

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

NAACP LEGAL DEFENSE AND EDUCATIONAL )  
FUND, INC., )

Plaintiff, )

v. )

U.S. DEPARTMENT OF JUSTICE, )

Defendant. )

Case No. 18-CV-09363 (AJN)

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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR  
SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT**

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## INTRODUCTION

The Freedom of Information Act (FOIA) requires a federal agency to conduct a search reasonably designed to identify all responsive records. When Plaintiff NAACP Legal Defense and Educational Fund, Inc. (LDF) submitted a FOIA request about the actions of the U.S. Department of Justice (DOJ or Department) regarding the addition of a citizenship status question to the census—the decennial action that implicates nearly every aspect of life for those living in the country—it expected the agency to take the request seriously in light of both the affirmative obligations under FOIA and the gravity of the subject matter. Instead, the agency narrowly construed the request and then conducted an improper search. Having failed in its obligations, Defendant now seeks summary judgment.

LDF opposes DOJ’s motion and respectfully asks the Court to grant it summary judgment. *First*, the Department’s search failed to use terms designed to identify the requested records. *Second*, it improperly ignored the majority of LDF’s request, having failed to actually search for records responsive to four of the five parts of the request. The purported lack of responsive records is inconsistent with the Department’s public position on why it requested that the citizenship status question be added to the census in the first place. *Third*, and *finally*, summary judgment in DOJ’s favor is inappropriate because the agency did not read the request to provide for the required liberal interpretation favoring disclosure, and thus failed to design an adequate search.

### **I. Background**

#### **A. Addition of the Citizenship Status Question to the 2020 Census.**

On March 26, 2018, the U.S. Department of Commerce (DOC or Commerce Department) announced that it was directing the U.S. Census Bureau to add a citizenship status question to the

census questionnaire provided to every U.S. household beginning in 2020.<sup>1</sup> This question had not been included in the census questions asked to all households for nearly seven decades. DOC Secretary Wilbur Ross purportedly grounded his decision to add it in a December 12, 2017 letter request from the DOJ, which asserted that the addition of a citizenship status question was necessary to enforce Section 2 of the Voting Rights Act of 1965 and protect minority voting rights.<sup>2</sup>

In response, scores of voting rights groups, including LDF, have advocated against the addition of a citizenship status question to the 2020 census, explaining that the stated justification for it is pretextual, and that the question would depress the census response rates of minority communities who are already hard-to-count populations. The proposed addition of this question has prompted multiple federal lawsuits, which have resulted in findings by three federal courts that including the question on the census would violate the Administrative Procedure Act and/or the Enumeration Clause of the U.S. Constitution.<sup>3</sup> It also has prompted lawsuits like the instant case, seeking public records under the FOIA from DOJ about its role in Secretary Ross's decision.

The pretense underlying the government's assertions about the need for this question is clear:

- a citizenship status question has never been on the decennial census during the existence of the Voting Rights Act;

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<sup>1</sup> Memorandum from Wilbur Ross, Secretary, DOC, to Karen Dunn Kelley, Under Sec'y for Econ. Affairs 1 (Mar. 26, 2018), <https://assets.documentcloud.org/documents/4424701/Wilbur-Ross-memo-2018-03-26-2.pdf>.

<sup>2</sup> Letter from Arthur E. Gary, General Counsel, DOJ, to Dr. Ron Jarmin, Acting Director, Census Bureau (Dec. 12, 2017), <https://www.documentcloud.org/documents/4340651-Text-of-Dec-2017-DOJ-letter-to-Census.html> [hereinafter "Gary Letter"].

<sup>3</sup> *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019); *California v. Ross*, 358 F. Supp. 3d 965 (N.D. Cal. 2019); *Kravitz v. U.S. Dep't of Commerce*, 366 F. Supp. 3d 681 (D. Md. 2019).

