IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	Civil Action No. 18-1771 (TSC) Oral Argument Requested

PLAINTIFF'S RENEWED CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Plaintiff Campaign Legal Center ("CLC") hereby opposes the Motion for Summary Judgment filed by Defendant Department of Justice ("DOJ" or the "Department") and respectfully files this Cross-Motion for Summary Judgment in the above-captioned matter. Relief in favor of CLC is appropriate because the materials that DOJ seeks to withhold under the Freedom of Information Act's ("FIOA") Exemption 5 are not subject to the deliberative process privilege. This motion is accompanied by and supported by a memorandum of law, statements of disputed and undisputed material facts, supporting declaration, exhibits, and a proposed order.

Respectfully submitted,

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INTRODUCTION

The Freedom of Information Act is "the legislative embodiment of Justice Brandeis's famous adage, 'sunlight is the best of disinfectants.'" *N.H. Right to Life v. HHS*, 778 F.3d 43, 48-49 (1st Cir. 2015) (citation omitted). If ever a matter requires sunlight, it is this one. The Supreme Court has already determined the core facts: political appointees in the government sought to add a "citizenship question" to the census and then concocted a false justification for their actions. *United States Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) ("[W]e cannot ignore the disconnect between the decision made and the explanation given … [and] we are not required to exhibit a naivete from which ordinary citizens are free.") (internal citation omitted). Moreover, other courts have noted that the addition of the citizenship question was motivated by "mysterious and potentially improper political considerations." *Kravitz v. United States Dep't of Commerce*, 366 F. Supp. 3d 618, 752 (D. Md. 2019).

The Department of Justice now seeks to withhold information related to its role in this charade, contending that draft documents or communications are protected from disclosure by the deliberative process privilege. DOJ's position is incorrect, and CLC respectfully requests that the Court deny DOJ's motion for summary judgment and instead grant its cross-motion for summary judgment.

The documents at issue must be disclosed for two reasons. *First*, many are not subject to the deliberative process privilege at all because they postdate the agency decision at issue, and therefore is neither predecisional nor deliberative. The documents at issue were drafted after a final agency decision had been reached and simply reflect a predetermined rationale and borrowed work product. *Second*, even if this Court were to find the material to be predecisional and deliberative, the documents should still be released because DOJ has not specifically articulated

how the withheld information could result in any foreseeable harm to the agency as required by FOIA—particularly since the documents concern a fictitious justification for an agency decision that had already been made.

The entire purpose of FOIA is to ensure an informed citizenry that can act as a check against government corruption and wrongdoing. *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) ("The basic 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."). Accordingly, DOJ should not be allowed to continue to withhold this information, and summary judgment should be granted in favor of CLC.

FACTUAL BACKGROUND

I. THE DECISION TO ADD THE CITIZENSHIP QUESTION TO THE 2020 CENSUS

On March 26, 2018, Department of Commerce ("Commerce" or "the Commerce Department") Secretary Wilbur Ross announced his decision to add a question regarding citizenship status to the 2020 Census Questionnaire.[1] Secretary Ross initially claimed that his decision arose from a December 12, 2017 request (the "December 2017 Letter") from Arthur Gary, the General Counsel of DOJ's Justice Management Division, to add the citizenship question in order to allow DOJ to better enforce Section 2 of the Voting Rights Act.[2] However, this letter and the purported rationale behind it were pretextual; Secretary Ross decided to add the question to

[1] Ex. 1 (Mar. 26, 2018 Memorandum from Sec'y of Com. Wilbur Ross to Under Sec'y of Com. for Econ. Affairs Karen Dunn Kelley on Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire).
[2] *See* Ex. 2 (Dec. 12, 2017 Letter from A. Gary to Dr. R. Jarmin).

the census shortly after his tenure began and months before the December 2017 Letter was issued.[3] *See New York*, 139 S. Ct. at 2575 ("The record shows that the Secretary began taking steps to reinstate a citizenship question about a week into his tenure."); *Kravitz*, 366 F. Supp. 3d at 706 ("[T]he Secretary decided in the Spring of 2017, months before receiving DOJ's request, that he wanted to add a citizenship question to the 2020 Census.").

Indeed, as early as May 2017, Secretary Ross was inquiring as to the status of his request that a citizenship question be included in the census, with one of his staff members confirming that Commerce would "need to work with Justice to get them to request that citizenship be added back as a census question" and suggesting that Commerce staff had legal reasoning that it could supply to DOJ in order to legitimize the request.[4]

As the Supreme Court found, the Commerce Department went to "great lengths to elicit the request from DOJ (or any other willing agency)." *See New York*, 139 S. Ct. at 2575. DOJ balked at issuing the request, specifically advising Commerce staff that "Justice staff did not want to raise the [citizenship] question" when Commerce initially began its outreach in the spring of 2017. *See Kravitz*, 366 F. Supp.3d at 695. This remained DOJ's position for months,[5] with Secretary Ross asking his staff about the status of the request throughout the spring and summer of 2017 and remarking that he would call the Attorney General himself regarding the issue.[6] *See*

