[ORAL ARGUMENT NOT SCHEDULED]

Nos. 20-5233, 20-5234

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAMPAIGN LEGAL CENTER,

Plaintiff-Appellee,

v.

DEPARTMENT OF JUSTICE,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1) and (b), the undersigned counsel certifies as follows:

1. Parties and Amici

Plaintiff-Appellee is the Campaign Legal Center.

Defendant-Appellant is the United States Department of Justice.

No amici curiae participated in the district court.

2. Corporate Disclosure Statement of Campaign Legal Center

There are no parent companies, subsidiaries or affiliates of Campaign Legal Center which have any outstanding securities in the hands of the public.

3. Rulings Under Review

Pursuant to the Notices of Appeal filed by Defendant-Appellant Department of Justice, the rulings under review are (1) the Memorandum Opinions entered on June 1, 2020, by the United States District Court for the District of Columbia (Chutkan, J.), which are available at 2020 WL 2849907 and 2020 WL 2849909; and (2) the Orders entered on June 1, 2020, by the United States District Court for the District of Columbia (Chutkan, J).

4. Related Cases

This case has not previously been before this Court. This appeal involves two related cases, *Campaign Legal Center v. Department of Justice*, No. 20-5233

(D.C. Cir.), and *Campaign Legal Center v. Department of Justice*, No. 20-5234 (D.C. Cir.). Both involve the same parties, similar procedural background, and identical (in relevant respects) orders issued by the district court.

/s/ Adam Miller
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GLOSSARY

FOIA Freedom of Information Act

JA Joint Appendix

STATEMENT OF THE ISSUE

After the Commerce Secretary decided to add a citizenship question to the census, the Attorney General agreed to send a request to the Census Bureau in an effort to concoct a pretextual justification for that politically controversial decision, a request memorialized in a December 12, 2017 letter.

The question presented is: Whether drafts of the letter are "predecisional" under the deliberative process privilege merely because they are "drafts" despite the related policy decisions having already been made, and the letter constituting a false justification for a policy decision that had already been made.

PERTINENT STATUTES AND REGULATIONS

5. U.S.C. § 552(b)(5).

STATEMENT OF THE CASE

A. STATUTORY BACKGROUND

Congress passed the Freedom of Information Act ("FOIA") to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (quoting *Rose v. Dep't of Air Force*, 495 F.2d 261, 263 (2d Cir. 1974)). The "purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Coffey v. Bureau of Land Mgmt.*, 249 F. Supp. 3d 488, 495 (D.D.C. 2017) (quoting *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989)).

FOIA creates a "strong presumption in favor of disclosure" which "places the burden on the agency to justify the withholding of any requested documents." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (citation omitted). Further, "[i]n light of the FOIA's strong policy in favor of disclosure, … Exemption 5 is to be construed 'as narrowly as consistent with efficient Government operation.'" *Petroleum Info. Corp. v. U.S. Dep't of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (*quoting EPA v. Mink*, 410 U.S. 73, 87, 93 (1973)).

B. FACTUAL BACKGROUND

On March 26, 2018, Department of Commerce Secretary Wilbur Ross announced his decision to add a question regarding citizenship status to the 2020 Census Questionnaire. JA 168-75, 622-29; JA 797-98, 812-13. Secretary Ross

falsely claimed that his decision was made in response to a request from the Department of Justice ("DOJ"), memorialized in a December 12, 2017 letter from Arthur Gary, the General Counsel of DOJ's Justice Management Division (the "Gary Letter"). JA 177-180, 631-33. The Gary Letter stated that DOJ was requesting the Census Bureau to add a question regarding citizenship to the census in order to obtain data to aid DOJ's enforcement of Section 2 of the Voting Rights Act ("VRA"). *Id.* However, subsequent litigation and discovery conclusively established that the Gary Letter was nothing more than a pretext and that the deliberative process and decision for adding the citizenship question to the census occurred well before the letter was drafted. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573-76 (2019).

The Supreme Court held that the "evidence showed that the Secretary was determined to reinstate a citizenship question from the time he entered office; instructed his staff to make it happen; waited while Commerce officials explored whether another agency would request census-based citizenship data; subsequently contacted the Attorney General himself to ask if DOJ would make the request; and adopted the Voting Rights Act rationale late in the process." *Id.* at 2754.

