

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

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| ANDREW MASON DVASH-BANKS, ET AL., |) | CASE NO: 2:18-CV-523-JFW-JC |
| |) | |
| Plaintiffs, |) | CIVIL |
| |) | |
| vs. |) | Los Angeles, California |
| |) | |
| MICHAEL R. POMPEO, ET AL., |) | Tuesday, December 11, 2018 |
| |) | |
| Defendants. |) | (10:02 a.m. to 4:04 p.m.) |

HEARING RE: MOTION TO COMPEL [DE #54]

BEFORE THE HONORABLE JACQUELINE CHOOLJIAN,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 Los Angeles, California; Tuesday, December 11, 2018; 10:02 a.m.

2 (Call to order)

3 **THE CLERK:** Calling Case Number 18-CV-523, *Andrew*
4 *Mason Dvash-Banks, et al. versus the United States Department*
5 *of State, et al.* Counsel, please state your appearances.

6 **MS. LAWSON-REMER:** Good morning, Your Honor, Alexa
7 Lawson-Remer appearing pro bono for Plaintiffs from Sullivan
8 and Cromwell.

9 **MR. EDELMAN:** Good morning, Your Honor, Theodore
10 Edelman, Sullivan and Cromwell, LLP, *pro hac vice*, also pro
11 bono counsel.

12 **MS. RAYBUCK:** Good morning, Your Honor, Rebekah
13 Raybuck, Sullivan and Cromwell, for Plaintiffs as well, pro
14 bono counsel.

15 **MS. MARCUS:** Good morning, Your Honor. I'm Lisa
16 Zeidner Marcus, trial attorney with the U.S. Department of
17 Justice, civil --

18 **THE COURT:** Go ahead, sorry.

19 **MS. MARCUS:** Civil Division. I represent the
20 Defendants in this matter.

21 **THE COURT:** All right, good morning. Everybody can
22 have a seat. I say that because we may be here a while. So
23 let me just start with just a couple preliminary matters.
24 First, I just want to remind the parties that under Rule 5.2 of
25 the Federal Rules of Civil Procedure, we are not to refer to

1 minors by their names. So you can either use initials or
2 generic descriptors, child minor. I realize that rule has not
3 really been observed throughout the litigation, but now you're
4 aware of the rule if you weren't already and so I would expect
5 counsel to comply with that rule from -- going forward.

6 Second, I had my fingers crossed. I know you folks
7 recently had a settlement conference. And without getting into
8 details, can someone just let me know just in sum where we are
9 on that?

10 **MR. EDELMAN:** So, Your Honor, the parties did have
11 two sessions, lengthy sessions, on November 29th and 30th, at
12 our offices in New York. I would say that the parties worked
13 hard and have been negotiating in good faith. For the
14 Plaintiffs' side we remain hopeful that perhaps there's an
15 opportunity to resolve this. And we're certainly open to that
16 prospect and willing to continue to engage. We are certainly
17 not there yet, Your Honor.

18 **THE COURT:** Okay. Defense, any different description
19 you would ascribe? And, again, I'm sensitive to not getting to
20 involved in it, I just --

21 **MS. MARCUS:** Of course.

22 **THE COURT:** -- obviously I -- you're all here. I
23 figured it didn't settle but --

24 **MS. MARCUS:** I appreciate the question, and agree
25 with Mr. Edelman's description of the hard work that the

1 parties put in. And Defendants do believe that at least some
2 of the claims in this case should be settled, if not all
3 claims. We --

4 **THE COURT:** Should or could?

5 **MS. MARCUS:** Both. We thought that we got pretty
6 close and need more time to complete that. We did work with a
7 mediator in New York who was excellent. And if I can be
8 candid, we were --

9 **THE COURT:** Remember, you're on the record so --

10 **MS. MARCUS:** -- gratified. We were --

11 **THE COURT:** -- feel free to be candid, but remember
12 you're on the record.

13 **MS. MARCUS:** We were gratified by the progress that
14 the parties made during the mediation and thought at the end of
15 it that we -- our understanding is the same as Plaintiffs'
16 understanding, that there -- that it's continuing, we're
17 continuing to have discussions. You know, it's not unusual to
18 have two tracks where we're having litigation and settlement is
19 difficult with having to do everything at once. But we do
20 think that, you know, a couple more weeks on the -- focusing on
21 the settlement would really bear -- we think would be
22 worthwhile for preserving the parties' and the Court's
23 resources.

24 **THE COURT:** Okay. Well, I appreciate your comments.
25 To the extent at least defense counsel might have been hinting

1 that you all would benefit from some change in the schedule,
2 all I can say is we are all bound by the district judge's
3 schedule, me included, and so I just leave it at that. So,
4 yes, we have to proceed as if we're going to trial, even if the
5 case ultimately does settle. So I suppose next I -- since you
6 filed your supplemental briefs a couple weeks ago and it looked
7 like there were some things that might have since been
8 resolved, I wanted to get a sense of whether there were things
9 that had been narrowed. So let me -- for example, let me start
10 with the depositions. It looked to me like a couple of the
11 depositions actually should have already happened by now.
12 Ms. Day and Ms. Ruffits. I don't know if that's how you say
13 her name. Have the parties resolved any issues on those?

14 **MS. LAWSON-REMER:** Yes, Your Honor. Two depositions
15 did go forward this past week, December 6th and 7th. It was
16 the depositions of Ms. Ruffit and Ms. Ramsey.

17 **THE COURT:** Oh, not Ms. Day, okay.

18 **MS. LAWSON-REMER:** There are still outstanding issues
19 related to the scheduling of Ms. Day and the remaining
20 individual depositions that Plaintiffs have noticed.

21 **THE COURT:** Okay. So, again, just to narrow,
22 Ms. Ruffit and Ms. Ramsey, no need to address those, right?

23 **MS. LAWSON-REMER:** That's correct. I -- if once we
24 get to documents there are some issues with respect to the
25 documents that dealt with those but we can revisit that when

1 we --

2 **THE COURT:** Okay.

3 **MS. LAWSON-REMER:** -- discuss that.

4 **THE COURT:** So it doesn't appear to me that there's a
5 need for any ruling or focus by me on whether or not there's a
6 need to order those depositions because those have already
7 occurred. So, Ms. Marcus, I take it you agree with that?

8 **MS. MARCUS:** I do, Your Honor.

9 **THE COURT:** Okay. So then we have Ms. Day. Last I
10 saw, she was someone whom Defendants had agreed to accept a
11 subpoena for and Plaintiffs had inquired as to her availability
12 for a deposition in North Carolina. And I think we're waiting
13 on a date. Where's -- where are we on that?

14 **MS. LAWSON-REMER:** Your Honor, we still don't have a
15 confirmed date for Ms. Day. What my understanding is that
16 there were conversations in Toronto about potentially offering
17 the deposition on January 2nd, which is the discovery cutoff.
18 That's unworkable for Plaintiffs for the precise fact that it's
19 the same day as the last day of discovery. If any issues come
20 out of that deposition, Plaintiffs will have no recourse to
21 address that.

22 **MS. MARCUS:** If I may, Your Honor?

23 **THE COURT:** Sure.

24 **MS. MARCUS:** Defendants offered two dates the week
25 after Thanksgiving for Ms. Day's deposition. Those were dates

1 that I was -- defense counsel was willing to travel to North
2 Carolina and Ms. Day was available. It was earlier in the week
3 of the mediation and I had offered to travel to Charlotte and
4 then travel to New York for the mediation. The Plaintiffs said
5 that they were not available on the dates that we offered. We
6 then offered to make Ms. Day available by video teleconference
7 which would still require defense counsel to travel to
8 Charlotte to be present with Ms. Day but it would relieve some
9 of the burden on the travel schedule of Plaintiffs' counsel.
10 Plaintiffs' counsel declined that offer and we are now in the
11 process of trying to find new dates with the window that we
12 still have.

13 **MS. LAWSON-REMER:** Your Honor, if I may just briefly?
14 With respect to --

15 **THE COURT:** You can have -- it's fine if everybody --

16 **MS. LAWSON-REMER:** Okay.

17 **THE COURT:** -- speaks -- unless I can't hear you or
18 we're having trouble getting it on the record, then I'll have
19 you, you know, do something different. But for now it's fine
20 to speak from there.

21 **MS. LAWSON-REMER:** Thank you, Your Honor. So with
22 respect to the earlier deposition dates that Ms. Marcus alluded
23 to, the Plaintiffs' concern was not the ability to travel but
24 the fact that we had not yet received any documents. I think
25 at that point we'd only received seven documents from

1 Defendants. They made a production on October 26th and then
2 they made a second production like two days before the dates
3 that they were offered, and it was missing a large number of
4 the files so we weren't actually able to review the production.
5 So we've noticed this deposition a very long time ago. We have
6 been asking for dates for a very long time. And one of the
7 things that we need in order to take that deposition are the
8 documents that Ms. Day used. Some of those documents weren't
9 even produced until this last Friday evening.

10 **MS. MARCUS:** The majority were produced with our
11 initial disclosures in August. This is a case where there
12 actually are at the end of the day very few documents that
13 exist. And this was -- this is something that we have been
14 telling the Plaintiffs' counsel for months, and this was
15 confirmed by testimony received on the record last week that
16 outside of -- that there's only a handful of emails that were
17 exchanged between the adjudicating officer, Ms. Day, and
18 others, that that's actually unusually high. In most cases,
19 there are no emails exchanged in adjudicating a passport or
20 CRBA application. We produced all of the file with our initial
21 disclosures, the application and those materials. It came to
22 our attention during the deposition last week that there were
23 some additional case notes. We worked to produce those at the
24 lunchtime break of the first deposition so that Plaintiffs'
25 counsel would have it right away. But we've been working, and

1 we had told Plaintiffs' counsel that we were working, to get
2 them as many of the documents that they would need to take the
3 deposition. It's just simply not true that they haven't had
4 the relevant documents because we produced the case file with
5 our initial disclosures.

6 **THE COURT:** Okay. Well, let me just say, from
7 defense perspective, do you have any more documents that you
8 have not yet produced, whether for privilege or some other
9 reason, that you view to be something Ms. Day is knowledgeable
10 about or would be appropriate for deposition? I understand you
11 two may not agree on what that means, but let me at least get
12 defense counsel's view.

13 **MS. MARCUS:** Sure. We've -- we have generally
14 finished reviewing her emails. I think we -- as with the
15 depositions last week, you know, this happens in discovery,
16 sometimes you don't have --

17 **THE COURT:** So I'm hearing the answer to be "no."

18 **MS. MARCUS:** There may be some more documents. We
19 would be willing to -- we propose having the deposition and, --

20 **THE COURT:** And so --

21 **MS. MARCUS:** -- if necessary, to hold it open. We --

22 **THE COURT:** Well when do you anticipate that you
23 could give me a "yes" answer to that question?

24 **MS. MARCUS:** Well, it -- the specific documents that
25 -- her emails have --

1 **THE COURT:** Are the emails the only thing in your
2 view that's outstanding relative to Ms. Day, or are there other
3 things?

4 **MS. MARCUS:** It depends on what else the Plaintiffs'
5 counsel want to ask her about. What we have produced are her
6 case file notes, her internal case file notes. We have
7 produced the case file itself. We have produced the emails
8 that she sent or received, including the email when she started
9 in the unit that was a -- the consular unit, the training email
10 that she received from her supervisor. The Plaintiffs deposed
11 last week her -- Ms. Day's supervisor, as well as Ms. Day's
12 colleague who was a witness to the adjudication and so the
13 interview process. So if there's anything left, it is less
14 than five percent of the materials. And I do not have anything
15 in particular in mind.

16 **THE COURT:** Okay. So, again when would you be giving
17 me a "yes" answer to the question?

18 **MS. MARCUS:** Will you repeat the -- I'm not trying to
19 be difficult but I think that we have mostly produced --

20 **THE COURT:** When will you have produced everything
21 relative to Ms. Day?

22 **MS. MARCUS:** My understanding is that we have
23 produced everything relative to Ms. Day. We are still
24 reviewing and double-checking that, but generally speaking, my
25 understanding is that we have produced -- we have gone through

1 her emails and done those productions and the -- I don't know,

2 **THE COURT:** Okay, and so when do you --

3 **MS. MARCUS:** -- I might want to hear from Plaintiffs
4 what else they think they need before her deposition.

5 **THE COURT:** When do you think you will have completed
6 your review so that you're satisfied you've done so?

7 **MS. MARCUS:** All this I think goes to the larger
8 question of the document review process which we have been
9 engaging in. It's a very wide net. And we have --

10 **THE COURT:** I'm really just looking for short
11 answers.

12 **MS. MARCUS:** Sorry, I'm sorry, Your Honor. We are
13 working to try to go through everything by January 2nd.

14 **THE COURT:** Okay, it has to be before January 2nd.
15 They have a fair point. They need to have time. This is a
16 court in which deadlines mean what they are, --

17 **MS. MARCUS:** I --

18 **THE COURT:** -- right? And so for you to say you
19 can't guarantee that you've produced everything to them by
20 January 2nd means they are without recourse if you produce
21 something at the last minute or fail to produce something. So
22 you need to do better than that.

23 **MS. MARCUS:** I understand, Your Honor. To be clear,
24 my understanding is that the vast majority, if not all of the
25 Ms. Day-specific material, have been produced to the

1 Plaintiffs. And what's outstanding is not Ms. Day-specific
2 materials and not anything that the Plaintiffs would need in
3 order to conduct her deposition.

4 **THE COURT:** All right, let me just turn to Defendants
5 (sic). Is there anything specific you believe you are missing
6 relative to Ms. Day?

7 **MS. LAWSON-REMER:** Your Honor, two issues come to
8 mind with respect to Ms. Day. One is the -- and it actually
9 relates to a broader issue that we have with the way the
10 document productions have occurred. So far the Defendants have
11 focused exclusively on these individuals in Toronto. And a --
12 one sort of integral piece to all this are, and the two
13 depositions actually show this to be true, that the policies
14 and the guidance come from D. C. And so we think that part of
15 the issue here and what we would need to be able to ask Ms. Day
16 about is what policies and issues and guidance has she received
17 from D. C. We don't believe that Defendants are actually
18 focusing their collection efforts on D. C. because in their
19 responses to our request for production, they've deliberately
20 limited their willingness to produce to only those individuals
21 in Toronto and to documents emanating from the Toronto
22 Consulate.

23 **THE COURT:** All right, what they said, they I guess
24 didn't agree with that, at least in what I read, and indicated
25 they also said anything available to Toronto which might have

1 been generated by an office in D. C., which to me would
2 encompass the kind of policies or anything Ms. Day would have
3 considered. Is that what -- that's what you're saying you're
4 looking for, whatever she -- policies that she considered,
5 anything that might have been conveyed to her that she thought
6 about.

7 **MS. LAWSON-REMER:** Certainly Ms. Day can only speak
8 to her personal knowledge.

9 **THE COURT:** Right.

10 **MS. LAWSON-REMER:** Right, so with her deposition,
11 that's true. We also --

12 **THE COURT:** Okay.

13 **MS. LAWSON-REMER:** -- have standing -- outstanding
14 this 30(b)(6) deposition --

15 **THE COURT:** No, I -- look, --

16 **MS. LAWSON-REMER:** So --

17 **THE COURT:** -- there's -- there are many other things
18 outstanding, right? I'm just trying to get past --

19 **MS. LAWSON-REMER:** With Ms. Day, I would --

20 **THE COURT:** I'm just trying to get past the
21 individual depositions at this point.

22 **MS. LAWSON-REMER:** Right.

23 **THE COURT:** So --

24 **MS. LAWSON-REMER:** Yes, Your Honor.

25 **THE COURT:** So, defense counsel, Ms. Day, have you

1 finished producing everything that you believe was conveyed to
2 her policy-wise, etcetera, that has --

3 **MS. MARCUS:** We have, Your Honor.

4 **THE COURT:** Yes, okay, so you're saying you don't
5 think there's anything else on that front that you haven't
6 produced.

7 **MS. MARCUS:** Correct.

8 **MS. LAWSON-REMER:** Your Honor, one other point with
9 respect to Ms. Day. The case notes that were produced in the
10 middle of the deposition on Friday afternoon --

11 **THE COURT:** And that was during Ms. Ruffit's depo?

12 **MS. MARCUS:** Yes, Your Honor.

13 **MS. LAWSON-REMER:** They were -- they're heavily
14 redacted and so we -- I think we haven't had an opportunity to
15 engage with Defendants on those notes yet. And to the extent
16 that we are able to review a less-redacted version of those
17 before the deposition, I think that would be important.

18 **THE COURT:** Okay, so what's the basis for the
19 redactions?

20 **MS. MARCUS:** The redactions are PII and we don't
21 currently have a protective order. I think that some of the
22 PII could be addressed through a protective order. That the --
23 that's the substantive information that's -- I don't believe
24 that most of what's redacted is substantive. There are
25 redactions, for example, of the local employees in the

1 consulate, there's extra protections taken for the identities
2 of individuals who are (indisc.)

3 **THE COURT:** Okay, so I saw much discussion about
4 getting a protective order relative to confidentiality and
5 privacy issues, and I didn't follow -- I didn't circle back to
6 see, oh, did they indeed seek and obtain a protective order.
7 So why hasn't that happened?

8 **MS. MARCUS:** Your Honor, I -- there's two -- I have a
9 co-counsel who last week when I was in Toronto, she was working
10 on our end and moving that forward. And I don't -- actually
11 don't know if she sent it to the Plaintiffs' counsel or not. I
12 know that she -- we had been working on moving it forward
13 internally and do intend to get it to the Plaintiffs' counsel
14 and could probably do so today if they haven't yet received it.

15 **MS. LAWSON-REMER:** Your Honor, we haven't received
16 anything. We have offered to treat everything on an attorneys-
17 eyes-only basis until a protective order is satisfactorily
18 negotiated and entered. We wanted to do that in order to
19 facilitate receiving documents as early as possible while the
20 parties --

21 **THE COURT:** It's --

22 **MS. LAWSON-REMER:** -- continue to get the documents.

23 **THE COURT:** It is really late in the day for a
24 protective order so -- but I have a standard protective order I
25 can issue as well. It's on the website. You folks can look at

1 it. I have an AEO version and a non-AEO version.

2 **MS. MARCUS:** That, Your Honor, that forms the basis
3 of what we had been working on.

4 **THE COURT:** An AEO version or a non-AEO version?

5 **MS. MARCUS:** The non-attorneys-eyes-only version is
6 what we were using. And there was some internal discussion
7 that we don't need to go into it right now but, yes, we're
8 aware of it, thank you, and we are -- I mean, that draft will
9 go to the Plaintiffs' counsel with the additions and the case-
10 specific information that we've inserted. The -- I don't think
11 that there is a current disagreement with respect to the case
12 notes. It was produced during a deposition. I had imperfect
13 technology with me and had -- you know, we were sending it to
14 folks in D. C. to process and so we were able to get it to them
15 quickly. But we're happy to take another look at the
16 redactions and will make sure that we explain the basis. This
17 is the -- you know, I hadn't heard about the concern about the
18 redactions until just now.

19 **THE COURT:** Well, you're not supposed to redact on
20 relevance. I understand the concern, but given the assurances
21 defense counsel has provided, I -- you should be providing
22 unredacted versions, okay? Unless there's some kind of
23 attorney-client privilege, which I don't see because they're
24 the individuals' case notes, and you haven't done a privilege
25 log, unless something has changed on that. We haven't gotten

1 there yet. So it seems to me to expedite matters as to
2 Ms. Day, you should be getting the defense (sic) the unredacted
3 notes forthwith and you should be getting them the proposed
4 protective order forthwith. And I can assure you as soon as I
5 get it, I will look at it promptly.

6 **MS. MARCUS:** Thank you, Your Honor.

7 **THE COURT:** And I will tell you, don't deviate too
8 much from my form. People like to fiddle a lot and they do
9 things that -- counter to what I specifically included in
10 there. So I would just say be careful on that front.

11 Okay, so right now we're just looking for scheduling
12 on Ms. Day. So I'm inclined to order her deposition to go
13 forward as Defendants may notice and so I'm not sure where we
14 go from there. I would just say on a date within -- what's
15 today? Oh, calendar's not up there. Oh, right here.

16 **MS. LAWSON-REMER:** Your Honor, today's the 11th.

17 **THE COURT:** Right. So typically I would do it by
18 January 25th as Defendants may notice.

19 **MS. LAWSON-REMER:** Your Honor, one issue is that that
20 is after the discovery cutoff and after the deadline for
21 summary judgment and so --

22 **THE COURT:** December 25th?

23 **MS. LAWSON-REMER:** Oh, sorry, I thought you said
24 January.

25 **THE COURT:** Oh, no, no, no, I am not setting anything

1 beyond January 2nd.

2 **MS. LAWSON-REMER:** Okay, thank you, Your Honor.

3 **MS. MARCUS:** Your Honor, just for clarity of the
4 record, I represent the Defendants and the counsel on the other
5 side of --

6 **THE COURT:** Oh, do I keep calling you guys -- I'm
7 sorry.

8 **MS. LAWSON-REMER:** Yes, Your Honor.

9 **MS. MARCUS:** It's okay.

10 **THE COURT:** You know what I mean.

11 **MS. LAWSON-REMER:** We fit in those shoes often so --

12 **MR. EDELMAN:** It's a little confusing, Your Honor.
13 We're not used to being plaintiffs.

14 **THE COURT:** Okay. Well, --

15 **MS. MARCUS:** Neither am I.

16 **THE COURT:** -- so, yes, plaintiff's always next to
17 the jury box, defense over here, so my apologies if I have
18 mixed that up. I think it's probably clear -- the record's
19 probably clear from the context of the remarks who I'm actually
20 speaking to but apparently I will try to do better in my
21 references. Okay, so that's Ms. Day.

22 **MS. MARCUS:** I'm sorry, Your Honor, I just want for
23 you to -- that order makes sense and we will comply with it.
24 So you know, Ms. Day does not currently work for the Department
25 of State. She is a third party so --

1 **THE COURT:** I'm aware of that. But you -- there's --

2 **MS. MARCUS:** We will work with her.

3 **THE COURT:** -- a subpoena that they issued and you
4 folks agreed to accept it or she authorized you to accept it,
5 right?

6 **MS. MARCUS:** Correct, yes.

7 **THE COURT:** Okay, so I know it's no fun for anybody
8 to be doing discovery over the holidays but that is the hand we
9 have all been dealt.

10 So, all right, next person was Ms. Warmenhoven. Do
11 Defendants agree to notify Plaintiffs if she returns to North
12 America between now and the discovery cutoff?

13 **MS. MARCUS:** Yes, Your Honor.

14 **THE COURT:** Okay, then does that moot the issue --

15 **MS. LAWSON-REMER:** Yes, Your Honor.

16 **THE COURT:** -- as to Ms. Warmenhoven? All right, so
17 I'll deny the motion as moot as to her.

18 Carlos Hernandez, sounds like this one is still in
19 dispute. Just -- if you could just succinctly indicate whether
20 it's still in dispute and if there's anything new, Plaintiffs'
21 counsel.

22 **MS. LAWSON-REMER:** Yes, Your Honor. With respect to
23 Mr. Hernandez, he's the signatory to a letter that --

24 **THE COURT:** Oh, I know who he is.

25 **MS. LAWSON-REMER:** Okay.

1 **THE COURT:** And I understand why you want to depose
2 him. I'm asking is it still in dispute?

3 **MS. LAWSON-REMER:** It is, Your Honor.

4 **THE COURT:** Okay.

5 **MS. LAWSON-REMER:** If I can just fast-forward just
6 ever so slightly? Mr. Hernandez is somebody that we offered to
7 defer to the end of discovery, which is we really are now at
8 the end of discovery, because we wanted to alleviate some of
9 the need to potentially, depending on what the 30(b)(6)
10 testimony bears, the need to potentially depose him, both on
11 Defendants' needing to prepare him and us needing to take him.
12 We still -- the 30(b)(6) is still a live dispute with --
13 especially with respect to his particular topic, the topic that
14 relates to him. And that is also --

15 **THE COURT:** So are you saying you want to circle back
16 after we've gone through the 30(b)(6) topics?

17 **MS. LAWSON-REMER:** I think so.

18 **THE COURT:** Okay.

19 **MS. LAWSON-REMER:** Yes.

20 **THE COURT:** Fine. I would bet the same is true of
21 Ms. Christensen (phonetic) then?

22 **MS. LAWSON-REMER:** Mr. Eagan (phonetic) as well.

23 **THE COURT:** Okay.

24 **MS. LAWSON-REMER:** Ms. Christensen and Eagan.

25 **THE COURT:** All right, so we will circle back to

1 those later.

2 **MS. MARCUS:** And, Your Honor, we can deal with this
3 later. For Mr. Hernandez, we did have some testimony last week
4 from the deponents who were involved in the case and they added
5 to our understanding of Mr. Hernandez's non-role, and I can
6 address that whenever the Court -- the same is true for
7 Mr. Eagan and Ms. Christensen.

8 **THE COURT:** Look, what I would say is, it seems to me
9 Mr. Hernandez's deposition will be very short, if it happens.
10 It sounds like he didn't draft the letter, he basically signed
11 the letter after somebody else prepared it. But the contents
12 of the letter is of interest and it does appear to me to be an
13 appropriate area for inquiry. So I don't know if Mr. Hernandez
14 or if the defense has shared with Plaintiff the identity of
15 whoever it is Mr. Hernandez references as having drafted it or
16 who at Legal Affairs coordinated or -- again, I have a note
17 about 30(b)(6), you know, underlying whether it's common to ask
18 for DNA where there's a surrogate, how widespread the practice
19 is, etcetera. So has the defense identified who it is that
20 drafted this particular letter and who at Legal Affairs
21 coordinated the drafting of that letter? In other words, what
22 Mr. Hernandez says in his declaration.

23 **MS. MARCUS:** We provided the declaration.

24 **THE COURT:** Right. I'm referring to his declaration.

25 **MS. MARCUS:** Sure. So this is a letter that took

1 place six months maybe after the case was closed. And, you
2 know, if the Plaintiffs want to ask this information of a
3 30(b)(6), then maybe we should circle back and deal with the
4 substance of the information they're seeking; because I think
5 we're all interested in having this -- Plaintiffs get what they
6 are entitled to, but within the -- to do it also efficiently
7 given the incredible resources that have been expended to date
8 in discovery efforts that are largely not relevant to the
9 Plaintiffs' claims in this matter.