[3] Ex. 3 (Jun. 21, 2018 Supplemental Memorandum by Sec'y of Commerce Wilbur Ross Regarding the Administrative Record in Census Litigation).
[4] Ex. 4 (May 2, 2017 email correspondence between E. Comstock and Sec'y W. Ross).
[5] Ex. 5 (Sept. 8, 2017 memo from E. Comstock to Sec'y W. Ross) ("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 that 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").
[6] Ex. 13 (Aug. 8, 2017 email correspondence between E. Comstock and Sec'y W. Ross).

id. at 696. On September 13, 2017, John Gore, the then-Acting Assistant Attorney General for Civil Rights, emailed Commerce staff asking for a call "about a DOJ-DOC" issue. *Id*. at 697. Five days later, on September 18, 2017, Secretary Ross and Attorney General Sessions spoke about the citizenship question. *Id.* Only after this conversation did DOJ agree to request the citizenship request under the pretextual rationale proposed by the Commerce Department. *See New York*, 139 S. Ct. at 2564 (finding that Secretary Ross and his staff "eventually *persuaded* DOJ to request reinstatement of the question for VRA enforcement purposes") (emphasis added). Accordingly, DOJ began drafting the December 2017 Letter, which "drew heavily on contributions from Commerce staff and advisors." *See id*. at 2575.

The Supreme Court and multiple other federal courts have found that the Government's proffered explanation behind the request—obtaining more accurate citizenship data in order to better enforce the Voting Rights Act— was "contrived." *See, e.g.*, *id.*; *Kravitz*, 366 F. Supp. 3d at 706 (concluding that Commerce staff searched for a rationale only after Secretary Ross decided to add the citizenship question). Nonetheless, DOJ continues to maintain that the documents created to craft artificial support for an already-made decision are somehow part of a deliberative process protected from disclosure under FOIA.

II. CLC'S FOIA REQUESTS AND INITIATION OF THIS LAWSUIT

On February 1, 2018, CLC submitted a FOIA request to the Civil Rights Division ("CRD"), the Justice Management Division ("JMD"), and the Office of the Attorney General ("OAG") at the Department of Justice seeking all records pertaining to the December 2017 Letter.[7] In

[7] Ex. 6 (FOIA Request). For the reasons described in Footnote 10, DOJ and CLC jointly vacated the briefing schedule in the separate CRD litigation. *See Campaign Legal Ctr. v. U.S. Dep't of Just.*, Civil Action No. 18-1187, at *3 (D.D.C. Sept. 16, 2021).

particular, CLC sought (1) documents to, from, or mentioning Dr. Ron Jarmin or Dr. Enrique Lamas; and (2) documents containing the phrases "2020 census," "long form," "citizenship question," "questions regarding citizenship," "ACS," "American Community Survey," "citizen voting age population," *or* "CVAP," dating from January 20, 2017 to the present. Ex. 6 at 3 CLC's FOIA request sought expedited processing because there is an "urgency to inform the public" about the "actual or alleged government activity" covered by the request and because the requested records involve "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence." 28 C.F.R. § 16.5(e)(1)(iv).

CLC addressed its request to three DOJ components. All of them acknowledged the urgency of the request and granted expedited processing.[8] However, only after CLC initiated this and related litigation against the components did DOJ begin a drawn-out process of producing documents,[9] with JMD's and OAG's productions concluding on June 21, 2021—nearly three years after CLC filed suit. CRD is still reviewing potentially responsive documents.[10]

[8] CRD Decl. Ex. 7 (CRD Feb. 9, 2018 Response to FOIA); Exhibit 8 (OIP Division (on behalf of OAG) Feb. 9, 2018 Response to FOIA). JMD granted expedited processing in a March 14, 2018 phone call with Danielle Lang. CLC confirmed this in a follow up letter on June 22, 2018 letter to JMD. Exhibit 9 (June 22, 2018 Letter from CLC to JMD).

[9] Ex. 10 (Oct. 7, 2020 Tr. 4:12-13) ("THE COURT: I have to say, Mr. Cirino – and I've said this before. A proposed production schedule of 300 documents a month seems to me glacial.").

[10] CRD is still reviewing potentially responsive documents; on September 13, 2021—just six days before their Renewed Motions for Summary Judgment were due—DOJ informed CLC that despite its prior representation to the contrary, a tranche of documents that hit on CLC's proposed search terms were never reviewed by any of the CRT staff. *See Campaign Legal Ctr. v. U.S. Dep't of Just.*, Civil Action No. 18-1187, at *3 (D.D.C. Sept. 16, 2021). Accordingly, CLC agreed to vacate the summary judgment briefing schedule in the related litigation. *See id.*

III. THE COURT'S ORDER ON THE PARTIES' INITIAL CROSS-MOTIONS FOR SUMMARY JUDGMENT

On June 1, 2020, the Court granted in part and denied in part each party's cross-motion for summary judgment. *See* June 1, 2020 Memorandum Opinion and Order ("Mem. Op."). As relevant here, the Court found that (i) OAG did not specify which portions of withheld DOJ-White House correspondence and draft interrogatory responses were protected under the deliberative process privilege; (ii) OAG did not provide sufficient information to allow the Court to determine whether certain categories of documents were protected by the deliberative process privilege;[11] and (iii) JMD did not provide sufficient information to allow the Court to determine whether an email to Arthur Gary and a draft letter to Representative Vincente Gonzalez were protected by the deliberative process privilege.[12] *See* Mem. Op. at 20-27.

