

# Exhibit P

Office of Legal Counsel

Department of Justice

WILMERHALE

August 13, 2020

**By Electronic Mail**

United States Department of Justice  
Office of Legal Counsel

Melissa Golden  
FOIA Public Liaison  
Office of Legal Counsel  
Room 5511, 950 Pennsylvania Avenue, NW  
Department of Justice  
Washington, DC 20530-0001

Re: July 1, 2020 Brennan Center for Justice at NYU School of Law's Submission of Freedom of Information Act Request, FOIA Tracking No. FY20-113

Dear Ms. Golden:

On July 1, 2020, our office delivered a Freedom of Information Act ("FOIA") request on behalf of our client, the Brennan Center for Justice at NYU School of Law (the "Brennan Center" or the "Requestors") to the United States Department of Justice, Office of Legal Counsel via electronic mail to USDOJ-OfficeofLegalCounsel@usdoj.gov (the "July 1 FOIA Request"). The July 1 FOIA Request is attached hereto as "Exhibit A."

On July 10, 2020, you denied our request for expedited processing. Although we believe your denial was incorrect at that time, since then the political and media environment surrounding our request has substantially shifted and grounds for expedition have only strengthened. As such, and in lieu of an appeal, we submit this letter to renew and ask for reconsideration of our request for expedited processing. This letter underscores the urgency and time sensitivity of our July 1 FOIA Request and supplements the record with additional support for expedition. Please respond to this renewed request for expedition within 10 calendar days, or by the latest August 24, 2020. 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 C.F.R. § 16.5.(e)(4).

**Renewed Request for Expedited Processing**

As we explained in the July 1 FOIA Request, the Brennan Center requested expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and 28 C.F.R. § 16.5(e). The Department of Justice must process requests on an expedited basis when either (1) "[a] matter of widespread and exceptional media interest involving questions about the Government's integrity which

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affect public confidence”<sup>1</sup> exists; or (2) “[a]n urgency to inform the public about an actual or alleged Federal Government activity” is made by an organization “primarily engaged in disseminating information.”<sup>2</sup> Exhibit A, at 5. We write to emphasize that expedited processing should be granted because there is widespread and exceptional media interest surrounding the 2020 Census, specifically as it relates to its uses for reapportionment, and the reporting by news organizations on the 2020 Census has also raised possible questions about the government’s integrity that affect public confidence. Further, as an organization primarily engaged in disseminating information, the Brennan Center urgently needs to inform the public of the information we are requesting.

Since the FOIA Request was filed, the exceptional interest surrounding the 2020 Census and the apportionment process has exploded. On July 21, 2020, President Trump issued a “Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census,” 85 Fed. Reg. 44,679 (July 23, 2020), which resulted in an outpouring of media and news reports.<sup>3</sup> Further, at the time we submitted the FOIA Request, the Census Bureau had asked Congress for a four-month extension to report the state-population totals used for reapportionment to the President, extending that deadline to April 31, 2021.<sup>4</sup> But on August 3, 2020, the Census Bureau reported its plan to “accelerate the completion of data collection and apportionments counts” to meet the statutory deadline of December 31, 2020.<sup>5</sup> Therefore, the

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<sup>1</sup> 5 U.S.C. § 552(a)(6)(E) and 28 C.F.R. § 16.5(e)(iv).

<sup>2</sup> 5 U.S.C. § 552(a)(6)(E)(II) and 28 C.F.R. § 16.5(e)(ii).

<sup>3</sup> See, e.g., Hansi Lo Wang, *Trump Sued Over Attempt to Omit Unauthorized Immigrants from a Key Census Count*, NPR (July 24, 2020), [https://www.npr.org/2020/07/24/894322040/trump-sued-for-attempt-to-omit-unauthorized-immigrants-from-a-key-census-count?utm\\_medium=RSS&utm\\_campaign=nprtopicspolitics](https://www.npr.org/2020/07/24/894322040/trump-sued-for-attempt-to-omit-unauthorized-immigrants-from-a-key-census-count?utm_medium=RSS&utm_campaign=nprtopicspolitics); Anita Kumar, *Trump Wants Immigration Out of the Census — and at the Center of the Election*, POLITICO (July 21, 2020), <https://www.politico.com/news/2020/07/21/trump-undocumented-immigrants-census-376241>; Andrew Restuccia and Paul Overberg, *Trump Moves to Exclude Unauthorized Immigrants From Counts for Congressional Seats*, WALL ST. J. (July 21, 2020), <https://www.wsj.com/articles/trump-moves-to-bar-who-are-people-in-u-s-illegally-from-being-counted-in-congressional-apportionment-11595352083>; Katie Rogers & Peter Baker, *Trump Seeks to Stop Counting Unauthorized Immigrants in Drawing House Districts*, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/07/21/us/politics/trump-immigrants-census-redistricting.html>; Hansi Lo Wang, *With No Final Say, Trump Wants to Change Who Counts for Dividing Up Congress’ Seats*, NPR (July 21, 2020), <https://www.npr.org/2020/07/21/892340508/with-no-final-say-trump-wants-to-change-who-counts-for-dividing-up-congress-seat>.

<sup>4</sup> See *Statement on 2020 Census Operational Adjustments Due to COVID-19*, Release No. CB20-RTQ.16, available at <https://2020census.gov/en/news-events/press-releases/statement-covid-19-2020.html?linkId=10000001175162>

<sup>5</sup> See *Statement from U.S. Census Bureau Director Steven Dillingham: Delivery a Completed and Accurate 2020 Census Count*, Release No. CB20-RTQ.23, available at <https://www.census.gov/newsroom/press-releases/2020/delivering-complete-accurate-count.html>.