10 **THE COURT:** Well, I understand that's your position.
11 I'm not sure I agree with you. But fine, we'll forego those
12 three -- or the discussion of those three depositions. Let's
13 just -- again, I'm still on the preliminary issue of let's see
14 what's still remaining.

15 So on the 30(b)(6) topics, it looks to me like one
16 through 14 and 16 through 22, in other words everything except
17 15, are in issue. Having said that, those are in issue as
18 narrowed by Plaintiffs' counsel's October 30th letter, which is
19 Exhibit 14 to Plaintiffs' counsel's initial declaration, and
20 then a subsequent November 22nd letter which is Exhibit 2 to
21 Plaintiffs' counsel supplemental declaration. So has there
22 been any further developments as to those? Because it did seem
23 to me that there were some -- at least a couple of outstanding
24 -- I'm thinking of topics seven, eight, and ten, I think.

25 **MS. LAWSON-REMER:** Yes, Your Honor.

1 **THE COURT:** And 16.

2 **MS. LAWSON-REMER:** So with respect to topics -- well,
3 I'll add to the list of agreed-upon topics, Your Honor. Topic
4 ten has been further agreed upon. We -- Plaintiffs' conceded
5 to a more narrow timeframe at Defendants' request and so that
6 topic is now confirmed.

7 **THE COURT:** Okay.

8 **MS. LAWSON-REMER:** And then additionally Plaintiffs
9 as we -- we have not yet communicated this to Defendants
10 because this was decided this morning, but Plaintiffs are
11 prepared to accept the narrowed -- the proposed narrowed
12 timeframe on topic 16.

13 **THE COURT:** Okay.

14 **MS. LAWSON-REMER:** And we further agreed to withdraw
15 topics 11, 21, and 22.

16 **THE COURT:** Wholesale or you had made that contingent
17 at some point but you're saying 11 -- say again, 11?

18 **MS. LAWSON-REMER:** Eleven, 21, and 22. And if you
19 will indulge --

20 **THE COURT:** I'm sorry, 11, 21, and 22, is that what
21 you said?

22 **MS. LAWSON-REMER:** Yes.

23 **THE COURT:** Okay.

24 **MS. MARCUS:** Do you mind rewinding just a little so I
25 can understand the page that you're on? Which are the topics

1 that you said have been agreed -- that we've agreed on?

2 **MS. LAWSON-REMER:** My -- so for Your Honor's benefit,
3 Plaintiffs and Defendants have engaged in further meet-and-
4 confers on this after the supplemental briefing was filed. We
5 had a meet-and-confer on November 20th. We sent a letter
6 shortly thereafter and Plaintiffs -- and Defendants responded
7 to that letter. We also sent a letter last week on December
8 4th where we articulated the accepting the topic ten as
9 narrowed by Defendants' timeframe.

10 **MS. MARCUS:** Okay.

11 **MS. LAWSON-REMER:** And --

12 **MS. MARCUS:** So the topic ten you agreed to last
13 week. And then what --

14 **MS. LAWSON-REMER:** And this morning we're telling you
15 for the -- I understand this is for the first time, but that we
16 will accept topic 16 with the more narrowed timeframe.

17 **MS. MARCUS:** Okay.

18 **THE COURT:** And so the narrowed timeframe is to limit
19 it to end on June 2nd, 2017; is that right?

20 **MS. LAWSON-REMER:** It's a -- it's actually more
21 narrow than that, Your Honor. The Defendants have asked for
22 January, 2015, through June 2nd, 2017. We had originally asked
23 for broader -- a broader time period --

24 **THE COURT:** Right.

25 **MS. LAWSON-REMER:** -- dating back to 2013 because of

1 all the case law.

2 **THE COURT:** I understand. We're going to talk about
3 that later, but go ahead.

4 **MS. LAWSON-REMER:** But for topic 16, we accept
5 Defendants' proposal of January 1st, 2015, through June 2nd,
6 2017.

7 **THE COURT:** Okay.

8 **MS. MARCUS:** And so does that leave us with two
9 agreed-upon topics, ten and 16?

10 **MS. LAWSON-REMER:** That's right.

11 **THE COURT:** All right.

12 **MS. MARCUS:** And you're withdrawing 11, 21, and 22?

13 **MS. LAWSON-REMER:** Yeah, that's correct.

14 **MS. MARCUS:** And you all still think you need to ask
15 about topics like one and two, even notwithstanding the
16 individual depositions that have occurred?

17 **MS. LAWSON-REMER:** We do. Your Honor, topics one and
18 two are essentially the only way we can get the State --

19 **THE COURT:** I understand what they are.

20 **MS. LAWSON-REMER:** -- Department's official position.

21 **THE COURT:** Yes. That's -- we'll take these -- right
22 now, I'm just trying to eliminate things. So from what I
23 understand then, as to the 30(b)(6) deposition topics, topics
24 one through nine at least remain in issue; ten is moot so I'll
25 deny that as such; 11 is withdrawn, I'll deny that as such; 12

1 through 14 remain an issue; 15, you had already told me in your
2 supplementals I think that that one is now moot so I'll deny
3 that one as moot; 16 you're now telling me is moot so I'll deny
4 that as moot; 17 through 20 remain in issue; and 21 and 22 have
5 been withdrawn so that's -- the motion then would be denied as
6 to those based on their being withdrawn. Now, --

7 **MS. LAWSON-REMER:** Your Honor, --

8 **THE COURT:** Go ahead.

9 **MS. LAWSON-REMER:** -- the only clarities on topic 15,
10 we do agree on substance but we don't agree on timeframe.

11 **THE COURT:** Then it's not moot. That's not -- I'm
12 looking at your little summary that you gave me. Your summary,
13 which is Exhibit 1 to your supplemental declaration, --

14 **MS. LAWSON-REMER:** Yes, Your Honor.

15 **THE COURT:** -- the chart, four, no, except for topic
16 15.

17 **MS. LAWSON-REMER:** I think, Your Honor, what happened
18 is that after we submitted our briefing, there was additional
19 letters that Defendants asserted a position that for all
20 topics, they would be taking this more narrow timeframe which
21 we had not agreed to.

22 **THE COURT:** Okay, so 15 remains in issue then. So as
23 I understand it, the remaining dispute on 15 has to do with
24 Defendant taking the position that they only want to produce it
25 for the timeframe January, 2015 to June, 2017, and Plaintiffs

1 taking the position that they want it from is it January, 2012
2 to present, is that the upshot?

3 **MS. LAWSON-REMER:** We are -- we have offered a more
4 narrow January, 2013 to January 22nd, 2018. That's also
5 subsequent to the filing --

6 **THE COURT:** The supplemental.

7 **MS. LAWSON-REMER:** Yeah.

8 **THE COURT:** Okay. So now turning to Defendant, it
9 looked to me like topic seven, Plaintiff had narrowed that to
10 the specified court rulings, and Defendant had basically said,
11 maybe, you'll check. So where is Defendant on topic seven, --

12 **MS. MARCUS:** Sure.

13 **THE COURT:** -- given the narrowing?

14 **MS. MARCUS:** Let me just consult my chart that my
15 colleague provided.

16 **THE COURT:** It doesn't go down to this level of
17 detail.

18 **MS. MARCUS:** From -- no, in preparation for today
19 because my colleague Vinita Andrapalliyal has --

20 **THE COURT:** Oh, that colleague, not --

21 **MS. MARCUS:** -- largely been involved --

22 **THE COURT:** Okay.

23 **MS. MARCUS:** -- with the 30(b)(6) --

24 **THE COURT:** Sorry, different chart. Go ahead.

25 **MS. MARCUS:** Yeah, no, that's okay. We -- you know,

1 I was in Toronto for much of last week for these depositions so
2 I was not as looped in on --

3 **THE COURT:** Okay, just --

4 **MS. MARCUS:** -- so just give me one moment, Your
5 Honor.

6 **THE COURT:** Just let me know when you're ready.

7 **MS. MARCUS:** Sure. For number seven, --

8 **(Pause)**

9 **THE COURT:** While she's looking, let me just inquire.
10 I saw something about a deposition starting at noon today. Is
11 that in fact happening?

12 **MS. LAWSON-REMER:** No, Your Honor.

13 **THE COURT:** Okay. Any other time constraints you
14 folks have?

15 **MS. LAWSON-REMER:** None from us, Your Honor.

16 **THE COURT:** Okay.

17 **MS. MARCUS:** So to be clear, are we -- we're talking
18 about a particular timeframe and taking out any court rulings
19 or just that they want to know about the impact or effect of
20 these specific decisions?

21 **THE COURT:** Well, where I thought the meet-and-confer
22 had left off was that Plaintiff had -- Plaintiffs had indicated
23 they were willing to limit it, topic seven, to specified court
24 rulings. So it currently reads, and this is my shorthand so
25 it's not -- the wording is not going to be exactly right, but

1 the impact effect of specified court rulings Pavano (phonetic),
2 Berjafel (phonetic) whose I'm sure I'm --

3 **MS. MARCUS:** Sure.

4 **THE COURT:** -- mispronouncing, Windsor, *Jaen*, *Solis-*
5 *Espinoza*, and *Scales* on the State Department's consideration of
6 applications for CRBA's, U.S. passports, or COC's by Plaintiffs
7 or any other person born outside the U.S. who asserts that
8 he/she is a child of a U.S. citizen, whose citizen's U.S.
9 parent is married to a foreign parent, and who does not have a
10 biological relationship to his or her U.S. citizen parent.
11 So --

12 **MS. MARCUS:** Yeah. I think that if it could be
13 specified with respect to the older -- you know, there are a
14 couple court orders -- court decisions here that are more than
15 ten years old. Any guidance that has gone to the field would
16 have been incorporated into the Foreign Affairs Manual. I
17 don't know, I think it would be burdensome for us to go back
18 and look for cables from the 2001, 2002 time period for
19 example.

20 **THE COURT:** Okay, so you're saying it does remain in
21 issue.

22 **MS. MARCUS:** Yes, Your Honor.

23 **THE COURT:** Okay. How about number eight? It was
24 the same thing, Plaintiff had indicated they were willing to
25 limit it to children of men in same sex marriages and to omit

1 the any circumstances language that was at the end of it so
2 that it basically called for testimony -- or preparation on
3 testimony on any circumstances under which the State Department
4 treats children of men in same sex marriages as children born
5 in wedlock if -- I think I've got that right. So, again,
6 Defendants said maybe, we're checking, and so I'm looking for
7 an update on the status. Does that remain in issue or no?

8 **MS. MARCUS:** Your Honor, you'll have to excuse me for
9 a moment. My understanding is that we had given more
10 information back to the Plaintiffs. And so what you have just
11 cited --

12 **THE COURT:** Exactly. That's why I'm asking, what's
13 the status?

14 **MS. MARCUS:** No, I understand, Your Honor. I just --
15 I may need to ask Your Honor for a short break because the
16 information that I have is -- I just need to -- I just would
17 like to pull up some more information about where specifically
18 this stands on the 30(b)(6) -- on topic eight -- I'm sorry, I
19 think that it still is in play. Plaintiffs' counsel probably
20 has more information as to -- than I do or may know off the top
21 of their head what the last --

22 **MS. LAWSON-REMER:** Yes, Your Honor, the --

23 **MS. MARCUS:** -- situation was from the --

24 **MS. LAWSON-REMER:** The last --

25 **MS. MARCUS:** -- offer from the Defendants.

1 **MS. LAWSON-REMER:** -- correspondence on it was that
2 it was still in dispute and that Defendants claimed it was
3 duplicative of other depositions.

4 **THE COURT:** Okay, and that was even after you agreed
5 to limit it to children and men in same sex marriages and to
6 admit that other language about circumstances under which
7 they --

8 **MS. MARCUS:** Your --

9 **MS. LAWSON-REMER:** I believe that to be true but I
10 would have to (indisc.)

11 **MS. MARCUS:** Your Honor, I can say we can agree to
12 that topic. There was testimony about it last week and I think
13 that it's a topic that we can prepare somebody for. We can
14 take that off the table.

15 **THE COURT:** Okay. So as I understand it then,
16 Defendant is saying that number eight is now moot, they're
17 willing to produce a 30(b)(6) witness to testify as to any
18 circumstances under which the State Department treats children
19 of married same sex couples as children born in wedlock; is
20 that right?

21 **MS. MARCUS:** I believe so. If you would allow me
22 just to -- if that's not the case, I will --

23 **THE COURT:** I need to know whether to rule or not,
24 you know, I'm -- we're going to be here really --

25 **MS. MARCUS:** I -- could we take a five -- would it be

1 possible --

2 **THE COURT:** It's already going to be long. We're
3 going to be here a really long time.

4 **MS. MARCUS:** I don't want to waste your time. Would
5 it be possible to take a five-minute recess? I just want to
6 make sure that I have our most recent position in front of me
7 which I'm struggling at the moment to pull up. I thought that
8 it --

9 **THE COURT:** Sure, five minutes. But --

10 **MS. MARCUS:** Thank you, Your Honor.

11 **MR. EDELMAN:** Your Honor, if I can --

12 **THE COURT:** Yeah, sure.

13 **MR. EDELMAN:** I'd like to be respectful of the
14 Court's time. It's conceivable that there may be some other
15 issues that fall into this category and I would just wonder if
16 the Court would prefer to plow through, and then if we end up
17 with one, two, or however many issues that defense counsel
18 wants to consult on, that we could use one break to do all of
19 that rather than episodically have to break the case (indisc.)

20 **MS. MARCUS:** Your Honor, for the 30(b)(6), I just
21 want to call my colleague very quickly and make sure that she
22 has sent me the latest letter that outlines our position. But
23 I'm happy to proceed however you wish.

24 **THE COURT:** Well, you may need to call her about
25 other things so why don't we just plow through here? So I did

1 want to I will say try and resolve the 30(b)(6) deposition
2 topics because it seemed to me, depending upon how those shook
3 out, it may have an impact on at least Plaintiffs' position
4 relative to the interrogatories, at least that was my sense.
5 Plaintiffs' counsel, you can tell me if you agree or disagree.

6 **MS. LAWSON-REMER:** No, Your Honor, your assessment's
7 correct.

8 **THE COURT:** Okay. All right, so what I'm inclined to
9 do then is just to let you know what my tentative rulings are
10 as we go through these. And I will say I have some tentative
11 thoughts on these. I can't say I'm as far along as you would
12 like and probably I would like on some of the requests for
13 production and interrogatories and we may have to, you know,
14 kind of just struggle through them. Your pleadings are very
15 thick and dense, and the issues are novel, and so I have
16 struggled with the proportionality issue. And I feel like many
17 things need to be narrowed even beyond what Plaintiff has
18 already narrowed. And I'm speaking mostly on the document
19 production, the request for production. But I'm not sure on
20 the best way to accomplish that. And so certainly one thought
21 that occurred to me was to -- since everybody was here, at
22 least to perhaps give you folks some more time to confer if you
23 all thought that might be helpful. I don't know if you would
24 or would not find that helpful. I'm getting the sense that
25 maybe it might not be helpful because we don't have all counsel

1 here who are maybe as up to speed.

2 **MS. MARCUS:** No, I'm sorry Your Honor, I did not mean
3 to suggest that I was not prepared. I just don't have our
4 latest bottom line of where we stand right in front of me. But
5 I do have it (indisc.) it but I think that it could be helpful
6 to have a conversation with the Plaintiffs' counsel about the
7 30(b)(6) topics. We have offered in a November 30th letter to
8 have the depositions on either December 14th or December 17th.
9 I know my colleague is working to prep witnesses for -- or a
10 witness for a 30(b)(6). It's just a matter of making sure that
11 we're on the same page as to what exactly the contours are of
12 the topics. As they were propounded, they were overly broad
13 and difficult for us to --

14 **THE COURT:** Okay, here's what I'm going to do. On
15 the 30(b)(6) topics, we're going to go through them and I'm
16 going to give you my tentative views. Then we'll take a break.
17 You folks can chat amongst yourselves, you can make your phone
18 call, and then we'll see where we are.

19 All right, so topic one -- and, again, I'm just
20 short-handing it so if you think I'm leaving out something
21 essentially, you can so indicate. But topic one essentially
22 talks about the process by which and the basis on which the
23 State Department considered and determined any CRBA and U.S.
24 passport for the minor in issue, including the refusal or
25 denial of the application. I am inclined to agree with

1 Plaintiffs' compromised proposal, either produce a 30(b)(6)
2 witness on that topic or agree that other witnesses who testify
3 on that subject may be deemed as 30(b)(6), that is that what
4 their testimony is would bind the entity. And just to clarify,
5 Plaintiff, can you tell me which particular -- is it -- would
6 it be Ms. Day and the supervisor Ruffit? Anybody else?

7 **MS. LAWSON-REMER:** Your Honor, we think Defendants
8 are in a better position to identify which witness would be
9 deemed their corporate representative or organizational
10 representative. We didn't want to sort of direct them. We
11 just offered as a compromise that they -- rather than prepare a
12 witness twice or separately, they could deem the same person.
13 So I defer to Defendants on whom they wish to identify. Having
14 said that, Ms. Ruffit's deposition has already occurred. And
15 so if we had known that she was -- we had -- we didn't probe
16 her, you know, preparation as an organizational deponent, we
17 didn't ask certain topics that we would have asked of an
18 organizational deponent because we confined our questions to
19 her personal knowledge.

20 **THE COURT:** Right. And Ms. Day is not actually even
21 still a current employee so I have my doubts as to whether the
22 Defendant would be comfortable having her constitute the
23 30(b)(6). So --

24 **MS. LAWSON-REMER:** Yes, we will --

25 **THE COURT:** -- I think --

1 **MS. LAWSON-REMER:** -- Your Honor, we --

2 **THE COURT:** They're nodding, defense counsel is
3 nodding. So I think what I'm inclined to do then is to --
4 again, as the tentative at least, require that a 30(b)(6)
5 witness be designated to testify on that topic.

6 Topic two originally was any and all communications
7 concerning Plaintiffs or any request or application for a CRBA
8 and a U.S. passport for the minor, including any refusal or
9 denial of any such application. Plaintiff narrowed it to
10 eliminate basically Plaintiffs or effectively having it call
11 for just communications concerning the request or applications
12 in issue as opposed to writ large any communications concerning
13 Plaintiffs in general. Now, realistically, it may be the same
14 thing but I am inclined to order a 30(b)(6) witness to testify
15 on that subject, so I'm inclined to grant as narrowed on that.
16 Same as on number one and two then on the rulings.

17 Three is State Department's interpretation of 301(g)
18 and 309 as applied to persons who claim to have acquired U.S.
19 citizenship under such provisions, including the rationale for
20 the application or interpretation, including any procedures,
21 practices, guidelines concerning such applications. I'm
22 inclined to limit that somewhat timewise and to perhaps narrow
23 it to the circumstances of a child of I think you call it
24 binational, I called it split citizenship or binational,
25 whatever term you use, whether deemed born in or out of

1 wedlock. That seemed to me to be really what was more an issue
2 here, but I'll hear from Plaintiffs on that.

3 **MS. LAWSON-REMER:** Now, Your Honor?

4 **THE COURT:** Sure.

5 **MS. LAWSON-REMER:** Okay, so with respect -- I think
6 we're talking about very similar things, that in and out of
7 wedlock is the distinction between 301 and 309. Those are two
8 separate sections of the INA that apply depending on whether a
9 child is born in or out of wedlock.

10 **THE COURT:** Well, I understand that. So you're
11 saying it's already implicitly in there.

12 **MS. LAWSON-REMER:** Yes. And that's --

13 **THE COURT:** Okay.

14 **MS. LAWSON-REMER:** -- the heart of the case, right,
15 is that --

16 **THE COURT:** Right.

17 **MS. LAWSON-REMER:** -- this minor child was treated as
18 being born out of wedlock.

19 **THE COURT:** Right. I guess I looked at as defined,
20 as they define it, in other words. So I will say I never saw a
21 definition of "out of wedlock." I only saw a definition of "in
22 wedlock." And 301 it seemed to me -- and, again, this is just
23 looking at the plain language, and I understand you all have
24 arguments about what it -- the import of the language is or is
25 not, or at least as interpreted by the guidance in FAM, but it

1 didn't look to me like 301(g) referenced wed or not wed; it
2 just looked like it was more general and then that 309 was an
3 overlay that said that only applies two out of wedlock if. But
4 it sounds -- okay, so it sounds like what you're saying is that
5 the way I proposed to narrow it is really not a narrowing
6 because it's implicit.

7 **MS. LAWSON-REMER:** I mean, I think ultimately what
8 Your Honor has identified as sort of how the law is interpreted
9 is actually a pretty core piece of the case. And the way the
10 State Department has interpreted that law and applied that law
11 and created policy out of that law is really what goes to the -
12 - how this minor was treated. So I'd say that it -- this --
13 it's difficult for Plaintiffs to conceive of a narrowing that
14 doesn't include the words "301(g)" and "309."

15 **THE COURT:** Okay.

16 **MS. MARCUS:** Your Honor, --

17 **THE COURT:** Yeah, I get -- I'm hearing you to say
18 that the narrowing I was proposing is implicit in the reference
19 to 301(g) and 309. Maybe we're saying it differently but
20 that's my understanding of what you're arguing. Go ahead,
21 defense counsel.

22 **MS. MARCUS:** Well, the legal interpretation, it's --
23 Defendants are struggling to understand how factual discovery
24 would, additional to what has already been exchanged, all of
25 the polices, I mean, we could have somebody read the policy but

1 the policy of the State Department is embodied in the FAM. And
2 what will happen but, you know, spoiler alert, the Department
3 of State designee will be pointing to the FAM, will be pointing
4 to things that we've already identified and have produced, and
5 there's already been testimony on this. So to the -- what
6 they're trying to use factual discovery to probe are legal
7 interpretation. It's just not clear that this is the kind of
8 thing that factual discovery could really be useful for or is
9 designed to do. It's --

10 **THE COURT:** Well, they're entitled to know. It's --
11 you know, it's not just -- you keep calling it "factual
12 discovery," but sometimes factual discovery is understanding
13 what a side's legal position is, historical legal position at
14 least as pertinent to the allegations. And that seems to me to
15 be where we are.

16 **MS. MARCUS:** It's usually like a contention
17 interrogatory. If we're talking about a contention deposition,
18 there's no -- Defendants do not have concerns with a contention
19 deposition. But Plaintiffs are seeking to ask a lot of
20 hypothetical questions that are maybe not with this topic in
21 particular, but generally it seems to Defendants that
22 Plaintiffs are seeking to probe not a contention topic, you
23 know, not applying the law to the facts but really just the law
24 on its own.

25 **THE COURT:** Well, it -- this isn't really law, so to

1 speak. It's policy. It's policy based on FAM. And it -- and,
2 again, I -- this was -- and I think this was covered in some of
3 the requests someplace else, but I sort of had overarching
4 questions about FAM itself. And I looked at what you
5 submitted, and I think this was attached to defense counsel's
6 original declaration, there were a number of pages about the
7 FAM itself and it talked about not just the FAM, but the
8 handbook that goes with FAM. And I don't know if the -- and
9 that suggested that there was more guidance in there. I don't
10 know if the handbook has been produced or not or if anybody has
11 testified about the handbook. It also talks about every year
12 the programming section, and I don't know who the programming
13 section is, and, again, it sounds to me like Plaintiffs has
14 asked about these kinds of things. Every year, they're
15 supposed to look at it and review it and perhaps update it or
16 change it or whatever the case may be. And it seems to me what
17 Plaintiffs are looking for and are probably entitled to have an
18 understanding of is, well, Supreme Court ruled "X," was there
19 any consideration of that. I mean, the language looks the same
20 now as it did in 2014. And there's been law that arguably
21 could or should have impacted what is in the language.
22 Certainly that is a position that parties are taking in the
23 lawsuit. So I think they're just trying to get some insight
24 into all of this and I think that's fair game.

25 **MS. MARCUS:** There -- understood. There was a --

1 these were a lot of the topics of the deposition, the two
2 depositions that we had last week. But if, you know, --

3 **THE COURT:** Well, you want to summarize for me?
4 Because, again, I had overarching questions but I wasn't trying
5 to -- I didn't want to muck up the discussion of the discovery
6 questions that covered some of the same questions I had. So --
7 about FAM and how it's revised and how it works. And another
8 general topic I had which again is the subject of some of these
9 discovery questions is -- and, again, may well be -- the
10 details may be buried in what you gave me, but, you know, what
11 stats, if any, the State Department keeps on CRBA's, are
12 details the same, specifics --

13 **MS. MARCUS:** Right.

14 **THE COURT:** -- are the same, and --

15 **MS. MARCUS:** Yeah. The deponents last week testified
16 that they do not keep stats. If -- but we can have a 30(b)(6)
17 deponent add to that from the Department's --

18 **THE COURT:** So any --

19 **MS. LAWSON-REMER:** Your --

20 **THE COURT:** -- stats. Go ahead, yeah.

21 **MS. LAWSON-REMER:** Your Honor, my understanding from
22 Ms. Marcus during our meet-and-confers is that there is an
23 internal index or database and that as originally requested in
24 our RFP's, the stats did not exist in that manner. We had
25 requested of Defendants to produce the fields that do exist in

1 that database so that then we could work with them to identify
2 what fields would be helpful for Plaintiffs without asking them
3 to create fields that don't exist. That -- Defendants have not
4 produced that index to us or that set of fields. You know, if
5 we had that information in advance of a 30(b)(6), and if we had
6 the documents in advance of a 30(b)(6), then we could ask about
7 those statistics in a different way. But at this point, we're
8 at a standstill because we haven't see that stuff.

9 **MS. MARCUS:** We did provide you with information that
10 had the fields. We gave you links to the published information
11 that describes the databases which does include information on
12 those fields. We can --

13 **THE COURT:** All right, well, you two should confer
14 about that because I'd like -- that'd be interesting to flesh
15 out.

16 All right, well, the -- you know, we haven't
17 gotten --

18 **MS. MARCUS:** I think we're on number three, Your
19 Honor.

20 **THE COURT:** Beg your pardon?

21 **MS. MARCUS:** I believe we're on number three.

22 **THE COURT:** Yeah, we're definitely on number three.
23 As I said, I'm tentatively inclined to grant that but to limit
24 it somewhat on the timeframe. So --

25 **MS. LAWSON-REMER:** Your Honor, we -- what timeframe

1 do you have in mind? Because perhaps we could just accept
2 that.