On July 9, 2020, JMD released, in full, the email to Arthur Gary. On August 31, 2020, OAG produced, in part, previously withheld DOJ-White House correspondence and draft interrogatory responses; however, portions of both those documents were still withheld pursuant to Exemption 5's deliberative process privilege. On September 17, 2021, OAG released, in full, documents identified in its *Vaughn* Index as "Deliberative Discussions Regarding Interagency

[11] These categories of documents were described in OAG's *Vaughn* Index as follows: (i) Deliberative Discussions Regarding Interagency Correspondence; (ii) Deliberative Discussions Regarding Congressional Correspondence; (iii) Deliberative Discussions Regarding the Drafting Process; (iv) Deliberative Discussions Regarding the Census and/or ACS; (v) Draft Correspondence between JMD and Department of Commerce; and (vi) Draft Correspondence with Representative Gonzalez.

[12] The Court also granted summary judgment in favor of CLC with regard to DOJ's deliberative process claim over drafts and emails related to the Gary Letter. *See* ECF No. 29 at 12-16. On July 1, 2020, DOJ filed a Notice of Appeal of the Court's summary judgment ruling with regard to the Gary Letter. *See* Case No. 20-5233 (D.C. Cir.). DOJ moved for a stay of its disclosure obligations with regard to the withheld Gary Letter materials, which this Court granted. See ECF Nos. 39, 43. The D.C. Circuit held oral argument on September 15, 2021.

Correspondence" and "Deliberative Discussions Regarding Congressional Correspondence," and produced, in part, the document identified as "Deliberative Discussions Regarding the Drafting Process."

Accordingly, the only withheld materials that remain at issue are those identified on DOJ's Vaughn Index as (i) Email Correspondence with the White House; (ii) Draft USCCR Interrogatory Responses; (iii) Draft Correspondence Between JMD and Department of Commerce; (iv) Draft Correspondence with Representative Gonzalez; (v) Deliberative Discussions Regarding the Drafting Process; (vi) Deliberative Discussions Regarding the Census and/or ACS; and (vii) Draft response. Census. Honorable Vicente Gonzalez. *See* July 21, 2021 Joint Status Report.

LEGAL STANDARD

Summary judgment is appropriate where, viewing the record in the light most favorable to the non-moving party, "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1433 (D.C. Cir. 1992).

In FOIA cases, when an agency claims an exemption, the burden is on the agency to show that requested material is covered by a statutory exemption. 5 U.S.C. § 552(a)(4)(B); *Petroleum Info. Corp.*, 976 F.2d at 1433. To meet its burden, a defendant agency must "describe the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). The court will grant summary judgment to the government in a FOIA case only if the agency can prove "that it has fully discharged its obligations under the FOIA, after the underlying facts and the inferences

to be drawn from them are construed in the light most favorable to the FOIA requester." *Hall v. Stoneman*, No. 19-cv-109 (RBW), 2020 WL 1451586, at *4 (D.D.C. Mar. 25, 2020) (citation omitted).

ARGUMENT

I. DOJ HAS NOT SATISFIED ITS BURDEN TO SHOW THAT EXEMPTION 5 AND THE DELIBERATIVE PROCESS PRIVILEGE APPLY TO THE WITHHELD INFORMATION

The information DOJ seeks to withhold should be released because the Department cannot meet its burden to show that the withheld material falls within the narrow bounds of the deliberative process privilege in Exemption 5. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) (holding that Exemption 5 is to be applied "as narrowly as consistent with efficient Government operation") (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)).

The deliberative process privilege only operates to shield documents generated during an agency's decision-making process. *See U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 783 (2021). The privilege does not apply unless the Government can show that the documents were both predecisional (generated before the adoption of an agency policy) and deliberative (prepared to help the agency formulate its position). *See id*. at 785-86. When material cannot "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." *Petroleum Info. Corp.*, 976 F.2d at 1435 (citing *Playboy Enters. v. Dep't of Just.*, 677 F.2d 931, 935 (D.C. Cir. 1982)).

DOJ has failed to establish that the withheld materials meet this rigorous standard. The decision to add the citizenship question to the census was made early in Secretary Ross's tenure, but DOJ did not issue the citizenship data request until many months later, following a September

18, 2017 phone call between Secretary Ross and Attorney General Sessions.[13] Everything following DOJ's accession to Secretary Ross's request that it provide the letter seeking the addition of the citizenship question was an exercise in obfuscation. *See New York*, 139 S. Ct. at 2574 (finding that the Voting Rights Act "played an insignificant role in the decisionmaking process" and noting that the district court held that the "evidence established that the Secretary had made up his mind to reinstate a citizenship question 'well before' receiving DOJ's request"); *Fish & Wildlife*, 141 S. Ct. at 788 (referring to hiding "a functionally final decision in draft form" as a "charade"). Such materials—post-hoc documents created to support a pre-decided policy and rationale from another agency—cannot be reasonably classified as reflecting "the give-and-take of the consultative process." *See Coastal States*, 617 F.2d at 866.