- in *New York v. Department of Commerce*, this Court found that “Secretary Ross was aggressively pressing to add a citizenship question to the census before the idea of justifying it on the basis of VRA enforcement was first floated . . . and that Secretary Ross’s aides then fed DOJ with the rationale for the request rather than vice-versa . . .”<sup>4</sup>; and,
- analyses, including by the Census Bureau itself, demonstrate that the addition of the citizenship status question would threaten the accuracy of the census by chilling the participation of people of color.<sup>5</sup>

LDF’s FOIA request seeks much-needed transparency about this issue of utmost public importance. An accurate census has wide-ranging and lasting impacts on many areas of life. Its count of the national population shapes numerous critical decisions, including the allocation of elected representatives to states, the development of congressional and state legislative districts, and the distribution of billions of dollars of federal and state funds. No one disputes that depressed census response rates resulting in inaccurate data would have damaging and distorting effects on a wide range of areas, including education, fair housing, criminal justice, and political representation that are critical to the health, safety, and civil rights of communities of color. Thus,

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<sup>4</sup> *New York*, 351 F. Supp. 3d at 568-69.

<sup>5</sup> *See, e.g.*, Memorandum from John M. Abowd, Chief Scientist & Assoc. Dir. for Research & Methodology, U.S. Census Bureau, to Wilbur L. Ross, Jr., Sec’y of Commerce 1281 (Jan. 19, 2018) <http://www.osec.doc.gov/opog/FOIA/Documents/AR%20-%20FINAL%20FILED%20-%20ALL%20DOCS%20%5bCERTIFICATION-INDEX-DOCUMENTS%5d%206.8.18.pdf#page=1289>.

Moreover, recently discovered evidence indicates that the “content, language, and structure” of the December 2017 DOJ letter closely resemble a 2015 study by a Republican redistricting specialist concluding that the addition of a citizenship status question to the census would create an advantage for Republicans and non-Hispanic white people. Letter Motion to Compel Defendants to Show Cause, *New York v. Dep’t of Commerce*, No. 18-cv-02921 (S.D.N.Y. May 30, 2019), ECF No. 587.

it is essential for the public to understand DOJ's role in the decision to add the harmful citizenship status question to the census.

**B. Factual and Procedural Background.**

Shortly after the DOC's March 26, 2018 decision to add the citizenship status question to the 2020 decennial census, purportedly at DOJ's request, on April 11, 2018, LDF submitted a FOIA request to DOJ's Civil Rights Division (CRT) and DOJ's Office of Legal Policy (OLP).<sup>6</sup> LDF's request seeks five categories of records:

1. All documents, including but not limited to draft and final memoranda, opinions, analyses, or correspondence, relating to the [DOJ's] review of whether a citizenship status question on the 2020 decennial U.S. Census is necessary to enforce Section 2 of the Voting Rights Act and/or how adding a citizenship question will improve protections for minority voting rights.
2. All documents, including but not limited to draft and final memoranda, opinions, analyses, or correspondence, relating to the [DOJ's] request for a citizenship status question on the 2020 decennial U.S. Census as necessary to enforce Section 2 of the Voting Rights Act.
3. All documents, including but not limited to draft and final memoranda, opinions, analyses, or correspondence, relating to the [DOJ's] review of whether a citizenship status question on the American Community Survey (ACS) is "insufficient in scope, detail, and certainty" to enforce Section 2 of the Voting Rights Act.

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<sup>6</sup> See ECF No. 24-1.

During the course of this litigation, the parties narrowed the scope of their dispute and LDF is not challenging the adequacy of OLP's search, which did not result in the production of any responsive records.

4. All documents, including but not limited to draft and final memoranda, opinions, analyses, or correspondence, relating to the [DOJ's] review of whether a citizenship status question on the 2020 decennial U.S. Census will have an impact on the response rate of Black or African American people on the 2020 decennial U.S. Census count.
5. All documents, including but not limited to draft and final memoranda, opinions, analyses, or correspondence, relating to the Department's review of whether a citizenship status question on the 2020 decennial U.S. Census will have an impact on the response rate of non-Black or non-African American racial or ethnic groups on the 2020 decennial U.S. Census count.<sup>7</sup>

On May 31, 2018, CRT asserted that *all* responsive records were exempt from disclosure.<sup>8</sup> Following LDF's August 28, 2018 appeal to DOJ's Office of Information Policy (OIP),<sup>9</sup> OIP denied LDF's appeal on September 27, 2018, affirming CRT's withholding of records in full.<sup>10</sup> LDF thereafter initiated the instant litigation on October 12, 2018 to compel DOJ's CRT and OLP to promptly make reasonable efforts to search for records responsive to LDF's five categories of requested documents and to promptly produce all non-exempt, responsive records.<sup>11</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> ECF No. 24-3.