3 **THE COURT:** Well, I understand you all had different
4 timeframes in mind and I hadn't -- to tell you the truth, the
5 timeframes you all had in mind, it seemed to me it might be
6 appropriate for one timeframe for some requests, one timeframe
7 for another request. So that is one of the things I frankly
8 have struggled with because I understand why you want things,
9 you know, immediately post a significant Supreme Court
10 decision, but at the same time, it's a lot of years and I think
11 it is somewhat burdensome so --

12 **MS. LAWSON-REMER:** Understood, Your Honor, which is I
13 think why we agreed on topic ten to a more narrowed timeframe
14 because we appreciate the concern that a broader timeframe for
15 some topics may not be necessary. For some of the topics where
16 a Supreme Court case is directly relevant and the actions
17 taken, you know, the cable sent or the instructions given as a
18 result of that case is much more relevant.

19 **THE COURT:** I suppose as to this topic I lean towards
20 a timeframe around when the application itself was considered,
21 the applications themselves were considered, and then the
22 current, because there's still -- the issue's still live it
23 seems to me. So the application was 2016 and was acted on
24 2017, right?

25 **MS. MARCUS:** It was January 24th, 2017 through March

1 2nd, 2017. It was submitted in January, 2017, and the
2 adjudication has to take place within 90 days, and it did.

3 **THE COURT:** All right, so I'd be inclined to do 2012
4 and current.

5 **MS. LAWSON-REMER:** Your Honor, 2017 and current?

6 **THE COURT:** Oh, I'm sorry, I couldn't read my
7 writing, 2017, yes, I'm sorry, 2017 and current on topic three.

8 **MR. EDELMAN:** And, Your Honor, --

9 **THE COURT:** Sure.

10 **MR. EDELMAN:** -- just so we can avoid disputes down
11 the line, is it the Court's intention that it would be clear
12 that that does not alter our ability to inquire on topic seven
13 to the extent that time period --

14 **THE COURT:** We haven't gotten to topic seven.

15 **MR. EDELMAN:** But if we were -- you know,
16 fundamentally, the people in Toronto say we followed the law,
17 which we think they mean they followed the FAM. They certainly
18 didn't follow the law in the Ninth Circuit. And we are trying
19 to find out what it is that they did follow, who directed what
20 the "law" should be, and what consideration was given to some
21 of these decisions. And topic three of course relates to that.
22 I understand the Court's limitation but we just want to confirm
23 that we can still ask on seven that if -- the limitation on
24 three doesn't then bleed in so we're met with an objection when
25 we get to seven --

1 **THE COURT:** Okay.

2 **MR. EDELMAN:** -- that the Court limited three.

3 **THE COURT:** Okay. The one doesn't -- as I said, I
4 think different timeframes apply to different things. Number
5 seven specifically now it cross references particular
6 decisions. So I think what I would be inclined to do as to
7 particular court decisions, I'd probably say within six months
8 of each of those decisions. I mean, I -- the agency has to
9 react and I think six months is probably the time period, a
10 reasonable time period by which they would react to a court
11 division (sic) and issue any updates, so I'd probably be
12 inclined to say as to specific court decisions that what the --
13 actually I'd have to look at seven now. Impact effect of one,
14 two, three, six, there are six court decisions referenced on
15 the State Department's consideration of applications for CRBA,
16 U.S. passports, or COC's by Plaintiffs or any other persons
17 born outside the United States who asserts that he or she is a
18 child of a U.S. citizen, whose citizen -- whose U.S. citizen
19 parent is married to a foreign parent and who does not have a
20 biological relationship to his or her U.S. citizen parent. So
21 on that one, I'd be inclined to say the deponent should be
22 prepared to testify as to the six-month period postdating each
23 of those decisions.

24 **MS. LAWSON-REMER:** Your Honor, subsequent to the
25 filing, Defendants proposed a narrowing of that topic that I

1 think the only issue now in dispute is a time period. And I
2 think that the time period that Defendants offered was January,
3 2015, to June 2nd, 2017, so I think the issue is really the
4 earlier time period and whether the Court is inclined to apply
5 that six-month proposal that you articulated to the earlier
6 time periods.

7 **THE COURT:** Remind me of the dates of each of *Pavan*,
8 *Obergefell*, *Windsor*, *Jaen*, *Solis-Espinita* (sic), and *Scales*.

9 **MS. LAWSON-REMER:** Yes, Your Honor. *Pavan* was in
10 2017; *Obergefell* was in 2015; *Windsor* in 2013; *Jaen* from the
11 Second Circuit was in 2018; *Solis-Espinoza* was in 2005; and
12 *Scales* was in 2000.

13 **THE COURT:** Okay, so then --

14 **MS. LAWSON-REMER:** So we --

15 **THE COURT:** Sounds like the only ones that are
16 implicated are *Windsor*, *Solis-Espinoza*, and *Scales*. And I was
17 going to say current so I think that would probably encompass
18 *Jaen*.

19 **MS. LAWSON-REMER:** I think so, Your Honor.

20 **THE COURT:** Pardon me?

21 **MS. LAWSON-REMER:** Yes, Your Honor.

22 **THE COURT:** Okay. So then I'd say -- again, I'll let
23 defense counsel be heard on this, but I'd say for the period of
24 -- to start with January, 2015 through June 2nd, 2017, current,
25 and then the six-month period following each of *Windsor*, *Solis-*

1 *Espinoza*, and *Scales*. Okay, from -- before I hear from defense
2 counsel, does that cover it from Plaintiffs' perspective?

3 **MS. LAWSON-REMER:** Yes, Your Honor.

4 **THE COURT:** Okay. Defense?

5 **MS. MARCUS:** Your Honor, I --

6 **THE COURT:** You need to look up the current chart?

7 **MS. MARCUS:** Well, I thought I -- my understanding
8 was that we were going to go through, you were going to say
9 generally what your thinking was, and then give us time to work
10 together; because I do think that that would probably be
11 efficient. I don't know if you need to --

12 **THE COURT:** I'm just asking your view on the
13 tentative but --

14 **MS. MARCUS:** That seems reasonable, Your Honor.

15 **THE COURT:** Okay, then why don't I just keep going
16 through. We skipped four, five, and six. I'll -- at the -- I
17 will break after we go through all of them and I'll let you
18 chat and you can make your -- you can check to make sure you
19 have current information, defense counsel. And then when I
20 retake the bench, you can tell me if you have anything to add
21 and then I'll rule on at least the 30(b)(6) topics. But
22 hopefully if you have the tentatives on the topics, that might
23 give you a basis to further confer on the other outstanding
24 issues which may well be impacted, like the interrogatories
25 which -- so that's why I'd like to continue plugging through

1 these.

2 So on four, I was inclined to grant that. And four
3 was any protocol, procedure, practice, policy, guideline for
4 applying 309 instead of 301(g) to a person born out of the
5 United States to married parents with one being a U.S. citizen
6 if the person is not biologically related to the U.S. citizen
7 parent, including the rationale of government interests or
8 concerns regarding the same, and application of the same to
9 Plaintiffs and/or other same sex couples who have applied on
10 behalf of a child or children for a CRBA, passport, or COC. So
11 I was inclined to grant that. Defense counsel, anything you
12 wanted to add on that before I just move on?

13 **MS. MARCUS:** Not at your -- not this moment, --

14 **THE COURT:** Okay, not at this time.

15 **MS. MARCUS:** -- Your Honor.

16 **THE COURT:** All right, topic five calls for
17 communications between specified CIS units and the State
18 Department. Well, specified and any other CIS units in the
19 State Department regarding procedures for applying 309 instead
20 of 301(g) to persons born outside of the United States to
21 married parents, one being a U.S. citizen if the person is not
22 biologically related to the U.S. citizen and including the
23 rationale for the same. It looked to me like Plaintiff had
24 indicated a willingness to narrow this to eliminate CIS units
25 not specifically referenced. And then I think I saw something

1 suggesting that you were also willing to eliminate the first
2 CIS unit, I guess a fraud department maybe that was initially
3 referenced.

4 **MS. LAWSON-REMER:** Your Honor, excuse me, I don't --

5 **THE COURT:** I could be confusing it. I'm -- I read
6 some of the correspondence and so I was -- I'm a little --

7 **MS. LAWSON-REMER:** I don't believe so. I think we do
8 have, you know, concerns about whether, you know, what the
9 fraud department does with --

10 **THE COURT:** Okay.

11 **MS. LAWSON-REMER:** -- respect to some of these.

12 **THE COURT:** So the only thing -- so you were willing
13 to narrow it as --

14 **MS. LAWSON-REMER:** The enumerated --

15 **THE COURT:** -- to the specified CIS units as opposed
16 to and other CIS units.

17 **MS. LAWSON-REMER:** Yes. Just so that Defendants
18 could focus on --

19 **THE COURT:** Sure.

20 **MS. LAWSON-REMER:** -- enumerated ones and not think
21 that we're going to ask about something that they don't have
22 the opportunity to prepare a witness on.

23 **MS. MARCUS:** Your Honor, I'm not sure how we could
24 prepare a deponent for any and all communications. I mean,
25 we're talking hundreds of individuals at the Department of

1 State who could be exchanging communications and emails with
2 hundreds if not thousands of people at the Department of
3 Homeland Security. We don't have these emails collected. We
4 cannot between now and the deposition review all of them and
5 have somebody be prepared to testify as to all of those
6 communications. This is the problem. We -- Defendants do not
7 have any objection to generally allowing Plaintiff the
8 opportunity to question somebody on some of these topics. But
9 the problem is that to obligate Defendants to prepare an
10 individual to testify as to all of these communications that
11 are so voluminous, we do not have them even in our current
12 possession, "we" being defense counsel, it just seems like it's
13 an impossible task.

14 **THE COURT:** Well, then propose a way to narrow it.

15 **MS. MARCUS:** Okay, Your Honor.

16 **THE COURT:** I mean, specified -- emails of specified
17 custodians, you know, something, a sampling, you know. This --
18 look, we're well along in discovery. These were sent out in --
19 I don't know when. Remind me when did the depo notice go out?

20 **MS. LAWSON-REMER:** Your Honor, we sent our request
21 for production in August and our deposition notice in
22 September. So to the extent Defendants have -- are saying they
23 haven't been able to collect documents, they've had -- at least
24 have been on notice of our interest in this topic since then.

25 **MS. MARCUS:** We've been proposing narrowing for all

1 of these topics. We've gone back and forth with them on
2 several letters and proposals for narrowing them and --

3 **MS. LAWSON-REMER:** Your Honor, the last
4 correspondence on this particular topic from Defendants was a
5 request that we eliminate it, not a request to narrow it or an
6 offer to narrow it. We -- also, to the extent the claim is
7 burden of any and all communications, we're focused on the
8 application of 309 over 301. So this isn't the entire universe
9 of people coming in and out of the United States or going into
10 the consulate and how those people are treated. We're really
11 focused on the core issue in this case of the incorrect
12 application of the law.

13 **MS. MARCUS:** Your Honor, we're -- Defendants are
14 intending to designate one person to testify on behalf of the
15 Department. And if -- I don't know if you have a sense of -- I
16 mean, we're agreeable to have one person for seven hours and
17 they can talk about all of these topics but with the
18 understanding that it's going -- that Plaintiffs will be able
19 to get a contour of the -- they will be able to get the
20 Defendants' position on the general contours of these topics.
21 But the specific way that the topics have been propounded are
22 so overly broad and unreasonable that it's just the problem is
23 that -- is not that we are not agreeable to produce somebody on
24 most of these topics. It's just that --

25 **THE COURT:** Well that may be news to Plaintiffs, but

1 go ahead.

2 **MS. MARCUS:** I don't think that it is. I mean, we
3 have had -- how many letters have we sent you on -- and have
4 you sent us, I mean, on how many conversations? We --

5 **THE COURT:** Okay, well address your comments to the
6 Court, please.

7 **MS. MARCUS:** Your -- I'm sorry, Your Honor. So it's
8 just a matter of how do we take on the burden in a reasonable
9 way of preparing that person and understanding sort of the
10 limits to what can be asked of that person, given that it is
11 humanly impossible for that person to testify to, for example,
12 any and all communications that the Department -- that anybody
13 at the Bureau of Consular Affairs had with people in even the
14 specific units of the Department of Homeland Security.

15 **THE COURT:** Okay, so what I'd like you to do on the
16 break is talk about particular custodians who are likely to
17 have communications along these lines, keywords or some other
18 methodology of narrowing, maybe agree to some things along
19 those lines so that it's more -- and timeframe, limiting it
20 again so that this doesn't become an impossible task or a waste
21 of everybody's time. So you folks can confer on that. Or
22 sampling, you know, specific, you know, for this month of this
23 year, something like that, things I would hope had already been
24 talked about, but maybe not.

25 Okay, number six, this calls for any evidentiary

1 requirements imposed by the State Department for an individual
2 to establish U.S. citizen under 301(g) or 309, including when
3 genetic testing will/won't be requested as part of that
4 showing, any requirement that a U.S. citizen demonstrate a
5 biological connection to or relationship with the child born
6 outside of the U.S., and sources of information relied upon by
7 the State Department to support imposition of a biological
8 relationship requirement for acquisition of citizenship at
9 birth. I was inclined to limit this to Plaintiffs'
10 applications and to current requirements.

11 **MS. LAWSON-REMER:** Your Honor, if I may?

12 **THE COURT:** Yeah.

13 **MS. LAWSON-REMER:** Two points. One, with respect to
14 the -- in this case, there are -- there's a discrimination
15 claim under the due process clause. And one of the ways in
16 which discrimination can be shown is through treatment of
17 others in similar situations. So with respect to the ability
18 to probe how others are treated here, that timeframe I think
19 might be a little bit too narrow. I think we would be open to
20 a slightly broader time period but not the time period that we
21 originally proposed. And so at this point, I think the two
22 competing time periods are the same ones that we've articulated
23 before. We offer January, 2013 to January, 2018. And they
24 asked for 2015 to 2017.

25 **MS. MARCUS:** Your Honor, I don't want to cut you

1 off --

2 **THE COURT:** Let me -- let her finish and then I'll
3 let you --

4 **MS. MARCUS:** Okay.

5 **THE COURT:** -- respond. Go ahead.

6 **MS. LAWSON-REMER:** So in their last letter to us on
7 this topic, Defendants had proposed a slightly more narrow
8 topic that we said we would be willing to accept but that we
9 wanted to hammer out an agreeable timeframe.

10 **MS. MARCUS:** Your Honor, --

11 **THE COURT:** Yes.

12 **MS. MARCUS:** -- I think that it's going to be most
13 helpful for you to go through the whole list because we are
14 talking about, you know, an entire package. So it may be that
15 on individual things, when we had in mind that there would be,
16 you know, five topics that the parties would agree to, you
17 know, the parties may have had a certain discussion. I think
18 that your going through what you are inclined to do would be
19 informative to the parties. And instead of having us go back
20 and forth at this point, let us hear you and talk to each other
21 and then respond, because I think we're all eager to use your
22 time as efficiently as possible. And so if you go through the
23 whole list rather than responding to each one of these things
24 and having more thoughts on it, let's just hear what you --

25 **THE COURT:** Okay.

1 **MS. MARCUS:** -- have to say, and then we can respond
2 to the whole -- we can discuss the whole thing and then each
3 side can be given an opportunity --

4 **THE COURT:** That's fine.

5 **MS. MARCUS:** -- to be heard.

6 **THE COURT:** Why don't we do that. So that was my
7 view on six.

8 Seven, we've already talked about.

9 Eight, I was inclined to grant eight.

10 **MS. LAWSON-REMER:** Your Honor, you had previously
11 said that eight was agreed upon as moot because defense counsel
12 in this proceeding had said that she would accept the narrowed
13 topic.

14 **THE COURT:** Oh, but then she said she wanted to look
15 at the updated version of the chart.

16 **MS. LAWSON-REMER:** Okay.

17 **THE COURT:** If memory serves. So as I said, I was
18 inclined to grant that.

19 Nine, I was inclined to grant at least -- I was --
20 that's why I was asking about what steps they had, if any. So
21 I wanted to elicit further information regarding what
22 statistics exhibited -- existed, and so I'll reserve on that
23 when you folks talk more about what the fields are and hash
24 that out.

25 Ten and 11, no longer an issue.

1 Twelve, I was inclined to grant.

2 Thirteen, I was inclined to grant.

3 Fourteen, I was inclined to grant.

4 Fifteen, I thought was not in dispute but let me look
5 at it again because I know it is now.

6 **MS. LAWSON-REMER:** Your Honor, at this point the only
7 dispute is the time period, not the scope.

8 **THE COURT:** Right, I understand that. I just need to
9 look at the request because I hadn't thought about it because I
10 was told it was not in dispute. I'll -- I'm inclined to accept
11 Defendants' timeframe plus current.

12 I was inclined to grant 17.

13 Eighteen, I was tabling because there was a proposal
14 on the table and it relates to resolution of certain document
15 requests.

16 Nineteen, inclined to grant for Defendants' timeframe
17 and current. Twenty, same. And I think that covers all the
18 topics. All right, we can take a break now. How much time do
19 you think you folks you need?

20 **MS. LAWSON-REMER:** Your Honor, I think it depends on
21 how much time Defendants first need to -- defense counsel needs
22 to consult with her colleague.

23 **THE COURT:** All right, defense, why don't you give me
24 your estimate?

25 **MS. MARCUS:** I'm just going to have a five-minute

1 conversation with her and then maybe have her be on the phone
2 when we confer with each other.

3 **THE COURT:** Okay, why don't we say 15 minutes to
4 start? If you're still in the midst of it, the clerk will let
5 me know that and we can wait longer. You can either do it here
6 -- there is a little anteroom in between the doors that is kind
7 of more intimate and may make -- it may be easier for you all
8 to be across the table from another, but suit yourself. Okay.

9 **MR. EDELMAN:** Your Honor, let me just --

10 **THE COURT:** Yeah?

11 **MR. EDELMAN:** -- say, the Court's been extremely
12 patient and very thorough, and we genuinely appreciate all the
13 Court's attention.

14 **THE COURT:** Well, it's -- I wish I could say I had --
15 I was as -- had put as much -- let me just say the other
16 request, discovery request, is the harder -- it's a harder road
17 to hoe. And I guess I should say I'm not -- this is fairly
18 laborious and I'm not sure we're going to be able to get
19 through all of this in one sitting or that it makes sense to do
20 that. And I know there -- time is of the essence as well. I
21 suppose I wanted to get a sense of whether it might make sense
22 to reconvene perhaps telephonically in a couple of days when
23 I've heard some arguments from you, you've conferred a little
24 bit more. But, again, I'm not -- I don't know all of your
25 schedules. So if we were going to do something like that, I'd

1 probably --

2 **MR. EDELMAN:** Well, speaking for the --

3 **THE COURT:** Sure.

4 **MR. EDELMAN:** Speaking for the Plaintiffs, Your
5 Honor, given all the Court's attention to this, we'll endeavor
6 to make ourselves at the Court's convenience. Fundamentally,
7 and I think the Court has already discerned this, it is
8 extremely important that we get some dates for the depositions
9 locked in. And once we do that, we can work around the Court's
10 schedule and those dates to try to do whatever the Court thinks
11 makes sense. I think --

12 **THE COURT:** Well, --

13 **MR. EDELMAN:** -- it's critical.

14 **THE COURT:** Yeah, why don't you talk about that as
15 well then, try and pin down those dates. Go ahead.

16 **MS. MARCUS:** No, --

17 **THE COURT:** Defense counsel?

18 **MS. MARCUS:** -- my understanding is that the deponent
19 designee is available on the 14th and the 17th, so I think we
20 should try to come to some agreement or if we --

21 **THE COURT:** Okay, well you can talk about that
22 amongst --

23 **MS. MARCUS:** Sure.

24 **THE COURT:** -- yourselves then. But try to -- let's
25 -- look, we can -- I think you're the only thing on my calendar

1 today so we can just spend the entire day on this. I think
2 that's a slog, but we can continue going through this. But I
3 urge you to try and resolve what you can. And even if you want
4 to talk further settlement now, that's fine with me, too.

5 **MS. MARCUS:** Thank you, Your Honor.

6 **THE COURT:** All right, we'll take a break.

7 **MR. EDELMAN:** Thank you, Your Honor.

8 **MS. LAWSON-REMER:** Thank you, Your Honor.

9 **MS. RAYBUCK:** Thank you.

10 **THE CLERK:** Court is in recess.

11 **(Recess taken from 11:29 a.m. to 12:48 p.m.)**

12 **THE CLERK:** Remain seated and come to order. This
13 Court is again in session, the Honorable Jacqueline Chooljian,
14 United States Magistrate Judge, presiding.

15 Recalling Case Number 18-CV-523, Andrew Mason Dvash-
16 Banks, et al. versus the United States Department of States,
17 et al.

18 **THE COURT:** All right. I'll just indicate for the
19 record that the same counsel are all present.

20 All right. Let me ask Ms. Lawson -- Remer is it?

21 **MS. LAWSON-REMER:** That's right, Your Honor. Yes.

22 **THE COURT:** Remer. Can you bring me up to speed?

23 **MS. LAWSON-REMER:** Sure. The current state of
24 affairs, the counsel met and conferred for the better part of
25 an hour, and we actually, I think, have made substantial

1 progress. Plaintiffs are prepared to accept the tentative on
2 everything. As you've said, we just wanted to clarify topic
3 number six. From our perspective, the outstanding topics that
4 remain in -- at issue are the ones that you have not yet ruled
5 on, and we think we are much closer now than we were before.

6 With respect to topic five, our understanding is that
7 defendants are going to endeavor to identify what
8 communications they would be prepared to offer a witness on, as
9 opposed to the any and all communications descriptor that we
10 had included in our notice topic, that they are going to
11 endeavor to get back to us by, I think, the middle of the day
12 or end of the day tomorrow with that information and that we
13 could potentially speak to the Court again either Thursday or
14 Friday if there is a need, but either -- or, if not, we would
15 notify the Court that there's no need and that we've reached an
16 agreement.

17 With respect to topic 18, it's a similar situation,
18 Your Honor. One of -- this topic and topic 17 relate to
19 statistical information that plaintiffs would use to show
20 intent. And my understanding is that defendants are going to
21 endeavor to identify the fields that we've previously discussed
22 with you, to provide that information by the end of the day
23 tomorrow, and also make an additional inquiry as to what other
24 statistical information may be available either via census or
25 elsewhere and that we would --

1 **THE COURT:** I'm sorry; via what?

2 **MS. LAWSON-REMER:** The census. My understanding --

3 **THE COURT:** Oh, the census?

4 **MS. LAWSON-REMER:** Yeah. My understanding is that
5 the census does have some information about bi-national couples
6 that could be relevant. I don't know if that information is in
7 the State Department's possession or if they have ingested that
8 in any manner. I was trying to make an offer of compromise,
9 and that was one of the suggestions.

10 So, and then I think that for us the only -- the only
11 issue that I wanted to clarify with the Court is with respect
12 to topic six. After our supplemental briefing had been
13 submitted, defendants proposed a narrowing of that topic, and
14 plaintiffs have accepted that proposal and are inclined to also
15 accept the Court's tentative of the time period being the year
16 in which plaintiffs -- plaintiff applied for his CRBA and
17 passport, so 2017, and the current time period.

18 **THE COURT:** Okay. So, I guess I'm not clear on
19 you're saying you want it -- because previously I gather it had
20 been narrowed to 2015 to 2017? And now you're saying --
21 because I had indicated tentatively 2017 plus current. You're
22 saying you're agreeable to the latter or both?

23 **MS. LAWSON-REMER:** So, I would -- I'm -- sorry, Your
24 Honor. We're agreeable to the scope of the topic, as
25 articulated by defendants in their November 27th communication

1 to us, and in terms of the time period, we would be amenable
2 to, I think, whatever the Court's inclination is there,
3 provided it covers that 2017 period and the present.

4 **THE COURT:** Okay. So, I'm not privy to what the
5 November 27 defense counsel letter is, but if I reference it,
6 you all know what it is, so -- time would be 2017 plus current.

7 All right. Ms. Marcus, did you want to add anything?

8 **MS. MARCUS:** Yes, Your Honor. I think there's just a
9 few big picture aspects of the topics as the Court has
10 articulated them with the -- with the date restrictions that
11 the Court has indicated that it is inclined to order. I just
12 have a couple of big-picture clarifications to ask you and just
13 want to be heard on a couple of the specific -- very, very
14 quickly -- specific topics.

15 First, there's a few of these topics -- so, generally
16 speaking, we are also amenable to the Court's -- what the Court
17 was inclined to order. We would like to clarify; for example,
18 for number two, the Court has -- or maybe plaintiffs previously
19 had narrowed that topic to be only about Ethan. The topic
20 as --

21 **THE COURT:** We don't use names, remember?

22 **MS. MARCUS:** Oh, I'm sorry, Your Honor. Only on one
23 particular child. The clarification is with respect -- when
24 the topic says any and all communications, there are verbal
25 communications that occurred between witnesses who are being

1 individually deposed. So, the -- other than the people who are
2 at those -- who are party to those oral communications, having
3 a deponent from the State Department, you know, describe
4 communications to which that individual in the department
5 generally wasn't, you know, present, I think is a difficulty.
6 So, with respect to the oral communications, would it be
7 sufficient for the designee to acknowledge the individual's
8 testimony with respect to their oral communications and to
9 acknowledge it?

10 **THE COURT:** Well, are there any other oral
11 communications you anticipate that would fall within the scope
12 of this, or you just don't know as we sit here?

13 **MS. MARCUS:** There aren't, generally. I mean, there
14 may be some work product type of communications that occurred
15 after the -- after the litigation was filed, but --

16 **THE COURT:** Would it make sense to limit it to
17 written communications, then? Obviously, I'll let plaintiff
18 weigh in, but that probably makes sense.

19 **MS. LAWSON-REMER:** Your Honor, the concern there is
20 that our understanding is that the person who adjudicated this
21 no longer works at the State Department, and so to the extent
22 she had conversations with others in the process of
23 adjudicating the minor's application, we would need a State
24 Department organizational deponent to speak to those so that we
25 can say --

1 **MS. MARCUS:** Well --

2 **MS. LAWSON-REMER:** -- the State Department's
3 position.

4 The other issue, I think, is that if there was a
5 decision to deny and a conversation about that decision
6 occurred that identified certain rationale that wasn't then put
7 into an email, we would want to know about that conversation.

