

# Exhibit 1

**Ruben, Lauren (DEN)**

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**From:** 'Gellert, Nicholas (Perkins Coie)' via carrp-eo <carrp-eo@nwirp.org>  
**Sent:** Thursday, August 6, 2020 9:51 AM  
**To:** Busen, Jesse (CIV); Slack, Michelle R (CIV)  
**Cc:** Hyatt, Heath (SEA); Perez, David A. (SEA); Schneider, Harry (SEA); hshamsi@aclu.org; Hugh Handeyside; Jennie Pasquarella; KMacleod-Ball@immcouncil.org; Igelernt\_aclu.org; Matt Adams; Minju Cho; stacy\_tolchinimmigration.com; John Midgley; Whidbee, Paige (SEA); Ahmed, Sameer; Kipnis, Brian (USAWAW); Brinkman, Andrew (CIV); Moore, Brendan T. (CIV); Flentje, August (CIV); Kanter, Ethan (CIV); Davis, Kathryn C (CIV); Taranto, Leon B. (CIV); Murphy, Lindsay M. (CIV); Braga, Victoria M. (CIV); Evans, Manning (CIV); Konkoly, Antonia (CIV)  
**Subject:** RE: Wagafe v. Trump: Defendants' Fifth Set of Supplemental Initial Disclosures

Jesse et al.: We believe these additional statements further demonstrate the prejudice to plaintiffs. So, unless defendants advise today that they are willing to accept our proposal that we get four additional depositions, we intend to proceed with filing our motion today, submitting these new statements with same. We obviously will be willing to continue to meet and confer on this issue, but we cannot wait to file the motion and lose another week given the posture of the case. Nick

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**From:** Busen, Jesse (CIV) <Jesse.Busen@usdoj.gov>  
**Sent:** Wednesday, August 05, 2020 5:07 PM  
**To:** Gellert, Nicholas (SEA) <NGellert@perkinscoie.com>; Slack, Michelle R (CIV) <Michelle.R.Slack@usdoj.gov>  
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**Subject:** RE: Wagafe v. Trump: Defendants' Fifth Set of Supplemental Initial Disclosures

Nick,

Attached, please find updates to the witness descriptions for Nadia Daud, Anthony Negrut-Calinescu, Kristin Averill, Kelley Costello, Alexander Cook, Sandy Marckmann, and Chris Atienza as part of Defendants' Fifth Supplemental Initial Disclosures. We are still awaiting review of expanded descriptions by Christina Salidzik, but we wanted to send these for now. Once Ms. Salidzik completes her review of the description of the subjects about which she has discoverable information, we will finalize these amended disclosures and send them to you.

Despite the suggestion implicit in your message on Monday, indicating Plaintiffs' intention to file a motion tomorrow, we do not believe these negotiations have reached an impasse. Instead, we are still willing to discuss resolution of this dispute and hope that these expanded descriptions will move such discussions forward.

Jesse Lloyd Busen

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**From:** Gellert, Nicholas (Perkins Coie) <[NGellert@perkinscoie.com](mailto:NGellert@perkinscoie.com)>  
**Sent:** Monday, August 03, 2020 1:56 PM  
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**Subject:** RE: Wagafe v. Trump: Defendants' Fifth Set of Supplemental Initial Disclosures

We do not understand why this should take this long, and this issue has already been under discussion for a considerable time. We are going to proceed to prepare a motion for filing this Thursday. If we can get the report before then and discussions can resolve the issue, we will not file. If we get the report after we file, we can always strike the motion (we will tell the court in our motion exactly that). Nick

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**From:** Slack, Michelle R (CIV) <[Michelle.R.Slack@usdoj.gov](mailto:Michelle.R.Slack@usdoj.gov)>  
**Sent:** Friday, July 31, 2020 5:57 PM  
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**Subject:** RE: Wagafe v. Trump: Defendants' Fifth Set of Supplemental Initial Disclosures

Nick,

We understand your preference to have the further descriptions that you have requested prior to accessing the other components of any proposed resolution. Unfortunately, with all the other pressing matters over the next few days, we

cannot complete the descriptions that you have requested and get them reviewed by the agencies and impacted personnel by Monday. Instead, we hope to have them to you by next Friday, August 7th.

Sincerely,

Michelle

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**From:** Gellert, Nicholas (Perkins Coie) <[NGellert@perkinscoie.com](mailto:NGellert@perkinscoie.com)>  
**Sent:** Friday, July 31, 2020 1:37 PM  
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**Cc:** Hyatt, Heath (Perkins Coie) <[HHyatt@perkinscoie.com](mailto:HHyatt@perkinscoie.com)>; Perez, David A. (Perkins Coie) <[DPerez@perkinscoie.com](mailto:DPerez@perkinscoie.com)>; Schneider, Harry (Perkins Coie) <[HSchneider@perkinscoie.com](mailto:HSchneider@perkinscoie.com)>; [hshamsi@aclu.org](mailto:hshamsi@aclu.org); Hugh Handeyside <[hhandeyside@aclu.org](mailto:hhandeyside@aclu.org)>; Jennie Pasquarella <[JPasquarella@aclusocal.org](mailto:JPasquarella@aclusocal.org)>; [KMacleod-Ball@immcouncil.org](mailto:KMacleod-Ball@immcouncil.org); Igelernt\_aclu.org <[Igelernt@aclu.org](mailto:Igelernt@aclu.org)>; Matt Adams <[matt@nwirp.org](mailto:matt@nwirp.org)>; Minju Cho <[MCho@aclusocal.org](mailto:MCho@aclusocal.org)>; stacy\_tolchinimmigration.com <[Stacy@tolchinimmigration.com](mailto:Stacy@tolchinimmigration.com)>; John Midgley <[jmidgley@aclu-wa.org](mailto:jmidgley@aclu-wa.org)>; Whidbee, Paige (Perkins Coie) <[PWhidbee@perkinscoie.com](mailto:PWhidbee@perkinscoie.com)>; Ahmed, Sameer <[sahmed@law.harvard.edu](mailto:sahmed@law.harvard.edu)>; Kipnis, Brian (USAWAW) <[BKipnis@usa.doj.gov](mailto:BKipnis@usa.doj.gov)>; Brinkman, Andrew (CIV) <[ABrinkma@civ.usdoj.gov](mailto:ABrinkma@civ.usdoj.gov)>; Moore, Brendan T. (CIV) <[bremoores@CIV.USDOJ.GOV](mailto:bremoores@CIV.USDOJ.GOV)>; Flentje, August (CIV) <[AFlentje@CIV.USDOJ.GOV](mailto:AFlentje@CIV.USDOJ.GOV)>; Kanter, Ethan (CIV) <[EKanter@CIV.USDOJ.GOV](mailto:EKanter@CIV.USDOJ.GOV)>; Busen, Jesse (CIV) <[JBusen@civ.usdoj.gov](mailto:JBusen@civ.usdoj.gov)>; Davis, Kathryn C (CIV) <[kathdavi@CIV.USDOJ.GOV](mailto:kathdavi@CIV.USDOJ.GOV)>; Taranto, Leon B. (CIV) <[LTaranto@civ.usdoj.gov](mailto:LTaranto@civ.usdoj.gov)>; Murphy, Lindsay M. (CIV) <[limurphy@CIV.USDOJ.GOV](mailto:limurphy@CIV.USDOJ.GOV)>; Braga, Victoria M. (CIV) <[vbraga@CIV.USDOJ.GOV](mailto:vbraga@CIV.USDOJ.GOV)>; Evans, Manning (CIV) <[maevans@CIV.USDOJ.GOV](mailto:maevans@CIV.USDOJ.GOV)>; Konkoly, Antonia (CIV) <[ankonkol@CIV.USDOJ.GOV](mailto:ankonkol@CIV.USDOJ.GOV)>  
**Subject:** RE: Wagafe v. Trump: Defendants' Fifth Set of Supplemental Initial Disclosures

