8 161:17,22 162:5 163:6,15 165:8 167:17,19 169:12 174:17 175:12 176:12,22 179:17 181:16 187:14,16 187:17 188:2 190:15,20 191:3,7 201:2 203:12 213:9,16 214:17 215:4 216:22 217:5,17 228:14 229:11 231:20 233:6 235:10,12 238:13,22 245:15 246:10 260:6 267:11 268:11 269:12 271:2 276:22 277:16,18 279:11 282:6,13 283:7 286:17 298:9,16 304:18 304:20 305:20 306:3 310:3,5 315:10,16 321:8 322:19 323:8 324:18 327:21 329:10 332:3,10 339:22 340:4,17 342:15 346:8 348:17 350:4 351:20 352:20 354:14 357:18 362:15 363:7 364:6,10,15 365:3 365:6 371:11 374:6,11 375:8 376:21 377:2,12 377:13 378:11,14 378:16 380:3,10 381:8,19 382:18 383:2 388:16,19 389:22 390:22 391:3,14,17,22 397:12,21 398:5 398:17,18,22 402:14,15 404:5,6 405:16 406:12 407:18 414:3 421:17 426:9 428:5 431:2,12
**knowing** 27:12 260:15 261:3 267:22 281:14 435:22
**knowledge** 122:22 157:6 164:12 189:2 228:17 315:13 387:8 388:22 391:10 392:10,19 398:16 399:17,19,21 403:1 409:20 424:1 425:17 433:20 435:4
**known** 124:2 287:10 343:19 422:2,9
**knows** 47:2,2,3 285:21
**kobach** 116:20 117:9,22 118:3,4,5 118:6 119:20 121:13 122:12,15 122:19 205:4,6 206:1,18 207:5 208:22 209:10 210:3,11,16
**kravitz** 4:10
**kris** 116:20 117:9 117:22 119:20 121:13 122:12,15 122:19 205:4,6 206:18 207:5 208:22 210:3,11 210:16

## l

**l** 5:7 160:18
**la** 381:7
**lack** 116:14 117:6 118:11,18 122:6 122:20 134:15,20 140:7 142:12 143:8,17 161:4 163:5 183:14,17 201:1 206:5,11 235:17 286:6,15 380:8 384:15 390:2,11 392:9,18 407:15 413:7 415:20 422:16 423:3 424:15
**lacks** 334:20 426:1
**laid** 300:9,13,19 351:19
**langdon** 46:21 47:4 56:20 57:1,8 57:17 58:10,19

83:1,15 87:18 88:13 89:4,12 93:1 110:15 200:8 200:12 201:5 202:6,16 203:4,8 204:5
**langdon's** 46:22 59:17
**language** 244:4,7 244:17,18,19 245:3,7,10 362:20 430:12
**large** 20:22 21:3,4 31:4 42:7 163:15 314:3 349:14 356:17
**largely** 20:20 41:10 74:10 102:4 110:3 142:7 203:18
**larger** 327:22 356:13 368:13
**late** 88:4 209:22 316:11
**law** 5:11 8:20 12:4 12:7,13,17 14:19 15:3,8,12,13,14 193:12,20 228:3 300:16,20 301:6 301:15 414:13
**laws** 15:5,7
**lawsuit** 11:15 287:5 359:7 405:22
**lawsuits** 80:17 287:7,14
**lawyer** 127:1 193:8,10 265:1,5 265:12 268:3 325:4,19,20
**lawyers** 5:11 13:21
**lawyerscommitt...** 5:14,14
**lay** 300:16
**lays** 301:5,13 302:19 303:21
**lead** 67:14
**leader** 23:7,8
**leadership** 23:8 44:9 162:21 224:7
**leads** 207:11
**learn** 271:13 281:6 396:20
**learned** 281:9 357:15 402:16 432:13
**learning** 402:18
**leave** 160:18
**leaves** 43:22
**leaving** 32:17,17 131:6
**left** 12:3 43:14 75:3 211:20
**legal** 3:18 9:2,4 52:3 150:13 154:11 155:11,12 172:7 220:14 221:11 239:19 258:21 261:14,21 265:22 266:9 267:3 301:3,18 303:4 304:6,17 305:2 308:12 340:7,14 348:13
**legally** 267:14
**legislative** 18:8 165:2
**legitimate** 155:1 157:14,21 158:1,3 180:19,21 192:15 304:12
**les** 160:19
**lesser** 366:6
**letter** 237:21 238:1,3,4,9,14,17 238:20 239:2 272:4 290:4 347:17 349:2 396:19 397:8,11 397:15,18 403:5 403:15,18 407:13 408:19,19 412:20 413:1 419:21 420:13 427:17
**letters** 385:7
**level** 175:19 176:8 177:1 272:16 275:8 294:21 296:19 357:4 403:19 416:5 422:14,14 423:2 426:17,18 427:18
**levels** 352:13
**leverage** 285:8
**levers** 284:14
**leviathan** 41:19,20 41:22
**lexicon** 273:17
**liberties** 4:7
**liberty** 6:4
**lifecycle** 47:12 203:16 223:20 288:21 359:12
**light** 350:11
**limit** 423:18
**line** 57:12,17,22 63:4,15 71:4,22 78:3,17 79:8,12,15 80:7,12,15,20 81:3 81:4,8,21 90:2 96:16 97:6 111:1 111:21 146:16 148:8 164:22 230:13 293:20 331:15 352:12 440:7
**lines** 294:3,6,10
**link** 66:12 208:9 208:10
**linkage** 86:1
**lisa** 203:5,9,15,17
**list** 22:22 129:1,4 132:14 220:22 369:6,8,10,15 373:15 383:1
**listen** 276:1 284:10 289:19 302:11
**literally** 282:22 411:17
**litigated** 194:7,10
**litigation** 6:15 249:2 342:8 343:10,17 344:17 410:18
**litigator** 344:17
**little** 17:19 31:13 75:20 225:9 247:13 253:2 254:5 259:2 282:21 290:10 301:11 313:7 314:14 332:13 336:18 356:18 382:21
**lo** 350:7
**located** 8:21 199:10,12
**lock** 275:8
**loggerheads** 304:8
**logic** 248:19

**logical** 133:5 171:8 181:12 331:18
**logistics** 43:15
**long** 4:17 124:2 155:18 171:14 174:8 178:11 198:16 226:9 233:12 250:5 302:2 321:9 326:20 327:3,6,8 327:12 353:9 372:11 417:17
**longer** 74:20 115:8
**look** 57:11 62:8 80:5,8 92:19 105:5 127:6 130:1 147:14 148:7 171:5,13 174:3,18 180:12 203:1 211:17 215:15 220:2 229:13 233:22 234:2 237:2 261:9 264:14 273:5,15 276:16 284:14 288:2 304:4 315:19 328:12 331:18 339:6 341:5,10 351:12 353:4 354:22
**looked** 110:11 155:16 156:3 264:7 364:8
**looking** 117:18 143:18 155:19 179:4 180:6 181:3 181:20 236:15,17 237:4 326:18 355:9 362:19 371:3 378:21 385:17 434:7
**looks** 83:4 93:3 159:16 165:19,21 225:2 375:12 431:1
**los** 4:14,19
**lost** 287:9
**lot** 20:1,7 40:21 52:10 84:12 88:4 91:8,17 112:16,17 113:5 143:2 147:15 150:15 204:16 211:13 222:5 231:5 232:11 243:14 285:16 288:12 345:12 359:10 360:17,17,18 411:18
**lots** 230:22 243:10 347:4,5 360:21 362:15 366:14 432:22
**louder** 336:18
**love** 160:19
**lower** 132:17
**lumber** 201:13,18
**lunch** 205:20 211:6
**lupe** 5:1 381:5,7
**lynn** 1:16 437:3,20 439:14

**m**

**m.s.** 6:14
**mail** 204:8
**maintain** 90:16 346:11
**major** 54:6 78:18 81:22 103:9 360:3 413:22 417:14
**majority** 349:15 349:17
**maker** 267:20 305:15 306:7,18 307:15 308:6 362:9 363:8 366:5
**makers** 304:15 307:5
**making** 36:19 177:2 209:5 290:5 338:2 352:6 358:5 434:5
**maldef** 5:2
**maldef.org** 5:4
**man** 433:21
**manage** 41:18,20
**managed** 374:17
**managing** 44:20
**mandate** 140:17
**manning** 385:21 385:22 386:1,3,13
**march** 64:6,8 65:1 67:22 68:4 69:3,8 72:15 77:19 78:1 81:16,20 82:7,13 83:2,5,14,16 88:1 88:9,11,17 89:9 115:13 137:11 140:21 146:13 149:13 199:4 208:1 241:8,12,16 241:18,19 242:3,9 287:19 290:17 318:2 322:1,12 323:9,10,15 324:2 324:13 326:6 343:1,20 345:3,14 345:15 346:17,21 352:10 375:21,22 376:8 384:4 420:1 420:14 424:4 426:8 428:13
**margin** 354:12,19 354:20 356:12,13 357:14 358:1,3,3 361:11
**margins** 352:15,20 354:10,16 355:21 356:2,4,9,20 357:5 357:19
**mark** 55:22 62:1 82:14 93:16 114:6 120:13 123:18,19 124:2,3 127:10,15 127:16 137:16 145:5 147:8 155:14,20 156:2 158:16 160:17 161:3 163:18 164:5,8,13 167:1 172:7 173:22 182:3 189:5 194:13 199:19 212:10 215:17 218:4 219:17 224:14 226:16 234:18 292:22 317:18 325:21 353:10,21
**marked** 56:3,11 62:4 80:9 82:18 87:6,9,12 93:20 111:15 114:8,11 120:16,20 123:9 123:12 137:18,20 145:8,11 147:11 158:20 164:15,18 167:3 182:8 189:8 194:16 199:22 212:15 215:20 218:7 219:20 221:18,20 224:17

226:19 234:21 293:3 309:4,15,19 310:4 317:21 318:1,12 320:2,9 326:2,5 339:6 341:6 372:14,16 372:18 373:2,18 374:18,21 375:2 375:17 376:1,12 376:14,22 378:17 378:19,21 383:22
**marking** 62:6
**marshal** 406:5
**marshall** 405:11 405:19 406:9
**mary** 157:11,11 167:8,10,13 184:11 185:22 188:1 269:13,17 269:22 338:5 381:9 410:9
**maryland** 4:2 89:22 90:2 91:11 381:6
**mason** 13:20
**massachusettes** 4:4
**massachusetts** 1:15 6:10 8:21 438:16
**masse** 90:6 91:3 91:11 92:8
**massively** 162:18
**matching** 369:2
**material** 232:7 359:18 360:2,6,7 360:16 361:5,19 362:2,20 363:1,11 363:17,22 365:11 365:20 366:4,7,14 367:4
**materially** 358:15 358:19 361:2 363:12
**materials** 72:12 92:9 105:8
**math** 365:5
**matt** 110:22
**matter** 8:15 16:22 18:1 22:4 37:20 52:13 68:10 168:18 179:4 193:17 194:1 203:2 204:10 220:17 229:8 230:13 231:1,19 233:22 237:4 266:10 290:8 342:11 400:13 407:3
**matters** 19:17 22:2 31:22 32:9 40:6,13 51:20 102:16 119:4,8 124:10,13 411:10
**matthew** 5:16 6:2 10:1 164:21 165:8 165:9
**matthew.colang...** 6:7
**matthew.wise** 5:20
**mcannon** 6:18
**mcconnell** 23:8
**mchenry** 174:20 175:5 177:22 179:8 184:13,14 185:22 196:14 270:20 271:21 272:2,8,11,22 273:4 275:12 276:21 278:4,11 278:17 281:4,5,11 281:14 282:20 284:3,11 285:4,8 381:10,17 382:10 382:15 383:3 410:13
**mchenry's** 175:1 175:13 281:22 410:14
**mean** 14:5,15 15:7 20:11 21:15 29:19 30:14 32:2 39:2 42:1 44:2 49:22 50:12,17 52:1,6 75:21 77:5 91:4 92:1,12 99:12 109:15 111:1 124:14 128:1 130:11 135:19 137:3 139:4 148:20 149:22 152:3,9 155:12,17 159:5 174:14 183:17 185:20 187:8 193:9 197:3 214:20 223:22 241:10 243:11 245:15 261:12 271:6 272:16 278:16 288:16 304:13 330:7 331:10,13 332:7 344:21 356:8 357:21 358:19 361:4,6,10 362:2 389:19 390:19 409:12 411:8 430:21
**meaning** 15:9 21:17 39:11 108:10 339:10
**means** 16:14 53:3 70:14 150:1 185:21 224:12 329:8 354:10 429:20
**meant** 57:21 152:4 222:19 243:16
**media** 8:13 111:6 111:10 158:12 211:22 212:4 250:7,11 308:18 308:22 380:17,21 389:14 390:6 402:16,17,19
**meet** 23:13 38:11 39:8 54:8 90:18 90:19 91:12,21 92:8 98:19 101:16 124:6 125:20 170:15,16 313:19 314:2 421:2,11
**meeting** 2:17 11:9 16:13 23:17 32:12 32:18 33:2 38:14 38:20 39:3,5,6 40:9 60:13,18 64:2 71:17 72:13 91:15 92:15,17 97:22 98:1 121:18 139:18 156:21 157:7 161:10,13 169:11 170:2,21 171:14 172:12,16 173:2,16,20 174:8 194:15,22 195:6 196:5 201:21 202:1,12,15 220:11,12,14 221:9,12 270:9 314:4 322:8 323:1 323:12 324:1,4,12

338:14 397:13 398:13 421:5
**meetings** 17:21 19:1,13 22:8,11,16 23:12,15,20 24:12 25:21 26:11 38:10 38:11,22 47:17,21 54:2,4,11 60:10 61:13,19 90:14 91:17 102:3 161:19,22 162:8 166:11 200:14,21 201:4,8 221:14 322:10,11,22 323:3,7,13 398:15 398:19 399:2,5
**member** 15:17 22:19 23:1,19 123:21 406:14
**members** 16:21 17:3,22 23:5,14 24:13,14,18,22 28:8,9,19 30:7,10 31:7 32:19 53:14 53:17
**memo** 2:11,16,16 3:3,3,6,6,8 40:18 41:2 93:19 94:21 94:22 95:1,2,4,12 95:15,17 96:8,13 97:18 98:9,10,15 98:20 99:2 100:13 101:2,19 104:16 107:12 110:17 111:15,19 113:10 113:19 136:22 137:4,5 174:17,19 179:17,19 182:7,9 182:16,18,20 183:1,9,12 184:10 184:18 185:17 187:8,18 189:7,18 191:9,12 213:22 215:12 216:9,10 216:19,20 217:14 217:16 218:13 219:10,15 223:17 232:13,20 233:4 237:16,19,20 245:3,4,13 269:15 300:9 301:5,14 303:1,12 305:5 306:19 309:3,18 310:16 311:5 312:21 313:16 315:19 317:3,20 318:2 319:14,20 320:20 321:2 322:1,12,12,20 323:9,10 324:2,13 339:2 346:17 351:19 352:11 353:1 355:1,22 357:9 358:2 366:3 367:3 370:3 371:17 372:16 374:20 376:14 410:20 420:1,2 428:14 432:9
**memoranda** 259:20
**memorandum** 3:4 241:13 242:10,13 244:11 245:14 246:14 247:17 248:2,15 249:3,15 249:22 287:20 290:18 292:2 301:16 302:19 303:22 304:3 305:17 306:9 325:22 326:2,6 341:6,8 343:19 344:1,5 345:17 346:5,12,18,21 347:1 350:20 420:14
**memorandums** 41:13 48:17
**memorialized** 339:1
**memory** 77:8 179:2 288:3 295:6 371:22
**memos** 40:15 422:13 423:1 432:21 433:3,7
**mena** 84:17 140:19 141:4,17 141:19 144:11
**mention** 173:4 257:21
**mentioned** 17:5 19:15 21:19 25:12 28:2 35:12 40:3 46:13 83:21 86:2 86:8 97:18 102:21 146:22 172:6 173:2 196:20,21 197:16 210:12 226:7 236:10,13 239:21 257:21 271:9 289:14 386:14,19 409:14 413:16
**mentions** 223:9
**message** 71:22 114:18 138:14,15 139:16 145:3 152:22 180:6 231:12
**met** 9:22 11:7 22:19,22 23:2,9,16 124:3 125:14,15 169:2,3,8,18 171:3 171:15 173:8 174:2 184:11 187:22 322:15 338:5,8 339:13
**method** 329:11
**methodology** 14:9
**methods** 329:16
**michael** 6:13,19 100:1
**microphones** 8:5,9
**mid** 3:18
**middle** 84:16 86:19 141:20 143:2 429:13
**midnight** 28:20
**mike** 95:7 97:2 98:6 246:9
**miller** 404:2,5,6 404:10,20
**miller's** 404:22
**million** 21:8 327:10,11,16,18 328:1,11 333:11 351:9 361:9 364:15,17,18,20 364:22 365:3,6,7 368:17 423:13
**millions** 328:16 364:11
**mind** 141:14 266:16
**mine** 257:4
**minor** 14:2
**minority** 349:11 349:12
**minute** 9:22 48:1 68:20 146:22 150:21 158:7 205:1 289:14

**minutes** 171:15 178:12 218:19 250:6
**mischaracterize** 425:6
**mischaracterizes** 108:5 210:6 247:2 247:21 253:18 316:22
**miscommunicati...** 236:3,19
**misinformed** 285:2
**missed** 12:12
**missing** 332:12
**misunderstanding** 316:6
**mo** 406:14
**models** 351:9
**modified** 177:18
**moment** 58:5 220:2
**monday** 33:20,21 34:1 218:18
**money** 419:2
**monitor** 46:14,17
**monitoring** 45:1
**month** 179:9 271:5,12
**monthly** 47:20,22
**months** 100:11 121:22 125:6 146:6,10 151:4,18 159:13 166:8 177:7 183:22 184:4 198:18 206:9 209:21 211:2 234:7,10,12 234:14 347:7
**morning** 8:3 38:17 166:1 213:4 246:1 246:17 247:16 248:14 324:5 342:5
**motivated** 113:4
**move** 331:5 415:4
**moved** 44:5,12 188:21
**moving** 168:17 218:3 265:19
**multi** 375:8
**multiple** 48:21 290:15 322:21 323:3
**multiply** 431:10 431:16
**mwalsh** 6:22
**myers** 228:2
**mystified** 146:5 151:17 159:12 177:6 318:12

**n**

**n** 4:1 8:1 25:10,11
**name** 9:1,19 77:10 77:16 87:20 125:1 155:15 157:9,10 167:15 174:7,9,16 174:21 175:1,13 179:15,18,19 205:17 219:6 241:2 262:11 269:8,11 270:13 336:7,9 379:11,14 381:3 410:11,13 420:5 440:2,5
**narrow** 355:16
**national** 44:4,11 50:3 51:1 138:20 139:2,8,19 140:10 140:17 141:12 286:14,20
**nations** 413:16
**nationwide** 366:12
**naturalization** 413:19
**nature** 381:20
**near** 94:11 199:9
**nec** 50:16,22
**necessarily** 45:2 45:16 69:5 86:1 119:18,21 154:16 268:4 276:16 281:19 314:9 332:7 369:16
**necessary** 152:5 152:10 177:17 331:19 342:20 430:7
**need** 39:6 40:20 50:6 57:20 64:12 84:11 105:5 106:7 127:11 128:19 129:8,8,14 153:2 153:11,22 154:6 154:10 155:1,7,21 157:14,21 158:4,5 176:8 180:11 192:15,20 193:4 220:2 236:2,18 240:3 254:16 258:22 261:7 262:3,4,7 263:5,10 263:17,17,21 264:1,8,14 266:4 267:11 272:12 273:12,14 274:9 274:15,21 276:2,2 276:3,7 278:6 294:8 296:5 297:8 333:1 347:12 351:12 365:14 372:19,22 400:2 413:11 415:22
**needed** 15:7 37:17 46:9 59:10 86:14 153:6 156:16 166:8 176:5,8 181:8,22 183:15 247:8 248:3 249:2 264:4,16 279:14 294:22 296:8 344:16 416:5
**needing** 392:6
**needs** 84:1 157:17 157:22 158:1 253:10 258:19
**negative** 319:18
**negotiating** 274:16
**negotiations** 201:13,17
**neither** 37:11 67:11 358:12 416:9 437:12
**nelson** 23:16
**neuman** 123:18,19 124:2,3 127:1,3,7 129:10,21 130:11 131:11 132:1 155:14,20 156:2 160:17 161:3,20 163:18 164:8 172:7 173:22
**neuman's** 130:1
**never** 15:12,13,14 112:10,13 118:4,6 122:14 123:7 152:12 164:11 171:22 175:7 185:9 207:21 255:1 258:14 259:7 271:16 272:11,12 279:3,5 279:8 281:9 291:4

291:5,12,13 298:7 307:7,9 315:7,8,9 315:12 316:2 320:7 324:12 335:2 349:16 364:7 385:10 387:14 392:20 400:21 406:4,9,20 408:3,6 409:16,21 409:22 419:11 434:22
**nevertheless** 350:14 352:1
**new** 1:2,3 4:1,3,7,8 4:8 5:12 6:1,5,5 8:16,19 10:2 76:5 178:13 241:3 438:18 440:2
**newman** 124:21 133:10,19 134:12 135:5,10 136:2,6 136:10,19 156:10 162:1 164:5
**newseum** 115:20
**nice** 77:9 121:18
**night** 12:17 28:20 73:8 75:8 83:7 88:4 117:3 128:19
**nine** 198:18 234:7 234:10,12
**nist** 43:14 44:13
**niyati** 5:5
**nom** 27:3
**nominated** 27:3,5 27:9
**nomination** 27:2 28:7
**nominee** 16:17 18:14,21 20:10,11 20:11,13 21:11,20 22:2,6,18 24:13,20 26:8,9 28:11
**nominees** 16:18 17:6
**noncitizen** 65:5 353:8,22 367:7 414:18 418:5 430:6
**noncitizens** 67:2 85:19 208:3,6,11 208:14,17 332:6 353:9 367:13 414:7 416:22 418:3 425:22 430:2,18 431:7,11 431:16
**nongovernmental** 53:22
**nonresponders** 432:17
**nonresponse** 360:12 361:3
**nonresponsive** 331:6
**nonstop** 160:20
**nope** 10:8 77:4 112:12,15 197:20 259:19 270:19
**normal** 290:1
**normally** 71:12 91:14 277:12 318:14
**north** 84:16 86:19 141:20 143:3 336:13
**northern** 420:9
**northwest** 8:22 439:15
**norton** 292:12 293:21 294:10 298:18 299:7,18 300:3
**note** 8:5 128:13 130:21 318:11 375:17 380:9 409:12 419:11 423:5
**noted** 9:9
**notes** 172:14 211:17
**notice** 1:14 92:12 130:14 203:14 321:1 387:4
**noticed** 304:13
**notices** 283:2
**notification** 2:17 57:19 58:20 61:6 64:16 84:1 87:3 88:22 130:3 140:20 194:16 195:1
**notifications** 86:10 88:17 89:5
**notify** 59:8,10 84:8 127:11 129:8
**noting** 132:9
**notion** 54:16 68:21
**notionally** 37:10
**notwithstanding** 70:16 401:18
**november** 15:16 15:19 16:7 27:6 27:10
**nrfu** 366:13 367:3
**nshah** 5:9
**ntia** 44:12
**nullify** 302:8
**number** 2:8 14:2 64:13 81:11 111:7 111:11 147:9 158:13 163:16 178:18 191:20 201:20 209:21 212:5 223:18 229:9 250:8 308:19 309:1 327:22 328:9,10 330:22 332:21 345:6,6 355:18,19 360:12 364:5,10 380:18,22 384:2 417:12 428:20 431:6,9,17
**numbered** 62:7
**numbers** 72:2 364:8
**numerous** 226:10 229:10 244:1
**nw** 1:15 3:18 4:4 4:12 5:2,7,12 6:16 6:20
**nyclu.org** 4:9

**o**

**o** 8:1 25:11 141:8
**o'melveny** 228:2
**oag** 235:12
**oath** 9:6
**object** 62:15 345:18
**objected** 69:22
**objection** 69:18 70:9,16,17 83:17 98:11 106:4 108:4 116:13 117:5 118:11,17 120:1,7 122:6,20 130:12 133:1,21 134:15 134:20 140:6 142:11 143:7,16 144:20 146:18 148:21 159:20 160:10 161:4,15 163:4 166:15 186:7,12 187:1

189:1 195:12,20 200:22 202:19 204:11 206:5,11 206:19 210:5 225:21 226:5 228:9 235:17 246:20 247:1,20 252:3,17 253:8,17 254:12 255:9 258:6 259:11 263:19 268:14 274:7,10 275:3 276:5 280:15 284:17,21 286:6 286:15 297:13 299:12,15 301:2 301:17 303:3,4 304:5,6 305:1,18 306:12,22 307:20 308:11,12 329:3 331:11 334:20 340:13 343:21 366:20 380:7 381:18 384:15 390:2,11 392:8,17 404:15 407:15 409:1 410:3,6 412:7,10,11 413:7 415:6,9,18 419:4 422:5,16 423:3 424:14,15 425:4 426:1,15 427:8 428:8 433:18

**objectionable** 70:8

**objections** 70:7 286:22 425:16

**objective** 28:21 106:18 266:3 267:1

**observe** 229:6

**obstacle** 331:4

**obstacles** 261:14

**obtained** 352:14 357:5

**obviously** 23:7,9 36:18 97:14 110:19 181:2,11 183:19 213:1 249:11 325:10 365:2 370:21 371:17 373:16 410:18

**occasion** 52:17 53:16

**occasionally** 198:1

**occupied** 411:10

**occur** 92:17 398:15

**occurred** 280:17 298:10 397:2 398:11,11

**occurs** 308:5

**oceanic** 44:4

**odd** 103:22 104:9

**offered** 432:5

**offers** 301:1

**offhand** 269:12

**office** 1:14 5:17 6:14 8:20 33:18 35:21 37:8 38:1 41:3,8 42:10,15 43:5,8,19 44:16,20 45:6,20 46:4,5,14 47:6 49:18,21 50:10,16 52:15,22 53:21 57:2,13 58:7 75:14 95:5,6 99:17 100:14 101:18 127:18,21 128:2,4,7,8,11,18 169:3,8 173:7,13 173:16 188:20,22 189:4 196:11 198:14,17 199:9 199:11,12 200:8 201:7 214:8 216:12 232:21 235:13,16 245:20 246:16 247:6,9 249:18 255:15 258:10 281:7 283:21 310:6 325:16 342:7 377:21 378:7 386:1,2

**officer** 437:4

**official** 36:18 295:3

**officially** 39:21

**officials** 37:18,19 90:4,19 96:2 111:20 112:2,7 113:11,13,16,21 245:1

**ogc** 99:20 101:10 187:15 219:12

**oh** 148:7 159:6 191:22 309:19 318:18 328:17

**okay** 10:9,14 12:9 12:16,22 13:8 14:8,18 15:6,16,22 16:3 18:18 19:9 19:15 21:6,14 23:11,13,20 24:5 24:12 25:22 27:5 27:14,17 29:3 30:22 31:6 32:5,7 32:11,16 33:6 34:4,8 35:12 36:9 36:12,16 37:6 43:4 45:5 47:4,22 48:11 49:3 55:15 55:18 56:19 57:11 58:6,18 59:3 61:18 63:7,11,22 64:10 65:5,11,13 66:18 67:6,9 69:16 70:6 71:8 71:15,21 72:17,20 73:12 74:4 75:13 76:16,19 77:12 79:13 80:5,19 81:7,13 82:12 83:15 84:4 85:1 85:16 86:17 89:12 89:21 90:3,9 91:10 92:4,7,19,22 93:16 94:9,21 95:3 96:18 97:6 98:9 99:9,12,16 100:18 102:2 105:6 106:7 107:8 109:12 110:5,21 111:19 113:9,18 116:4 120:12 121:7,10 122:4 125:5 128:10 129:10 131:14 132:7 134:11 135:8,14 136:5,15 138:19 139:16 141:19 143:1 144:6,10 145:12 145:15 146:1 147:13,15,22 148:11 150:11 152:2,17 155:16 157:3,13,21 158:16 159:9 161:9 162:7 163:2 164:2 166:19 167:17 168:9

171:2 174:13 175:5 176:19 177:21 178:5,13 178:16 179:7 181:14 183:17 184:17 186:5 188:10 189:5,5 191:8,18 195:2 197:11 200:7 202:1,5,12 203:4,8 204:9 205:3,11 209:20 210:2 213:2,10 214:3,15 215:2,11,16 216:4 216:8,19 218:12 218:16 219:17 220:4,5,12 221:17 227:1,12 229:13 230:16 231:22 235:3,14,22 237:14,22 239:1 239:14 241:5 242:15 244:8,8 250:2,18 255:6 256:13 257:9 258:9 259:17 263:16 274:19 276:17,21,21 287:7,13 290:19 292:6 293:12,16 293:19 294:4 298:1 300:19 308:4 309:16 311:11 312:16 313:22 314:22 318:9 321:1,4,10 323:6,16 328:18 334:12,17 335:9 336:10,15,22 341:12 342:12 367:12 373:20 374:18 379:17 382:12 384:8,10 384:11,21 385:17 385:19 386:3,12 386:16,21 387:2 389:3 394:4 401:1 401:15,22 406:20 407:9 408:16 415:14 416:3 418:8 419:13 420:11 421:8,20 424:2 425:19 427:3 428:13,19 428:21 429:4,17 430:15 431:12 434:17 435:5

**old** 146:6,11 151:4 151:19 159:13 166:8 177:7 184:4

**omb** 52:6 154:6

**onboarding** 34:21 35:1

**once** 103:21 150:13 209:14 211:17 247:22 248:19 297:15 322:15 347:10 371:20 410:22 411:13

**ones** 43:9 332:1 405:22

**ongoing** 84:19

**online** 110:11

**op** 48:17

**open** 256:16 257:1 289:16 335:21 435:19

**operated** 197:14

**operates** 204:16

**operation** 124:15 126:1

**opinion** 207:21 428:6 429:13 432:19 433:6

**opinions** 433:3,12

**opportunity** 130:9 130:11 131:9 132:2,8,10 133:20 135:21 285:5

**oppose** 435:20

**opposed** 45:21 318:13 350:18

**opposite** 265:20

**opsp** 283:19

**option** 352:11 353:18 423:9 429:5,8,12,12 435:21

**options** 368:20 422:13 423:1

**oral** 1:13 40:14 71:14,17

**orally** 9:10 71:7,8

**order** 10:19 28:11 90:14 109:22 129:11 152:14 154:19 155:9 181:21 217:13 239:7 282:19 327:9

**orders** 48:18

**ordinarily** 68:16

**organization** 12:5 125:1 192:8

**organizing** 57:8

**orientation** 64:18 84:18 86:18 130:16,22 131:14 141:9

**original** 180:14 185:6 245:3,4 346:11 384:12 439:4,8

**os** 57:12,13

**ought** 105:8

**outcome** 9:8 437:17

**outlined** 107:1 175:18 181:22 239:7 319:19 320:19 366:3

**outlining** 214:1

**outreach** 419:1

**outset** 272:14

**outside** 23:14 53:22 54:8,14,15 77:22 91:20 100:5 100:14 139:5 255:15 325:11 393:9 406:21 407:9,13,19 409:15 410:18

**outstanding** 435:17,22

**outweigh** 304:11 363:22

**overall** 359:19

**overcharacteriza...** 234:13

**overlap** 338:20

**overrun** 162:18

**oversees** 42:18

**oversight** 3:1 291:22 293:2,6

**overstates** 312:6

**overview** 59:19 60:2

**p**

**p** 4:1,1 8:1

**p.m.** 73:8 83:5,14 116:1 128:14,18 203:9 212:1,5 235:8 240:19,22

250:8,12 308:19 309:1 335:12,15 380:18,22 419:15 419:18 435:11,14 436:6,7
**p.o.** 5:18
**page** 2:1,8 66:9,14 78:4 80:8,9,12 88:21 121:7,11,12 127:8 200:11,12 202:6 205:8,10 208:10,13,21 209:6 235:6 293:20 318:4 329:18 352:10,10 353:4,18 354:10 358:8 384:8,9 428:19 439:4,9 440:7
**pages** 438:3
**panel** 406:17,21
**paper** 80:3 172:11 259:18 349:15 390:6
**papers** 402:21
**paperwork** 34:20 154:5 302:3
**paragraph** 57:16 130:8 132:12 182:22 183:8 310:11 321:13 322:1 323:20 329:20 339:8 358:8 429:1,3,11 429:14 433:17
**pardon** 156:8 227:10
**park** 4:15 377:20 377:21 380:5
**part** 13:22 21:8 30:13,15 68:8 76:3 95:21 110:6 116:21 152:11 153:1 159:5,7 215:9 229:17,18 244:21 248:16 249:7,8 273:17 279:19 285:13 296:16 297:21 369:5 375:7 421:4
**participate** 19:12
**particular** 18:3 37:20 42:13 44:22 64:8 92:6 170:20 252:20 261:18 266:10 310:4 314:19 360:3 369:15,22 385:13 387:3 391:10 411:16
**particularity** 33:5
**particularly** 28:9 35:10 84:6 261:8 344:21 412:1
**parties** 1:19 8:11 118:21 437:13,16
**partitions** 256:22 257:7,8
**partner** 12:3
**party** 9:6 125:7 192:12
**pass** 30:2 174:22
**passing** 218:13
**pay** 34:6 308:8
**paying** 164:1
**pending** 84:21 86:16
**people** 16:10,12 20:3 30:18 31:12 41:4,5 42:3,9 43:5 43:19,19 44:20 47:2 63:21 65:3,6 84:17 91:6,9,11,20 102:5,22 107:15 108:18 131:1 150:16 152:12,15 176:5 192:10,19 197:15 202:7 204:14 211:14 224:10 244:1,3 255:17 258:10 266:22 273:9 281:13,20 282:14 284:10 289:12,15 322:8 323:17 325:11 327:10,11 327:16,19 328:3 328:16 330:13 331:18 332:4,8,21 334:4 345:7 349:14,18,22 351:16 355:4,8 360:13,22 362:16 362:19 363:5 385:3 388:15 407:18,19 410:17 414:9 417:12,16 418:8 421:21 430:19 431:3,6,10 431:15 433:20
**people's** 359:4
**percent** 224:1 328:6,7,15 331:1 332:4,6 353:2,6,11 353:22 354:13 355:2,4,5,8,11,17 357:12 362:6,10 362:22 364:6 365:1,9,15,17,17 366:1,12,18,19 367:3,7,20 369:1 414:7 416:22 417:15 425:21 431:3,6,8,11,14,14
**percentage** 108:17 351:4 361:18 430:7
**perception** 143:10 414:2
**perdue** 52:12
**perfect** 11:3
**perfectly** 264:11 302:8 434:6
**period** 30:14 31:19 32:7 34:7 34:17 55:11 96:7 147:1 179:7 197:12,14 262:15 271:8 277:17 283:16 290:4 341:2 369:4 383:17 419:21 420:12,20
**permit** 429:22
**perry** 4:7
**person** 16:17 43:14,17,22 44:1,4 44:10 48:5 76:7 77:5,7 90:5,20 91:12 92:8,13 104:3 125:14,15 153:16 161:7 169:18 171:3 173:9 179:20 183:5 184:11 203:14 213:16 214:18 215:5,7,13 266:21 267:6,17 282:20 283:13 285:9 295:4 339:13 382:5 391:9,12 396:18 397:22 410:16