8 **MS. MARCUS:** She -- she certainly --

9 **THE COURT:** Hold on.

10 **MS. LAWSON-REMER:** And, lastly, Your Honor, as you're
11 aware, Congressman Lieu did inquire as to sort of what happened
12 here, and there were conversations that took place in
13 connection with responding to his inquiry. If Mr. Hernandez
14 was on vacation, so he didn't have those conversations, then
15 somebody else needs to tell us what those conversations were.

16 **MS. MARCUS:** I think, Your Honor, we could limit it
17 to oral communications that took part -- place during the
18 adjudication of the applications and in connection with
19 answering the congressional inquiry. And if it was that -- if
20 it was so limited, that would take care of the concern that I
21 raised.

22 **MS. LAWSON-REMER:** Your Honor, to the extent --
23 again, we don't know how the State Department handles
24 applications once they've been denied, but to the extent there
25 was an inquiry into reopening it or keeping it closed and that

1 did or didn't happen, we would want to know that.

2 **THE COURT:** Unless there's -- the problem is, is
3 unless there is some kind of written record of an oral
4 communication, there's not going to be any way for, it seems to
5 me, any person they prep to be aware of it or for them to be
6 aware of it. I mean, if you disagree with that, tell me why
7 and what you think we can do. I'm willing to try and --

8 **MS. LAWSON-REMER:** Certainly.

9 **THE COURT:** -- work with you on this, but I'm just
10 not sure how you get to the oral communications if there isn't
11 a written memorialization.

12 **MS. LAWSON-REMER:** Right. Your Honor, I understand.
13 So, I don't want to tell defense counsel how to prepare a
14 witness. That's not -- that's not my intention. But in the
15 past what I have done is, when preparing a 30(b)(6) witness, is
16 I have allowed them to interview individuals that were privy to
17 information or reviewed their deposition transcripts. Ms. Day
18 has not yet been deposed, so there is no deposition transcript
19 to review, but certainly -- and neither has Mr. Hernandez. But
20 that's one way in which an oral communication could be -- you
21 know, a person could be educated about those communications.

22 **MS. MARCUS:** There --

23 **THE COURT:** Go ahead.

24 **MS. MARCUS:** There is no need to think -- to come up
25 with hypotheticals of what oral communications may have

1 occurred outside of the adjudication time period and the time
2 period of the consideration of the congressional inquiry.
3 Those are two actions that occurred. And I can represent that
4 there -- that the case was not reopened, and there was -- I
5 don't know if they want to talk about whether it was ever
6 considered to be reopened. If that's the case, you know, that
7 is going to be another one. I've seen no written information
8 that goes beyond these two periods of, you know, consideration.
9 So, I think our proposal, again, is to limit the oral
10 communications to those connected to the adjudication and those
11 connected, if any, to the congressional testimony.

12 **MS. LAWSON-REMER:** Your Honor, to the extent it's
13 really a matter -- a matter of just inquiring as to whether
14 those individuals that were involved in the initial
15 adjudication or who are aware of the case now have had oral
16 communications that are not privileged --

17 **MS. MARCUS:** This was asked at the depositions --

18 **THE COURT:** Okay. So, wouldn't --

19 **MS. MARCUS:** -- last week.

20 **THE COURT:** Wouldn't what you're saying be
21 encompassed within oral communications concerning the
22 adjudication?

23 **MS. LAWSON-REMER:** That -- yeah, I think that we can
24 accept that, Your Honor. And --

25 **THE COURT:** Concerning -- how about the consideration

1 and adjudication?

2 **MS. LAWSON-REMER:** Right.

3 **THE COURT:** So, to the extent there is a
4 consideration posted, adjudication -- maybe -- maybe that
5 covers it.

6 **MS. LAWSON-REMER:** But is that one piece of the
7 topic, Your Honor? And the other piece, though, is with
8 respect to Congressman Lieu.

9 **THE COURT:** Right. Right. Just I'm trying to do one
10 at a time. Hold on.

11 **(Pause)**

12 **THE COURT:** So, I'd probably -- be somewhat
13 duplicative, but it would be any and all written communications
14 concerning any request or application for a CRBA and U.S.
15 Passport for the minor in issue, including any refusal or
16 denial of any such application, and any oral communications
17 concerning the -- or -- yeah; concerning the consideration and
18 adjudication of any request or application for a CRBA and U.S.
19 Passport for the minor, including any refusal or denial of such
20 application, and any oral communications relating to the
21 congressional inquiry regarding the same?

22 **MS. LAWSON-REMER:** Yes, Your Honor.

23 **THE COURT:** Does that work? Plaintiff's saying yes.
24 Defense?

25 **MS. MARCUS:** And relating means, you know, during --

1 during the -- during the process of considering the
2 applications and during the process of responding to the
3 congressional test -- the inquiry, right? You're not asking --
4 for example, I had a conversation with somebody at the State
5 Department last week about -- relating to the applications, but
6 that is not a oral communication that you -- that is within the
7 scope of the topic, as you understand it.

8 **THE COURT:** Well, was it someone to whom a privilege
9 did or did not apply? I mean, I --

10 **MS. MARCUS:** I mean, you know, since the -- since the
11 litigation was filed we've had a lot of internal communications
12 that generally might be considered to relate to the
13 applications and figuring out how to respond to the litigation.
14 But I think what my understanding is you're looking for the
15 communications that were part and parcel of responding to the
16 congressional inquiry and responding to the applications and
17 considering the applications that were submitted.

18 **THE COURT:** I keep scratching out and scribbling.
19 I'm not going to be able to get any of this down, so -- just a
20 moment.

21 **(Pause)**

22 **THE COURT:** How about if I exclude other than with
23 counsel? Does that satisfy?

24 **MS. MARCUS:** The direction of counsel. I mean, you
25 know, they had to have some internal conversations at the State

1 Department and to also to respond and gather information and
2 respond to the interrogatories. I mean --

3 **THE COURT:** Other than with or at the direction of
4 counsel to this action --

5 **MS. MARCUS:** Sure.

6 **THE COURT:** -- relating to the congressional inquiry
7 of the same. And, so, I'd put the same parameters. Any and
8 all -- so, it's any and all written communications concerning
9 any request or application for a CRBA and U.S. Passport for the
10 minor, including any refusal or denial of any such application,
11 and any and all oral communications other than with or at the
12 direction of counsel to this action relating to the
13 consideration and adjudication of the request or application
14 for a CRBA and U.S. Passport for the minor, including any
15 refusal or denial of any such application, and any and all oral
16 communications other than with or at the direction of counsel
17 to this action relating to the congressional inquiry of the
18 same.

19 Plaintiff?

20 **MS. LAWSON-REMER:** That's acceptable to plaintiffs.

21 **MS. MARCUS:** Thank you.

22 **THE COURT:** Defense?

23 **MS. MARCUS:** Thank you, Your Honor.

24 **THE COURT:** Okay.

25 **MR. EDELMAN:** Your Honor --

1 **MS. MARCUS:** And that communications concept that's
2 sort of part and parcel or not at the direction of counsel,
3 that general framework defendants would propose would be
4 reasonable and appropriate for any -- for the topics that talk
5 about communications.

6 One of the other topics that I wanted to be heard on
7 is -- and Ms. Lawson-Remer is correct with respect to topic
8 five that --

9 **THE COURT:** Okay. Let's stop for a moment. Your
10 recent suggestion just now, is that something that has been
11 discussed with plaintiff's counsel?

12 **MS. LAWSON-REMER:** It has not, but plaintiffs don't
13 intend to inquire into privileged information. That -- to the
14 extent that is a valid objection or, you know, an area that
15 plaintiffs -- the plaintiffs don't intend to do that. So, it
16 can be --

17 **THE COURT:** Maybe it's just --

18 **MS. LAWSON-REMER:** Like, it can be generally --

19 **THE COURT:** -- any and all non-attorney-client
20 privileged, work product communications instead of other than
21 with or at the direction of counsel.

22 **MS. LAWSON-REMER:** Yeah. If we're speaking of
23 attorney-client privilege or work product protection --

24 **THE COURT:** Yeah.

25 **MS. LAWSON-REMER:** -- that's understood. I think we

1 do have an outstanding issue with respect to deliberative
2 process privilege, but that we have not --

3 **THE COURT:** Hasn't been invoked, as far as I can
4 tell, properly anyway. But --

5 **MS. LAWSON-REMER:** Yes, Your Honor. That's our
6 concern.

7 **THE COURT:** Okay.

8 **MR. EDELMAN:** Your Honor, if I may, it would just be
9 helpful to the parties to understand what the Court envisions
10 with respect to how the situation will work regarding topic
11 six, in particular, and five -- I guess maybe all of them. But
12 to the extent that we're talking about communications that
13 individuals other than the designee, the actual deponent had,
14 is it the Court's expectation that the designee will conduct a
15 reasonable inquiry to --

16 **THE COURT:** Of course.

17 **MR. EDELMAN:** -- to inform him or herself and not
18 simply say, "Well, there's a deposition transcript of Mr. So-
19 and-so or Ms. So-and-so; you can go and read it"?

20 **THE COURT:** Of course. Yes.

21 **MR. EDELMAN:** Okay. Thank you, Your Honor, for the
22 clarification.

23 **MS. MARCUS:** And it's not necessarily on the
24 designee, correct? It's the department has to prepare the
25 designee; the obligation -- it's on the designee but also the

1 department who's designating to prepare the designee.

2 **THE COURT:** There are obligations on both.

3 **MS. MARCUS:** Okay.

4 **THE COURT:** Yes.

5 **MS. MARCUS:** Correct. I mean, thank you, Your Honor.

6 **THE COURT:** I feel like you all are just -- want to
7 speak to each other about these things and I'm the person
8 you're just using to do that. But okay. Let me --

9 **MS. LAWSON-REMER:** There --

10 **THE COURT:** I know you have something else, but what
11 are the ones -- other ones? Just give me the numbers for now.

12 **MS. LAWSON-REMER:** Sure. Thirteen and 14 and 17 and
13 18.

14 **THE COURT:** Okay. Let's just --

15 **MS. LAWSON-REMER:** And five.

16 **THE COURT:** -- again, so we're all -- and what?

17 **MS. LAWSON-REMER:** And five. I'm sorry.

18 **THE COURT:** Anything else?

19 **MS. LAWSON-REMER:** I don't believe so, Your Honor.

20 **THE COURT:** Okay. Let me just go through in order
21 where we are, so make sure we're all on the same page, okay?
22 So, as to one, it was granted -- I have as narrowed. And I'm
23 trying to recall now --

24 **MS. LAWSON-REMER:** Your Honor, I think that that's
25 topic two that's granted as -- as narrowed.

1 **THE COURT:** Okay. Well, I know that's definitely
2 topic two. Okay.

3 **MS. LAWSON-REMER:** We --

4 **THE COURT:** All right. So, go ahead.

5 **MS. LAWSON-REMER:** I --

6 **THE COURT:** Did you have something on topic one?

7 **MS. LAWSON-REMER:** Oh, yes, Your Honor. The -- now
8 I'm recalling your tentative with more detail. You had
9 originally been inclined to accept our offer of allowing them
10 to double designate an individual witness as their
11 organizational deponent, and I said the issue with that now is
12 that in some respect that ship has sailed because the deponents
13 have already -- the individual depositions have already
14 occurred. So, I thought that you had landed on to tentatively
15 accept the -- or to grant the topic --

16 **THE COURT:** Yeah. I think I have. I think you're
17 right. So, number one granted. Number two granted as
18 narrowed, and we just talked about that. Number three; granted
19 as to 2017 and the current time. Number four; I believe I said
20 granted. Number five; this was the one where defense counsel
21 wanted to address?

22 **MS. MARCUS:** Yes, Your Honor. Number five has the
23 same language with respect to any and all communications, and
24 we would ask that the same -- the same approach be taken for
25 number five as you've just taken for number two.

1 **THE COURT:** Okay. Well, on this one I thought you
2 folks were going to -- defense was going to identify what
3 communications you'd be prepared to offer. You were going to
4 talk to plaintiffs about that, and then we were going to either
5 confer again on a telephonic or you were going to notify me we
6 didn't need to do that. So, why do I need to address that one
7 further right now?

8 **MS. MARCUS:** You don't need to, Your Honor. I
9 think --

10 **THE COURT:** Okay.

11 **MS. MARCUS:** I just wanted to put on the record that
12 we are working to get back to the plaintiff's counsel, as just
13 discussed, and we'll endeavor to do so by close of business
14 today. We do have the same -- notwithstanding that, we do have
15 the same general concern with the language "any and all
16 communications" and would ask either later or at this time that
17 a similar approach be taken as for number two. But we will get
18 back to plaintiff's counsel on --

19 **THE COURT:** Well, confer. They said they're not
20 going to be asking -- or not intending to ask for privileged
21 information, so let's move to six.

22 So, on this one the parties agree that the scope
23 that -- well, the time is going to be 2017 and current, and the
24 scope is going to be as reflected in defense counsel's 11/27
25 letter. I should say otherwise the scope as in the November 27

1 letter.

2 **MS. LAWSON-REMER:** Yes, Your Honor.

3 **THE COURT:** Okay. As to seven, this was limited to
4 the specified cases, and it was for the following time periods:
5 January, 2015, to June 2nd, 2017; the six-month period
6 following Windsor, Solis-Espinoza (phonetic), and Scales
7 (phonetic), and currently.

8 **MS. LAWSON-REMER:** Yes, Your Honor, with one
9 clarification, which is that plaintiffs accepted defendant's
10 proposal in their November 27th letter as to the description of
11 the topic.

12 **THE COURT:** I do not have this letter, right? Is
13 this a letter I have?

14 **MS. LAWSON-REMER:** Your Honor, I'm happy to give you
15 a copy.

16 **THE COURT:** Is -- I'm just say --

17 **MS. LAWSON-REMER:** I don't believe --

18 **THE COURT:** You can give it to me, but is it one I
19 already have some -- I mean --

20 **MS. LAWSON-REMER:** I don't believe that it was
21 included in defendant's supplemental submission, but I'm not
22 sure.

23 **MS. MARCUS:** I think it probably was --

24 **THE COURT:** Actually, it is.

25 **MS. MARCUS:** -- an attachment to the supplemental.

1 **THE COURT:** I think it's Exhibit 3 to defendant's
2 supplemental.

3 **MS. MARCUS:** That's correct, Your Honor.

4 **THE COURT:** Okay.

5 **MS. MARCUS:** It's Document 56 dash 3.

6 **MS. LAWSON-REMER:** Oh. That's correct.

7 **THE COURT:** Okay.

8 **MS. LAWSON-REMER:** This also was what I was trying to
9 put my fingers on earlier today, and I apologize again for that
10 delay.

11 **THE COURT:** Okay. So, number seven. Okay. So, I'll
12 just say the scope is narrowed to specified court rulings. The
13 date -- time frames I have indicated, and as further reflected
14 in defense counsel's November 27 letter, which is Exhibit 3 to
15 defendant's supplemental memo.

16 Anything else on that one?

17 **MS. LAWSON-REMER:** No, Your Honor.

18 **MS. MARCUS:** No, Your Honor.

19 **THE COURT:** Okay. Eight was a grant, and that was as
20 plaintiff had narrowed it.

21 Nine; this one I think you were going to talk about
22 the fields. Right?

23 **MS. LAWSON-REMER:** Your Honor, I had written down
24 that you granted this one; or tentatively were inclined to
25 grant it.

1 **MS. MARCUS:** The fields have to do with numbers 17
2 and 18, I believe.

3 **MS. LAWSON-REMER:** Seventeen and 18.

4 **THE COURT:** All right. And, defendant, your notes
5 also reflect I granted this one?

6 **MS. MARCUS:** Yes, Your Honor.

7 **THE COURT:** Okay. So, number nine is a grant.

8 **MS. MARCUS:** I believe with a date restriction.

9 **MS. LAWSON-REMER:** Your Honor, I didn't note a date
10 restriction. And --

11 **THE COURT:** I would do plaintiff's date on this one,
12 2012 to present.

13 All right. Ten, moot. Eleven, withdrawn. Twelve
14 was a grant, 13 was a grant, and 14 was a grant.

15 And, defense counsel, you said you wanted to be heard
16 on 13 and 14?

17 **MS. MARCUS:** Yes, Your Honor. Thank you. Just
18 wanted to clarify -- this may have already been clarified, but
19 I understand that plaintiffs generally aren't seeking
20 privileged information. The State Department in my
21 understanding of the factual and legal basis and circumstances
22 that led to the development of these letters did include
23 consultation with attorneys, with an attorney or more than one
24 within the Department of State, and so the only clarification
25 that I'm seeking is for number 13 and 14 that we reserve the

1 right to object on the basis of privilege and to support such
2 objections, you know, at the time of the deposition; and,
3 generally, that these topics are not designed to unearth
4 privileged information off an attorney-client or attorney work
5 product nature.

6 **THE COURT:** I think that's correct. Plaintiff,
7 any --

8 **MS. LAWSON-REMER:** Your Honor, that --

9 **THE COURT:** No?

10 **MS. LAWSON-REMER:** -- that's correct.

11 **THE COURT:** Okay. So, grant subject to reserve --
12 any reserved attorney-client or work product privilege
13 objections.

14 Fifteen, I had -- let's see. Okay. I know the
15 parties had agreed on something, and I had indicated that I
16 would -- whatever they had agreed to would be for the time
17 period January, 2015, to June, 2017, and current. Just for the
18 record, anybody want to tell me what your agreement was?

19 **MS. LAWSON-REMER:** Yes, Your Honor. We had inserted
20 additional clarifying information into the topic, so the topic
21 now reads: "Any information the State Department considers in
22 making a determination of whether a parent-child relationship
23 exists for purposes of applying Section 301(g) or Section 309,"
24 period. The topic -- the rest of the topic is unchanged.

25 **THE COURT:** All right. And you had already agreed to

1 narrow it to delete "and any decisions, discussions of how to
2 define and basis therefor." Does that remain deleted?

3 **MS. MARCUS:** I think --

4 **THE COURT:** Or did you with your other change?

5 **MS. MARCUS:** I think that that topic as I just
6 articulated it is what we agreed to, Your Honor. Any
7 decisions, discussions -- I think we -- I think we kept that
8 piece in, Your Honor.

9 **THE COURT:** Okay. I thought you had indicated in
10 your supplemental that had come out, but --

11 **(Pause)**

12 **MS. LAWSON-REMER:** In the supplemental didn't they
13 indicate that they were proposing a narrow to any information
14 that State Department considers in making a determination of
15 whether this exists for purposes of applying Section 301(g) or
16 Section 309, which I believe is what Ms. Lawson-Remer just --

17 **MS. LAWSON-REMER:** I think --

18 **MS. MARCUS:** -- said.

19 **MS. LAWSON-REMER:** I think that then the sentence
20 ends there is what the Court is asking? That the sentence ends
21 at after "Section 309" without the "and decisions"?

22 **THE COURT:** Right.

23 **MS. MARCUS:** That's my understanding. Is that --
24 that's your understanding, too, right?

25 **THE COURT:** It does end. At 309? Is that right or

1 no?

2 **MS. LAWSON-REMER:** That -- Your Honor, just excuse
3 me. I just want to confirm that that was --

4 **THE COURT:** Hold on. That actually was -- exact
5 language wasn't in the joint stipulation, so I've got to go to
6 your -- I think it's Exhibit 2 to your original declaration.

7 **(Pause)**

8 **THE COURT:** You know, rather than do this, I'm just
9 going to say denied as moot except to the extent it calls for a
10 date, and as to that the Court ruled that the appropriate time
11 frame is January, 2015, to June, 2017, and current. Save us
12 some time.

13 All right? Sixteen was moot. Seventeen was a grant.
14 Eighteen I had tabled, and plaintiffs indicated the defendants
15 would I.D. the fields by close of business tomorrow and make
16 additional inquiry regarding potentially available information.

17 Defense, you indicated you wanted to be heard on 17
18 and 18?

19 **MS. MARCUS:** Yes, Your Honor. Thank you.

20 Our understanding is that the way this is phrased the
21 number of and the outcomes of this kind of statistical
22 information is not -- is not information that the State
23 Department has. The plaintiffs are skeptical and specifically
24 are wondering whether even if this isn't information that the
25 State Department regularly maintains or keeps, whether it is

1 accessible or could be, you know, studied, I suppose, by
2 somebody within the department. To address that concern we
3 have agreed to provide to the plaintiff's counsel by close of
4 business tomorrow the specific field names that are in the
5 database at issue. We expect that with those field names the
6 plaintiffs will see what we see, which is that it's not -- this
7 information is not information that the Department maintains in
8 any way that would make it that they could identify the -- you
9 know, the number asked for, number 17, and the outcomes asked
10 for for number 18. So, if the information is not available,
11 you know, the deponent would then be limited to saying that
12 this information is not available and sort of describing why
13 that is the case. And that is fine from defendant's
14 perspective. I wanted to set everyone's expectations because
15 we -- we don't believe that this information is information
16 that the department has in any way that's reasonably
17 accessible, and, therefore, it's unlikely that somebody from
18 the -- that the Department could designate somebody to testify
19 as to this information.

20 **THE COURT:** Okay. Well, let me step back for a
21 second. Plaintiff's counsel had indicated the provision of the
22 fields with going back and checking. That was as to 18. So,
23 is that -- is it Plaintiff's position that that is also as to
24 17?

25 **MS. LAWSON-REMER:** We're amenable, Your Honor, to 17

1 and 18 being grouped in this fashion.

2 **THE COURT:** Okay.

3 **MS. LAWSON-REMER:** I think, to the extent the
4 witness -- the designee is aware of what inquiries are made and
5 what it -- to ascertain this information, and to the extent
6 that that includes not just the fields but the other inquiries
7 that I mentioned earlier, such as census information or other
8 statistical information that may exist or compilations of -- I
9 mean, if they have a stack of grantees -- this is
10 hypothetical -- they could count them. There's ways to figure
11 it out that we would want to probe if -- with the witness to
12 confirm that they actually made the effort.

13 **MS. MARCUS:** And -- I'm sorry, Your Honor.

14 **THE COURT:** Go ahead.

15 **MS. MARCUS:** The general contours of that and what
16 would be required was described in detail in the -- in similar
17 document requests, responses, so these deposition topics
18 overlap with document requests. And --

19 **THE COURT:** Twelve through 15?

20 **MS. LAWSON-REMER:** Yes, Your Honor.

21 **MS. MARCUS:** Right. So, some of the details as to
22 what it -- why this information is not reasonably accessible to
23 defendants and what it would take, you know, printing out the
24 8,000 passport -- I don't -- applications, reviewing it all
25 manually, that is -- has been described in connection with

1 defendant's responses to the, you know, corresponding document
2 requests.

3 **THE COURT:** Okay. Well, it sounds like the 30(b)(6)
4 witness should be prepared to address the fields of information
5 that are available, to have made some type of good faith
6 inquiry to see if the information called for is reasonably
7 available, if so, to state what that is, and if not, to explain
8 what he or she did that constitutes the reasonable diligence.

9 **MS. MARCUS:** That --

10 **THE COURT:** That make sense? Plaintiff?

11 **MS. LAWSON-REMER:** Yes, Your Honor.

12 **MR. EDELMAN:** Yes, Your Honor.

13 **THE COURT:** Okay. So, on that, actually, then, I
14 don't -- I mean, I think I can rule that they're granted in
15 part, denied in part, and that the witness is to be prepared to
16 discuss the available fields and reasonable efforts to
17 ascertain the information called for and to either -- and to
18 describe that inquiry and results thereof.

19 **MS. LAWSON-REMER:** Thank you, Your Honor.

20 **THE COURT:** Okay. As to 19 and 20, the Court granted
21 but limited it to the defendant's time frame and the current
22 time frame and current, and that's the same as to both of them;
23 and, then, 20 and 21 were withdrawn. So, it sounds to me like
24 the only one now really outstanding is number five. So, I'll
25 just defer a ruling on that one.

1 Okay. That's it on the topics. I don't know whether
2 you folks then -- because at least as to some of the
3 interrogatories that were in issue there was an indication
4 that, depending upon the 30(b)(6) issues, that would impact
5 plaintiff's position on the interrogatories. So, let me just
6 go back to plaintiff's counsel. Any change in that regard?

7 **MS. LAWSON-REMER:** No, Your Honor. I think that it
8 should come as no surprise to defense counsel that plaintiffs
9 will ask the witness about the interrogatory responses to the
10 extent they overlap with topics and hope to be able to do that
11 as a way to get the information that we would otherwise have
12 sought as a supplemental interrogatory, but we would then
13 withdraw the request for supplemental information in the
14 interrogatory as moot based on that.

15 **THE COURT:** Okay. So, we've done depo topics now
16 with five deferred and the others ruled on, interrogatories --

17 **MR. EDELMAN:** Your Honor, before we -- before we
18 leave for the day the subject of the 30(b)(6) deposition, not
19 on the question of topics, but more on the question of the
20 schedule, it has been suggested that the witness would be
21 available on December 17, and we would endeavor to make
22 ourselves available to depose the witness or witnesses, however
23 many there are, on that date. We do think, as we said earlier
24 today, Your Honor, that it's important that whatever documents
25 still remain to be produced that bear on this that they are

1 produced in advance and not the night before or during the
2 middle of the examination. We do want to be respectful of the
3 witness's time but also to the process, and that all of this
4 homework, if you will, Your Honor, can be done in time. And we
5 do think -- we want to be efficient, and we'll endeavor to be
6 efficient, but that does require the witness to be informed.
7 So, I -- it's -- if the 17th is the date, we'll make that work,
8 but really we ask the Court to confirm that it's the Court's
9 expectation, as it is ours, that the documents be produced
10 substantially in advance, which is a relative term given that
11 it's already the 11th, and that the witness undertake the
12 reasonable inquiry we expected under the rule.

13 **THE COURT:** Well, we haven't talked about the
14 document requests just yet, so what do you have in mind in
15 terms of -- I mean, again, given where we are, we're talking
16 less than a week away. Is Friday not soon enough?

17 **MR. EDELMAN:** Friday sounds to me like the best we're
18 going to do in the circumstances --

19 **THE COURT:** I think that's --

20 **MR. EDELMAN:** -- and we'll make that work.

21 **THE COURT:** -- probably right. Okay.