<sup>9</sup> Aden Decl., Ex. A.

<sup>10</sup> Aden Decl., Ex B.

Given this response, LDF was surprised to learn in the Declaration of Tink Cooper, ECF No. 24, filed in support of DOJ's motion for summary judgment, that many of the records eventually produced by DOJ were the product of searches conducted and completed by CRT in January, February, July, and August 2018. *See* Cooper Decl. ¶¶ 11, 13–16.

<sup>11</sup> *See* Compl., ECF No. 1.

DOJ filed its Answer on November 16, 2018.<sup>12</sup> On November 16, 2018, CRT provided a supplemental response to LDF's request, (i) producing 78 pages of documents with redactions, pursuant to 5 U.S.C. § 552(b)(5) and 5 U.S.C. § 552(b)(6), and (ii) withholding 42 pages of documents in full, pursuant to 5 U.S.C. § 552(b)(5), and stating that the records included "intra-agency memoranda containing pre-decisional, deliberative material[.]"<sup>13</sup>

On February 14, 2019, CRT provided a second supplemental response that it designated as its "final response," indicating that the documents that it already had produced in part and withheld in full on November 16, 2018 were responsive to LDF's second category of requested documents, and that *no* additional responsive records had been located in response to the other four requests.<sup>14</sup>

On March 15, 2019, CRT provided a third supplemental response, producing an additional 97 pages of documents and withholding 17 pages of documents in full, pursuant to 5 U.S.C. § 552(b)(5).<sup>15</sup>

Following the parties' extension of the summary judgment briefing schedule in the instant litigation to facilitate a supplemental search by CRT, on May 9, 2019, CRT provided another supplemental response, (i) producing an additional three pages of documents with redactions, pursuant to 5 U.S.C. § 552(b)(5) and 5 U.S.C. § 552(b)(6), and (ii) withholding four pages of documents in full.<sup>16</sup> CRT indicated that this response constituted its "final supplemental response."<sup>17</sup>

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<sup>12</sup> See Answer, ECF No. 14.

<sup>13</sup> See ECF Nos. 24-4 & 24-5.

<sup>14</sup> See ECF No. 24-6.

<sup>15</sup> See ECF Nos. 24-7 & 24-8.

<sup>16</sup> See ECF Nos. 24-9 & 24-10.

<sup>17</sup> *Id.*

All told, to date, DOJ has produced 178 pages in full or with redactions and withheld 63 pages in full,<sup>18</sup> following four productions and after it initially denied LDF's request in full and, on multiple occasions, indicated that its productions were "final."

On May 13, 2019, DOJ moved for summary judgment. *See* Def.'s Mot. Summ. J., ECF No. 22. LDF opposes DOJ's motion and cross-moves for summary judgment with regard to the adequacy of CRT's search for records responsive to LDF's April 11, 2018 request.

## **II. Argument**

DOJ has not conducted an adequate search for records. FOIA requires agencies to perform a search reasonably calculated to identify all relevant records, which DOJ failed to do. DOJ's search here failed to use appropriate and precise search terms designed to identify the requested records, which the agency could have readily done within the identified database that DOJ created. DOJ also improperly limited its search to one item in LDF's request, and failed to conduct a search appropriately designed to identify records responsive to the other components in LDF's request. The inadequacy of the search as conducted is highlighted by the lack of records relating to DOJ's purported review and analysis of whether a citizenship status question on the 2020 census is necessary to enforce Section 2 of the Voting Rights Act and minority voting rights, an absence of records strikingly inconsistent with the Department's public position on the question. Finally, summary judgment in DOJ's favor is inappropriate because the agency has inappropriately read LDF's request for records too narrowly, and consequently failed to design its search to locate the records actually requested by LDF.

