

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CITY OF SAN JOSE, a municipal corporation; and BLACK ALLIANCE FOR JUST IMMIGRATION, a California nonprofit corporation,

Plaintiffs,

vs.

WILBUR L. ROSS, JR., in his official capacity as Secretary of the U.S. Department of Commerce; U.S. DEPARTMENT OF COMMERCE; RON JARMIN, in his official capacity as Acting Director of the U.S. Census Bureau; U.S. CENSUS BUREAU,

Defendants.

3:18-cv-02279-RS

JOINT RULE 26(F) REPORT AND INITIAL CASE MANAGEMENT CONFERENCE STATEMENT

Dept: 3
 Judge: The Honorable
 Richard G. Seeborg
 Date: June 28, 2018
 Time: 2:30 p.m.

Trial Date: None Set
 Action Filed: April 17, 2018

Counsel for Plaintiffs City of San Jose (“San Jose” or “the City”) and the Black Alliance for Just Immigration (“BAJI”) (collectively “Plaintiffs”) and Defendants Wilbur Ross, U.S. Department of Commerce, Ron Jarmin, and U.S. Census Bureau (collectively, “Defendants,” and together with Plaintiffs, “the Parties”) have met and conferred as required by Federal Rule of Civil Procedure 26(f) and this Court’s Order Setting Initial Case Management Conference, dated May 23, 2018. Pursuant to Rule 26(f), Civil Local Rule 16-9, and the Standing Order for All Judges of the Northern District of California, the Parties hereby submit the following Joint Rule 26(f) Report and Initial Case Management Conference Statement:

1. Jurisdiction and Service: Plaintiffs contend that this Court has subject matter jurisdiction over Plaintiffs’ claims under 28 U.S.C. § 1331 (action arising under the laws of the United States), 28 U.S.C. § 1361 (action to compel officer or agency to perform duty owed to Plaintiff), and 5 U.S.C. §§ 701-706 (judicial review under the Administrative Procedure Act

1 (“APA”).

2 Defendants contend that this Court lacks subject-matter jurisdiction because Plaintiffs lack
 3 standing. Specifically, Defendants maintain that Plaintiffs’ claimed injuries of lost representation
 4 and funding, and diversion of organizational resources, based on their allegation that adding a
 5 citizenship question to the 2020 Census will reduce the response rates of San Jose’s residents, are
 6 too speculative and conclusory to confer Article III standing. And even if Plaintiffs could allege
 7 injuries that are concrete and non-speculative, those injuries would be not be fairly traceable to
 8 the governmental decision being challenged but would be attributable instead to the independent
 9 decisions of individuals who disregard their legal duty to respond to the census. As set forth in
 10 paragraph 4 below, Defendants will be filing a motion to dismiss that will argue, *inter alia*, that
 11 the case should be dismissed for lack of subject-matter jurisdiction for the foregoing reasons.

12 There are no issues regarding personal jurisdiction or venue; Defendants have been served
 13 and are subject to the personal jurisdiction of this Court.

14 **2. Facts:**

15 **Plaintiffs’ Statement of Facts**

16 The United States Constitution requires that all persons in each state be counted every ten
 17 years for the purpose of apportioning congressional representatives among the states. U.S. Const.
 18 art. I, § 2, cl. 3, and amend. XIV, § 2. Plaintiffs seek declaratory and injunctive relief against the
 19 Defendants for violating the Constitution and the Administrative Procedure Act (“APA”) by
 20 arbitrarily and capriciously adding new and untested questions to the 2020 Decennial Census that
 21 will require all United States residents to disclose whether they are citizens. Inclusion of these
 22 questions in the 2020 Census will dramatically depress the number of responses from persons
 23 living in San Jose and minority populations, leading to the unconstitutional and unlawful loss of
 24 representation in the U.S. House of Representatives and millions of dollars in federal funds.