Michelle,

We will need to review your further descriptions before deciding on next steps. Can you please confirm that you will be able to provide those descriptions by the end of the day on Monday?

Nick

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**From:** Slack, Michelle R (CIV) <[Michelle.R.Slack@usdoj.gov](mailto:Michelle.R.Slack@usdoj.gov)>  
**Sent:** Thursday, July 30, 2020 4:01 PM  
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**Subject:** RE: Wagafe v. Trump: Defendants' Fifth Set of Supplemental Initial Disclosures

Nick,

To follow-up on our message from last week, indicating that we did not believe the parties have reached an impasse in our negotiations over Defendants' Fifth Supplemental Initial Disclosures, we offer a more thorough explanation to clarify a few of points. First, we were not deferring a response on your request that we withdraw Chris Atienza from our disclosures on condition that you agree to all aspects of our counter-proposal, nor do we intend to withhold the further information/descriptions you have requested until you have agreed with all other aspects of our proposal. Rather, we intend to provide you with the further descriptions, as we believe they will clarify the connection between these disclosures and information to which you had access prior to the deadline for fact witness depositions—namely factual information held and/or used by your own experts. Regarding Mr. Atienza, we maintain our position that this disclosure is not untimely, and we also contend that it is both substantially justified and harmless. In any event, we are willing to consider this component of your proposal, but we are deferring this consideration until we see how the other aspects of this proposed resolution proceeds. (On this issue, we would appreciate your response to our question about using relevant parts of the video from Mr. Jihad's interview instead of Mr. Atienza's proposed rebuttal testimony.)

Moreover, contrary to your assertion that we have offered no explanation for taking additional time to provide you with these disclosures, we have offered you our primary explanation numerous times—we had difficulties associated with the pandemic. Simply because you reject our explanation does not mean we have never offered one. The pandemic so disrupted the ordinary business of this case that the parties stipulated to suspending the case schedule, and the Court agreed.

Yet, with that said, we offered to provide you with an additional deposition beyond the presumptive limit of 10 in order to depose one of the people listed in this supplement, if you are both willing to provide the requested information and explanations, as well as permit Defendants to hold an additional deposition of one of your identification of potential witnesses (notice responder) as well. We were surprised by your refusal to even consider our request to make this component mutual, as you had said that you would be open to it, so long as we provided a reasonable justification. If your justification is that you did not know the identities of any of the potential additional defense witnesses to have made an informed decision about whether to hold open additional deposition slots or seek additional

depositions earlier, the same is certainly true for Defendants with reference to the possible six potential witnesses you may add as a result of your class notice posting. After all, Plaintiffs knew at least as early as December the identities of the notice responders you wanted to contact, but you withheld that information from Defendants. We only recently learned the identities of the pool of 10 notice responders who you interviewed for purposes of selecting six additional potential witnesses. Despite our disputes over the timing of these mutual disclosures and the impact they had on case planning, we should be able to agree to make this component mutual to avoid dueling motions at this late date in the discovery schedule.

We remain hopeful that we can resolve this dispute.

Sincerely,

Michelle

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**From:** Slack, Michelle R (CIV)  
**Sent:** Tuesday, July 21, 2020 6:33 PM  
**To:** Gellert, Nicholas (Perkins Coie) <[NGellert@perkinscoie.com](mailto:NGellert@perkinscoie.com)>  
**Cc:** Hyatt, Heath (Perkins Coie) <[HHyatt@perkinscoie.com](mailto:HHyatt@perkinscoie.com)>; Perez, David A. (Perkins Coie) <[DPerez@perkinscoie.com](mailto:DPerez@perkinscoie.com)>; Schneider, Harry (Perkins Coie) <[HSchneider@perkinscoie.com](mailto:HSchneider@perkinscoie.com)>; [hshamsi@aclu.org](mailto:hshamsi@aclu.org); Hugh Handeyside <[hhandeyside@aclu.org](mailto:hhandeyside@aclu.org)>; Jennie Pasquarella <[JPasquarella@aclusocal.org](mailto:JPasquarella@aclusocal.org)>; [KMacleod-Ball@immcouncil.org](mailto:KMacleod-Ball@immcouncil.org); [lgelernt@aclu.org](mailto:lgelernt@aclu.org) <[lgelernt@aclu.org](mailto:lgelernt@aclu.org)>; Matt Adams <[matt@nwirp.org](mailto:matt@nwirp.org)>; Minju Cho <[MCho@aclusocal.org](mailto:MCho@aclusocal.org)>; [stacy\\_tolchinimmigration.com](mailto:stacy_tolchinimmigration.com) <[Stacy@tolchinimmigration.com](mailto:Stacy@tolchinimmigration.com)>; John Midgley <[jmidgley@aclu-wa.org](mailto:jmidgley@aclu-wa.org)>; Whidbee, Paige (Perkins Coie) <[PWhidbee@perkinscoie.com](mailto:PWhidbee@perkinscoie.com)>; Ahmed, Sameer <[sahmed@law.harvard.edu](mailto:sahmed@law.harvard.edu)>; Kipnis, Brian (USAWAW) <[BKipnis@usa.doj.gov](mailto:BKipnis@usa.doj.gov)>; Brinkman, Andrew (CIV) <[ABrinkma@civ.usdoj.gov](mailto:ABrinkma@civ.usdoj.gov)>; Moore, Brendan T. (CIV) <[bremoores@CIV.USDOJ.GOV](mailto:bremoores@CIV.USDOJ.GOV)>; Flentje, August (CIV) <[AFlentje@CIV.USDOJ.GOV](mailto:AFlentje@CIV.USDOJ.GOV)>; Kanter, Ethan (CIV) <[EKanter@CIV.USDOJ.GOV](mailto:EKanter@CIV.USDOJ.GOV)>; Busen, Jesse (CIV) <[JBusen@civ.usdoj.gov](mailto:JBusen@civ.usdoj.gov)>; Davis, Kathryn C (CIV) <[kathdavi@CIV.USDOJ.GOV](mailto:kathdavi@CIV.USDOJ.GOV)>; Taranto, Leon B. (CIV) <[LTaranto@civ.usdoj.gov](mailto:LTaranto@civ.usdoj.gov)>; Murphy, Lindsay M. (CIV) <[limurphy@CIV.USDOJ.GOV](mailto:limurphy@CIV.USDOJ.GOV)>; Braga, Victoria M. (CIV) <[vbraga@CIV.USDOJ.GOV](mailto:vbraga@CIV.USDOJ.GOV)>; Evans, Manning (CIV) <[maevans@CIV.USDOJ.GOV](mailto:maevans@CIV.USDOJ.GOV)>  
**Subject:** RE: Wagafe v. Trump: Defendants' Fifth Set of Supplemental Initial Disclosures