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Brennan Center's need to receive the agency records responsive to its request, and to receive them as soon as possible, has only become more urgent.

Additionally, the Brennan Center is an organization that is primarily engaged in the dissemination of information, and there is an urgency to inform the public about the issues surrounding the 2020 Census. The Brennan Center's efforts in law and policy are ancillary to its mission to inform and help shape public opinion. As the Brennan Center stated in its initial request, it plans to use the information received from the request to inform the public about the government's plans to use citizenship data in calculating the reapportionment count, and how those plans were developed. With the Census Bureau's deadline approaching even more quickly than when the request was initially submitted, these records are urgently needed to inform the public about how the government's plans may affect their rights.

#### **Widespread Media Interest Raising Questions of Government Integrity**

As indicated in our initial request, how the Trump administration plans to use citizenship data to affect reapportionment, in contravention of the U.S. Constitution, raises questions about the government's integrity and is the subject of intense media speculation. Media interest surrounding the government's activities has persisted since the Supreme Court's ruling in June 2019. And since we submitted the July 1 FOIA Request, news articles from a variety of media sources have reported nearly daily updates on the administration's plan to collect citizenship data in conjunction with the 2020 Census, as well as its plan to truncate the timeline for conducting census operations in time to report the state-population totals to the President by December 31, 2020. We expect the influx of media attention to these matters only to continue and expand.

The courts have not specified exactly what threshold must be met for the subject matter of a FOIA request to qualify as a "matter of widespread and exceptional media interest," but, under any standard, that threshold is met here. Agencies entertaining a request for expedited processing on this basis cannot "simply turn a blind eye to the flurry of media attention" surrounding a topic. *Am. Civil Liberties Union v. Dep't of Justice*, 321 F. Supp. 2d 24, 32 (D.D.C. 2004). Even just a "handful of articles" are sufficient to establish the "exceptional media interest" prong if those articles are "published in a variety of publications, and repeatedly reference the ongoing national discussion" about the issues at hand. *Id.*

Each of the articles listed below also indicates that there are possible questions about the Government's integrity that affect public confidence. *See Oversight v. Dep't of Justice*, 292 F. Supp. 3d 501, 505 (D.D.C. 2018) (requiring "the same matter that draws widespread and exceptional media interest [to] be the matter in which there exists possible questions about the government's integrity that affect public confidence"). A possible question about government integrity is raised where the articles indicate possible ethics issues, *id.* at 508 ("The primary way to determine whether such possible questions exist is by examining the state of public coverage

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of the matter at issue, and whether that coverage surfaces possible ethics issues.”), or if the reports suggest the government is acting unconstitutionally, *see Am. Civil Liberties Union*, 321 F. Supp. 2d at 32 (concluding that possible questions of government integrity were raised by articles that reported on whether the issue at bar violated the constitutional rights of the public).

The articles listed below raise issues such as: (1) whether the plans revealed by the President’s July 21st Memo are unconstitutional or otherwise violate federal law; (2) whether the citizenship data the Government plans to use will be accurate and thus legitimate; (3) whether the reapportionment counting plan affects the constitutional right to representation or affects other constitutional rights; and (4) whether the Census count is being improperly politically influenced or is otherwise lacking transparency. *See Citizens for Responsibility and Ethics in Wash. v. Dep’t of Justice*, 436 F. Supp. 3d 354, 361 (D.D.C. 2020) (“CREW”) (instructing that “possible questions” does not require proving “wrongdoing by the government”). The public has the right to know that the Census and the government’s use of Census data is lawful, ethical, and fair; any suggestion to the contrary affects public confidence in the government.

The myriad media reports raise possible questions about government integrity, come from a variety of publications, and are all related to the agency records requested in the July 1 FOIA Request. They, at minimum, include the following:

### ***The Government Is Acting Unconstitutionally***

- *Editorial: The census counts, so Congress must make sure there’s time to make the count accurate*, HOUS. CHRONICLE (Aug. 5, 2020), <https://www.houstonchronicle.com/opinion/editorials/article/Editorial-The-census-counts-so-Congress-must-15461351.php> (“These immigrants work, pay taxes and contribute to the community. They should be counted. Everyone should. That’s not just a good idea, it’s the law.”).
- Steven Shepard, *Census Bureau will finish count earlier than expected, deliver data to Trump*, POLITICO (Aug. 3, 2020), <https://www.politico.com/news/2020/08/03/census-bureau-data-trump-391146> (reporting that “[t]his latest scheme is nothing more than a partisan attempt at manipulating the census to benefit the president’s allies, but it plainly violates the U.S. Constitution and federal laws, and cannot stand”).
- Hansi Lo Wang, *Trump Sued Over Attempt to Omit Unauthorized Immigrants from a Key Census Count*, NPR (July 24, 2020), [https://www.npr.org/2020/07/24/894322040/trump-sued-for-attempt-to-omit-unauthorized-immigrants-from-a-key-census-count?utm\\_medium=RSS&utm\\_campaign=nprtopicspolitics](https://www.npr.org/2020/07/24/894322040/trump-sued-for-attempt-to-omit-unauthorized-immigrants-from-a-key-census-count?utm_medium=RSS&utm_campaign=nprtopicspolitics) (describing three lawsuits filed challenging the government’s arbitrary and capricious decision to exclude non-citizens from the census apportionment count).
- Katie Rogers & Peter Baker, *Trump Seeks to Stop Counting Unauthorized Immigrants in Drawing House Districts*, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/>