**person's** 179:15
**personal** 167:10 205:17 262:5 266:10 300:11
**personally** 68:2 297:9 400:12
**personnel** 21:1 32:3 34:21 35:1 74:10
**persons** 66:2 345:2,9 353:7 416:19
**perspective** 259:10 266:10 352:2,5
**persuade** 284:11 284:15
**persuading** 282:20
**peter** 95:11 100:6 100:8 218:17,22 225:1,8 227:16 231:20 288:15 386:18 396:15 399:7
**pgrossman** 4:9
**phone** 74:3 118:16 121:19,21 122:9 156:6,11 169:3,4 169:13 170:6 175:15,16 178:3 179:8 184:17 210:3,17 217:19 270:8 271:6 398:1
**phones** 8:8
**phrase** 278:10 355:21 356:4,7,20 360:7 363:11 366:7
**phrased** 280:21,22 337:16 348:11
**physically** 34:13
**pick** 8:6 431:5
**picture** 77:14 351:11 354:7
**piece** 224:11,12
**pine** 4:16
**pitfalls** 67:19
**place** 8:8,11 60:2 89:13 122:9 130:6 132:10 135:16 149:18 151:22 152:3,8 171:8 181:12 204:18 337:21,22 348:14 397:22 411:9 439:15
**placed** 64:15 163:18 301:8 418:15
**placing** 265:16 429:18 434:18
**plaintiff** 8:15
**plaintiff's** 383:20
**plaintiffs** 1:4,14 2:9,9,10,10,11,11 2:12,12,13,13,14 2:14,15,15,16,16 2:17,18,18,19,19 2:20,20,21,21,22 2:22 3:3,3,4,5,6,7 3:8,9 4:10 5:1 10:3 56:2 62:3 80:17 82:17 87:8 93:19 114:7 120:15 123:11 137:17 145:7 147:10 158:19 164:14 167:2 182:7 189:7 194:15 199:21 212:14 215:19 218:6 219:19 221:19 224:16 226:18 234:20 241:4 293:1 309:3 317:20 326:1 372:15 374:20 376:13 378:18 381:4 383:21 420:7
**plan** 415:4
**planned** 419:1
**planning** 36:2 37:8 52:8 150:16 200:9 283:21 377:22 378:8
**plans** 115:20
**plausible** 86:6
**play** 204:13
**please** 8:5,7 9:12 9:19 10:12,20 46:2 79:5 98:5 100:7 135:1 213:16 214:17 296:13 336:18 339:7 439:2,8,11
**plenty** 130:15
**plus** 263:9 266:21 413:21
**point** 10:11 12:13 60:20 64:11 69:13 75:15 105:7,12 135:7 137:1,8 139:20 142:15 150:4 165:11 166:13 171:20 179:22 185:17 186:1,2,6 187:12 199:13 216:15 234:7 237:15 241:8,12 251:2,13 268:2 273:4 275:12 292:17 294:17 315:1 316:2 332:2 342:12 361:18 362:5 371:18 374:1 408:18 411:6 414:12 415:2
**pointed** 193:2 227:6 278:2 331:20 369:21
**pointing** 131:7
**points** 124:20
**policy** 19:2,7,10 19:12 32:9 33:9 33:11,13 35:13,18 35:20 36:2 37:8 37:20 38:1 41:3,8 41:16 42:7,10,15 42:21 43:8,19 44:16,19 45:2,5,6 45:16,20,21,22 46:4,5,6,7,14 47:6 48:2 49:21 50:2 51:20 52:15 53:15 53:21 54:6 57:2 84:7 86:11 102:16 124:10,12 128:7 131:19 143:11 150:5 173:7,13,16 200:8 201:8 257:16 267:6,17 283:21 377:22 378:8 404:8
**political** 13:17 58:7 74:13 75:11 75:12,21 104:10 359:4
**politicals** 57:12 76:5

**politics** 104:11
**poorer** 319:16 320:16
**popped** 342:4
**population** 108:17 155:8 272:18 328:8 332:9 349:10,13,18,22 352:18 354:4 355:3,17 357:7 361:19 364:8,21 368:7,13 430:3 431:3,13
**populations** 124:17 138:22 139:10 140:11 141:13 331:21 349:12,13 359:13 359:14 360:20
**porter** 1:15 4:4 8:21
**portfolio** 281:22
**portion** 429:16
**posed** 70:19
**position** 33:7 35:20 37:22 38:7 44:7,13 74:9,13 84:4 116:8 131:19 142:18 173:13 175:8,11 188:19 188:22 281:14 313:9,14,15 317:11,15 336:1 410:14
**positions** 19:2
**possibility** 133:4,9 135:18 160:12 164:5 171:5 176:22 180:7 190:17,21 380:13
**possible** 55:21 65:22 72:19 85:14 89:17 93:12 95:13 95:16 101:12 102:1 133:17,18 135:13 145:4 169:7 197:16 201:6 203:22 231:2,2 254:9 282:19 306:7,17 306:18 318:16 324:8 376:17 380:15 406:18 422:10
**possibly** 60:20 61:9 64:3 72:14 73:19 136:21 144:5 233:15 260:5,10 397:12
**post** 67:7,10,19 77:14 78:21 79:16 81:8,20 146:14 402:22
**postal** 20:7
**postulating** 362:4
**potential** 125:20 265:18,21 360:16 363:20 367:18 395:22 406:21 408:7
**potentially** 64:15 84:12 146:15 368:22 397:17
**practice** 13:2 159:19 413:20
**practiced** 15:14 193:11,19
**practices** 108:22 109:4,13,21 110:7
**pre** 213:22 311:5 320:2
**precedent** 379:7
**precise** 230:5,7
**precisely** 130:18 142:21
**predecision** 375:18
**preliminary** 153:9 153:14 154:2,20 156:18
**premise** 258:19 303:10
**premised** 301:20
**premises** 258:18
**prep** 26:19 288:13
**preparation** 56:17 62:13 345:13
**prepare** 20:10,18 29:21 183:12 232:21 243:18 289:15 290:22 369:8,9
**prepared** 11:5 179:17 183:14 232:5,19 288:10 324:16 342:16 368:16 423:14
**preparing** 18:20 29:12 216:9 219:12 288:18
**prepped** 289:1
**prepping** 26:10 290:10
**presence** 315:11 315:17 322:3
**present** 1:18 34:13 76:12 97:22 126:5 126:7 151:7 152:4
**presentation** 322:20
**presented** 223:7 264:5 316:20 330:9 332:4 347:12 360:14 391:7
**president** 116:7 385:2 388:14 392:14,20 393:5 393:13 404:8
**president's** 29:1 392:5,11 393:2
**presidential** 15:18 16:4 17:16,17 48:17
**press** 77:5,7 198:3 257:17 386:11 389:20 390:1,15 390:20 402:9,13
**presumably** 65:16 163:16 220:18 222:5 365:18
**presuming** 295:4
**presumption** 177:14
**presupposes** 304:10
**pretextual** 301:1
**pretty** 31:4 128:17 343:9
**prevent** 84:7
**previous** 149:4 159:6 247:2,3,21 377:7
**previously** 96:2 103:8 111:20 245:2 305:8
**priebus** 394:5,9,16
**primarily** 179:10 224:9 257:16,17 325:15
**primary** 41:11 48:5 124:20 161:6 171:1 181:11

208:19 242:18 263:14 338:21 421:20
**prime** 369:14,16 369:17
**principal** 242:15 242:16,17 345:5,8 345:10
**principally** 345:2
**print** 384:17,22
**prior** 23:17 41:8 64:12,14 84:11,14 84:22 86:15,17 108:5 130:20 168:11 242:2 253:18 298:8 333:5 346:20,21 347:8,18,20 384:5 385:16 397:18 407:13
**priorities** 160:6
**priority** 168:10 172:21 383:1
**privacy** 167:10 205:17
**private** 8:6 204:14
**privilege** 186:13 186:15,18 195:22 340:16
**privileged** 340:11 346:15
**privy** 421:13
**probably** 59:7 64:2,7 83:14 85:2 88:8 94:7 96:20 104:9 124:3 129:1 129:17 141:17 142:18 146:13 147:21 150:4 179:9 190:11 211:16 215:14 225:6 243:2 261:16 271:6 285:13 323:14 341:4 346:14 390:14 391:13,21 413:11 431:8
**problem** 196:7 207:12,18 333:3 355:5 413:22 414:5,10
**process** 23:22 28:11 30:20 31:13 84:1,19 88:22 97:1 106:10 150:3 152:5,11,20 153:1 154:16 176:5 181:5,22 211:3 239:4,5 296:3 345:20 348:13 350:20 372:13 374:5 379:5
**processes** 106:1 152:13 347:4,6
**processing** 34:19
**proclamation** 50:13
**produced** 78:11 80:16 81:2 137:5 247:10 248:20 309:14 311:9 320:11 321:8
**product** 62:17 429:6
**production** 302:3
**professional** 42:8
**program** 402:11
**programs** 103:14 203:21 204:2
**progress** 172:22 183:14,18,22 197:4 215:1 225:11 230:10 231:15 232:4 233:3 338:2
**promise** 239:19
**promote** 350:6
**prompt** 161:2
**pronounce** 87:20
**pronounced** 203:7
**pronounces** 379:11,14
**properly** 124:19 281:1
**proposal** 334:17
**proposed** 335:3 351:7
**proposing** 368:15 369:19
**proposition** 305:14 306:6
**prosecuted** 419:12
**protected** 62:21 414:13
**protection** 6:4
**provide** 30:4 77:11 95:11,14 103:16 132:14 139:15 162:22 167:16 174:9 177:20 274:13 331:14 349:6 354:5,6 356:14 370:10,21 403:22 424:22 425:11 426:17 427:10 429:9
**provided** 95:2 126:17 132:19 155:14 156:2,5,10 156:12 157:10 174:6 248:6 258:20 275:5,10 301:7,21 303:12 317:5 321:7 344:15 354:15 367:10 370:17 372:1,7 418:2 434:7
**provides** 103:13 312:21 313:16 350:3
**providing** 95:3 350:9 355:1 422:14 423:1
**public** 386:2,11
**published** 390:5
**pueblo** 381:7
**pull** 22:22 284:15
**pulled** 66:19 91:17
**pulling** 66:16
**purpose** 11:14 350:4 369:18,19 408:21 414:14
**purposes** 65:6,21 67:3 85:20 207:14 207:20 208:4,6 249:1 421:4
**pursuant** 1:14 348:17
**pursue** 151:2 152:6 154:10 264:15 265:15 279:12
**pursued** 415:15
**pursuing** 150:19
**put** 61:20 132:2,8 174:17 176:8,19 190:11 243:4 245:9 248:12 267:16,16 295:20 300:1 302:13 306:5,18 307:13 323:19 327:14

333:3 337:15
338:10 347:21
348:12 367:22
411:19,20 419:2
435:21
**puts** 306:8 308:6
**putting** 91:18
164:5,8 180:7
337:1,12 348:3
372:8
**puzzled** 202:8,13
202:17

**q**

**qfr** 32:1
**qfrs** 29:15,17,22
30:8,12 31:15
**quality** 78:6
310:21 312:1
315:3 319:16,18
320:16,18 350:16
**quantify** 354:21
361:4 362:2
**quarter** 361:18
362:6,10,22
363:16
**quarters** 78:4
**question** 10:4,11
10:21 20:16 21:12
21:15,16 24:3,6,9
24:15,18,21 30:3
31:17 43:3 45:14
47:14 51:4 53:8
53:12,18 54:9,12
54:17 55:6,13
59:13 61:6 63:5
63:16,18 64:1
65:12,14,17,20
67:5 68:6,13,17,22
69:10,11,13,14,17
70:10,15,19 71:4,5
71:17,19 73:17,20
76:13 77:22 79:6
79:17,18,22 81:15
82:4,8 83:8,20
84:15,17 85:18
86:19 90:13 96:1
96:15 97:8,17
103:2,5,7,12,18
104:1 105:8,19
106:3,9,18 107:3,6
107:11,13,19
108:1,19 109:9,16
110:1,20 111:21
112:7 126:6 127:2
127:11,15 128:11
128:22 129:11,11
129:16,20 130:22
131:3,4,12,15,20
132:2,8,10 133:5,6
133:9,20 134:6,12
135:5,12,17,18
136:12 140:4,12
140:18,19,21
141:7,14,21,21,22
142:8 143:3 144:1
144:11,15 146:7
146:11 149:17
150:3,11 151:2,3,5
151:15,20,22
152:2,6 153:4,13
153:17 154:10,13
155:2,17 156:9,17
157:5,15,19 161:2
161:21 162:7
163:3,7 164:10
166:10 168:4
170:12,22 171:6,7
171:17,21 172:1,3
173:15 175:21
176:11,13,17
178:10 180:8,8,15
181:19 187:3,7
188:5,11 190:4,7
190:10,12,14
192:16 193:5,6
194:4 195:4,8,10
195:16 196:2
203:1 204:7 208:2
208:7,16 209:13
209:21 214:2,5
216:5,10,20 218:1
218:14 219:13
220:13 221:9
222:14 223:4,8
225:12,16,20
230:11,14,18
231:18 232:2,6,9
232:19 233:3
237:18 239:13,16
240:3 241:14
242:6,11 244:22
247:13 248:11,19
251:1,4,10,13,22
252:16,21 253:2,3
253:4,7,10,11,14
254:3,5,6,10,17
255:3,8 257:12,12
258:2,12,16,18,20
259:2,3,4,6,9,13
259:15,16 260:7
260:14,17 261:1,9
261:15,22 262:3,6
262:8 263:1,1,6,7
263:12 264:6,15
265:3,4,16 266:5
267:16 268:1,8
270:3,6,16 271:20
272:1,5,9 273:21
274:11,17,22
275:9 277:21
278:9,15 279:2,9
279:13 280:2,14
280:19 284:7
285:22 286:12
287:16 288:8,17
289:5,6,22 290:20
291:2,9,19 292:15
294:7,11,14,15,19
295:9 296:4,18
297:12,22 298:6
298:19 299:5,8,10
299:17,18 300:1,4
300:5,6 301:9,11
302:2,5,6,12,15,18
303:9,11,13,14,20
305:9,21 306:5
308:15 309:9
310:14,20 311:15
311:20 312:1
313:7 314:14
315:21 317:10
319:2,9,11 321:21
322:22 323:4,16
324:16,22 325:4
326:17,17 327:20
330:1,14,20 331:8
332:5,8,20 333:4,7
333:13,14,16
334:8 337:2,10,15
337:21 338:10,15
338:22 339:14
341:1,3 344:18
346:19,20 347:10
347:22 348:4,19
350:17 354:15
355:2,3 359:1,16
360:1,15 361:17
361:21 362:7
363:8 364:1,2
365:10,22 366:4
367:8,14,22 368:8
372:11 373:10,11
373:11,12,13,13
373:18,19,21,22

374:3 375:14 377:10 379:4,10 379:18,20 380:6 381:15,21 383:9 383:14 389:6,7 391:13 392:6,12 393:3,18 394:22 395:22 396:10 399:16 400:6,10 400:20,22 401:7 402:2,6 403:11,21 404:3,12 405:12 406:7 407:1,14 408:21 409:4 410:5 412:6,18,22 414:4,8 415:5,12 415:17 416:21 417:5 418:4,9,15 419:22 421:3,8,12 424:11,12,17 425:2 426:14,22 427:2,7 429:18 430:16 434:19,22 435:2

**questioned** 192:8

**questioning** 111:1 240:14

**questionnaire** 130:5 367:14

**questions** 3:5,7 10:9,19 18:19 22:6 23:3 26:12 26:15,21 28:3,5,9 28:10,14,20,22 29:5,9,19 30:16 64:13 66:9,20 68:9 70:4,8 84:19 89:1 127:12 129:8 130:16,18 131:8 132:15,16 134:2,8 134:9 141:22 146:4 149:11,12 149:14 154:3 220:15 226:10 241:6 242:2,6 244:8 250:16 258:21 288:7,18 289:11 292:11,13 303:18 319:5 326:9 329:17 335:17,22 336:4 349:21 353:9 356:3 362:15 369:6,17,19 370:2 370:4,9,18,19 371:8,16 372:4,5,8 372:15 373:7,9,17 374:14,17 375:10 376:13 377:1 378:10 379:5 381:11 382:1 413:18 416:14 417:13,14,17 419:9 423:20 435:16 439:11

**quick** 30:18 109:19 127:10 168:12 264:14 375:12

**quickly** 106:19 128:20 226:14,15 365:5

**quite** 47:13 52:21 53:1 72:14 73:19 106:19 163:16 224:8 345:6 360:4 371:14

**quote** 59:17 67:10 72:1 75:10 83:8 88:14 115:19 146:3 148:4 202:7 225:9 236:1 310:20 357:12,19 357:19 385:2 388:19

**quoted** 390:6

**r**

**r** 4:1 5:16 8:1 25:10 440:1,1

**race** 349:20 362:15

**races** 259:1

**racial** 138:21 139:9 140:10 141:13

**raise** 24:5,8,17,21 144:14 170:17

**raised** 69:1,4 81:14 96:2 104:3 104:14 111:20 112:7 144:8,15 245:2 390:10

**raising** 131:1

**ramp** 20:22 21:3,4

**ran** 12:5 125:7 407:11

**randomized** 334:12,13,17 335:3

**range** 70:8 105:19 288:18 353:3 365:2

**ranges** 49:10

**rarely** 257:3

**rate** 330:11,21 351:1,3 355:7 358:14 361:3 365:9 366:17 367:4,15,19,20 416:20 418:3 430:2,17 431:14

**rates** 105:20 132:14,17 134:7 137:7 327:5,6 366:13 417:18

**ratio** 430:5 432:16

**rationale** 254:1 266:9,14 267:5,8 267:12,22 268:4 268:17,22 271:18 286:11,18 294:21 296:7 300:10,13 300:16,17,19,21 301:7,8,12,13,21 302:13,15,19,20 302:22 303:21 304:1,4,11,12,15 304:20 305:4,8,15 306:8,9,19,20 308:6,7,9,10 350:22 351:19,20 351:22 352:3 383:11 392:6,11 415:8

**reach** 73:13,15 165:1

**reached** 168:3,6 400:4

**read** 15:5,7,7,9 78:10 79:21 80:21 101:4 130:15 145:13 146:17 238:17 294:5,8 312:17,21 314:11 314:16 315:22 321:13 356:21 376:1 402:9 428:22 429:15 436:3 438:3

**reading** 121:8 206:13 220:1 235:2 388:22 402:19

**reads** 80:20 207:6 207:11 329:20 339:9 358:12
**ready** 216:10 281:4
**real** 300:21,22 301:12,15 302:20 302:22 303:20,22 304:20 306:10 308:7,9
**really** 30:3 41:17 77:9 103:20 184:19 211:3 229:7 276:1 278:2 322:15 364:13 378:6
**reason** 64:17 140:9 143:5 181:9 192:9 257:19 258:1,3,19 260:16 263:8 264:11 265:18,21 266:4,6 268:8,12 272:10 273:13,15 275:1,6 286:10 291:7 295:18 296:9 300:21,22 301:5,9 301:15 302:7 303:6,11 305:3 306:10 307:16,18 315:14 316:3 340:10 343:14,15 361:20 414:16 429:14 440:7
**reasonable** 67:17 289:7
**reasonably** 80:3
**reasons** 70:9 86:6 86:8 106:22 167:10 205:17 259:8 262:1,12 263:15 264:8 291:1 301:1 304:16 330:16 359:10 360:21 418:21 429:12
**recall** 22:17 24:4,7 24:11,16,19 25:1 32:14,20 35:10 38:8 51:8 53:13 55:11 58:18,22 59:4,12,15 64:2 65:12 71:15 73:21 76:12 77:10,20 78:2 85:7,9,12 86:21,22 87:4 88:10 92:6 94:20 96:6 100:2,10 101:20 102:3 104:7,13 110:12 114:19 122:16 124:5,11 125:18 131:13 133:12,16 135:15 136:13,21 137:14 142:16,21 145:4 146:15 155:4 156:3 157:20 162:9 170:19 172:10,13 172:18 173:17,21 174:1 178:7,18 179:11 188:8,10 189:19 191:5,11 195:13,15 202:15 207:4,6 209:16 214:14 215:11 217:11 225:14,17 233:13 237:3 242:8 244:15 246:22 257:22 260:1 269:7 292:14 324:14 340:6 341:18 367:9 369:5 370:15 371:19 372:3 375:4 376:7 383:10 397:9 408:5,9
**recalling** 33:19 67:1
**receipt** 439:7
**receive** 26:21 93:3 237:16,19 246:7
**received** 31:16 216:15 222:12 245:4,5 246:2,5 247:18 290:4 291:8 294:20 295:10,15 335:20 344:4 347:17 387:1 390:20
**receiving** 71:18
**receptive** 285:13
**recipient** 115:9 181:11
**recognize** 212:20 222:3 384:21
**recollection** 11:14 27:8 29:8 34:4 61:3 67:4 68:5 71:20 89:10 93:11 196:4 203:17 258:7 323:6,11 324:7,10,11 328:5 346:10 398:12
**recommend** 101:3 132:13 142:19 344:22
**recommendation** 246:13 248:22 352:6,7
**recommendations** 86:15,17
**recommended** 173:9 245:13 247:16 248:5 283:8 285:11 344:11,14 350:15 421:1,10
**recommending** 113:18 132:21
**recommends** 101:2 413:17
**record** 8:4,12 10:1 11:10 20:16 25:9 26:12,15,22 28:3,6 28:14,21 29:6,9,19 36:21 39:14 50:19 50:21 60:13 98:4 111:8,9,12 141:8 158:8,9,11,14 164:20 211:18 212:2,3,6 239:9,10 240:17,18,20,21 250:9,10,13,15 301:8 308:20,21 309:2,6 311:8 321:8,9 335:12,13 335:14 343:3,8 346:15 347:8 354:3 380:16,19 380:20 381:1 383:20 391:19 419:13,15,15,16 419:17 435:7,9,11 435:12,13 436:6 437:11 439:10,17
**recorded** 8:14
**recording** 8:10
**records** 37:5 60:10 350:19 353:7,13 354:2,5 355:13 367:22 368:2,9,14 368:16,18 369:2

418:18,20 421:1 421:11 423:11 424:8,13,21 425:3 429:22 430:20 431:4
**red** 53:4
**redacted** 145:20 145:22 167:9 227:8,11,16 229:20 232:7 340:18
**redaction** 78:12 78:14
**redactions** 222:8
**redactors** 340:2
**redistricting** 14:22 193:19,20,22 194:10 393:22 395:4 396:4 399:20 401:11 404:13 406:8 409:10
**reduced** 437:9
**reduction** 154:5
**refer** 79:3 143:11 146:16 148:11 200:18 281:11 292:18 384:8 414:6
**reference** 137:6 141:17 142:21 187:9,10,18 209:4 229:12 230:12 231:10,17 239:21 302:12,14 357:8 358:2
**referenced** 301:22 409:14
**referencing** 219:15
**referred** 60:3 118:7 141:12 143:6,14 198:9 270:20 352:21 382:10,16,18 409:21 410:9,12 411:11,11,13
**referring** 72:6 96:8,18 102:22 107:15 132:6,8 137:10 149:3,4 150:22 155:3 161:14 187:14 200:21 213:8,21 216:19 217:16 222:21,22 229:8 239:5 241:16,18 241:19 244:16,19 354:11,12 357:10 357:15 358:3 360:7,9 373:22 388:20 400:5
**refers** 58:3 60:22 97:6 113:10 157:13 163:2,7,8 230:13 277:2 321:2 388:12
**reflect** 147:22 165:14 312:17 317:11 377:6
**reflected** 55:19 61:7 72:18,20 89:15 110:16 312:9 313:15 321:12 433:7
**reflective** 317:9
**reflects** 217:21 220:9,10 312:19 327:11,15 377:9
**reform** 3:2 291:22 293:2,7
**refresh** 288:3
**refreshing** 11:14
**refuse** 332:8
**refute** 351:6
**regard** 26:7 48:3 51:10 270:2
**regarding** 21:11 22:2 59:13 95:20 117:13 119:11 127:12 165:1 195:3,8 220:16 221:11 225:11,15 225:20 230:10 233:3 241:15 242:10 244:20 262:6 383:13 394:10,11,13 396:9 400:10 404:2 405:11 409:3 439:5
**regardless** 320:14
**region** 3:18
**register** 283:2
**registration** 13:5
**regular** 38:9 44:14 44:16 159:19 414:1
**reidy** 7:1 9:1
**reince** 394:5
**reinstate** 95:22 244:22 348:19
**reinstating** 96:14 97:7 103:1,5 107:13
**rejected** 352:1,4
**relate** 31:17 140:16
**related** 9:6 15:9 20:9,17 110:7 119:4 224:9 437:12
**relates** 318:9
**relating** 130:4,16
**relation** 14:4,5,6
**relative** 112:17 313:3 437:15
**relay** 383:4
**relayed** 184:19 185:3 233:19 237:11 383:4
**relevant** 39:4 50:6 82:11 108:20 109:6 211:3 253:9 253:14 254:2 260:9 299:9,17 300:8 304:17 340:19 346:22 427:12 428:11
**reliable** 351:5
**relied** 108:2 351:2
**rely** 108:7,13 350:18
**relying** 283:7
**remaining** 355:5 355:10 431:9
**remember** 27:1 28:17 32:16,21 33:2 37:4 60:5 61:1 71:18 79:5 82:2,6 92:4 114:4 147:6 179:15 188:12,14 202:12 210:13 221:12,14 237:22 255:12 287:20 292:13 322:17
**remind** 117:19 356:22 386:9
**reminded** 57:18
**reminder** 28:18
**remote** 20:1

**repeat** 259:5 398:21 403:10
**repeatedly** 223:14
**repetitive** 422:19
**rephrase** 10:13 278:18 422:19
**replied** 165:22
**reply** 71:12 130:1
**report** 9:10 36:4 42:3 43:5 102:11 178:14 197:3,8 252:8 272:15 378:2
**reported** 36:13 37:10,15 266:1 411:20 417:11
**reporter** 9:3,12 13:12 26:13 186:9 191:14 201:14 211:14 243:12 293:17 353:15,20 437:2
**reporting** 1:17 202:6 439:14
**reports** 120:8 310:18 402:17,19
**represent** 10:2 66:18 79:11 80:15 205:14 241:3 290:13 311:7 317:15 320:7,11 336:11 364:6 375:20 420:7 432:15
**representation** 312:8 374:5
**representations** 432:10
**representative** 292:12 298:18 299:7 300:3 316:19
**representatives** 297:10,16 299:18 434:21
**represented** 205:15
**represents** 314:20 342:10
**republican** 307:4
**request** 146:6,11 151:4,19 153:3,7 153:22 156:16 159:13 162:15 164:3 165:15 166:8,9 173:1 176:3 177:2,7,18 177:18 181:8 184:5 185:8 186:2 190:9 192:5 197:6 223:3,5 239:10,15 251:3 262:17 264:5 265:16 271:22 279:1 290:16 291:8,10 294:20 295:10,15 295:19 296:3,6,10 296:13,22 297:3,4 297:8,11,19 298:7 299:4,11 300:7 305:11 309:8,11 348:17 349:4 381:14 382:15 389:14 410:2,22 412:5,13 413:2,6 414:22 415:2,19 421:2 426:13 427:6 429:10
**requested** 64:14 153:17 239:3 261:13 299:19 342:13 348:18
**requester** 180:14 180:20
**requesting** 175:20 204:19 237:17 349:2 412:21 419:22
**requests** 28:13 64:21 154:4 250:22 337:14 421:11
**require** 20:22 21:3 21:4 368:20
**required** 13:22 300:15 419:7
**research** 4:2 108:21 109:13 155:5,6,11,12 172:7 181:6 193:2 282:21 283:3 285:6 413:15 416:8
**researched** 109:4 192:21 326:16,18
**researching** 285:16,18
**reside** 207:12,19
**residents** 80:22 81:18
**resolve** 436:2
**resolved** 139:20 141:2,5 142:10 341:3
**resources** 412:2 419:2
**respect** 86:3 248:13 291:18 309:11 324:20 326:15 382:14 418:4 430:10,19
**respectful** 281:1
**respective** 1:19
**respond** 129:11 332:22 353:9 360:14 367:13 390:7 418:9,10 427:11 430:19
**responded** 151:21 217:18 218:17 332:22 367:8 372:1
**respondents** 207:8 369:3
**responding** 76:14 331:22
**response** 30:6,18 65:14 67:18 83:8 105:20 132:14,17 134:7 137:7 146:6 151:4,18 159:13 166:7 177:7 180:12 184:1,4 215:6 216:4 276:15 327:5,6 330:11,12,21 351:1,3 358:14 362:7 363:1,16 365:9 366:13,17 367:3 372:7 373:6 373:9 377:10 387:7 389:20,22 391:8,8 409:15 416:20 429:10 430:1,17
**responses** 29:12 29:21 30:8,12 32:1 353:6 355:12 371:16,20 425:21 429:21 430:6 431:5 435:18
**responsibilities** 16:8 17:11

**responsibility** 242:20 289:13
**responsible** 26:10 44:20 192:12 439:5
**responsive** 65:17 68:14,17 79:22 168:13 300:4 331:9
**responsiveness** 330:2 366:2
**rest** 19:19 130:15 312:21
**restate** 187:2 228:10
**result** 319:15 320:16 338:6 350:5 362:16 393:17 394:21 395:21 399:15 401:6 404:12 406:6
**resulting** 361:17 366:1
**results** 252:8
**resumes** 43:4
**reveal** 291:1,7 305:9
**revealing** 307:17
**review** 11:8,13 41:1,13 97:18 105:9 151:6 153:10,14 154:2 227:7 281:8 290:8 296:4 325:2,16 360:19 375:12 378:9 426:12 427:6,10
**reviewed** 94:7 244:2 247:8 249:4 344:12 345:7 371:7,14,18,19 372:12
**reviewing** 370:3
**revision** 52:9 177:15
**riggins** 17:10
**right** 18:22 19:17 19:18 20:14 26:4 26:10 27:6,7,12,18 27:22 28:17 34:22 37:4,9 46:15 55:2 56:21 57:2,5,6 58:16 62:9 63:9 63:17 66:15 67:7 67:20 68:11 72:11 73:9,14,18 74:16 83:2,5,9 86:12,20 88:1 89:19 90:20 91:1,22 93:2,5,6 94:17,18 97:9,10 97:20,21 98:3 106:21 107:14,17 119:5 121:15,16 122:5 124:21 125:3 130:10 131:2,16 132:4 133:18 134:8 136:18 138:9 140:5 141:3 143:2 143:15 144:11,16 147:3 148:6,9,17 150:5 152:22 153:4,5 157:5 159:14 163:3 165:12,18 166:14 168:4,7 174:21 176:13 177:8 178:15,17 180:21 183:6 185:8 186:3 187:20 193:8 197:7 199:12 203:6 205:4 209:22 214:11 215:8 216:6,17,21 218:21 220:13 221:4 223:11,15 229:19 230:19 232:22 234:5 238:7,8 240:2 241:8,20 243:8,19 244:16 245:22 246:4 250:21 251:20 253:16 254:22 255:12,18 256:11 259:18,20 260:4 264:21 265:2,5 268:13 269:19,21 270:3,9 270:10,21 271:1,5 272:1 274:4,14 275:13 277:4,5,7 278:10 281:1 282:8,11,12,15,17 283:11,13 286:1 286:14 287:5,8 288:1 289:2,6 290:2 291:19 292:7 293:14 294:1,5,9,12 295:7 295:16,21 296:13 296:18 300:14 305:17 307:8,19 309:11,13 310:15 311:3,21 312:18 314:6,11 315:7 316:8,15,16 318:10,22 319:21 320:10,21 321:11 322:9 323:4 325:21 326:19 327:1,4,6,7,14,17 327:19 328:16,17 329:1,7,8,13 330:3 333:10,17,22 334:4 339:15,17 341:12 342:6 345:8 356:3 375:9 376:3 382:22 410:16 411:9 412:2 415:11 416:16 419:9 421:22 422:20 424:5
**rights** 5:11 14:19 126:16 127:3 153:18 155:9 192:13,17,18,21 192:22 193:8,10 193:11,14,17 194:8 262:9,16,18 263:14 264:9 265:1,5,11,12 268:3,9 271:1,14 277:11 295:1 349:9 381:22 382:6 383:6,6 400:4 403:7,16 409:19 410:1 427:18
**rivers** 20:3
**road** 4:3
**rockas** 198:1,2 256:10 386:4,8,13 386:14 387:1 391:6,18
**role** 17:13,20 19:2 25:19 26:1 48:3 51:10,17,20 52:14 53:15 74:20 139:13 152:11 393:2,6
**roles** 37:13 204:13

**rolled** 23:6
**rolling** 371:20
**room** 6:16 90:8,10 90:11 197:15
**rosenberg** 2:4 5:10 336:5,7,16,19 340:15,21 341:14 345:22 354:8 367:5 372:17,20 373:1 374:22 376:15 378:20 380:12,16
**ross** 17:8,9 18:14 20:11,18 21:11 35:8 40:17 63:7 65:1 85:5 115:19 121:20 144:2 200:19 213:17 241:10 244:13 250:22 251:20 279:11 284:13,13 285:21 286:3 287:18 289:10 310:1 318:3 319:7 324:5 338:9 339:3 343:1,6 344:9 381:5 390:10,22 401:18,19 412:3 413:4 415:14 418:15,19 420:1,9 423:14
**ross's** 63:12 94:12 286:11 326:5 337:5 420:14
**rough** 328:4
**roughly** 135:16 271:11 328:3 357:11
**rpr** 1:17 437:3,20 439:14
**rule** 46:6 70:2,3
**run** 30:5 98:18 150:9 224:10 411:7

**s**

**s** 4:1 8:1 25:10 57:18 141:8 160:18 440:1
**sacramento** 5:19
**safe** 364:16
**sahra** 377:20,21 379:4,11,14,15 380:5
**sample** 334:4 352:18 357:7 416:16
**sampling** 329:14 356:11 368:11
**san** 4:21 336:11
**santa** 11:20
**saturday** 189:16
**saw** 62:19 63:1 83:13 88:8 94:5 94:15,19 97:19 98:9 113:9 125:6 138:5 145:17,19 147:19 165:5 201:13,18 221:1 222:5 225:4 227:4 238:4 310:9 319:21 320:1,3 330:3 342:16 344:19 364:1 390:22
**saying** 45:11 149:16 166:3 183:21 203:5 214:4 215:4 217:18 218:17 227:15 230:9 252:13 267:21 279:20,21 293:11 312:11 314:15 317:10,13,16 321:11 340:3 342:12 356:5 358:1,21 361:7 431:22
**says** 40:8,9 57:17 58:10 59:17 66:17 67:10 71:21 78:15 78:17 80:21 81:6 88:14 95:17 96:9 96:13,19 103:1 104:16 107:12,16 108:12 111:19 115:19 121:17,18 127:10 130:2,8 132:13 138:15 139:17 146:2 148:8 150:8 152:7 153:2 154:22 157:16 159:12 160:16 161:9 162:11 177:13 181:13 183:1 184:6,10 185:17 187:11 191:12 200:13 204:8 206:8 213:14 214:16 216:8 221:2 222:12 225:13 229:8 231:14 235:22 236:17,21 244:19 251:20 257:11 258:1 273:19 274:1 275:13 279:6,8,10 293:21 294:14 295:9 299:7 310:16 311:17 319:15 321:2,6 330:5,8 340:17 352:12 386:10 388:20 429:5,18
**scalise** 53:5
**scenario** 155:7
**schedule** 20:22 39:3 86:7 88:15 89:4,13 92:2,16 93:1 202:4
**scheduled** 38:13 39:1 91:14
**scheduling** 85:21
**school** 4:14 11:18 11:19 12:17
**schumer** 23:8
**science** 12:1 13:17 14:2,6 18:11 104:10 434:3
**scientific** 433:15
**scientifically** 357:9
**scientist** 309:22
**scientists** 357:13
**scrap** 259:18
**se** 289:16
**search** 71:10 109:20
**seated** 256:18
**second** 25:2 57:16 80:8 95:17 107:10 116:18 121:7 130:7 151:14 178:21 182:22 191:18 200:11 205:7,10 240:7 284:6 326:12 335:10 358:8 384:9
**secret** 125:2