Each remaining category of withheld documents, and why they are not subject to the deliberative process privilege, is discussed in further detail below.[14]

A. The Withheld DOJ-White House Correspondence Is Not Subject to the Deliberative Process Privilege.

OAG seeks to withhold portions of documents it describes as "emails between DOJ attorneys and individuals in the White House seeking advice and decision from the White House as to congressional notification of DOJ's request for a citizenship question on the census." Third Declaration of Vanessa R. Brinkman ("Third Brinkman Decl."), ¶ 19. However, OAG has failed

[13] Ex. 11 (Sept. 18, 2017 email from D. Cutrona to W. Teramoto).

[14] Based on the additional explanation provided by DOJ in its Renewed Motion and accompanying Declarations, CLC does not dispute that the categories of documents described as "Deliberative Discussions Regarding the Census and/or ACS," *see* ECF No. 48-1 at 13-14, or "Draft Correspondence Between JMD and Department of Commerce" subject to the deliberative process privilege. However, as explained in greater detail in Section II, *infra*, these documents should still be disclosed because DOJ has not made an adequate showing of harm.

to demonstrate that these documents were prepared to arrive at a final decision or formulate a policy, and the documents should therefore be released.

i. The Withheld DOJ-White House Correspondence Was Not Predecisional

OAG has not met its burden of establishing that the withheld information was "'prepared in order to assist an agency decisionmaker in arriving at his decision,' rather than to support a decision already made." *Petroleum Info. Corp.*, 976 F.2d at 1434 (quoting *Renegotiation Bd. v. Grumman Aircraft*, 421 U.S. 168, 184 (1975)). In fact, OAG's own description of the emails, as well as their date of transmission, show that these documents were prepared "to support a decision already made." *See id*.

Specifically, the withheld information appears in a December 19, 2017 email chain between Commerce, DOJ, and White House staff. *See* Ex. 12. Not only does this post-date both the September 18, 2017 DOJ decision to request the citizenship question and the December 2017 Letter that officially made the request to the Census Bureau, the portions of the email chain already released demonstrate that the purpose of the correspondence was to "advise the Secretary of the [White House's] view on notifying Congress on the DOJ request and how that would affect the agenda for the remainder of the week." Ex. 12 at 20-21.

Thus, at the time of this correspondence, the final agency decision and the purported rationale behind it had already been adopted. The purpose of the emails was not to further develop the relevant policy decision, but rather to determine how to notify Congress of DOJ's action. Documents that merely explain an already-decided agency policy are not predecisional. *See, e.g.*, *Reps. Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 367 (D.C. Cir. 2021) (holding that draft presentations for the White House were not predecisional because they "did nothing more

than explain the existing [agency] policy"); *Coastal States*, 617 F.2d at 868-69 (discussions of established policy that do not contain "suggestions or recommendations as to what agency policy should be" are not predecisional); Mem. Op. at 15 (rejecting contention that letter drafts were predecisional where "[t]hey were not used to help the agency make a decision, but rather were used to communicate the decision").

ii. The Withheld DOJ-White House Correspondence Was Not Deliberative

OAG has also failed to identify any deliberative component to these emails. Documents are only deliberative if they are "prepared to help the agency formulate its position[,]" *Fish & Wildlife Serv.*, 141 S. Ct. at 786, and "reflect[] the give-and-take of the consultative process." *Jud. Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 151 (D.C. Cir. 2006) (quoting *Coastal States*, 617 F.2d at 866). As explained above, non-redacted portions of the email thread show that the correspondence was triggered after the Census Bureau confirmed receipt of the December 2017 Letter, and the purpose of the emails was to discuss how to notify Congress of DOJ's request to Census. *See* Ex. 12; Third Brinkmann Decl., ¶ 21 (withheld information reflects requests for "related background context" and "information and attempt to properly characterize actions and rationales").

Such communications do not "help the agency formulate its position" or "reflect[] the give-and-take of the consultative process," and are therefore not deliberative. *See Reps. Comm.*, 3 F.4th at 362 (documents explaining existing agency policy and containing purely factual information are not shielded by the deliberative process privilege); *Nat'l Day Laborer Org. Network v. U.S. Immigr. & Customs Enf't Agency*, 811 F. Supp. 2d 713, 741 (S.D.N.Y. 2011) ("Nevertheless, a draft is only privileged if it contains discussions that reflect the policy-making process. It is not

privileged if it reflects the personal opinions of a writer with respect to how to explain an *existing* agency policy or decision." (emphasis in original) (citation omitted)).

Because OAG has failed to carry its burden in establishing that the withheld information is both predecisional and deliberative, CLC is entitled to summary judgment as to the DOJ-White House Correspondence.