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07/21/us/politics/trump-immigrants-census-redistricting.html (noting that “[t]he action directly conflicts with the traditional consensus interpretation of the Constitution”)

- Andrew Restuccia and Paul Overberg, *Trump Moves to Exclude Unauthorized Immigrants From Counts for Congressional Seats*, WALL ST. J. (July 21, 2020), <https://www.wsj.com/articles/trump-moves-to-bar-who-are-people-in-u-s-illegally-from-being-counted-in-congressional-apportionment-11595352083> (reporting on President Trump signing a memorandum “meant to exclude unauthorized immigrants from being taken into account when the government divides up congressional seats, a move that civil-rights groups swiftly vowed to challenge in court” and suggesting that the request may cause the Census Bureau to violate federal law).
- David Jackson, *Trump Tells Census to Not Count Undocumented People for Purposes of Deciding House Apportionment*, USA TODAY (July 21, 2020), <https://www.usatoday.com/story/news/politics/2020/07/21/trump-tell-census-not-count-undocumented-immigrants/5459873002> (reporting on President Trump’s July 21, 2020 memorandum noting that the “memo does not say how the U.S. Census Bureau could distinguish citizens from non-citizens – for any reason – because counters are prohibited from a citizenship question” and noting that Trump’s demand is “blatantly unconstitutional”).
- Hansi Lo Wang, *With No Final Say, Trump Wants to Change Who Counts for Dividing Up Congress’ Seats*, NPR (July 21, 2020), <https://www.npr.org/2020/07/21/892340508/with-no-final-say-trump-wants-to-change-who-counts-for-dividing-up-congress-seat> (recognizing that the President’s memo is without constitutional authority).
- Mica Rosenberg, Nick Brown & Mimi Dwyer, *Trump Orders Voting Districts to Exclude People in U.S. Illegally*, REUTERS (July 21, 2020), <https://www.reuters.com/article/us-usa-trump-migrants-census/trump-aims-to-stop-counting-of-illegal-migrants-in-redrawing-of-us-voting-maps-idUSKCN24M26U> (reporting that “U.S. census experts and lawyers say the action is legally dubious”).
- Anita Kumar, *Trump Wants Immigration Out of the Census — and at the Center of the Election*, POLITICO (July 21, 2020), <https://www.politico.com/news/2020/07/21/trump-undocumented-immigrants-census-376241> (reporting that “Congress has not given discretion [to the President] on what you’re supposed to be counting”).
- Kevin Liptak, Maegan Vazquez, Ariane de Vogue & Catherine E. Shoichet, *Trump Signs Order Targeting Undocumented Immigrants in the US Census*, CNN (July 21, 2020), <https://www.cnn.com/2020/07/21/politics/white-house-census-undocumented-immigrants/index.html> (reporting that Trump’s “latest attempt to weaponize the census for an attack on immigrant communities will be found unconstitutional.”).
- Dartunorro Clark, *Trump Signs Memo to Omit Undocumented Immigrants From Census Apportionment Count*, NBC NEWS (July 21, 2020), <https://www.nbcnews.com/politics/white-house/trump-sign-executive-order-aimed-omitting-undocumented->

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immigrants-census-count-n1234228 (quoting advocates statements that “[t]he Constitution requires that everyone in the U.S. be counted in the census. President Trump can’t pick and choose”).

- Jordan Fabian & Greg Stohr, *Trump Bars U.S. Census From Counting Undocumented Immigrants*, BLOOMBERG (July 21, 2020), <https://www.bloomberg.com/news/articles/2020-07-21/trump-order-to-bar-census-from-counting-undocumented-immigrants> (quoting DNC President Tom Perez as saying the President’s order is “an unconstitutional order that has no purpose other than to silence and disempower Latino voices and communities of color”).
- Sam Levine, *Trump Orders Undocumented Immigrants Excluded From Key Census Count*, GUARDIAN (July 21, 2020), <https://www.theguardian.com/us-news/2020/jul/21/trump-executive-order-census-undocumented-immigrants> (“The Trump administration appears to be on shaky legal ground – the US constitution requires seats in Congress to be apportioned based on the ‘whole number of persons’ counted in each state during each decennial census.”).
- Matt Stieb, *Trump Tries Last-Ditch Order to Keep Undocumented Immigrants Off Census*, NEW YORK (July 21, 2020), <https://nymag.com/intelligencer/2020/07/trump-tries-last-ditch-order-to-keep-undocumented-off-census.html> (reporting that it is likely that President Trump’s order will be overturned because “the Constitution does not determine between citizens and noncitizens”).
- Nicole Narea, *Trump Is Using the Census to Undermine Immigrants’ Political Power*, VOX (July 21, 2020), <https://www.vox.com/policy-and-politics/2020/7/21/21328714/trump-executive-order-immigration-census-2020-redistricting> (explaining that the memorandum “could also indirectly discourage immigrants who have yet to respond to the census from doing so,” and that “legal experts say that it clearly flouts the US Constitution, which requires that every person in the US — not just every citizen — be counted in the census.”).
- Trevor Hughes, *Trump, Census Bureau Collect Driver’s License Data to Check Citizenship Status of Americans*, USA TODAY (July 16, 2020), <https://www.usatoday.com/story/news/nation/2020/07/16/trump-seeks-drivers-license-data-iowa-sc-check-citizenship/5445492002/> (quoting the ACLU that the sharing of license data pursuant to Executive Order 13880 “appears to be part of a scheme motivated by an unconstitutional discriminatory purpose to dilute the political power of communities of color.”).
- John Nichols, *Trump Wants to Use ‘Citizenship Data’ to Gerrymander Democracy*, THE NATION (July 13, 2019), <https://www.thenation.com/article/archive/trump-census-citizenship-data-gerrymander-democracy> (reporting that the use of citizenship data, “is a

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threat to the basic premises of representative democracy as they have historically been understood”).