22 **MS. MARCUS:** And --

23 **THE COURT:** So, what I would say is, to the extent
24 documents defendant has indicated they plan to produce have not
25 yet been produced, they should be produced not later than

1 December 14, and to the extent I order documents produced in
2 response to the document requests, those should also be
3 produced by the 14th.

4 But, yes, defense counsel I know you want to be
5 heard. Go ahead.

6 **MS. MARCUS:** Yes, Your Honor. We also will endeavor
7 to prepare the designee and have that person available. The
8 17th was one of the dates that he had previously indicated to
9 us he was available. Given the breadth of the Court's ruling
10 today, the Department may need to designate a second designee.
11 That is something that I will need to talk to my clients about,
12 whether it's going to just be this one person who's available
13 on the 17th, whether it will be another person. I --

14 **THE COURT:** Have you already disclosed the name of
15 the person? And, if not, can you tell us who it is?

16 **MS. MARCUS:** I believe the answer is no, but that I
17 can --

18 **THE COURT:** Haven't done so so far, but you're going
19 to do so now.

20 **MS. MARCUS:** I can do so today. I don't know if I
21 actually -- I know his name is Paul, but I actually personally
22 don't know his last name. I understand that he has a position
23 within the Bureau of Consular Affairs, and I can ask my
24 colleague to circulate that information to all of us,
25 plaintiff's counsel, within the hour, Your Honor. And just

1 generally speaking, you know, even with this individual, given
2 the topics and the breadth, you know that we have -- my
3 colleague has put binders together and was planning on meeting
4 with him, I believe, you know, tomorrow and Friday. I don't
5 know the exact schedule of the meetings, but, you know, I think
6 that we will work to have the person as -- you know, prepared
7 for the 17th. I do generally think it would be helpful, if
8 possible, to, you know, have that 30(b)(6) deposition in
9 January. I understand that you are not in control of that; if
10 possible, just to have one more week beyond the 2nd. You know,
11 two weeks to --

12 **THE COURT:** You're wasting your breath.

13 **MS. MARCUS:** Okay.

14 **THE COURT:** Your and my time and everybody's time.
15 That's not going to happen here. So, if that's something you
16 want, you need to pose that inquiry to another judge.

17 **MS. MARCUS:** Okay.

18 **THE COURT:** Okay?

19 **MS. MARCUS:** Thank you, Your Honor.

20 **THE COURT:** All right.

21 **MS. LAWSON-REMER:** Your Honor, on the potential for a
22 second designee for certain topics, to the extent it is going
23 to be bifurcated and we're going to have two depositions, it
24 would be helpful to plaintiffs to know which topics to prepare
25 for --

1 **THE COURT:** Of course.

2 **MS. LAWSON-REMER:** -- the 17th as opposed to we'll be
3 held for another deposition.

4 **MS. MARCUS:** And --

5 **THE COURT:** Okay. So, by the end of the week.

6 **MS. MARCUS:** Yes, Your Honor.

7 **THE COURT:** By the 14th you'll tell them who the
8 person on -- who Paul -- which topics Paul is going to be
9 addressing.

10 **MS. MARCUS:** Yes, Your Honor.

11 **MR. EDELMAN:** And if it's going to be a second
12 designee, Your Honor, could we ask for the dates to -- for
13 that?

14 **MS. MARCUS:** Yes. I think --

15 **THE COURT:** Well, it has to be before the discovery
16 cutoff. I understand you want a date, but right now we don't
17 know if there's going to be such a --

18 **MR. EDELMAN:** Understood, Your Honor.

19 **THE COURT:** -- second designee, let alone who the
20 person is, let alone what their schedule is, so --

21 **MS. MARCUS:** And --

22 **THE COURT:** -- I think it's asking too much for that
23 right now.

24 **MS. MARCUS:** You know, he will be -- he is available
25 on the 17th. I want to preserve the opportunity to offer him

1 available for later in that week to the extent that now he
2 needs to prepare for, frankly, you know, twice as many topics
3 as I think he today is prepared for, but understanding the
4 Court's ruling, he will need to prepare for all the topics.
5 So, I would ask if it's possible for us to have some
6 flexibility, working with plaintiff's counsel, in scheduling
7 that but, you know, knowing that he's currently available on
8 the 17th, but he may be available later in the week, as well.

9 **THE COURT:** Okay. I don't -- I don't -- I didn't
10 hear plaintiff's counsel to be asking me to order the
11 deposition to go forward on the 17th. That wasn't -- I think
12 that you were just noting for the record.

13 **MR. EDELMAN:** That's correct.

14 **MS. LAWSON-REMER:** Right.

15 **THE COURT:** Right. Right.

16 **MR. EDELMAN:** No, all I --

17 **THE COURT:** So, I'm not ordering that it happen on a
18 particular date, so you folks are free to confer. I'm just --
19 I am ordering that documents be produced by the 14th so that
20 if, in fact, it does go forward on the 17th they have time to
21 prepare. So, documents due on the 14th; also defendants to
22 notify plaintiffs if there will be a second designee and topics
23 each designee will cover by 12/14.

24 Okay. So, let me inquire as to whether what we've
25 done so far impacts plaintiff's desire to depose Carlos

1 Hernandez, Karen Christensen, and Brian Eagan (phonetic).

2 **MS. LAWSON-REMER:** Your Honor, with respect to
3 Messrs. Eagan and Christensen, we would defer that in favor of
4 the 30(b)(6) deposition. With respect to Mr. Hernandez, I
5 think it will depend on what the witness at the 30(b)(6) says
6 on topic -- I can't remember if it's 13 or 14, but one of those
7 two topics relates to him and his letter. If it's satisfied,
8 we would not depose Mr. Hernandez.

9 **THE COURT:** Okay. So, just to sum, you no longer
10 wish -- need a rule on Christensen and Eagan?

11 **MS. LAWSON-REMER:** That's fair, Your Honor.

12 **THE COURT:** Okay. So, motion withdrawn as to
13 Christensen and Eagan, so that part is denied as moot. I would
14 grant the motion at this point as to Hernandez. Of course,
15 subject to plaintiff's withdrawal.

16 **MS. MARCUS:** Your Honor?

17 **THE COURT:** Just one second.

18 **MS. MARCUS:** Yes, Your Honor. Sorry.

19 **(Pause)**

20 **THE COURT:** So, I'll let defense counsel be heard,
21 but what I'm inclined to do is to grant the motion to compel
22 Hernandez to appear for a deposition subject to plaintiff's
23 withdrawal of a request to depose him and order Mr. Hernandez
24 to appear for deposition as plaintiffs may notice on a date
25 prior to the discovery cutoff.

1 So, defense counsel. Yes.

2 **MS. MARCUS:** Thank you, Your Honor. I just wanted to
3 bring to the Court's attention that there is some additional
4 information on Mr. Hernandez since the supplemental filings.

5 **THE COURT:** Okay. Is it information that you've
6 shared with the plaintiff?

7 **MS. LAWSON-REMER:** No, Your Honor.

8 **MS. MARCUS:** It was shared in deposition testimony
9 last week.

10 **MS. LAWSON-REMER:** All right. Well, why don't you
11 spit it out.

12 **MS. MARCUS:** Sure. So, the -- the -- okay. So, I'm
13 just going to read from the draft testimony from --

14 **THE COURT:** Just tell me what the issue is.

15 **MS. MARCUS:** It's just some additional information
16 that there was testimony elicited of the consular staff at
17 Toronto, whether there was any communications with
18 Mr. Hernandez regarding the adjudication of the applications;
19 and that he was the desk officer at the time --

20 **THE COURT:** Okay. He's not being deposed because he
21 was involved in the adjudication of the application, as I
22 understand it. He's being deposed because he was the author of
23 a letter that was sent to Congressman Lieu, and that letter
24 contained certain representations relating to how common it is
25 for people to be given DNA tests or something along those

1 lines. I'd have to go back and look at the letter, but it had
2 more to do with the response to Congressman Lieu's inquiry than
3 it had to do with his knowledge of the actual adjudication.

4 So --

5 **MS. MARCUS:** Okay. And --

6 **THE COURT:** -- he'd have to give the basis for the
7 representations in the letter, and if he says, "It's just what
8 the guy who drafted it gave me," then he'd have to identify the
9 person who drafted it, and if it's -- and who that person
10 conferred with. As I said early on, I think it will probably
11 be a very short deposition, but they're entitled to make
12 inquiry --

13 **MS. SPEAKER:** Thank you.

14 **THE COURT:** -- on those things. So, aside from what
15 I said, is what else you have going to impact that?

16 **MS. MARCUS:** No, Your Honor. That's --

17 **THE COURT:** Okay.

18 **MS. MARCUS:** Thank you.

19 **THE COURT:** So, plaintiff, hopefully I'm right about
20 what you were after him for. Is there anything else I missed?

21 **MS. LAWSON-REMER:** No, Your Honor; only to note that
22 defendants have produced some communications related to 301 and
23 309 that Mr. Hernandez is a party to, and so the deposition may
24 take half an hour longer than expected or, you know, just --

25 **THE COURT:** Okay.

1 **MS. LAWSON-REMER:** There are -- there's discovery
2 in -- that's been produced that he's on.

3 **THE COURT:** Okay. Fair enough. And, so, the defense
4 is on notice. So, the tentative on Mr. Hernandez would stand.
5 So, it's incumbent upon plaintiffs to either renote that and
6 he's ordered to appear or to advise them that you're
7 withdrawing that request.

8 Okay. So, I think what we have left are the document
9 requests. Do you folks want to just continue to plod through
10 this today? Or, you know, we can do a phone call on Thursday
11 morning. I would make it early because I have a 10:00 o'clock
12 telephonic also, or we could do it right after that telephonic.
13 But I have to pick people up at the airport at 1:30 that day,
14 so we're not going to go too long that morning.

15 **MS. LAWSON-REMER:** So, Your Honor, there -- I think
16 there's two ways to deal with the document requests. One is to
17 speak to a couple of categorical issues, and if we could
18 resolve those, we may not need to go through each document by
19 document request.

20 **THE COURT:** Which I'm sure would be torture, but we
21 would do it if we needed to.

22 **MS. LAWSON-REMER:** And that -- maybe that is the way
23 to sort of just get a resolution today, and if you wanted to
24 instruct us to meet and confer further on any particular
25 request, and since we are going to come back to the Court

1 potentially with respect to topic --

2 **THE COURT:** Five?

3 **MS. LAWSON-REMER:** -- five, we would maybe do it at
4 that same time.

5 **THE COURT:** Okay. We can do that. I'm not sure if
6 by category you're thinking about, you know, the Toronto office
7 versus other places, the time frame. Are you talking those
8 kinds of categories or is there some other way you would
9 categorize it?

10 **MS. LAWSON-REMER:** I would say those two, Your Honor,
11 plus the deliberative process privilege. And if we resolve
12 those today, then it sounds like our other biggest outstanding
13 issue was a date certain for completion of the document
14 production.

15 **THE COURT:** Okay. And I had indicated that any
16 orders I made those documents would be produced by the 14th.
17 So, you have --

18 **MS. LAWSON-REMER:** So, that's --

19 **THE COURT:** You have that issue --

20 **MS. LAWSON-REMER:** That's resolved.

21 **THE COURT:** Yeah.

22 **MS. LAWSON-REMER:** Right.

23 **THE COURT:** All right. Defense counsel?

24 **MS. MARCUS:** I think plowing through makes sense. I
25 may need to take a personal break of three minutes or four.

1 **THE COURT:** Oh, that's fine. If -- I don't -- we've
2 also sort of gone through the lunch hour. If you folks want to
3 take a half hour to get something, you know, you can even bring
4 it back here if you want; that's fine. Or you need your five
5 minutes now or later? Now?

6 **MS. MARCUS:** I wouldn't mind two and a half.

7 **THE COURT:** Okay. Before I break even for two and a
8 half, did you want to take a little more time to get something
9 to eat and come back? Or --

10 **MS. LAWSON-REMER:** Whatever is the Court's preference
11 and is the best use of the Court's --

12 **THE COURT:** Let me -- let me let my clerk be the
13 tiebreaker. Does she need a break?

14 **THE CLERK:** I don't want to be the one to hold
15 everyone up, so I can (indisc.).

16 **THE COURT:** Okay. Let's just take five minutes,
17 then. Okay?

18 **MS. MARCUS:** Thank you, Your Honor.

19 **THE CLERK:** This court is in recess.

20 **(Recess was taken from 1:49 p.m. until 1:53 p.m.)**

21 **THE CLERK:** Calling 18-523, *Andrew Mason Dvash-Banks,*
22 *et al versus the United States Department of State, et al.*

23 **THE COURT:** And all the same counsel are still here.
24 Okay, document requests. It sounded like Plaintiffs'
25 counsel wanted to make some suggestions on how to get through

1 this efficiently.

2 I can tell you thoughts on some of these. Let me
3 just say, as to 12 through 15, I was inclined to grant those
4 that are framed as documents sufficient to show.

5 And to the extent Defendant has documents in their
6 possession, custody, or control on that statistical
7 information, I'd be inclined to order them to produce it. And
8 to the extent they don't, they can just say they don't.

9 But that would be my thoughts on 12 through 15. I'm
10 just trying to cut through what we can if we can. Anybody want
11 to be heard on 12 through 15?

12 **MS. LAWSON-REMER:** Your Honor, that's fine.

13 **THE COURT:** Defense? 12 through 15, those are the
14 documents sufficient to show numbers of various combinations --

15 **MS. MARCUS:** Yeah.

16 **THE COURT:** -- or criteria.

17 **MS. MARCUS:** So again, Your Honor, I think that this
18 gets to the issue that we were talking about before, with the
19 statistics and the numbers, that the documents sufficient to
20 show don't really exist in a manner that shows it.

21 So we're talking about individual applications that
22 have a lot of personal privacy information of those individual
23 applicants, and printing out all of those individual
24 applications and then providing them to the Plaintiffs'
25 counsel. And we would object on a number of grounds for us to

1 do that.

2 **THE COURT:** Plaintiff?

3 **MS. LAWSON-REMER:** So Your Honor, I think that what
4 we originally asked for from Plaintiffs -- or from Defendants
5 was to produce the fields and work with us on identifying what
6 aggregated information can come from this database, based on
7 the fields that they've identified.

8 If there are other areas of documents in their
9 possession, custody, or control, such as, like I said, poor
10 census information relating to binational couples or something,
11 we would also be interested in that as a compromise as well.

12 But I think that what I -- at least what I've seen in
13 the past with other cases with the Government is that it is a
14 bit iterative. We asked for this a long time ago.

15 **THE COURT:** I'm sorry; it is a bit what?

16 **MS. LAWSON-REMER:** It's an iterative process to
17 identify the fields. And given where we are timewise, I just
18 want to make sure that we do that sooner rather than later.

19 **MS. MARCUS:** If I can explain what we have already
20 said in the document response on September 18th. So there may
21 be some additional fields that are available; but the fields
22 that are not available are sex of the parents, marriage status
23 of the parents, and nationality.

24 So these are not fields that -- it's not a matter of
25 these fields that would allow us to easily answer this question

1 are available; they are not. We are willing to tell Plaintiffs
2 what additional fields are available; but these are not.

3 These databases collections are a range of personally
4 identifiable and adjudication-related information for passport
5 records and CRBA records. But they can't be retrieved, they're
6 not retrievable by the sex of the parents or the marriage
7 status of the parents.

8 So to answer these questions, it would require to
9 manually review more than 3,000 CRBA applications and thousands
10 -- the testimony last week was that there's about 8,000
11 passport applications processed on an annual basis.

12 So we really are talking here about documents
13 sufficient to show would be each of these individual
14 applications. And --

15 **THE COURT:** How many CRBAs?

16 **MS. MARCUS:** There are more than 3,000 that were
17 processed between January 2015 and June 2017, just in Consulate
18 Toronto. So this step of looking at these individual
19 applications would take hundreds of hours; and it would only
20 indicate as an initial matter whether the reviewed applications
21 appeared to meet the criteria.

22 And then you have to go through and -- often, the
23 face of an application may not even provide the information.
24 So we would manually sort through, try to find on the face of
25 the applications information that may fit this criteria.

1 But it's not always the case that the individual
2 applicant puts this information on the application.

3 **THE COURT:** On the -- just to deviate -- on the
4 Canada issue versus a broader array of issues, do you have any
5 sense of how many -- what countries have the highest CRBA
6 application numbers?

7 Because I hear you; you got to limit it somehow. I
8 hear them; it's not really fair to just limit it to Canada.
9 There may be -- obviously, they're all over the place; it's not
10 just Canada.

11 **MS. MARCUS:** But their claims -- I guess I'm trying
12 to understand what more -- if there are 3,000 CRBA
13 applications, just CRBAs, and I guess, if I'm doing the math,
14 8,000 times 2-and-a-half, approximately 20,000 passport
15 applications, again, just for -- not even for Canada, for
16 Toronto Consulate, which is one of six, and Canada, that is
17 tens of thousands; it's 3,000 plus -- CRBAs, plus maybe 20,000
18 for passport applications, just for Toronto Consulate.

19 So I don't -- I guess my question is, what is the
20 additional relevance of anything beyond Consulate Toronto, to
21 the claims in the case?

22 **THE COURT:** Well, it goes to their equal protection
23 claim, it goes to their due process claim. So look, the
24 problem that I see here is the way the State Department does
25 business, keeps records.

1 And I'm not saying it's bad or good; I'm just saying
2 the way they do it does not lend itself to easily locating the
3 information that Plaintiffs would like that's relevant and that
4 they're -- certainly otherwise would be entitled to receive.

5 And so I -- I'm -- this is why I'm having such
6 difficulty, because I feel like we're not able to narrow it to
7 a custodian or two; we're not able to narrow it in any kind of
8 a way that makes sense frankly.

9 So normally, I get these kinds of things. And the
10 parties have conferred, and they've narrowed it to key words,
11 and they've narrowed it to custodians, or we can get there.

12 I feel like we just can't get there here; and I don't
13 have the information I would need to be able to narrow these in
14 an intelligent fashion. And that is my frustration.

15 So I -- a lot of these, I feel like are overbroad and
16 not proportional to the needs of the case in light of what I
17 just described. I'm not sure what else I can say on that,
18 other than I have to rule on something.

19 So if indeed the fields -- they just don't keep those
20 kinds of fields, I'm not sure what giving you the fields is
21 even going to do.

22 Plaintiffs' counsel, any thoughts you have here?

23 **MS. LAWSON-REMER:** Sure. Your Honor, I appreciate
24 the frustration. We also are frustrated, because even when we
25 -- things are happening so last-minute too that it --

1 **THE COURT:** Right.

2 **MS. LAWSON-REMER:** -- hampers our ability to make
3 that kind of progress of let's look at the fields and let's
4 brainstorm and figure out what we can do.

5 There -- if the exact data that we want does not
6 exist, there are other sort of ways to get at it, right, so
7 taking, for example, the total number of CRB applications and
8 the total number of passport applications, and figuring out how
9 many are granted and how many are denied, and maybe looking at
10 other immigration statistics and other statistics from
11 binational couples coming into the United States and emigrating
12 to the United States, and -- which coming from which countries,
13 which recognize same-sex marriage.

14 There are -- it's obviously not a perfect fit, but
15 there are other ways to get to it. And I'm speaking sort of in
16 an effort to brainstorm here.

17 But if we knew what data existed, then we could
18 brainstorm how to extract some statistical information that
19 maybe it's not exactly what we originally requested, but it's a
20 fair compromise.

21 **THE COURT:** Okay.

22 Go ahead.

23 **MS. MARCUS:** I don't -- I mean we've put a lot of
24 effort to provide these details on September 18th. I
25 understand everyone's frustration.

1 These are very -- one of the problems is the
2 continued sort of broad efforts, the unfocused requests that
3 Defendants have faced have made it difficult for Defendants to
4 focus on any one of these things, that Plaintiffs have
5 continued to push for sort of the whole world and want to be
6 able to get all of this information.

7 And -- but I -- it is not true that we haven't
8 provided useful information to at least explain how these
9 records are kept. I mean this is very detailed. And it took
10 effort to provide that in the timely fashion that we did in the
11 September 18th response.

12 And so I also think that this kind of information --
13 the numbers that are granted are denied -- it's just -- it's
14 not clear what that is going to show.

15 If Plaintiffs had identified in a more specific way
16 who they were trying to compare themselves against, I mean
17 there exists some additional problems that even if they have
18 this information, it's not clear how it will -- I don't know.

19 It's just -- it's a struggle, because that kind of
20 data, the number of dual citizen parents' applications, or the
21 number of CRBAs that are granted or denied, or the number of
22 U.S. passport applications that are granted or denied, if we
23 had those numbers, I -- it's not clear what that would actually
24 provide.

25 **MS. LAWSON-REMER:** It's --

1 **THE COURT:** Okay. But that's not your problem.
2 They're asking for that information. They can make whatever
3 arguments, and maybe put it together with some other
4 information, and ask the trier of fact or the judge to make
5 some inferences.

6 So your job is really just to try and respond to the
7 requests with the information you have.

8 **MS. MARCUS:** And to consider the proportionality and
9 the burden of them and the need for the information, there is
10 Rule 15 as it -- I mean Rule 26(b) as it was amended in 2015,
11 does more than it used to, make it so that part of my
12 assessment also is how this information is going to be used,
13 not just whether or not they exist.

14 **THE COURT:** Possibly. I think that's more for the
15 Court to make an assessment. And that's certainly part of the
16 analysis I'm having to do here.

17 Let me just start with the Toronto issue. I guess on
18 -- I don't agree that on -- just as a general proposition, that
19 the document production should be limited to what's within
20 Toronto's, what they had considered received, necessarily, for
21 the application; because I think the claims are broader than
22 that.

23 In order to, again, prove equal protection, they have
24 to look at how similarly situated people may have been treated
25 or dissimilar people were treated, things of that nature. And

1 that is not limited to Toronto general, and it more stems from,
2 I guess headquarters what I would say.

3 So I'm just not sure, again, who -- looking at what's
4 in front of me, and this also seemed to be some of the
5 requests, who the actual policymakers are, what specific office
6 is the policymaker, what specific office is looked to for
7 guidance when someone has a question in terms of a decision
8 that they're making on a passport application, or the other
9 CRBA.

10 **MS. MARCUS:** Yeah.

11 **THE COURT:** So what subsets --

12 **MS. MARCUS:** There are desk officers within the
13 Bureau of Consular Affairs. I think there is a sub-office
14 within the Bureau of Consular Affairs.

15 For what it's worth, I did the -- identify the name
16 of the designee on the 30(b)(6). And his name is Paul Peek.
17 He is the director of the Passport Adjudications Office.

18 So I think that there is, for example, a Passport
19 Adjudication's Office. The -- or Internal Organization of the
20 State Department did change in 2017. It has always been within
21 the Bureau of Consular Affairs; but that is the largest bureau
22 at the State Department, and there are subcomponents within it.

23 And there was some shifting in 2017 that has been
24 explained in the papers or in our responses. But for example,
25 the Passport Adjudications Office is an office within the

1 Bureau of Consular Affairs.

2 I do want to say one thing with respect to comparing
3 Toronto to elsewhere. My sense is that these cases, artificial
4 reproductive technology for example, applications in which
5 artificial reproductive technology is -- applications
6 reflecting a child born using artificial reproductive
7 technology, that it's -- there are some regional and specific
8 local considerations that do impact the kinds of numbers that
9 different consulates or locations would receive, and that there
10 are differing concerns, and from a fraud perspective and other
11 concerns, reasons regionally or locally-wise, some applications
12 would be granted or denied.

13 So for example, there are places around the world
14 that have -- are known to be more -- use of artificial
15 reproductive technology.

16 Tel Aviv is a place that has very sophisticated
17 artificial reproductive technology. So compared to Toronto, it
18 may be a different population or different numbers.

19 There are also places where surrogacy is very
20 popular, so for people who are traveling abroad to go to
21 certain locations to use surrogates. So it is not so simple --
22 when thinking about the possibility of orienting the Toronto
23 Consulate in some sort of larger, even to Canada, sphere, that
24 that introduces a number of additional factors that will make
25 things even more complicated, believe it or not.

1 **THE COURT:** All right. Looking at how Plaintiffs
2 framed their request, it -- they seem to think, and so at least
3 I'm inferring, that the Secretaries of States' staff, the
4 Office of Legal Advisor, and the Bureau of Consular Affairs are
5 the three sort of subgroups within the State Department most
6 likely to have responsive information, in addition to the
7 Consulate in Toronto; is that --

8 **MS. LAWSON-REMER:** Yes, Your Honor. And we have not
9 asked for -- in our communications with Defendants, we have not
10 asked them to, for example, go to Ethiopia's Consulate and get
11 information.

12 We have been very focused in our efforts to get
13 information from the relevant decisionmakers and policymakers
14 in headquarters, whether that be in Washington DC or the person
15 resides elsewhere.

16 The fact is in connection with this case, the State
17 Department actually considered changing its policy. And so
18 there are -- they know who those people are. That's as
19 recently as last year.

20 And so there are identifiable individuals that they
21 could collect documents from. It's not this amorphous glob of
22 every single consulate in the -- that exists.

23 **THE COURT:** Do you know who those people are?

24 **MS. LAWSON-REMER:** We do not.

25 **MS. MARCUS:** Just to be clear; the Bureau of -- I

1 mean I think that Ms. Lawson-Remer is referring to
2 considerations that took place before I was on the case, but
3 internally in connection with some potential policy changes
4 that may, at that point, were considered part of settlement
5 discussion.

6 So a lot of that information is going to be attorney
7 work product. And we mostly are working with attorneys on
8 thinking about policy changes.

9 The Bureau of Consular Affairs is the largest bureau.
10 So it is going to be -- we would strongly encourage to -- I
11 mean off the bat, I would say we have never taken the position
12 that we are limiting our search to Toronto.

13 **THE COURT:** Right, I understand; things available to
14 Toronto, you add.

15 **MS. MARCUS:** But not just available. We're talking
16 about policy information and training. So all of the things
17 that Consulate Toronto could use are the things that we've been
18 searching for.

19 And it -- the Bureau of Consular Affairs is very
20 large. And for us to have a -- some reasonable search, it --
21 we're talking about even within the passport office, passport
22 adjudications, this is one of the largest offices and one of
23 the largest bureaus; so we're talking about thousands of
24 potential custodians.

25 **MR. EDELMAN:** Your Honor, we --

1 **THE COURT:** Go ahead.