B. The Withheld Draft USCCR Interrogatories Are Not Subject to the Deliberative Process Privilege.

In this Court's June 1, 2020 Memorandum Opinion, the Court noted that OAG had "not disclosed what types of decisions were involved in drafting" its responses to USCCR's interrogatories, which prevented the Court from reaching a decision as to whether those responses were subject to the deliberative process privilege. *See* Mem. Op. at 21. OAG subsequently released most of the draft responses but continues to withhold "two comment bubbles explaining the rationale for proposed edits to the draft interrogatory responses and raising potential areas of concern and question." Third Brinkmann Decl., ¶ 23. However, OAG has not shown that the withheld information assisted the agency in arriving at any discernible policy decision or was part of the deliberative, policy-making process.

i. The Withheld Draft USCCR Interrogatory Responses Are Not Predecisional

In support of its contention that the withheld material is predecisional, OAG asserts that it was "created prior to the final, released versions of the USCCR interrogatories." Third Brinkmann Decl., ¶ 24. But as multiple courts have made clear, "drafts are not presumptively privileged." *See, e.g., Jud. Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 260 (D.D.C. 2004) (citing *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257 (D.C. Cir. 1982)). "The mere fact that a document is a draft … is not a sufficient reason to automatically exempt it from disclosure." *Lee*

v. F.D.I.C., 923 F. Supp. 451, 458 (S.D.N.Y. 1996). Thus, OAG cannot rely on the fact that this information is contained in a non-final version of a document to carry its burden in demonstrating that the withheld information was predecisional.

The only "decision" to which OAG can tie the withheld information is the "approved final set of responses." *See* Defendant's Memorandum of Law in Support of Defendant's Renewed Motion for Summary Judgment ("Def.'s Renewed Mot.") at 9. But wordsmithing is not a policy decision, and it does not reflect "the formulation or exercise of…policy-oriented *judgment*." *See Prop. of the People, Inc. v. Office of Mgmt. and Budget*, 330 F. Supp. 3d 373, 382 (D.D.C. 2018) (emphasis in original) (quoting *Petroleum Info. Corp.*, 976 F.2d at 1435). OAG argues that the withheld information is akin to an agency decision not involving informal or unadopted policy, which may still be protected under the privilege. *See* Def.'s Renewed Mot. at 9. But at the time these responses were drafted, DOJ had already decided to request the citizenship question and had issued the December 2017 Letter to the Census Bureau. Thus, the withheld material does not contain "suggestions or recommendations as to what *agency policy should be*," *see Coastal States*, 617 F.2d at 868 (emphasis added), but rather proposed edits to a document describing what the agency policy is. Such material is not predecisional. *See Fish & Wildlife*, 141 S. Ct. at 785-86 ("[D]ocuments reflecting a final agency decision and the reasons supporting it" are not predecisional); *cf. See Knight First Amend. Inst. at Columbia Univ. v. CDC*, No. 20 Civ. 2761 (AT), 2021 WL 4253299, at *13 (S.D.N.Y. Sept. 17, 2021) (documents described as "an attempt by the government to articulate a framework" were not pre-decisional, even if not final).

ii. The Withheld Draft USCCR Interrogatory Responses Are Not Deliberative

OAG asserts that the withheld comments are deliberative because they "were made as part of a defined editing process[.]" *See* Def.'s Renewed Mot. at 10. But OAG fails to demonstrate how edits to explanations of an already decided policy are "a part of the agency give-and-take of the deliberative process by which the decision itself is made." *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). These responses, and the edits contained therein, were not part of any discernible policy-making process, but rather a reflection or explanation of a decision already made. Such material is not deliberative. *See Nat'l Day Laborer Org. Network*, 811 F. Supp. 2d at 741 ("It is not privileged if it reflects the personal opinions of a writer with respect to how to explain an *existing* agency policy or decision.") (emphasis in original); *see also Reps. Comm.*, 3 F.4th at 367 ("A document that serves only to explain an existing agency policy 'cannot be considered deliberative.'") (quoting *Public Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010)); *Nat'l Day Laborer Org. Network v. U.S. Immigr. & Customs Enf't.*, 486 F. Supp. 3d 669, 707 (S.D.N.Y. 2020) (excluding from the deliberative process privilege emails "relat[ing] to the explanation, interpretation or application of an existing policy, as opposed to the formulation of a new policy") (citation omitted).

Because OAG has failed to carry its burden in establishing that the withheld information is both predecisional and deliberative, CLC is entitled to summary judgment as to the Draft USCCR Interrogatory Responses.

C. The Withheld Discussions of a Proposed Response to the Washington Post Are Not Subject to the Deliberative Process Privilege.

OAG seeks to withhold three pages of material it describes as "Department officials discuss[ing] a proposed response to questions from the Washington Post editorial board related to

the addition of a citizenship question to the 2020 Census." Third Brinkmann Decl., ¶ 11. This Court and several other trial courts in this District previously held that similar correspondence was protected under the deliberate process privilege. *See* Mem. Op. at 22-23. However, CLC respectfully submits that a recent D.C. Circuit opinion, *Reporters Committee for Freedom of the Press v. FBI*, 3 F.4th 350 (D.C. Cir. 2021), requires a different result. Specifically, *Reporters Committee* stands for the proposition that agency discussions regarding press inquiries are not necessarily protected from disclosure, and the Court's reasoning establishes that the material is neither predecisional nor deliberative.

i. The Withheld Discussions of a Proposed Response to the Washington Post Are Not Predecisional

In *Reporters Committee*, the D.C. Circuit distinguished between communications formulating responses to press inquiries in the midst of a potential policy change and those that "discuss, describe, or defend an already-determined agency policy." *Reps. Comm.*, 3 F.4th at 363 (citing *Fish & Wildlife Servs.*, 141 S. Ct. at 786). The D.C. Circuit noted that at the time the emails were exchanged, the FBI's undercover policy had "a decidedly uncertain future," and that the purpose of the emails at issue was to "preserve through unsettled waters and at an unpredictable time an at-risk policy that the agency hoped to retain." *Id.* In reaching its decision that the communications at issue were predecisional, the D.C. Circuit cited two district court cases—*Access Reports v. Department of Justice* and *Krikorian v. Department of State*—both of which involved an "unsettled policy landscape." *See id.* (referencing 926 F.2d 1192 (D.C. Cir. 1991) and 984 F.2d 461 (D.C. Cir. 1993)).