**secretary** 17:8,9,9 17:20 18:1,14,20 19:16 20:11,12,18 21:11,20 22:1,4,5 22:6,13,14,17 24:8 24:13,20 26:8,9 27:14 30:1 31:16 31:21 32:12 33:3 35:8,21 36:5,6,8 36:14,17 37:1,2,11 38:2,10,19 39:11 40:4,11,17 41:11 41:17 44:17,21 45:8 46:7 47:20 48:13 49:18 50:10 51:13 52:12 54:2 54:5,12,22 55:1,5 57:5,14 58:7,12 63:7,12,13 65:1,2 65:14 67:2,9,15 68:3,10,21 69:1,4 69:16 71:1 72:1,9 73:5,8,17 75:8 76:10,13 79:16 81:9,13 82:3,7 83:8 85:5,5,18 92:13 93:9 94:12 95:18 96:8,13,18 98:17 100:16,19 100:20 101:1,18 104:3,14,16 112:3 112:8 113:2,15 115:21 116:11,20 117:2,9,12,16 118:8 119:3,7,13 119:15 120:3,5 121:20 122:18 123:2 124:15 125:17,22 126:6 128:8 129:7,12 134:11,14 135:3 135:11 136:1,11 137:5,11 138:14 139:17 140:15 141:11 142:5,9 143:5 144:2 146:1 146:10 147:4 148:1,14 149:16 150:8,22 151:17 152:21 154:9,13 159:11 160:4,16 161:20 162:1,10 162:16,20 164:2,4 166:6 168:10 171:4,16,20,22 172:19 173:18 174:18 176:11 177:5,13 179:18 181:7 183:9,13 184:7 190:2,5,13 191:1 196:18 197:1 198:3 199:7 200:19 201:4,8 202:7,13,17,21 204:19 205:7,9,16 205:18 206:2,2,17 207:17,22 209:1 209:10 210:3,10 210:15 213:3,4,14 213:20 214:21 215:12 216:8 217:14,18 218:13 219:5,13 221:15 222:4,12 223:11 224:3 225:10,15 226:3,13 230:9 231:15 232:4,13 232:18 233:4,9,17 234:15 236:13 237:1,5 238:21 239:1,14 241:9,9 241:10,12 242:9 243:2,22 244:13 245:13 246:13 247:7,11,16 248:7 248:15 249:1,5,9 249:14 250:22 251:20 252:15 253:6,7 254:7,20 255:1,7 257:11 258:1,11,20 260:6 261:1,18 264:6 266:1,2,6 267:8 268:2,7 272:8 279:11 284:13 285:21 286:3,11 287:16,18 289:10 289:19 290:12,14 290:21 291:1,6 298:10,14 299:9 299:17,19 300:5 302:18 303:21 304:18 305:8 309:19 310:1 318:3 319:7 324:5 325:5,6,8 326:5 333:18,20 337:5 338:9 339:3 343:1 343:6,20 344:9 346:18 347:21 351:11,12 357:14 358:5 360:4,6 364:1 369:11 386:11 390:10,14 390:22 391:7,11 397:4 401:18,19 409:16 410:21 412:3,14 413:4,10 415:14 418:15,19 420:1,14 423:6,14 425:8 428:3 432:15 433:21

**secretary's** 27:1 63:18 71:5,10 72:21 76:16 90:7 90:11 92:1 102:22 107:12 111:15 115:6,10 138:16 146:17 159:17 161:1 177:18 199:9,10,11 214:15 216:5 217:22 233:16 239:18 255:15 260:16 265:15 266:15 267:22 286:18 301:4,12 310:6 351:21 352:3 355:21 387:15 389:11,13 391:10 412:16 432:2

**section** 50:14 349:5 394:2 395:6 396:6 399:22 400:1,5 401:13 404:13 406:8 408:14 409:19 410:1 411:15

**sector** 204:14

**security** 179:6,14 180:1,10,13,19 181:14,15 183:3 275:16,22 276:10 277:2,10 279:22 286:14,21 378:1 382:17,19

**see** 10:13 38:16 56:14 57:7,17,22 58:1,13 63:4 72:4 78:21 80:13 81:3 81:4 88:18 89:2 96:4,16 111:21

115:2,18 116:2 121:11 122:2,3 127:8 130:7 131:8 131:12 132:16 139:22 140:1 146:1,8,9 148:13 149:15,20 157:1 160:21 161:11,12 162:10,14 163:13 180:22 182:22 184:21,22 191:8 200:16 202:5,10 203:4 204:5 205:22 206:8 207:9,10,15,16 208:20 213:6,13 213:18,19 215:15 216:13 218:16 222:17 227:18 231:9 234:11 235:6 236:4,5,8,9 238:9 258:14 259:7 261:16 267:2 270:5 293:21 310:7 318:1 320:1,6 321:5,6 325:14 339:8 342:19 352:22,22 358:16 358:17 364:21 379:9,17,19,21 384:11 385:8,9 386:20

**seeing** 66:7 88:10 99:17 114:19 137:14 175:19 231:19 232:7 244:5

**seek** 412:17

**seeking** 421:5,6

**seen** 38:6 43:4 44:7 56:12 62:9 83:11 88:6 94:3 114:15,17,21 121:2,4 138:2 145:15 147:16,17 159:4,7 165:3 189:14 200:5 212:22 216:1 220:5 223:14 224:22 227:1 235:4 238:3 310:2 310:3 318:7,8 320:7 373:3 375:2 375:4,5 376:16,20 378:22 385:12,13 385:14 387:9,11

**self** 353:6

**senate** 12:1,18 16:11,13,20 17:6 18:6

**senator** 11:22 18:9 20:6 23:16,17 25:17

**senators** 23:15,21

**send** 28:8,9 30:6 30:16 44:9 49:5 50:7 60:17 68:16 83:15 92:9 110:19 189:17 191:9 272:4 349:2 370:5 413:2

**sending** 79:16

**sends** 160:15

**senior** 38:20 44:13 47:15 52:12 53:3 74:5,7,17 75:10,12 75:21 76:7 96:1 98:17 111:19 112:1,6 113:11,20 113:20 124:22 173:12 245:1

**sense** 19:4,5 59:18 108:2 110:4 385:6 385:6 389:6

**sensitive** 8:6 131:4

**sent** 60:15 61:21 62:10 65:13 71:13 73:7,12 81:8 83:4 83:12 114:4,20 121:20 148:1,14 165:21 189:15 203:5,8 208:9 212:21 215:6 220:7 225:6 232:12,16 233:2,4 237:21 247:4 248:21 311:6 322:21 339:3 370:6 385:21 387:6

**sentence** 95:17 183:1 310:12 313:13 319:15 329:20 339:9,10 348:16 352:12,21 356:21 357:1 358:12 385:1

**sentences** 430:10 433:16

**senteno** 2:4 5:1 381:2,4 382:2 384:1,20 390:8,16 392:13,22 403:12 403:13 404:17 407:21 409:5 410:4,19 412:8,19 413:14 415:7,13 416:2 419:13 428:12

**sentiment** 389:9 389:10

**sentiments** 389:3

**separate** 22:8,9 106:8,11,15,20 107:9 266:5

**separately** 22:14 22:15 26:20

**september** 182:21 183:10,19 187:15 189:16,18,18 215:12 222:11 225:6,19 227:15 234:11 235:8,15 237:14 339:3 437:22

**sequence** 166:17

**series** 223:6 288:22 322:10

**servers** 352:18

**serves** 179:2 371:22

**service** 20:7 307:3

**sessions** 167:22 279:11 283:10 400:9

**set** 85:12 161:10 166:10 199:3 349:11 354:3 372:8

**setting** 17:21 25:6 25:21 189:20 220:11 231:14

**settled** 146:4 148:19 149:11,14

**seven** 12:6 234:14

**sex** 141:9

**sexual** 64:18 84:18 86:18 130:16,22 131:14

**shah** 5:5

**she'd** 174:3

**she'll** 10:18
**sheet** 438:7 439:8
**shelf** 132:19
**sherpa** 16:10,12 16:14 17:5,13,20 21:20 25:6,21 26:2,5 31:13 77:1 124:7
**shocking** 73:15 224:2
**short** 55:17 211:15 240:12 250:3 327:4,5,13,15 336:20 363:19 418:10
**shortly** 25:22 27:9 27:22 29:1 54:19 55:7 69:2 81:15 142:16 177:4,4 214:4 234:15 281:18 337:9 341:17 387:1
**show** 92:15 317:18 326:4 333:1 353:7 376:11,18
**showed** 97:21 101:4,14 332:19 353:5
**showing** 81:17 293:5 372:18 373:2
**shown** 56:16 62:13 62:21 98:10,15,20 99:2 101:7,10 145:20 244:10 359:22 366:17,19 377:7 384:5
**shows** 223:18 391:19
**sic** 27:19 84:17 157:11 219:14 269:5 278:11 297:1 316:6
**side** 74:12 150:5 203:18 363:14
**sign** 101:3 113:18 245:13 246:14 247:8,17 248:8,15 249:5,9,15 344:11 436:3
**signature** 94:12 326:7 437:18 439:4,6,9,13 440:19
**signed** 100:16,19 100:22 247:11 438:7 439:8
**significant** 68:8 261:14 350:10 360:2,11
**significantly** 357:16
**signing** 369:6
**similar** 179:3 226:9 375:6 379:7 433:22
**simple** 303:20
**simply** 55:12 92:14 131:7 152:16 185:10 276:8 278:3 285:8 323:16 342:12 382:19
**single** 314:13 317:14
**sir** 253:4 259:5,15 275:1 303:13 305:7 315:11 323:17 419:20
**sit** 287:11
**sitting** 77:15 98:3 197:21 256:15 257:10 417:9
**situation** 347:12 355:10
**six** 12:4 41:4,5 42:9 43:19 188:3
**size** 20:20 272:17 331:2 380:1,4
**slightly** 297:22
**slow** 353:20
**small** 76:4 224:11 354:18,20 356:17 371:12 384:17,22 414:10 430:6
**smaller** 355:18 356:14
**smart** 433:21
**snapper** 53:4
**snow** 361:14
**sogi** 140:18,20,22 141:7,8,13
**solely** 370:17
**solutions** 3:18 9:2 9:4
**solved** 196:7
**somebody** 42:17 44:9 46:17 51:15 60:15,17 61:20 73:2 76:1 80:1 90:16 110:14 118:1 132:10 149:10 179:6 185:16 270:13 279:10 283:5,9 285:5 289:18 324:19 362:8 370:21 387:5 411:7
**somewhat** 44:3 285:12
**soon** 59:20 61:1 95:18 96:9 104:17
**sooner** 200:13
**sorry** 20:15 40:2 45:13 100:7 110:22 115:14 121:8 134:18 156:9 158:18 186:11,19 190:18 197:19 207:2 228:9 238:11 241:17 242:5 255:22 266:1 271:20 299:18 316:11 318:18 358:11 379:13 393:1 398:20 400:9 403:10 405:21 408:12 410:6 415:9 420:3
**sort** 31:9 36:15 47:20 84:21 218:19
**sound** 11:2 27:6 27:17 238:7 292:7
**sounds** 11:3 27:7 27:22 174:21 236:2 238:8 241:7 356:18
**source** 360:16 431:19 433:14
**sources** 311:1 312:4 315:6
**southern** 1:2 8:19
**space** 18:11 257:1
**speak** 117:2,9 125:5 136:6 145:2 168:20,22 169:4 171:10 172:19 177:21 179:21 190:18 191:1 208:14 277:4 381:16 400:12,14

400:19 407:22
**speaking** 134:18 139:16 142:22 182:10,17,18 183:5 184:14 207:2
**specific** 18:13 46:14 61:3 102:3 153:11 361:19 394:12 402:20 403:1
**specifically** 59:4 66:17 221:13,16 288:16 322:20 382:3 405:2,4,6,9
**specificity** 330:19
**specifics** 225:17
**specifies** 136:16
**specify** 122:8 187:21
**speculate** 68:6 120:2 168:15 251:16 268:16 287:1 416:1
**speculated** 331:16
**speculating** 82:9 251:14
**speculation** 69:19 83:18 98:12 116:14 117:6 118:18 122:7 130:13 132:5 133:2,22 140:7 141:16 142:12 143:8,17 144:21 146:19 148:22 159:21 161:5,16 163:5 201:1 202:20 226:6 268:15 286:7,16 347:19 360:17 380:8 390:12 392:9,18 422:6 428:9
**speed** 40:19 59:10 204:15
**spell** 25:9 305:16
**spelled** 303:6
**spelling** 259:7 304:9
**spells** 304:14 355:1
**spence** 5:11
**spend** 150:15 204:16 218:19 285:16,18
**spent** 20:7 112:16 112:20 142:1 143:1
**spoke** 135:4 136:1 136:4 169:2,13 170:5 174:22 175:16 178:2,16 179:20 180:4 195:10 206:18 207:5 210:11 215:15 227:16 233:10,17 271:6 383:3,8 397:4 408:3,6 410:17
**spoken** 118:3,4 121:21 122:14 123:5,7 125:9 135:11 136:11 156:1 166:20 175:5 183:16 197:18 216:22 217:3 233:5,21 234:1 387:14 399:7 400:21 401:1,20 406:9 407:2,12,19 409:18
**sponsor** 270:6 271:19,22
**sponsored** 171:7
**spots** 147:15
**spring** 55:11 75:5 96:12 103:4 105:7 108:22 109:18 110:8 119:1,5,8,12 126:21 134:12 135:19 140:16 141:6 146:12 184:8 196:17 209:18 250:22 251:21 262:15,19 263:5,10 264:3,12 264:17 265:7 285:22
**square** 278:8
**squares** 295:6
**staff** 17:1 23:13,14 23:17,18,21 25:16 33:8,10 34:17 35:13,15 36:7,9,13 37:11 38:20 39:12 39:13,15,17,20,22 41:10 42:9 45:11 46:5 47:14,15 48:13 49:18 50:10 52:12,16,19 53:2,3 53:5,8,12 73:13 96:14,19,21,22 97:1,3,7 102:9,18 103:1 107:12,16 125:20 156:21 157:8 160:7 198:8 198:12 201:7 268:5 279:16 283:18,19 284:10 284:20 289:17 301:7 321:17 345:5 377:18 378:7 395:9,14 412:1 433:1,3
**staff's** 199:17
**staffed** 41:9
**stakeholders** 53:22 54:1,8,14,15 358:13
**stamp** 73:10 82:15 164:20 318:3 376:5 385:20
**stamped** 56:5 78:5 87:11 93:18 114:10 120:19 123:14 137:20 145:10 158:22 167:5 182:12 189:10 194:14 200:12 234:19
**stand** 57:13 192:9
**standards** 44:11
**standing** 30:19 38:9,11 47:17 256:19,19,20,21 300:18
**standpoint** 350:15
**stands** 141:8 235:12 381:7
**start** 12:8 19:22 34:6 61:15 171:9 181:13 230:22 239:4 275:19 429:2,7
**started** 11:21 43:11 73:5 75:14 195:14 287:14 411:12
**starting** 269:5 339:9 429:14 430:11

**starts** 296:3
**state** 5:15 6:1 9:19 70:7 118:1 206:2 420:6,8,8 434:21
**stated** 308:6,9 312:20 342:6 346:17 389:15 410:21
**statement** 80:1 130:15 260:13 295:13,14 305:12 306:15 312:6 313:1,18 314:9,11 314:13,16,20 315:13,20,22 316:15,21,22 317:2,8,14,17 348:9 377:10 417:6 432:1,2,9,14 434:6
**statements** 313:5
**states** 1:1,6 8:17 8:18 13:9 70:9 207:13,19 364:22 385:2 438:18 440:3
**stating** 80:3
**statistical** 105:17 105:18 106:1 108:21 109:4 329:16 351:8 417:15 434:9,14
**statistics** 13:19,21 14:3 42:18 47:1 219:6
**status** 78:20 82:1 223:3 310:22 312:3 315:5 319:12 425:22
**statute** 15:9 412:14
**stay** 402:21
**steel** 50:13 53:1 201:19 288:20
**steer** 283:10
**stenographic** 9:10
**stenotype** 437:8
**stephen** 404:2,5,6
**steve** 116:6 405:11 405:19
**steven** 115:21 116:4 119:16 121:22 122:18 123:1,5,7
**stevens** 11:22 18:9 20:6 25:17
**stick** 162:11
**sticking** 141:7
**stipulate** 205:19 313:6,10
**stood** 314:5,8,15
**stool** 256:20,20,21
**stop** 150:20 211:9
**stopped** 199:13 417:19
**straight** 260:2 331:15
**straightforward** 290:7
**strategic** 36:2 37:8 52:8 200:9 283:21 377:22
**street** 3:18 4:8,12 4:20 5:2,7,18 6:4 67:7 80:1 81:21 146:14 402:22 409:13
**strike** 44:14 71:15 76:20 96:6 105:15 115:14 116:18 137:15 160:14 167:18 183:8 198:20 232:11 331:5
**struck** 103:22
**studied** 15:12,13
**study** 13:16 334:13
**stuff** 47:3 203:16
**su** 377:20,21 380:5
**subcommittee** 148:2,15
**subject** 16:22 18:1 22:3 57:11 63:4 63:15 71:4 148:8 164:22 177:15 186:13 195:21 220:17 230:13 288:11 291:4 338:13 345:20 360:10 407:3
**subjects** 202:8 231:21
**submit** 28:20 249:2
**submitted** 28:15
**subsequent** 237:15 413:15
**substance** 120:10 233:7,18 237:10 275:14 298:4 385:15 426:11 427:5
**substantially** 310:22 312:2 313:4 315:4
**sudden** 342:4
**suddenly** 292:16 294:16
**sufficient** 105:12 264:11 265:14,18 265:21 304:11 331:3
**sugar** 52:9 201:12 201:17
**suggest** 231:14
**suggested** 123:2 136:20 248:2 275:15,21 276:8 283:12 298:20 346:6
**suggesting** 247:7 344:16 363:15
**suggestion** 278:3
**suggestions** 289:17
**suggests** 139:7 418:1,2
**suit** 287:4
**suite** 3:18 4:16,20 5:3,7,12
**sum** 319:15
**summarized** 339:2
**summary** 312:5 313:18
**summer** 141:6 199:2 209:17,18
**supersecret** 286:12
**supplement** 244:10 342:22 343:2
**supplemental** 101:2 247:17 248:2,15 249:2 341:6,8 343:18 345:16 346:5
**supplemented** 350:19
**supplements** 343:5,7
**support** 86:12 153:12 155:19,21 193:5 267:9

350:22 432:8,12 432:14
**supported** 370:1
**supporting** 240:1
**supports** 417:6,8 432:1
**supposed** 266:17 284:3 302:7,21 304:2,3
**supposition** 67:17
**sure** 10:16,20,22 35:11 38:5 42:5 43:12 48:5 49:22 50:7,12 52:1 59:9 78:17 79:7 86:13 90:14 91:22 98:21 104:11 105:3 110:5 128:1 136:8 149:1 154:15 187:5 194:3 198:7 211:19,21 213:9 217:15 219:16 240:9,16 243:10 248:10,18 249:6 251:17 255:17 260:4 279:19 289:1 293:13 296:9 300:2 305:22 308:2 311:5,16 312:10 329:14 334:16 338:16 356:1 357:2 360:3 368:19 373:14 387:16 389:19 390:19 401:19 417:5 420:5 424:18
**surmise** 160:9
**surname** 167:9
**surprise** 344:20 389:17 432:13
**surprised** 342:19 344:19 386:19 387:10,11,13 432:18
**survey** 14:9 78:18 81:22 356:16
**surveys** 105:16 327:1 357:7
**swear** 9:12
**sweet** 336:20
**switch** 43:13
**switched** 231:21 232:9
**switching** 434:17
**sworn** 9:16 437:7
**swr** 200:14,18

**t**

**t** 25:10 440:1,1
**take** 8:11 12:13 14:16 17:7 22:10 22:13 26:20 28:15 30:1 34:3 44:13 54:2,4 56:10 57:11 58:2 60:2 62:8 63:13 66:22 80:5,8 84:11 89:13 92:19 111:5 127:6 130:1,6 139:11 151:9 168:12 172:14 211:15 229:13 239:8 244:9 250:3 261:15 275:17 283:11 287:21 292:10 298:8 302:16 315:8,13 315:14,15,17,22 316:3,4 321:22 322:5 339:6 341:5 365:14 406:16 431:9,11
**taken** 8:14 106:13 304:13 313:13 437:5,8,14
**talk** 52:6 101:17 115:21 116:12,20 117:1 122:18 123:3 135:6 160:17 168:3 170:9 173:6,15,19 173:22 175:4 185:21 190:2 231:4 249:13 275:21 276:9 283:6 284:9 338:17 359:17 382:5 383:5 410:16 411:15 419:20
**talked** 35:11 97:14 100:4 126:14 131:11 155:13,15 157:18 175:7 207:7 219:11 277:14 283:12 338:13,18 381:8 383:2
**talking** 20:12 46:4 46:5 96:11 97:10 111:14 122:5 132:1 133:19 140:15 179:8 190:5 192:5,15 196:13 217:5,6,9 229:11 230:18 242:4 257:20 262:15 298:3 325:11 327:8 359:18,19 363:11 363:13 420:15 424:3
**talks** 160:19
**tariffs** 50:14 53:1 288:20
**task** 42:7 182:1 378:12,14
**tasked** 25:6 257:16,17
**tax** 77:8
**team** 15:18 16:5 17:12 25:3,4,20 26:2 30:8 31:2,10 32:13,19 57:9 76:20,21 161:7
**teams** 19:7 25:6
**technical** 324:20 352:2,5 426:12 427:5,10
**technology** 44:12
**ted** 11:22 227:21
**telecommunicati...** 18:4
**telephone** 71:18 90:5 125:12 206:9
**telephonically** 4:15 5:16
**tell** 11:5,17 13:15 16:14 17:19 18:18 21:22 33:6 42:8 55:5,10 60:6 65:10 66:17 71:5 74:7 75:20 78:15 94:10 100:18 117:20 118:8 122:11 126:11,21 127:5 135:4,9,14 136:10,17 137:2,3 139:6 140:3 144:22 152:21 153:21 154:12 156:14 159:22

169:5 172:19 174:11 175:8 176:1,15 178:22 185:14 195:18 196:5 203:10 205:20 206:17 207:17 210:10 211:17 217:9 219:16 220:8 228:15,18 267:3,4 267:9 284:14 289:19 298:18 314:1 316:16 322:13,16 323:1 358:18 371:5,15 374:15 376:17,19 397:6 404:7 415:14 417:19 420:3
**telling** 58:18,22 78:13 85:9 136:3 151:12 207:4 223:14 367:1 397:3
**temporary** 124:18
**ten** 12:2 250:6 364:20
**tens** 364:11
**tenth** 4:12
**teramoto** 32:21 39:16 75:14 97:3 102:6 121:14 138:9 144:18 159:10 189:17 197:11,22 199:7 202:2 205:6 208:21 218:16 220:19 221:2 231:13 235:7 236:1,6 255:18 256:18 298:13 325:14
**teramoto's** 163:8
**term** 16:15,16 43:22 44:2 158:3 313:3 329:9 356:9 357:14 358:1
**terms** 126:15 328:4
**test** 253:19 260:4 333:9 334:3,18 335:3
**tested** 333:15
**testified** 9:16 22:10 57:1 68:8 68:20 81:16,19 104:2 107:14 108:3 109:7 165:10 166:19 184:10 200:7 208:9 214:10 248:13 255:13 287:22 288:3,4 291:18 305:7 337:6 345:1 346:4 356:19 406:17 410:20
**testify** 132:7 246:17 288:10 290:14 319:4
**testifying** 288:20 288:21
**testimony** 2:22 45:9,15 61:19 108:5 148:2,4,15 177:9 210:2,6,7 231:22 246:1,10 246:22 247:2,3,15 247:21 249:20 252:10 253:13,18 253:22 254:22 276:12 279:4 280:6 287:19 291:21 292:19 293:1,6,18 295:2 298:9 303:19 304:21 312:11 347:15 400:18 410:8 437:6,7,11 438:4,5
**testing** 334:13
**thank** 21:18 28:17 56:9 70:21 120:17 158:18 182:2 186:16 212:13 215:21 218:8 224:13 230:6 243:20 249:12 278:19 294:18 335:16 336:3 372:22 420:11 424:2 439:12
**thanks** 77:17 166:3 236:7 318:19
**thanksgiving** 15:20 26:1
**theirs** 320:21
**theoretically** 281:2
**thereabouts** 324:6
**thing** 79:21 107:7 154:5 251:17 307:5 322:4 334:9 361:22 362:9,14 362:14 417:19
**things** 41:16 74:12 84:3,5,6,12,21 86:3 92:10 106:12 106:15 108:20 109:9 112:17 129:2,3,5 150:16 163:16 168:5 197:8 201:20 204:13,17,17 226:8 229:9 239:20 257:16 266:19 285:14 288:22 289:4 302:3 307:10 309:13 347:6 356:11 419:3
**think** 22:20 25:11 28:19 29:11 37:3 39:21 41:16 55:4 55:12 61:16 63:8 65:19 66:4,8 75:5 75:5 77:14 78:9 85:16 86:1 90:1 94:20 102:4 103:4 103:13 106:7,16 106:17 109:19 115:1 123:19 124:3 125:17 128:10 131:6 141:5 150:6,8 155:13,14,14 156:2 157:11 158:2,17 168:11 169:2 174:6 178:1 179:2 180:2,2,22 187:16 190:15 193:1 198:7 199:3 199:17 203:7 209:14 211:11,11 212:12 219:8 222:19 223:17 233:1 236:13 237:20,20 240:10 244:1 260:3 271:8 272:14 273:14 274:13,13 277:13 278:16 279:14,14 285:2 286:20

289:16 299:8 300:4,8 303:18 312:16,19 314:12 314:18 317:8,13 320:3 321:15,20 323:2 328:1,10 332:15 334:8,15 336:7 337:5,21 338:18 342:1,6,20 343:5,22 345:1,11 346:3,6 347:2 352:22 354:22 358:2 363:14,19 364:16,19 367:17 369:20 382:20 386:18 389:20 391:20 400:2 406:3 410:7,11 413:9 414:2,16 422:2,8 425:5 427:22 428:4,10 428:16,17 433:11

**thinking** 192:2 387:15 389:1

**thinks** 58:11 222:15 254:9

**third** 43:16 310:11 339:10 350:11 352:12

**thirds** 80:11

**thompson** 59:18 59:21 142:19 162:17

**thompson's** 148:1 148:14

**thought** 96:14 97:7 99:9 103:1 107:13 168:16 186:17 254:20 255:2,7 326:10 364:14

**thoughts** 342:13

**three** 78:4 125:18 162:5 178:1,19 180:3 183:22 256:5 270:12 271:7 277:16 310:11 316:1 323:8,12 328:6,6,7 365:17

**threshold** 150:18

**thresholds** 150:14 154:11

**thursday** 1:10 8:4 440:6

**time** 9:11 20:7 21:8 22:7 27:13 28:22 31:1 34:17 38:16 40:19 46:12 49:7 52:6 55:9 57:4 59:22 60:20 62:19 63:1 64:13 64:20 74:6,18 75:11,13,22 83:13 84:9 86:11,13 87:1,1,5 94:5,11 94:15,18 96:7 97:19 99:7,13 104:12 109:3 111:3,7,11 112:16 112:20,21 113:6 114:17,21 115:7 116:1,8 125:8,19 127:20 128:12,13 133:11 134:19 138:4 142:2,3 143:2 145:17 147:1,19 150:15 158:10,13 162:21 164:3 165:5 178:2 179:7 182:1 186:1 186:17 187:14,21 188:3 189:3 197:12,13 198:4 201:10,18 203:11 203:20 204:17 207:3 211:6,9,11 211:20 212:1,5 219:2,7,9 223:19 224:7 225:4 227:4 228:10 229:4 230:3,6 233:9 237:7,7 240:19,22 242:8 250:8,12 251:2 252:2 257:9 258:14 259:6 271:13 281:3,16 281:17 283:3 285:15,16,18 287:13 289:7 290:3 304:14 308:16,19 309:1 319:21 335:6,12 335:15,18 341:2 342:1 343:19 344:2 353:11,22 371:7,13 372:2 380:18,22 397:5 403:4,14 411:18 411:19 413:12 419:15,18,20 420:12,20 423:18 435:11,14,19 436:5

**timeline** 183:16

**times** 125:11,16,18 125:18 143:22 162:4,5,5 168:7 169:1 177:21 178:1,17,19,20 179:21 180:3 256:14 271:7 277:15,16 316:1 338:1

**timing** 30:17 141:4 317:7

**title** 35:12 139:6 198:7 282:1,4 378:5,6 386:10

**titles** 281:19

**today** 10:6 11:6 62:14 97:19 99:22 114:21 138:4 147:19 165:6 197:2 212:22 225:5 227:5 244:10 335:22 336:2 381:8 384:6 385:16 423:19 435:16

**today's** 436:4

**todd** 17:10

**told** 27:5 34:1 81:13 83:22 84:8 112:13 119:15,19 120:5 148:7 153:15,20 162:18 166:8,10 173:8 176:10,21 184:15 193:7 210:4 236:1 239:14 245:16 264:16 337:9 381:15 410:22 426:4

**tomorrow** 209:1 231:14

**top** 130:2 149:15 202:6 209:6 429:2

**topic** 59:19 87:2 131:4,16 142:1 143:1 171:1 187:6 232:10 288:19

**topics** 57:20 58:21 59:6 61:7 85:22

86:10 88:16,22 93:6 140:22 393:9 404:20
**total** 328:8,9 418:11
**touch** 59:18 217:13
**touched** 227:16
**track** 45:3,17,21 51:15 150:9 411:6
**tracks** 22:9
**trade** 12:5 274:16 274:21,22
**traffic** 376:19
**training** 13:18 14:9,11,19,21 15:2
**transcribed** 295:4
**transcribing** 10:18
**transcript** 3:11 10:20 293:5,9,13 293:15 295:4 439:7
**transcription** 438:5
**transition** 15:18 16:5,9 17:12 25:3 25:4,19 26:2 30:8 31:2,8 32:13,19 76:2,19,21 123:21 123:22 124:10,13 126:4 161:7 383:16
**transitioned** 30:15
**transmit** 422:12 422:21 425:9
**transmittal** 219:10
**transmitted** 49:15 49:20 238:10,14 238:15
**transportation** 12:1
**treating** 168:18
**tremendous** 142:1 223:18,20
**trial** 316:6,14 333:17,21 334:1
**tried** 20:2 65:16 193:14,20
**troublesome** 261:8
**true** 418:7 437:10 438:4
**trump** 3:9 383:13 383:21 384:3,13 388:4,14 392:2,20 393:13
**trump's** 392:15
**trust** 340:18
**truth** 295:12
**truthfully** 70:5
**try** 10:22 28:21 30:4,19 41:2,15 68:14 84:4,19 128:20 135:16 162:11 305:13 332:13,16 336:20
**trying** 32:3 42:4 48:7,9 51:13 86:4 89:4,13 128:16 129:2 155:13 162:21 168:13 224:9 254:6 261:18 282:7 314:19 317:15 356:6 362:1 366:22 397:13 398:13
**turn** 8:8 121:7 329:17,18 346:16 352:9 358:7 428:13,19
**turnaround** 49:7
**turned** 283:12
**turning** 352:11 373:19 377:3
**turns** 278:7
**twice** 23:2 209:14 322:15
**two** 12:5 14:1 16:18 18:5 31:5 49:10 80:11 86:2 86:21 100:11 106:11,15,16 125:18 141:22 142:6 150:14 162:5 180:3 214:7 214:10 242:21 243:9 270:11 277:18 287:12 294:11,14 310:11 323:8,12 328:5,6,7 345:2,5 346:7,8 349:11,21 351:13 410:17 430:10 433:16
**typewriting** 437:9
**typical** 28:10 51:9 51:10 52:15 53:20 202:2 243:8
**typically** 22:5 30:1 41:1 49:8,13 51:17 60:13,17 90:4,6,18,21 91:5 91:6,10 92:9 98:18 102:16 279:13 320:5 356:14
**typing** 66:6

**u**

**u.s.** 6:10,14 9:20 152:18 207:7 438:16
**ucsb** 12:9 14:2
**uh** 31:11 67:8 79:1 103:3 123:15,17 127:9 128:15 149:19 151:16 159:3 213:7 229:14 231:11 280:9,11 292:4 293:22 326:13 328:22 339:12 341:7 358:10 362:21 377:5
**ultimately** 267:19 427:16
**umpteenth** 133:11
**unable** 20:4
**unanswered** 373:17
**unavailable** 399:1
**unaware** 278:5
**unclear** 10:12
**uncommon** 185:12 185:14 204:18 276:14 282:17
**undercount** 361:16 393:17 394:21 395:21 399:15 401:6 404:11 406:6
**underestimate** 416:22
**underestimated** 81:11
**undergraduate** 14:16
**underlined** 58:11 139:21
**understand** 10:11 15:10 21:15 29:17 43:12 64:12 70:12 70:20 79:3 110:6

115:9 116:17,19 128:1 138:13 139:13 148:18 172:20 187:18 200:18 202:22 214:20 222:7 223:2 241:10 253:3 254:8,15 259:4 260:7 293:10,11 298:13 299:16 302:4 307:18 308:4 309:10 310:13 311:21 312:10 313:6,8 329:7,9 343:2 358:18 366:22 381:12 382:12 389:8,10 414:12 420:16,17 423:17 429:1
**understanding** 93:8 113:12 154:3 171:19 176:4,6 180:15 181:5 188:18 203:19 221:8,10 230:12 235:14 247:15 248:12 252:15 253:6 260:3 266:13,17 277:9 281:21 300:20 301:14 302:21 304:1 307:15 308:8 314:21 315:1 343:13,15 349:7 354:9 355:20 356:6 370:16 371:1,5 392:4,14 393:1,5 398:7 400:18 414:21 415:3
**understood** 151:11,13 223:5 245:22 246:17 274:19 276:18 317:1 326:16 342:22 343:7,8
**undertaking** 331:3
**underway** 78:19 79:2
**undocumented** 63:21 65:3,20 66:1 81:12,18 262:10 349:14
**unfamiliar** 30:4
**unfortunately** 77:10 276:14 333:6 374:10
**unified** 4:14
**union** 4:7
**unique** 20:8
**unit** 8:13 111:6,10 158:12 212:1,4 250:8,11 308:18 308:22 380:17,21
**united** 1:1,6 8:17 8:18 207:13,19 364:22 385:2 413:16 438:18 440:3
**university** 11:20 13:20
**unión** 381:7
**unquote** 83:9 388:19
**unredacted** 145:21 227:8 229:15
**unusual** 45:5 66:10 119:13 243:17
**upcoming** 57:18 95:20 147:2,5 244:20
**update** 40:17 119:10,13 172:16 214:4 222:13 225:10 226:4 230:9 233:2 236:10,11
**updated** 76:8 222:13 231:6
**updates** 119:4,8 232:19
**updating** 233:5
**upper** 159:7
**uproar** 131:2
**ups** 360:12
**urgency** 204:10
**urgent** 73:20 168:9,16,18 204:19
**usdoj.gov** 6:12,12
**use** 16:15 158:3 177:3 180:11 190:10 262:21 296:2,14,17 297:7 307:9 310:21 312:2 313:3 315:4 319:11 329:9,15 353:12 354:1 357:19 365:7 368:15 382:7 383:7 403:19 418:19 423:10 425:3
**useful** 126:15 176:7 252:22 272:20 273:1 275:7 279:18 297:3,18
**uses** 350:4 357:22
**usual** 45:20
**usually** 49:5 52:21 128:20 150:11 204:16 273:13 347:9
**uthmeier** 95:14 97:2,15 100:4 155:15 156:3 186:6,22 187:6,13 188:6,8,19 195:3,9 195:18 214:11 217:8 220:20 225:2 227:14 228:18 231:13 232:2 242:18 243:16,22 246:9 255:20 288:14 345:10 369:12 386:18
**utilize** 185:4
**utilized** 153:18

**v**

**v** 8:16 381:5 420:9 438:18 440:3
**v10** 320:2
**valid** 267:14 301:5 302:8 303:5,6
**value** 279:16 410:15
**var** 399:22
**variation** 417:15
**variety** 106:21 329:15 418:20
**various** 95:19 96:10 244:5 417:18
**vast** 282:13
**velkoff** 335:2
**venued** 336:13