2 **MR. EDELMAN:** -- we're trying to make this easier, at
3 least easy --

4 **THE COURT:** I -- yeah, I wish it was easier; but go
5 ahead.

6 **MR. EDELMAN:** And so what Ms. Lawson really was
7 saying is, we're not asking for the State Department to canvas
8 every case officer, everybody in the Bureau of Consular
9 Affairs, every embassy and consulate around the world.

10 It is our impression from our interactions with the
11 Defendants that there is a core group of people who are
12 offices, which is charged with or involved in developing,
13 considering changes to, and implementing changes to the
14 relevant provisions of the FAM.

15 And our suggestion was, those are individuals and
16 offices who are known to the Defendant or at least the State
17 Department. We believe that to be the case, because those are
18 the people who we understand would be involved in any
19 considerations about those subjects, including in connection
20 with what was understand was some consideration about making a
21 change.

22 That is highly relevant -- the documents they have
23 are highly relevant, we submit, whether or not they were
24 conveyed to the people in Toronto.

25 Because what's core, as Ms. Lawson-Remer said

1 earlier, is this question of, does the State Department believe
2 that Section 301 has a biological relationship requirement,
3 where does that come from, when, how, and why is it applied.

4 Because the people in Toronto, when they said this in
5 their testimony last week, said, we don't make the policy, we
6 are informed, we are instructed what the policy is, and then we
7 apply it.

8 They called it the law, but we believe that what
9 they're talking about are the instructions from the head
10 office.

11 **MS. MARCUS:** And they also refer to it as the FAM. I
12 mean --

13 **THE COURT:** Okay. So --

14 **MS. MARCUS:** -- isn't this what --

15 **THE COURT:** Hold on.

16 **MS. MARCUS:** -- the 20(b)(6) --

17 **THE COURT:** Hold on. Is it loosely stated, could we
18 call these people State Department policymakers?

19 **MS. LAWSON-REMER:** That's how we would frame it, yes,
20 Your Honor.

21 **THE COURT:** Okay.

22 **MS. LAWSON-REMER:** One other point; if they produce
23 at least one cable of instruction related to a court decision,
24 we expect there are others that are responsive to our other
25 court decisions that we've discussed earlier, Pavin (phonetic),

1 Overshell (phonetic), those ones.

2 That emanates from somewhere. There is -- there are
3 people involved in putting that together, having conversations.
4 And so those are also the custodians that, in our mind, would
5 be relevant here, not the sort of thousands that Ms. Marcus has
6 alluded to.

7 **MS. MARCUS:** No, there are hundreds of people
8 involved with putting together cables on the variety of topics
9 that are implicated here. I --

10 **THE COURT:** Let me say -- let me inquire of
11 Plaintiffs; because U.S. passports seem to me to be a really
12 broad bucket. And it seems to me that in this case, the issue
13 with the denial of the U.S. passport application really stems
14 from the denial of the other application, this CRBA.

15 So I -- one thing I thought about doing was just
16 eliminating passports. I was trying to narrow it in some
17 fashion and just limiting it to CRBAs.

18 That might make it easier to get documents. But I --
19 obviously, passports are relevant, because a passport
20 application was denied.

21 So I guess I just wanted to get your reaction on
22 that. But before I do that, Ms. --

23 **MS. MARCUS:** Marcus.

24 **THE COURT:** -- can you spell the last name of Paul;
25 is it P-E-A-K-E; what is his last name?

1 **MS. MARCUS:** I believe it's P-E-E-K, but --

2 **THE COURT:** P-E-E-K.

3 **MS. MARCUS:** Yes.

4 **THE COURT:** And he is the director of Passport
5 Adjudications; is that what you said?

6 **MS. MARCUS:** That's right. And my understanding is I
7 believe that that office now has also the responsibility for
8 guidance on CRBAs. CRBAs are solely adjudicated abroad; they
9 are not adjudicated by anybody in DC.

10 There is guidance that is provided. I understand
11 that the 30(b)(6) will deposition, as the Court has outlined
12 it, will go through the types of guidance that the Plaintiffs
13 say that they're looking for.

14 The issue really is the enormous number of documents
15 that we would have to sift through. I mean we have provided
16 all of the policies; we have provided the cables.

17 Those kinds of sort of formalized instructions are
18 what we have looked for and provided, the formalized
19 instructions, and guidance documents, and training that's
20 within the Bureau of Consular Affairs, and specifically within
21 the relevant subgroup.

22 So beyond those things, my understanding is that
23 Plaintiffs are largely looking for sort of predecisional
24 discussion about potential changes to the policies. The State
25 Department's approach is encapsulated in the FAM, the Foreign

1 Affairs Manual.

2 This -- the testimony was that they look at the
3 Foreign Affairs Manual that there is a Foreign Affairs Manual
4 that was -- provision that was attached to my first declaration
5 that sort of describes how that -- the State Department needs
6 to use a formalized system to provide instruction and guidance
7 to the field.

8 So all of those sort of formalized cables,
9 instructions, manual provisions, handbook provisions, that is
10 all encompassed within what we have already committed to
11 provide and are providing.

12 **THE COURT:** By Friday?

13 **MS. MARCUS:** Correct. It's -- the dispute is what
14 goes beyond that, beyond the sort of formalized guidance and
15 direction, and is relating to internal communications about
16 potentially making changes.

17 And a lot of these -- as is evidenced -- we have to
18 date produced FAM provisions going back to 1986. And as
19 evidenced in those FAM provisions, they have largely not
20 changed with respect to the State Department's position.

21 It is not a secret that the State Department takes
22 the position that a biological requirement exists for both 301
23 and 309. And that has been the policy as evidenced in what
24 we've produced since 1986.

25 So they're trying to find sort of rationale maybe for

1 not changing the policy.

2 **THE COURT:** Yes, in light of recent developments.

3 **MS. MARCUS:** Correct. And with respect to that, I
4 think that the 30(b)(6) topic will -- topics, it sounds like --
5 will allow them to get some information on that.

6 But an exercise in which we sort through all of the
7 internal emails between hundreds, frankly thousands, and that
8 is not an understatement of individuals who would be involved
9 with aspects of considering changing these policies, that
10 exercise is very unlikely to produce anything that is
11 particularly fruitful or useful.

12 Because at that time, after we did the exercise of
13 collecting all of these things, which is a resource and huge
14 amount of money and time on itself, but after we collected it,
15 then sorting through it, and then asserting appropriate
16 privileges at that time, I think it's unlikely that documents
17 are going to be a path that is going to be manageable for this
18 issue of rationale, unless there's some sort of formalized
19 internal memo.

20 **THE COURT:** Okay. Thank you; but I think we're
21 getting to a point of where it's not helpful to be over-talking
22 about this stuff. So I just -- let me look at -- I did sort of
23 sketch out a few tentatives.

24 So let me just -- again, I'm not sure we made any
25 headway on the categories frankly. But on number one, that's

1 the one that calls for all documents, communications,
2 stating/discussing protocols, policies, et cetera, for applying
3 301(g) and 309 to persons who claimed have acquired U.S.
4 citizenship under such provisions, including among other
5 things, drafts, explanations related thereto.

6 So this one, what I was inclined to do -- and some of
7 this, I think has already been produced, or Defendants have
8 already agreed to produce it -- but what I would say is, for
9 the period of 2012 to the present --so here, I would use
10 Plaintiffs' timeframe -- I would be inclined to order
11 Defendants to produce documents sufficient to reflect the
12 policies of the State Department, for applying 301(g) and 309
13 to persons who claimed to have acquired U.S. citizenship under
14 such provisions, the reasons/rationale for the same, and
15 internal objections opposition to the same.

16 Let me do 2 and 3. For 2, that calls for basically
17 all communications between specified CIS units and other CIS
18 units in the State Department basically concerning, again, the
19 procedures for applying 309 versus 301(g) to any person born
20 outside U.S. to married parents, one of whom is a U.S. citizen,
21 if not biologically related, and the rationale for the same.

22 Here, I'd be inclined to, again, use Plaintiffs' time
23 period, so for the period of 2012 to the present, documents
24 sufficient to reflect any direction, agreement, or disagreement
25 between the specified CIS units and the State Department

1 relating to those same protocols, procedures, policies, et
2 cetera, for applying 309 instead of 310(g), to the same people
3 and the basis therefore.

4 And as to 3, which calls for all documents concerning
5 the impact of court rulings, including some that are
6 specifically specified on applications for CRBA, or U.S.
7 passports, or certificates of citizenship by Plaintiffs or any
8 other person born outside the U.S., who asserts he's a child of
9 a U.S. citizen, whose U.S. citizen parent is married to a
10 foreign national, and who does not have a biological
11 relationship to the U.S. citizen parent.

12 Sorry, I'm trying to read my notes. Okay. I would
13 limit it to the specified cases, and say, for the six-month
14 period following each such decision, documents sufficient to
15 reflect whether, and the degree to which, State Department
16 policymakers considered the impact/effect of the specified
17 court ruling on those same applications and any directions or
18 guidance issued relating to the same.

19 Plaintiff, thoughts on those three tentatives?

20 **MS. LAWSON-REMER:** With respect to number 1, at this
21 point, Defendants had not agreed to produce anything. And it
22 wasn't clear to us whether they were going to produce anything.

23 They have cited some documents in their interrogatory
24 responses, which are a handful of sections of the FAM. And we
25 have those.

1 **THE COURT:** Can you speak into the mic? I'm sorry.

2 **MS. LAWSON-REMER:** Sorry, Your Honor.

3 **THE COURT:** I think what you said was as to 1 --

4 **MS. LAWSON-REMER:** Yeah --

5 **THE COURT:** -- you weren't sure if Defendant had
6 produced or had agreed to produce anything responsive?

7 **MS. LAWSON-REMER:** Yes, we believe that the -- what's
8 still outstanding are some of the policies and procedures that
9 are within DC. And so I think to the extent your character --
10 your limiting language still encompasses some of the policies
11 and procedures in DC.

12 I think that that would be acceptable. One other
13 area though is USCIS materials.

14 **THE COURT:** Yeah --

15 **MS. LAWSON-REMER:** We think that's covered by this --

16 **THE COURT:** I --

17 **MS. LAWSON-REMER:** -- request as well.

18 **THE COURT:** -- I will tell you, I was not inclined,
19 for the most part, except to the extent it was shared with the
20 State Department or communications between the two. I was not
21 inclined to encompass customs. In this, it's a separate
22 agency. I --

23 **MS. LAWSON-REMER:** Understood, Your Honor. We have
24 actually subpoenaed DHS, and specifically asked for the USCIS
25 materials. And Ms. Marcus actually also represents DHS. And

1 we had agreed to defer moving on that in connection with
2 securing it from the party to the case from the State
3 Department

4 And as far as we know, that information hasn't been
5 produced. So I think as long as it's coming from the party, as
6 opposed to the third party, we understand the concern of having
7 them go over to the other agency and collect documents. That's
8 not what we're asking for.

9 **THE COURT:** Okay. Well, that's a motion to compel a
10 third party; that's not before me. What I have is --

11 **MS. LAWSON-REMER:** Of course, Your Honor. We had
12 deferred that motion, because Defendants had said, well, we're
13 going to produce some of this stuff. They haven't produced it
14 yet. So we just don't know if it's not going to come --

15 **THE COURT:** I'm sorry; I guess I'm not clear on
16 whether you're telling me that Defense counsel represented,
17 that they would produce USCIS information in this --

18 **MS. LAWSON-REMER:** Only what's in their possession,
19 custody, and control that was responsive. And I think we --

20 **THE COURT:** Okay.

21 **MS. LAWSON-REMER:** -- our concern is whether that's
22 actually going to happen.

23 **THE COURT:** Okay.

24 **MS. LAWSON-REMER:** That's still -- I think -- let me
25 start over, Your Honor. That particular issue of the USCIS

1 communications, I think is encompassed in our -- in request
2 Number 1. It's also covered by Number 2.

3 **THE COURT:** Well, it's -- Number 2 -- okay.

4 **MS. LAWSON-REMER:** I actually think that with --

5 **THE COURT:** Okay --

6 **MS. LAWSON-REMER:** -- as a frame --

7 **THE COURT:** -- I would say the policies of the State
8 Department and to the extent in the State Department's
9 possession, custody, or control, the policy of the USCIS, and
10 then same thing; is that what you are --

11 **MS. LAWSON-REMER:** That --

12 **THE COURT:** -- talking about?

13 **MS. LAWSON-REMER:** -- that's fair for us, Your Honor.

14 **THE COURT:** All right.

15 Defense?

16 **MS. MARCUS:** Just to make sure I understand where we
17 are; you're asking for my reflection on the first three that
18 you just described?

19 **THE COURT:** The tentative on Number 1, yes.

20 **MS. MARCUS:** Oh, on just Number 1, okay. So I -- the
21 sufficient to reflect the reasons and rationale; and then was
22 there something beyond that?

23 **THE COURT:** And internal objection/opposition to the
24 same.

25 **MS. MARCUS:** Okay. So I guess with the internal

1 objections and opposition, that's where I don't know how we
2 could find, and search for, and produce information documents
3 sufficient to reflect internal objections to the same; because
4 the --

5 **THE COURT:** I would think that any discussion of the
6 reasons and rationale would discuss the pros and cons --

7 **MS. MARCUS:** Right, yes.

8 **THE COURT:** -- why one interpretation might be
9 different than another.

10 **MS. MARCUS:** Right. I guess -- but if there -- if
11 included in your ruling is beyond documents that are sufficient
12 to reflect the reasons and rationale, that you also are
13 expecting Defendants to also produce separately, documents
14 sufficient to reflect the internal objections that is going to
15 be not possible.

16 I mean the types of internal objections, those are
17 raised by individuals; and that is going to require searching -
18 - I guess I'm having a hard time understanding what's
19 sufficient to reflect objections; because in my mind, the only
20 kinds of documents that would be sufficient to reflect
21 objections, other than a formalized memo or some internal memo
22 discussing the pros and cons.

23 **THE COURT:** That might be what it is.

24 **MS. MARCUS:** Okay. So you're not ordering us to
25 search through all the emails of all the policymakers, to find

1 email discussion?

2 **THE COURT:** How many policymakers are there?

3 **MS. MARCUS:** Hundreds.

4 **THE COURT:** Then I guess I'm not ordering you to do
5 that.

6 **MS. MARCUS:** Okay. Thank you, Your Honor.

7 **THE COURT:** So I'm inclined to adopt that
8 tentative unless Plaintiff wants to weigh in any more in light
9 of my discussion with the Defense Counsel?

10 **MS. LAWSON-REMER:** Your Honor, the only thing I would
11 say is, to the extent there are, perhaps, some of the more
12 senior individuals within that group of policy makers, that we
13 could see whether any of those e-mails actually have pros and
14 cons. I mean, I'm not --

15 **THE COURT:** How many senior policy -- that's like --

16 **MS. LAWSON-REMER:** I don't -- we don't have --

17 **THE COURT:** Yeah.

18 **MS. LAWSON-REMER:** -- the hierarchy.

19 **THE COURT:** How many senior policy makers are there?

20 **MS. LAWSON-REMER:** Hundreds. But it can't be that
21 everybody is equally senior. So there's obviously -- but
22 there -- some hierarchy. And within that, there -- there's --
23 are there -- is there not a core group of individuals that --

24 **MS. MARCUS:** It has changed between 2012 and the
25 present. So the -- it has been difficult to obtain -- for the

1 four custodians that we are searching, it has taken the
2 Department of State -- for better or worse, they have been
3 working hard at it. And it has taken them weeks or months to
4 provide to us e-mails for those four custodians.

5 I mean, we're talking -- for four custodians, for a
6 more narrow time frame -- for one custodian, there were 20,000
7 e-mails in the time frame that we had narrowed it to -- January
8 2015 to June 2017.

9 So to go -- I think, will all due respect to
10 Ms. Lawson-Remer, she should take yes for an answer. I think
11 anything beyond documents sufficient to reflect are -- it's
12 just not going to possible for us to do that.

13 **THE COURT:** Okay, let me just say this. What I think
14 we should do is -- because I'm not sure what the results of all
15 of this is -- the orders are going to be.

16 And I don't know what your schedules are next week,
17 but I'd be inclined to probably just set a telephonic
18 conference, maybe for the afternoon of the 19th if you're not
19 in depositions. And just see where we are on some of these
20 orders. Because maybe people will have been identified and it
21 makes more sense to hone down.

22 You know, I don't know, I'm not trying to create more
23 work for anybody. I just am a little concerned that, by the
24 time the document production happens, there's still going to be
25 some significant gaps by next weeks.

1 **MS. LAWSON-REMER:** We also have that concern. And as
2 Your Honor knows, we served these in August and are not opposed
3 to search terms being applied; we're not opposed to, you know,
4 a narrow set of custodians. We're really open to a compromise.

5 I think if -- I guess we just want to understand what
6 the -- with the same clarity that Defense Counsel sought -- the
7 documents sufficient to -- sufficient to reflect reasons,
8 rationale, internal objections, and opposition to same.

9 If there are -- in detailed e-mails on that, that,
10 then, because the person is of a senior status, is not required
11 to put it into a memo, because it's not going up the chain;
12 it's actually going down. We will never know.

13 **THE COURT:** I am not unsympathetic. I am just trying
14 to -- it's hard to manage.

15 So I guess what I'm thinking is that maybe, when you
16 do your 30(b)(6) deposition, hopefully on Monday, you'll be
17 asking some questions. And maybe you'll be getting some
18 answers that might be helpful to focus, so that it may focus on
19 particular people or senior custodians or key terms or whatever
20 it is that might be more fruitful.

21 **MS. LAWSON-REMER:** Just so I'm clear, Your Honor --

22 **THE COURT:** Yeah.

23 **MS. LAWSON-REMER:** -- is inclined to modify it, as
24 you've described, but we've opened the possibility of an
25 additional search?

1 **THE COURT:** Yeah. Yes, I should say.

2 **MS. MARCUS:** Beyond sufficient to show --

3 **THE COURT:** Well, right now, that would be the order.

4 **MS. LAWSON-REMER:** Okay, but as --

5 **THE COURT:** Without prej -- so, basically, I'm
6 granting the motion in part and denying it in part. What I'll
7 say is, "without prejudice."

8 So, if indeed, it turns out that there is some basis
9 for searching in a more constructive focused way for things
10 that might be relevant that are within the scope of the
11 requests, then we can talk about that, I guess, at a telephonic
12 maybe.

13 **MS. LAWSON-REMER:** Thank you, Your Honor.

14 **THE COURT:** You know, at that point, I don't know.
15 You'll be so far down, you may decide to just move on.

16 So, again, for one, the ruling is, for the period of
17 2012 to the present, documents sufficient to reflect the
18 policies of the State Department and to the extent within the
19 possession, custody, or control of the State Department, the
20 USCIS, for applying 301(g) and 309 to persons who claim to have
21 acquired U.S. citizenship under such provisions, the reason,
22 slash, rationale for the same and internal objections
23 opposition to the same.

24 And for Two, any argument on that -- that tentative
25 was, again, for the period of 2012 to present -- "Documents

1 sufficient to reflect any direction, agreement, or disagreement
2 between the specified CIS units and the State Department
3 regarding the procedures reflected and the basis of,
4 therefore."

5 Defense, yes?

6 **MS. MARCUS:** I'm having a hard time, on behalf of my
7 client, trying to figure out how, beyond the policies -- like,
8 "sufficient to show the policies."

9 I still don't understand. I'm still struggling with
10 the -- you know, if you're looking for a disagreement or
11 agreement going back to 2012, it does still strike me as, that
12 is, that piece of it is extremely -- I don't know if I can -- I
13 think the State Department will do its best, but I just don't
14 know if it's possible to identify documents sufficient to show
15 agreement and disagreement going back to 2012.

16 **THE COURT:** Do the best you can.

17 **MS. MARCUS:** And I guess the question is, the
18 agreement and disagreement -- I suspect that if it's
19 predecisional and deliberative agreement or disagreement, that
20 the State Department would then, at that time, invoke and
21 appropriately, you know, prepare -- provide a declaration on,
22 from a high-level official, that the agreement and disagreement
23 are predecisional and deliberative.

24 **THE COURT:** Well, we're litigating this today. The
25 time for any kind of a declaration within the scope of the

1 items sought by the document request should have been submitted
2 to the Court in connection with the litigation of this motion.

3 So I think we're past that point.

4 **MS. MARCUS:** Your Honor, the Plaintiff -- I mean,
5 this -- the squeeze that we're in is not only because of
6 Defendants. And we are in a squeeze.

7 And you're ordering us to comply with a much
8 broader -- there has been a struggle to date. It's not because
9 they have been dragging their heels. It is because it is so
10 difficult for the Department of State to collect and review and
11 provide to their Counsel these kinds of documents.

12 This is -- these are -- the Bureau of Consular
13 Affairs, there are statutory restrictions on it and these are
14 things that -- they are not usually in discovery.

15 So it has been known since mid-September that we were
16 taking a cutoff of January 15th to January -- June 2017. I
17 appreciate that, now, in mid-December, the Court is agreeing
18 with the Plaintiffs that -- that that position we took in mid-
19 September is too narrow.

20 But the difficulty is -- and I also appreciate the
21 circumstance that maybe Plaintiffs wanted to see what all of
22 their concerns were before moving to compel. But we are down
23 this path that has been known to the Plaintiffs we were going
24 to be down since mid-September.

25 And I just -- I don't know. I mean, I hear what

1 you're saying, that we should have given you a declaration. I
2 personally pulled all-nighters to provide the Court with the
3 Defendant's portion of the joint stipulation. And we did pull
4 together four declarations from individual -- individuals who
5 the Plaintiffs were threatening to move to compel their depo --
6 individual depositions.

7 I mean, the amount of effort and work that my co-
8 Counsel and I have put in has been extensive and extended and
9 it's not -- I do not think it was feasible, given where the
10 part -- how far the parties were on the overall scope.

11 And just, I mean, the challenge -- and I appreciate
12 that you have gone through the challenge of even reading these
13 materials.

14 But I would respectfully request that we be given an
15 opportunity to provide a declaration on deliberations, on
16 internal deliberative process, for the portion of your ruling
17 that is considering requiring the department to disclose
18 documents and communication sufficient to reflect internal
19 agreement and disagreement.

20 **MR. SPEAKER:** Your Honor, if I may?

21 **THE COURT:** Sure.

22 **MR. SPEAKER:** The Court's been extremely generous
23 with its time, and so I won't belabor any of the issues. But I
24 don't think that in fairness to our client that we could leave
25 the record as it is.

1 I won't belabor the point, but we've submitted the
2 discovery, meet and confer back and forth. And the Court will
3 draw its own conclusions as to who did what and didn't do what
4 when.

5 On the particular issues before us, I can say with
6 extreme confidence and comfort to this Court that we really
7 tried extremely hard to avoid being here today, and made
8 extensive efforts to get the Department of State to engage.

9 And the Court, again, will draw its own conclusions,
10 but that was neither a linear nor, for large portions of the
11 time, very successful effort.

12 On the subject of the declaration for the
13 deliberative process privilege, we had pointed this issue out
14 repeatedly in various forms, in responses to discovery
15 requests, in letters, in telephonic meet-and-confers. We've
16 raised this issue over and over and over to the Defendants.

17 It is neither untimely nor surprising that they find
18 themselves in the predicament in which they find themselves
19 today.

20 We've made clear to them, we've tried to make clear
21 to the Court, and I'll make clear once more time to everyone,
22 we are willing to be receptive to anything that is in the
23 interest in the orderly and efficient litigation of this
24 action.

25 But we are here because the Defendants took certain

1 positions, insisted on certain approaches. And now that the
2 waters have been tested because the issues have been joined,
3 they find that those may be not the right approaches to have
4 taken.

5 **THE COURT:** Okay, so RFP Number Two is communications
6 between the CIS -- between CIS and the State Department.
7 They're different agencies. Frankly, I'm not sure how that
8 even implicates the deliberative process, assuming that I had
9 been given a declaration.

10 So I guess Defense Counsel can speak to that if she
11 likes, but --

12 **MS. MARCUS:** I would just ask the Court to explain so
13 that I can make sure that my clients understand what the Court
14 has in mind, with respect to communic -- documents sufficient
15 to show such communications in the time period of 2012 to 2017.

16 **THE COURT:** Look, I'm really -- I would even limit it
17 to policy makers, all right?

18 **MS. MARCUS:** I mean, it --

19 **THE COURT:** Between policy makers. It's specified --
20 that the specified CIS units and the State Department.

21 So if one policy -- if the State Department and CIS
22 are corresponding about the interpretation of, "born of
23 parent," and one says, "I think it means this," the other one
24 says, "I think it means that," that is -- again, I don't see
25 how that's deliberative process because it's external to each

1 agency. It's the communications with another agency.

2 **MS. MARCUS:** Sure. So the -- are you talking about
3 leadership policy makers?

4 Because the term, "policy makers," incorporates
5 everybody in the Bureau of Consular Affairs. It is a policy-
6 making component that --

7 **THE COURT:** We're trying to define it as narrowly as
8 we can and get the pertinent people.

9 So if senior policy -- you tell me. What words
10 narrow it down to the core people, in Plaintiff's words? "Core
11 policy makers"?

12 **MS. MARCUS:** Core policy makers.

13 **THE COURT:** Fine.

14 **MS. MARCUS:** Thank you, Your Honor.

15 **THE COURT:** Uh-huh. Okay, so the other tent -- last
16 tentative I gave you was for Number Three. This was the impact
17 of the decisions -- the legal decisions.

18 **MS. LAWSON-REMER:** Yes, Your Honor. And I think
19 limiting it to the enumerated decisions and limiting it to the
20 six months after each of those decisions is acceptable to
21 Plaintiffs. And I think we would -- we would be fine with
22 that.

23 **THE COURT:** Okay, and I'll make it core policy
24 makers. So for Defendant's benefit, just to repeat the
25 tentative, I would say, "For the six-month period following

1 each specified decision, documents sufficient to reflect
2 whether in the degree to which State Department core policy
3 makers consider the impact, slash, effect of those Court
4 rulings on..." and then I go back to the language of the
5 request, which is, "Applications for CRBA and U.S. passport or
6 certificate of citizenship, by Plaintiffs or any other person
7 born outside the U.S. who asserts he's a child of U.S. citizen
8 whose U.S. citizen parent is married to a foreign national who
9 does not have a biological relationship to the U.S. citizen
10 parent and any directions or guidance issued relative to the
11 same."