Contrary to OAG's position in its Renewed Motion for Summary Judgment, the correspondence here is not analogous to the material in *Reporters Committee*. The emails at issue,

dated January 2, 2018, came after the Department's decision to request a citizenship question and the December 2017 Letter officially requesting the question be added to the census. Nothing in its Renewed Motion or supporting Declaration suggests DOJ was considering changing course with regard to its decision, or that its policy landscape was "unsettled." The response to the *Washington Post* was not given in the midst of a potential policy change and any potential reaction to DOJ's response to the *Washington Post* would not, and did not, have any impact on the already-made decision to request the addition of the citizenship question. Rather, the communications at issue are more akin to documents describing or explaining the rationale behind a certain policy decision and are therefore not predecisional. *See Fish & Wildlife*, 141 S. Ct. at 785-86 ("[D]ocuments reflecting a final agency decision and the reasons supporting it" are not predecisional); *see also Reps. Comm.*, 3 F.4th at 367 (excluding from the deliberative process privilege documents that were "about existing policy").

ii. The Withheld Discussions of a Proposed Response to the Washington Post Are Not Deliberative

As with the draft responses to the USCCR interrogatories, OAG fails to demonstrate how edits to explanations of a pre-decided policy and its purported rationale are "a part of the agency give-and-take of the deliberative process by which the decision itself is made." *Vaughn*, 523 F.2d at 1144. At the time these emails were transmitted, the Department had already made its decision and adopted a rationale supporting that decision. Moreover, unlike in *Reporters Committee*—where the D.C. Circuit observed that there was "no allegation that Director Comey was providing any sort of direction or explaining the basis for a final decision to his subordinates in these emails," *see Reps. Comm.*, 3 F.4th at 364—the facts here show that Attorney General Sessions directed Department staff to make the request and provided the rationale to use in support of the request, a

rationale that the Supreme Court has found to be a pretexual justification for an already-made decision. *See New York*, 139 S. Ct. at 2575 ("[W]e share the District Court's conviction that the decision to reinstate a citizenship question cannot be adequately explained in terms of DOJ's request for improved citizenship data to better enforce the VRA."). Thus, in contrast to the emails in *Reporters Committee*, these emails were not written "to allow agency employees to have candid discussions necessary to make the best policy decisions in service of the public." *Reps. Comm.*, 3 F.4th at 363-64 (citing *Fish & Wildlife*, 141 S. Ct. at 786). Such communications are not deliberative. *See Nat'l Day Laborer Org.*, 486 F. Supp. 3d at 697 (excluding from the deliberative process privilege emails "relat[ing] to the explanation, interpretation or application of an existing policy, as opposed to the formulation of a new policy").

Because OAG has failed to carry its burden in establishing that the withheld information is both predecisional and deliberative, CLC is entitled to summary judgment as to the Withheld Discussions of a Proposed Response to the Washington Post.

D. The Withheld Draft Correspondence to Representative Gonzalez is Not Subject to the Deliberative Process Privilege.

Both OAG and JMD seek to withhold drafts of letters from Assistant Attorney General Stephen Boyd to Representative Vincente Gonzalez in response to a January 9, 2018 letter from Representative Gonzalez seeking additional information about the addition of the citizenship question. *See* Def.'s Renewed Mot. at 14-15; 17-18. OAG and JMD have failed to demonstrate that the draft letters, which merely reflect an explanation of an already-made policy decision and its post-hoc, fictitious justification, are predecisional and deliberative such that they are protected under the deliberative process privilege.

i. The Withheld Draft Correspondence to Representative Gonzalez is Not Predecisional

OAG and JMD once again rely on the draft status of these documents as their basis for concluding that they are predecisional. *See id*. at 14, 17 (asserting that the letters should be withheld because they vary from the letter ultimately sent to Representative Gonzalez). But as noted above, characterizing a document as a draft is not sufficient to exempt it from disclosure. *See Fish & Wildlife Serv.*, 141 S. Ct. at 786 ("That is not to say that the label 'draft' is determinative."); *Jud. Watch, Inc.*, 297 F. Supp. 2d at 260 (holding that draft status is not sufficient to exempt from disclosure); *Lee*, 923 F. Supp. at 458 (same). As with the other draft documents it seeks to withhold, OAG and JMD claim that the relevant final decision was the finalization of the letter—not so. The relevant determination remains DOJ's decision to request the addition of the citizenship question; the draft letters merely communicate aspects of that decision to Representative Gonzalez. Such documents are not predecisional. *See Knight First Amendment Inst.*, 2021 WL 4253299 at *13 (documents intended to articulate or clarify a policy framework are not predecisional, even if not final). Nor does the fact that the final letter ultimately varied from the drafts DOJ seeks to withhold transform the drafts into predecisional documents. *See Fish & Wildlife Serv.*, 141 S. Ct. at 786 ("What matters, then, is not whether a document is last in line, but whether it communicates a policy on which the agency has settled.").