Nick,

We are disappointed that you are unwilling to agree to our counter-proposal, but we do not believe that these negotiations have reached an impasse. Rather, we continue to hope that this matter can be resolved without the Court's



intervention. We will provide you with a more thorough response in the next couple of days.

For purposes of tomorrow's hearing/status conference, though, we agree to your proposal that the parties inform the Court only to the existence of this dispute and that we are in negotiations to resolve it. We are willing to refrain from getting into the details, other than to the extent necessary to answer the Judge's questions, so long as you do as well. Maybe we can come to some agreed upon statement. Please let us know if you have a proposed language in mind.

Sincerely,

Michelle

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**From:** Gellert, Nicholas (Perkins Coie) <[NGellert@perkinscoie.com](mailto:NGellert@perkinscoie.com)>  
**Sent:** Monday, July 20, 2020 1:08 PM  
**To:** Slack, Michelle R (CIV) <[mislack@CIV.USDOJ.GOV](mailto:mislack@CIV.USDOJ.GOV)>  
**Cc:** Hyatt, Heath (Perkins Coie) <[HHyatt@perkinscoie.com](mailto:HHyatt@perkinscoie.com)>; Perez, David A. (Perkins Coie) <[DPerez@perkinscoie.com](mailto:DPerez@perkinscoie.com)>; Schneider, Harry (Perkins Coie) <[HSchneider@perkinscoie.com](mailto:HSchneider@perkinscoie.com)>; [hshamsi@aclu.org](mailto:hshamsi@aclu.org); Hugh Handeyside <[hhandeyside@aclu.org](mailto:hhandeyside@aclu.org)>; Jennie Pasquarella <[JPasquarella@aclusocal.org](mailto:JPasquarella@aclusocal.org)>; [KMacleod-Ball@immcouncil.org](mailto:KMacleod-Ball@immcouncil.org); [lgelernt\\_aclu.org](mailto:lgelernt_aclu.org) <[lgelernt@aclu.org](mailto:lgelernt@aclu.org)>; Matt Adams <[matt@nwirp.org](mailto:matt@nwirp.org)>; Minju Cho <[MCho@aclusocal.org](mailto:MCho@aclusocal.org)>; [stacy\\_tolchinimmigration.com](mailto:stacy_tolchinimmigration.com) <[Stacy@tolchinimmigration.com](mailto:Stacy@tolchinimmigration.com)>; John Midgley <[jmidgley@aclu-wa.org](mailto:jmidgley@aclu-wa.org)>; Whidbee, Paige (Perkins Coie) <[PWhidbee@perkinscoie.com](mailto:PWhidbee@perkinscoie.com)>; Ahmed, Sameer <[sahmed@law.harvard.edu](mailto:sahmed@law.harvard.edu)>; Kipnis, Brian (USAWAW) <[BKipnis@usa.doj.gov](mailto:BKipnis@usa.doj.gov)>; Brinkman, Andrew (CIV) <[ABrinkma@civil.usdoj.gov](mailto:ABrinkma@civil.usdoj.gov)>; Moore, Brendan T. (CIV) <[bremoores@CIV.USDOJ.GOV](mailto:bremoores@CIV.USDOJ.GOV)>; Flentje, August (CIV) <[AFlentje@CIV.USDOJ.GOV](mailto:AFlentje@CIV.USDOJ.GOV)>; Kanter, Ethan (CIV) <[EKanter@CIV.USDOJ.GOV](mailto:EKanter@CIV.USDOJ.GOV)>; Busen, Jesse (CIV) <[JBusen@civil.usdoj.gov](mailto:JBusen@civil.usdoj.gov)>; Davis, Kathryn C (CIV) <[kathdavi@CIV.USDOJ.GOV](mailto:kathdavi@CIV.USDOJ.GOV)>; Taranto, Leon B. (CIV) <[LTaranto@civil.usdoj.gov](mailto:LTaranto@civil.usdoj.gov)>; Murphy, Lindsay M. (CIV) <[limurphy@CIV.USDOJ.GOV](mailto:limurphy@CIV.USDOJ.GOV)>; Braga, Victoria M. (CIV) <[vbraga@CIV.USDOJ.GOV](mailto:vbraga@CIV.USDOJ.GOV)>; Evans, Manning (CIV) <[maevans@CIV.USDOJ.GOV](mailto:maevans@CIV.USDOJ.GOV)>  
**Subject:** RE: Wagafe v. Trump: Defendants' Fifth Set of Supplemental Initial Disclosures

Michelle: Your proposal is not acceptable. But we are willing to withhold judgment on what additional arrangements should be made pending your provision of additional information about what the topics that the newly identified witnesses may address and how you only identified the need for this information upon receipt of our expert's reports in February. (You have yet to explain, by the way, why the supplemental disclosures were only made months later.) We look forward to receiving that additional information soon, so that we can keep this process moving toward resolution. We should note, however, that we reject the notion that the withdrawal of Christopher Atienza should await discussions on other subjects, as it is clear from the disclosure and our communications since that he has nothing to do with disclosures made in our expert's reports, and thus even defendants' explanation for the timing of the disclosures does not apply to him. And, we fail to see why defendants should get additional depositions just because we have requested additional depositions to mitigate the prejudice from the timing of defendants' disclosures. Finally, given the status of this issue, we believe it appropriate that the parties alert Judge Jones during the telephone conference on

June 22 that a new dispute has arisen related to new witness disclosures from the government, and that the parties are in the process of meeting and conferring on that subject. We do not believe the court should be advised further, unless the judge inquires, unless you believe that the meeting and conferring has concluded. Thus, please let us know if you will be refusing to provide the additional information absent our agreement to your other conditions, in which case we believe we are at impasse, and the court should be so told and advised that it appears unfortunately that additional motion practice may be required. Nick

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**From:** Slack, Michelle R (CIV) <[Michelle.R.Slack@usdoj.gov](mailto:Michelle.R.Slack@usdoj.gov)>

**Sent:** Thursday, July 16, 2020 1:12 PM

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**Subject:** RE: Wagafe v. Trump: Defendants' Fifth Set of Supplemental Initial Disclosures

Nick,

Thank you for the call yesterday and for following-up with us. As I explained on the call, we disagree with your position that our disclosures were untimely under the rules and circumstances. Yet, to avoid raising this dispute to the Court, we are willing to consider your proposed resolution.