### **A. Legal Standard.**

Summary judgment is appropriate when "there is no genuine dispute as to any material fact

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<sup>18</sup> Def.'s Memo. of Law in Support of Def.'s Mot. for Summ. J. at 1, ECF No. 23.

and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In deciding a motion for summary judgment, the Court draws all reasonable inferences in the non-movant’s favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

“Summary judgment is the procedural vehicle by which most FOIA actions are resolved.” *Seife v. U.S. Dep’t of State*, \_\_\_ F. Supp. 3d \_\_\_, No. 16-cv-7140 (GHW), 2018 WL 1517196, at \*3 (S.D.N.Y. Mar. 26, 2018); *see also Doyle v. U.S. Dep’t of Homeland Sec.*, 331 F.Supp.3d 27, 43 (S.D.N.Y. 2018). “[O]n a motion for summary judgment in a FOIA case, the defending agency has the burden of showing that its search was adequate[.]” *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). In FOIA cases, courts may “supervise the agency’s ongoing progress, ensuring that the agency continues to exercise due diligence in processing the request.” *Brennan Ctr. for Justice at NYU Sch. of Law v. DOJ*, \_\_\_ F. Supp. 3d \_\_\_, No. 17-cv-6335 (AKH), 2019 WL 1932757, at \*3 (S.D.N.Y. Apr. 30, 2019) (quoting *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm’n*, 711 F.3d 180, 189 (D.C. Cir. 2013)).

Courts judge a FOIA search’s adequacy by the appropriateness of the methods used to carry out the search, rather than by the results of the search. *See Brennan Ctr. for Justice at NYU Sch. of Law*, 2019 WL 1932757, at \*3. With respect to the appropriateness of search terms, agencies must show that the search terms used were “reasonable and adequate.” *Id.* at \*4 (citing *Long v. Office of Pers. Mgmt.*, 692 F.3d 185, 190 (2d Cir. 2012)).

**B. The Department Failed to Conduct an Adequate Search for Records.**

*1. The Department failed to conduct a thorough search of the “Census Database” for records responsive to Part 2 of LDF’s FOIA request.*

The agency bears the burden of showing that it conducted a good-faith search reasonably calculated to identify the requested records.<sup>19</sup> To establish that it has conducted an adequate search, “an agency must ‘show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents.’”<sup>20</sup>

The records that LDF seeks are discrete and clearly identifiable, but DOJ failed to conduct a search reasonably calculated to uncover all relevant documents that are responsive to LDF’s request. Based on the Department’s explanation of its search processes,<sup>21</sup> communications with the Department’s counsel, and the substance of the documents produced by DOJ, evidence indicates that DOJ effectively limited its search to one of five parts of LDF’s FOIA request, and even that search was not reasonably designed to identify all of the relevant records.

DOJ seemingly narrowed its search to part (2) of LDF’s FOIA request, which seeks: “All documents, including but not limited to draft and final memoranda, opinions, analyses, or correspondence, relating to the [DOJ’s] request for a citizenship status question on the 2020 decennial U.S. Census as necessary to enforce Section 2 of the Voting Rights Act.”<sup>22</sup> The Department is correct that the records that Plaintiff seek are related to “DOJ’s role leading up to

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<sup>19</sup> See *Bloomberg L.P. v. Bd. of Governors of Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 271 (S.D.N.Y. 2009), *aff’d sub nom. Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143 (2d Cir. 2010) (citation omitted).

<sup>20</sup> *Nat’l Day Laborer Org. Network v. U.S. Immigration & Customs Enf’t Agency*, 877 F. Supp. 2d 87, 95 (S.D.N.Y. 2012) (quoting *Morley v. Central Intel. Agency*, 508 F.3d 1108, 1114 (D.C. Cir. 2007)).

<sup>21</sup> See, e.g., Cooper Decl. ¶¶ 17-18.

<sup>22</sup> ECF No. 24-1.

the Secretary's [March 2018] decision" and *not* the agency's role in the subsequent litigation around the citizenship status question, congressional testimony, or press inquiries.<sup>23</sup> But the agency failed to conduct an adequate search for those pre-March 2018 records.

In its search declaration, the Department represents that it "created a database of both electronic and paper records responsive to the 2020 census" ("Census Database").<sup>24</sup> The Census Database contains "electronic records and hardcopy documents" from custodians that the Department also searched for records responsive to LDF's FOIA request.<sup>25</sup> The Census Database also contains records that are date responsive to LDF's FOIA request.<sup>26</sup>

The Census Database contains records explicitly related to the 2020 census, yet the Department failed to conduct a thorough search of this subset of records. The Department chose to search only "census" (claiming that doing so would "compile the largest possible data collection to locate all documents responsive to Plaintiff's request") and "citizenship question."<sup>27</sup> Yet the Department declined to search the Census Database for "citizenship" or "Section 2," as suggested by LDF, because the agency alleges that those terms "would be extremely likely to capture a large

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<sup>23</sup> See Cooper Decl. ¶ 8; *see also* ECF No. 23 at 7.