By simply resting on the letters' status as drafts, OAG and JMD have not met their burden to show that the withheld draft letters are predecisional.

ii. The Withheld Draft Correspondence to Representative Gonzalez is Not Deliberative

OAG and JMD have also failed to demonstrate that the withheld material is deliberative, once again resting on the fact that the letters are drafts and contain edits to incorrectly assert that

this correspondence was part of the policy-making process. *See* Def.'s Renewed Mot. at 15, 18. In maintaining that the drafts are deliberative, OAG and JMD cite to two cases finding that draft correspondence was protected under the deliberative process privilege. *See Krikorian v. Dep't of State*, 984 F.2d 461 (D.C. Cir. 1993); *Brown v. Dep't of State*, 317 F. Supp. 3d 370 (D.D.C. 2018). However, both of these cases are distinguishable from the facts here.

Unlike in *Krikorian* and *Brown*, where the protected communications concerned an unsettled policy or decision, the draft letters at issue here communicate or describe an already-decided policy, which courts have routinely held are not part of the deliberative process. *See e.g.*, *Reps. Comm.*, 3 F.4th at 362-363 (distinguishing between internal efforts to settle on a substantive policy and documents that "simply describe an already-adopted policy"). OAG and JMD have not demonstrated that the edits or modifications in the draft letters were tied to any policy decision or reflect "the policy-making process." *See Nat'l Day Laborer Org. Network*, 811 F. Supp. 2d at 741. Rather, OAG and JMD appear to be attempting to shield drafts wordsmithing an explanation of an existing agency policy or decision, which is not part of the deliberative process. *See id.* (documents relating to the "explanation, interpretation or application of an existing policy" are not protected).

II. DOJ HAS NOT MADE AN ADEQUATE SHOWING OF HARM SUCH THAT THE WITHHELD DOCUMENTS SHOULD NOT BE DISCLOSED

In 2016, Congress added language to FOIA to require that "an agency shall withhold information under this section only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption…… or disclosure is prohibited by law." 5 U.S.C. § 552(a)(8)(A)(i). This showing is required even if a court finds that the materials are otherwise protected by the deliberative process privilege. *See Savage v. Dep't of the Navy*, No. 19-2983

(ABJ), 2021 WL 4078669, at *5 (D.D.C. Sept. 8, 2021) (finding materials covered by the deliberative process privilege but ordering their release when the agency provided nothing more than boilerplate assertions of harm).

Thus, the foreseeable harm requirement prohibits the withholding of materials unless the agency can "'articulate both the nature of the harm [from release] and the link between the specified harm and specific information contained in the material withheld.'" *See Reps. Comm.*, 3 F.4th at 369 (quoting H.R. Rep. No. 391, at 9). It is not enough that an agency cautions that disclosure will chill free and open communication within the government; the agency must "connect[ ] the harms ... to the information withheld, such as by providing context or insight into the specific decision-making processes or deliberations at issue, and how in particular they would be harmed by disclosure." *See Jud. Watch, Inc. v. DOJ*, No. 17-0832 (CKK), 2019 WL 4644029, at *5 (D.D.C. Sept. 24, 2019); *Reps. Comm.*, 3 F.4th at 365 (withheld information must be released unless the agency can provide "a focused and concrete demonstration of why disclosure of the particular type of material at issue will, in the specific context of the agency action at issue, actually impede those same agency deliberations going forward").

In support of its foreseeable harm argument, DOJ has offered only boilerplate descriptions of potential harm, which fail to meet the rigorous standard imposed under FOIA. *See Jud. Watch, Inc. v. U.S. Dep't of Com.*, 375 F. Supp. 3d 93, 99-100 (D.D.C. 2019) (explaining that the addition of the foreseeable harm requirement created a "a heightened standard for an agency's withholdings under Exemption 5"). Accordingly, all of the withheld material—even that to which the deliberative process privilege may be found to apply—must be released.

A. The Brinkman Declaration Fails to Establish that Disclosure of Withheld Material Would Result in Foreseeable Harm.

In support of its Renewed Motion, DOJ submitted the Third Brinkman Declaration, authored by a Senior Counsel in the Department's Office of Information Policy. Among other things, the Third Brinkman Declaration sets forth the alleged foreseeable harm if each category of withheld information were to be disclosed. *See* Third Brinkmann Decl., ¶¶ 14, 18, 22, 26, 31. While the precise language of some of the paragraphs vary slightly, the paragraphs provide nothing more than boilerplate assertions of a chilling effect on agency communications if this material were disclosed. *See id*.