Taking this a bit out of order, I'd like to start with your second item—your request that we provide more information about the facts/topics that each person has discoverable information. We are willing to provide additional information to you. As we discussed yesterday, FRCP 26(a) does not require a lot of detail. But we are willing to provide you with information that shows a more direct link between these disclosures and the facts/assumptions from your expert reports about which these people may provide substantive responses. Although this supplemental information may also reveal potential lines of impeachment, we have no obligation under the rules to disclose information used solely for impeachment.



Regarding your request to get four additional depositions beyond the presumptive limit of ten in FRCP 30(a)(2)(A)(i), it is our understanding that you claim to not have had sufficient awareness of any of the people, other than Nadia Daud, to have known that they likely have discoverable information that Defendants might use to respond to the facts/assumptions offered by your experts' reports and/or anticipated testimony. We do not agree, and we believe that prior disclosures/discovery provided you with this information and/or your experts possessed this knowledge. Moreover, because substantial fact discovery remains pending in this case, we believe that you have at least one other alternative available to you in the upcoming 30(b)(6) deposition of USCIS to explore the discoverable information in these disclosures because topics overlap between the topics identified in the 30(b)(6) and those covered in your experts' reports.

For the sake of resolution, though, we are willing to accept the possibility that with the further information we are offering to provide to you above that you may either realize you had sufficient information or you may be better positioned to explain why you did not. Thus, we offer a counterproposal that ties an additional deposition to the prejudice you offered to us yesterday—namely that if you had sufficient information about these people and their knowledge of rebuttal facts, you would have used your depositions differently or sought additional depositions earlier. We are willing to agree to one additional deposition, under the following terms: (1) You limit the deposition to one of the people disclosed in our 5<sup>th</sup> Supplement; (2) You identify the proposed deponent to us within two weeks of receiving our supplemental descriptions and coordinate the timing of the deposition in a manner that accommodates reasonable unavailability issues, including the pending USCIS furloughs; (3) You explain, in light of the supplemental descriptions, why you could not have deposed this person prior to the close of fact witness depositions and why you cannot avoid prejudice by addressing your questions to the 30(b)(6) designee(s), or why you could not have foreseen the need to exceed the presumptive limit in FRCP 30(a)(2)(A)(i) and agreed to in this case; and (4) You accept a corresponding additional deposition for the Defendants to depose any notice responder identified as a potential witness for Plaintiffs, recognizing that not even the pool of ten potential witness were identified to Defendant until this week.

As to your first point, dealing with your offer to retract your request that we withdraw Nadia Daud, but still withdraw Christopher Atienza, we will consider that amended request and respond once we have resolved the other two components of your proposed resolution. In the meantime, as we only intend to offer Mr. Atienza to rebut the new accusations Mr. Jihad makes about his interview, please let us know if you would be willing to accept admission of relevant parts of the video of Mr. Jihad's interview if we are to agree to withdraw Mr. Atienza from our disclosures. Note, too, we may still call Mr. Atienza to offer impeachment testimony even if we withdraw our disclosure of him.

We appreciate your willingness to make any necessary adjustments to the schedule to deal with resolution of this dispute. By mentioning the impact of additional depositions on the schedule, though, we did not mean to seek an extension of the discovery schedule. Rather, Defendants would like to finalize any depositions prior to the current discovery deadline. We expressed concern precisely to avoid extensions for further depositions, with the exception of Mr. Ostadhassan and the notice responders. Unfortunately, the wild card that remains is the pending furloughs that impact USCIS personnel necessary to these discovery plans. As the furlough situation and this potential resolution evolve, the flexibility you offer may become necessary.

Please let us know your position on our proposal set forth above. We remain hopeful that we can resolve this without court intervention. If we cannot, though, we will be forced to consider immediately moving to strike part or all of the factual assertions/assumptions contained in the relevant Plaintiffs' expert reports to which our disclosures are responding.

Finally, because the Court asked the parties to raise any discovery disputes to it before filing further motions, we would like to discuss any issues that remain unresolved with the Court at next week's hearing. We plan to send you a proposed schedule for our depositions in the next couple of days. Yet, based on your statement that Mr. Ostadhassan is unlikely to be available for even a remote deposition prior to the discovery deadline, we have not reserved a deposition for him. If he becomes available at a later date, we reserve the right to depose him.

Sincerely,

Michelle

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**From:** Gellert, Nicholas (Perkins Coie) <[NGellert@perkinscoie.com](mailto:NGellert@perkinscoie.com)>  
**Sent:** Wednesday, July 15, 2020 7:11 PM  
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**Subject:** RE: Wagafe v. Trump: Defendants' Fifth Set of Supplemental Initial Disclosures

Michelle et al. –

Thanks for the call earlier today. Based on our discussion, we are willing to remove our request that you withdraw Ms. Daud. We would still ask that you withdraw Mr. Atienza. We continue to submit that the timing of your disclosures, including your affirmative disclosure as to Ms. Daud, are untimely. Nevertheless, we are willing to not seek to have these newly disclosed witnesses stricken if you will both provide more information as to the topics on which you believe they have relevant information and agree that we can depose four of them (on top of the original limit of ten). As we mentioned, we would agree that another deposition of Mr. Cook would not be one of the four, but we cannot yet provide further direction as to which four we would depose. We appreciate that adding more depositions to the busy schedule may pose difficulties, but we think it can be accomplished; however, we will be open to an adjustment to the schedule if it is determined that is needed after the parties' reasonable diligence efforts to get all depositions done within the current agreed schedule. We look forward to hearing back from you soon.