<sup>24</sup> Cooper Decl. ¶ 20.

<sup>25</sup> Compare Cooper Decl. ¶ 20 (identifying "John Gore, Chris Herren, Bethany Pickett, and Ben Aguiñaga" as custodians in the Census Database) *with id.* ¶¶ 11 (identifying Chris Herren as the most appropriate custodian in the Voting Section of the Civil Rights Division) *and* 14–16 (identifying John Gore as the most appropriate custodian in the immediate Office of the Assistant Attorney General for the Civil Rights Division).

<sup>26</sup> Compare Cooper Decl. ¶ 20 (reflecting January 20, 2017, through August 2, 2018, date range in the Census Database) *with* ECF No. 24-2 (LDF request submitted on April 11, 2018, *with* Part 2 seeking documents at least up through to the March 26, 2018 decision, which would include DOJ's December 12, 2017 request for a citizenship status question).

<sup>27</sup> See Cooper Decl. ¶ 22.

number of records relating to voting issues but not responsive for records relating to Plaintiff's request [*sic*] 2020 Census.”<sup>28</sup>

Although it is true that, “[*i*]n general, a FOIA petitioner cannot dictate the search terms for his or her FOIA request,”<sup>29</sup> this is only true “so long as the agency provided an explanation as to why the search term was not used.”<sup>30</sup> The Department’s explanation here makes little sense.<sup>31</sup> If the Census Database contains records about the census and the Department’s request to have a question added to the census regarding citizenship status—in other words the very subject of the records that Part 2 of LDF’s request is seeking—how is it possible that a search of that database is “extremely likely” to yield records that are *not* about the 2020 Census? The Census Database, by its own criteria, is a database of records relevant to LDF’s FOIA request; thus, any search within the database using a term like “Section 2” would return relevant results that include “Section 2” but not the other original search terms of “census” and “citizenship question.”

Nor would there be any significant burden on the agency from searching these additional terms. Doing so would not require additional collection of records but simply an additional search of already identified records in its Census Database.

Because of the Department’s failure to conduct an adequate search for records responsive to Part 2 of LDF’s request, summary judgment for the Defendant is inappropriate. DOJ should be ordered to conduct a supplemental search for responsive records.

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<sup>28</sup> Cooper Decl. ¶ 22.

<sup>29</sup> *Bigwood v. U.S. Department of Defense*, 132 F. Supp. 3d 124, 140 (D.D.C. 2015) (emphasis added) (as quoted in *Immigrant Defense Project v. U.S. Immigration & Customs Enforcement*, 208 F. Supp. 3d 520, 528 (S.D.N.Y. 2016)).

<sup>30</sup> *Immigrant Defense Project*, 208 F. Supp. 3d 520 at 528.

<sup>31</sup> Nor does Plaintiff seek to dictate the precise terms, so long as DOJ uses terms reasonably designed to locate all relevant records. The problem is that the limited terms used here likely excluded significant swathes of potentially responsive records.

2. *The Department's claimed lack of records in response to Parts (1), (3), (4), and (5) of LDF's request is not credible and is inconsistent with the Department's public positions.*

The purpose of the FOIA statute is “to advance ‘a general philosophy of full agency disclosure.’”<sup>32</sup> The presumption in favor of disclosure is reflected in the requirement that for an agency to secure summary judgment its affidavits must “‘contain *reasonable specificity* of detail rather than merely conclusory statements” and they must not be “‘called into question by contradictory evidence in the record or by evidence of agency bad faith.’”<sup>33</sup>

DOJ failed to meet its burden of demonstrating with reasonable specificity that it conducted a search reasonably calculated to identify all relevant records for the other four categories of LDF's request. The other four parts of LDF's FOIA request can be broken into two categories. The first category consists of Parts (4) and (5) and seeks records relating to DOJ's review of whether a citizenship status question on the 2020 census would impact the response rate of Black or African American people and of non-Black or non-African American racial or ethnic groups.<sup>34</sup> The custodians in the Voting Section and then-Acting Assistant Attorney General Gore were asked if they had records responsive to these parts; they responded that they would not have anything other than what was located in the search for Part (2).<sup>35</sup> Upon review of the records collected, the Department did not identify any records responsive to Parts (4) or (5) of LDF's FOIA request.<sup>36</sup>

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<sup>32</sup> *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999) (quoting *Federal Labor Relations Auth. v. U.S. Dep't of Veterans Affairs*, 958 F.2d 503, 508 (2d Cir. 1992)).