- Tess Berenson, *President Trump Backs Down on Adding Citizenship Question to Census*, TIME (July 11, 2019), <https://time.com/5624485/trump-census-citizenship-question-pivot/> (quoting Thomas Wolf, counsel with the Brennan Center, as stating “The president doesn’t have the ability to unilaterally alter the census . . . The Trump administration is in a bind that it’s not going to be able to escape on the substance of the justification for a citizenship question.”).

***The Census Count Is Possibly Inaccurate and Possibly Illegitimate***

- *What risks does ending the census count early pose?*, PBS (Aug. 9, 2020), <https://www.pbs.org/newshour/show/what-risks-does-ending-the-census-count-early-pose> (noting that the decision to shorten the Census Bureau’s operations mere weeks after the memorandum calling for unauthorized immigrants to be excluded from the census numbers used to reapportion seats in Congress is “causing a lot of confusion” and asking “are there going to be enough indicators and metrics for the Census Bureau as well as outside researchers to really make that assessment of how good is the 2020 census? *How good are these results?*”).
- *Businesses to Help Wednesday as Census ends Sept. 30*, DAILY MOUNTAIN EAGLE, (Aug. 8, 2020), <http://www.mountaineagle.com/stories/businesses-to-help-wednesday-as-census-ends-sept-30,27659> (noting that Census experts and civil rights activists worry the sped-up deadlines could affect the thoroughness of the count, which determines how many congressional districts each state gets).
- Michael Wines, *At the Census Bureau, a Technical Memo Raises Alarms Over Politics*, N.Y. TIMES (Aug. 6, 2020), <https://www.nytimes.com/2020/08/06/us/2020-census-undocumented-immigrants.html> (reporting that an internal Census Bureau memo issued on August 3, 2020 ordered an internal task force to explore statistical methods of compiling an accurate estimate of noncitizens in an effort to carry out President Trump’s July mandate to exclude undocumented residents from the apportionment count).
- Vania Patino *Census count finishing early may cause undercount in some TX Panhandle counties*, KLTN (Aug. 6, 2020), <https://www.kltv.com/2020/08/07/census-count-finishing-early-may-cause-undercount-some-tx-panhandle-counties/> (reporting that the Census Bureau’s new deadline “seems impossible” and that it is essential for the numbers to be correct for the representation to be correct).
- Michael Wines & Richard Fausset, *With Census Count Finishing Early, Fears of a Skewed Tally Rise*, N.Y. TIMES (Aug. 4, 2020), <https://www.nytimes.com/2020/08/04/us/2020-census-ending-early.html> (quoting former Census Bureau directors warning that an earlier deadline would “result in seriously incomplete enumerations in many areas across our country.”).



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- *Census to Finish Count Month Early*, WBUR (Aug. 4, 2020), <https://www.wbur.org/hereandnow/2020/08/04/census-count-cut-short> (noting that many people fear that the Census’s Bureau’s shortened operations period will reduce the accuracy of the population count).
- Hansi Lo Wang, *Census Cuts All Counting Efforts Short by a Month*, NPR (Aug. 3, 2020), <https://www.npr.org/2020/08/03/898548910/census-cut-short-a-month-rushes-to-finish-all-counting-efforts-by-sept-30> (“These last-minute changes to the constitutionally mandated count of every person living in the U.S. threaten the accuracy of population numbers used to determine the distribution of political representation and federal funding for the next decade.”).
- Dudley L. Poston, Jr. and Teresa A. Sullivan, *Excluding Undocumented Immigrants from the 2020 U.S. House Apportionment*, UVA CTR. FOR POLITICS (July 30, 2020), <http://centerforpolitics.org/crystalball/articles/excluding-undocumented-immigrants-from-the-2020-u-s-house-apportionment> (“[I]t is not clear whether the Secretary of Commerce could produce acceptable numbers of undocumented residents according to the timetable the new memorandum requires.”).
- Adam Shaw & John Roberts, *Trump Signs Order to Prevent Illegal Immigrants from Being Counted in Redrawing Of Voting Districts*, FOX NEWS (July 21, 2020), <https://www.foxnews.com/politics/trump-to-sign-order-illegal-immigrants-voting-districts> (noting that it is “not clear how the administration would determine who was in the country illegally” for purposes of determining reapportionment).
- Brett Samuels & Rafael Bernal, *Trump Aims To Bar Undocumented Immigrants From Counting Toward House Representation*, HILL (July 21, 2020), <https://thehill.com/latino/508314-trump-aims-to-bar-undocumented-immigrants-from-counting-toward-house-representation> (suggesting that the administration may be using “questionable social science data techniques” including sampling, which was struck down by the Supreme Court in 1999).
- Chris Sommerfeldt, *Trump Moves to Exclude Undocumented Immigrants From Census Data on Voting Districts*, N.Y. DAILY NEWS (July 21, 2020), <https://www.nydailynews.com/news/politics/ny-trump-memo-immigrants-voting-census-20200721-5rexysrdbbd3vp7gqq2seu4of4-story.html> (noting that “it’s unclear how the government would be able to determine whether a resident is undocumented, since the Supreme Court blocked the Trump administration last year from adding a citizenship question to the 2020 census.”).