12 **MS. LAWSON-REMER:** Thank you, Your Honor.

13 **THE COURT:** All right, anything from Defense on that
14 one? No?

15 **MS. MARCUS:** I don't want to belabor the -- you know,
16 the points that -- my sense is that the Court has made a
17 decision here and so we will endeavor to --

18 **THE COURT:** Okay.

19 **MS. MARCUS:** -- to meet it.

20 **THE COURT:** All right, so that's the ruling on Number
21 Three.

22 I will tell you, on the ones that follow, I was not
23 certain how to narrow those. And so --

24 **MS. MARCUS:** I'm sorry, Your Honor. I did just think
25 of a question of clarification for Number Three, which does

1 overlap with one of the 30(b)(6) topics we had talked about.

2 And my clarifying question here is, you know,
3 certainly, you know, there will be a lot of attorney-client
4 deliberations and work product within, you know, the Legal
5 Counsel's Office and how to deal with these things.

6 But my understand -- and correct me if I'm wrong --
7 that you're looking for documents sufficient to show the core
8 policy makers --

9 **THE COURT:** Non-privileged, non-attorney work
10 product. Okay, so --

11 **MS. MARCUS:** Thank you, Your Honor.

12 **THE COURT:** For the six month period, non-attorney
13 client privilege, non-work product documents sufficient to
14 reflect.

15 **MS. MARCUS:** Thank you.

16 **THE COURT:** Uh-huh. I was tentatively inclined to
17 deny Five through Eight, just based on overbreadth and
18 proportionality. I will hear from Plaintiffs on that.

19 **MS. LAWSON-REMER:** So, Your Honor, I think that, at
20 this point, we haven't actually received any documents on this,
21 although Defendants did agree to produce a narrow subset.

22 And we -- if we get those documents by Friday, as you
23 said, we would, I think, accept the narrow subset. We just
24 haven't gotten anything.

25 **THE COURT:** Okay, then to the -- then what I would

1 say as to Six to Eight, Defendants, to the extent they haven't
2 done so, produce documents responsive to narrowed version --
3 Defendants' narrowed version, and that otherwise, denied, as to
4 Six through Eight.

5 Defense Counsel, you want to be heard on that one --
6 on those?

7 **MS. MARCUS:** Yeah. My sense is that not everything
8 Plaintiffs have requested actually exists. So we are -- you
9 know, we have produced, and will produce, what we -- what
10 exists.

11 But they're -- if they are wondering why there's only
12 a small number of documents, it is because for the -- for the
13 reasons that we had talked about, that these are the, you know,
14 kinds of things that are not -- that are generally encapsulated
15 in the FAM and there are not a lot of e-mails.

16 So I don't have any -- I think Your Honor's ruling
17 is -- we just say thank you.

18 **THE COURT:** I'm just saying produce what you said you
19 would produce, responsive by the 14th --

20 **MS. MARCUS:** Yes, Your Honor.

21 **THE COURT:** -- and otherwise denied --

22 **MS. LAWSON-REMER:** Your Honor, just one --

23 **THE COURT:** -- as to Six through Eight.

24 **MS. LAWSON-REMER:** One more point of clarity for
25 Request Number Seven. The limited -- limitation that

1 Defendants impose is the same as we've discussed previously
2 about the U.S. Consulate in Toronto.

3 And to the extent there are e-mails or communications
4 responsive to this request, in connection with the
5 Congressional inquiry by Congressman Lieu, those, we would
6 hope, would also fall in -- be granted by this Court.

7 **THE COURT:** Defendant, was that within what you said?

8 **MS. MARCUS:** I believe so, yes. Any, you know,
9 documents or communications discussing, describing,
10 constituting any application for a (indisc.) or a U.S. passport
11 for E. or A., the minor children.

12 And the -- that Congressional inquiry was, you know,
13 describing the applications. So, yes, that is within what we
14 have said that we would --

15 **MS. LAWSON-REMER:** Okay, yes. That would be a
16 helpful clarification. Because the time frame, as narrowed by
17 Defendants for this request, excludes the Congressional
18 inquiry.

19 **THE COURT:** Okay, I'm just not locating easily where
20 Defendants narrowed version is. I'm thinking it's the
21 joint stipulation.

22 **MS. LAWSON-REMER:** Your Honor, it's on page 25 of
23 Exhibit A.

24 **THE COURT:** Pardon me? Of the joint stip?

25 **MS. LAWSON-REMER:** Page 25 of Exhibit A.

1 MS. SPEAKER: Exhibit 15.

2 MS. LAWSON-REMER: Exhibit 15, Your Honor.

3 THE COURT: Wait a minute.

4 MS. LAWSON-REMER: Exhibit -- it's on page 25 --

5 THE COURT: A or --

6 MS. LAWSON-REMER: It's page 25 of Exhibit 15, which
7 is attached to Exhibit A. Is that helpful?

8 THE COURT: It should be in the joint stip, right?

9 Or no?

10 MS. LAWSON-REMER: It is, Your Honor.

11 THE COURT: Okay, let's use the --

12 MS. LAWSON-REMER: On page 55.

13 THE COURT: Okay, there we go. Okay, yes, that seems
14 to be encompassed.

15 So that ruling stands, then, as --

16 MS. LAWSON-REMER: So, Your Honor, the time period
17 before the Congressional inquiry is in the fall of 2017. And
18 the time period that Defendants have articulated here is
19 through June of twenty -- June 2nd of 2017.

20 THE COURT: Well, they actually don't put that time
21 parameter on the inquiry. They put that on (b). It's not on
22 (d). So as I'm looking at 55, "Defendants construe their
23 request to seeking documents or communications for which all
24 the following is true: (a), generated by, available to, or sent
25 or received by relevant officers in the Consular section of the

1 U.S. Consular in Toronto; (b), during the relevant time period
2 of January 1, 2015 through January 2 -- or sorry -- June 2,
3 2017; (3), describing, memorializing, or discussing,
4 constituting; (d), any application or any adjudication or any
5 inquiry."

6 I see what you're saying.

7 **MS. LAWSON-REMER:** Yeah, I read those to require all
8 of those conditions in order for them to produce documents.

9 And we -- you know, we had asked for a time period
10 that was broader than that. And they -- in their response to
11 the Court, they say -- or in their -- they say they object to
12 the time period.

13 **MS. MARCUS:** So it sounds like that to amend the
14 Court's ruling, the Court -- and Defendants are open to this --
15 the Court should also add, "...or documents or communications
16 related to the Congressional inquiry."

17 **MS. LAWSON-REMER:** Or if Your Honor just said for all
18 of twenty -- from 2015 through the end of 2017, it's an
19 additional six months.

20 **THE COURT:** Okay, hold on. I'm going to say, "As
21 narrowed by Defendant, plus any inquiry from any Congressional
22 inquiry" --

23 **MS. MARCUS:** Thank you, Your Honor.

24 **THE COURT:** -- "relating to such apps, period."
25 Okay.

1 **MS. LAWSON-REMER:** Thank you, Your Honor.

2 **THE COURT:** All right. Well, this was where I
3 thought it was going to be easy and it ended up not being easy.
4 And so we went back to the beginning.

5 So Twelve through Fifteen was the whole documents
6 sufficient to -- and this is where we talked about the fields.
7 So I suppose, as to Twelve to Fifteen, let's start with
8 produced documents sufficient to identify the fields of
9 available -- available information via automation. Is that --

10 **MS. LAWSON-REMER:** Yes.

11 **THE COURT:** -- the automation. And then I think that
12 is all I would order at this juncture. And then I would deny
13 the remainder without prejudice, as to Twelve to Sixteen.

14 **MS. LAWSON-REMER:** Your Honor, if I may suggest a
15 slightly different approach?

16 **THE COURT:** Sure.

17 **MS. LAWSON-REMER:** Since we are already intending to
18 update the Court, with respect to Topic 5 on the 30(b)(6), and
19 have that conference, if needed, if Defense Counsel produces
20 the fields by the end of the day tomorrow, as she said that she
21 would, we can try to come up with a resolution to that one and
22 present a proposal.

23 **THE COURT:** So you're saying you basically want me to
24 defer ruling on 12 through 15?

25 **MS. LAWSON-REMER:** Yes, Your Honor, only for a

1 limited period of time while we -- while we -- because it --
2 what may -- what may be, Your Honor, is that we ask for certain
3 information and Defendants don't agree to produce it. And
4 we're sort of back where we are now.

5 But if we could just have that conversation instead
6 of --

7 **THE COURT:** Okay, we'll defer on Twelve through
8 Fifteen. Defense, any objection to that?

9 **MS. MARCUS:** Not generally. I do want to note, to
10 the extent that the idea is that we would give them --
11 Plaintiffs something tomorrow and then they can make a proposal
12 that -- you know, I think your inclination was reasonable, and
13 I would urge you to adopt that now.

14 I just want to note it is 6 p.m. on the east coast
15 and I am taking a deposition here tomorrow, so, just the
16 logistics of getting some of this done and conferring with my
17 colleagues, is itself a challenge.

18 So, I just wanted to be mindful of that and if
19 plaintiffs expect us to get them something at the end of the
20 day tomorrow, that, you know, it is something that I threw out
21 there this morning, but it's logistically maybe not possible,
22 so we may need an additional day, because, again, I am deposing
23 the plaintiff here tomorrow.

24 **THE COURT:** Okay. Let me -- I'm just going to order
25 the documents sufficient to produce the fields at this point.

1 We're going to do maybe, I know we talked about next week and
2 we also talked about later this week, so are you all in
3 depositions on Thursday morning? Are you on a plane Thursday
4 morning?

5 **MS. MARCUS:** I don't have to be, Your Honor.

6 **MS. LAWSON-REMER:** Your Honor, I have a deposition
7 for another case, but I can try to arrange it for --

8 **THE COURT:** What time does that start?

9 **MS. LAWSON-REMER:** It's in Denver --

10 **THE COURT:** Oh, okay.

11 **MS. LAWSON-REMER:** At 9:30 on Denver time.

12 **THE COURT:** Okay. Are you flying the night before,
13 or that morning?

14 **MS. LAWSON-REMER:** I am flying the night before.

15 **THE COURT:** If we try to do a conference call at 8?

16 **MS. LAWSON-REMER:** So, I think Denver is one hour
17 ahead and so I would be available for about 30 minutes. Your
18 Honor, I could also try to arrange to ensure that the lunch
19 break there is at noon, so that we convene at 11 o'clock your
20 time.

21 **THE COURT:** Okay. Okay. We could do 11 o'clock on
22 Thursday or -- are you on a plane, that's what I'm trying to
23 figure out?

24 **MS. MARCUS:** Again, I can -- my current travel
25 arrangements is to take an early flight. I have two legs.

1 There's no nonstop.

2 **THE COURT:** Okay.

3 **MS. MARCUS:** But, I could rearrange.

4 **THE COURT:** How are you on early Friday morning?

5 First thing Friday morning, or is everybody --

6 **MS. LAWSON-REMER:** I'm available.

7 **MS. MARCUS:** I'm available.

8 **THE COURT:** Everybody available? Okay. Why don't we
9 say, we'll tentatively set it up. You will let me know if we
10 actually need to do it. So we'll do a tentative tel con,
11 12/14, 8 a.m. and what time on the afternoon of the 19th, just
12 for a stat -- we'll call it a status conference?

13 **MS. MARCUS:** We will make ourselves available
14 whenever the Court -- works for the Court.

15 **THE COURT:** 1:30?

16 **MS. MARCUS:** Sure.

17 **THE COURT:** All right. Go ahead.

18 **MR. EDELMAN:** There's some possibility, Your Honor,
19 that I may be at the Justice Department in Washington, but --

20 **THE COURT:** Lucky fellow.

21 **MR. EDELMAN:** Yes, yes. It is not -- it is never
22 something to which I aspire with all appropriate courtesies to
23 my --

24 **MS. MARCUS:** I'm starting to regret my aspirations.

25 **MR. EDELMAN:** But I don't want my schedule to

1 interfere. We'll make sure that the plaintiffs are
2 appropriately represented.

3 **THE COURT:** Okay.

4 **MS. MARCUS:** If Your Honor, if, you know, we end up
5 scheduling a deposition in this case for that day, we'll work
6 around 1:30.

7 **THE COURT:** To tell you the truth, any time that
8 afternoon is fine. I just cannot do it in the morning. But
9 anytime that afternoon. So if for example, counsel should be
10 done with DOJ by five, I would think --

11 **MR. EDELMAN:** One hopes.

12 **THE COURT:** One hopes. So, we could always make it a
13 little later in the day, California time. So, we can set up
14 for 2:30 even, if you want. I don't -- again, I'm open to --
15 okay, let's say 2:30.

16 **MR. EDELMAN:** Thank you, Your Honor.

17 **THE COURT:** That maximizes the chance of everybody
18 participating. And of course, if we don't need to have it,
19 that's fine with us too. So, again then, just as to 12 to 15,
20 it's going to be produced documents sufficient to identify the
21 fields of the available information via automation.

22 Okay. I was trying not to do this request by
23 request, but that seems to be where we are. Sixteen, I was --
24 my initial notes are tentative to grant from 2012 to the
25 present. I would probably limit this to docs sufficient to

1 show.

2 **MS. LAWSON-REMER:** Your Honor, that would be fine so
3 long as it contains all of the evidentiary requirements. So,
4 we wouldn't need the same evidentiary requirements for these
5 multiple times but it would be --

6 **THE COURT:** Documents --

7 **MS. LAWSON-REMER:** If we go to the 36 deposition and
8 there's another evidentiary requirement that we weren't made
9 aware of or something like that.

10 **THE COURT:** Okay. So, documents sufficient to show -
11 - I'm going to shorthand because you all use like five words to
12 describe the same thing, so, to show policies reflecting all
13 evidentiary requirements necessary and then it continues on to
14 establish U.S. citizenship under 301G, 309, including when
15 genetic testing will or won't be requested for plaintiffs,
16 others born outside of the U.S., to assert child of U.S.
17 citizen married to foreigner who does not have a biological
18 relationship to the U.S. citizen parent.

19 I doubt it's parsed that finely. I would probably be
20 inclined to just put a period after including when genetic
21 testing will or won't be requested. But I will hear from
22 counsel. Plaintiff?

23 **MS. LAWSON-REMER:** Yes, Your Honor. Two questions.
24 One, when you use policies as shorthand, it's not intended to
25 eliminate the production of practices or protocols, is that a

1 fair understanding?

2 **THE COURT:** That's a -- because to me, those are all
3 policies and I think that's the point when you're trying to
4 demonstrate that a uniform practice --

5 **MS. LAWSON-REMER:** Okay.

6 **THE COURT:** -- constitutes a policy.

7 **MS. LAWSON-REMER:** Right.

8 **THE COURT:** It all boils down to, is it a policy?

9 **MS. LAWSON-REMER:** Right. I just wanted to be clear
10 because I think that a certain point in time, the defendants
11 have said that the FAM is the policy and we're looking for
12 something beyond the FAM. So, on that --

13 **MS. MARCUS:** The FAM is also the procedure and the
14 protocol. I'm not sure there is anything beyond the FAM.

15 **MS. LAWSON-REMER:** Well, defendants have already
16 produced at least a handful of training materials and so, we
17 would, to the extent that it a practice or procedure, that
18 would fit into this category. So, I just wanted to clarify
19 that.

20 With respect to your other suggestion of limiting it,
21 I actually think that would be fine with plaintiffs. The
22 second sentence was intended to make clear what genetic
23 testing, when we would expect to see it because of the
24 circumstances affecting plaintiffs here, so if it -- if
25 anything, it was an effort to narrow it.

1 **THE COURT:** I mean, I'll let defendant tell me what
2 they prefer. I just suspect there's not anything so granular
3 as to when genetic testing will or won't be requested and that
4 it's more just encompassed within the gee when you suspect
5 fraud or something like that. But, I'll let defense counsel
6 speak to it.

7 **MS. MARCUS:** That's correct, Your Honor, your
8 understanding and that's consistent with the testimony from
9 last week where the two consular officers testified as to when
10 they inquired and both of them said even, you know, both of
11 them said it's a case by case basis, that they look at the
12 applications that are submitted and you know, then determine if
13 they have sufficient information to determine whether there's a
14 genetic -- a biological relationship and they don't need to ask
15 for genetic material and if there's not, then they may provide
16 that as an option to the applicant, as a way to establish the
17 biological relationship.

18 **THE COURT:** Okay. So, you're fine with putting a
19 period after including when genetic testing will or will not be
20 requested.

21 **MS. MARCUS:** Yes.

22 **THE COURT:** Okay.

23 **MS. LAWSON-REMER:** But, Your Honor, they so far
24 limited this to Toronto. So, are you including the core
25 policy?

1 **THE COURT:** Yeah. I'm not limiting it to Toronto.

2 **MS. MARCUS:** But it is the policies that Toronto
3 would be applying.

4 **THE COURT:** Sure.

5 **MS. MARCUS:** Okay. So that -- so we weren't limiting
6 it to Toronto either then in that case.

7 **THE COURT:** Okay.

8 **MS. MARCUS:** Generally, that's true with all the
9 policy across the board, as long as it's understood that it's
10 the policies that Toronto would be applying, but not
11 necessarily themselves developing, that is our understanding of
12 what we have agreed to produce and can produce.

13 **MR. EDELMAN:** So, I'm loathed at this late hour to
14 reach (indisc.) ground but I think the Court made clear that
15 some document requests, those that relate to the adjudication
16 of the applications of the particular plaintiffs, those
17 policies are policies that Toronto was aware of, but by and
18 large, some of these other requests that the Court's already
19 ruled on, those relate to the consideration and communications
20 to which or in which Toronto people may or may not be involved
21 and may not even be aware.

22 They're just applying the FAM, so I think rather than
23 ask the Court to reconsider this issue, we're happy to rest on
24 the record as its been developed over the past few hours, but
25 it's not the case, as I understand it, from what the Court has

1 said so far, that for every one of these document requests,
2 it's only something that Toronto received or was aware of.

3 **THE COURT:** That's correct.

4 **MR. EDELMAN:** Thank you, Your Honor.

5 **THE COURT:** Yeah, I don't think there was any
6 confusion on that.

7 **MS. MARCUS:** Right.

8 **THE COURT:** Okay. All right. Any thoughts on how to
9 expedite the remaining ones? We have 17 through 23.

10 **MS. LAWSON-REMER:** So, Your Honor, if you want to --
11 I don't know if this is what you want, but one way would be to
12 just tell us your inclination, we'll assess for all of them,
13 we'll assess as a whole whether we would be satisfied with that
14 and just pick and choose what really --

15 **THE COURT:** Okay. All right. I have less thoughts,
16 fewer thoughts on these, so let me try to do that. So
17 initially on 17, I'm probably going to stick a doc sufficient
18 to on all of these.

19 **MS. MARCUS:** And with 17, it says concerning any
20 decision, not to treat so it seems to be asking for any
21 decision that could be made with respect to any one of the 3000
22 CRBA applications and the 20,000 U.S. passport applications
23 that come from Toronto.

24 So, I think if you could also -- if we could -- I can
25 also try to suggest, but the documents sufficient to show

1 modifier is a reasonable one. I think we also may need to
2 think of a reasonable modifier for any decision language.

3 Maybe decisions, you know, documents sufficient to
4 show concerning decisions, but not require documents on the
5 granular level, that would show the concerns of, you know, on
6 any individual --

7 **THE COURT:** I'll tell you what I'm contemplating and
8 I really -- I'm not looking for it. I think there are probably
9 a finite list of concerns. One is, again, fraud. There are
10 probably others. So, what I'm looking for are documents
11 sufficient to identify all of those types of concerns, as
12 opposed to necessarily a specific concern with a specific
13 application. I'm looking for the categories of concerns, so to
14 speak.

15 **MS. MARCUS:** Right.

16 **THE COURT:** That is what I'm going for.

17 **MS. MARCUS:** That was my sense of where you were
18 going and I just wanted to point out that any decision language
19 in the request may then need to be modified to be consistent
20 with where you're trying to go with this. Describing it, you
21 know, decisions as opposed to any decision may help to
22 generalize it.

23 **THE COURT:** All right. So documents sufficient to
24 identify State Department, CIS's or DHS's rationale, Government
25 interest or concerns concerning decisions not to treat as U.S.

1 citizen a child born outside the U.S. to married U.S. citizen
2 who is not child's biological parent, but who was listed as a
3 parent on the child's birth certificate.

4 **MS. LAWSON-REMER:** Your Honor, that would be
5 acceptable to plaintiff.

6 **THE COURT:** Okay. We need to do --

7 **MS. MARCUS:** And with respect to CIS or DHS's
8 rationale, would you include the modifier that you included
9 before?

10 **THE COURT:** Yeah, within -- as to those two within
11 State Department's possession, custody, or control. And then,
12 I need to put a time frame on this.

13 **MS. MARCUS:** Would the Court be open to -- I mean, is
14 it necessary to have DHS's -- I am worried that it's -- I don't
15 want to -- I just am worried about the logistics of getting all
16 of this done.

17 **THE COURT:** Well, to tell you the truth, I'd be
18 inclined to just limit this one to the State Department. I'm
19 not sure that the concerns of the other agencies A) would be
20 any different; or B) would necessarily be relevant, but, well
21 proportional. But go ahead.

22 **MS. LAWSON-REMER:** Your Honor, they are -- the
23 rationale or interests also overlap somewhat with the
24 disagreement issue that we flagged earlier. I think it's in
25 request number two and -- what if we limited it to those

1 individual eight entities within the third party?

2 **MS. MARCUS:** That is not a meaningful limitation and
3 it wasn't for number two, and it wouldn't be here.

4 **THE COURT:** I'm just going to limit this one to the
5 State Department. Okay. I'm going to -- for this one, I'm
6 going to --

7 **MS. LAWSON-REMER:** Your Honor, number 18?

8 **THE COURT:** No, I'm on 17. I have -- timeframe. I'm
9 on 17, timeframe. I think I'm going to say just current. I
10 don't see how those concerns would necessarily be different or
11 less than what they would currently be. So, keep it simple.

12 **MS. LAWSON-REMER:** Your Honor, if we may ask for
13 2017's and whatever rationale existed when they denied the
14 minor.

15 **THE COURT:** Okay. That's fair. Let me say 2017 to
16 present.

17 **MS. MARCUS:** Your Honor, I'm mindful that your clerk
18 has and maybe you haven't yet eaten lunch.

19 **THE COURT:** Don't worry about us. If you're worried
20 about yourself, go ahead and say that.

21 **MS. MARCUS:** No, I have a -- actually a snack bar
22 that I can munch on, but I --

23 **THE COURT:** What's your question?

24 **MS. MARCUS:** I just want to -- if you need to take a
25 break. I mean --

1 **THE COURT:** I just want to be done.

2 **MS. MARCUS:** Okay, go ahead.

3 **THE COURT:** And I think the best way to be done is to
4 just continue plodding though. Now again, having said that, if
5 anybody needs a break, just say so, including my clerk, and I
6 will accommodate you. Okay. 18. I don't think there's any
7 problem with all versions of FAM.

8 **MS. MARCUS:** I don't know if this is still at issue,
9 I believe we've already --

10 **THE COURT:** Is this one moot?

11 **MS. LAWSON-REMER:** Well, the second half of it, the
12 document concerning decisions or discussion of how to define
13 those terms, I think that there was an objection to producing
14 that portion, but if defendants have withdrawn that, then --

15 **MS. MARCUS:** The decisions on how to define those
16 terms would be communicated either via cable or incorporated
17 into the FAM themselves, so my sense is that we are, you know,
18 this would include cables if those cables exist. The
19 discussions again is overly broad and not proportional.

20 **THE COURT:** So you're saying it is still an issue
21 then, it's not moot?

22 **MS. MARCUS:** I don't know.

23 **MS. LAWSON-REMER:** As narrowed by defendants in their
24 prior productions, it's still an issue because of the decisions
25 piece and the Toronto piece, but if Your Honor's inclined to --

1 **THE COURT:** Okay. So, the first part of it is not an
2 issue. Okay. All versions of FAM or equivalent related
3 documents that define in wedlock or out of wedlock or any other
4 terms defendants believe have similar meaning as those terms
5 for purposes of applying 301G or 309, that's not in dispute.

6 All documents concerning decisions or discussions on
7 how to define those terms. I would limit that to core policy
8 makers. Okay.

9 Non-privileged, non-attorney/client privileged work
10 products, docs concerning decision or discussions of core
11 policy makers of how to define those terms, etcetera.

12 **MS. MARCUS:** Could you --

13 **THE COURT:** And then I would say 2012 to present.

14 **MS. MARCUS:** And for those, if documents sufficient
15 to show, you're not looking for all the discussions?

16 **THE COURT:** Yes. And non-privileged attorney, non-
17 attorney work product docs, sufficient to reflect decisions or
18 discussion of core policy makers of how to define those terms.

19 **MS. LAWSON-REMER:** Your Honor?

20 **THE COURT:** Yes?

21 **MS. LAWSON-REMER:** That's acceptable to us as long as
22 it doesn't exclude the four individuals in Toronto. So, it's
23 the four individuals in Toronto, plus the policy makers. Does
24 that make sense.

25 **THE COURT:** Yes.

1 **MS. MARCUS:** We've already included them.

2 **MS. LAWSON-REMER:** And if the defendant's position is
3 that they've already agreed to produce those people, then I'll
4 stop talking right now.

5 **THE COURT:** Remind me who the four people are. Is it
6 the deponents or is there somebody else?

7 **MS. LAWSON-REMER:** It is the deponents.

8 **MS. MARCUS:** The four consular officers, well three
9 consular officers and one Fraud Unit specialist. Two were
10 deposed last week and one is Frankie Carry David (phonetic).
11 The fourth person is Endira Salam (phonetic). I --

12 **MS. LAWSON-REMER:** Your Honor, it's just a
13 clarification of the record that as we are defining these and
14 saying from core policy makers that that is in addition to the
15 four individuals from Toronto.

16 **MS. MARCUS:** That's fine, except for I would say that
17 those four individuals were not in positions, you know. Most
18 of them were -- they were not in positions in which they --
19 that we have access to their information going back to 2012.
20 Most of them, you know, arrived I think during the time that
21 they were at the Toronto Consulate, would be a useful modifier
22 to the extent that just to make sure everybody's clear that,
23 you know --

24 **MS. LAWSON-REMER:** That's acceptable.