**veritext** 3:18 9:2,4
**version** 227:7 229:16 311:17 319:2 320:3,8 321:10 375:21
**versions** 245:4 320:10
**versus** 364:9 417:14
**vicinity** 22:21 178:19 323:14
**victoria** 335:2
**victoria's** 125:2
**video** 8:10,13 111:7,11 158:10 158:13 212:5 240:19,22 250:8 250:12 308:19 309:1 335:12,15 380:18,22 419:18 435:11,14 436:5,5
**videographer** 7:1 8:3 9:3 111:6,10 158:9,12 211:15 211:22 212:4 240:18,21 250:7 250:11 308:18,22 335:11,14 380:17 380:21 419:14,17 435:10,13 436:4
**view** 103:17 105:6 105:9,12 106:2 107:2,5,18,22 108:8,14 109:8 110:8 113:12 156:15 180:18,22 192:4,14 284:22 307:7 311:21 312:17,19 314:20 335:19 402:4
**viewpoint** 370:1
**viewpoints** 402:20
**views** 320:15 402:1,4,7,11,14,15 404:22
**villages** 20:1
**volume** 331:2
**vote** 350:1
**voter** 393:14 394:19 395:19 399:13 401:4 404:11 406:5 408:10 409:6
**voters** 364:5
**voting** 14:19 126:16 127:3 153:18 155:8,9 192:13,17,18,21 192:22 193:8,9,11 193:14,17 194:8 262:9,16,18 263:13 264:9,9 265:1,5,11,12 268:3,9 271:1,14 272:17 275:8 277:11 295:1 349:6,8,18 351:9 368:17 381:22 382:6 383:6,6 400:4 403:7,16 409:19 410:1 411:15 423:13 427:18
**vp** 124:22
**vra** 251:10,18 277:6 394:2 395:6 396:6 401:13 404:14 406:8 408:14 416:3
**vs** 1:5

**w**

**wait** 10:21 79:5
**wall** 67:7 80:1 81:21 146:14 402:22 409:13
**walls** 256:22 257:5 257:6
**walsh** 6:19 95:7 97:2 98:6 100:1 246:9 318:16,19
**want** 18:18 59:9 91:22 103:11,15 110:5 116:11 131:19 161:10 191:18 240:12 242:3 250:17,21 254:1 257:11 260:2,4 268:8 270:16 272:12 273:5,6,11,17,22 274:6,12 275:2 277:20,20 279:6,8 279:19 280:1 282:15,21 283:6 284:8,9,12,19 289:1 293:8 294:2 302:11,16 310:10 311:12 312:10 316:5,7,15 341:10 350:12 363:13 383:19 398:19 424:17 427:22 428:5 429:1
**wanted** 64:11 86:9 116:19,22 130:20 142:18 154:14 160:7 170:17 171:16,20 172:1 176:2,11,11 190:13 218:2 226:13 243:3 252:16 258:11 260:6 261:4 270:5 272:8 285:22 287:16 291:2 299:9 300:6 332:10 337:10 348:5 382:5 435:21
**wanting** 176:22 260:16 268:1 286:11 383:5
**wants** 38:2 40:4,7 44:17 226:15 251:22 252:2 253:7,13 258:2 262:1 266:16 306:10,20 333:21 385:2 423:18
**warn** 162:19
**warrant** 265:19
**warranted** 96:15 97:8 103:2,6 106:13 107:14,20 108:1,10 109:9 110:1,3
**washington** 1:9,16 3:19 4:5,12 5:3,8 5:13 6:11,17,21 8:22 32:18 77:14 228:5 402:22 438:17 439:16
**watched** 293:17
**watermark** 376:2 376:6
**way** 34:7 64:11 68:19 78:4 80:11 90:5 92:17 106:10 107:4 142:8 152:18 185:10 243:8 260:6,11,13 260:15,17,22

261:17 266:13,19 266:20 267:2,4 273:22 280:22 284:8 302:16 305:13 310:13 321:1 332:17 337:16 346:3,3 348:11 349:5 367:6 368:14 379:12 423:19 428:6 432:6
**ways** 45:1 53:3
**we've** 26:7 53:1 87:12 104:20 111:2 145:11 308:17 320:7,11 344:11 350:8 381:8 383:2 386:7 387:14 419:11
**web** 66:14 208:10 208:13
**website** 66:3,5,7 66:19 390:5
**wednesday** 148:5 148:8
**week** 49:11 156:21 178:4 233:14 387:5
**weeks** 174:15 188:3 221:1 277:18 287:12
**weigh** 363:13
**weighing** 362:9 363:8,10,12
**weight** 366:6
**welcome** 212:8
**wendy** 32:21 33:3 39:16 75:14 97:3 102:6,8,9,14,15 121:14,18 122:11 122:14 138:9 144:18 159:10,17 160:15 161:2 164:2,4 173:4,18 189:15 191:8 197:22 205:6 210:12,13 218:16 235:7 236:7 255:18 256:18 257:2 325:14
**went** 11:19 12:6 12:17 170:16 269:21 271:4 283:4 296:12 297:9,16 371:16 372:9,11 381:20 383:10
**when's** 27:19 63:1 83:13 94:5,15,18 145:17 147:19 225:4 227:4
**whispering** 8:6
**white** 48:4,8,16,19 49:4,9,15,21 50:9 50:11,15,16,16 51:4,7 74:5,7,12 74:17 167:18 173:12 283:9 388:1 391:16,20 393:8 395:9 410:12
**widely** 330:11
**wife** 115:10
**wilbur** 200:19 213:17
**willing** 271:22 296:22
**wise** 5:16
**wishes** 239:18
**withdraw** 156:9 294:2
**withdrawn** 138:19 246:12 251:7 252:13 254:21 260:14 271:20 275:18 278:18 282:6 290:12 299:14 304:19 322:7 323:22 327:10 328:18
**witness** 9:13,15,17 26:15 56:8 62:16 70:21 87:11 93:17 114:9 116:15 117:7 118:13 120:2,8,17,19 122:8,22 130:14 133:3 134:1 140:8 143:9,18 144:22 145:10 146:20 149:1 159:22 160:11 161:6,17 163:6 165:21 166:16 182:9 186:13 187:2 189:2 190:20 191:16 194:5 195:13 196:1,4 201:2,16 202:21 204:12 206:13 210:7 211:7,12 215:21 218:8 224:5 225:22 226:7 235:19 243:14 247:3,22 252:5 253:9,19,22 254:14 255:10 258:7 259:12 263:21 268:16 274:11 275:5 276:6 280:16 284:22 286:8,17 287:1 291:15 297:15 299:13 301:4,19 303:5 304:8 305:3,20 306:14 307:2,22 308:14 311:16 329:4 331:13 334:22 336:3 340:17 341:12 343:22 345:21 353:17,21 366:22 380:9 381:19 384:17 390:4,13 392:10,19 404:16 407:17 409:2 410:7 412:12 413:9 415:11,19 415:21 423:5 425:5,17 426:3,16 427:9 428:10,17 433:19 436:3 437:5,8,11 439:5 440:5
**witness's** 108:5 210:6 247:2,21 253:18
**woliver** 4:15
**word** 34:3 66:22 70:13 81:5 108:9 180:21 287:21 292:10 298:17 307:9 358:19 360:6 362:18 429:15 430:11
**wording** 324:1,13 346:6,8
**words** 43:13 176:14,20,21 237:3 251:21 275:13 298:4 330:8 337:21

353:8 356:2 360:2 423:12
**work** 9:19 10:1,15 17:15 30:7,10 38:1,3 40:3,4,7 42:3 43:5 44:10 44:18 62:17 73:18 74:22 89:19 112:18 124:21 150:2,14 153:2,6 199:5 201:19 228:1 229:1 243:21 254:7 256:16,17 260:6 260:11,18,20 266:17 268:5 276:16,20 277:1 280:10 282:11,15 284:12,16,20 285:5 337:22 338:20 371:13 378:2
**worked** 11:21 25:15,16 75:6 76:1 98:16 104:8 152:12 167:20 168:1 235:15 242:13 243:5,9 248:7 255:13 289:9 389:11
**workers** 21:8 124:18
**working** 11:22 12:17 15:20,22 43:10 50:5,13,17 51:13 52:9 54:6 76:9 77:18 97:13 97:15 99:6,13 113:5 118:22 129:2 195:14 198:13,16 199:13 201:11,12,17 209:20 211:1,4 214:8 223:20 226:10 234:6,10 234:12,13 237:12 257:10,15,15 355:13 411:17 421:21
**workload** 285:1,1
**works** 34:7 45:11 57:2 58:4,7 97:4 128:6 152:19 200:8 228:2 377:21 386:1
**world** 103:9 262:12
**worry** 91:18
**worst** 146:3 148:18
**worth** 150:19
**worthy** 108:10
**writes** 162:10 236:6
**written** 146:2 148:2,14 208:21
**wrong** 205:21 246:2 262:14 325:3 336:9
**wrote** 147:18 151:17 159:11 213:1,22 214:3 269:16 339:19 340:4 380:6,14 396:18 430:11 432:20 433:3
**www.census.gov** 66:13

**y**

**yang** 5:6
**yeah** 15:19 16:16 24:1 27:7,19,22 41:21 43:11 44:19 49:19 52:4 54:6 57:10 60:8,20 79:4 83:10 87:21 88:4,19 89:3 92:10 98:8 102:1 109:19 114:19 116:3 135:13 156:1 159:15,15 159:22 196:16 220:3 243:17 247:13 254:5 269:20 271:7,10 271:12 276:19,20 278:9 280:19 287:6 289:3 292:8 292:9 297:21 307:22 310:17 313:6 314:8 327:17 328:14,17 329:19 353:4 354:22 370:13 374:2 403:12 432:7 435:8
**year** 12:7,20 35:16 43:16 44:10 75:6 88:22 89:1 108:17 130:9 131:5,9 132:11 199:4 226:9 241:20,22 242:4 244:14 288:5 292:5 328:6 334:18 335:4 338:2 346:20,21
**years** 11:21 12:2,4 12:5,6 14:1 104:10 261:6 263:9 266:22 292:16 294:16 307:3 347:7 413:21
**yep** 58:17 63:6 67:21 72:5 80:10 80:14 81:4 96:17 125:13 138:12 145:14 148:12 149:21 269:18 330:4 339:7
**yesterday** 11:7 63:3 94:20 97:20 98:1 138:6 145:18 145:19 165:7 225:11 227:6,7 230:10
**york** 1:2,3 4:1,3,7 4:8,8 5:12 6:1,5,5 8:16,19 10:2 241:3 438:18 440:2

Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

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VERITEXT LEGAL SOLUTIONS
COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

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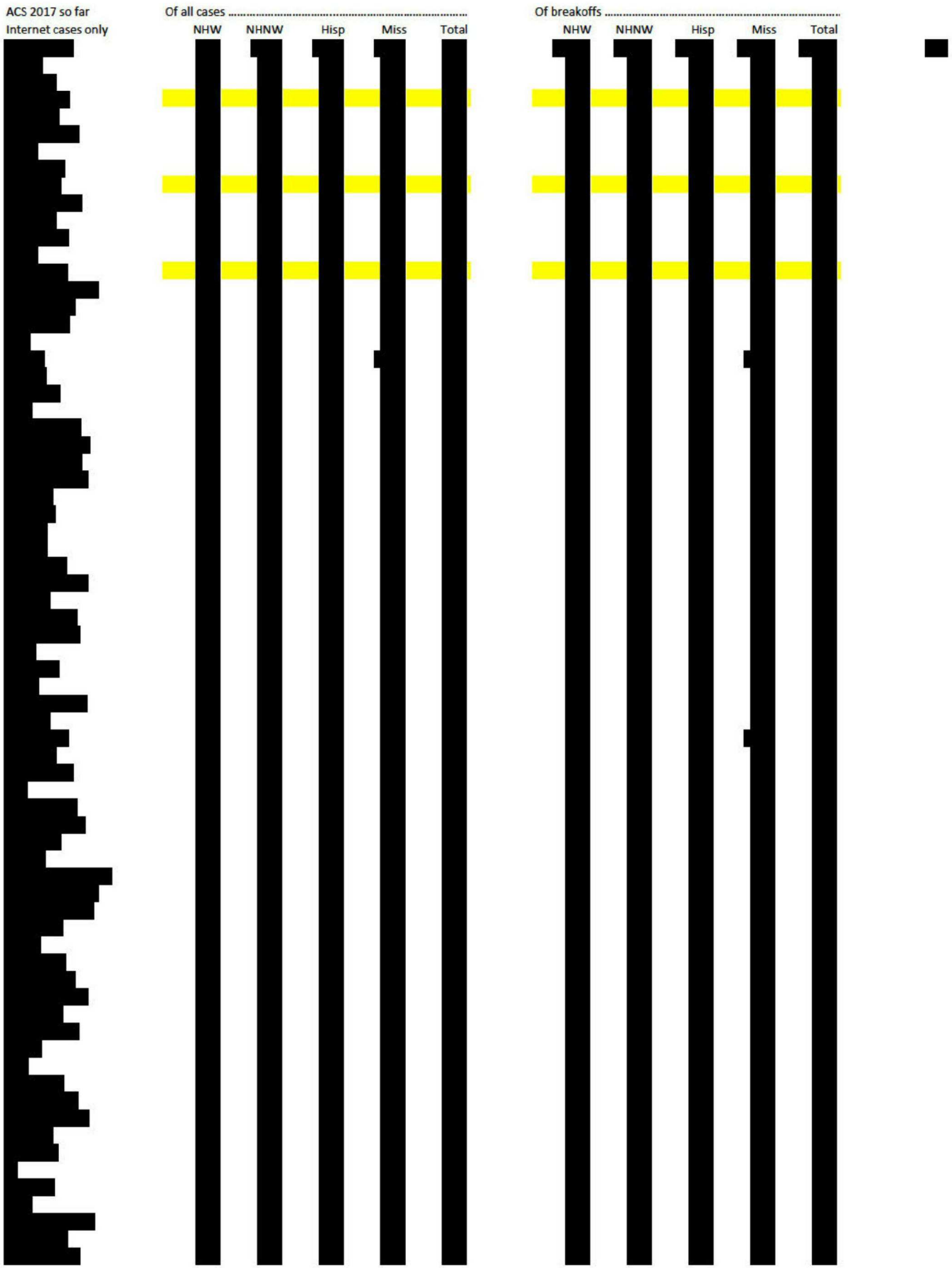
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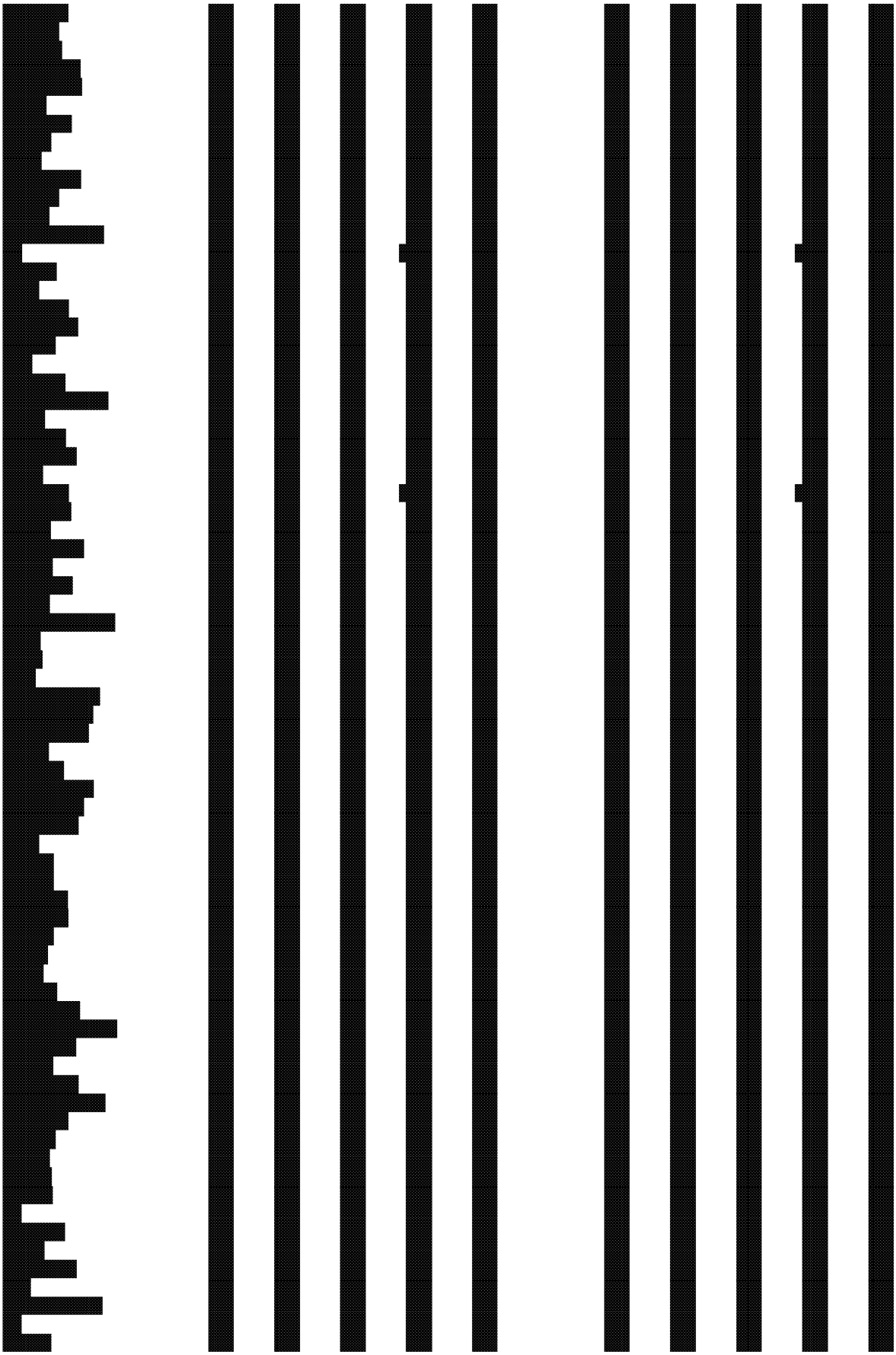

[redacted]

The results are embargoed, but you could make qualitative conclusions about them. They are for January-November 2017. They are unweighted.

The place of birth and citizenship questions come after the basic person demographics and housing unit questions, so the people who get to this place in the form are already pretty cooperative. Dave Raglin suggests considering the place of birth and citizenship questions jointly, and he thinks [redacted] breakoff rate for the two questions together for Hispanics is notable.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| IN THE MATTER OF: | * | |
| NEW YORK IMMIGRATION COALITION, et al., | * | |
| Plaintiffs, | * | |
| v. | * | |
| UNITED STATES DEPARTMENT COMMERCE, and WILBUR L. ROSS, JR., in his capacity As Secretary of Commerce, et al., | * | Civil Action No. 1:18-cv-05025 |
| Defendants. | * | |

Deposition of DIONE SUNSHINE HILLYGUS, was taken on Tuesday, October 9, 2018, commencing at 9:24 a.m., at 1100 L Street, NW, Washington, DC, before Timothy J. Atkinson, Jr., a Notary Public.

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I N D E X


| Deponent | Examination By | | Page |
|---|---|---|---|
| Dione S. Hillygus | Mr. Ehrlich | - Direct | 5 |


E X H I B I T S


| Exhibit No. | Description | Marked |
|---|---|---|
| DOJ: | | |
| 1 | DSSD 2010 Census Coverage Measurement Memorandum Series 2010-G-1 | 12 |
| 2 | 2016 Internet Break-Off Rates, Bates 9692 | 27 |
| 3 | January 19, 2018, memorandum for Wilbur Ross, Bates 1277 | 30 |
| 4 | Understanding the Quality of Alternative Citizenship Data Sources for 2020 Census, by David Brown, et al | |
| 5 | Expert Report and Declaration of Ms. Hillygus | 73 |
| 6 | Press Release | 136 |
| 7 | January 1999, GAO High Risk Series an Update | 137 |
| 8 | Expert Rebuttal Report of Ms. Hillygus | 157 |
| 9 | Discussion Comments, 2020 update by Ms. Hillygus | 170 |
| 10 | Curriculum Vitae of Ms. Hillygus | 178 |

P R O C E E D I N G S

(9:24 a.m.)

(Whereupon,

DIONE SUNSHINE HILLYGUS

the Deponent, called for examination by Counsel for Department of Justice, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:)

DIRECT EXAMINATION

BY MR. EHRLICH:

Q. Dr. Hillygus, thank you for coming in.

A. Yeah.

Q. Can you state your full name for the record?

A. Dione Sunshine Hillygus.

Q. And you understand that you're under oath to tell the truth today?

A. I do.

Q. Are you represented by counsel?

A. Um-hmm.

Q. Have you ever had your deposition taken before?

A. Once.

Q. When was that?

A. It was in a voting rights act case in North Carolina.

Q. Okay. So you're familiar with the process a

little bit. Just want to go through a few things, will refresh your recollection so that --

A. Right.

Q. -- will make this a smooth process. So I'm going to be asking some questions today of course. Your counsel is here. From time-to-time he may object. I'm going to ask you to go ahead and answer the question anyway unless he directs you not to. All answers should be verbal. So, for example, no nodding. Does that make sense?

A. Yes.

Q. So they need that for the transcript. Let's try not to interrupt each other. So I'll try to wait until you're done talking before I talk and vice-versa. Does that make sense?

A. Yes.

Q. I'm going to try and phrase my questions clearly. I'm not trying to trick or confuse you. So if something is not clear, just ask me to clarify or explain, and I'll try to do that as well. Okay?

A. Okay.

Q. Is there any medical reason you can't testify truthfully today?

A. As long as my voice holds out.

Q. Any other reason you can't testify truthfully today?

A. No.

Q. Okay. If you need to take a short break, I understand you're a little bit under the weather. Just let me know. The only thing I'll say is if I had asked a question, if you could answer that question before we go to a break. We'll try to do that, and then we can take a break after that. Does that make sense?

A. Sounds good.

Q. Okay. At a high level, can you just explain the opinions and conclusions you're offering in this case?

A. Sure. And I'm happy to read from the report if helpful and entirely summarizing. But I think that based on the available evidence that external to the Census Bureau as well as internal Census Bureau that there's going to be a differential self-response rate. It is also the case that I see no evidence to suggest, and plenty of evidence to indicate that it will not be corrected by NRFU operations, and the communications campaign. And, finally, I would say that based on the available evidence and standard scientific -- methodology practices and Census Bureau practices, that the addition of the citizenship question was not adequately tested to evaluate the impact on data quality.

Q. Got it. So now, first of all when you're talking about a differential self-response rate, can you explain

what differential self-response rate is?

A. Sure. So the best quality data on the census comes from people self-responding. That is, is they fill out information about their household. This round that will happen online predominantly, although it will also be available for some people with a paper form. The differential self-response rate simply refers to the fact that some groups are going to be more likely to self-respond than others, and that the addition of a citizenship question on the census form will make it more likely that some subgroups will be unlikely to respond.

Q. Okay. And what are those subgroups?

A. So the level at which I've focused attention, the Census Bureau has focused attention, but I'm happy to talk about others, is non-citizen households. And that is -- includes households that have mixed status. Hispanics as a population category.

Q. Okay. And so is it your opinion in this case that the differential self-response rate will result in a differential net undercount?

A. Correct.

Q. Okay. So I just want to make sure we're on the same page with a few things before we get into the -- sort of the meat of your analysis. Does that make sense?

A. Um-hmm.

Q. So when we're talking about a differential net undercount, we're saying that with regard to race and ethnicity, correct?

MR. FREEDMAN: Object to form.

BY MR. EHRLICH:

Q. Would you agree that there's been a differential net undercount in pretty much ever census since that started being measured?

A. Correct.

Q. Okay. And so your analysis in this case is not focused on that, you know, persistent net undercount in the census, but on the additional net undercount differential? Strike that. Sorry. Your opinion in this case is based on a differential net undercount attributable to the citizenship question, correct?

A. Yes.

Q. And not just persistent one that's been in every census, correct?

A. Yes. Although I certainly make reference to history and the importance of history or understanding the current census.

Q. Of course. Of course. Thank you. Would you agree that net undercount is the net undercount is the best measure we have for accuracy of the census count?

MR. FREEDMAN: Object to form.

THE DEPONENT: So I think it's very important following the Census Bureau quality standards to think about the objectivity, the integrity and the utility of the data. In terms of objectivity, that includes accuracy, but also unbiasness. And so that means that we need accuracy not only of the overall count but also accuracy of subgroups. So that the census is fair and complete.

BY MR. EHRLICH:

Q. So then would you say differential net undercount is the best standard we have for judging the accuracy of the census count?

MR. FREEDMAN: Object to form.

THE DEPONENT: I'm not sure what you mean by best. I mean, it is one of the, you know, key things that we look at in terms of evaluating the fairness and completeness of the census count.

BY MR. EHRLICH:

Q. And what are better forms of judging the accuracy of the census count?

A. I'm not sure.

Q. Okay. In terms of quantitative analysis, is there another way to measure after the census how accurately we counted the population?

MR. FREEDMAN: Object to form.

THE DEPONENT: If I'm interpreting your question

correctly, the way that the accuracy is evaluated is with a post-enumeration survey and demographic analysis.

Q. And those analyses are using net undercount, is that right?

MR. FREEDMAN: Object to form.

THE DEPONENT: So, I guess, I'm not sure exactly your question.

BY MR. EHRLICH:

Q. Sure. So we do the census in the year ending in zero, correct? After that we do an analysis as best we can of whether got certain counts correct. Is that right?

A. Um-hmm.

Q. And so when we do that analysis how do we judge whether we got the count correct or incorrect?

A. So the post-enumeration survey is one piece of that coverage analysis. A demographic analysis is another. I'm not sure if you're asking me which is better or there -- these are both separate from and independent of the census, and both have identified the differential undercount for Hispanics.

Q. Got it. And so both of those analyses, both the post-enumeration survey and the demographic analyses focus on that undercount, is that right?

MR. FREEDMAN: Object to form.

THE DEPONENT: Differential undercount and net

undercount are both --

Q. Got it. Okay, got it. Thank you.

MR. EHRLICH: So I'm going to mark this as Exhibit 1.

(DOJ Exhibit 1 marked for identification.)

BY MR. EHRLICH:

Q. I've handed you what's been marked as Exhibit 1.

MR. FREEDMAN: Counsel, this doesn't have Bates numbers already. Do you know if it's been produced in this litigation?

MR. EHRLICH: This is publicly available online.

MR. FREEDMAN: I'm aware of that. Has it been produced in litigation?

MR. EHRLICH: I believe so, but I'm not entirely sure.

MR. FREEDMAN: Okay. We'll be following up on that.

MR. EHRLICH: Okay.

BY MR. EHRLICH:

Q. So I've handed you what's been marked as Exhibit 1. It says DSSD 2010 Census Coverage Measurement Memorandum Series 2010-G-1. Is that right?

A. Yes.

Q. Do you recognize this document?

A. I believe I have reviewed it, yes.

Q. Okay. I just want to walk through this so we're on the same page. Because obviously this goes to a lot of things in your analysis, correct?

MR. FREEDMAN: Object to the form.

BY MR. EHRLICH:

Q. So can we turn to page 12, please? So looking at Table 3, I just want to get a handle on what we're measuring here. So that's -- the census count at the top, that equals the sum of the correct enumerations, the erroneous enumerations and the whole person census imputations, is that right?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: So, I mean I, I didn't produce this. I think I've looked at it at some point. I'd hate to --

BY MR. EHRLICH:

Q. Well --

A. -- issue an interpretation of somebody else's work in terms of the components or misstate without careful review.

Q. Sure. Well, go ahead and take a quick review of it, if you like, just so we're on the same page.

A. I mean, I can, but I mean in terms of what is it that I should be --

Q. So I'm just, I'm wondering how each of these

things are calculated is where I was going to go with this.

MR. FREEDMAN: Same objection, form and foundation.

THE DEPONENT: I would be very hesitant to try and explain Dr. Mule's work. I'm certainly happy to talk at a very high level, but just don't know that I feel comfortable interpreting in great detail without review.

MR. FREEDMAN: And for the record, we learned last Friday it's pronounced Mule.

THE DEPONENT: Oh.

BY MR. EHRLICH:

Q. Okay. So is it fair to say that you don’t know how these numbers are calculated here in Table 3?

A. Well, it's just without review I'm not exactly sure what it's referencing.

Q. So I think the -- if you want to turn to the first several pages of the document, I think it explains. You want to turn to page 6? It says correct enumerations for components, right?

(Pause.)

A. So I think I have a general sense of this.

Q. Okay.

A. It wasn't, you know, kind of central to my opinion.

Q. I understand.

A. Right. Yeah.

Q. Okay. Thank you. So in Table 3 when we're looking at the -- it says the census count.

A. Um-hmm.

Q. And if we add up the numbers for correct enumerations, erroneous enumerations and whole person census imputations, that equals the census count. Does that make sense?

MR. FREEDMAN: Object to form and foundation.

BY MR. EHRLICH:

Q. I'm sorry. I didn't catch your answer.

A. Okay.

Q. Okay. Do you agree with that?

MR. FREEDMAN: The same objection. Go ahead.

THE DEPONENT: Looks like, yeah.

BY MR. EHRLICH:

Q. Okay. And so the category correct enumerations that's going to be the census count minus the erroneous enumerations and minus the whole person imputations, correct?

MR. FREEDMAN: Same objection.

THE DEPONENT: Sounds correct.

BY MR. EHRLICH:

Q. Does that look right from you -- for you?

A. Uh-huh.

Q. Okay. And then the category omissions near the bottom there, it's calculated with the difference between the dual system estimate of the total population and the category correct enumerations.

A. Right.

MR. FREEDMAN: Same objection. Just let me object before you --

THE DEPONENT: Okay.

BY MR. EHRLICH:

Q. And so the net undercount then, if I get this right, is equal to the omissions minus the erroneous enumerations, minus the whole person census imputations, correct?

A. We're on the same page.

Q. Okay.

A. So to make clear though this is the net undercount, which is for the nation as a whole. The issue here is not about the net undercount. You can have, because you have over counted whites and under counted other subgroups you can have across the population as a whole a undercount that looks quite good, but can nonetheless have a differential undercount of subgroups that has implications for the distribution of funding and representation. And my focus has been on the implications of adding a citizenship question for the differential self-

response and undercount.

Q. Got it. Is it possible to calculate a differential net undercount without an overall net undercount?

MR. FREEDMAN: Object to form.

THE DEPONENT: Technically I don't know the answer to that. I mean, I know as part of the coverage analysis that we get the net undercount. That's a very important metric for the census full -- at the same time for the census to be unbiased and fair and complete, we also have to have accuracy at subgroups that are distributed geographically in concentrated ways.

BY MR. EHRLICH:

Q. Got it. Understood. So going back to the table for a moment in the calculations that we talked through, is it possible for omissions to increase without increasing the net undercount?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: Sure. If you overcount a bunch of college students, you can miss more people, and overall your count is still going to have an okay net undercount.

BY MR. EHRLICH:

Q. So could we turn to page 16 for a moment? Actually, I'm sorry. Can we go back to 12?

A. Okay. So we were just talking about omissions,

and we said that omissions it subtracts erroneous enumerations and whole person census imputations, right?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: I think so, if I got that correctly.

BY MR. EHRLICH:

Q. Yeah. And so the whole person census imputations are not accounted for by omissions, right?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: So as noted in the table, omissions are people who should have been enumerated but were not. And it says many of these people may have been accounted for in the whole person census imputations.

BY MR. EHRLICH:

Q. Got it. Okay. Page 16, please. Table 8, which is titled Estimates of Percent Net Undercount by Race and Hispanic Origin. Did I read that right?

A. Correct.

Q. So according to this table the net undercount for Hispanics in the 2010 census was 1.54 percent, correct?

A. Correct.

MR. FREEDMAN: Object to foundation.

THE DEPONENT: Correct.

BY MR. EHRLICH:

Q. Is it fair to say that Hispanics in 2010 were not

evenly distributed across the country?

A. Yes.

Q. And so this would be an example of the differential net undercount, correct?

A. Well, I'm not sure the -- both of those things are separately true. Yes, the 1.54 is how much Hispanics are undercounted. The differential undercount would be whites minutes Hispanics. And so you add the whites and Hispanics together. It is also true that Hispanics are not geographically distributed equally across the population.

Q. Okay. I think I understand. But just to go back for a moment. The white population it says was undercounted by .54, is that right?

MR. FREEDMAN: Object to foundation.

THE DEPONENT: So this is reported as an undercount. And so it's a negative number, which means that whites were actually overcounted. And so when calculating the differential undercount then whites were overcounted; Hispanics were undercounted. And so the difference between them is the differential undercount that I referenced in my report.

BY MR. EHRLICH:

Q. Got it. So is the net undercount judged against whites or judged against what the Hispanic population should have been counted at?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: I mean, when we talk about the net undercount for the population as a whole, that's everyone. But when we talk about the differential undercount, we're talking about the subgroups relative to the count of whites. In some censuses whites have also been undercounted. And so we would say the differential undercount, right, is still the difference between the undercount of whites compared to the undercount of this other group. In the last couple censuses, we've overcounted whites. And so you end up with a differential undercount that is actually wider than the subgroup undercount. And, again, in terms of distribution of funding and resources, what matters is that fairness, right, that differential.

BY MR. EHRLICH:

Q. Got it. And so you were saying that the Hispanics were not evenly spread across the country in 2010, right?

A. This particular table does not speak to that, but it is the case that Hispanics are not evenly distributed across the country in 2010 or today, yeah.

Q. And how in 2020? We'd expect that to be the case again, right?

A. I would assume so. Yes.

Q. Okay. And just for clarity this analysis in this document we're looking at is for the 2010 census, right?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: Correct.

BY MR. EHRLICH:

Q. And there was no citizenship question on the 2010 census?

A. Correct.

Q. And so that's why this report does not calculate an undercount for non-citizens, right?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: I can't speak to their logic. But, yes, they would not be able to because they didn't have citizenship on the census.

BY MR. EHRLICH:

Q. Got it. So this document in front of you doesn't calculate a net undercount for non-citizens?

A. Correct.

MR. FREEDMAN: Object to --

BY MR. EHRLICH:

Q. Okay. Could we go to page 21, please? This is titled Percent Net Undercount for Persons by State, correct?

A. Yes.

Q. And it's showing the net undercount for each

state, is that right?

MR. FREEDMAN: Object to foundation.

THE DEPONENT: I, you know, I looked at this at one point but, again, it was not central to my opinion. I'm happy to review it, if you want me to look into it.

MR. EHRLICH: Yeah, just briefly, just so you know what this chart is saying or figure, I should say.

(Pause.)

THE DEPONENT: Okay. I think I --

BY MR. EHRLICH:

Q. So the note below says for each state and the District of Columbia the estimated percent net undercount is not significantly different from zero. Did I read that right?

MR. FREEDMAN: Object to form.

THE DEPONENT: Correct.

BY MR. EHRLICH:

Q. And we just looked at the percent net undercount for Hispanics that said it was 1.54 percent, correct?

MR. FREEDMAN: Object to form.

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: Correct. But this is a different quantity. This is now looking at the overall net undercount by geography, not within subgroup.

BY MR. EHRLICH:

Q. Got it. But you said that Hispanics are not evenly distributed across the country in 2010, right?

A. Correct.

Q. And the note for this figure says that each of these net undercount per state were not significantly different than zero, correct?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: It does. But that is not testing whether for those subgroups that those differential undercount might not vary by geography. They're separate questions.

BY MR. EHRLICH:

Q. I got it. I'm just trying to see -- let me ask it this way. Based on these percent net undercount and the note below Figure 1, it doesn't seem that congressional appointment would have been effective, correct.

MR. FIDLER: Objection to foundation and form.

THE DEPONENT: So number one, this is 2010, without the citizenship.

BY MR. EHRLICH:

Q. Yes.

A. Number two, I was not retained to look at impacts on apportionment. So I can't say that I feel comfortable making that judgment. And, three, I would just say that this in terms of where I was retained to talk about the

impact of adding a citizenship question on the 2020 census and the likely impact on self-response and the differential undercount that this graphic doesn't actually speak to that because it's lot looking by subgroup.

Q. Got it. But it is looking by state, correct?

A. It is.

MR. FREEDMAN: Object.

BY MR. EHRLICH:

Q. And the Table 3 we just looked at was talking about population by subgroup?

MR. FREEDMAN: Object to foundation.

THE DEPONENT: Yes.

BY MR. EHRLICH:

Q. Okay. And just for clarity, this says that the net undercount for each state here is not significantly different from zero?

MR. FIDLER: Objection to form and foundation.

THE DEPONENT: For the overall population in that state in 2010, correct.

BY MR. EHRLICH:

Q. Got it. So you can put that to the side for now. Thank you. So we are talking about the differential self-response rate, correct?