The evidence upon which the Supreme Court relied included an email sent by Secretary Ross just two months after taking office in which he stated that he was "mystified why nothing have been done in response to my months old request that

we include the citizenship question." JA 184, 637; JA 795, 810. Earl Comstock, a Commerce Department official, responded that "[w]e need to work with Justice to get them to request that the citizenship be added back as a census question, and we have the court cases to illustrate that DoJ has a legitimate need for the question to be included. I will arrange a meeting with DoJ staff this week to discuss." JA 184, 637; JA 796, 811. On August 8, 2017, Secretary Ross inquired "where is the DOJ in their analysis? If they still have not come to a conclusion please let me know your contact person and I will call the AG." JA 186, 639. A month later, on September 8, 2017, Comstock sent Secretary Ross a memo explaining that "I spoke several times with James McHenry [DOJ] by phone, and after considering the matter further James said that Justice staff did not want to raise the question … James directed me to … the Department of Homeland Security … after discussion DHS really felt it was best handled by the Department of Justice. At that point … I asked James Uthmeier [OGC at Commerce] to look into the legal issues and how Commerce could add the question to the Census itself." JA 188, 641; JA 796, 811.

When DOJ staff balked at issuing the request, presumably because there was no legitimate justification for it, Secretary Ross got Attorney General Sessions involved. The same day he received Comstock's memo, noting that DOJ staff did not want to request the citizenship question, Secretary Ross called Attorney General Sessions, asked DOJ to request the addition of the citizenship question and supplied

DOJ with the rationale for the request. JA 182, 635; JA 190, 643; JA 796, 798, 811, 813. Attorney General Sessions quickly agreed to issue the request for the citizenship question, was "eager to assist", and "do whatever [Secretary Ross] need[s] us to do" on the issue. JA 190, 643; JA 796-97, 811-12.

Even after the Attorney General's agreement to issue the request, "DOJ's interest was directed more to helping the Commerce Department than to securing the data." *Dep't of Commerce*, 139 S. Ct. at 2575. "The December 2017 letter from DOJ drew heavily on contributions from Commerce staff and advisors." *Id.* Due to "[t]heir influence," the Gary Letter "went beyond a simple entreaty for better citizenship data—what one might expect of a typical request from another agency—to a specific request that Commerce collect the data by means of reinstating a citizenship question on the census." *Id.* Moreover, "after sending the letter, DOJ declined the Census Bureau's offer to discuss alternative ways to meet DOJ's stated need for improved citizenship data, further suggesting a lack of interest on DOJ's part." *Id.*

Based on this evidence, the Supreme Court held that Secretary Ross' decision to add the citizenship question to the census was "arbitrary and capricious" and that the purported justification, DOJ's request, was "contrived." *Id.*

C. PROCEDURAL HISTORY

1. Procedural Background

On February 1, 2018, Campaign Legal Center ("CLC") submitted a FOIA request to three components of the Justice Department – the Civil Rights Division, the Justice Management Division, and the Office of Attorney General – seeking all records pertaining to the December 12, 2017 Gary Letter to the Census Bureau. JA 798, 813. After the Civil Rights Division denied CLC access to responsive documents and the Justice Management Division and Office of Attorney General exceeded their statutory deadlines to respond, CLC filed two lawsuits against DOJ seeking disclosure of responsive documents. JA 798, 813. One lawsuit is directed at the Justice Management Division and Office of Attorney General (Appeal No. 20-5233), while the other is directed at the Civil Rights Division (Appeal No. 20-5234). DOJ subsequently produced some documents but continued, in both lawsuits, to withhold drafts of the Gary Letter and associated cover emails discussing its contents pursuant to the deliberative process privilege. *Id.* The parties subsequently filed cross-motions for summary judgment.

2. The District Court's Ruling

The district court ruled that the documents at issue are not predecisional, and therefore do not fall under the deliberative process privilege. JA 807-08, 825. In determining that the documents are not predecisional, the district court concluded "that the relevant decision for purposes of Exemption 5 is the one made by Attorney

General Sessions to request the citizenship question, not the decision about the final contents of the letter." JA 807, 825.