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- Tara Bahrapour, *Trump Administration Seeks to Bar Undocumented Immigrants from a Portion of the 2020 Census*, WASH. POST (July 21, 2020), [https://www.washingtonpost.com/local/social-issues/trump-administration-seeks-to-bar-undocumented-immigrants-from-a-portion-of-the-2020-census/2020/07/21/9af682ee-c87f-11ea-a99f-3bbdff1af38\\_story.html](https://www.washingtonpost.com/local/social-issues/trump-administration-seeks-to-bar-undocumented-immigrants-from-a-portion-of-the-2020-census/2020/07/21/9af682ee-c87f-11ea-a99f-3bbdff1af38_story.html) (noting that the administrations appointment of two “high-level political appointees to the Census Bureau ... rais[ed] concern that the new hires could attempt to influence the count”).
- Colin A. Young, *Trump Seeks to Squeeze Immigrants Out of Apportionment*, WWLP-22NEWS (July 21, 2020), <https://www.wwlp.com/news/state-politics/trump-seeks-to-squeeze-immigrants-out-of-apportionment/> (reporting that “[t]he Census, throughout our history, has always been an accurate, even count. That’s what it’s been irrespective of which party controlled Congress, controlled the presidency, and [President Trump] clearly has no such qualms about accuracy or honesty.”).
- Michael Wines, *Census Bureau Adds Top-Level Political Posts, Raising Fears for 2020 Count*, N.Y. TIMES (June 23, 2020), <https://www.nytimes.com/2020/06/23/us/census-bureau-cogley-korzeniewski.html> (reporting that veteran Census Bureau officials are “worried that the new appointees will seek to skew the 2020 census totals in a similarly inaccurate way, accomplishing what the battle over the citizenship question failed to achieve.”).
- Hansi Lo Wang, *Four States Are Sharing Driver’s License Info To Help Find Out Who’s A Citizen*, NPR (July 14, 2020), <https://www.npr.org/2020/07/14/890798378/south-dakota-is-sharing-drivers-license-info-to-help-find-out-who-s-a-citizen> (“Many voting rights advocates, however, are skeptical about the accuracy of data that would be generated from historical records that often contain out-of-date information, especially about whether a person is currently a U.S. citizen.”).
- Aaron Boyd, *How Census is Building a Citizenship Database Covering Everyone Living in the U.S.*, NEXTGOV (Apr. 1, 2020), <https://www.nextgov.com/analytics-data/2020/04/how-census-building-citizenship-database-covering-everyone-living-us/164275/> (quoting a statement from the Census Bureau’s website about citizenship data stating “[w]e are still receiving and analyzing data from external sources, including federal and state administrative records, and require additional time for evaluation”).
- Tara Bahrapour, *Census Bureau’s Request for Citizenship Data From DMVs Raises Privacy, Accuracy Concerns*, WASH. POST (Oct. 17, 2019), [https://www.washingtonpost.com/local/social-issues/census-bureaus-request-for-citizenship-data-from-dmvs-raises-privacy-accuracy-concerns/2019/10/17/aa8771f2-f114-11e9-89eb-ec56cd414732\\_story.html](https://www.washingtonpost.com/local/social-issues/census-bureaus-request-for-citizenship-data-from-dmvs-raises-privacy-accuracy-concerns/2019/10/17/aa8771f2-f114-11e9-89eb-ec56cd414732_story.html) (reporting that “DMV records [requested by the Executive Order] are not necessarily updated when a person naturalizes, and said relying on such data would result in undercounts of people who became citizens after getting driver’s

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licenses or state IDs — a group that includes a higher proportion of minorities than the general population.”).

- Nicole Narea, *Trump is Still Trying to Collect Citizenship Data For Redistricting*, VOX (Oct. 17, 2019), <https://www.vox.com/policy-and-politics/2019/10/17/20918989/trump-2020-census-citizenship-data-redistricting-drivers-license> (quoting Dale Ho, director of the ACLU’s Voting Rights Project, as saying that state’s Department of Motor Vehicles data is concerning because it is “highly unreliable due to poor database protocols and stale citizenship data”).
- Chris Dunn, *The Long Fight to Protect the 2020 Census from Trump*, BOSTON GLOBE (Feb. 17, 2020), <https://www.bostonglobe.com/2020/02/17/opinion/long-fight-protect-2020-census-trump> (“A worrisome threat to the legitimacy of this process lies with the step where the President is to certify census results to Congress.”).

#### ***An Inaccurate Reapportionment Affects Persons’ Rights***

- Doug Thompson, *Time crunch has census-takers in Arkansas racing the clock*, (Aug. 9, 2020), ARK. DEMOCRAT-GAZETTE, <https://www.arkansasonline.com/news/2020/aug/09/census-count-time-cut-short-advocates-say/?latest> (affecting rights because “[i]f a county in Arkansas has a lower-than-accurate census count, it loses out on representation”).
- Megan Tomasic, *Earlier census deadline could cause W.Pa. officials to accelerate counts*, TRIB TOTAL MEDIA (July 31, 2020), <https://triblive.com/local/regional/local-leaders-respond-to-date-change-for-in-person-census-count-collection/> (estimating that the decision to cut short in-person counting efforts could result in “catastrophic outcomes for cities and towns across the country who rely on federal funding and congressional apportionment”).
- Katie Rogers, Adam Liptak, Michael Crowley & Michael Wines, *Trump Says He Will Seek Citizenship Information From Existing Federal Records, Not the Census*, N.Y. TIMES (July 11, 2019), <https://www.nytimes.com/2019/07/11/us/politics/census-executive-action.html> (reporting on President Trump’s July 11 Rose Garden announcement that the administration’s goal is to obtain data on citizenship to eliminate noncitizens from the population bases used to draw political boundaries).
- Dan Mangan & Tucker Higgins, *Trump Abandons Fight to Put Citizenship Question on Census, Says He Can Get Data From Existing Records*, CNBC (July 11, 2019), <https://www.cnn.com/2019/07/11/trump-abandons-fight-to-put-citizenship-question-on-census.html> (quoting Dale Ho, director at the ACLU, as stating President Trump “lost in the Supreme Court, which saw through his lie about needing the question for the Voting Rights Act . . . It is clear he simply wanted to sow fear in immigrant communities and turbocharge Republican gerrymandering efforts by diluting the political influence of Latino communities.”).