A. Correct.

Q. And your analysis focuses on Hispanics and non-

citizens, is that right?

A. Correct.

Q. Can you explain the basis for your conclusion that a citizenship question will depress the response rate among Hispanic citizens?

A. Sure. So there's two different reasons to look at Hispanics and not just non-citizens. Sometimes it's the case that the data are not available separating non-citizens from Hispanics. We know that there's an overlap between the two. And so that seemed to the rationale in some of the Census Bureau analyses. But I outlined and reviewed and showed that there is considerable evidence that in fact Hispanic citizens are also showing increased sensitivity, are likely to have increased sensitivity to the citizenship question as evidenced by public opinion, polling data, by other kind of civic and government interactions that have had spillover effects on Hispanics citizens. Leading me to the conclusion that it is likely to have an impact not only on non-citizens but also on Hispanic citizens.

Q. Got it. Did you attempt to quantify the potential impact of a citizenship question on the self-response rate of Hispanic citizens?

A. The Census Bureau has not produced the data that would make that possible.

Q. Got it. And so the studies you were talking about, were those qualitative studies?

MR. FREEDMAN: Object to form.

THE DEPONENT: No. It was a variety of different research projects, quantitative and qualitative. So for instance public opinion polling data that has looked at, you know, fears about deportation. That's quantitative data now. It's not directly linked to the citizenship question. Likewise, there is considerable quantitative evidence regarding Hispanic citizens declining to take food stamps and healthcare benefits under the Trump administration when there's fears about deportation and fears about confidentiality. These all point to the likelihood that Hispanic citizens will also be -- also consider citizenship question to be sensitive.

BY MR. EHRLICH:

Q. Got it. Were those studies performed in the context of a decennial census?

MR. FREEDMAN: Object to form. Do you want her to look at -- I mean, she talks about the 12 of them in the report or so. Do you want her to walk through, and she can tell you what's quantitative, what's qualitative?

MR. EHRLICH: No. Just talking generally right now.

THE DEPONENT: So -- I'm sorry. Will you repeat

the question. Sorry.

BY MR. EHRLICH:

Q. Sure. I was wondering if those studies that you were referencing were in the context of the decennial census?

MR. FREEDMAN: Object to form.

THE DEPONENT: So in terms of some of the evidence that I relied on in reaching my conclusions some of that was specific to the Census Bureau. For instance, some of the spontaneous -- the qualitative research that showed spontaneous concerns about confidentiality of the census, mentioning DACA and other things. Some of it was external quantitative research that was not specific to the census.

MR. EHRLICH: Got it. Exhibit 2.

(DOJ Exhibit 2 marked for identification.)

BY MR. EHRLICH:

Q. So I've handed you what's been marked as Exhibit 2. The title says 2016 Internet Break-off Rates from Internet -- Data Weighted with Base Weight. And it's Bates stamped 9692. Can you describe what a break-off is?

A. Sure. It's when in the course of taking a survey that someone exits from the survey. So in the Internet case that could come about because somebody lost Internet connection or they could come about because somebody

decides they don't want to continue the survey.

Q. Got it. So this is a household group again answering, and then stopped answering at a particular point?

A. Correct.

Q. Okay. And this chart breaks it down by non-Hispanic white, non-Hispanic non-white and Hispanic, right?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: Correct.

BY MR. EHRLICH:

Q. Does it differentiate between Hispanic citizens and Hispanic non-citizens?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: It does not.

BY MR. EHRLICH:

Q. Okay. Given the current planning for the 2020 census do you know where the citizenship question is going to be placed on that?

MR. FREEDMAN: Object to foundation.

THE DEPONENT: So according to Secretary Ross's memo, the citizenship question will be added at the end. But that's a little bit unclear because what the end is depends on the nature of the household. And so if you have multiple individuals in a household, the end in answering

about one member of the household is not in fact the end of the survey. I don't know how the Census Bureau has resolved Ross's direction to put it at the end of the survey given that it is an individual household member. That's not something I have an answer to.

Q. Got it. So if somebody was filling out the questionnaire for the household and they got to the citizenship question, decided not to answer, the remainder of that information would have been filled out, is that right?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: So yes. So if a member of the household answers the household level of questions, and then they start answering the questions about them as the head of household, and they get to the citizenship question, and decide that because of that question they no longer want to participate, they will -- they would break off. Maybe they want to answer that question for themselves and not for, say a spouse, who might be a non-citizen. Then they might answer for themselves, continue on in answering about the other member of the household and break off the citizenship question at a different point. The point I would just make is that it's -- there's not a clear it's the end of survey at least as I understand it.

BY MR. EHRLICH:

Q. Got it. Before they got to that point on the census they would have filled out how many members in the household, right?

MR. FREEDMAN: Object to form.

THE DEPONENT: Correct.

MR. EHRLICH: Okay. We're done with two. So I've handed you what's been marked as Exhibit 3.

(DOJ Exhibit 3 marked for identification.)

BY MR. EHRLICH:

Q. It's a January 19, 2018, memorandum for Wilbur Ross, Secretary of Commerce, Bates stamped 1277. Can we go to page that's labeled 1280?

A. Okay.

Q. Are you familiar with this memo?

A. I am.

Q. And you've reviewed this memo before?

A. I have.

Q. So in the section that's labeled quality of citizenship responses, the second paragraph in that section, this is talking about item non-response rates for non-Hispanic whites, non-Hispanic blacks and Hispanics, is that right?

MR. FREEDMAN: Object to form and foundation.

(Pause.)

THE DEPONENT: Okay, sorry. Will you repeat your

question?

BY MR. EHRLICH:

Q. Sure. So this paragraph is discussing item non-response rates for non-Hispanic whites, non-Hispanic blacks and Hispanics, correct?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: Correct.

BY MR. EHRLICH:

Q. And this on the 2013 and 2016 American Community Survey?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: Correct.

BY MR. EHRLICH:

Q. If I say ACS, you know that means American Community Survey?

A. Yes.

Q. Okay. Can you explain what an item non-response is?

A. Yes. Item non-response refers to someone not providing an answer for an individual question.

Q. So if somebody skips that question, for example, that would be an item non-response?

A. Correct.

Q. And so as we were discussing for the 2020 census questionnaire, if somebody skipped the citizenship

question -- assuming they answered the other questions, we would have the remaining information for that household?

MR. FREEDMAN: Object to form.

THE DEPONENT: Correct. So the Census Bureau would impute, and would end up with lower quality data because of that imputation. But, yes, you would still enumeration of the entire household.

BY MR. EHRLICH:

Q. Got it. Did you rely on this memo when you were talking about decline in self-response rates for Hispanic citizens?

A. No, I don't recall that I did. I mean, in terms of a decline in self-response rate of Hispanic citizens --

MR. FREEDMAN: Do you need to see your report?

THE DEPONENT: Yeah. I could look at my report to look specifically. This to me was evidence that this is a sensitive question for Hispanics. The fact that you have higher levels of item non-response as with the break-offs. Again, indication that the citizenship question is a sensitive question for Hispanics. Of course, we don't have this broken by citizenship status.

BY MR. EHRLICH:

Q. Got it. So we looked at the break-off rates -- strike that. So we've looked at the ACS break-off rates and ACS item non-response rate, correct?

A. Correct.

Q. And neither of these studies provided quantitative evidence regarding unit non-response rates of Hispanic citizens, is that right?

MR. FREEDMAN: Object to form.

THE DEPONENT: Correct.

BY MR. EHRLICH:

Q. Okay. So focusing on the non-citizen piece of the differential self-response rate we were talking about, can you describe the basis for your conclusion that the citizenship question will depress response rates among non-citizens?

A. Sure. I'm happy to review my report. It helps to be more precise. But generally I think some of the most compelling evidence comes from the Census Bureau analysis regarding the -- it's the Brown white memo.

Q. Got it. And this Exhibit 3 memo also does sort of a preliminary analysis that ends up in that White paper, is that right?

A. My understanding is, is that it summarizes some initial analyses that Brown et al, were working on related to that.

Q. Got it. So looking at Exhibit 3, staying on the same page, 1280, the section titled Self-Response Rate Analysis. Can you describe what this analysis is doing?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: So the -- this is summarizing what was later in the Brown, et al, White memo that matches the administrative records to be able to identify households as citizen or non-citizen to be able to speak about the impact of the addition of the citizenship question on self-response.

BY MR. EHRLICH:

Q. And this is comparing the 2010 census and the 2010 ACS, right?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: Correct.

BY MR. EHRLICH:

Q. Separately for citizen and non-citizen households?

A. Yes.

Q. And the bottom of this paragraph, the last sentence, it says once again --

MR. FREEDMAN: Which paragraph are you --

MR. EHRLICH: I'm sorry. The second paragraph under the heading of Self-Response Rate Analysis.

MR. FREEDMAN: So the very bottom of the page?

MR. EHRLICH: correct. It says once again the self-response rates were lower in the ACS than in 2010 census for both citizen and non-citizen households in this

2010 comparison. Moreover, the decline in self-response was 5.1 percentage points greater for non-citizen households than for citizen households.

BY MR. EHRLICH:

Q. Did I read that correctly?

A. Yes.

Q. Okay. And so this is concluding that the difference in self-response rate between all citizen households and households with at least one non-citizen as noted by administrative records is 5.1 percentage-wise, right?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: Among the sample that was able to be matched of these datasets, yes. And the analysis later revised that particular estimate, and based on various modeling functions had a wider range of -- sizes.

BY MR. EHRLICH:

Q. Got it.

A. Yes.

Q. I'm handing you what's been marked as Exhibit 4.

(DOJ Exhibit 4 marked for identification.)

BY MR. EHRLICH:

Q. Titled Understanding the Quality of Alternative Citizenship Data Sources for the 2020 Census, by David Brown, et al. Bates stamped COM underscore DIS 00009833.

Can we turn to page 11. Table 1 says 2016 ACS Internet Self-Response Break-off Rates Percent by Screen, is that right?

A. Yes.

Q. So this is showing the break-off rates for the 2016 ACS broken down by non-Hispanic whites, non-Hispanic other and Hispanics, correct?

MR. FREEDMAN: Object to foundation.

THE DEPONENT: Yes.

BY MR. EHRLICH:

Q. Okay. Can you look at the break-off rate for work location for Hispanics? What is that rate?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: 1.246.

BY MR. EHRLICH:

Q. And that's about double the break-off rate for non-Hispanic whites, correct?

A. Correct.

Q. And the break-off rate for wage amount for Hispanic, what is that?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: .751.

BY MR. EHRLICH:

Q. And that's higher than the break-off rate for non-Hispanic whites, correct?

MR. FREEDMAN: Object to form and foundation.
THE DEPONENT: Yes. That looks, yeah.
BY MR. EHRLICH:
Q. And what is the break-off rate for work for wages for Hispanics?
MR. FREEDMAN: Object to form and foundation.
THE DEPONENT: .590.
BY MR. EHRLICH:
Q. And that's again higher than non-Hispanic white, correct?
MR. FREEDMAN: Same objection.
THE DEPONENT: Correct.
BY MR. EHRLICH:
Q. And the break-off rate for type of employee for Hispanics?
MR. FREEDMAN: Same objection.
THE DEPONENT: .399.
BY MR. EHRLICH:
Q. And again that's higher than the break-off rate for non-Hispanic whites, correct?
MR. FREEDMAN: Same objection.
THE DEPONENT: Yes.
BY MR. EHRLICH:
Q. And the break-off rate for health insurance for Hispanics on the 2016 census or 2016 ACS, excuse me, what

is that?

MR. FREEDMAN: Same objection.

THE DEPONENT: .336.

BY MR. EHRLICH:

Q. And that's again higher than non-Hispanic white break-off rate on the 2016 ACS?

MR. FREEDMAN: Same objection.

THE DEPONENT: Yes.

BY MR. EHRLICH:

Q. And the break-off rate for work duties for Hispanics?

MR. FREEDMAN: Do you have a question?

BY MR. EHRLICH:

Q. What is that?

MR. FREEDMAN: Same objection.

THE DEPONENT: .266.

BY MR. EHRLICH:

Q. And again that's higher than the break-off rate for non-Hispanic whites on the 2016 ACS?

A. Correct.

Q. Okay. And for the taxes question on the 2016 ACS, what was the break-off rate for Hispanics?

MR. FREEDMAN: Same objection.

THE DEPONENT: .259.

BY MR. EHRLICH:

Q. And that's again higher than non-Hispanic whites, correct?

MR. FREEDMAN: Same objection.

THE DEPONENT: Correct.

BY MR. EHRLICH:

Q. And residence last year, what is the break-off rate for Hispanics on the 2016 ACS?

MR. FREEDMAN: Same objection.

THE DEPONENT: .232.

BY MR. EHRLICH:

Q. And that's higher than the break-off rate for non-Hispanic white on the 2016 ACS, is that right?

MR. FREEDMAN: Same objection.

THE DEPONENT: Correct.

BY MR. EHRLICH:

Q. So is it fair to say that each of these questions we looked at on the 2016 ACS have break-off rates that differentially impact Hispanics when compared to non-Hispanic whites?

MR. FREEDMAN: Same objection.

THE DEPONENT: They are larger for Hispanics than non-Hispanic whites, but none of them come close to the differential that we see on the citizenship question.

BY MR. EHRLICH:

Q. And the citizenship question on the 2016 ACS has

a break-off rate for Hispanics of .363, is that right?

MR. FREEDMAN: Same objection.

THE DEPONENT: Correct.

BY MR. EHRLICH:

Q. And for non-Hispanic whites the break-off rate on the 2016 ACS for the citizenship question is .035, is that right?

A. Correct.

Q. Can we go to page 36? Looking at Table 7. Feel free to review the -- text.

(Pause.)

BY MR. EHRLICH:

Q. Have you reviewed this before?

A. I have seen it before, although it was given to me very late in the process in terms of my writing expert report. So I wasn't able to give it as much, nearly as much attention as I would have preferred.

Q. Yes. Time is short in these cases. Looking at the top panel in Table 7.

A. Um-hmm.

Q. This mirrors the analysis we looked at for Exhibit 3, right, Dr. Abowd's January 19th memo?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: I mean, he was referencing a different table in here, my understanding.

BY MR. EHRLICH:

Q. So the top panel here, this looks at households with at least one -- one AR non-citizen, right?

A. Correct.

Q. And compares it with households with AR all citizen households?

A. Correct.

Q. Was that the same analysis that was done in Exhibit 3?

A. Well, so he was referencing Table 6.

Q. Yes.

A. Where you get the 5.1 difference in the --

Q. Yes.

A. Whereas this is the 11.9 difference in difference, which was just one of the points I made was that depending on the modeling assumptions that you make, you can get -- you get a different effect.

Q. Right. So but the -- you're talking about the bottom panel for the 11.9, right?

A. Yes.

Q. Okay.

A. But I believe Dr. Abowd when he was referencing the 5.1 that that was the difference in difference result from Table 6.

Q. Right. And those same two groups, AR all citizen

households and households with at least one AR non-citizen are analyzed at the top panel of Table 7, right?

A. Yes.

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: Yes.

BY MR. EHRLICH:

Q. And the bottom panel is analyzing two different groups, right?

MR. FREEDMAN: Object to foundation.

THE DEPONENT: Yes.

BY MR. EHRLICH:

Q. And what are those two groups?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: So it looks like AR refers to administrative record, and ACS, and then it's all citizen households.

BY MR. EHRLICH:

Q. And that's compared with another group?

A. Well, it's comparing self-response rates for the 2010 ACS compared to the 2010 census, and what you see is for all citizen households that you have a higher self-response rate in the 2010 census compared to the 2010 ACS, and that difference is 8.9 percentage points.

Q. Got it. And above that it says all other households, right?

A. Correct.
Q. And what group is that?
MR. FREEDMAN: Object to form and foundation.
THE DEPONENT: I assume that refers to any households that are not all citizen households.
BY MR. EHRLICH:
Q. And then the drop in response rate from the -- between the 2010 census and the 2010 ACS is 20.7, right?
A. Correct.
Q. And so the difference in difference analysis here in Table 7 the bottom panel appears to be that AR and ACS all citizen households have a self-response rate that's 11.9 percentage points higher than all other households, right?
MR. FREEDMAN: Object to form and foundation.
THE DEPONENT: Correct.
MR. FREEDMAN: We've been going a little over an hour. Can we take a break?
MR. EHRLICH: Yes. Let me just ask one more question, then we can take a break.
BY MR. EHRLICH:
Q. So the paragraph below the table, the second sentence says, other characteristics besides citizenship status could be associated with the lower ACS self-response and AR non-citizen household and all other household groups

could have a higher propensity to have such characteristics. Is that right?

MR. FREEDMAN: I'm sorry. You're talking about the text paragraph, not the long footnote or the --

MR. EHRLICH: Correct.

MR. FREEDMAN: Okay.

THE DEPONENT: And correct, yes, that was my --

MR. EHRLICH: Okay, we can take a break.

MR. FREEDMAN: Thank you.

(Off the record at 10:30 a.m.)

(On the record at 10:47 a.m.)

BY MR. EHRLICH:

Q. Dr. Hillygus, we were looking at page 36 here of the Brown white paper.

A. Um-hmm.

Q. You said you've reviewed this before, correct?

A. Correct.

Q. Okay. And the text paragraph below Table 7, the second sentence was the sentence I just read. Can you read the last sentence of that paragraph?

A. To explore this possibility, we performed Blinder-Oaxaca decompositions.

Q. Do you know what Blinder-Oaxaca decompositions are?

A. Vaguely. They're not something that I have done

before. They're kind of discipline specific. Much more common in economics than other social science disciplines.

Q. Got it. So you don't perform Blinder-Oaxaca decompositions in your work?

A. No. But even when I'm doing causal inference type of modeling, I mean, it's, you know, it's just a particular modeling assumption.

Q. Okay. And do you know what the modeling assumption is for a Blinder-Oaxaca decomposition?

A. So I don't want to misspeak on exactly, but essentially what is going on here is they're attempting to account for a set of -- for variants that you can see in Table A-14, I believe is the one, as an attempt to account for these other characteristics that might also be associated with self-response rates. But, you know, one of the things that was a little bit frustrating about this to the write-up is that the justification for that model specification was not given. And I would argue that some of the items were not exactly ones that -- I mean, I think an argument can be made as to ones that you might not want to include.

Q. Okay. So let's go to Table A-14 then since you're talking about it. So these are the factors they're attempting to rule out for the purposes of the Blinder-Oaxaca decomposition analysis?

A. Well, think about it just in terms of what they're trying to do is remove from the prediction of the effect of these particular variables. Yeah.

Q. Got it.

A. It is standard practice for statistical analyses to explain why you include particular variables in your model, and that's not done here. So I can certainly speculation about their decision making but, of course this is just reviewing their analyses.

Q. So the first factor listed here is log household size, is that right?

A. Correct.

Q. And so this means that the Blinder-Oaxaca decompositions are taking into account log household size in attempting to explain the difference in self-response rates between the 2010 ACS and the 2010 census for these groups at the tops of the columns, right?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: That's my understanding of their analysis.

BY MR. EHRLICH:

Q. Okay. And the second two groups of columns what are those?

MR. FREEDMAN: Same objection.

THE DEPONENT: So it is the administrative record

and ACS all citizen versus all other households.

BY MR. EHRLICH:

Q. Got it.

A. And to be clear, I mean, this is basically just talking about different comparisons. That's one of the points I made in my report was that you can make an argument that given the differential undercount is relative to whites that looking at just all citizen households as kind of the baseline or all other house lines as a base line is maybe not even the right benchmark comparison.

Q. Okay. We'll get there in a little bit. So looking at the left side, these are the factors that they're attempting to account for with their Blinder-Oaxaca decompositions? Is that right?

A. That's my interpretation of their analysis, yes.

Q. Okay. Do you see work location as one of the factors?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: No. I see last week search for a job.

BY MR. EHRLICH:

Q. Do you see wage amount?

MR. FREEDMAN: Same objection.

THE DEPONENT: I don't.

BY MR. EHRLICH:

Q. Do you see work for wages?
MR. FREEDMAN: Same objection.
THE DEPONENT: I don't. I don't know how the household income is computed relative to some of those variables that you're mentioning. So I'm not exactly sure of the --
BY MR. EHRLICH:
Q. Fair enough. Do you see type of employee on the left side of Table A-14?
MR. FREEDMAN: Object to form.
THE DEPONENT: No.
BY MR. EHRLICH:
Q. Do you see health insurance as one of these factors in Table A-14?
MR. FREEDMAN: Same objection.
THE DEPONENT: I do not.
BY MR. EHRLICH:
Q. Do you see work duties?
MR. FREEDMAN: Same objection.
THE DEPONENT: I do not.
BY MR. EHRLICH:
Q. Do you see taxes?
MR. FREEDMAN: Same objection.
THE DEPONENT: I do not.
BY MR. EHRLICH:

Q. Do you see residence last year?

MR. FREEDMAN: Same objection.

THE DEPONENT: I do not.

BY MR. EHRLICH:

Q. So we can go back to page 37. The paragraph in the middle of the page that starts the first term, can you read the last sentence of that paragraph?

MR. FREEDMAN: I'm sorry. Where?

MR. EHRLICH: The middle paragraph on page 37 that starts with the first term.

THE DEPONENT: The --

MR. FREEDMAN: Objection. Asked and answered.

Go ahead.

THE DEPONENT: The White paper says the interpretation of the unexplained variation represents the citizenship question effect is dependent on the assumption that there are no unobserved variables relevant to the difference in differences in self-response across the two surveys.

BY MR. EHRLICH:

Q. What does that mean?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: It means that an RCTU would have been better at the end of the day. That when you're trying to do observational work and draw a causal inference that

you have to deal with both observed and unobserved confounders. And they presumably are very limited in the things that are observed that they can account for. So, for instance, as I explained in my report the reason that we expect to see this impact of the citizenship question is because citizenship is a sensitive question on which some groups in the population are concerned about confidentiality. If we had that directly measured, right, that would allow us to explicitly kind of test for that. We don't have that directly measured. And so, you know, they are attempting to account for some of -- the variety of factors that account for differences in self-response rates. They have to do it imperfectly. All social scientists who try to do causal inference work recognize this. They also say that their conclusions are conservative for a variety of reasons. I think that the model specification is potentially however one of them. In part because they account for some -- treatment variables, I think. They don't explain or justify why they have the particular model specification that they do, which is standard practice.

BY MR. EHRLICH:

Q. Got it. So turning to page 38. Table 8 is showing the analysis of some factors we just looked at in Table A-14 of this White paper, right?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: Yes. That's my understanding of their analysis.

BY MR. EHRLICH:

Q. And so looking at the bottom panel, what is the difference in differences for AR and ACS all citizen households versus all other citizen households?

MR. FREEDMAN: Same objection.

THE DEPONENT: Which one?

BY MR. EHRLICH:

Q. The difference in differences.

A. So the 11.9?

Q. Yeah. And that's the same 11.9 from Table 7, right?

A. Yes.

Q. And so Table 8 is trying to apply the Blinder-Oaxaca decompositions to that in order to explain certain factors that they tried to account for, right?

A. Yes.

MR. FREEDMAN: Objection.

BY MR. EHRLICH:

Q. And that -- the part that's explained by the factors that they attempted to control for is the row that says explained on the bottom of Table 8?

MR. FREEDMAN: Same objection.

BY MR. EHRLICH:

Q. Is that right?

A. Correct.

Q. And, I guess, then the part that says unexplained would be other factors, right?

MR. FREEDMAN: Same objection.

THE DEPONENT: Yeah.

BY MR. EHRLICH:

Q. So and the number for -- what is the number for unexplained in this Blinder-Oaxaca decomposition comparison?

MR. FREEDMAN: Same objection.

THE DEPONENT: The negative 6.1.

BY MR. EHRLICH:

Q. And so if there were no other factors to consider other than the ones they ruled out and the citizenship question then this entire 6.1 would be due to the citizenship question, correct?

MR. FREEDMAN: Same objection.

THE DEPONENT: I don't feel entirely comfortable with that interpretation of the model given the set of assumptions and controls. So --

BY MR. EHRLICH:

Q. So this is taking into account the factors that they controlled for, correct, that we looked at in Table A-

14?

MR. FREEDMAN: Same objection.

THE DEPONENT: And as I explained in my report very briefly, you know, I think that they may have over controlled for some things.

BY MR. EHRLICH:

Q. Got it.

A. So but generally, I think your general sense of the interpretation I believe is also my interpretation of their analysis.

Q. Okay. And so is it fair to say that that 6.1 unexplained difference according to the Blinder-Oaxaca decomposition comparison incorporates a number of other unobserved factors?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: No.

BY MR. EHRLICH:

Q. Can you explain?

A. It accounts for some observed factors.

Q. Isn't it right that the observed factors are the explained part?

MR. FREEDMAN: Same objection.

THE DEPONENT: So the -- oh, so they explained accounts for the observed, yeah.

BY MR. EHRLICH:

Q. And the non-explained is the unobserved factors, right?

MR. FREEDMAN: Same objection.

THE DEPONENT: Assuming, you know, with those modeling assumptions, yes.

BY MR. EHRLICH:

Q. And the observed factors includes the citizenship question, right?

MR. FREEDMAN: Same objection.

THE DEPONENT: So the explained are -- there are variables in A-14.

BY MR. EHRLICH:

Q. And the citizenship is not in A-14, right?

A. Correct.

Q. And so that would fall into the unexplained column in Table 8?

MR. FREEDMAN: Same objection.

BY MR. EHRLICH:

Q. Or row. Sorry. Is that right?

A. I think. I feel like I'm getting a little bit muddled in the conversation, but yeah.

Q. Sure. So I'm just trying to, I'm just trying to clarify what the 6.1 is in the Blinder-Oaxaca decomposition. And so when you account for the factors that's in the explained row of Table 8 explaining the

Blinder-Oaxaca decomposition, is that right?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: Again, you know, I think my interpretation of their analysis is consistent with that, yes.

BY MR. EHRLICH:

Q. Okay.

A. But I also don't want to --

Q. I understand. But the -- so the unexplained row includes other factors that weren't listed in Table A-14, one of which is the citizenship question, is that right?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: I think if I interpret that correctly, yes.

BY MR. EHRLICH:

Q. Okay. And there are other factors along with the citizenship question that also are not considered in that 6.1?

MR. FREEDMAN: Same objection.

THE DEPONENT: Correct.

BY MR. EHRLICH:

Q. Okay. There's a lot of math. And then just turning briefly to Table 9, and feel free to review as much as you need to, to understand the table.

(Pause.)

A. Okay.

Q. So the bottom panel of Table 9 -- strike that. The Table 9 uses the 2016 ACS, right?

A. Correct.

Q. Whereas Table 8 had used the 2010 ACS?

A. That is my interpretation of their analysis, yes.

Q. So the -- is it fair to say that this is -- that Table 9 is essentially updating Table 8 using the 2016 ACS numbers?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: That is my interpretation of their analysis, yes.

BY MR. EHRLICH:

Q. Okay. So that looking at the bottom panel of Table 9, this difference in differences what -- strike that. The bottom panel of Table 9, what is the difference in differences between the AR and ACS all citizen households and all other households?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: Negative 5.8.

BY MR. EHRLICH:

Q. Okay. And that's essentially the same as the negative 6.8 in Table 8 except it's using the 2016 ACS data instead?

MR. FREEDMAN: Object to form and foundation.

BY MR. EHRLICH:

Q. Is that right?

A. I think that's my interpretation of -- I mean, I think that's correct based on my review of their analysis.

Q. Okay. Can we turn to page 54? That's Bates stamp 9886. So the bottom paragraph, last sentence. Can you read what that says?

A. The implication is that adding a citizenship question to the 2020 census would lead to lower self-response rates in households potentially containing non-citizens resulting in more non-response follow-up field work, more proxy responses, and a lower quality population count.

Q. The authors don't use the 5.8 number we just looked at, right?

MR. FREEDMAN: Object to form and foundation.

BY MR. EHRLICH:

Q. In that paragraph about conclusions.

MR. FREEDMAN: Object to form.

THE DEPONENT: They don’t specifically reference 5.8, no.

BY MR. EHRLICH:

Q. Do they cite any projection of how much self-response would be reduced for households potentially containing non-citizens?

MR. FREEDMAN: Object to form. You talking about in the report or in that specific sentence?

MR. EHRLICH: In this conclusion paragraph.

THE DEPONENT: No, they don't specifically reference any of their precise estimates in the conclusion paragraph.

BY MR. EHRLICH:

Q. And their conclusions only relate to households containing non-citizens, right?

MR. FREEDMAN: Object to form.

THE DEPONENT: That is correct.

BY MR. EHRLICH:

Q. Okay. I want to turn to one of the other conclusions we were discussing at the beginning about how the self-response, the differential self-response rate will not be corrected by outreach and NRFU. Is that one of the conclusions that you reached?

MR. FREEDMAN: Object to form.

THE DEPONENT: Yes.

BY MR. EHRLICH:

Q. Okay. Can you describe the basis for your conclusion that increased outreach through the integrated partnership and communications campaign will not fully address the differential self-response rate?

MR. FREEDMAN: Object to form.

THE DEPONENT: Sure. As I outlined in my report --

BY MR. EHRLICH:

Q. I'm sorry. Can you set aside the report?

A. Oh, sure.

MR. FREEDMAN: You want her to do it from memory? I mean is that --

MR. EHRLICH: Yeah. I'm talking generally about her conclusions right now.

MR. FREEDMAN: I mean, she -- I mean there's like pages of analysis.

MR. EHRLICH: I understand.

THE DEPONENT: So in terms of --

MR. FREEDMAN: Hold on. Hold on. Object to form. Go ahead.

THE DEPONENT: So in terms of the outreach campaign, the concern about its ability to correct the differential self-response is partly just based on the fact that they haven't done the research that the Census Bureau deems necessary to do, but ultimately was cancelled because of budgetary concerns. Second, to the extent that they have started doing research for the communications campaign, it points to all the issues that I talk about in my report, and that we know is this climate that makes the census count more challenging. And so, you know, there is

no evidence that the communications campaign is going to somehow be able to fix the differential self-response that is attributable to the addition of the citizenship question. And some of the internal research suggests that confidentiality concerns in particular can be especially difficult to influence. My own research, the book that I wrote on the 2000 census was focused on the ability to have an effect on self-response with a communication campaign. There are a number of challenges that I haven't seen the Census Bureau be able to address, in part because they haven't been able to do the research. We also face a more fragmented communication environment than we did in 2010. That complicates how you actually get your message to the people that you intend to reach. Some of the, you know, critical players for the communication campaign are the trusted voices. There has been concern that the trusted voices are not going to be able to -- be able to make a compelling case in their committees to increase self-response. I have a, I hope, a far more coherent explanation in my report that I'm happy to reference if it would be useful.

BY MR. EHRLICH:

Q. Sure. We'll get to your report in a little bit. So when you were talking about the -- you were talking about the internal research the census has done on this, is

that right?

A. Um-hmm.

Q. Can you describe what that research was?

MR. FREEDMAN: Object to form.

THE DEPONENT: So I know they have CBAMS and I didn't get the updated CBAMS for this time around. But looking at CBAMS for 2010 points to concerns about confidentiality among Hispanics. And so that was, again, one of the indications of this hard to count group. There was a CSM research project on administrative records that I recall. I can't remember who the authors were in the Census Bureau who were looking specifically at attitudes about administrative records. And that was the one that said that privacy attitudes could be moved, but confidentiality concerns couldn’t.

BY MR. EHRLICH:

Q. Was the 2010 CBAMS that you reviewed was that a qualitative assessment of people's attitudes?

A. No. There was -- these are survey -- I mean, I've seen both qualitative and also survey-based estimates.

Q. Okay. And in what context was the 2010 CBAMS conducted?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: I believe that it was conducted in 2008 to, again, inform the communications campaign going

into 2010.

BY MR. EHRLICH:

Q. Okay. And can you describe the CSM research that you were just referencing?

A. Not beyond the description I gave about reviewing.

Q. Without reviewing your report?

A. Yeah. I'm happy to find the citation, if it's useful.

Q. Are there any other sources that you reviewed in reaching your conclusion that the differential self-response rate will not be -- will not be fully addressed by the outreach campaign?

MR. FREEDMAN: Do you want her to consult her report?

MR. EHRLICH: No.

MR. FREEDMAN: You just want a memory test of like how much -- whether she remembers anything else?

MR. EHRLICH: No. I would just like her to answer the questions I'm asking.

MR. FREEDMAN: You've been promising for almost two hours that she would be allowed to consult her report. So at some point, I think you should ask her questions about what's actually in her report rather than conducting a memory test. She can answer if she remembers --

MR. EHRLICH: I would just like her to answer the questions that I'm asking. We'll look at the report when we look at the report.

THE DEPONENT: I don't remember anything specifically else.

BY MR. EHRLICH:

Q. Okay.

A. I'm happy to take a look at my report, if you want me to.

Q. Do you know if the 2010 CBAMS included -- that you reviewed included research on reactions to a citizenship question?

A. Did not.

Q. How about the CSM research that you reviewed?

A. It did not. This is one of the big gaps in knowledge is that the research hasn't been conducted specifically about the citizenship question and the attitudes about it. I don't know what research is going on right now but --

Q. Understood. You mentioned your book on the 2000 census. Can you describe your conclusions in the book?

MR. FREEDMAN: Object to form.

THE DEPONENT: Dust those off, those cobwebs. It's been awhile. But what we find is that concerns about privacy at the time depressed cooperation among those who

have privacy concerns because of the salience of that issue. So in that sense it was really highlighting the importance of the macro environment in terms of people's willingness to complete. We also looked at the impact of the communication campaign, and found an increase particularly in awareness of the census over the course of that communications campaign. And so my take away would be that communications can have an effect on cooperation at the same time that this macro environment really matters particularly for subgroups who might consider questions to be particularly sensitive. It's a different set of issues in 2000. But in terms of that underlying model of survey response that it's essentially the same.

BY MR. EHRLICH:

Q. Did the 2000 census have a citizenship question?

A. It did not.

Q. It did not on the short form, right?

A. Correct.

Q. On the long form did it have one, a citizenship question?

A. I don't think it did actually. Did it? I'm --

Q. It was a long time ago.

A. It was long -- yeah, sorry.

Q. That's okay.

A. I should know that, and my mind is fuzzy with

cough medicine.

MR. FREEDMAN: I'll interpose an objection that there's better evidence than asking you --

THE DEPONENT: Right.

MR. FREEDMAN: Go ahead.

BY MR. EHRLICH:

Q. And so you mentioned the internal research from the Census Bureau including the 2010 CBAMS and the CSM research, and you mentioned your book on the 2000 census in terms of materials you consulted for supporting your conclusion that the outreach campaign will not fully mitigate the issues with differential self-response. Is that right?

MR. FREEDMAN: Object to form. Mischaracterizes her testimony.

THE DEPONENT: I can't remember if one of the things that I also relied on was some of the qualitative evidence the Census Bureau. Certainly the qualitative evidence from the Census Bureau was relevant to my overall opinion. And so I'm happy to talk about it.

BY MR. EHRLICH:

Q. But what qualitative evidence was that?

A. So there was the focus groups. Most recently there's the focus groups from the CBAMS that I've just now seen that wasn't incorporated into my report. There was

the report from a couple of members of the CSM about spontaneous concerns about confidentiality that came about not in a focus group dedicated to understanding what the impact of the citizenship question, which in some way is actually even more compelling about the importance because these were things that were volunteered in discussions about, I think, it was language testing for instance. And so that -- those AAPOR presentations were something that I did rely on.

Q. What is AAPOR?

A. American Association of Public Opinion Researchers. It's a national organization that is a big organization for survey methodologists.

Q. Got it. And you said that was qualitative research from focus groups?

A. Qualitative in -- I mean, I can review if you'd like, but my recollection is, is that there was qualitative research from focus groups not specific to the citizenship question in which people spontaneously brought up issues of confidentiality.

Q. Got it. Can you think of any other sources right now that you consulted in reaching your conclusion that the differential self-response rate will not be fully mitigated by the outreach campaign?

MR. FREEDMAN: Again, you want her to do that

from memory, not consult what's actually in her report?

MR. EHRLICH: I just asked her if she can think of any other ones that she consulted right now.

THE DEPONENT: Not off the top of my head. I'm certain I have 176 footnotes, as people have mentioned. So I am certain that I might have others that I'm happy to talk about.