In reaching this conclusion, the district court evaluated whether the drafts bear on the "formulation or exercise of agency policy-oriented judgment." JA 805-06, 822-23 (citing *Petroleum Info Corp.*, 976 F.2d at 1435 (D.C. Cir. 1992)). The district court found that the instant case was "significantly different" from cases where this Circuit and the district court held that drafts were predecisional based on facts showing the exercise of "policy-oriented judgment." JA 805-806. In contrast, the district court found that the draft "letter at issue did not involve discretion about an agency position or about the primary reasons for the agency position. The agency's position and reasons for the letter had already been decided." JA 806, 823. The district court also concluded that the "contested documents do not fit the mold of documents drafted by subordinates to supervisors to help the agency make a decision." JA 806-07, 823-24. Therefore, the district court, properly construing Exemption 5 narrowly, held that the relevant decision for purposes of Exemption 5 was the one made by the Attorney General to request the citizenship question. *Id.* Notably, the district court only evaluated whether the documents at issue are

predecisional without reaching the second requirement of the deliberative process privilege, whether or not the documents are deliberative. JA 808, 825.[1]

D. SUMMARY OF THE ARGUMENT

DOJ contends that the drafts of the Gary Letter and associated emails discussing its content are predecisional simply because they pre-date the final version of the letter. DOJ does not contend that the drafts reflect deliberations about formulating agency policy, but merely that they reflect discussions about the "content and phrasing" of the letter. Appellate Brief at 5-6. Under DOJ's strained and implausible interpretation of the law, every "draft" document would automatically be predecisional because it reflects deliberations about its content. This is not the law, nor should it be.

Here, the Supreme Court already held that the Commerce Department's decision to add a citizenship question to the census was "arbitrary and capricious" because the Gary letter was a "contrived" justification for an already-made decision. The Gary letter itself, therefore, did not reflect a "typical" agency process for formulating a policy as DOJ contends. Rather, it was directed towards helping the Commerce Department create a "contrived" pretextual justification. Permitting the

[1] If this Court decides that the documents at issue are predecisional, the Court should remand to the district court to analyze whether the documents are also deliberative. *Paisley v. CIA*, 712 F.2d 686, 698-99 (D.C. Cir. 1983), *vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984).

withholding of the documents at issue under these circumstances would undermine the purposes of the FOIA to promote transparency and honest governance.

Moreover, the documents at issue were drafted *after* DOJ staff had already declined to issue the request, Attorney General Sessions intervened, agreed to issue the request, and agreed to the pretextual rationale provided by the Commerce Department. At that point, the decisions were already made. Therefore, the drafts of the letter do not reflect an exercise of agency policy-oriented judgement subject to the deliberative process privilege.

Instead, the drafts of the letter reflect discussions about how to communicate an already-decided policy. Such "messaging" documents may, under certain circumstances, fall under the deliberative process privilege, but DOJ waived that argument by failing to raise it and explicitly rejecting its application in the district court proceedings.

ARGUMENT

A. WITHHOLDING THE DOCUMENTS AT ISSUE WOULD CONTRADICT THE PURPOSES OF THE DELIBERATIVE PROCESS PRIVILEGE.

Withholding under the deliberative process privilege must further the policy goals of the exemption. *See, e.g., Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 258 (D.C. Cir. 1977). The purpose of the deliberative process privilege "is to prevent injury to the quality of agency decisions." *N.L.R.B. v. Sears,*

Roebuck & Co., 421 U.S. 132, 151 (1975). This Circuit has articulated three underlying policy purposes as the bases for the deliberative process privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are actually adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

Here, none of these policy considerations relevant to the quality of agency decision-making apply.

First, withholding these materials cannot encourage open, frank discussion on matters of policy because the materials were not generated as part of a process by which the relevant policies were formulated. Commerce Secretary Ross decided to add the citizenship question to the census well before the Gary Letter was drafted, and Attorney General Sessions likewise agreed to supply the pretextual letter and accept the Commerce Department's policy rationale for it before the drafting process began. *N.L.R.B.*, 421 U.S. at 151 ("[I]t is difficult to see how the quality of a decision will be affected by communications with respect to the decision occurring after the decision is finally reached; and therefore equally difficult to see how the quality of the decision will be affected by forced disclosure of such communications[.]") The

purpose of the letter, therefore, was simply to state a decision DOJ had already made. *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) ("The deliberative process privilege does not shield documents that simply state or explain a decision the government has already made … unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations.") (citation omitted).