25 **MS. MARCUS:** Thank you.

1 **THE COURT:** Okay, so it's Day, Ruffits (phonetic).
2 Who are the other two?

3 **MS. LAWSON-REMER:** Harmon, Hovan and Ramsey (all
4 phonetic).

5 **MS. MARCUS:** And it would cover the period of time in
6 which --

7 **THE COURT:** They worked there, right?

8 **MS. MARCUS:** They were at the consulate at Toronto.

9 **THE COURT:** Right. Okay. So the undisputed portion
10 is ordered. That's all versions of the FAM that we talked
11 about and then documents sufficient to reflect -- well, let me
12 put -- non attorney/client privilege, non work products
13 documents sufficient to reflect the following four: Jay Refit
14 Ward Worman Hovan and Ramsey (all phonetic) while working at
15 the Toronto Consulate and core policy makers, decisions or
16 discussions of how to define those terms, etcetera for 2012 to
17 present.

18 **MS. LAWSON-REMER:** Yes, Your Honor.

19 **THE COURT:** Okay.

20 **MS. MARCUS:** And by sufficient to show discussions,
21 you're not asking for sufficient to show all of the discussions
22 of the core policy makers between 2012 and present?

23 **THE COURT:** Okay. Please try to tell me these things
24 all at once because the way I can do it at once because I keep
25 -- I feel like I'm taking one step forward, two steps back.

1 **MS. MARCUS:** It's just the same issue that has been
2 raised before with respect to --

3 **THE COURT:** Okay. Please stop talking so I can read
4 it with what your argument is in mind.

5 **MS. MARCUS:** All right, Your Honor.

6 **THE COURT:** No problem. I think I mean it as it is.
7 Mean to leave it as it is. Okay. Nineteen. All right. So
8 for period 2012 to present, documents sufficient to reflect the
9 policies, State Department policies, defining or interpreting
10 those terms.

11 **MS. LAWSON-REMER:** That's acceptable to plaintiffs,
12 Your Honor.

13 **THE COURT:** Defense?

14 **MS. MARCUS:** We will work to comply, Your Honor.

15 **THE COURT:** Okay.

16 **MS. LAWSON-REMER:** Your Honor, if I may, with respect
17 to 20 through 23, plaintiffs would also accept that limiter of
18 documents sufficient to show.

19 **THE COURT:** Tell me why you need this.

20 **MS. LAWSON-REMER:** Which number, Your Honor?

21 **THE COURT:** What they've done to prevent
22 discrimination.

23 **MS. LAWSON-REMER:** So, part of the due process claim,
24 Your Honor, is that the marriage was not actually recognized,
25 even after Windsor and Obershroe (phonetic). And so to the

1 extent policies were enacted to make sure that same sex couples
2 that are legally married are treated under the proper provision
3 of the INA. That's relevant.

4 **THE COURT:** Because? Again, play it out.

5 **MS. LAWSON-REMER:** Well, to the extent the individual
6 in Toronto that adjudicated this did not follow the policy that
7 would, you know, bear on whether there was intentional
8 discrimination by that individual.

9 **THE COURT:** Okay then, that seems to be me to mean it
10 should be limited to 2017. Yes?

11 **MS. LAWSON-REMER:** Yes, Your Honor, with the
12 exception of the periods immediately following those cases that
13 we've discussed previously.

14 **MR. EDELMAN:** Well, is the Court saying those
15 documents existing or in effect in 2017?

16 **THE COURT:** Well, if you're saying that the denial --
17 this seems to me to be more focused on the specific decisions
18 and issue. The other ones that are, you know, a little more
19 broad and the other information seems more relevant. This one
20 seems to me, to be really focused on, again, that's why I asked
21 her, why do you need this information. And her response was,
22 to show that they complied, or didn't comply, with an existing
23 policy.

24 **MR. EDELMAN:** So, I think we're saying the same
25 thing, Your Honor. That if something was promulgated, the

1 policy was promulgated in say 2015, but existed in 2017, is it
2 the court's intention that that would be covered?

3 **THE COURT:** Right.

4 **MR. EDELMAN:** Yes, okay.

5 **MS. REMER:** Okay.

6 **THE COURT:** So --

7 **MS. REMER:** Yes, Your Honor.

8 **THE COURT:** -- okay. So, what I'm thinking about is
9 documents sufficient to reflect, and again, it wasn't CIS that
10 processed this. So, any State Department policy in effect in
11 2017, having the purpose or effect of preventing
12 discrimination. I'm going to say based on sexual orientation,
13 that's what at issue here.

14 **(Pause)**

15 In provision of consular or passport services, or
16 adjudication with respect to persons claiming to be U.S.
17 citizen under 301(g) or 309.

18 **MS. REMER:** Your Honor, to be further helpful for 21,
19 22, and 23, we can accept that time period limitation there as
20 well.

21 **THE COURT:** Okay. Defense, any thoughts on the
22 tentative on 20?

23 **MS. MARCUS:** No, Your Honor. We will endeavor to
24 comply to the extent that we haven't already --

25 **THE COURT:** Okay.

1 **MS. MARCUS:** -- committed to producing these items.

2 **THE COURT:** Okay. So, 21, we're going to again do
3 docs sufficient to reflect training instructions in effect,
4 well, given to U.S. Embassy personnel.

5 **(Pause)**

6 And I'm going to say to those four people. Documents
7 sufficient to reflect, or training, or instructions given to
8 the four people we identified previously. Concerning how to
9 interact with, et cetera, gay, lesbian, or other LGBT
10 individuals or same-sex couples.

11 **(Pause)**

12 And just to make it clear, who worked in Toronto
13 Consulate in 2017. Defense?

14 **MS. MARCUS:** Yes, Your Honor. We will endeavor to
15 comply to the extent that we already, haven't already.

16 **THE COURT:** Okay. I appreciate that, I'm merely, and
17 I understand you're trying to get out of here. But, if there's
18 any argument you want to make for the record, that's what I'm
19 looking for.

20 **MS. MARCUS:** I see.

21 **THE COURT:** I understand you will endeavor to comply.
22 I expect that that is the case, but.

23 **MS. MARCUS:** I think if the question is, it's
24 documents sufficient to show --

25 **THE COURT:** Yeah, sufficient to reflect --

1 **MS. MARCUS:** -- the training.

2 **THE COURT:** -- sufficient to show.

3 **MS. MARCUS:** Right. So, not communications, but
4 documents.

5 **THE COURT:** Right.

6 **MS. MARCUS:** Okay.

7 **THE COURT:** Training or instructions given to the
8 four people who worked at the Toronto Consulate in 2017. I'll
9 name them, but the four people, we all know who they are
10 concerning. Those how to interact with gay, lesbian, and or
11 LGBT individuals or same-sex couples.

12 **MS. MARCUS:** Yeah --

13 **THE COURT:** Yeah.

14 **MS. MARCUS:** -- so, I don't believe that this is a --
15 the only thing that comes to mind with respect to that
16 clarification, Your Honor, is that to the individuals that
17 Ms. Ruffit (phonetic) is the one who has been with the
18 Department of State the longest, since about 2015. And she, I
19 mean sorry 2005, and she testified that she had undergone
20 training back in 2005. My sense is that you're looking, that
21 there's a time, is there a timeframe restriction?

22 **THE COURT:** Well I --

23 **MS. MARCUS:** I know some of the training is still
24 applicable.

25 **THE COURT:** -- right. So, she would have been

1 trained in 2005 to 2017. There's got to be, in a personnel
2 folder, all of these people have to, it has to show what
3 training they attended somewhere.

4 **MS. MARCUS:** Yes, but for example, you know there are
5 weeks or month long trainings to prepare to be a Consular
6 Officer. And so, I'm not sure that we have the full curriculum
7 for those things from 2005. I think, you know, training that
8 is, I think we can try to find it. But, if we don't have it
9 going back that far, I think that these are the kinds of things
10 given how the world changes, and given how society has changed
11 in 2005, I'm not sure that --

12 **THE COURT:** All right how about training or, what is
13 it, training or instruction, I mean they should have it for at
14 least I'm going to say 2012 to 2017.

15 **MS. MARCUS:** -- thank you, Your Honor.

16 **THE COURT:** So, there's at least a five year
17 parameter, and presumably if they were going to get that kind
18 of training, they would have had it during that five year
19 period. Okay.

20 **MS. REMER:** Your Honor, that's acceptable to us with
21 the one request that to the extent Ms. Ruffit's training does
22 exist, just to ask defendants to make that single inquiry to
23 look for it. Not to do a broad sweep of looking for all
24 training from 2005 to present, but just to look and see if that
25 one document can be located.

1 **THE COURT:** Well, you just deposed her. Is that a
2 question you posed to her?

3 **MS. REMER:** We discussed some of the training, but
4 the document hasn't, wasn't produced, so there's nothing we
5 could have asked her about the document.

6 **MS. MARCUS:** It's not a document. She testified that
7 she, she testified to ongoing, continuing education trainings,
8 as well as other trainings that she had taken throughout her --

9 **MS. REMER:** Okay.

10 **THE COURT:** Okay.

11 **MS. REMER:** So then --

12 **MS. MARCUS:** -- her career with the State Department.

13 **THE COURT:** I'm going to leave it as --

14 **MS. REMER:** -- so then --

15 **THE COURT:** -- you've got what you need.

16 **MS. REMER:** -- understood.

17 **THE COURT:** If you need --

18 **MS. REMER:** -- thank you, Your Honor.

19 **THE COURT:** -- yeah, on her. Okay. Okay. On 22
20 again, docs sufficient to reflect training, instructions given
21 to, again I'm going to say for 2012 to 2017, to the four people
22 at the Toronto Consulate concerning circumstances in which they
23 should inquire about biological and or gestational
24 relationships, et cetera.

25 **MS. REMER:** Your Honor, that's fine with the

1 plaintiffs.

2 **THE COURT:** And I'm going to limit it too. Because
3 it speaks more generally about married couples applying, so
4 when the married couple in issue applied for CRBA and passport
5 on behalf of the minor in issue. Defense?

6 **MS. MARCUS:** I think what you have outlined is
7 already covered by what the defendants have --

8 **THE COURT:** Produced.

9 **MS. MARCUS:** -- agreed to produce with maybe the one
10 addition of the date range, is that correct?

11 **THE COURT:** I just said for their training for the
12 five year period, 2012 to '17.

13 **MS. MARCUS:** Right.

14 **THE COURT:** Yeah, on that topic.

15 **MS. MARCUS:** And if, and you're, for these four
16 individuals, right?

17 **THE COURT:** Correct.

18 **MS. MARCUS:** And for the time, that's applicable to
19 the time that they were at Toronto. So, the training might be
20 before Toronto but, you're --

21 **THE COURT:** If they had the training, I presume it
22 would be applicable to their time in Toronto.

23 **MS. MARCUS:** -- they're, Ms. Ruffit was in a
24 different position working on visas, for example, not on CRBAs.
25 And so, and I believe that at least one of, I think it might

1 have been Ms. Day, who had been posted someplace else. I
2 know --

3 **THE COURT:** Okay the, the --

4 **MS. MARCUS:** -- Ms. Ramsey had a Consular --

5 **THE COURT:** -- the parameters are, inquiring about it
6 in the context of applications for CRBAs and passports.

7 **MS. MARCUS:** -- okay.

8 **THE COURT:** Okay?

9 **MS. MARCUS:** Thank you, Your Honor.

10 **THE COURT:** Last, yeah, and I would limit this the
11 same. So, documents sufficient to reflect training of four
12 individuals at the Toronto Consulate in 2017, from 2012 to
13 2017, concerning requests or requirements for DNA testing to
14 establish biological, the biological relationship of the
15 couple, married couple in issue. And I'm going to say the
16 minor child when they applied for a CRBA and passport. Okay.
17 Plaintiff?

18 **MS. REMER:** Your Honor, that's acceptable to
19 plaintiffs.

20 **THE COURT:** Defense?

21 **MS. MARCUS:** Will you read it? Will you re-state
22 that one more time --

23 **THE COURT:** Sure.

24 **MS. MARCUS:** -- so I can make sure I heard it?

25 **THE COURT:** It's pretty much parallels what we did in

1 the others. But, documents sufficient to reflect the training
2 for the period of 2012 to 2017, of the four same individuals
3 who worked at the Toronto Consulate in 2017, concerning a
4 request or requirement for DNA testing to establish the
5 biological relationship of the married couple and the minor
6 child when they applied for a CRBA and passport for the minor.

7 **MS. MARCUS:** Okay.

8 **THE COURT:** That's the upshot.

9 **MS. MARCUS:** And the, yeah, and the training is for
10 that and, you know, applicable to their work in the Toronto
11 Consulate. The reason I mention that is, one of the Consular
12 Officers had been in a different region, in a different
13 location. And if she got regional specific training, my sense
14 is that that is not encompassed. And I don't know if any such
15 regional training exists, but that you're generally looking for
16 what they received as background to prepare them for their
17 work --

18 **THE COURT:** Yes.

19 **MS. MARCUS:** -- in the Toronto Consulate.

20 **THE COURT:** Yes.

21 **MS. MARCUS:** Okay. Thank you, Your Honor.

22 **THE COURT:** Okay. So, I've now ruled on all of the
23 requests for production. So, just to recap, the rulings have
24 all been made on the depo topics except number five, which has
25 been deferred.

1 Motion has been denied as moot, as to the
2 interrogatories, because those were withdrawn from the motion
3 to compel. The motion for compelling the depositions of
4 Christensen and Eagen was withdrawn, or denied as moot given it
5 was withdrawn. The court granted the motion as to the
6 deposition of Hernandez, without prejudice to that being
7 withdrawn by plaintiff. And then that has to be noticed by
8 plaintiff, or withdrawn within, has to be set within, prior to
9 the discovery cut off.

10 Rulings on the requests for production were just
11 made. All documents that defendants agree to produce or that
12 the court has now ordered them to produce, to be produced by
13 Friday, December 14th. Also, by Friday, December 14th,
14 defendants are to notify the plaintiffs if a second 30(b)(6)
15 witness is going to be designated, and to advise plaintiffs of
16 the topics each will cover.

17 And then, I also directed defendants to forward their
18 proposed protective order to defendant's --

19 **MS. REMER:** Plaintiffs, Your Honor.

20 **THE COURT:** -- by, I'm sorry, ordered defendant to
21 produce their proposed protective order to plaintiffs by close
22 of business tomorrow.

23 **(Pause)**

24 Okay. Am I missing anything?

25 **MS. REMER:** Your Honor, Ms. Day's deposition, I

1 believe you had been inclined to require it to occur before
2 December 25th.

3 **THE COURT:** Yes.

4 **(Pause)**

5 Right, plaintiffs to notice and she's to appear not
6 later than 12/25. Let's see, I also set a further telephonic
7 conference for December 14 at 8:00 a.m. and a further status
8 conference for December 19th at 2:30 p.m., all Pacific time.

9 **MS. REMER:** Your Honor, is the December 19th status
10 conference in person?

11 **THE COURT:** I'm sorry?

12 **MS. REMER:** Is the December 19th status conference in
13 person or a teleconference?

14 **THE COURT:** These are, the additional appearances are
15 telephonic, so.

16 **MS. MARCUS:** Your Honor, now that we've had the
17 benefit of your full ruling on the document productions, I
18 would like to be heard on the logistics of trying to comply
19 with the order by the 14th.

20 **THE COURT:** Okay. Hold on one second.

21 **MS. MARCUS:** Thank you.

22 **THE COURT:** Let me get my clerk. Go ahead.

23 **MS. MARCUS:** Yes, Your Honor. It is presently,
24 almost 7:00 p.m. on the east coast. Tomorrow, I personally am
25 deposing one of the plaintiffs and that I expect will be most

1 of the day taking my attention as well as this evening. On the
2 13th, I am flying back to the east coast, and then we have one
3 day, which is the 14th.

4 The logistics of, for the defendants' counsel to
5 receive these, the documents from the State Department in order
6 to review we send over a courier and that courier brings a hard
7 drive and they put documents on a hard drive, and they send it
8 back. That typically takes a day for us to get them.

9 **THE COURT:** I don't, I'm sorry, what is a courier?

10 **MS. MARCUS:** A courier.

11 **THE COURT:** Oh, a courier.

12 **MS. MARCUS:** A person to go in person --

13 **THE COURT:** Okay, no, I know what a courier is, I
14 just didn't hear you properly.

15 **MS. MARCUS:** -- so, for example, you know, I think it
16 will take at least a day for the Department of State to collect
17 the broad, you know, documents to the extent that they haven't
18 already been collected that will take a day. And then they
19 have to get those documents to the Justice Department. That
20 exchange usually takes a day. We send a courier and they put
21 the information on the hard drive. It can take time, because
22 depending on the size of the file. So, just getting it to us
23 takes a day, and then it has to be processed and uploaded into
24 our database for us to review it to produce.

25 **THE COURT:** Why don't you tell me what you would

1 like? And then, I can discuss that with plaintiffs,
2 understanding that your 30(b)(6) witness is currently supposed
3 to be on the 17th. So, there's not a lot of time to play with.

4 **MS. MARCUS:** Well, I think that 30(b)(6) deponent,
5 for that person to be prepared by, that person is going to have
6 to probably we're going to have to look to move that deposition
7 until later that week. Or early the following week. And
8 because we need to make the production so that the designee
9 himself can have the produced documents, in order to prepare
10 for the deposition. So, I think we will need additional days
11 to make the production, and --

12 **THE COURT:** Do you know what alternative days
13 Mr. Peek is available?

14 **MS. MARCUS:** -- frankly, if Mr. Peek himself is not
15 available, I think the Department may need to consider
16 designating somebody else. I think it is essential that, we
17 have to have, it has to be logistically possible to produce the
18 documents that you have ordered to be produced to the extent
19 that --

20 **THE COURT:** I'm not disagreeing with you.

21 **MS. MARCUS:** -- yeah.

22 **THE COURT:** Normally, I put a two week deadline on
23 production of documents. But, we don't have the luxury of that
24 time now. So, why don't you, I'll stay up here, but why don't
25 you confer with plaintiffs' Counsel about these things? Maybe

1 they would prefer to have the 30(b)(6) later next week or early
2 the following week, and then that gives us a little leeway in
3 terms of your production deadline. So why don't you all --

4 **MR. EDELMAN:** Your Honor, may I --

5 **THE COURT:** -- chat. Yes, you may.

6 **MR. EDELMAN:** -- make a suggestion? I think this is
7 somewhat emblematic of how the discovery process has gone in
8 this case. One of the takeaways from that is that nothing
9 focuses the mind like a deadline. In an effort to be
10 constructive, I wonder if the court would entertain, and
11 whether the defendant would accept the following.

12 If we were to leave the deadline as is, on the
13 understanding that the 30(b)(6) will proceed on the 17th. If
14 that deposition can be moved to a time when an informed witness
15 is available and we can accommodate that, and we would try to
16 be accommodating, then we would of course, be willing to
17 consider an alternative deadline, albeit given how short the
18 amount of time left there is. It's not going to be a material
19 change.

20 And the reason for the proposal is just, I'm afraid
21 if we leave here with no deadline, there won't be sufficient
22 progress, and we'll be back in the same situation.

23 **THE COURT:** Well, no, I'm definitely --

24 **MS. MARCUS:** I wasn't --

25 **THE COURT:** -- setting a deadline.

1 **MS. MARCUS:** -- I wasn't proposing not setting a
2 deadline.

3 **THE COURT:** Okay. Go ahead.

4 **MS. MARCUS:** I'm just proposing --

5 **THE COURT:** I'm hearing from plaintiffs' Counsel now.

6 **MS. MARCUS:** -- I'm sorry, Your Honor.

7 **MR. EDELMAN:** So, in order for this to work, we would
8 really need to have an understanding of when the 30(b)(6), at
9 least the portion that is supposedly Mr. Peek's bit, is going
10 to go forward. Our current understanding is that's the 17th.
11 If it turns out that it's not the 17th, then of course we'll
12 work with the State Department, if we can.

13 But, if we set a deadline, that deadline has to bear
14 some relationship to when the deposition will occur.

15 **THE COURT:** Okay. Here's what I'm inclined to do.
16 We're talking at 8:00 a.m. on Friday, which is the 14th. Let
17 me leave the deadlines as they are. But, I'm not going to jam
18 you up if, you know, I just need to have the deadline in place.
19 If we talk at 8:00 a.m. on Friday, and you can then give me a
20 status on where you are, and you'll have a better idea of when
21 you're going to be able to complete the production. But, that
22 leaves it on a date prior to the date you all have indicated
23 will be the 30(b)(6) deposition.

24 Meanwhile, you can work on whether the 30(b)(6) is
25 going to be a different day. You can confer, and then I can

1 make appropriate alternative orders on the morning of the 14th.

2 **MS. MARCUS:** If I could make a proposal, Your Honor.

3 **THE COURT:** You can.

4 **MS. MARCUS:** The 17th is going to have to be moved.

5 It is not logistically possible for us to produce documents on
6 the 14th and for the designee to review them by the 17th. It
7 will just be moved. So, it's off, it's going to have to be off
8 for the 17th. My request is that the court consider making a
9 ruling that he will be, he will, the 30(b)(6) will occur no
10 later than a date, and then we can back up from there with
11 respect to a deadline for the document productions. Because,
12 the court, I hope, we want to comply with the court's orders.
13 The court is now ordering the defendants to produce more in a
14 more constrained timeframe than we have been working very hard
15 and extensively to meet, so.

16 **THE COURT:** Well, let me just say I think plaintiffs
17 have been working at least as hard. And me, I've been working
18 hard, but not quite --

19 **MS. MARCUS:** I appreciate the --

20 **THE COURT:** -- as hard as the parties.

21 **MS. MARCUS:** -- I appreciate that.

22 **THE COURT:** But --

23 **MS. MARCUS:** No, I wasn't, I --

24 **THE COURT:** -- I don't think it's fair to just say
25 the defense is the only one who's killing themselves here. I

1 think everybody in the room is.

2 **MS. MARCUS:** -- of course. And, I wasn't trying to
3 indicate otherwise. I'm just saying that I, right now --

4 **THE COURT:** Well, then let me stop you and see.
5 Plaintiff, is there --

6 **MS. MARCUS:** -- I mean the logistical possibility.

7 **THE COURT:** -- that's not an unreasonable position.
8 Thoughts? And if you want to confer amongst yourselves.

9 **MS. REMER:** Your Honor, embedded in the current
10 schedule is a summary judgment deadline. And so --

11 **THE COURT:** When's that? Remind me.

12 **MS. REMER:** -- I believe it's December 31st, the
13 documents, the papers would need to be filed by December 31st
14 in order to meet the court's requirement that it be heard by
15 January 28th. And so, we really do need, if we're going to
16 take this route that defendants have proposed of kicking the
17 can down the road, we just need a firm deadline, so that we can
18 actually have substantive material to move on.

19 **THE COURT:** Okay. How about this, deadline Monday
20 the 17th for production, depo not later than 12/21.

21 **MS. REMER:** That would be fine with plaintiffs.

22 **THE COURT:** Defense?

23 **(Pause)**

24 **MS. MARCUS:** I do, I cannot tell you if it's
25 logistically possible, but we will, we will --

1 **THE COURT:** That's what I'll set. Okay?

2 **MS. MARCUS:** -- you can set it and we can raise it on
3 the 14th, if need, wait, when are we talking again? On the?

4 **THE COURT:** We're talking at 8:00 a.m. on the 14th.

5 **MS. MARCUS:** Okay. 8:00 a.m. on the 14th.

6 **THE COURT:** And, you're going to confer, if anybody's
7 asking for any movement on any of the deadlines I've set, they
8 need to be sure to confer with opposing Counsel, and come up
9 with a plan, and any deponents, and make sure that they have an
10 alternative proposed schedule that everybody can comply with.

11 So, the deadlines on the documents, 12/17; 30(b)(6)
12 depo, not later than 12/21. And I think there weren't any
13 other deadlines.

14 You should still notify plaintiffs of whether it's
15 going to, of where you are on one, two, whether it's going to
16 be Mr. Peek or somebody else, by Friday.

17 **MS. MARCUS:** Okay, Your Honor.

18 **THE COURT:** Okay. Anything else from defense
19 Counsel?

20 **MS. MARCUS:** Your Honor, had generously, and you've
21 already given us more than our share --

22 **THE COURT:** Just cut to the chase, what is it?

23 **MS. MARCUS:** -- to the extent that we have been close
24 in our settlement discussions, and you know, would I think
25 defendants will likely either on or own or with plaintiffs'

1 Counsel, ask the judge who set the overall deadlines to extend
2 all the deadlines by two weeks, fourteen days, to allow us to
3 complete all of the things and focus also on settlement, which
4 we do think we have made progress on. I am asking if you have
5 any insight or advice with respect to that potential
6 application.

7 **THE COURT:** I would say don't count on it being
8 granted.

9 **MS. MARCUS:** Okay.

10 **THE COURT:** I would also say that to the extent you
11 do submit something like that to the District Judge, and he
12 grants it, which again, you should not count on, I would say
13 that most vehemently about this particular Judge. In my
14 experience, he rarely grants these kinds of continuances. But,
15 it is Christmas, so who knows?

16 But, what I would say is, if you folks want to take a
17 couple of weeks and do a settlement, and Judge Walter
18 authorizes that kind of delay, and you want to submit to me a
19 stipulation to bump some of these deadlines to allow for that,
20 I am happy to be flexible if the parties agree on the deadlines
21 so long as those deadlines comport with the orders of the
22 District Judge. So, if he does not extend the discovery cut
23 off, for example, I cannot extend any deadlines beyond January
24 2nd.

25 **MS. MARCUS:** Understood, Your Honor.

1 **THE COURT:** Okay? Everybody got it?

2 **MR. EDELMAN:** Yes, Your Honor.

3 **THE COURT:** All right. Anything else? Defense?

4 **MS. REMER:** Nothing from plaintiffs, Your Honor.

5 Thank you very much for (indisc.).

6 **THE COURT:** All right. Thank you all. I'm sorry we
7 kept you here. It's an interesting case.

8 **MS. MARCUS:** Thank you, so much for your time.

9 **MR. EDELMAN:** Thank you, Your Honor.

10 **THE CLERK:** This court is adjourned.

11 **(Proceeding adjourned at 4:04 p.m.)**

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



December 13, 2018

Signed

Dated

TONI HUDSON, TRANSCRIBER