<sup>33</sup> *Id.* (quoting *Gallant v. NLRB*, 26 F.3d 168, 171 (D.C. Cir. 1994)).

<sup>34</sup> ECF No. 24-1.

<sup>35</sup> *See* Cooper Decl. ¶ 18.

<sup>36</sup> *See* ECF No. 24-6.

The second category consists of Parts (1) and (3) and seeks records related to the Department's consideration of the citizenship status question as it relates to enforcement of Section 2 of the Voting Rights Act.<sup>37</sup> Specifically, Part (1) seeks records related to DOJ's review of whether the citizenship status question is necessary to enforce Section 2 and/or how adding the question will improve protections for minority voting rights.<sup>38</sup> Part (3) seeks records related to DOJ's review of whether a citizenship status question on the American Community Survey (ACS) is insufficient to enforce Section 2.<sup>39</sup> As with Parts (4) and (5), the custodians in the Voting Section and then-Acting Assistant Attorney General Gore were again asked if they had responsive records, and they again responded that nothing existed beyond what was already collected.<sup>40</sup> And again, as with Parts (4) and (5), the Department did not identify any records responsive to Parts (1) or (3) of LDF's FOIA request.<sup>41</sup>

Defendant's lack of records related to the necessity of a citizenship status question on the 2020 census to enforce Section 2 and/or improve protections for minority voting rights—*when DOJ asked the Commerce Department to include a citizenship status question on the 2020 census so that the agency can enforce Section 2 of the Voting Rights Act and improve protections for minority voting rights*—is implausible. The agency's search for records for Parts (1), (3), (4), and (5) is inadequate because it is not appropriately designed to identify all relevant records. Moreover, the lack of responsive records produced when compared to the Department's public statements

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<sup>37</sup> ECF No. 24-1.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *See* Cooper Decl. ¶ 18.

<sup>41</sup> *See* ECF No. 24-6.

and justifications for requesting the addition of the citizenship status question are positive indications of overlooked materials.

*First*, the search was not reasonably calculated to identify the requested records because it was overly narrow and incomplete.<sup>42</sup> In the immediate Office of the Assistant Attorney General (OAAG), the Department’s primary search term to identify records responsive to Part (2) of LDF’s FOIA request was simply “census.”<sup>43</sup> However, Parts (1) and (3) relate to the necessity of the citizenship question to enforce Section 2 of the VRA and improve protections for minority voting rights; Parts (4) and (5) regard the response rates of different racial and ethnic groups to the citizenship status question. Limiting the search to only “census” is not a substitute for an adequate search of records as to why a citizenship question is supposedly necessary to enforce Section 2 and protect minority voting rights—the topics about which LDF was inquiring. In particular, by not searching for “ACS,” DOJ would not have found responsive records about any supposed problem with the ACS data—which have long been used for collecting and calculating citizen voting-age population in voting rights cases—in its lead up to asking DOJ to include a citizenship status question on the census.

Moreover, the search in the Voting Section was even narrower. The only electronic search conducted was of Voting Section Chief Herren’s email correspondence with OAAG, including Mr. Gore. As stated in Defendant’s declaration, “the Voting Section is the section charged with enforcement of the civil provisions of various federal voting rights laws enacted by Congress” and the Section engages in “significant utilization of [various census data] as part of its enforcement

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<sup>42</sup> See *Bloomberg L.P. v. Bd. of Governors of Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 271 (S.D.N.Y. 2009), *aff’d sub nom. Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143 (2d Cir. 2010) (citation omitted).