25 Plaintiffs contend that Defendants’ decision to set aside decades of tried-and-tested
 26 practice and expert opinion by adopting the exact question lobbied by then Deputy Chair of the
 27 Presidential Commission on Election Integrity Kris Kobach at the direction of then White House
 28 Chief Strategist Steve Bannon (*see* Dkt. No. 38 at AR000763) (1) directly interferes with

1 Defendants' fulfillment of their constitutional responsibility, as delegated by Congress, to conduct
2 an "actual Enumeration" of the U.S. population; (2) violates the apportionment clause of the
3 Fourteenth Amendment because it will yield inaccurate, diminished result; (3) is contrary to the
4 constitutional requirements that (a) the Census conduct "actual Enumeration" of all people in
5 each state every ten years for the sole purpose of apportioning representatives among the states
6 and (b) congressional seats be apportioned among the several states according to their respective
7 numbers, counting the whole number of persons in each state; and (4) is, among other things,
8 arbitrary, capricious, an abuse of discretion, not in accordance with law, contrary to constitutional
9 right, power, privilege or immunity, and in excess of statutory jurisdiction, authority, or
10 limitations, or short of statutory right. Plaintiffs further contend that the addition of a citizenship
11 question to the 2020 Census was motivated by improper political influence following undue
12 political pressure from Kobach, Bannon, and the Trump/Pence re-election campaign.

13 **Defendants' Statement of Facts**

14 The Constitution's Enumeration Clause vests in Congress the authority to decide the
15 manner in which the census is conducted. U.S. Const. art. I, § 2, cl. 3. Through the Census Act,
16 Congress has directed the Secretary to conduct the decennial census "in such form and content as
17 he may determine," 13 U.S.C. § 141(a), and to obtain other demographic information through that
18 device, *id.* On March 26, 2018, in the exercise of this discretion, the Secretary of Commerce
19 decided to reinstate a question about U.S. citizenship on the 2020 decennial census. Such
20 citizenship information historically has been collected as far back as 1820. Citizenship
21 information also forms an important component of enforcing the Voting Rights Act of 1965. In
22 order to obtain such information at the census block level, the U.S. Department of Justice
23 formally requested that a citizenship question be added back onto the census on December 12,
24 2017. The Secretary's decision to reinstate such a question is not subject to review but, even if it
25 were, it is not in violation of the Constitution or arbitrary or capricious.

26 First, the Constitution textually commits the manner of conducting the census to
27 Congress, and it contains no judicially discoverable or manageable standards for determining
28 which demographic questions may be included on the census form. That question involves policy

1 determinations that are ill-suited for judicial resolution and that the Constitution expressly
2 commits to the political branches. Accordingly, Plaintiffs' challenge is unreviewable under the
3 political question doctrine.

4 Second, for similar reasons, Plaintiffs are barred from proceeding under the APA because
5 the form and content of the census is committed to the Secretary's discretion by law. "Congress
6 has delegated its broad authority over the census to the Secretary [of Commerce]," *Wisconsin v.*
7 *City of NY*, 517 U.S. 1, 19 (1996), and it has done so in broad terms. These broad delegations
8 leave a court with no meaningful standard to apply and accordingly preclude judicial review of
9 which demographic questions the Secretary decides to include on the decennial census form.

10 Third, the Secretary's decision does not violate the Constitution's Enumeration Clause.
11 The Secretary has developed comprehensive plans to conduct a person-by-person headcount of
12 the population, all of whom are under a legal obligation to answer, which is all the Enumeration
13 Clause requires. The Secretary's decision to reinstate a citizenship question is consistent with the
14 longstanding historical practice of asking about citizenship and other demographic information.
15 In contrast, Plaintiffs' theory would call into question the constitutionality of asking any of the
16 other long-standing demographic questions—*e.g.*, about sex, Hispanic origin, race, or relationship
17 status—that also go beyond counting the population and that could also cause at least some
18 individuals not to respond for any of various reasons, such as discomfort with the question or
19 increased time needed to answer. The constitutionality of such questions is not in serious dispute,
20 and neither should the constitutionality of the present one.

21 Fourth, the Secretary's decision is not arbitrary or capricious but rather is a reasonable one
22 based on an informed consideration of all relevant factors. The Secretary reasonably weighed the
23 usefulness of census-block-level citizenship data against the lack of empirical evidence of a
24 significant impact on response rates, and concluded that the reinstatement of the question,
25 coupled with an increased use of administrative data, was warranted.