Moreover, disclosing the documents would not risk chilling internal deliberations between subordinates and superiors because there were not such deliberations. The Attorney General agreed to Secretary Ross' request that DOJ issue the letter, and then directed junior officers to draft the letter as requested by Commerce. *Dep't of Commerce*, 139 S. Ct. at 2575 ("The December 2017 letter from DOJ drew heavily on contributions from Commerce staff and advisors."). While Mr. Gore of DOJ did email the draft to supervisors before it was sent to the Census Bureau, it was already in "near-final" form, and was not provided to help them make a policy decision because that decision had already been made. JA 807, 824.

Second, releasing the documents would not risk premature disclosure of agency policies. The Supreme Court has already concluded that the reason for issuing the Gary Letter was to help the Commerce Department provide a "contrived"

justification for its already-made decision of adding a citizenship question to the census and not the stated VRA rationale. *Dep't of Commerce*, 139 S. Ct. at 2575.

Third, releasing the documents will not cause public confusion about the reasons and rationales for DOJ's decision to issue the Gary Letter. To the contrary, the documents will further FOIA's critical purposes of transparency and accountability. That is, the people have a right to be informed of the true reasons why DOJ took the action it did, rather than the pretextual reason that DOJ sought to propagate. *N.L.R.B.*, 421 U.S. at 152 ("the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted.").

Therefore, in the unusual circumstances of this case, allowing DOJ to withhold the documents would undermine rather than support the policy purposes of the deliberative process privilege. FOIA is intended to "open agency action to the light of public scrutiny" and provide a "check against corruption." *Dep't of Air Force*, 425 U.S. at 361; *Coffey*, 249 F. Supp. 3d at 495. Where the documents sought shed light on a false justification for a policy, withholding should be denied "on the grounds that shielding internal government deliberations in this context does not serve 'the public's interest in honest, effective government.'" *In re Sealed Case*, 121 F.3d at 737. (internal citations omitted).

Here, any internal discussion related to drafting the Gary Letter was intended to obscure the rationale for an already decided policy. Shielding such drafts cannot

promote effective agency decision-making because DOJ was not engaging in policy making when it was drafting the request. *Dep't of Commerce*, 139 S. Ct. at 2575 (finding that DOJ was more interested in helping Secretary Ross and that its behavior suggested a "lack of interest" in the addition of the citizenship question). It was, instead, drafting a post-hoc pretextual rationale for an already decided policy. DOJ should not be able to use Exemption 5 to shield its deliberations on how to most effectively conceal the rationale for critical public policy decisions. The deliberative process privilege seeks to avoid chilling internal discussions to protect quality decision-making, not to protect agency efforts to create a "contrived" justification for an arbitrary and capricious policy. Such discussions are at the heart of what should be released under FOIA.

B. THE WITHHELD MATERIALS ARE NOT PREDECISIONAL

1. The Drafts Were Created After the Relevant Policy Was Already Decided.

There is no dispute that the drafts of the Gary Letter post-date the Attorney General's decision to issue the letter. Appellate Brief at 3. "A document is predecisional if it was 'prepared in order to assist an agency decision-maker in arriving at his decision,' rather than support a decision already made." *Petroleum Info Corp.*, 976 F.2d at 1434 (internal citation omitted). Therefore, DOJ argues that the relevant policy decision was finalizing the contents of the Gary Letter. Under DOJ's formulation of the policy decision, every draft of every government document

would be "predecisional" because it pre-dates the finalization of the document. But "designation of the documents as 'drafts' does not end the inquiry," nor are drafts per se exempt from disclosure. *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257 (D.C. Cir. 1982) (citing *Coastal States*, 617 F.2d at 866).

It is true that Exemption 5 typically protects "recommendations, draft documents, proposals, suggestions, and other subjective documents," but "the privilege does not protect a document which is merely peripheral to actual policy formation; the record must bear on the formulation or exercise of policy-oriented judgment." *See Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) (internal citations omitted); *see also Petroleum Info Corp.*, 976 F.2d at 1435 (D.C. Cir. 1992) ("[W]hen material could not reasonably be said to reveal an agency's or official's mode of formulating or exercising policy-implicating judgment, the deliberative process privilege is inapplicable.") (citation omitted).