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- Jeff Mason & David Shepardson, *Trump Drops Census Citizenship Question, Vows to Get Data From Government*, REUTERS (July 11, 2019), <https://www.reuters.com/article/us-usa-census/trump-drops-census-citizenship-question-vows-to-get-data-from-government-idUSKCN1U61D9> (quoting Michael Waldman, president of the Brennan Center, as saying that the Brennan Center would challenge “any administration move to violate the clear and strong rules protecting the privacy of everyone’s responses, including the rules barring the use of personal census data to conduct law or immigration enforcement activities.”).

#### ***Questions and Concerns That the Census Is Being Improperly Politically Influenced***

- Hansi Lo Wang, *‘Not Enough Time’: Census Workers Fear Rushing Count Could Botch Results*, (Aug. 11, 2020), <https://www.npr.org/2020/08/11/901202892/not-enough-time-census-workers-fear-rushing-count-could-botch-results> (quoting a Census field worker as saying about the administration’s plans “It does not feel like we have the same mission in mind. We’re trying to get a complete count. I’m not sure everyone on the team has the same mission.” Also quoting a Senator as saying, “I believe that this deviation in schedule is driven not by expert opinions of career Census Bureau employees but by external pressure from the White House and the Department of Commerce for perceived political gain.”).
- Hansi Lo Wang, *Census Door Knocking Cut a Month Short Amid Pressure to Finish Count*, NPR (July 30, 2020), <https://www.npr.org/2020/07/30/896656747/when-does-census-counting-end-bureau-sends-alarming-mixed-signals> (“The director of the Census Bureau testified that he first learned about Trump’s plans to attempt to exclude unauthorized immigrants from the census numbers used to reapportion seats in Congress not from any internal discussions, but from a news report ‘late on a Friday’ that said ‘such a directive may be coming down.’”).
- Michael Wines, *New Census Worry: A Rushed Count Could Mean a Botched One*, N.Y. TIMES (July 28, 2020), <https://www.nytimes.com/2020/07/28/us/trump-census.html> (reporting that despite admitting that “meeting that deadline is impossible,” “the White House declined to address questions about its census plans. Responding to a reporter’s questions, the Census Bureau issued a statement on Monday that neither confirmed nor denied an effort to hasten the completion of the count and the delivery of reapportionment figures.”).
- Tara Bahrapour, *Lawmakers, inspector general demand answers on Census Bureau political appointees*, WASH. POST (July 16, 2020), [https://www.washingtonpost.com/local/social-issues/lawmakers-inspector-general-demand-answers-on-census-bureau-political-appointees/2020/07/16/6c355046-c656-11ea-8ffe-372be8d82298\\_story.html](https://www.washingtonpost.com/local/social-issues/lawmakers-inspector-general-demand-answers-on-census-bureau-political-appointees/2020/07/16/6c355046-c656-11ea-8ffe-372be8d82298_story.html) (describing several concerns over the addition of two partisan appointees to the Census

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Bureau staff because the move could “politicize the decennial census, which is used to determine congressional apportionment”).

- Nikita Lalwani & Rachel Brown, *Donald Trump’s Efforts to Distort the Census Have Started Back Up*, SLATE (July 17, 2020), <https://slate.com/news-and-politics/2020/07/donald-trump-census-citizenship-question-executive-order-scotus.html> (“The American Statistical Association decried the news [of two new partisan appointees] as creating ‘the perception—if not reality—of improper political influence.’”).
- Adrian Sainz, *Commerce Department IG Seeks Info on 2 Census Hirings*, WASH. POST (July 8, 2020), [https://www.washingtonpost.com/national/commerce-department-ig-seeks-info-on-2-census-hirings/2020/07/08/c5579c3a-c14f-11ea-8908-68a2b9eae9e0\\_story.html](https://www.washingtonpost.com/national/commerce-department-ig-seeks-info-on-2-census-hirings/2020/07/08/c5579c3a-c14f-11ea-8908-68a2b9eae9e0_story.html) (citing Thomas Wolf, a counsel with the Brennan Center, that the two new Census Bureau employees appointed by the Trump administration raise concerns that the administration may try to violate longstanding protections ensuring that data is kept confidential and secure).
- Michael Wines, *Knocked Off Track by Coronavirus, Census Announces Delay in 2020 Count*, N.Y. TIMES (Apr. 13, 2020), <https://www.nytimes.com/2020/04/13/us/census-coronavirus-delay.html> (“[A] number of experts [] said that the aura of secrecy surrounding this census, in sharp contrast to previous ones, limited support for the count and raised questions about what, if anything, was being concealed.”).
- Jeffrey Mervis, *Why the U.S. Census Bureau Could Have Trouble Complying With Trump’s Order to Count Citizens*, SCIENCE (Sept. 16, 2019), <https://www.sciencemag.org/news/2019/09/why-us-census-bureau-could-have-trouble-complying-trump-s-order-count-citizens> (reporting that researchers fear complying with President Trump’s Executive Order could “tarnish” the Census Bureau’s “stellar reputation for nonpartisanship”).
- Hansi Lo Wang, *Trump Wants Citizenship Data Released But States Haven’t Asked Census For That*, NPR (Sept. 11, 2019), <https://www.npr.org/2019/09/11/759510775/trump-wants-citizenship-data-released-but-states-havent-asked-census-for-it> (reporting that Thomas Hofeller, a GOP redistricting strategist, concluded that detailed citizenship information could allow for redrawing of voting districts that would be “advantageous to Republicans and Non-Hispanic Whites,” but that the Trump Administration argues Hofeller’s study played little role in advocating for a citizenship question).
- Hansi Lo Wang, *Do Trump Officials Plan to Break Centuries of Precedent in Divvying Up Congress?*, NPR (Aug. 14, 2019), <https://www.npr.org/2019/08/14/749930756/do-trump-officials-plan-to-break-centuries-of-precedent-in-divvying-up-congress> (reporting