Thanks - Nick

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**From:** Gellert, Nicholas (SEA) <[NGellert@perkinscoie.com](mailto:NGellert@perkinscoie.com)>  
**Sent:** Tuesday, July 14, 2020 5:07 PM  
**To:** Slack, Michelle R (CIV) <[Michelle.R.Slack@usdoj.gov](mailto:Michelle.R.Slack@usdoj.gov)>  
**Cc:** Hyatt, Heath (SEA) <[HHyatt@perkinscoie.com](mailto:HHyatt@perkinscoie.com)>; Perez, David A. (SEA) <[DPerez@perkinscoie.com](mailto:DPerez@perkinscoie.com)>; Schneider, Harry (SEA) <[HSchneider@perkinscoie.com](mailto:HSchneider@perkinscoie.com)>; [hshamsi@aclu.org](mailto:hshamsi@aclu.org); Hugh Handeyside <[hhandeyside@aclu.org](mailto:hhandeyside@aclu.org)>; Jennie Pasquarella <[JPasquarella@aclusocal.org](mailto:JPasquarella@aclusocal.org)>; [KMacleod-Ball@immcouncil.org](mailto:KMacleod-Ball@immcouncil.org); [Igelernt\\_aclu.org](mailto:Igelernt_aclu.org) <[Igelernt@aclu.org](mailto:Igelernt@aclu.org)>; Matt Adams <[matt@nwirp.org](mailto:matt@nwirp.org)>; Minju Cho <[MCho@aclusocal.org](mailto:MCho@aclusocal.org)>; stacy\_tolchinimmigration.com <[Stacy@tolchinimmigration.com](mailto:Stacy@tolchinimmigration.com)>; John Midgley <[jmidgley@aclu-wa.org](mailto:jmidgley@aclu-wa.org)>; Whidbee, Paige (SEA) <[PWhidbee@perkinscoie.com](mailto:PWhidbee@perkinscoie.com)>; Ahmed, Sameer <[sahmed@law.harvard.edu](mailto:sahmed@law.harvard.edu)>; Kipnis, Brian (USAWAW) <[Brian.Kipnis@usdoj.gov](mailto:Brian.Kipnis@usdoj.gov)>; Brinkman, Andrew (CIV) <[Andrew.Brinkman@usdoj.gov](mailto:Andrew.Brinkman@usdoj.gov)>; Moore, Brendan T. (CIV) <[Brendan.T.Moore@usdoj.gov](mailto:Brendan.T.Moore@usdoj.gov)>; Flentje, August (CIV) <[August.Flentje@usdoj.gov](mailto:August.Flentje@usdoj.gov)>; Kanter, Ethan (CIV)

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**Subject:** RE: Wagafe v. Trump: Defendants' Fifth Set of Supplemental Initial Disclosures

Michelle et al.:

First, we can use this call-in for the call:

Dial-in: 888-857-7291

Passcode: 206-359-3843

Second, we stand by our objection as to the untimeliness of Defendants' Fifth Set of Supplemental Initial Disclosures. We have explained, and you have not refuted, that disclosure of witnesses after the conclusion of fact discovery, and thus after the time when a party can elect which depositions to take, is prejudicial and thus improper. You have sought to justify the belated disclosure by connecting the witnesses to one or more of our experts' reports, but you have not told us what topics in those expert reports the witnesses specifically would be addressing. To the extent this is your justification for the late disclosure, which would still not be proper, we believe more detail to confirm the connection is appropriate. With this introduction, we offer the following as a potential resolution of the issue to avoid a motion to strike.

1. Defendants withdraw Nadia Daud and Christopher Atienza as potential witnesses. Defendants appear interested in having these witnesses testify about a named plaintiff. The identity of the plaintiffs and the relevance of what happened to them has been known from the outset of this case. There is no justification for Defendants first disclosing these two witnesses at this juncture.
2. Within two weeks, Defendants provide a more thorough disclosure of the topics raised in Plaintiffs' expert reports about which the other witnesses have relevant information.
3. Defendants stipulate to a court order that Plaintiffs may take four additional depositions, for a total of 14.

The Fifth Disclosures also disclose some potential additional documents. We are not sure what exactly these documents are or why they were not earlier identified or produced. We, therefore, do not have a specific proposal as to the documents, but would ask that you provide us with more specifics when we meet.

Thanks - Nick

---

**From:** Slack, Michelle R (CIV) <[Michelle.R.Slack@usdoj.gov](mailto:Michelle.R.Slack@usdoj.gov)>

**Sent:** Tuesday, July 14, 2020 3:51 PM

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**Subject:** Re: Wagafe v. Trump: Defendants' Fifth Set of Supplemental Initial Disclosures

Thanks, Nick.

Sent from my iPhone

On Jul 14, 2020, at 6:27 PM, Gellert, Nicholas (Perkins Coie) <[NGellert@perkinscoie.com](mailto:NGellert@perkinscoie.com)> wrote:

We can do this at that time; thanks.

We will send you an email later today with some thoughts regarding potential resolution.

Nick

---

**From:** Slack, Michelle R (CIV) <[Michelle.R.Slack@usdoj.gov](mailto:Michelle.R.Slack@usdoj.gov)>

**Sent:** Monday, July 13, 2020 3:20 PM

**To:** Gellert, Nicholas (SEA) <[NGellert@perkinscoie.com](mailto:NGellert@perkinscoie.com)>; Hyatt, Heath (SEA) <[HHyatt@perkinscoie.com](mailto:HHyatt@perkinscoie.com)>; Perez, David A. (SEA) <[DPerez@perkinscoie.com](mailto:DPerez@perkinscoie.com)>; Schneider, Harry (SEA) <[HSchneider@perkinscoie.com](mailto:HSchneider@perkinscoie.com)>; [hshamsi@aclu.org](mailto:hshamsi@aclu.org); Hugh Handeyside <[hhandeyside@aclu.org](mailto:hhandeyside@aclu.org)>; Jennie Pasquarella <[JPasquarella@aclusocal.org](mailto:JPasquarella@aclusocal.org)>; [KMacleod-Ball@immcouncil.org](mailto:KMacleod-Ball@immcouncil.org); [Igelernt\\_aclu.org](mailto:Igelernt_aclu.org) <[Igelernt@aclu.org](mailto:Igelernt@aclu.org)>; Matt Adams <[matt@nwirp.org](mailto:matt@nwirp.org)>; Minju Cho <[MCho@aclusocal.org](mailto:MCho@aclusocal.org)>; [stacy\\_tolchinimmigration.com](mailto:stacy_tolchinimmigration.com) <[Stacy@tolchinimmigration.com](mailto:Stacy@tolchinimmigration.com)>; John Midgley <[jmidgley@aclu-wa.org](mailto:jmidgley@aclu-wa.org)>; Whidbee, Paige (SEA) <[PWhidbee@perkinscoie.com](mailto:PWhidbee@perkinscoie.com)>; Ahmed, Sameer <[sahmed@law.harvard.edu](mailto:sahmed@law.harvard.edu)>