26 **3. Legal Issues:** Plaintiffs have asserted claims against Defendants under the
27 Constitution's "Actual Enumeration" Mandate (U.S. Const., art. I, § 2, cl. 3), the Constitution's
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1 Apportionment Clause (U.S. Const. amend. XIV, § 2), and the APA (5 U.S.C. §§ 706(2) and
 2 706(2)(A)). The primary legal disputes arising from Plaintiffs' Complaint are:

- 3 • Whether Plaintiffs lack standing to challenge the Secretary's decision to add a
 4 citizenship question to the decennial census;
- 5 • Whether Plaintiffs' challenge is unreviewable under the political question
 6 doctrine;
- 7 • Whether Plaintiffs' challenge is unreviewable under the Administrative
 8 Procedure Act because the form and content of the census are committed to the
 9 Secretary's discretion by law;
- 10 • Whether Defendants' inclusion of a citizenship question on the 2020 Census
 11 violates the "actual Enumeration" clause of the U.S. Constitution;
- 12 • Whether Defendants' inclusion of a citizenship question on the 2020 Census
 13 violates the Apportionment Clause of the U.S. Constitution;
- 14 • Whether Defendants' inclusion of a citizenship question on the 2020 Census
 15 violates Section 706(2) of the APA;
- 16 • Whether Defendants' inclusion of a citizenship question on the 2020 Census
 17 violates Section 706(2)(A) of the APA;
- 18 • Whether Defendants' inclusion of a citizenship question on the 2020 Census is
 19 harmful to Plaintiffs;
- 20 • Whether Defendants' inclusion of a citizenship question on the 2020 Census
 21 was motivated by improper political influence;
- 22 • Whether Defendants' conduct warrants a declaratory judgment, under 28
 23 U.S.C. §§ 2201 and 2202, that inclusion of the citizenship question on the
 24 2020 Census violates Article I, Section 2, Clause 3 of the U.S. Constitution
 25 and the APA;
- 26 • Whether Defendants' conduct warrants a preliminary injunction prohibiting
 27 Defendants and all those acting in concert with them from including a
 28

citizenship question in the 2020 Census and from taking any irreversible steps to include a citizenship question in the 2020 Census; and

- Whether Defendants' conduct warrants a permanent injunction prohibiting Defendants and all those acting in concert with them from including the citizenship question on the 2020 Census; and
- Whether Plaintiffs are entitled to costs, expenses, and reasonable attorneys' fees.

4. **Motions:** Pursuant to stipulation and order, the Parties filed simultaneous briefs on June 14 and response briefs on June 21, 2018, on the issue of whether discovery beyond the administrative record is appropriate in this action. The Court will hear oral argument on these briefs at the Initial Case Management Conference on June 28, 2018.

Plaintiffs anticipate filing a motion to supplement the administrative record and/or a motion for preliminary injunction and/or a motion for summary judgment. Defendants will file a motion to dismiss on June 21, 2018, which Plaintiffs will oppose. The motion will be heard on August 9, 2018. Should that motion be denied, Defendants anticipate filing a motion for summary judgment. The Parties have not yet determined whether they will be filing any additional dispositive motions.

5. **Amendment of Pleadings:** Plaintiffs do not currently intend to amend their Complaint or add parties, but reserve the right to do so. Defendants have not filed an answer but plan to file a motion to dismiss in lieu of an answer. The parties propose a deadline to amend the pleadings of September 17, 2018.

6. **Evidence Preservation:** Plaintiffs and Defendants both confirm that their counsel have reviewed the Guidelines Relating to the Discovery of Electronically Stored Information ("ESI Guidelines"). Plaintiffs and Defendants further confirm that they have undertaken steps to preserve evidence relevant to the issues reasonably evident in this action. However, the Parties have not yet met and conferred regarding reasonable and proportionate steps to preserve evidence because of their unresolved dispute before the Court regarding the expansion of discovery beyond the administrative record.

1 7. **Disclosures:** Plaintiffs have fully and timely complied with Federal Rule of Civil
2 Procedure 26(a) by serving initial disclosures on Defendants by June 21, 2018. Plaintiffs reserve
3 their right to amend their disclosures as additional information becomes available in discovery.

4 Defendants' position is that initial disclosures are not required under the Federal Rules of
5 Civil Procedure and the Local Rules because this case involves review on the Administrative
6 Record and review is limited to that record. *See* Fed. R. Civ. P. 26(a)(1)(B)(i); Civ. L.R. 16-5.
7 Defendants filed the Administrative Record on June 8, 2018. Should the Court deny Defendants'
8 request for a stay of discovery or for an order that there be no discovery, Defendants request that
9 they be given 30 days from the date of that order to provide any additional initial disclosures.

10 8. **Discovery:** Plaintiffs propounded Requests for Production (Set One) ("RFPs") on
11 May 23, 2018. Defendants have not yet responded to Plaintiffs' RFPs (the responses are
12 presently due on or before July 6, 2018). Should the Court deny Defendants' request for an order
13 that there be no discovery or alternatively for an order staying discovery, Defendants request that
14 they be given 30 days from the date of that order to respond to Plaintiffs' RFPs.