<sup>43</sup> See Cooper Decl. ¶¶ 14, 15, and 22.

work under a number of the federal voting rights laws, such as Section 2 of the Voting Rights Act.”<sup>44</sup> As the career attorney (*i.e.*, Herren) tasked with enforcing Section 2, a search that is not constructed to identify Voting Section records regarding the necessity of the citizenship status question for enforcement is not one that is reasonably calculated under FOIA.

Similarly, the searches were not reasonably calculated to identify records discussing the citizenship question’s effects on different racial and ethnic groups’ census response rates. Searching the OAAG for only “census” and the Voting Section for only correspondence with OAAG ignores the natural language of a discussion of response rates detached from an explicit reference to the “census.”

*Second*, the Department’s public statements and justifications for requesting the addition of the citizenship status question suggest that there are, in fact and at minimum, analyses in DOJ’s possession regarding whether the citizenship status question being on the census is necessary for the agency’s enforcement of Section 2 of the VRA and to protect minority voting rights. In the first instance, the lack of records is belied by the very document that prompted LDF’s FOIA request. The Gary Letter states that “[the citizenship status question] data is critical to the Department’s enforcement of Section 2 of the Voting Rights Act and its important protections against racial discrimination in voting.”<sup>45</sup> The Letter goes on to cite cases that are ten to thirty years old to support the proposition that “citizen voting-age population data” is necessary “where potential Section 2 violations are alleged or suspected,” noting that the Department had used that data in compliance and enforcement actions “for years.”<sup>46</sup> The Letter concludes by examining how

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<sup>44</sup> Cooper Decl. ¶ 6.

<sup>45</sup> Gary Letter at 1.

<sup>46</sup> *Id.* at 2.

the use of ACS data in the 2010 redistricting cycle is inferior to the census data already collected.<sup>47</sup>

Yet, the Department did not identify—let alone produce—any of the underlying memoranda, opinions, analyses, or correspondence that were incorporated into the letter and sought by LDF.<sup>48</sup>

Even the productions that DOJ did make refer to substantive analyses. In its November 2018 release, DOJ produced a September 2017 email referring to “questions about citizenship information being raised by career policy staff about a year and a half ago[.]”<sup>49</sup> Mr. Gore then picks up the thread again at the end of October 2017.<sup>50</sup> Yet the Department did not identify *any* such substantive analysis regarding the Department’s enforcement needs in its search.

The Department has made additional public statements that suggest that it has studied or analyzed the necessity of a citizenship status question on the census to enforce Section 2 and the efficacy of that question being on the census rather than reliance on the ACS data. As recently as last week, the government made a filing in this Court stating that the “problems with ACS citizenship data” included in the Gary Letter “are widely known, and have been discussed in case law and academic literature for years.”<sup>51</sup> Yet the Department did not identify *any* of these documents in its search.

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<sup>47</sup> *Id.* at 2-3.

<sup>48</sup> ECF No. 24-6; *see also* Cooper Decl. ¶¶ 33, 35 & Ex. K (all records identified as responsive that had claimed exemptions fell into three categories (a) email correspondence discussing the Gary Letter, (b) draft versions of the Gary Letter, and (c) the Uthmeier Memo)).

<sup>49</sup> ECF No. 24-5 at 5 (page number refers to the numbering on the supplemental records, which does not include the cover letter). Plaintiff acknowledges that the cited email notes that Commerce did not have anything in writing, but that does not mean that the DOJ career policy staff did not.

<sup>50</sup> *Id.* at 4-5.

<sup>51</sup> Gary Letter at 2; *New York v. U.S. Dep’t of Commerce*, No. 18-cv-2921-JMF (S.D.N.Y. June 3, 2019), ECF No. 601.

Publicly available documents suggest that the Department had been evaluating the citizenship question for at least several months prior to the issuance of the Gary Letter.<sup>52</sup> In August 2017, Secretary Ross asked his staff about DOJ's status regarding its analysis of the citizenship question.<sup>53</sup> In September 2017, in a thread that is initiated by Mr. Gore (and that does not use explicitly the word "census"), the Department relays an "eager[ness]" to assist Commerce.<sup>54</sup> But the Department produced no substantive analysis or communications from this time.