**Cc:** Kipnis, Brian (USAWAW) <[Brian.Kipnis@usdoj.gov](mailto:Brian.Kipnis@usdoj.gov)>; Brinkman, Andrew (CIV) <[Andrew.Brinkman@usdoj.gov](mailto:Andrew.Brinkman@usdoj.gov)>; Moore, Brendan T. (CIV) <[Brendan.T.Moore@usdoj.gov](mailto:Brendan.T.Moore@usdoj.gov)>; Flentje, August (CIV) <[August.Flentje@usdoj.gov](mailto:August.Flentje@usdoj.gov)>; Kanter, Ethan (CIV) <[Ethan.Kanter@usdoj.gov](mailto:Ethan.Kanter@usdoj.gov)>; Busen, Jesse (CIV) <[Jesse.Busen@usdoj.gov](mailto:Jesse.Busen@usdoj.gov)>; Davis, Kathryn C (CIV) <[Kathryn.C.Davis@usdoj.gov](mailto:Kathryn.C.Davis@usdoj.gov)>; Taranto, Leon B. (CIV) <[Leon.B.Taranto@usdoj.gov](mailto:Leon.B.Taranto@usdoj.gov)>; Murphy, Lindsay M. (CIV) <[Lindsay.M.Murphy@usdoj.gov](mailto:Lindsay.M.Murphy@usdoj.gov)>; Braga, Victoria M. (CIV) <[Victoria.M.Braga@usdoj.gov](mailto:Victoria.M.Braga@usdoj.gov)>; Evans, Manning (CIV) <[Manning.Evans@usdoj.gov](mailto:Manning.Evans@usdoj.gov)>

**Subject:** RE: Wagafe v. Trump: Defendants' Fifth Set of Supplemental Initial Disclosures

Nick,

At your request, we are available for a meet and confer regarding Defendants' Fifth Supplemental Initial Disclosures on Wednesday morning. We propose 1:00 p.m. Eastern (10:00 a.m., Pacific).

Because you are asking for more time to consider possible ways to resolve your concerns about our disclosures, we hope you will provide us with a supplemental statement beforehand that identifies your prejudice for each disclosure you are challenging and a complementary



proposal for resolution that you believe would satisfactorily address such prejudice. Otherwise, we may not have sufficient time to consider these issues and consult with the impacted agencies and witnesses prior to your proposed Thursday filing. The Court has already cautioned us against filing further discovery motions without exhausting options for resolution, so I think we can all agree that we should avoid reaching an impasse only because we have not had time to reach agreement.

Sincerely,

Michelle

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**From:** Gellert, Nicholas (Perkins Coie) <[NGellert@perkinscoie.com](mailto:NGellert@perkinscoie.com)>  
**Sent:** Friday, July 10, 2020 4:21 PM  
**To:** Slack, Michelle R (CIV) <[mislack@CIV.USDOJ.GOV](mailto:mislack@CIV.USDOJ.GOV)>; Hyatt, Heath (Perkins Coie) <[HHyatt@perkinscoie.com](mailto:HHyatt@perkinscoie.com)>; Perez, David A. (Perkins Coie) <[DPerez@perkinscoie.com](mailto:DPerez@perkinscoie.com)>; Schneider, Harry (Perkins Coie) <[HSchneider@perkinscoie.com](mailto:HSchneider@perkinscoie.com)>; [hshamsi@aclu.org](mailto:hshamsi@aclu.org); Hugh Handeyside <[hhandeyside@aclu.org](mailto:hhandeyside@aclu.org)>; Jennie Pasquarella <[JPasquarella@clusocal.org](mailto:JPasquarella@clusocal.org)>; [KMacleod-Ball@immcouncil.org](mailto:KMacleod-Ball@immcouncil.org); [lgelernt\\_aclu.org](mailto:lgelernt_aclu.org) <[lgelernt@aclu.org](mailto:lgelernt@aclu.org)>; Matt Adams <[matt@nwirp.org](mailto:matt@nwirp.org)>; Minju Cho <[MCho@clusocal.org](mailto:MCho@clusocal.org)>; [stacy\\_tolchinimmigration.com](mailto:stacy_tolchinimmigration.com) <[Stacy@tolchinimmigration.com](mailto:Stacy@tolchinimmigration.com)>; John Midgley <[jmidgley@aclu-wa.org](mailto:jmidgley@aclu-wa.org)>; Whidbee, Paige (Perkins Coie) <[PWhidbee@perkinscoie.com](mailto:PWhidbee@perkinscoie.com)>; Ahmed, Sameer <[sahmed@law.harvard.edu](mailto:sahmed@law.harvard.edu)>  
**Cc:** Kipnis, Brian (USAFAW) <[BKipnis@usa.doj.gov](mailto:BKipnis@usa.doj.gov)>; Brinkman, Andrew (CIV) <[ABrinkma@civ.usdoj.gov](mailto:ABrinkma@civ.usdoj.gov)>; Moore, Brendan T. (CIV) <[bremooore@CIV.USDOJ.GOV](mailto:bremooore@CIV.USDOJ.GOV)>; Flentje, August (CIV) <[AFlentje@CIV.USDOJ.GOV](mailto:AFlentje@CIV.USDOJ.GOV)>; Kanter, Ethan (CIV) <[EKanter@CIV.USDOJ.GOV](mailto:EKanter@CIV.USDOJ.GOV)>; Busen, Jesse (CIV) <[JBusen@civ.usdoj.gov](mailto:JBusen@civ.usdoj.gov)>; Davis, Kathryn C (CIV) <[kathdavi@CIV.USDOJ.GOV](mailto:kathdavi@CIV.USDOJ.GOV)>; Taranto, Leon B. (CIV) <[LTaranto@civ.usdoj.gov](mailto:LTaranto@civ.usdoj.gov)>; Murphy, Lindsay M. (CIV) <[limurphy@CIV.USDOJ.GOV](mailto:limurphy@CIV.USDOJ.GOV)>; Braga, Victoria M. (CIV) <[vbraga@CIV.USDOJ.GOV](mailto:vbraga@CIV.USDOJ.GOV)>; Evans, Manning (CIV) <[maevans@CIV.USDOJ.GOV](mailto:maevans@CIV.USDOJ.GOV)>  
**Subject:** RE: Wagafe v. Trump: Defendants' Fifth Set of Supplemental Initial Disclosures

While some of us are available at 10:00 on Monday, we actually would like some additional time to consider options for seeing if a resolution is feasible before we get on call, so can we perhaps do this on Wednesday morning. Please advise what might work on your end then. Thanks - Nick