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that the Census Bureau failed to provide clear answers as to whether citizenship would be used in the 2020 Census and factor into apportionment).

The abundance of reporting from an array of media outlets listed above overwhelmingly establishes that the July 1 FOIA Request satisfies the exceptional media interest requirement because each article raises a possible question about government integrity that affects public confidence.

For the reasons set forth above, the Brennan Center has established, and reiterates here, that there is widespread and exceptional media interest surrounding the topics in its July 1 FOIA Request. Therefore, expedited processing must be granted.

**The Brennan Center Is Primarily Engaged in Disseminating Information**

The Brennan Center should be granted expedited processing as it is an organization “primarily engaged in disseminating information,” and there is “urgency to inform the public” about the issues their request identifies. 5 U.S.C. § 552(a)(6)(E)(II) and 15 C.F.R. § 4.6(f)(iv).

In *Citizens for Responsibility and Ethics in Washington v. U.S. Department of Justice*, the court concluded that CREW<sup>6</sup> was primarily engaged in disseminating information based on its assertion that its “primary purpose is to inform and educate the public about the activities of government officials and those who influence public officials.” *CREW*, 436 F. Supp. 3d at 360–61. Similarly, the July 1 FOIA Request specifies that the Brennan Center is primarily a “cutting-edge communications hub, shaping opinion by taking our message directly to the press and public,” *Mission & Impact*, Brennan Ctr., <https://www.brennancenter.org/about/mission-impact> (last accessed August 13, 2020). The Brennan Center works first to inform the public of injustice in society and then uses its expertise to advance its policies. The legal and advocacy work the Brennan Center does has the purpose of creating a public record of important issues, all of which supports the notion that the Center is primarily engaged in disseminating information.

Following President Trump issuing the July 21 Memorandum, a multitude of lawsuits were filed challenging the constitutionality of the administration’s plan. As the July 1 Request specified, the Brennan Center will use the agency records received through the request to “explain to the public how citizenship data may be used to calculate the apportionment.” Exhibit

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<sup>6</sup> CREW’s website indicates that they “use[] aggressive legal action, in-depth research, and bold communications to reduce the influence of money in politics and help foster a government that is ethical and accountable.” *Who We Are, About Us*, CREW, <https://www.citizensforethics.org/who-we-are> (last accessed August 10, 2020).

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A, at 7. Access to the requested documents is essential for the public to assess the Administration's plans for using citizenship for the 2020 Census count.

Additionally, the Brennan Center has an online library with thousands of publications, articles, and reports that are publicly available,<sup>7</sup> including 75 that are dedicated solely to the census such as the following:

- Thomas Wolf, Kelly Percival, and Brianna Cea, *Getting the Count Right: Key Context for the 2020 Census*, Brennan Ctr. (March 31, 2020), <https://www.brennancenter.org/sites/default/files/2020-03/CensusPrimer.pdf>.
- Kelly Percival, *Strong Confidentiality Laws Protect All Data the Census Bureau Collects*, Brennan Ctr. (Dec. 5, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/strong-confidentiality-laws-protect-all-data-census-bureau-collects>.
- Kelly Percival, *Trump Administration Abandons Citizenship Question*, Brennan Ctr. (July 12, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/trump-administration-abandons-citizenship-question>.
- Kelly Percival & Brianna Cea, *Annotated Guide to the Amicus Briefs in the Supreme Court's Citizenship Question Case*, Brennan Ctr. (Apr. 11, 2019), <https://www.brennancenter.org/our-work/court-cases/annotated-guide-amicus-briefs-supreme-courts-citizenship-question-case>.
- Thomas Wolf & Brianna Cea, *A Critical History of the U.S. Census & Citizenship Questions*, Brennan Ctr. (Apr. 2, 2019), <https://www.brennancenter.org/our-work/research-reports/critical-history-us-census-citizenship-questions>.
- Kelly Percival, *Federal Laws that Protect Census Confidentiality*, Brennan Ctr. (Feb. 20, 2019), <https://www.brennancenter.org/our-work/research-reports/federal-laws-protect-census-confidentiality>.
- Brianna Cea, *Potential Shifts in Political Power After the 2020 Census*, Brennan Ctr. (March 27, 2018), <https://www.brennancenter.org/our-work/research-reports/potential-shifts-political-power-after-2020-census>.

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<sup>7</sup> *Library: A Fair & Accurate Census*, Brennan Ctr., <https://www.brennancenter.org/library/?issue=22&subissue=60&>.