The Department's claimed lack of records in response to Parts (1), (3), (4), and (5) of LDF's request is not credible and is inconsistent with the Department's public positions. Here too, at a minimum, DOJ should be compelled to search the Census Database for terms explicitly referenced in these four subparts that may produce responsive documents, such as: "Section 2"; "citizenship"; "VRA" or "Voting Rights Act"; "minority voting rights"; "ACS" or "American Community Survey"; and "response rate." Having raised serious doubt as to the completeness of DOJ's search, summary judgment in favor of the agency is inappropriate.<sup>55</sup>

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<sup>52</sup> See Hansi Lo Wang, *How the 2020 Census Citizenship Question Ended up in Court*, NPR (Nov. 4, 2018, 10:14 AM), <https://www.npr.org/2018/11/04/661932989/how-the-2020-census-citizenship-question-ended-up-in-court>.

<sup>53</sup> See *Administrative Record for Census Citizenship Question Lawsuits - Pages 2458, 9834, 12470-12475, 12526-12540, 12480-12488, 12502-12505, 12467-12469, 12476*, NPR, <https://apps.npr.org/documents/document.html?id=4872562-2018-09-11-Letter-Response#document/p40/a453277>.

<sup>54</sup> See *Page 2637 of Administrative Record for Citizenship Question Lawsuit*, NPR, <https://apps.npr.org/documents/document.html?id=5027607-Page-2637-Of-Administrative-Record-For-Census#document/p1/a464469>.

<sup>55</sup> *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enf't Agency*, 877 F. Supp. 2d 87, 96 (S.D.N.Y. 2012) (citing *Exxon Corp. v. Federal Trade Comm'n*, 466 F. Supp. 1088, 1094 (D.D.C. 1978)).

3. *The Department is construing the request too narrowly.*

DOJ's search is also inadequate because the agency adopted an overly narrow construction of what records were sought by the request, and consequently failed to conduct a search reasonably calculated to identify *all* relevant records. In constructing a search reasonably calculated to uncover all responsive records, an agency "must construe [FOIA requests] liberally."<sup>56</sup> The Department's seemingly singular focus on Part (2) of LDF's FOIA request and the Gary Letter (including its various drafts) suggests that the Department is construing the request too narrowly. In each part of its request, Plaintiff sought "all documents, including but not limited to draft and final memoranda, opinions, analyses, or correspondence." A wide range of potential records could be responsive to this request, including, for example, (i) soft copy memoranda on shared or hard drives that were referenced to inform the Department's stated position in the Gary Letter, (ii) hard copy materials that were referenced in preparation for meetings or other discussions regarding whether and to what extent the citizenship status question was necessary to the Department's Section 2 enforcement efforts, or (iii) emails internal to the Voting Section that discussed the need for a citizenship status question so that Chief Herren could provide informed edits to the Gary Letter. The limited details offered in the Cooper Declaration regarding the Department's search for Parts (1), (3), (4), and (5) seem to suggest that the custodians were queried in a way that framed the request as only related to the Gary Letter. This narrow reading of LDF's FOIA request has resulted in an inadequate search for responsive records because the search was not designed to seek all relevant records for the actual scope of the request.

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<sup>56</sup> *Immigrant Def. Project*, 208 F. Supp. 3d at 526 (quoting *Amnesty Int'l USA v. C.I.A.*, 728 F.Supp.2d 479, 498 (S.D.N.Y. 2010) (alteration in original)).

**CONCLUSION**

For the foregoing reasons, Plaintiff respectfully requests that this Court deny Defendant's motion for summary judgment, grant Plaintiff's cross-motion for summary judgment, and require the Department to conduct additional searches for records responsive to LDF's FOIA request.

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Respectfully submitted,

/s/ Leah C. Aden

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Leah C. Aden  
Aaron Sussman  
John Z. Morris  
NAACP LEGAL DEFENSE &  
EDUCATIONAL FUND, INC.  
40 Rector Street 5th Fl.  
New York, NY 10006  
(212) 965-7715  
laden@naacpldf.org

/s/ Cerissa Cafasso

Austin R. Evers  
*Executive Director*  
Cerissa Cafasso\*  
AMERICAN OVERSIGHT  
1030 15th Street NW, B255  
Washington, DC 20005  
(202) 869-5244  
austin.evers@americanoversight.org  
cerissa.cafasso@americanoversight.org

*\*admitted Pro Hac Vice*

*Counsel for Plaintiff*