BY MR. EHRLICH:

Q. Okay. But without the report in front of you that's --

A. Yeah.

Q. Okay. Those are all the sources you recall right now? Right?

A. True.

Q. Okay. Can you turn back to Exhibit 4, which is the Census Bureau authors and their white paper?

A. Uh-huh.

Q. Page 42, please. The second paragraph here, can you read the first sentence of that paragraph?

A. Using these estimates as well as the data in Table 12, we can develop cautious estimates of the data quality and cost consequences of adding the citizenship question to the enumeration form.

Q. And when that sentence says these estimates, do you know what that is referring to?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: I don't without review. But I presume they're referencing in part the 5.8 difference in difference.

BY MR. EHRLICH:

Q. We've already talked about where that comes from extensively.

A. Um-hmm.

Q. But that number is an attempt to figure out the possible drop in self-response rate for households potentially containing non-citizens, right?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: Can you state that again?

BY MR. EHRLICH:

Q. Sure. That 5.8 difference in differences was an attempt to estimate the potential drop in differential self-response for households potentially containing non-citizens.

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: Not potentially containing. The ones that have been identified, I believe, as not being all citizens. And, of course, with the assumptions made in calculating the estimate. But, yes, it is an estimate of the impact on self-response.

BY MR. EHRLICH:

Q. So if the households did not contain all citizens, then it was included in the latter group of every other household, right?

MR. FREEDMAN: Object to foundation.

THE DEPONENT: I --

BY MR. EHRLICH:

Q. You can feel free to review if you'd like.

A. So I believe the 5.8, and this is from my memory, but this is their analysis. So, you know, I'm happy to be corrected. I believe that the difference between the 5.1 and the 5.8 is the assumption made about individuals who -- for whom citizenship is missing in the administrative record. And that the 5.1 assumes that those individuals are citizens, and so it puts them in that part of the comparison, and the 5.8 does not. But that's just my recollection of, you know, of their analysis.

Q. Got it.

A. And then I -- my understanding of this sentence is to say we take the self-response estimate that we have as long as we buy all the assumptions that go into that estimate, and that we can then look at what that means in terms of cost consequences and some data quality.

Q. Got it. And that sentence also says that the data from Table 12. Can you describe what the data in Table 12 is?

MR. FREEDMAN: Object to the foundation.

THE DEPONENT: Sure. My interpretation of their analysis here is that they are comparing the quality of proxy respondents in the NRFU operation compared to those who are self-responding. Which in 2010 self-responding was a mail-back, whereas in 2010 for most people that would be an Internet completion.

BY MR. EHRLICH:

Q. So looking at this bottom paragraph of page 42, seems to go into page 43. Can you describe what that analysis is doing?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: I'm happy to review the paragraph.

BY MR. EHRLICH:

Q. Sure.

A. If you want me to interpret their analysis.

(Pause.)

A. So to summarize their analysis what they're doing is with some additional assumptions which, by the way, one of the assumptions it's a pretty big stretch is to say that anyone who is a citizen household will not be affected by the citizenship question. But that's in my report. So they're saying, okay, if we take that 5.8 percent, we can then look at what the projected increase is in NRFU, and we could look to see how likely we are to get, you know, the

increase in proxy responses instead of self-responses. And then the subsequent -- what that means in terms of the projected whole person imputations and erroneous enumerations. And then ultimately what that means in terms of being linkable to administrative records. And the key takeaway of these numbers, again, these numbers are resting on some assumptions that I call into question in my report in rebuttal. But still the takeaway is not one that I disagree with. And that is, is that you're going to see lower data quality because proxy respondents don't give as good data as a self-response.

Q. When you say data quality, what do you mean by that?

A. So that has a very specific meaning. Data quality has defined in terms of utility integrity and objectivity. In common usage you think of data quality as kind of accuracy. And so that's how I was using it right there. But in terms of data quality there, you know, is a, is kind of this broader definition. And actually but it does apply here, right? Because if you're using -- if you have a high percentage of imputations and proxy respondents, then the utility of the resulting data is potentially lower because it's lower, less accurate. And so these things are all linked together.

Q. And when you're talking about accuracy, you're

talking about the quality of the data you're receiving, is that right?

A. Getting the right answer.

Q. For the questions on the form, right?

A. Correct.

Q. But you're not referring to the actual count of people?

A. Correct.

Q. Does this Census Bureau analysis that you just reviewed, does that say anything about possible net undercounts?

A. It does not. Except actually, well, no, it does not.

Q. Can we go back to Exhibit 3 for a moment? This is the January 19th memo to Secretary Ross again. And you've reviewed this before today, right?

A. Correct.

Q. Does this analysis contain the same type of analysis that we've just looked at for Exhibit 4 in terms of possible increases in cost for NRFU?

MR. FREEDMAN: Object to form and foundation --

THE DEPONENT: Section B-4 is a cost analysis. I don't know if that's what you're --

BY MR. EHRLICH:

Q. And so turning to page 1282, the second paragraph

from the bottom. This is talking about an increase in NRFU workload, right? And the associated cost?

MR. FREEDMAN: Object to form.

THE DEPONENT: Correct.

BY MR. EHRLICH:

Q. I'm sorry. And when I say NRFU you know I mean non-response follow-up?

A. Correct.

Q. Okay. Does this analysis have any discussion of net undercount?

MR. FREEDMAN: Object to form.

THE DEPONENT: It does not.

MR. EHRLICH: Can we take a quick break?

MR. FREEDMAN: Sure.

(Off the record at 11:34 a.m.)

(On the record at 11:50 a.m.)

MR. EHRLICH: I'm handing you Exhibit 5.

(DOJ Exhibit marked for identification.)

BY MR. EHRLICH:

Q. It's the expert report and declaration of D. Sunshine Hillygus, PhD. Do you recognize this?

A. I do.

Q. I'd just like to walk through this report a little bit. Can you turn to page 4, please? And the bottom paragraph that says the undercount. Can you read

that first sentence?

A. Although the U.S. Census Bureau has the goal to count everyone once, only once and in the right place, scientific measurements of census accuracies since 1940 have shown a persistent and disproportionate undercount of some population subgroups, including racial and ethnic minorities -- and children immigrants.

Q. Can you describe the basis for your opinion that the -- that census accuracies since 1940 have shown persistent and disproportionate undercounts of immigrants?

MR. FREEDMAN: Object to form.

THE DEPONENT: So there's a considerable basis of research, like, De la Puente, the ethnography researches are some of the ones that have looked at the differential undercount in particular. And I talk a little bit more about that later in the report.

BY MR. EHRLICH:

Q. And what does that research show?

A. Just that the hard to count population, the Census Bureau recognizes these groups as hard to count populations, are less likely to be counted.

Q. Fair enough. And there's a specific -- is there a Census Bureau analysis on the disproportionate undercounts of immigrants?

MR. FREEDMAN: Object to form.

THE DEPONENT: So in terms of the Post Enumeration Survey and the demographic analyses that are the specific coverage measurement of the Census Bureau, that that -- I don't believe immigrants have been included as a subgroup. However, there is Census Bureau research, ethnographies and other research that certainly has looked at the undercount of immigrants.

Q. And what -- are those?

A. The one that comes to mind immediately is De la Puente. But, you know, I can look through it.

Q. Sure. Do you cite that in here?

A. Yeah. So in looking at the differential undercount, my recollection of some of the citations that are particularly valuable for this particular point might be Kissam (ph.) from 2017, the differential undercount of Mexican immigrant families in the U.S. census. I don't believe that's a Census Bureau person, but and then De la Puente, 1993, why are people missed or erroneously enumerated in the census, a summary of findings from ethnographic research would be another. In my rebuttal the Fine and West, the exploratory assessment of the 1986 Los Angeles test census.

Q. I'm sorry. You're looking at your rebuttal?

A. So that I think that's not cited in my main report.

Q. Okay. Let's just focus on the main report now. Turn to page 5, the first full paragraph. It says, at the same time as the decennial census count -- decennial count undercount some segments of the population decennial has also overcounted whites in 2000 and 2010 censuses largely as a result of double counting those with second homes or those with college students away from home. Can you describe your basis for the basis that whites have been overcounted in 2000 and 2010 due to double counting of those with second homes or college students?

A. Yeah. That's just one, one explanation for how you can end up with overcounting.

Q. Okay.

A. Yeah.

Q. Did that come from somewhere?

A. I mean, we talk about it my 2006 book, and I mean, you know, I think that in terms of attributing explicitly duplications that is my, you know, general understanding as opposed to that I can give you a specific citation to those particular factors. Those are model factors that explain the overcounting.

Q. Okay. So you're just saying that these are a couple of factors that contribute --

A. Yeah.

Q. -- to that?

A. For sure.

Q. Okay. Can we go to page 7, please? Can you read the second sentence of Footnote 21?

A. Incentives are obviously not a relevant factor for the decennial census, but this example highlights the way the survey design decisions can shape the respondent participation.

Q. Okay. When you say incentives there, what do you mean?

A. So what I was referencing was the fact that when we think about the survey participation decision that people might have characteristics that make them more or less likely to participate in a survey. But their decision to actually participate or not depends not only on their characteristics but also the design of the survey and the external environment. The design of the survey includes a wide variety of different factors, and that can include the questionnaire, the question order. It can include the mode of the survey. And incentives refers to if you give somebody money or sometimes the incentives are not actually money. They might be points if it's some type of survey. But those incentives can affect somebody's decision about whether to participate or not. We don't give people incentives, you know, for the -- for a census survey. However, there was reference in Secretary Ross's memo about

a Nielson study, and so it was pointed out that was one of the ways in which it's different, and all of those design decisions matter.

Q. Got it. So for the census there's no financial incentive, right?

A. So what we term in survey methodology as an incentive is the -- in exchange for your completion you will receive a gift card or a check or points.

Q. And that doesn't happen in the census?

A. That does not happen in the census.

Q. Okay. If only.

A. Yeah.

Q. But there -- is there such a thing as negative incentives? So let me ask a different question. Is responding to the census required by law?

A. It is.

Q. And do you know if there's criminal penalties for not answering the census?

MR. FREEDMAN: Object to form.

THE DEPONENT: My understanding is that there has not been a prosecution in a very long time.

BY MR. EHRLICH:

Q. But they exist?

A. It is my understanding that the Department of Justice, I believe, could, yes.

Q. And so are these criminal penalties some sort of incentive for people to answer the census?

MR. FREEDMAN: Object to form.

THE DEPONENT: It is not the way that survey methodologists would think about it. We refer to an incentive as a very explicit part of the survey design. Certainly the mandatory nature of the census is one feature of the design that matters, and it matters a lot. There is no doubt about that. I'm not sure I would label it incentive or not.

BY MR. EHRLICH:

Q. Got it.

A. Yeah.

Q. So it's not an incentive in the terminology you're using?

A. Yeah, right.

Q. Okay. How did you take into account in your analysis that the census is mandatory?

MR. FREEDMAN: Object to form.

THE DEPONENT: So one of the ways is that where possible I tried to look at research that was explicit to census, census surveys that were mandatory. It's certainly a case that -- certainly the case that the mandatory nature of the census is a factor that does not come into play in all of the surveys that have been cited here though.

BY MR. EHRLICH:

Q. What other census surveys that you relied on also have that mandatory nature?

A. The ACS.

Q. Okay. Any other ones?

A. Not to my knowledge.

Q. Looking at the third full paragraph on page 7. I'd like to talk about this first sentence. Can you just read that for me?

A. For the 2020 decennial census scientific framework for thinking about survey participation would best predict that the subgroups in the population disproportionately concerned about the confidentiality of the citizenship question will be less likely to respond; more likely to skip the individual question, and more likely to give an inaccurate response.

Q. Okay. So when you say that subgroups in the population disproportionately concerned about confidentiality of the citizenship question will be less likely to respond, can you explain what you mean by less likely?

A. Yes. So as I explained it, the framework for understanding the survey participation decision depends on, again, both the characteristics of the individual, the characteristics of the survey, and the broader survey

environment. And so at issue here is that there is going to be some individuals who consider the citizenship question to be sensitive because of concerns about confidentiality. And so they will respond in a way that is different. And that could include not responding at all. It could include skipping the individual question. It might include breaking off, as we've talked about before. Or it could include providing an inaccurate response. And all of those are ways that we have seen within the survey methodology literature that people respond to sensitive items.

Q. Okay. Do you know -- so for the subgroups in the population that you're referring to here, do you know how much less likely they are to respond with the addition of a citizenship question?

A. Precisely no. But the internal Census Bureau research has their estimates. The thing that I do is I review all of the literature and the analyses, and conclude that all of the evidence cumulative to all points in the same direction, that it will be a negative effect. There is nothing that suggest to me that we would find a positive factor for instance.

Q. Okay.

A. The size of that negative effect, the Census Bureau analysis is the closest thing we have because we

don't have an RCT that gave a precise estimate.

Q. Yeah. And so when you say subgroups in the population disproportionately concerned about confidentiality would be more likely to skip the individual question, you also don't have a quantitative estimate of how much more likely they are to skip an individual question?

MR. FREEDMAN: Object to form.

THE DEPONENT: Again, all the evidence points to a impact on skipping. But I can't speak to a precise estimate of the size of that because the Census Bureau didn't do the pre-testing that would allow us to calculate that.

BY MR. EHRLICH:

Q. And would you have the same answer for some populations in terms of their likelihood to give an accurate response?

A. Correct.

Q. Okay. If you'd turn the page to page 8. Can you read the -- at the very top the census that begins as explained? Can you read that sentence?

A. As explained in a classic survey methodology textbook there are some ubiquitous correlates of the tendency to refuse the survey request. When the key variables of the survey are related to these attributes, we

can anticipate non-response biases on the respondent-based estimates.

Q. Can you explain what that means?

A. Sure. It basically says that we can rely on our existing body of scientific knowledge about survey response to be able to predict likely biases in our estimates. Or put in terms that are directly relevant here is that we can predict who is likely to be affected by the survey design that we're trying to evaluate. So the basic point I'm trying to make here I -- even though the Census Bureau didn't have the exact empirical test that would allow us to -- the RCT that I would have loved to have seen, that we can nonetheless make predictions on the basis of what we do know from survey methodology and from previous surveys.

Q. So what is non-response biases in respondent-based estimates?

A. So when we are trying to get an estimate of the population that that can be biased. It can be wrong, right, it can be inaccurate because of even non-response. It can be inaccurate because of item non-response, and it can be inaccurate because of measurement error. And so those three things that we talked about, right, that people will fail to respond, that can create biases in the estimates, and that people skip individual questions, that can create population biases in estimate. And then if some

people provide an inaccurate response, that can also provide biases in the estimate.

Q. So the respondent-based estimates part is just referring to the self-response, is that right, in determining how people will respond to a survey?

A. In terms of like a survey. Right. That people are providing responses.

Q. Okay. But so is the type of enumeration that occurs in non-response follow-up such as an in-person interview, is that a respondent-based estimate?

MR. FREEDMAN: Object to form.

THE DEPONENT: Yes. As I conceptualize it, yes. I guess I'm not entirely sure what the question is but --

BY MR. EHRLICH:

Q. Yeah. So I guess I'm trying to determine what step of the process this statement is referring to when it's talking about non-response biases in the respondent-based estimates.

A. So you can have non-response -- so when you think about non-response bias in the census, right, very clearly we recognize that the estimates that we get just from self-response, right, that that's a biased estimate of the population. There's a whole bunch of people who didn't respond. And so the non-response follow-up is intended to reduce that non-response bias. The point of this agreement

between Dr. Apav (ph.) and myself if the extent to which that non-response follow-up is going to be able to correct for that non-response bias.

Q. Got it. But and then at the end of the process, imputation, that's not a respondent-based estimate, right?

MR. FREEDMAN: Object to form.

THE DEPONENT: I guess it's -- that is a -- not entirely how to put those two things together. But an imputation would be an attempt to correct for non-response biases. It requires some assumptions as the Brown paper makes clear. Imputation, it's really tricky, when you're talking about the citizenship question because it's the non-ignorable missing data. So but imputation is an attempt to correct for non-response bias.

BY MR. EHRLICH:

Q. Turn to page 9, in the second full paragraph. You say extensive empirical research shows that sensitive questions can result in increased burden, which can impact data quality in a number of ways, including -- and then you list a few of the ways here.

A. Um-hmm.

Q. We've already talked about some of these, but can you describe again what these bullet points are?

A. Sure. So it's unit non-response or unit response rate. That's where we're spending a lot of time in this

case. There's item non-response. So that's skipping an individual question. There's break-offs. That's people leaving the survey. There's response accuracy or measurement error. That's people giving the truthful answer. And then the additional thing that I mention in terms of data quality is a little bit more meta, and that is the spillover effect on attitudes about surveys, about the survey sponsor and so on.

Q. Yeah. Could you just describe negative evaluations of surveys generally, and just describe that more for me?

A. Sure. If people take -- if they have a bad survey experience, then they are less likely to participate in surveys generally.

Q. Got it.

A. Specifically from the same. So where I -- my own research has focused on this that the most is with longitudinal surveys where you're trying to interview someone more than once. If somebody has a bad survey experience, they think that the questions are too sensitive or it's burdensome in terms of length or complexity, that it reduces their willingness to participate in the study in the future, and from that sponsor in the future. And so in terms of implications here, you know, I don't have the empirical study to be able to provide any explicit

evidence, but the concern that this raises is how does a negative experience with the census have an impact on the other census surveys and people's willingness to cooperate with the Census Bureau generally.

Q. And this is due to a sensitive question on the survey?

MR. FREEDMAN: Object to form.

THE DEPONENT: Explicitly it's about burden. And, yes, sensitivity is related to burden. Burden captures a variety of things.

BY MR. EHRLICH:

Q. Okay.

A. And there's variation across the population in terms of what people consider burdensome. And so sometimes it's, you know, this has been a lot of focus within the Census Bureau to understand burden. Burden both in terms of how difficult it s for somebody to figure out how much they pay in property taxes, as well as how sensitive an item is. And so those are just two elements of burden.

Q. Got it. So it's the burden that causes possible increase in negative evaluations of surveys generally?

A. Correct.

Q. And the sensitive question is one component of that burden?

A. Correct.

Q. Okay. Got it. So talking about decreasing unit non-response rates here, that same analysis would apply then, we're talking about burden?

MR. FREEDMAN: Object to form.

THE DEPONENT: Um-hmm.

BY MR. EHRLICH:

Q. Okay. And a sensitive question is one aspect of that burden?

A. Correct.

Q. That could decrease non-response rates, correct?

A. Correct.

Q. And just to go down the list. So increased burden could increase item non-response, right?

A. Correct.

Q. And a sensitive question is one aspect of that burden?

A. Correct.

Q. And increased seeing break-offs is one possible impact of increased burden and one -- I'm sorry.

A. Yes.

Q. And sensitive questions are one aspect of that burden, right?

A. Yes.

Q. Decreasing response accuracy in terms of somebody answering untruthfully is an aspect of burden, correct?

A. Yes.
Q. And a sensitive question is one aspect of that?
A. Correct.
Q. Okay. When you're talking about -- I'll just focus on decreasing unit response rates. How are you quantifying decreasing there? Or --
MR. FREEDMAN: Objection.
MR. EHRLICH: Let me rephrase.
BY MR. EHRLICH:
Q. Can you quantify the amount of decreasing unit non-response rates due to increased burden?
MR. FREEDMAN: Object to form.
THE DEPONENT: It depends on a lot of other factors. And so what I can say is that there is rich scientific literature that looks at the relationship between survey burden and response rates and the other metrics of data quality that point to a negative effect. The precise amount depends on a lot of factors.
BY MR. EHRLICH:
Q. So what are some of the other aspects of burden?
A. So of burden, complexity is one, and survey length is the one that Secretary Ross seems to focus on. But those are the other aspects.
Q. When you say complexity is one aspect of burden, do you mean of a particular question or of the survey as a

whole?

A. Both. So one of, you know, within my field one of the things that we find is viewed as particularly burdensome is if we ask a whole bunch of political knowledge questions. People hate it, right. Because they don't know the answers, and so they get frustrated, and they don't want to participate anymore. So that is an example where it's not easy to say that it's just about length. Yes. A long survey is more burdensome. But it is so much more than just length. There's a number of very, very long surveys that people are still willing to participate in. So you have to take into account a lot of factors.

Q. And the length of the form is one of those other factors you said?

A. Yes.

Q. And then from this paragraph also the sensitivity of the question is another one of those factors?

A. Yes.

Q. Can you think of other factors that go into burden?

A. Well, how hard it is. How hard a question is.

Q. Okay. The complexity?

A. Right.

Q. Or is it --

A. And remember, remember that it's not, you know, that might be that the question itself is hard or it might mean that it's asking for people to remember something that might be difficult to remember. So --

Q. Um-hmm. Is there any way based on the increased burden, is there a way to determine whether a particular person would -- which action a particular person would take? So, for example, not respond entirely, skip the question or break off?

A. Sure. We can do studies.

Q. Okay. Is there -- do you know how much of an increased burden it would take to undertake one of those actions?

MR. FREEDMAN: Object to form.

THE DEPONENT: Again, it depends. So in -- with respect to the census and the sensitive AFS citizenship question, it -- all this literature points to this negative effect. In terms of a precise estimate, that's where I would say that we need empirical research to give us a more precise estimate.

BY MR. EHRLICH:

Q. Got it. Could we turn to page 11?

MR. EHRLICH: Actually, can we go off the record?

(Off the record at 12:22 p.m.)

(On the record at 1:18 p.m.)

BY MR. EHRLICH:

Q. Okay. Can we turn to page 11 of your expert report? Footnote 44 says there are two reasons to separately consider the categories of non-citizens and Hispanics. First, citizenship cannot always be fully determined because a significant percentage of non-citizens are Hispanic. The Hispanic category captures non-citizens who would not -- who would otherwise be missed or allows for analysis that could not otherwise be conducted. Can you describe that?

A. Sure. It's just there are times when there are datasets that don't have citizenship status that have been used in forming an opinion here, and that's both my opinion, but also within the Census Bureau research. And at times you don’t have citizenship status because there is an overlap between non-citizens and Hispanics that both the Census Bureau and I have used that as one reason to look at Hispanic as a subgroup.

Q. Got it. Can you turn back to Exhibit 4, which is the white paper?

A. Um-hmm.

Q. Is this one of the Census Bureau analyses that you were just referring to?

A. Yes. I think they do include in here some analyses just by Hispanic that they don't have citizenship

status for. Although a lot of it -- this is one of the few examples where you do have the overlap of the two.

Q. Can you explain what you mean it's one of the examples that has overlap of Hispanic and non-citizens?

A. The Brown paper is one of the very few examples of analyses in which we can actually look at data quality issues related to citizenship status specifically. Whereas other analyses were restricted to looking at Hispanic. But we don't have citizenship status within that.

Q. Got it. And that's because they used every other household as their benchmark in their analysis rather than AR non-citizen households, is that right?

MR. FREEDMAN: Object to form.

THE DEPONENT: No. This is just one of the few examples in which they are able to make use of data in which citizenship status is available. And they are able to do that through the matching of administrative records. A lot of the data quality analyses that I've looked at like with the break-offs, for instance, and the item non-response that some of that is -- it's -- we don't have it linked to data that identifies citizenship status. So we're only to -- I'm only able to look at the Hispanics generally.

BY MR. EHRLICH:

Q. Understood. So this analysis in Exhibit 4, the

Brown paper, in terms of their quantitative analysis in attempting to ascertain a self-response rate due to the citizenship question did they take into account Hispanics that would have an uncertain citizenship status?

MR. FREEDMAN: Object to form.

THE DEPONENT: Their primary analysis is comparing only upon citizenship. But in some of the earlier, like Figure 1 and Figure 2, they use Hispanic there.

BY MR. EHRLICH:

Q. Got it. But their later analyses about the drop-off and self-response they used all citizen versus all other, right?

A. Right.

Q. Okay. And so your language in Footnote 44 is just talking about generally the problem with evaluating surveys like -- generally evaluating research in this area?

A. Well, then my next sentence says offers a substantive rationale, not simply -- so the first point is to say there are some times that we use Hispanic essentially as a proxy even though we might be interested in a particular subset. And that seems to be sometimes the rationale Census Bureau analyses. The second point is to say there's actually a -- reason that we want to look explicitly at Hispanics, and that's because as evidence I

show that even Hispanic citizens might be impacted by the addition of the citizenship question.

Q. Got it. Okay. Turning to the next page. Can you read that very first paragraph for me?

A. Census Bureau data stewardship policies identifies citizenship as a sensitive topic. In fact, of the questions planned for the decennial short form only the citizenship question has a sensitive designation.

Q. And there was no other topics in there that had a -- strike that. There were no other topics that would appear on the 2020 census that had a sensitive designation in that?

A. So age, race and relationship to householder not in my understanding designated as sensitive items.

Q. Did that stewardship policy also have a category of very sensitive topics?

A. It did.

Q. Were any of the topics on the 2020 census included in that category?

A. I don’t recall, but it seems like that was not the case.

Q. Okay. I'd like to talk about some of the research that you're summarizing here, if that's okay.

A. Um-hmm.

Q. Looking at page 13, the first bullet point. I

think this is the CSM survey you referred to earlier, is that right?

A. It's not a survey, but it's a memo from the CSM researchers in which they had found spontaneously within the field and in focus groups these fears among immigrant respondents.

Q. Got it. And in what context was this -- were these fears reported?

A. My recollection, although I'm happy to review to clarify if needed, was that it was a variety of different contexts. And that is part of what makes it somewhat striking is that these were, again, even in like focus groups in which the point wasn't to ask about confidentiality concerns, the point was to do, say language testing. And yet these issues were being raised. And from my standpoint that makes it all the more reason that that is a striking piece of qualitative evidence.

Q. Got it. And was this memo about Hispanic citizens in particular?

A. I don’t know if there was any reference to Hispanic citizens in the memo. I don't remember that.

Q. But it says -- the quote you have here is a new phenomena the field -- oh, sorry, in the field, and reported that respondents fears particularly among immigrant respondents have increased markedly this year.

Is that right?

A. Correct. I don't know if there was any distinction between Hispanics who are citizens, Hispanics generally or just --

Q. Got it --

A. -- immigrants.

Q. Okay. Got it. The next bullet point, a research presentation. Says that in a research presentation at the American Association of Public Opinion Research census researchers Mikelyn Meyers and Patricia Gorman explained that respondents were spontaneously expressing concerns about confidentiality during multi-lingual pre-testing projects conducted in 2017. Respondents referenced legal residency status, immigration and certain current events like changes to the DACA program. Do you know if this presentation differentiated Hispanic citizens from non-citizens?

A. I don't know that.

Q. And this -- they were talking about fears that were raised during multi-lingual pre-testing projects, right?

A. Correct.

Q. And so this was not some sort of research on the census specifically?

MR. FREEDMAN: Object to form.

THE DEPONENT: On the census, yes. But not on the citizenship question.

MR. EHRLICH: I'm not sure I follow that. Sorry.

MR. FREEDMAN: Question was about the census --

THE DEPONENT: Right. So these are Census Bureau researchers referencing research about the census, but it wasn't research was explicit to the addition of a citizenship question.

BY MR. EHRLICH:

Q. Got it. Got it. And was this a -- would you define this as a quantitative analysis or a qualitative analysis?

A. Qualitative.

Q. And I don't think I asked this for the first one, but the Center for Survey Management memorandum qualitative or quantitative?

A. Qualitative.

Q. Okay.

A. And, in fact, I'm not sure that I would call the first one an explicit research design. It was an observation of researchers. So in some ways it's far broader than a single research question.

Q. And neither of those were gauging reactions to a citizenship question in particular, right?

A. Correct.

Q. The third bullet here, in a study of qualitative interviews to do language testing, census researchers have said immigrants they interviewed spontaneously raised topics like the travel ban and dissolution of the deferred action for childhood arrivals, program that has protected from deportation young immigrants brought to the country as children without legal status. What study of qualitative interviews are you referencing there?

A. I'm guessing it's probably the same, the same one.

Q. From the prior bullet?

A. Yeah, yeah.

Q. Okay. The next bullet going on to 14. This is talking about a presentation to the National Advisory Committee by Mikelyn Meyers. Is that right?

A. Um-hmm.

Q. And there she discussed unprecedented ground swell and confidentiality in data sharing concerns particularly among immigrants or those who live with immigrants may present a barrier to participation in the 2020 census. And this was also referring to immigrants, right?

A. Correct.

Q. Did it differentiate between citizens and non-citizens?

A. I don't recall that it did.

Q. Okay. And the presentation weren't talking about reactions to a citizenship question in particular, right?

A. Correct.

Q. And this is another, you would say qualitative way of trying to determine?

A. Yes. I think it's -- I suspect referencing some of the same research, qualitative research.

Q. In the next paragraph you're talking about the 2011 CBAMS. And CBAMS is the Census Barriers Attitudes and Motivators Survey, is that right?

A. I believe that's correct.

Q. Okay. So we know what each other is talking about for that. Says a cluster analysis identified -- I'm sorry. In the second sentence. A cluster analysis identified five distinct attitudinal segments or mindsets within the population, including 14 percent labeled suspicious, which is described as a segment, which has the lowest self-reported intent to respond to the census, and are mostly likely to believe that the census can harm them. And then the next sentence goes on talking about Hispanics making up a disproportionate share of this mindset, right?

A. Um-hmm.

Q. Did this differentiate between Hispanic citizens and Hispanic non-citizens?

A. No. CBAMS did not ask for the citizenship status.

Q. Got it. And this CBAMS is in testing for the census, but it's not -- can you describe CBAMS, please?

A. To the best of my knowledge, yes. CBAMS is intended to measure the attitudes and motivators and help to inform the challenges that the Census Bureau has in increasing self-response. And this particular analysis, I have no idea if they've done a similar type of analysis of the survey data. I've seen the survey questionnaire is all for the 2020. But I think the earlier CBAMS is telling in that this concern about confidentiality seems disproportionately to affect Hispanics.

Q. Yeah. And we didn't -- I think you mentioned this, but that CBAMS did not talk about citizenship status, right?

A. Correct. And it's actually quite striking to me that the CBAMS does not include a citizenship question, and they ask about foreign born status but not citizenship, and it's -- I wonder why.

Q. And this was the 2011 CBAMS, right?

A. Um-hmm.

Q. Okay. And moving down the page, it says these findings are also apparent in public opinion polling data. Can you describe what public opinion polling data is?

A. Sure. I'm just referencing here survey data that has been conducted outside of the Census Bureau for the purposes of generalizing about some population of interest about attitudes and behaviors.

Q. So how would a public opinion poll be conducted? Would it be by phone?

MR. FREEDMAN: Object to form.

THE DEPONENT: There's a variety of different ways to do that. You can do telephone. You can do mail. You can do Internet.

BY MR. EHRLICH:

Q. Okay. So going to the first one, for example, UCLA Luskin Institution Survey of Los Angeles County in 2017 found that 56 percent of Latinos report being worried about the deportation of themselves or a friend or a family member compared to only 19 percent for whites. Is that right?

A. Correct.

Q. This seems to reference Latinos. Is that basically a synonym for Hispanics?

A. Correct.

Q. Okay. And did this study differentiate between Hispanic citizens and Hispanic non-citizens?

A. I'm trying to recall if the study did or not. It might have. I don’t remember.

Q. Okay.

A. I'm embarrassed I didn't include the citation here specifically to the study. But the full report is available.

Q. Um-hmm.

A. Online Googling.

Q. And this study was not specifically talking about the census, right, confidentiality of the census?

A. Correct.

Q. Okay. Or the confidentiality of asking a citizenship question on the census, for example?

A. Correct.

Q. Okay. The next one, next bullet down, in national poll of Hispanics following the 2016 election, Pew Research Center found that 47 percent of all Hispanics have a lot or some worry that they, a family member or a close friend would be deported. It says the numbers were even higher for foreign born Hispanics or foreign born U.S. citizens and 66 percent for non-citizens. Is that right?

A. Correct. That would be 66 percent of non-citizen Hispanics.

Q. Got it. That's higher than the 47 percent for all Hispanics, right?

A. Correct.

Q. And higher than the foreign born U.S. citizen

Hispanics?

A. Correct.

Q. Okay. And this was, again, general fears of deportation, right?

A. Right.

Q. And this was not related to the census?

A. Correct. These are all indicators of the broader macro environment, which is -- I outlined in the beginning part of the calculation for somebody's decision to participate in a survey or not.

Q. Okay. Got it. And just to cut to the chase the remaining one cited in the section in the bullet points on 15, for example, are also your analysis of broader themes in the macro environment?

A. No. I mean, these are all indications. So these are indicating this macro environment, but they're also indicating that Hispanics including Hispanics citizens have these confidentiality -- are more likely to consider the citizenship question to be sensitive. And that's evident both in this public opinion data, but also in these estimates of civic behavior such as use of food stamps and healthcare and so on. Where economic analyses have found that the impact applies not only to those who would directly be deported, but also even to Hispanic citizens.

Q. And when you say the impact, you're talking about

the impact of confidentiality concerns, right?

A. Yes. The operationalization in these particular cases are -- there's different treatments that have been evaluated, but they are all kind of tapping into confidentiality concerns.

Q. Okay. Did any of them relate specifically to the context of the decennial census?

A. No.

Q. Did any of them relation specifically to a citizenship question?

MR. FREEDMAN: Object to form.

THE DEPONENT: No. Well, I mean, I -- people have made the argument that the first case actually is pretty explicitly parallel about citizenship question because it's the case in Alabama where the requirement was for citizenship status to be reported. And upon that policy decision there was this impact of Hispanic students not showing up for class. And so some have made the parallels that that is in fact about a citizenship question, but clearly not within the context of the Census Bureau.

BY MR. EHRLICH:

Q. Got it. Were they -- did the Alabama Department of Education estimate whether it was Hispanic citizens that did not show up for class?

A. That was not specified.

Q. Okay. Can we turn to page 17? So this is your explanation of why the Census Bureau's differential self-response rate analysis is conservative, right?

A. Correct.

Q. And these were the analyses we looked at before, which were Exhibit 3, the January 19th memo, and Exhibit 4, the Brown technical paper?

A. Correct.

Q. Okay. The second paragraph starts, first the analysis was based on a dataset that individually linked ACS responses with administrative records, but each of these files are more likely to be missing non-citizens and Hispanic households exacerbating potential coverage bias in the resulting estimates. Can you explain what coverage bias is?

A. Sure. So we know that administrative records don't cover 100 percent of the population. As the Brown white paper acknowledges, non-citizens are more likely to be missing from that sample of administrative records. We also know that the ACS also doesn't cover 100 percent of the population or it does with weighting, but those weighting -- those particular weights make some assumptions that again you have non-citizens who are more likely to be excluded. So when you put those two things together, and

you only find that pool of people who are in each of those two samples, you are missing non-citizens at a higher rate, and within certain methodology we reference kind of the extent to which that's adequately covering the population of interest. That's coverage error. And all of what the Bureau had put out suggests that there is coverage bias. That is, is that we're disproportionately missing non-citizens in that resulting match sample.

Q. The match sample you're referring to was that administrative record matching?

A. It's the analysis that the Brown et al., white paper was based on.

Q. So but didn't the Brown analysis compare all citizen households based on administrative data versus all other households such that if there was no administrative record linkage that would be included in the second group?

A. Maybe that's possible in some of the analyses, but that's not my understanding of all of the analyses. That my understanding of the analyses is that they used it for some of their -- for the bulk of their analyses that they were relying on that match. But perhaps there's something I missed. Like I said, I got that white paper in detail quite late in my report writing.

Q. And so if that was the way they did do it in terms of putting one group of only citizens that was both

by ACS data and administrative data, and the second group all other citizens, would that change your opinion about the coverage bias?

MR. FREEDMAN: Object to form.

THE DEPONENT: No. Because still what you're dealing with is you're defining on the basis of a set of data that are incomplete.

BY MR. EHRLICH:

Q. And the set of data that are incomplete, are they ACS responses?

A. No, both. Each of them are incomplete.

Q. So if a household doesn't have administrative record data, they would be put in the second group though, right?

MR. FREEDMAN: Object to form.

THE DEPONENT: So the only way that you -- I mean, the way that they have defined citizen and non-citizen households, my understanding was it was the combination of the administrative records where the administrative records were as they acknowledged more likely to miss non-citizens. And they are looking at estimates. They're looking at ACS again as they acknowledge the ACS is also missing -- more likely to miss non-citizens.