For example, with regard to the withheld DOJ-White House correspondence, *supra* at 9-12, DOJ contends that disclosure would inhibit or interfere with the ability of the Executive Branch to "engage in candid discussions and to obtain or offer advice," and this "lack of candor would seriously impair the ability to foster and engage in the forthright intra-Executive Branch discussions that are essential for efficient and proper decision-making." *See* Third Brinkmann Decl., ¶ 22. Similarly, in connection with the withheld draft USCCR interrogatory responses, *supra* at 12-14, DOJ claims that disclosure would "significantly undermine the ability of Department Officials to freely engage in the candid 'give-and-take' and forthright internal development of final agency decisions and documents." Third Brinkmann Decl., ¶ 26.

This is precisely the type of boilerplate language that federal courts have routinely found do not meet FOIA's foreseeable harm threshold. *See, e.g., Reps. Comm.*, 3 F.4th at 370 (rejecting as foreseeable harm "a series of boilerplate and generic assertions that release of any deliberative material would necessarily chill internal discussions"); *Knight First Amend. Inst.*, 2021 WL 4253299, at *13-14 (no foreseeable harm where the only potential harm alleged was "chilling

future free exchange of ideas and opinions by agency leadership on similarly sensitive matters"); *Savage*, 2021 WL 4078669, at *5-6 (same).

DOJ's generic alleged concern that disclosure of certain documents or correspondence will chill free and open discussion fails to meet the requirement articulated by the D.C. Circuit of "a focused and concrete demonstration of why disclosure of the particular type of material at issue will, in the specific context of the agency action at issue, actually impede those same agency deliberations going forward." *Reps. Comm.*, 3 F.4th at 370. Accordingly, the withheld material—even if found to be protected by the deliberative process privilege—should be released.

B. The Plante Declaration Fails to Establish that Disclosure of Withheld Material Would Result in Foreseeable Harm.

Similarly, DOJ submitted the Declaration of Jeanette Plante ("Plante Declaration") to, among other things, attest to the alleged foreseeable harm if the material withheld by JMD was disclosed. *See* Declaration of Jeanette Plante, ¶ 16. But the relevant paragraph contains virtually the same boilerplate language as the Third Brinkman Declaration, relying on the potential chilling effect on agency communication if the material were to be released. *See id*. ("Release of the draft letter would cause the foreseeable harm of discouraging and ultimately chilling agency deliberation and decision-making, the exact harms that the deliberative-process privilege is intended to prevent."). For the same reasons detailed above, such standard, non-specific language does not meet the Government's burden of demonstrating that disclosure of specific material will harm the agency. Therefore, the Government has not met its burden under FOIA.

C. Any Assertion of Harm is Further Undercut by the False and Pretextual Nature of the Request and its Rationale

As the Supreme Court noted in *Department of Commerce v. New York*, a case such as the one before this Court is rare—and it should be. *See* 139 S. Ct. at 2575. This Court is presented

with an agency seeking to withhold from public scrutiny documents reflecting a manufactured rationale for a predetermined agency decision of critical national importance—the exact kind of government secrecy and public confusion that FOIA and the deliberative process privilege were designed to combat. *See John Doe Agency v. John Doe Corp*., 493 U.S. 146, 152 (1989) (stating that the purpose of FOIA is "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") (citation omitted).

Any assertion of harm by DOJ strains credulity for the simple reason that these documents do not reflect any policymaking by the Department of Justice. Writing for the majority of the Supreme Court, Chief Justice Roberts dedicated several paragraphs to the Court's disbelief regarding the proffered explanation for the Department's request that the citizenship question be added to the census. *See New York*, 139 S. Ct. at 2575 ("[T]he decision to reinstate a citizenship question cannot be adequately explained in terms of DOJ's request for improved citizenship data to better enforce the VRA."). Not only did the Supreme Court question the validity of DOJ's justification, it also concluded that the rationale did not originate with DOJ at all; it was imported from Commerce when Secretary Ross's staff was endeavoring to legitimize the request. *See id*. ("The possibility that DOJ's Civil Rights Division might be willing to request citizenship data for VRA enforcement purposes was proposed by Commerce staff along the way[.]"). Indeed, the Supreme Court expressed serious doubt that DOJ was ever interested in census-based citizenship data. *See id*. (suggesting that DOJ's primary interest was "helping the Commerce Department").

The request for addition of a citizenship question to the 2020 Census in order to better enforce Section 2 of the VRA was never a policy of the Department of Justice. It was a post-hoc, fictitious rationale imported from a separate agency in order to provide feeble justification for an

action expected to depress census response rates among certain minority groups, which was expected to improve the political prospects of the party then in power. Materials discussing a false and misleading government "policy" do not reflect "forthright internal collaboration" necessary for the "development of well-reasoned and accurate" work product. *See* Third Brinkmann Decl. ¶ 14.

Continued withholding of agency documents discussing aspects of this charade does not serve the purposes of FOIA or the deliberative process privilege. Nor can the release of such documents be said to cause harm to an agency that had limited involvement or interest in the development of the policy at issue.

CONCLUSION

For the reasons set forth above, Plaintiff Campaign Legal Center respectfully requests that the Court deny summary judgment in favor of Defendant Department of Justice, grant summary judgment in favor of CLC, and order DOJ to produce all remaining withheld materials. Alternatively, CLC respectfully requests that the Court review the withheld materials in camera to determine the applicability of Exemption 5.

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Respectfully submitted,

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