15 Plaintiffs also filed a Motion to Expand Discovery Beyond the Administrative Record
16 (ECF No. 48), and Defendants filed a simultaneous Memorandum in Support of Review on the
17 Administrative Record (ECF No. 49), which will be heard by the Court on June 28, 2018.
18 Plaintiffs believe that full discovery is appropriate in this action and that no limitations or
19 modifications would be proper at this time. Plaintiffs further oppose Defendants' request that
20 discovery should be stayed pending resolution of Defendants' Motion to Dismiss. Defendants
21 believe that no discovery is appropriate because this case involves review on the Administrative
22 Record and review should be limited to that record. In addition, no discovery should occur until
23 after the Court has resolved the threshold justiciability issues to be raised in Defendants' Motion
24 to Dismiss.

25 The Parties have not yet considered entering into a stipulated e-discovery order, but will
26 consider doing so after the Court has ruled on the pending Motion to Expand Discovery Beyond
27 the Administrative Record and Memorandum in Support of Review on the Administrative
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1 Record. Plaintiffs do not request any modifications to the discovery rules of the Federal Rules of
2 Civil Procedure.

3 Should the Court permit discovery, the parties propose a discovery schedule as set forth in
4 Section 17 below.

5 Subjects of discovery taken by plaintiffs may include, *inter alia*: (1) the Defendants'
6 consideration of the citizenship question, (2) the likely impact of the citizenship question on 2020
7 Census response rates and on congressional apportionment, and (3) the likely impact of the
8 citizenship question on Voting Rights Act enforcement. Plaintiffs expect to take the depositions
9 of Defendants Ross and Jarmin, and other current and former agency officials and staff,
10 including, but not limited to, John Abowd, Enrique Llamas, Hermann Habermann, and Karen
11 Kelley. Plaintiffs also expect to take the third-party depositions of persons with relevant
12 information, including, but not limited to, Arthur Gary, John Gore, Steve Bannon, Robert Groves,
13 Kris Kobach, and Christine Pierce. If the Court allows discovery to proceed, Defendants reserve
14 all rights to conduct fact discovery and both parties anticipate identifying experts and taking
15 expert discovery. All discovery, including all hearings on discovery motions, should be
16 completed by October 25, 2018. Electronically-stored information should be produced in load
17 file format.

18 Defendants reserve their rights to put forward timely objections to any of the foregoing
19 discovery, including objections to the proposed depositions.

20 The parties currently dispute whether Defendants are obligated to produce a privilege log
21 in connection with the Administrative Record and future document productions. Plaintiffs
22 formally requested these logs in its RFPs and Defendants have denied the request. Plaintiffs
23 therefore ask the Court to order Defendants to produce a privilege log identifying all documents
24 withheld from the Administrative Record on the basis of any privilege, including the deliberative
25 process privilege. *See* Plaintiffs' response brief on their right to discovery for supporting
26 argument and legal authorities. Defendants contend that they should not be required to produce a
27 privilege log for materials not included in the Administrative Record, and not considered part of
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the Administrative Record, for the reasons set forth in Defendants' Memorandum in Support of Review on the Administrative Record and response brief on discovery.

9. Class Actions: Not applicable as this case is not a class action and the Parties do not anticipate the addition of class allegations.

10. Related Cases: This case has been related to *State of California v. Ross*, 18-cv-01865 pending before this judge and Court. Similar cases have been filed before the Southern District of New York (*State Of New York et al v. United States Department of Commerce et al.*, Case No. 1:18-cv-02921-JMF and *The New York Immigration Coalition v. U.S. DOC*, 18-CV-5025-JMF) and the District of Maryland (*Kravitz et al v. United States Department of Commerce et al*, Case No. 8:18-cv-01041-GJH, and *LUPE et al v. Ross et al*, Case No. 8:18-cv-01570-GJH).

11. Relief: As set forth in their Complaint, Plaintiffs seek:

(a) a declaratory judgment, under 28 U.S.C. §§ 2201 and 2202, that including the citizenship question on the 2020 Census violates Article I, Section 2, Clause 3 of the United States Constitution and the APA;

(b) a preliminary injunction prohibiting all Defendants and all those acting in concert with them from including a citizenship question on the 2020 Census and from taking any irreversible steps to include a citizenship question on the 2020 Census;

(c) a permanent injunction prohibiting all Defendants and all those acting in concert with them from including the citizenship question on the 2020 Census;

(d) an award of costs, expenses, and reasonable attorney fees; and

(e) an award of such other relief as the Court deems just and proper.