Consistent with these precedents, the district court correctly determined that the drafting of the letter at issue did not "demonstrate 'the process by which policy is formulated," nor could it "reasonably be said to reveal an agency's or official's mode of formulating or exercising policy-implicating judgment." JA 805 (citing *Petroleum Info. Corp.*, 976 F.2d at 1434 (D.C. Cir. 1992)). That is because, even before the drafting began, the Attorney General had already made the decision to issue the pretextual letter, and the Commerce Department had supplied the false

rationale. Therefore, the district court held that "the letter at issue did not involve discretion about an agency position or about the primary reasons for the agency position. The agency's position and reasons for the letter had already been decided." JA 806; *see Coastal States*, 617 F.2d at 868 (holding that documents do not fall under Exemption 5 where they "were not suggestions or recommendations as to what agency policy should be.")

Moreover, the district court correctly took into account that the DOJ officials who drafted the letter, Mr. Gary and Mr. Gore, "were not drafting the document so that a supervisor or colleague could decide a particular issue." JA 806-807. While "a document from a subordinate to a superior official is more likely to be predecisional," the contested documents do not fit the mold of cases finding the deliberative process privilege applicable. JA 806-807; *Coastal States*, 617 F.2d at 868. Instead, the documents at issue were used to communicate a pre-determined decision. JA 807.

DOJ analogizes to other instances where high-ranking officials issue internal directives and staff undertakes a deliberative process involving relevant considerations and rationales to finalize agency policy. Appellate Brief at 11. But that analogy fundamentally mischaracterizes the facts of the process that led to the Gary Letter. It was drafted pursuant to a directive from the Attorney General after agency staff refused to issue the request for the addition of the citizenship question.

JA 796. "The December 2017 letter from DOJ drew heavily on contributions from Commerce staff and advisors." *Dep't of Commerce*, 139 S. Ct. at 2575. As the Supreme Court noted, this was not "what one might expect of a typical request from [one] agency [to another]." *Id.*

Nor would the district court's approach embroil courts in the "difficult task of determining when an agency's internal decision had become sufficiently final." Appellate Brief at 12. The courts are already tasked with deciding whether a document was "predecisional." And there is nothing unusual about the court evaluating draft or pre-final documents to determine whether they are predecisional. *See e.g.*, *Coastal States*, 617 F.2d at 868.

C. THE DRAFT GARY LETTERS DO NOT CONSTITUTE PREDECISIONAL DRAFT MESSAGING DOCUMENTS

As a fallback position, DOJ argues that even if the Attorney General's decision to issue the Gary Letter is the relevant policy decision, the documents at issue are nevertheless predecisional because they constitute "messaging documents," reflecting the "Department's deliberations about how to communicate the Attorney General's decision to the Census Bureau and others." Appellate Brief at 12-14. However, the posture of this action places the burden on DOJ to establish that the documents constitute messaging documents and were created primarily for that purpose. DOJ made no such claim in the district court, let alone put forward any admissible facts that would meet this burden. To the contrary, DOJ affirmatively

conceded that the withheld materials are not messaging documents in order to bolster its argument that the documents reflect policy decision-making and are therefore predecisional. JA 807 (citing Dkt. No. 18 at 15 n.3); *see also* JA 824 (citing Dkt. 26 at 13 n. 8). DOJ's footnote argued that "the focus on whether the December 2017 letter is a 'messaging' document misses the mark." No. 1:18-cv-01187, Dkt. No. 18 at 15 n.3; *see also* No. 18-cv-01771, Dkt. 26 at 13 n. 8. Instead, DOJ specifically asserted that "the letter was not intended to 'explain an already made decision to the public' … but rather was an inter-agency letter about an important government policy determination." *Id.* DOJ should not be permitted to now resurrect an argument it previously disavowed and chose not to pursue in the district court. *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084 (D.C. Cir. 1984) ("It is well settled that issues and legal theories not asserted at the [d]istrict [c]ourt level ordinarily will not be heard on appeal.").

CONCLUSION

For the foregoing reasons, CLC respectfully requests that this Court affirm the district court's ruling.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4599 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Times New Roman 14-point font, a proportionally spaced typeface.

/s/ Adam Miller
Adam Miller

CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Adam Miller
Adam Miller