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**From:** Slack, Michelle R (CIV) <[Michelle.R.Slack@usdoj.gov](mailto:Michelle.R.Slack@usdoj.gov)>  
**Sent:** Thursday, July 09, 2020 12:56 PM  
**To:** Gellert, Nicholas (SEA) <[NGellert@perkinscoie.com](mailto:NGellert@perkinscoie.com)>; Hyatt, Heath (SEA) <[HHyatt@perkinscoie.com](mailto:HHyatt@perkinscoie.com)>; Perez, David A. (SEA) <[DPerez@perkinscoie.com](mailto:DPerez@perkinscoie.com)>; Schneider, Harry (SEA) <[HSchneider@perkinscoie.com](mailto:HSchneider@perkinscoie.com)>; [hshamsi@aclu.org](mailto:hshamsi@aclu.org); Hugh Handeyside <[hhandeyside@aclu.org](mailto:hhandeyside@aclu.org)>; Jennie Pasquarella <[JPasquarella@clusocal.org](mailto:JPasquarella@clusocal.org)>; [KMacleod-Ball@immcouncil.org](mailto:KMacleod-Ball@immcouncil.org); [lgelernt\\_aclu.org](mailto:lgelernt_aclu.org) <[lgelernt@aclu.org](mailto:lgelernt@aclu.org)>; Matt Adams <[matt@nwirp.org](mailto:matt@nwirp.org)>; Minju Cho <[MCho@clusocal.org](mailto:MCho@clusocal.org)>; [stacy\\_tolchinimmigration.com](mailto:stacy_tolchinimmigration.com) <[Stacy@tolchinimmigration.com](mailto:Stacy@tolchinimmigration.com)>; John Midgley <[13](mailto:jmidgley@aclu-</a></p></div><div data-bbox=)



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**Subject:** RE: Wagafe v. Trump: Defendants' Fifth Set of Supplemental Initial Disclosures

Nick,

We are disappointed that Plaintiffs are unwilling or unable to provide us with some clarity about the still unidentified prejudice you claim to have suffered as a result of the content or timing of our most recent supplemental initial disclosures. Contrary to your assertion that our responsive message was “irrelevant/improper,” it outlines our view of the situation and explains our uncertainty about how this dispute might be resolved without more information from Plaintiffs. Although we can wait until the meet and confer to get this information, it would help us to get the information in advance. Accordingly, prior to any meet and confer, we hope you will reconsider our request that you provide us with some clarity on your claimed prejudice for each of our disclosures and provide us with more information about how you think this matter can be resolved without court intervention.

We are available for a meet and confer on either Monday or Tuesday at 1:00 p.m. Eastern, 10:00 a.m. Pacific. Please let us know when you would like to hold this meet and confer.

Finally, please note that our lack of a point-by-point response to any of your objections or other responses on this matter does not mean we agree or concede the point. In the spirit of cooperation, I hope that we can enter this meet and confer with the goal of finding a path to resolution foremost on our minds.

Sincerely,

Michelle

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**From:** Gellert, Nicholas (Perkins Coie) <[NGellert@perkinscoie.com](mailto:NGellert@perkinscoie.com)>  
**Sent:** Tuesday, July 07, 2020 8:35 PM  
**To:** Slack, Michelle R (CIV) <[mislack@CIV.USDOJ.GOV](mailto:mislack@CIV.USDOJ.GOV)>; Hyatt, Heath (Perkins Coie) <[HHyatt@perkinscoie.com](mailto:HHyatt@perkinscoie.com)>; Perez, David A. (Perkins Coie) <[DPerez@perkinscoie.com](mailto:DPerez@perkinscoie.com)>; Schneider, Harry (Perkins Coie) <[HSchneider@perkinscoie.com](mailto:HSchneider@perkinscoie.com)>; [hshamsi@aclu.org](mailto:hshamsi@aclu.org); Hugh Handeyside <[hhandeyside@aclu.org](mailto:hhandeyside@aclu.org)>; Jennie Pasquarella <[JPasquarella@aclusocal.org](mailto:JPasquarella@aclusocal.org)>; [KMacleod-Ball@immcouncil.org](mailto:KMacleod-Ball@immcouncil.org); Igelernt\_aclu.org <[Igelernt@aclu.org](mailto:Igelernt@aclu.org)>; Matt Adams <[matt@nwirp.org](mailto:matt@nwirp.org)>; Minju Cho <[MCho@aclusocal.org](mailto:MCho@aclusocal.org)>; stacy\_tolchinimmigration.com <[Stacy@tolchinimmigration.com](mailto:Stacy@tolchinimmigration.com)>; John Midgley <[jmidgley@aclu-wa.org](mailto:jmidgley@aclu-wa.org)>; Whidbee, Paige (Perkins Coie) <[PWWhidbee@perkinscoie.com](mailto:PWWhidbee@perkinscoie.com)>; Ahmed, Sameer <[sahmed@law.harvard.edu](mailto:sahmed@law.harvard.edu)>  
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**Subject:** RE: Wagafe v. Trump: Defendants' Fifth Set of Supplemental Initial Disclosures

Michelle:

We too are very busy right now, and we believe we have sufficiently identified for you the issues that we would like to discuss at a meet and confer. Thus, we do not intend to take the time to write another lengthy email. This is especially when much of what you raise below is irrelevant and otherwise improper. We have not been deceitful (see definition of "guise"); to the contrary, we months ago provided very detailed expert reports. And you have never told us (until perhaps in your email below) that you consider any of our expert reports improper in any way.

We very promptly, as you note below, told you that we did not think that such detailed expert reports justified defendants to belatedly disclose additional evidence supporting its defenses. Despite that, you then took several months, without explanation, to actually provide your supplemental disclosures. We believe that both parties now need a quick resolution of whether your disclosures should be stricken. Thus, we wanted to meet and confer in time that we could file a motion this Thursday, if necessary and we could otherwise get it done around the press of other work. Since you appear unable or unwilling to meet and confer in that time frame, we will wait until the following Thursday to present our anticipated motion. Please advise as soon as possible when on Monday or Tuesday you are available to discuss these issues.

Nick

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**From:** Slack, Michelle R (CIV) <[Michelle.R.Slack@usdoj.gov](mailto:Michelle.R.Slack@usdoj.gov)>  
**Sent:** Tuesday, July 07, 2020 4:04 PM  
**To:** Hyatt, Heath (SEA) <[HHyatt@perkinscoie.com](mailto:HHyatt@perkinscoie.com)>; Gellert, Nicholas (SEA) <[NGellert@perkinscoie.com](mailto:NGellert@perkinscoie.com)>; Perez, David A. (SEA) <[DPerez@perkinscoie.com](mailto:DPerez@perkinscoie.com)>; Schneider, Harry (SEA) <[HSchneider@perkinscoie.com](mailto:HSchneider@perkinscoie.com)>; [hshamsi@aclu.org](mailto:hshamsi@aclu.org); Hugh Handeyside <[hhandeyside@aclu.org](mailto:hhandeyside@aclu.org)>; Jennie Pasquarella <[JPasquarella@aclusocal.org](mailto:JPasquarella@aclusocal.org)>; [KMacleod-Ball@immcouncil.org](mailto:KMacleod-Ball@immcouncil.org); Igelernt\_aclu.org

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**Subject:** RE: Wagafe v. Trump: Defendants' Fifth Set of Supplemental Initial Disclosures

Heath,

We received your response to our Fifth Supplemental Initial Disclosures, setting forth your objections to them. Within a few weeks after receiving Plaintiffs' nine expert reports, we put you on notice that we take the position that some of these reports included extensive factual assertions and assumptions warranting more factual, than expert, responses. As a result, Plaintiffs have known for months now that Defendants planned to respond to your nine expert reports and related anticipated testimony with not only experts, but also with responsive fact witnesses and other evidence. Yet, before receiving these responsive disclosures, Plaintiffs made clear that they objected to any supplements to Defendants' factual case, even while large parts of Plaintiffs' factual discovery of Defendants remain open and Plaintiffs continue to "reserve the right" to identify additional evidence in support of their case up to the time of their final pretrial disclosures. And, when Defendants proposed a deadline for these responsive disclosures, Plaintiffs rejected it without proposing an alternative. Accordingly, it appears that Plaintiffs plan to offer factual evidence under the guise of so-called "experts," but prevent Defendants from responding with factual witnesses and evidence.