BY MR. EHRLICH:

Q. And so if your understanding of their grouping was incorrect would that change your opinion of the coverage bias then?

MR. FREEDMAN: Object to form.

THE DEPONENT: I guess I would need to have more clarity on where I've misinterpreted something.

BY MR. EHRLICH:

Q. Okay. Why don't we just turn to Exhibit 4 for a second. I think page 33. Can you just look at pages 33 to 34 for a second? And I'll do the same.

(Pause.)

Q. I'm sorry. The second part of 34 is, I think, the relevant part.

(Pause.)

Q. Does this describe the process they used?

MR. FREEDMAN: Object to form.

THE DEPONENT: I mean, I'm happy to have you point out where I may have misinterpreted their method in some way. And that is entirely possible. But, I guess, I don't see what would point me to that.

BY MR. EHRLICH:

Q. So looking at Table 7, for example, the top is an analysis, and it compares AR, all citizen household response rates versus households with at least one AR non-citizen, right?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: So if your interpretation is that the match dataset is used for one of -- the AR and ACS that the all other households is on the basis of just the ACS and just the census, that doesn't fully address the concern --

BY MR. EHRLICH:

Q. Got it.

A. -- about coverage bias.

Q. Okay. Can you explain that?

A. And that's because the ACS is also missing non-citizens at a higher rate as Brown, et al., acknowledge in their discussion of the weights.

Q. Okay. Got it. Page 17, looking at Footnote 72 --

MR. FREEDMAN: Same objection.

THE DEPONENT: Just so the record's clear, going back to the report?

MR. EHRLICH: Oh, I apologize. Yes.

BY MR. EHRLICH:

Q. Exhibit 5, your expert report. Says other modeling decisions are also likely to bias the downward estimate. And then you list a few things. The first one is the assumption that foreign born individuals with missing citizenship data in administrative records are all

U.S. citizens.

A. That's in some of the analyses, not all of them.

Q. Got it. Is it fair to say if you look at Exhibit 4, that that's in, you know, page 36 for example that would be the case in the top panel but not the bottom panel?

A. I think that's correct.

Q. Okay. Fair enough.

A. I believe that's a distinction between the 5.8 and the 5.1, if I'm not mistaken.

Q. Okay. And it says, sorry. Going back to Exhibit 5, in Footnote 72. The inclusion of the English language ability in the Blinder-Oaxaca decomposition. Can you explain why that bias is downward --

A. Yeah. So what the attempt here to do is to try, and with observational data make for a clean estimate of the causal effect of the citizenship question. Any time you're trying to estimate a causal effect, you want to not account for post-treatment variables. And you have -- in observational data, it's very difficult to know what are potential confounders and how variables that you include in the model might impact the estimated results. I would say that I was surprised by the inclusion of the English language ability. In some ways when we're thinking about the non-citizen versus the citizen comparison, you know, we don't necessarily, you know, we think that a mechanism

there by which the addition of the citizenship question is going to have an effect I expect is the confidentiality concerns. And so it seemed like the inclusion of the English language ability might be over correcting for the estimate. Now it's entirely possible that these are the best variables to include in the model. My biggest complaint was that there was no explanation of why we saw the model justification, you know, why there was no justification of the particular model specification that we saw. I think others might pick apart the particular modeling assumption, and say that we should have then said -- used some type of non-parametric matching to do the estimation instead. All I wanted, the point I was trying to make was that there are a variety of different assumptions that were built into these estimates, and I was pointing out some of the assumptions that might have led to a smaller estimate than we might otherwise have gotten.

Q. Okay. I think I understand that. The point of the Blinder Oaxaca decomposition that we discussed is to try and rule out factors that could be contributing to the thing that you're trying to study. Is that right?

A. Um-hmm.

Q. And so your position is that excluding that from the factors that you're trying to control for would give you a better estimate of the effect of the citizenship

question?

A. My fundamental position is that we need to have a theoretical reason that some variables are accounted for in the model. I haven't been presented with that justification for why some things were accounted for and some things weren't. And so my basic point is just to say that you're going to get different results depending on what is included in your model. And this is entirely, you know, potentially a entirely reasonable model specification. And the reality is, is that different researchers will, you know, have different views about what is the correct model specification. I would have just liked to have seen the model without this particular variable accountable.

Q. Got it. So I'm just trying to gauge what effect excluding the English language ability from the Blinder-Oaxaca decomposition would have.

A. I want to be careful not to answer that in a way that steps beyond what I'm able to say because I don't have access to the data.

Q. Yeah.

A. All I have access to is their results. And so that's where, you know, I want to just be clear about what I can and can't say.

Q. Yeah. Okay.

A. And, you know, one possibility is that this particular variable in particular would have an impact. Might not. I don't -- without being able to run the data myself, I can't say.

Q. Sorry. When you say this particular impact you're talking about English language ability on -- may have an impact on --

A. The estimates that we get as to the causal effect. And I say that with some quotes around causal effect.

Q. Yeah.

A. Because it is still observational data that is not in our CT. And as Brown, the researcher said, like, this is imperfect. It is entirely imperfect. We would prefer to have an RCT. Modeling decisions had to be made. Those modeling decisions have consequences for the estimates that we get as a result.

Q. Got it. So if you -- strike that. So is it your opinion that households containing only citizens that speak a foreign language at home would be negatively affected by the citizenship question?

MR. FREEDMAN: Object to form.

THE DEPONENT: No. My expectation is that households who view the citizenship question sensitive and are concerned about confidentiality associated with that

citizenship question will be less likely to respond. We don't directly have a measure of that in the population. And so what we do is we look for potential proxies in subgroups that we think might disproportionately be -- consider the citizenship question to be sensitive. Non-citizens would be one subgroup. Hispanics would be another subgroup. But we would also expect heterogeneity within those groups as well. And that's what my concern about this particular control is, is that it might be downward biasing because if you're wanting to recognize that there's going to be variation across the non-citizen population in terms of the likely effect.

Q. Okay. I don't want to belabor this point, but I do want to understand the point. So the Blinder-Oaxaca decomposition, the factors that you're analyzing there are the ones that you're ruling out, correct?

A. So, I guess, the thing that I would say again is that there's a particular model that was estimated that ended up with the results. That model isn't the perfect model, and we don't know how the results would exactly change with a different model, and I would have liked to have seen the results without English language ability in there.

Q. Okay. Later on in the footnote it goes on to page 18.

MR. FREEDMAN: Same objection.

THE DEPONENT: Again you're back to Exhibit 5?

MR. EHRLICH: Yeah, sorry, Exhibit 5, Footnote 72.

BY MR. EHRLICH:

Q. Going over on to page 18. So the failure to account for attrition bias in the SIPP analysis, can you explain what that means?

A. Yeah. There was some analysis presented at some time, and I don't even remember exactly what it is at this point, where SIPP was used. SIPP is another census survey that includes citizenship. And there as, if I'm recalling correctly, an analysis that looked at multiple waves. And SIPP has attrition. That attrition is not random. And so, you know, you have to account for that in your modeling.

Q. Okay. And then the last part of that footnote says another thing that downward biased the estimate was the use of all citizen households rather than white citizen households. Can you explain that?

A. Sure. So, you know, I think a case could be made that because when -- if we're particularly interested in at the end of the day the differential undercount, that is the undercount of Hispanics relative to whites, that it would have been a relevant benchmark to compare to white households, not to just citizen households or not just to

all households in some of the analysis. So it -- there's always the question of what's the counterfactual. And, you know, that's what ultimately the question is.

Q. Yeah. Understood. I guess I'm a little bit confused because the analysis was attempting to using a natural experiment rather than RCT to determine what the decline in self-response would be due to the citizenship question, correct?

A. Yes.

Q. And so using whites as one group rather than all citizens would add non-citizen whites to the control group, right?

A. No. So what the issue is, is if we think that the impact of the citizenship question could affect citizens, say Hispanics citizens, then what you actually do is you have some treated people in your control group at that point. So, you know, one possibility to say is that the counterfactual of interest is actually a group that we think absolutely is not going to be impacted by the addition of a citizenship question, and that would be white citizen households. So, you know, we might think that non-citizen Asians could be impacted. We might think -- right -- there are other subgroups where we -- given that kind of the causal mechanism that is suggested by the survey methodology research is this sensitivity of the

survey -- citizenship question. Then remember that all of the analyses that we're doing are imperfectly, you know, looking at the impact of increased sensitivity of the citizenship question. And so that counterfactual includes some individuals who are presumably treated. I think a case can be made either way, but the point is, is that because it's also the case that there's probably some non-citizens who will not be impacted. Right? I have a lot of colleagues who are non-citizens that they probably are not terribly fearful about the addition of a citizenship question. But the point is just that the choice of the counterfactual is meaningful here, and an argument can be made for a different counterfactual.

Q. But the counterfactual of all citizens isn't necessarily unreasonable?

A. No. I'm saying that an argument can be made for a different counterfactual that would have probably resulted in a larger estimate. So it's a reasonable -- it's fine, it's fine. But I think a case could be made for that it's a conservative estimate because there are people within that control group, right, that are -- that have been treated, if that makes sense.

Q. Such as non-white citizens?

A. Correct.

Q. Okay. Turning to the next page 18, last

paragraph. You're talking about the change in survey climate in terms of -- sorry, strike that. You're talking about the -- in the last paragraph on 18, you're talking about a change in survey climate, right?

A. Um-hmm.

Q. Can you describe that?

A. Sure. As I talk about in the beginning of the report that the kind of scientific framework of survey participation takes into account the individual characteristics of the respondent, the characteristics of the survey, and the broader environment. And those three things kind of interact together. And the broader environment matters here because it's likely to make salient the concerns about the citizenship question and, yeah.

Q. Okay. So turning to the next page on 19. Just going to your concluding paragraph at the bottom. You say there is ample empirical support as well as well-grounded science of survey methodology, which all consistently points to the same conclusion. The addition of a citizenship question is highly likely to reduce rates and data quality among non-citizens and Hispanic households. Right?

A. Yes.

Q. What's the empirical support you're specifically

referencing with that sentence?

A. There's several different pieces. There is both the internal Census Bureau analyses, the Brown memo. There's the break-off data. There's the item non-response data. There's the aggregate relationship that's reference in this report. There's empirical data that is from previous censuses that's been published in survey methodology literature. There's empirical data that has been published in other white papers within the Census Bureau. And then there is all of the citations that I gave. Just generally a -- survey methodology that sometimes is not specific to the census.

Q. Okay. So here you're talking about empirical support for what exact proposition?

A. For that entire conclusion.

Q. Okay. But the empirical support you're referencing was possibly outside the context of the census and outside the context of a citizenship question?

MR. FREEDMAN: Object.

THE DEPONENT: Some yes, some no.

BY MR. EHRLICH:

Q. Okay. And the next part of the sentence, well grounded signs of survey methodology. What did you mean by that?

A. Meaning that there is large scientific

literature, for instance, about the impact of response burden on data quality and non-response. And that we can make predictions on the basis of that research about the likely impact in the context of the census, combined with the explicit census analyses that that offers a pretty compelling body of evidence about the impact on self-response --

Q. Got it.

A. -- data quality.

Q. And so going on to page 20, the end of the sentence, you say that addition of a citizenship question is highly likely to reduce response rates and data quality among non-citizens and Hispanic households. What do you mean by highly likely there?

A. Meaning that every piece of evidence, qualitative, quantitative, about the census, about other surveys, all points in the same direction of expecting there to be a lower response rate.

Q. Is there a quantifiable way to say that?

A. I agree with you that I would love to have a precise point estimate, and think that the Census Bureau should have done more to get a precise point estimate. But that doesn't eliminate the fact that there is a large body of other evidence from the census, from external to the census that point all to the same direction of a negative

impact.

Q. And that's due to a lot of the studies we discussed in terms of confidentiality concerns and things like that?

A. Yes.

Q. And when you say highly likely, you mean even more than just likely? You're expressing some certainty there, is that right?

A. Yes. It means that in my professional opinion that I am confident that the evidence points towards a negative impact on response rates and data quality.

Q. Okay.

A. As Census Bureau research also suggests.

Q. Okay. So turning to 21 we're in the section discussing pre-testing of the census question here, right?

A. Um-hmm.

Q. And in the first full paragraph, second sentence, you say research has shown for instance that respondents are more likely to give socially desirable answers in interviewer-administered surveys compared to self-administered questionnaires. What do you mean by socially desirable answers?

A. Sure. In the context specific to what we're talking about, socially desirable means wanting to give a response that the society, right, thinks is the right

response. And so here the people might say that they're citizens. So imagine a neighbor who is having to report on the citizenship status of, you know, the apartment next to them, that the social desirable response there might be to say they're citizens even if they might not know. In survey methodology literature, socially desirable is just a category of sensitive questions where we recognize that it is difficult to get people to respond to a sensitive question.

Q. Got it. And in that situation that you were just discussing where family next door would want to say that their neighbors are all citizens, that would result in inaccurate citizenship data for that enumerated next door neighbor, right?

A. Correct.

Q. Okay.

A. Yeah. And so sensitive question -- as I talk about before, sensitive questions can lead to, you know, problems with unit non-response, item non-response and inaccuracy. And, you know, when we're talking about social desirability, that's all wrapped up in these kind of sensitive questions. And so people might give an inaccurate response because of the socially desirable response.

Q. And before, I think you said sensitive questions

are one aspect of burden, right?

A. Right.

Q. Along with various other aspects. Is the macro climate part of the burden? Is that associated with that too?

A. I would consider that a separate.

Q. Separate.

A. So perceived burden of a survey is, you know, related to the design of the survey. It's also because there's going to be some groups who consider citizenship to be sensitive and some that aren't. It's also related to the characteristics of the individual. The external environment can prime or make salient some aspects of like the confidentiality concerns. In 2000, it was privacy concerns that were made salient.

Q. Okay. Page 22, near the bottom of the page going into 23. You're talking about the 2018 -- a 2018 press release. Talking about the end-to-end census test.

A. Um-hmm.

Q. And you say the -- well, the press release says the 2018 census test will help the Census Bureau validate its readiness for the 2020 census operations, procedures, systems and field infrastructure for a once in a decade census. Right?

A. Um-hmm.

Q. That description of the end-to-end test doesn't talk about testing new content, right?

A. It does not.

Q. Was the -- was one of the purposes of the 2010 end-to-end test to test new content?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: The citizenship question was not on the end-to-end test.

BY MR. EHRLICH:

Q. Right. But what is the purpose of the end-to-end test?

A. It is --

MR. FREEDMAN: Same objection.

THE DEPONENT: It's a field test. It's supposed to be everything. It's supposed to be exactly what's going to happen, right, when it comes to the decennial census. That was not what happened in 2018, right? Because this citizenship question was added so late the end-to-end test cannot be considered helpful field test. They also didn't do the communications campaign associated with 2018. they also didn't do the testing in West Virginia where the, you know, there was the worst self-coverage. Anyway, but the point is that the end-to-end test is intended to be the dry run for the real thing.

BY MR. EHRLICH:

Q. Did the end-to-end test, test the operations of the census?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: I would conclude that it was incomplete. It was incomplete in part because the limited geographic nature, cutting the West Virginia side. But also incomplete because the content is different. And you would very much learn about how operations -- some of the operations, right, might be related to the inclusion of a citizenship question. Now, I think generally, you know, the -- our systems in place and procedures and, you know, those, did the phones work as intended and things like that, that those things all happened.

BY MR. EHRLICH:

Q. So from an operational perspective you would say that 2018 end-to-end test was a success?

MR. FREEDMAN: Object to form.

THE DEPONENT: I'm not able to -- I mean I have, I have not seen any reports about calling it a success or not beyond Dr. Abowd's characterization.

BY MR. EHRLICH:

Q. Got it. If a citizenship question were on the 2018 end-to-end test what extra data would that have given you?

MR. FREEDMAN: Object to form.

THE DEPONENT: So actually there's several things that I think would be valuable to know. You would have seen for that particular test what it looked like in terms of the increased NRFU workload. You would be able to see how enumerators were able to handle NRFU in light of having the citizenship question. Had there been a full-on engagement with trusted voices for instance, there could have been some on the ground understanding of how people were reacting to the citizenship question. That certainly would have informed 2020. So --

BY MR. EHRLICH:

Q. Would it -- if you're looking for the effect of a citizenship question would an RCT be better than that or not as good as that?

A. That's a little bit of interesting question. I would want to see an RCT. On the other hand, I would want an RCT and a field test would be ideal. I mean, you know, the standard census process is that the end-to-end test is, you know, a dry run of everything. And so the ideal would be to do the RCT type of testing in the run-up so that your end-to-end test is in fact end-to-end.

Q. Given the timing of adding the citizenship question, is it your opinion that it was reasonable to undertake that process that you're talking about before the end-to-end test?

MR. FREEDMAN: Object to form.

THE DEPONENT: I think the decision to add the citizenship question at such a late date precluded probably doing the testing within the end-to-end. However, it did not precluded doing adequate pre-testing.

BY MR. EHRLICH:

Q. And that pre-testing you're talking about is what exactly?

A. Like an RCT.

Q. Okay. And that could still occur, right?

A. That is a question for the Census Bureau.

Q. Well, let me ask this. If that did occur, would that assuage your concerns?

MR. FREEDMAN: Object to form.

THE DEPONENT: I do think that -- I'm not fundamentally opposed to asking sensitive questions on census surveys. So to be clear, the concern here is about the process, number one, the lack of pre-testing, and what the likely impact is going to be. I think had the Census Bureau done a thorough job of evaluating the impact of adding the citizenship question on the objectivity, integrity and utility of the census that a reasonable decision could be made to ultimately include it. But it's my opinion that they have not adequately evaluated the impact of adding the citizenship question on those

dimensions of data quality.

MR. FREEDMAN: Counsel, we've been going about an hour and 15 minutes. Whenever you get to a convenient point, take a break.

MR. EHRLICH: Okay.

BY MR. EHRLICH:

Q. And so if we -- if the Census Bureau had or does conduct an RCT, and has a better handle on the effect of a citizenship question, it's your opinion that the addition of a citizenship question could be better handled in the census and, therefore, less of an issue for the concerns you raise in your report? Is that right?

MR. FREEDMAN: Object to form.

THE DEPONENT: So if I, if I'm interpreting your question correctly, I do think that there is a process that could be followed that would allow the decision makers to be able to determine if the citizenship question could be added without impacting the objectivity, utility and integrity of the data, and if it was determined that it could be added without having significant impacts on those -- data quality, then that would be a reasonable decision.

BY MR. EHRLICH:

Q. Could that testing still be done today?

MR. FREEDMAN: Object to form.

THE DEPONENT: I think that's a question for the

Census Bureau.

BY MR. EHRLICH:

Q. Let me ask the question this way. Given infinite time from this point forward, is there testing that could be done that would assuage your concerns about a citizenship question on the 2020 census?

MR. FREEDMAN: Object to form.

THE DEPONENT: But there's not infinite time before 2020 is the problem.

BY MR. EHRLICH:

Q. Fair enough. Fair enough.

A. So if I'm interpreting you correctly, would it be possible to separate from 2020 but to add a citizenship question to a census, and to do so in a way that I wouldn't have concerns, the answer is yes. If all of the conditions, you know, all of the processes were in place that allowed us to evaluate impacts on data quality. Now, when I look at the reality of the timeframe between now and 2020, I look at the reality of the macro environment. I think that there is nothing that suggest to me that it would be possible to add a citizenship question on 2020 and not have a negative impact of self-response of non-citizens and Hispanics absent some type of really massive policy change in this country.

Q. Okay. So even if we did an RCT tomorrow, do you

think -- and understood the results, and understood the effects of a citizenship question there's no way that the citizenship question could be added to the 2020 census without -- let me start again. If we did an RCT tomorrow, and understood the full results and impacts of a citizenship question, is it your view that even understanding those results we could not put a citizenship question on the 2020 census?

MR. FREEDMAN: Object to form.

THE DEPONENT: Is your hypothetical that with this RCT we find that there's no effect or a positive effect on response rate?

BY MR. EHRLICH:

Q. So you would want to know the results of the RCT is what you're saying?

A. Yeah. I mean, so in your -- so I think with the hypothetical the reason to do the RCT is to understand the impact of adding a citizenship question on data quality. And so the outcome of that RCT matters in terms of decision making. I mean, if the outcome didn't matter, then I would be concerned about evidence based policy making.

Q. Yeah. And when you say -- when you're talking about data quality, what exactly do you mean?

A. The objectivity, integrity and utility of the data.

Q. Okay. The data being the responses you get from -- the information you get from the 2020 census?

A. The census --

MR. FREEDMAN: Object to form.

THE DEPONENT: I'm sorry.

MR. FREEDMAN: Go ahead.

THE DEPONENT: The census count. By objectivity, I mean the accuracy and -- again going back to as we talked about earlier in the day that it's both about getting an overall accurate count, but also getting accurate counts of subgroups so that there's not differential inaccuracies that have implications for resources and representation. Integrity refers to the, you know, the confidentiality of the data. And the utility means the usefulness. And in this case, that's, you know, evaluated with respect to what has been requested of the Census Bureau. But as I made the case in my report, is also in question. Would this be a good time for a bathroom break?

MR. EHRLICH: Yeah. Let's take a break.

(Off the record at 2:36 p.m.)

(On the record at 2:50 p.m.)

BY MR. EHRLICH:

Q. We were just talking about testing of the citizenship question. We're on page 23 of your report, which is Exhibit 5. And we're talking about -- just to

close the loop on this. We were talking about the advantage of an RCT. And you were saying that even with an RCT you felt that it would not be advisable to add the citizenship question in 2020, is that right?

A. No. I said I would want to see the results of the RCT before making a judgment about --

Q. Got it. Given the macro environment, do you think it's possible that the RCT would show that there would be no effect of a citizenship question on 2020?

A. That is hard to imagine.

Q. Okay. Do you think the macro environment is going to cause difficulties for 2020 in non-citizens for example even absent a citizenship question?

MR. FREEDMAN: Object to form.

THE DEPONENT: Yes. And I think the addition of a citizenship question exacerbates that.

BY MR. EHRLICH:

Q. Okay. Due to the burden and confidentiality concerns that we talked about earlier?

A. Yes.

Q. Okay. On page 23 you say there -- the middle of the page, you say there are two well-known examples of recent content evaluations, which highlight the role of testing. One is the evaluation of a combined race and ethnicity question, which was not adopted, and revisions to

the decennial relationship question to capture same sex relationships, which was adopted. Right?

A. Yes.

Q. And both underwent multi-year testing evaluation in cooperation with experts and stakeholders. Is that right?

A. Yes.

Q. Both of those had to do with changing the format and wording of two particular questions, right?

A. Yes.

Q. At the bottom of the page, it says even before addition of a citizenship question the Government Accountability Office -- if I say GAO you would know what that means?

A. Um-hmm.

Q. Had designated the 2020 census as high risk, and had emphasized the importance of testing evaluation to mitigate risk to census accuracy and cost. Do you know why the GAO classified the 2020 census as high risk?

A. They had a full report that I believe they cite here. They gave a -- my recollection is, is that they gave a number of different issues. Some have been tests that were not conducted, budgetary constraints, you know, decisions still to be made. At the end of the day, if I'm correctly summarizing that document, there are a lot of

changes for 2020, and making those changes requires a lot of testing, and creates a lot of uncertainty. And my understanding is that the -- that GAO report was pointing to risks associated with a number of those changes.

Q. Would you say information technology shortcomings is one concern?

A. Yeah. I mean, so of those -- of the major changes that were meant to try and keep accuracy the same while holding cost study, the Internet self-completion of course is one of them. The use of administrative records is another. And both of those are ones that there have been bumps along the way and fits and starts and uncertainties about where things will end up.

Q. Is it fair to say that these are fairly common challenges for a decennial census?

MR. FREEDMAN: Object to form.

THE DEPONENT: I don't know how to answer that question. This is the first time that the Census Bureau will be conducting online. The first time to use administrative records in such an extensive fashion. And so I would not consider those kind of commonplace in that respect.

BY MR. EHRLICH:

Q. Fair enough. More broadly speaking, do you think technology issues, cost issues, elimination of tests, do

you think those are common things for the decennial census to face?

MR. FREEDMAN: Object to form.

THE DEPONENT: I probably shouldn't speak to common versus not common.

BY MR. EHRLICH:

Q. Okay.

A. In terms of those issues.

Q. Okay.

MR. FREEDMAN: What exhibit?

MR. EHRLICH: Six.

MR. FREEDMAN: Okay.

(DOJ Exhibit 6 marked for identification.)

BY MR. EHRLICH:

Q. So I've handed you what's been marked as Exhibit 6. This is a press release titled the GAO Adds the 2010 Census to the High Risk List. Have you seen this before?

A. Um.

Q. The third paragraph down starting with GAO added, can you read that?

MR. FREEDMAN: Object to form and foundation. Go ahead.

THE DEPONENT: GAO added the upcoming census to the high risk list due to a combination of longstanding

deficiencies and emerging challenges including shortcomings in the Census Bureau's management of information technology, weak performances by technology that the Bureau plans to use for data collection, uncertainty of cost estimates, and the elimination of several dress rehearsal activities.

BY MR. EHRLICH:

Q. So looking at this, is it fair to say that the 2010 census was also classified as high risk?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: Yes, it was also -- high risk. And my recollection is, is, right, there was the last-minute device disaster with 2010. So, yeah, they also had issues.

BY MR. EHRLICH:

Q. They also had issues. Handed you Exhibit 7.

(DOJ Exhibit 7 marked for identification.)

MR. FREEDMAN: Do you have copies for --

MR. EHRLICH: Oh, sorry about that. Yeah.

BY MR. EHRLICH:

Q. This is -- I've handed you what's been marked Exhibit 7, GAO High Risk Series an Update is the title, dated January 1999. Publicly available. Have you seen this document before?

A. I have not, no.

Q. Can you turn to page 143? Paragraph at the bottom, very bottom of the page on 143. The last sentence says as we reported in our earlier work -- excuse me. Let me back up. It says in that regard our work has shown that the Bureau faces a number of formidable challenges to cost effective, accurate and complete census no matter which design is chosen. As we reported in our earlier work, they include the following: Mail response rates remain problematic. Scanning equipment used to electronically record responses from census questionnaires experience system crashes due to software flaws, and local partnerships, et cetera, et cetera, et cetera. Further down the page it says, these major challenges and uncertainties have led us to conclude that there is a high risk that the 20 -- 2000 census will be less accurately and more costly than previous censuses. Did I read that right?

MR. FREEDMAN: Object to form and foundation.

THE DEPONENT: Yes.

BY MR. EHRLICH:

Q. So the 2000 census was also classified as high risk, is that right?

MR. FREEDMAN: Object to foundation.

THE DEPONENT: Yes.

BY MR. EHRLICH:

Q. And both the 2000 and 2010 censuses, the GAO

raised similar concerns to 2020 regarding technology and cost shortcomings and things like that?

MR. FREEDMAN: Object to form.

THE DEPONENT: I mean, I don't want to say that they're exactly similar. Did they raise issues about the fragile nature of the census in these censuses? Absolutely. And it's one of the reasons that we -- I think the Census Bureau as such important standards and guidelines about making changes to the census, and the process by which that testing happens.

BY MR. EHRLICH:

Q. But the concerns that the GAO raised for 2020 broadly speaking are not uncommon as it relates to decennial censuses?

MR. FREEDMAN: Object to form.

THE DEPONENT: Correct. And those concerns raised were ones raised prior to the addition of the citizenship question.

BY MR. EHRLICH:

Q. Right. So going back to Exhibit 5, which is your report, if we go to page 27, the top of 27, the first full sentence says pre-testing should have been used to determine if the placement and prominence of a citizenship question on the decennial census questionnaire influences the way in which the respondent interprets and evaluates

the survey, right? What did you mean by that?

A. So survey methodologists, internal and external to the Census Bureau recognize that what matters is not just the wording of a question, but also where it is within the survey. So the question order. And then the context as well. And all of those things are different with a citizenship question on the short form compared to a citizenship question on the ACS. And so the question is, is how does that impact how people interpret the survey? Do they, for instance, think that the rationale for adding the citizenship question is different in the census compared to the ACS? If so, then their likelihood of responding or breaking off or lying could be different in those two different surveys.

Q. And so here you're talking about the placement and prominence of a citizenship question on the census, right?

A. Um-hmm.

Q. And --

A. And I mean I would say context generally. So the absence of having the nativity question before is another way in which the context is different.

Q. Got it. In terms of placement and prominence though the citizenship question is, as currently planned, is going to be last on the form, right?

MR. FREEDMAN: Object to form.

THE DEPONENT: So what I have seen in Secretary Ross's statement is a directive to put it at the end of the form. How that actually happens we talked about before, is entirely unclear given that that is a household member level question, and so what that means for it to be on the end of the form is a little bit unclear.

BY MR. EHRLICH:

Q. Got it. Isn't there -- is there a less prominent place for a citizenship question to be on the 2020 decennial census questionnaire?

MR. FREEDMAN: Object to form.

THE DEPONENT: My point about prominence was about the fact that it was one of, I guess, 11 questions, as opposed to one of 75. So just the prominence is about how much that question sticks out relative to can somebody dress or bathe themselves, for instance. In the short form it really stands out.

BY MR. EHRLICH:

Q. So in the second full paragraph -- oh, excuse me. Yeah, the second full paragraph, the last sentence says in the ACS and on the 1950 census the placement of a citizenship question after a place of birth question might signal the government's interest in patterns of migration, which might not trigger the same sensitivities as a

freestanding question about citizenship status. Right?

A. Um-hmm.

Q. Do you have -- strike that. What's the basis for this opinion?

A. That's simply my basis as a survey methodologist as how somebody might interpret. I don't know if that is backed up by anything. It's simply to say that it is a plausible interpretation that would to me signal the need to actually do some testing.

Q. Um-hmm. Have there been studies done in terms of the ACS and people viewing the place of birth and citizenship question as related to patterns of migration?

MR. FREEDMAN: Object to form.

THE DEPONENT: I have no, I have no idea if that's true.

BY MR. EHRLICH:

Q. You haven't reviewed any --

A. No.

Q. -- like that?

A. No.

Q. How often do census respondents understand the rationale for every question on the census questionnaire?

MR. FREEDMAN: Object to form.

THE DEPONENT: Not enough. And it's related to whether or not they are likely to respond. Certainly

there's been recognition by the Census Bureau and testing by the Census Bureau of the need to provide a rational for individual questions. And so it's one of the things that we've seen over the last decade in terms of explaining with the ACS why individual questions are asked. Going back to the research I did in 2000, and the privacy concerns that were associated with individual questions, people are like, why are you asking me if I have, you know, plumbing in the house, right? And part of the thinking was is that if we can explain to people why we need to ask this question, then it makes them more likely to respond. And so my point here is, yes, it's entirely speculation as to how people might be interpreting why this question is asked. My point is to say is that how they interpret the question matters in terms of if and how they respond, and how they interpret the question is related to, according to survey methodology research not only the wording of the question, but also the placement of the question, and the context in which it's asked.

BY MR. EHRLICH:

Q. Got it. So your sentence here about how the placement of a citizenship question after a branched question on place of birth might signal the government's interest in patterns of migration is just your speculation in terms of highlighting the larger importance of context

and people understanding the rationale for questions?

A. No. It's my -- based on my background as a survey methodologist, recognizing what it is that we need to further scrutinize, and this would be one of those things.

Q. Do you know if the citizenship question on the ACS was preceded by a question on place of birth in order to evaluate patterns of migration?

MR. FREEDMAN: Object to form.

THE DEPONENT: I can't speak specifically to the rationale for that.

BY MR. EHRLICH:

Q. Okay.

A. Good question though.

Q. If we could go to 29. I'm sorry, 30. This is talking about, the top of the page is talking about consultation with experts and advisors, and it's talking about two advisory committees. Can you describe that process?

A. So I make a couple different points here. One is that in the 2010 decennial there was a Census Advisory Committee that was set up to make recommendations specifically about the decennial. There was a Federal Register seeking nominations, but then I never heard anything else about it, and heard that it was -- advice was

going to be heard instead through the two Advisory Committees, the National Advisory Committee and then the Census Scientific Advisory Committee.

Q. How often does the -- if I say NAC, you'll understand that's National Advisory Committee?

A. Um-hmm.

Q. How often does that Committee meet?

A. I can't speak to NAC, but CSAC would meet twice a year.

Q. Twice a year.

A. Um-hmm. And then working groups would do work in between meetings.

Q. Got it. So when was the last CSAC meeting?

A. I don’t know if there's been one this -- there hasn't been one. So, I guess, the last one was in the spring.

Q. In March 2018?

A. That sounds right.

Q. And so when would the CSAC meeting before that have been?

A. In the fall.

Q. The fall of 2017?

A. Um-hmm.

Q. So there would not have been a CSAC meeting between when the Department of Justice asked for a

citizenship question and Secretary Ross decided to add the citizenship question, is that right?

MR. FREEDMAN: Object to form.

THE DEPONENT: So CSAC, I was a member of CSAC until -- ended at the March meeting. But we submitted a letter to Secretary Ross when it was announced that he was considering it not officially as CSAC but members of CSAC. And then right before the March meeting, we heard about the decision.

BY MR. EHRLICH:

Q. So the March meeting was after the decision was made?

A. Um-hmm.

Q. But in that intervening time between the request from DOJ and the decision to add it, there was no CSAC meeting?

MR. FREEDMAN: Object to form.

THE DEPONENT: No.

BY MR. EHRLICH:

Q. Okay. Do you know if that's true for NAC as well?

MR. FREEDMAN: Same objection.

THE DEPONENT: I don't know, but I would say that we oftentimes receive -- when I was on CSAC, we would receive updates in between meetings. So the timing of a

meeting doesn't necessarily correspond to engagement of the committee.

BY MR. EHRLICH:

Q. And what does an update entail?

A. It varies. Sometimes it is a sharing of information. Sometimes it would be a presentation where we all call in. Sometimes it was a working group meeting virtually. So certainly there was activity going on in between meetings.

Q. Got it. You mentioned that you were on CSAC, correct?

A. Correct.

Q. And CSAC, did CSAC talk about the citizenship question after the decision was made in the March meeting?

A. I did.

Q. And is it fair to say that CSAC had concerns about the citizenship question?

A. That is fair to say, yes.

Q. Okay. And if CSAC had been consulted while the citizenship question was under active consideration by the Secretary, what would CSAC's advice have been?

MR. FREEDMAN: Object to form.

THE DEPONENT: I think we were pretty explicit about our advice and our recommendations, and I think I quoted them in my report. But one of the main things we

said was the importance of testing. We also raised concerns about the impact on data quality, specifically on response rates, and the overall impact on the opinions of the Census Bureau. That included, you know, just the political -- this just makes the Census Bureau's job so much more difficult.

BY MR. EHRLICH:

Q. Got it. Do you know if the Census Bureau itself supported the addition of a citizenship question?

MR. FREEDMAN: Object to form.

THE DEPONENT: So I -- based on the things that I've read, the explicit recommendation was that it was going to be harmful to the count.

BY MR. EHRLICH:

Q. Harmful to data quality?

A. Yeah.

Q. And CSAC would have been of that same opinion, right?

MR. FREEDMAN: Object to form.

THE DEPONENT: I don't want to say that those are parallel decisions. They're, you know, my understanding of the official Census Bureau position comes from analyses of administrative records, and analyses of these series of different options. Those were not discussed by CSAC. The CSAC concerns were explicitly focused on not the set of

alternatives, but what was the likely impact going to be based on our expert opinions, and what was the information that we would like to see the Census Bureau pull together in responding.

BY MR. EHRLICH:

Q. Okay. But CSAC did not support the addition of a citizenship question is that right?

MR. FREEDMAN: Object to form.

THE DEPONENT: CSAC made an official recommendation stating opposition to the addition of a citizenship question.

BY MR. EHRLICH:

Q. Okay. And the --

A. Because of concerns of -- a number of concerns about the likely impact, the process and so on.

Q. Did CSAC feel that those concerns were echoed by the Census Bureau in its memos to the Secretary?

MR. FREEDMAN: Object to form.