These damages are based on the facts and legal issues set forth in Sections 1 and 2. Plaintiffs reserve the right to amend their prayer for relief and set forth additional damages as additional information becomes available during discovery.

Defendants contend that the relief sought in this suit—a declaratory judgment and injunction barring the Secretary of Commerce from collecting demographic information through the decennial census—is as extraordinary as it is unprecedented and that Plaintiffs are not entitled to the relief requested or any relief whatsoever. Moreover, Defendants assert that damages are

improper regardless of the ultimate resolution of this case because Plaintiffs have not made any claim for which there could be a waiver of sovereign immunity to seek damages.

12. Settlement and ADR: The Parties agree that referral to a formal ADR process is unlikely to be beneficial given the nature of the case and that ADR may unnecessarily consume the Court's time and resources. As a result, the Parties filed a Joint Request for Relief from Automatic Referral to ADR Multi-Option Program on June 11, 2018, which this Court granted on June 12, 2018.

13. Consent to Magistrate Judge for All Purposes: The Parties do not agree to have a magistrate judge conduct all further proceedings, including trial and entry of judgment. Plaintiffs filed a declination to magistrate judge jurisdiction on April 30, 2018.

14. Other References: The Parties agree that this case is not suitable for reference to binding arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

15. Narrowing of Issues: The Parties are open to stipulating to facts relating to public statements and documents, though they have not yet identified the specific facts.

16. Expedited Trial Procedure: It is the Parties' position that this case is not the type that can be handled under the Expedited Trial Procedure of General Order No. 64 Attachment A.

17. Scheduling: Plaintiffs propose the following case schedule:

Proposed Event	Plaintiffs' Proposed Dates
Designation of Experts	Wednesday, August 22, 2018
Designation of Rebuttal Experts	Wednesday, September 12, 2018
Fact Discovery Cutoff, including hearings on discovery motions	Thursday, October 25, 2018
Expert Discovery Cutoff, including hearings on discovery motions	Thursday, October 25, 2018
Last Day to File Dispositive Motions	Thursday, October 25, 2018 (within 30 days of close of discovery; 35 days before hearing)

Proposed Event	Plaintiffs' Proposed Dates
Last Hearing Date for Dispositive Motions	Thursday, November 29, 2018
Pretrial Conference	Thursday, December 6, 2018
Trial	Tuesday, December 11, 2018

Plaintiffs suggest that, at either party's request, a shortened briefing schedule for any motion to compel filed on or after September 13, 2018, and will timely meet and confer to determine the specific briefing schedule and hearing date for such a motion.

As stated above, Defendants' position is that this case involves review on the Administrative Record and review is limited to that record. If the Court orders that discovery should proceed, Defendants request that the Court allow the parties 7 days from entry of such Order to submit a proposed schedule. If the Court determines to adopt Plaintiffs' proposed schedule, Defendants request that Plaintiffs should coordinate discovery as much as possible with the attorneys representing the plaintiffs in the other cases listed in paragraph 10 above. If such coordination does not occur, Defendants reserve the right to move for an extension of any of the above deadlines based on the failure of coordination and the resulting effect this will have on Defendants' ability to meet the foregoing deadlines.

18. Trial: If trial is necessary, the parties agree that a bench trial would require 7-10 days.

19. Disclosure of Non-Party Interested Entities or Persons: Plaintiffs filed a Certification of Interested Entities or Persons as required by Civil Local Rule 3-15 on April 17, 2018 (ECF No. 2). Other than the named parties, there is no such interest to report with respect to Plaintiff BAJI, a California nonprofit corporation. Plaintiff San Jose is a public entity. Therefore, Civ. L.R. 3-15 does not apply.

20. Professional Conduct: Counsel for the Parties have reviewed the Guidelines for Professional Conduct for the Northern District of California.

21. Counsel are not aware of other matters that may facilitate the just, speedy and inexpensive disposition of this matter.

Respectfully submitted,

Dated: June 21, 2018

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**CITY OF SAN JOSE and BLACK ALLIANCE FOR
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Dated: June 21, 2018

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FILER'S ATTESTATION

Pursuant to Civil Local Rule 5-1(i)(3), regarding signatures, Olufunmilayo O. Showole hereby attests that concurrence in the filing of this document has been obtained from all the signatories above.

Dated: June 21, 2018

s/ Olufunmilayo O. Showole
Olufunmilayo O. Showole