Otherwise, your objections appear to ask us to justify these disclosures by explaining more specifically how Defendants may use these witnesses to rebut/impeach Plaintiffs' evidence and/or to otherwise defend themselves in this case. Such information, though, is protected by the work product doctrine, making these types of objections premature until the evidence is offered to the Court.

Importantly, although you claim prejudice, you do not identify any particular prejudice or explain how these supplemental disclosures caused such prejudice. Notably, given the contents of Plaintiffs' prior disclosures and discovery responses, as well as the significant factual content in Plaintiffs' expert reports and the breadth of Plaintiffs' 30(b)(6) Notice of USCIS, these disclosures should not surprise Plaintiffs. In any event, you offer no proposal for us to consider prior to, or discuss during, a meet and confer that would resolve your objections or minimize your unidentified prejudice. In order to have a chance to effectively address your objections and prepare for a constructive meet and confer, as you propose, we ask you to provide us with this missing information.

Finally, we ask that you explain the need to hold a meet and confer in the next three days. As you are aware, this is an exceptionally busy time in this case, including several significant deadlines over the next couple of weeks. We are stretched to the limit right now, and USCIS is preparing for significant furloughs in less than a month. Given these circumstances, we need to maximize the productivity of any proposed meet and confer by having these explanations, as well as the above requested information, prior to scheduling a meet and confer. Assuming we have such information from you soon, we tentatively propose holding a meet and confer to discuss these issues with you early next week, on Monday or Tuesday. Please provide us with this information and explanation as soon as you reasonably can and let us know if Monday or Tuesday will work for you.

Sincerely,

Michelle

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**From:** Hyatt, Heath (Perkins Coie) <[HHyatt@perkinscoie.com](mailto:HHyatt@perkinscoie.com)>

**Sent:** Monday, July 06, 2020 5:34 PM

**To:** Slack, Michelle R (CIV) <[mislack@CIV.USDOJ.GOV](mailto:mislack@CIV.USDOJ.GOV)>; Gellert, Nicholas (Perkins Coie) <[NGellert@perkinscoie.com](mailto:NGellert@perkinscoie.com)>; Perez, David A. (Perkins Coie) <[DPerez@perkinscoie.com](mailto:DPerez@perkinscoie.com)>; Schneider,

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**Subject:** RE: Wagate v. Trump: Defendants' Fifth Set of Supplemental Initial Disclosures

Counsel,

We write regarding Defendants' Fifth Initial Disclosures served on July 2, 2020. These disclosures are incredibly untimely and there is no justification for the profound delay. Fact discovery (with only limited exceptions inapplicable here) closed six months ago; and these disclosures should have been provided in time for us to consider them during fact discovery. We reject that any of these disclosures are proper in response to Plaintiffs' experts' reports, as Defendants at least in part appear to suggest. But, in any event, those expert reports were provided in February – four full months prior to you providing this supplemental disclosure. (We also note that you served these disclosures the day after Plaintiffs served their updated expert reports to address the data error that Defendants made. There is no basis for holding off disclosure pending these updated reports.) As discussed below, the disclosures are inadequate in other ways, but even on the information that is provided it is apparent that Defendants could and should have provided the disclosures much earlier. For instance, two of the new witnesses appear to have information related to Mr. Jihad; he has been a party to this suit for years. With respect to the *ten new categories of documents* now identify for the first time, Defendants offer no reason as to why these categories of information were not disclosed in Defendants' first initial disclosures, (let alone Defendants' second, third, and fourth supplemental disclosures, the latter of which was served over six months ago). Plaintiffs are greatly prejudiced by these very belated disclosures.

Not only are the disclosures untimely and prejudicial, but they are flawed in other respects as well. First, Defendants did not include the "subject" on which the newly identified witnesses have discoverable information as required by Rule 26(a)(1)(A)(i). Second, the disclosures appear to be inconsistent with Defendants' position on privilege, as they reference considerable third-agency information. We would like to understand why you think this is proper. It certainly cannot be that you use privilege selectively to only allow use of information that you believe support Defendants' positions, but refuse us access to information that allows us to analyze that information. Third, several of the disclosures are broad and lacking in specificity. For example, b) discloses, in part, "Any data and/or materials for the Global Terrorism Database, website and related links/websites", not only do Defendants' not identify all "related links/websites" of which the universe could be unlimited, the Global Terrorism Database contains "information on more than 190,000 Terrorist Attacks." Fourth, the disclosures suggest that even further supplementation is coming even later. For instance, Defendants indicate an intent in the future to identify and produce "additional training

materials and resources available to USCIS officers handling relevant applications.” These materials should have been produced months, if not years, ago. Yet, Defendants still do not even say what they are, or why they have been so delayed in their production.

Plaintiffs do not object to Defendants’ formal disclosure of the revised FY 2013 through FY 2019 data, subject to our right to conduct discovery regarding the error and the new data. We await your prompt response to our proposed Rule 30(b)(6) topics on that issue.

This email is not an exhaustive list of our objections.

We obviously hope we can resolve this issue without Court intervention. Please advise when over the next three days (by the close of business on Wednesday) you are available to meet and confer. We look forward to hearing about your availability as soon as possible.

Best,

Heath

**Heath Hyatt | Perkins Coie LLP**

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**From:** Slack, Michelle R (CIV) <[Michelle.R.Slack@usdoj.gov](mailto:Michelle.R.Slack@usdoj.gov)>

**Sent:** Thursday, July 2, 2020 1:13 PM

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**Subject:** Wagafe v. Trump: Defendants' Fifth Set of Supplemental Initial Disclosures

Counsel,

Please find attached Defendants’ Fifth Set of Supplemental Initial Disclosures.



Sincerely,

Michelle R. Slack  
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U.S. Department of Justice, Civil Division  
Office of Immigration Litigation-Appellate  
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