THE DEPONENT: We never had that explicit discussion. At the CSAC meeting concerns were raised. The Census Bureau response was exactly what, you know, it should have been, which is to say we are going to try and do the very best job we can do as we're told, you know, depending on what we're told to do. It was very clear that particularly given the freshness of the decision that there

was a lot of uncertainty. Uncertain, like, inability to be able to say what the consequences of this would be in response to questions that CSAC raised.

BY MR. EHRLICH:

Q. So as of the March meeting neither CSAC nor the Census Bureau supported the addition of the citizenship question at that point?

MR. FREEDMAN: Object to form.

THE DEPONENT: I don't know. I mean, certainly at that point I didn't know the -- I had not seen Abowd's memo. I don't know the date of when those two things corresponded, but I don't think I had seen Abowd's memo. So I at that point I didn't know the official Census Bureau position, if that's what we're -- Abowd's position.

BY MR. EHRLICH:

Q. Yeah. So given your knowledge today --

A. Yeah.

Q. -- the Census Bureau did not advocate for the addition of the citizenship question on the 2020 census, right?

A. The Census Bureau recommended against adding a citizenship question.

Q. And CSAC --

A. Also recommended against adding the citizenship question.

Q. Okay. Can we turn to 34? At the bottom -- the bottom paragraph on this page, the middle sentence. Empirical research finds that respondents are less likely to answer sensitive questions in an interview-administered survey compared to a self-administered survey, right?

A. Um-hmm.

Q. This is -- and what's your basis for that opinion?

A. Just previous research, and again the point of this paragraph of which this is one piece, is to say that the addition of a citizenship question in the NRFU operation where you have an interviewer creates an additional layer of complication to be studied. And certainly we recognize in the survey methodology research that different modes of survey completion matter in terms of sensitive questions in particular.

Q. So here we're just talking about answering sensitive questions.

A. Generally.

Q. Generally.

A. Not citizenship questions specifically.

Q. And do this in the terminology we discussed earlier, this would be concerns about item non-response?

A. Not necessarily. I mean, you could also have break-offs. And if you have a breaking off early enough

then it becomes essentially unit non-response. So, yeah. I mean, typically with the sensitive -- with a sensitive question oftentimes people don't encounter it until they have already agreed to participate in the survey. And, you know, this is one of the things that's kind of different about something as big as the census is that people know about a question before they actually encounter it on the actual survey.

Q. But if an enumerator visited someone's house during NRFU, and they interviewed with the enumerator but broke off at the citizenship question, they would have already supplied the household information before that, right?

A. With that, yeah, particular example, yeah.

Q. Yeah. And if an enumerator comes to the door, and the person skips the citizenship question in the enumerator interview, all the information about the household would still have been collected at that point, right?

A. If they just give it, yeah.

Q. Okay. So this is along the same lines, but going on the top of 35. You know what -- scratch that. Further down on 35, you're talking about the background of enumerators hired for the non-response follow-up process, right? And the last sentence of that paragraph, can you

read that?

A. Moreover, the staffing challenges noted by a recent GAO report --

Q. I'm sorry. The -- I'm sorry. The first full paragraph on 35, the sentence that begins for example.

A. Oh. For example, the Census Bureau has announced it will hire only U.S. citizens as enumerators for the 2020 census, a decision that could deprive the Bureau of a pool of potential enumerators likely to have the very language skills and cultural backgrounds critical to reaching the very populations -- well, deterred from census participation because of the sensitive question.

Q. And what's your basis for that opinion?

A. That non-citizens might be able to better reach non-citizens. Is that a part of the question or about the decision that they will only hire U.S. citizens?

Q. The former is what I was going for.

A. Okay.

Q. So --

A. So we know that interviewer characteristics matter in terms of people's willingness to respond, and willingness to respond to the questionnaire. Let me give just an extreme example. So suppose an enumerator shows up in a high density Hispanic household with a Make America Great Again hat on, that they would likely be less willing

to open the door, and less willing to respond, and respond accurately. Interviewer -- I mean, obviously that's not going to happen, but interviewer characteristics matter. And so it's one of the reasons that there has been an attempt to match neighborhood enumerators in the neighborhoods that need to be counted. When you have, you know, areas that have a high density of non-citizens we have removed from the potential pool of potentially effective enumerators if we're limiting ourselves to citizens.

Q. And so here you're highlighting language skills and cultural backgrounds that would be helpful when you're in a particular community, right?

A. Yeah.

Q. And so is it possible that U.S. citizens would have the same language and cultural skills in order to enumerate those same communities?

MR. FREEDMAN: Object to form.

THE DEPONENT: I think that's a reasonable question. The question is, is will there be sufficient numbers of citizen enumerators who are also viewed as, you know, like me in those neighborhoods. You've taken out a potential pool of enumerators by with this restriction.

BY MR. EHRLICH:

Q. But you have no quantitative evidence that there

won't be enough people with language and cultural backgrounds to enumerate?

MR. FREEDMAN: Object to form.

THE DEPONENT: I do not.

BY MR. EHRLICH:

Q. Okay. Could we go to 41? So your concluding paragraph at the end you say based on a review of the quantitative and qualitative research and evidence the preponderance of the evidence suggests that it's highly likely that the addition of a citizenship question will exacerbate the disproportionate undercount of non-citizen households and Hispanics. Is that right?

A. Um-hmm.

Q. What level of certainty do you have in that conclusion?

A. As I say, I think that every piece of evidence that I have seen all points in the same direction. All points to a negative impact. So, you know, have a high degree of certainty about the direction of that effect.

Q. Um-hmm. When you're saying a preponderance of evidence here, what do you mean by that?

A. Just meaning that study after study after study -- every piece that I looked at. Like I never encountered any piece of evidence that was counter to their being a negative impact. There was nothing that suggests,

oh, maybe we'll get some people that will be more likely to respond. Maybe they'll be -- there was nothing that pointed to any other direction over the fact.

Q. Any you say -- when you say highly likely, do you -- did you attempt to quantify how likely this would be?

A. No.

Q. Would it be able -- would you be able to do that?

A. The Census Bureau could.

Q. How would the Census Bureau do that?

A. They might do a coverage analysis after an end-to-end test in which there was a citizenship question that had been adequately tested over the course of many years.

Q. But absent that, there's no quantitative way to figure out the answer to this question?

MR. FREEDMAN: Object to form.

THE DEPONENT: I think the question is if you're looking for the likely effect and the direction of that effect versus a point estimate about the size of that effect, and that's where I feel very confident in concluding that all of the evidence -- there is considerable evidence that suggests a negative impact. I understand the desire to try and get the size of that negative effect, and that's a far more difficult empirical challenge, and it's one that absent additional testing and

research by the Census Bureau that we just aren't going to have any confidence.

BY MR. EHRLICH:

Q. Got it. So your -- in your professional opinion there's going to be some negative effect of the citizenship question, but you don't know how much?

A. Correct.

MR. EHRLICH: Okay. Handed you Exhibit 8.

(DOJ Exhibit 8 marked for identification.)

BY MR. EHRLICH:

Q. This is the expert rebuttal report of D. Sunshine Hillygus, Ph.D. Does this look familiar?

A. It does. I'm sure I'll identify some more typos.

Q. Page 2. At the bottom paragraph, middle of the paragraph, you say it is well established that proxy respondents provide less accurate data. Is that right?

A. Yes.

Q. And what's your support for that?

A. There I'm referencing the Mule coverage analysis. I think that might be the same one that is entered into evidence. But I also reference there Restacki (ph.) and O'Hara. And pretty much any time we see any analysis of proxy respondents by, you know, every measure we see lower quality data.

Q. So this is -- sorry. If we look at Footnote 8,

it looks like you're citing Dr. Abowd's January 19th memo, is that right?

A. Oh, yeah, sorry. Looking at the wrong one. But in the next sentence is an example of how proxy respondents provide lower quality data, and that was the Mule citation.

Q. Got it. And that's what that says, the 2010 census coverage measurement analysis found the correct enumeration was 27.1 percent lower for proxy responses compared to self-responses, right?

A. Um-hmm.

Q. And we looked at how those calculations were done earlier today in terms of what correct enumerations are, right?

A. Yes.

Q. Okay. Can we turn back to Exhibit 3 again, please? And this is again Dr. Abowd's January 19th memo, is that right?

A. Um-hmm.

Q. Turning to page 1282, the first full paragraph. Can you read the first sentence?

A. Sure. One reason that the erroneous enumeration in the whole person imputation rates are so much greater during NRFU is that the data are much more likely to be collected from a proxy rather than a household member. And when they do come from a household member, that person has

less accurate information than self-responders.

Q. Right. And then the further down in the paragraph he writes, the information for 21 percent of persons whose data were collected during NRFU is based on proxy responses. For these 16 million persons the correct enumeration rate is only 70.1 percent. Among proxy respondents erroneous enumerations are 6.7 percent, and whole person census imputations are 23.1 percent. Is that right?

A. Um-hmm.

Q. So when Dr. Abowd is talking about accuracy here, he's measuring it in terms of enumerations, erroneous enumerations, whole person imputations, right?

MR. FREEDMAN: Object to form.

THE DEPONENT: Correct. That is my understanding.

BY MR. EHRLICH:

Q. If we go back to your rebuttal report, which is Exhibit 8. Actually, I'm sorry. Can we turn to the Mule report.

MR. FREEDMAN: That's Exhibit 1.

MR. EHRLICH: Exhibit 1. Thank you.

BY MR. EHRLICH:

Q. Actually you know what, I apologize. Let's go back to your report. Rebuttal Report Exhibit 8, please,

page 4. So the bottom paragraph of this you're referencing the Census Bureau analysis that we've looked at today in terms of the drop in self-response rate for non-citizens, right?

A. Yes.

Q. The end of that paragraph into the next page says in addition the translation of the estimate into a predicted increase in NRFU workload rests on the assumption that average household size for non-citizens is the same as the general population. Can you describe the basis for that opinion? Or strike that. Can you describe why household size matters in terms of increased NRFU workload and cost?

A. Sure. Actually, the household size is actually really critical, I think, throughout because if you assume that the non-citizen and Hispanic households are less likely to self-respond, and you're making a projection about your NRFU households on the basis of general household size, then you're underestimating the number of people who are going to ultimately be put into -- and counted through NRFU. Household size matters again when it comes to proxy responding, and why I expect that proxy respondings is more likely to lead to under estimates of Hispanic and non-citizen households. And so --

Q. So is it your understanding of the NRFU process

that when an enumerator is attempting to follow-up on a household that has not self-responded they would attempt to contact every person in that house?

A. No, no, no. It's more just in terms of, yeah. So I mean it's certainly the households don't -- number of households don't change, but when you trace out the implication from self-response to NRFU to ultimately undercount that's where that ultimately matter.

Q. But looking at the sentence in terms of NRFU workload and costs, is it fair to say that household size does not matter for purposes of NRFU workload and cost?

A. I don't -- I mean, so as I reference on picking up on the Brown assumption about equivalents. And so if that's an assumption that's not necessary because it doesn't matter, then it doesn't matter. But that was what I was trying to do was trying to identify within the Brown estimates.

Q. So Brown is Exhibit 4, page 42, Bates stamp ending in 9874.

A. So maybe this reference here means that this assumption here doesn't necessarily apply to the NRFU. Only it applies to the implications of a NRFU for the next stage.

Q. Got it.

A. Yeah.

Q. But an increase in household size is not going to -- that factor alone will not increase NRFU costs and workload, right?

A. I should -- that's probably something I don't know the answer to exactly. But I think it's a fair point to say that NRFU workload is in terms of households, not individuals.

Q. Okay. And so --

A. I don't know if the assumptions that Abowd made about like field staff, if that comes in or not, but it is correct to -- I think it is correct to say that NRFU workload is a function of households, not individuals within the household.

Q. Got it. Can we go to page 6? In the bottom paragraph, the second sentence you're talking about testing again, and you write simply because Census Bureau standard A2-3 indicates that the pre-testing exception is allowed in some circumstances does not mean that conclusion is the appropriate decision here. So the Census Bureau standards do allow an exception for pre-testing of a question when it was included on another survey, right?

MR. FREEDMAN: Object to form.

THE DEPONENT: So what I can speak to is both my understanding of Census Bureau standards and survey methodology --

MR. EHRLICH: Sure.

THE DEPONENT: -- standards. And the standard practices in terms of pre-testing. Is there potential to waive an exception for pre-testing? It does appear that that is the case of the pre-testing of a question. One of the things that, as I explained in my report, is the importance of not just testing a question but a questionnaire, and that the extent to which the inclusion of a citizenship question on the ACS is fundamentally different from inclusion on the census short form, that's in terms of, you know, placement, prominence, the lead-in to the context. That all of those things are different, and different in a way that I would say makes it not previously extensively tested, similar to including on census long form. I mean census short form.

BY MR. EHRLICH:

Q. So in your opinion the question has been adequately tested, but has not been adequately tested in the context of the short form questionnaire for the 2020 census?

MR. FREEDMAN: Object to form.

THE DEPONENT: Yes. And I should say the ACS question has been tested. A question on the short form is different from the ACS question in several respects, and so has not been adequately tested.

BY MR. EHRLICH:

Q. But context of the question on the short form, correct?

A. Right. And in particular the connection to the where you were born.

Q. But the citizenship question on the 2020 census will be identical to the ACS, right?

MR. FREEDMAN: Object to form.

THE DEPONENT: I have made the case that it is not identical. It's not identical because you don't have first ask where you were born, and then the other parts of the questionnaire that are different.

BY MR. EHRLICH:

Q. So in terms of the questionnaire and how you get to the question, that's different, right?

A. Yeah.

Q. But the question itself asking about citizenship?

A. The response options and stuff, yes.

Q. That's all the same for the 2020 census?

A. Um-hmm, yeah.

Q. For both -- we've looked at your initial expert report, which is Exhibit --

MR. FREEDMAN: Five.

MR. EHRLICH: Five. Thank you.

BY MR. EHRLICH:

Q. And your rebuttal expert report, which is Exhibit 8, correct?

A. Um-hmm.

Q. Are there any other grounds supporting your opinions that you have not disclosed on the record?

A. No.

Q. Okay. Backing out of the reports. When did you first learn that a citizenship question was being considered for the 2020 census?

A. It was when I was a member of CSAC and a little bit of -- I'm not entirely sure of the timing, but I believe I was probably contacted by Barbara Anderson about it being considered.

Q. Who is Barbara Anderson?

A. She was Chair of CSAC. And there was a question if members of CSAC not representing CSAC, but as members of CSAC if we wanted to write an opinion, we sent a letter to Secretary Ross.

Q. And about when was that?

A. Whenever. I don't know.

Q. Okay.

A. Like whenever he said he was considering it we sent in a letter, and I really thought there was just no chance that it would actually happen. And then got a letter from him, and then heard the announcement shortly

thereafter right before the March CSAC.

Q. And from him you mean Secretary Ross?

A. Yes.

Q. So I think you sort of suggested the answer to this next question, but what was your initial reaction upon learning that the citizenship question was being considered for the 2020 census?

A. Upon that initial -- that wasn't that big of a surprise. To consider the addition of a citizenship question is not out of the realm of possibility. To consider doing some extensive testing to see if it would be feasible to add, I also wasn't terribly surprised by. What I was surprised by was by the decision to actually add it in this round as opposed to putting it in a queue for testing and evaluation.

Q. Did you have an opinion around the time you sent the letter to Secretary Ross whether adding the citizenship question would be a good idea or a bad idea?

A. We recommended at a pretty high level against doing it. But --

Q. And why was that?

A. On expectation that it could have a negative impact based on just our, you know, collective expert opinion about the questionnaire.

Q. But you had not done any testing at that point to

determine the impact, right?

A. Well, I mean, no testing. I didn't do any original data analysis from my report. And I would say that in terms of a good chunk of the survey methodology literature that I brought to bear here was stuff that I carry around in my head, right? So, you know, I can't remove my opinion on the basis of my background in survey methodology then from -- I mean, certainly my opinion here has been better researched and have been able to bring to bear more empirical evidence. But I wouldn't say it was an uninformed opinion then.

Q. At the time you formed that opinion, you had not seen, for example, Dr. Abowd's analysis of drop-off in self-response rates, right?

A. No. My opinion at that point was based on my knowledge of the survey methodology literature, my experiences as a member of CSAC, as a researcher, NCRN, having at that point written, you know, had already written a book on census participation. So, you know, I hadn't seen any new specific analyses regarding the addition of a citizenship question that we'd seen, but a lot of the same things that I brought to bear and document I discuss in my report.

Q. And when you're talking about the knowledge that you brought to bear, you're talking about the studies

concerning, for example, non-citizen concerns with confidentiality and things of that nature?

A. No. More I was thinking about just my knowledge of the survey response decision, and the likely impact of sensitive questions generally. That that is where a lot of the scientific literature has focused. Yes, I'm a public opinion scholar. So I'm certainly, you know, vaguely aware of what public opinion is right now in various domains. But I, at that point, I wasn't aware specifically of say, you know, what specific numbers were regarding Hispanics fear of deportation for instance.

Q. So just to clarify. So your initial reaction when around the time when CSAC sent the letter to the Secretary that adding the citizenship question to the 2020 census would be a bad idea, it was based on just your general knowledge in the field, is that right?

A. In multiple fields, yeah. So with respect to census cooperation specifically with survey methodology as well. And familiarity with, you know, the census -- the challenge -- I mean, the 20 -- there was certainly recognition that the 2020 census was already fragile, had a lot of challenges on its, you know, without adding one more piece to make it more complicated. And so that background knowledge was what led into that collective letter.

Q. Okay.

A. And I don't actually remember the content of that letter. I think it was pretty short and sweet to say we just want to get down on the record that this seems like a bad decision. And, again, we were really surprised. I should speak for myself. I was really surprised.

Q. At the time you sent that letter, did you know that there was not going to be testing done?

A. No. But I also was familiar with the lengthy process of testing that we go through with the ACS for instance. And it was hard to imagine how you squeeze that much thoroughness into a short timeframe.

Q. So beyond -- strike that. And at this point you didn't know if a citizenship question was added to the census what form that question would take, correct?

A. I did not know, no.

Q. Okay.

A. I probably would have assumed that it would have been a, are you a citizen? Yes, no. As opposed to one that had distinctions between Guam and, you know, foreign born or U.S. citizens abroad, parents, and so on.

Q. Would a yes, no citizenship question have been better?

MR. FREEDMAN: Object to form.

THE DEPONENT: I think that's a good question that we could have answered with the RCT that was designed.

MR. EHRLICH: I'm handing you what's been marked as Exhibit 9.

(DOJ Exhibit 9 marked for identification.)

BY MR. EHRLICH:

Q. And it's a presentation called Discussion Comments, 2020 Update by D. Sunshine Hillygus, Duke University, publicly available. Do you recognize this document?

A. I do.

Q. Did you write this presentation?

A. I did.

Q. And can you explain what this presentation is for?

A. Sure. The CSAC Chair asked CSAC members to discuss various presentations over the course of the CSAC meeting, and she had asked me to do the discuss and comments. I can't remember the exact timing of her request and the announcement of, but again as you can see in here, I focused quite a bit of attention on the announcement of the citizenship question.

Q. And so what was the purpose for giving the presentation?

A. To provide feedback to the Census Bureau, to ask questions of the Census Bureau, to be able to get -- I mean, our role is to be able to offer advice, also serve as

kind of liaison census and the user community.

Q. So you talked about how you first formed your opinion around the time that CSAC sent the letter to the Secretary, right?

A. Yeah.

Q. And so this presentation to CSAC could have been two months later or so?

A. Yeah, yeah.

Q. Had you done any additional research between the first point in time and the second point in time?

A. I mean, only probably the 45 minutes or two hours or whatever put into to articulating my responses.

Q. Got it. So turning to the second page.

A. Um-hmm.

Q. Which I think is the first slide. The slide just says WTH, right?

A. Right.

Q. What does that stand for?

A. I was censoring myself.

Q. Please uncensor yourself for the purposes here.

A. Well, I would have said WTF, but I thought there could be people watching. So what the hell. So, like I said, I was really surprised, and that about the decision to add a citizenship question. I don't know the internal dynamics of how much the Census Bureau is kind of forced to

do what the Commerce Secretary says even if it violates their standards and guidelines and procedures. And so I had just assumed that because an addition of the citizenship question just so clearly seemed like a danger to the quality of the census that 2020 would be protected. And I had also hoped that Secretary Ross was committed to an accurate and fair census. And so, again, I was just really surprised by the decision.

MR. FREEDMAN: Counsel, we've been going about an hour and 15 minutes again, and there's a court order that I want a chance to look at. So if we could go off, I appreciate.

MR. EHRLICH: Yeah, sure.

(Off the record at 4:05 p.m.)

(On the record at 4:19 p.m.)

BY MR. EHRLICH:

Q. So we were talking about your presentation at CSAC at the end of March 2018. And you were describing your opinion at the time of the Secretary's decision. Do you recall saying during the presentation that it was an absolutely awful decision?

A. That sounds right.

Q. Okay. Is that for substantially the reasons that you've already talked about?

A. Well, and, I mean, I think at the time I laid out

exactly the specific things that were coming to mind at that point. I think there have probably been a few things that have changed since I have done more research.

Q. What has changed since the time of this presentation in terms of the research you've done?

A. I've been able to look at the research that was more explicitly about citizenship question specifically. Like I said, the things that I was able to bring to bear on more were informed based on my background knowledge about surveys generally in the census, and in previous cycles. And so, you know, at this point having seen the Brown analysis and break-offs and so on it just gives, again, I guess a way to put it is to say every piece of evidence is still pointing to a negative effect. Some of the research that has been done since I had already expected a negative effect confirms the likelihood of a negative effect, and that was all things that were new.

Q. Do you recall saying during the presentation that the controversy caused by the addition of a citizenship question could possibly increase response rates?

A. So I may have talked about the phenomenon that sometimes what you see is essentially what's called a backlash effect. And so you can see a backlash effect in some phenomena, you know, like there's been speculation that you put in place an electoral rule that makes it

harder for a particular group to participate and they're feeling more mobilized as a result. And so I suspected like in context of talking about this that I may have been emphasizing the importance of all this what's going to happen.

Q. Do you recall in the presentation saying anything along the lines of you would like to resign and rail against the decision?

A. I don't remember that explicitly. It was my last CSAC meeting. So there was no need to resign. But certainly rail against the decision. Yes, I think that I did that.

Q. Fair enough. When were you first contacted by counsel about testifying in this case?

A. I don't -- I can't remember exactly when it was. It was definitely after, after this. I just got a little bit of attention. I didn't, I really didn't realize -- I always say that with my 2000 census book, that, you know, like three people read it, my mom included. Nobody ever seems to care about census stuff. So I was surprised by how much attention this got. I -- it was sometime in late spring, I think.

Q. So about April?

A. Could be, yeah.

Q. Okay. And how soon after that were you retained?

A. I think in May.

Q. Okay. And what analysis were you asked to do?

A. So, you know, initially we had a lot of conversations about, you know, overall assessing the impact of a citizenship question. And then my foot in this is in many different spots, both as a survey methodologist, as somebody who has been on CSAC's. I've been -- talked about processes. And so from the very beginning there was a little bit of like, you know, we want to ask you questions, and get your feedback, and ultimately they decided to retain me even though I think at the time we weren't exactly clear how I would be used.

Q. Got it. So about when was it decided that you would actually provide expert testimony?

A. I guess probably in May or so. I didn't really get started just because of other commitments. I'm working on a book. And so I had a book manuscript. And so the plan was is, you know, in July once I had the draft of that manuscript done, I could commit to focusing on my expert report.

Q. And what did you do to prepare the -- both reports?

A. Reviewed a lot of documents, and looked at essentially everything that I could get my hands on about census participation, about citizenship questions,

sensitive questions. And so I was reviewing both my personal collection of survey methodology books, the literature, academic journals out there. I mean, one of the things that has been so, so helpful is the fact that the Census Bureau is so much more transparent now. And so, you know, when counsel asked about what I referenced, I said, just can I put the Census Bureau website? Because so much of the material is on the Census Bureau website.

Q. In preparing your reports, did you do all the work yourself?

A. I did.

Q. And so about how much time have you spent reading materials in order to prepare your reports?

A. Just on reading materials, I'm not entirely sure of the numbers. But, I mean, I've worked over 100 hours on reviewing material and writing and revising and so on.

Q. How much time have you spent discussing this case with others?

A. It's a little hard to say because, I mean, from the get-to I've been talking about it. And I have now tried to, you know, not talk to journalists and stuff as much. But, yeah, certainly I've talked to others.

Q. In preparing your report, did you talk to any other experts that were retained by Plaintiffs?

A. So I have talked -- like some of the other

experts are ones that I've encountered at conferences and interact with. I saw Chris Warsha (ph.) at American Political Science Association Conference. And we both said, I have no time these days. I mean, that was the extent of that conversation. So, you know, I have had some interactions.

Q. You sure it wasn't a Stanford alumni event?

A. No.

Q. Have you talked to other experts retained in this case about your report?

A. Not about my report, no.

Q. Have you reviewed other experts' reports in this case?

A. I reviewed one of the reports.

Q. Which one?

A. Salvo (ph.).

Q. Okay. Did you talk with Mr. Salvo?

A. No.

Q. Okay.

MR. FREEDMAN: And, obviously, you reviewed Dr. Abowd's report as well.

THE DEPONENT: Oh, of course, yeah.

MR. FREEDMAN: That goes without saying.

BY MR. EHRLICH:

Q. Does the report, both the initial report and the

rebuttal report represent your independent views?

A. Yes.

Q. How much time did you spend preparing for this deposition?

A. A few hours. So met with them yesterday. Met once before for a couple hours, and spent some time reading and rereading materials last night.

MR. EHRLICH: Got it. Handing you Exhibit 10.

(DOJ Exhibit 10 marked for identification.)

BY MR. EHRLICH:

Q. Do you recognize this document?

A. I do.

Q. And what is it?

A. My CV.

Q. Can you describe your education?

A. Sure. I have a BA in political science and Spanish from the University of Arkansas, a Master's in political science from the University of Arkansas, a Master's in political science from Stanford, and a PhD from Stanford.

Q. And during the time pursuing these degrees, did you receive any training in statistics?

A. Yes.

Q. And what type of training was that?

A. Statistical training both within political

science and the Statistics Department.

Q. For which degree?

A. For my MA and PhD at Stanford. Some at Master's at Arkansas, but pretty minor.

Q. Um-hmm.

A. I also teach, taught statistics at Duke.

Q. Did you have any training in demography?

A. No.

Q. Any training in psychology?

A. Political psychology, yes.

Q. Can you describe what political psychology is?

A. Applied to political decision making. So, you know, how it is people make up their mind about political decisions. And I would say civic decisions as well. I mean, so my current book, and then the book about census participation draws on that psychology of decision making.

Q. And did you receive any training in survey methodology?

A. Um-hmm.

Q. Have you -- what classes have you taught in statistics?

A. So I teach, I currently teach a survey methodology introduction to statistics, a research design class, a survey practicum. I think those are the main ones I teach.

Q. And just to back up. So after you received your PhD, you taught at Harvard, is that right?

A. Correct.

Q. And that was in the Political Science Department?

A. Well, it's the Department of Government, but yes.

Q. Okay. And in 2010 you transitioned to Duke?

A. 2009.

Q. 2009. And at Duke you joined the Political Science Department, right?

A. Correct.

Q. And you're still in the Political Science Department?

A. Yes. I have a courtesy appointment in public policy.

Q. What is a courtesy appointment?

A. Basically they make me do work, and list me on their website, but don't pay me.

Q. Fair enough. What responsibilities do you have as a professor at Duke currently?

A. So in addition to teaching, I'm teaching a class on public opinion. This semester I'll teach my graduate level survey methodology class. In the spring I advise students. I sit on dissertation committees in political science and statistics and other fields. I direct the initiative on survey methodology, which is part of the

Social Science Research Institute. And the DISM as we're called, we provide research and training support for researchers at all levels at the university in survey methods.

Q. Have you ever worked in the Census Bureau?

A. Not paid, just a member of CSAC. So I think it's a special some type of appointment.

Q. And CSAC is an advisory committee to the Census Bureau?

A. Correct.

Q. How long were you on CSAC?

A. The full length. I think that's six years.

Q. And why did that end this year?

A. Just timing. Bob Robes (ph.) is the one who invited me to join initially, and I just rotated out. So didn't have to, you know, resign and rail.

Q. Fair enough. And as part of CSAC, what were your responsibilities?

A. It depended on the particular meeting, whether I would provide feedback on particular areas of the census. I was also part of working group that I actually worked with Tom Beuley (ph.), I was mispronouncing his name the whole time, on the use of administrative records and adaptive design. And anyway over six years -- and learned so much about the census. I'm also -- or was a senior

investigator on one of the research nodes. Duke has had one of those, and so was my other involvement in census.

Q. Got it. So I'm not going to go through each one individually, but as I count it, you have about two books, 34 journal articles and 21 other publications? Does that sound about right?

A. Sounds right.

Q. Okay. How many of those related to the conduct of the decennial census?

A. Only the book.

Q. And that's --

A. Well, except, I mean, the survey methodology stuff is certainly related. A lot of the work that I have done has been on non 19:26:07 missing data, and fundamentally a lot of the stuff that we are talking about is about the fact that it's not random who is going to respond and who is not. And so although it's not directly within application of the census, it's the fundamental issues ultimately.

Q. You would agree that the census is sort of its own beast though, right?

MR. FREEDMAN: Object to form.

THE DEPONENT: Yes. I would agree that the census is its own beast.

BY MR. EHRLICH:

Q. And so, for example, in your other political surveys, for example, there's no non-response follow-up, is that right?

MR. FREEDMAN: Object to form.

THE DEPONENT: True. Well, actually not exactly true. The American National Election Study, for instance, had a non-response follow-up. But, yes. I mean, certainly there are some surveys on which there are differences. Some of my methodological work though was -- particularly that with Jerry Ryer (ph.), who also does work with the Census Bureau, was very much motivated from the standpoint of thinking about census applications, even if we sometimes, you know, is purely methodological as opposed to using census data.

BY MR. EHRLICH:

Q. Got it. In the other areas that you studied, primarily political science, right?

A. Um-hmm.

Q. Strike that. Have you ever conducted your own survey?

A. Many, many times.

Q. And in what areas?

A. Many, many different areas.

Q. Okay. Just broad strokes?

A. Yeah. So in terms of because as a survey

methodologist both in terms of where I've worked, collaborated on projects, but also where I've been interested in the substantive question myself, I mean, I -- have a publication about how you measure sleep satisfaction. So like that has nothing to do with politics. Although I guess there are some potential links. But my involvement in projects is sometimes based purely as a survey methodologist, not because I'm a substantive expert in the project. My substantive expertise is looking at civic and political decision making. And so that's where the decision to participate in the census, the decision to vote or not, the decision to get involved in your community, those are the type of outcomes that I primarily -- and how people decide in a campaign. The other aspect of my research is focused on communication effects. So can the campaign, whether that's an information campaign from the census or campaign efforts from a particular candidate, can that have an influence on people's decision making?

Q. And of your extensive publication list have any of your publications been refuted?

A. Yeah. I had -- well, not refuted. I did an errata on one of them.

Q. Which one was that?

A. American Journal Political of Science article on

the impact of pre-registration on youth turnout. We just had a mistake in our model. Doesn't change the conclusions but --

Q. Have --

A. -- for transparency.

Q. Any of your publications have your views changed since you've public published those papers?

A. Oh, for sure, yeah.

Q. Can you give an example?

A. Not so much my views changed, but just the standards of what is considered convincing empirical political behavior research has changed since 2005. And so, yeah, I mean, so some of the conclusions that I reached, you know, it's kind of difference between correlation and causation. We know a lot more now about how to identify causal effects than we did 15 years ago.

Q. Would you consider your reports in this case of the same quality as the papers that you've published?

A. That's a difficult question actually because the report wasn't peer reviewed, and these are peer reviewed. And I think highly of the peer review process in terms of having people catch errors. And so in terms of do I stand behind the things that I wrote, yes, absolutely. But it's -- and most of my research is entirely different. Most of my research is where I'm doing the data collection and

doing the data analysis myself.

Q. And you didn't do that here?

A. There is no original data analysis in my expert report or rebuttal.

Q. Got it. Have you ever served as an expert before?

A. Just once.

Q. Can you describe the circumstances?

A. Yeah. So it was for the Voting Rights Act case in North Carolina, and I came on very late, and basically my expert report was co-authored with my co-author. It was looking at the impact of pre-registration on youth turnout.

Q. Was your expert testimony in that case limited or excluded at all?

A. No.

MR. EHRLICH: Can we go off the record?

(Off the record at 4:43 p.m.)

(On the record at 4:46 p.m.)

MR. EHRLICH: Dr. Hillygus, thank you for coming in today. That's all the questions we have for you at this time.

MR. FREEDMAN: We'll read and sign.

(Whereupon, signature not having been waived, the deposition was concluded at 4:46 p.m., on October 9, 2018.)

# C E R T I F I C A T E

I, TIMOTHY J. ATKINSON, JR., a Court Reporter and a Notary Public, do hereby certify that the foregoing deponent, DIONE SUNSHINE HILLYGUS, was duly sworn on the date indicated, and that the foregoing is a true and accurate transcription of my notes and electronic recording and is a true record of the testimony given by the foregoing witness.

I FURTHER CERTIFY that I am not employed by or related to any party to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

In witness whereof, I have hereunto set my hand this 9th day of October, 2018.

Timothy J. Atkinson, Jr.
Notary Public

My commission expires: May 14, 2021

INSTRUCTIONS TO THE DEPONENT

Please read your deposition over carefully and make any necessary corrections. You should state the reason in the appropriate space on the errata sheet for any corrections that are made.

After doing so, please sign the errata sheet and date it.

You are signing same subject to the changes you have noted on the errata sheet, which will be attached to your deposition.

It is imperative that you return the original errata sheet to the deposing attorney within thirty (30) days of receipt of the deposition transcript by you. If you fail to do so, the deposition transcript may be deemed to be accurate and may be used in court.

E R R A T A

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ACKNOWLEDGMENT OF DEPONENT

I, DIONE SUNSHINE HILLYGUS, do hereby certify that I have read the foregoing pages and that the same is a correct transcription of the answers given by me to the questions therein propounded, except for the corrections or changes in form or substance, if any, noted in the attached Errata Sheet.

_____ _____

DATE SIGNATURE

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF NEW YORK**

| | |
|---|---|
| STATE OF NEW YORK, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,<br><br>Defendants. | No. 1:18-cv-2921 (JMF) |

| | |
|---|---|
| NEW YORK IMMIGRATION COALITION, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,<br><br>Defendants. | No. 1:18-cv-5025 (JMF) |

**DEFENDANTS' INITIAL DISCLOSURES**

In accordance with the Court's order on the record on July 3, 2018, and entered on the docket on July 5, 2018, Defendants United States Department of Commerce, Bureau of the Census, Wilbur L. Ross, Jr., in his official capacity as Secretary of Commerce, and Ron S. Jarmin, in his official capacity as performing the non-exclusive functions and duties of the Director of the U.S. Census, disclose under Federal Rule of Civil Procedure 26(a)(1):

## I. Witnesses

Defendants maintain their position that this challenge to a final agency action is properly reviewed, if at all, on the basis of the administrative record produced by the agency. Accordingly, at this time there are no fact witnesses Defendants intend to use to support their claims or defenses, other than for impeachment. If this case proceeds to trial, Defendants reserve the right to call any individuals identified in Plaintiffs' initial disclosures or discovery responses or any individuals deposed by any party. Also, should the Court or the plaintiffs question the authenticity of the administrative record, Defendants reserve the right to call a witness to authenticate the administrative record.

## II. Documents

Defendants may use the following documents in their possession, custody, or control to support their claims or defenses, but not solely for impeachment:

- Complete administrative record upon which the Secretary of Commerce based his decision to reinstate a question concerning citizenship on the 2020 Decennial Census, filed on June 8, 2018, *see* ECF No. 173, *New York v. U.S. Dep't of Commerce*, No. 18-cv-2921 (JMF)
- Supplement to administrative record, filed on June 21, 2018, *see* ECF No. 189, *New York v. U.S. Dep't of Commerce*, No. 18-cv-2921 (JMF)

## III. Damages

Not applicable. Defendants are not claiming damages in these cases.

## IV. Insurance

There is no insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in these actions or to indemnify or reimburse for payments made to satisfy the judgment.

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