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For the foregoing reasons, we request that you promptly grant our expedited processing request and produce agency records responsive to the July 1 FOIA Request. Thank you for your prompt attention to this matter. Please copy all responsive records and furnish copies in electronic format by email or U.S. mail to undersigned counsel for the Requestors at:

Jared V. Grubow  
Wilmer Cutler Pickering Hale and Dorr LLP  
7 World Trade Center  
250 Greenwich Street, 42nd Floor  
New York, NY 10007  
jared.grubow@wilmerhale.com

Respectfully,

/s/ Patrick Carome

Patrick Carome  
Caitlin Monahan  
Mikayla C. Foster  
Jared V. Grubow  
Rieko H. Shepherd  
*Counsel for Requestors*



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**CERTIFICATION**

I hereby certify, on behalf of the Brennan Center and pursuant to 5 U.S.C. § 552(6)(E)(vi), that the content of this letter, as well as the statements supporting the Brennan Center's request for expedition set forth in the original FOIA Request, are true and correct to the best of my and the Brennan Center's knowledge and belief.

/s/ Patrick Carome

Patrick Carome

# **Exhibit A**

WILMERHALE

July 1, 2020

**By Electronic Mail**

United States Department of Justice  
Office of Legal Counsel

Melissa Golden  
Lead Paralegal and FOIA Specialist  
Office of Legal Counsel  
Room 5511, 950 Pennsylvania Avenue, N.W.  
Department of Justice  
Washington, DC 20530-0001

Re: Freedom of Information Act Request

Dear Madam:

On behalf of our client, the Brennan Center for Justice at NYU School of Law (the “Brennan Center” or “Center” or “Requests”), we respectfully request all records in the possession of the Department of Justice, Office of Legal Counsel, including any officers, employees, or divisions thereof, on the topics listed below concerning the 2020 Census, pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). By this letter we also request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E).

**Background**

On June 27, 2019, the U.S. Supreme Court struck down the Trump administration’s attempt to add an unprecedented citizenship question to the 2020 decennial census.<sup>1</sup> Soon after, on July 11, 2019, President Donald J. Trump renewed the administration’s attempt to collect citizenship data via the Census Bureau by issuing Executive Order 13880, which ordered the Bureau to collect pre-existing administrative records on citizenship from other federal agencies.<sup>2</sup> During the same press conference where President Trump announced Executive Order 13880, United States Attorney General William Barr stated that the Administration “will be studying” whether the data collected via Executive Order 13880 is “relevant to” whether “illegal aliens can

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<sup>1</sup> *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2576 (2019).

<sup>2</sup> 84 Fed. Reg. 33821 (July 11, 2019).

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be included for apportionment purposes.”<sup>3</sup> Several agencies have already complied with that Executive Order.<sup>4</sup>

Apportionment—the determination of how many seats each state receives in the U.S. House of Representatives—is a constitutionally required, once-a-decade calculation made using the results of the decennial census. Under the U.S. Code, the Secretary of Commerce provides the state-population totals required for congressional apportionment to the President.<sup>5</sup> The President then must use those state totals to calculate the congressional apportionment using a mathematical formula specified by statute and report the results to Congress.<sup>6</sup> Because the administration has indicated that it may attempt to use citizenship data in some way during the process for calculating the congressional apportionment but has not revealed any details of its plans to the public, this request seeks all records related to the administration’s plans for how it might use citizenship data collected by the Census Bureau for apportionment purposes.

Apportionment affects the representational rights of every person living in the United States. Accordingly, the public has a right to know how the administration intends to calculate the apportionment and whether and how citizenship data might be used in the calculation.

### **Records Requested**

We request the following:

- 1) All records<sup>7</sup> created on or after June 27, 2019, pertaining to how any of the citizenship-status data collected pursuant to Executive Order 13880 can, could, should, or may be used, incorporated, referenced, or considered in any of the following activities:

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<sup>3</sup> *Remarks by President Trump on Citizenship and the Census*, The White House (July 11, 2019, 5:37 p.m.), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-citizenship-census>.

<sup>4</sup> See Hansi Lo Wang, *To Produce Citizenship Data, Homeland Security to Share Records With Census*, NPR (Jan. 4, 2020), <https://www.npr.org/2020/01/04/793325772/to-produce-citizenship-data-homeland-security-to-share-records-with-census.be>.

<sup>5</sup> 13 U.S.C. § 141(b).

<sup>6</sup> 2 U.S.C. § 2a(a).

<sup>7</sup> The term “records” includes any and all codes, correspondence (including electronic mail and instant messages), digital recordings, documents, directives, examinations, guidelines, handbooks, instructions, manuals, maps, microfilms, computer tapes or disks, memoranda, notes, photographs, regulations, reports, rules, or standards, including any drafts thereof.

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- calculating or otherwise formulating the 2020 total national population;
  - calculating or otherwise formulating the 2020 state-population totals to be used to apportion the United States House of Representatives as contemplated by 13 U.S.C. § 141(b) (hereinafter, the “2020 state-population totals”);
  - reporting the 2020 state-population totals to President Trump by the Secretary of Commerce as required under 13 U.S.C. § 141(b);
  - reporting by President Trump to Congress the 2020 state-population totals and number of congressional representatives to which each state is entitled, as required under 2 U.S.C. § 2a(a);
  - changing the Census Bureau’s policy for calculating the 2020 state-population totals, which currently states the 2020 state-population totals will be calculated using the Census Unedited File<sup>8</sup>;
  - changing the Census Bureau’s policy for creating the Census Unedited File, which currently states the Census Unedited File will not contain any citizenship status data.<sup>9</sup>
- 2) All records created on or after June 27, 2019, pertaining to the process by which the Secretary of Commerce will report the 2020 state-population totals to President Trump, as required under 13 U.S.C. § 141(b).
- 3) All records created on or after June 27, 2019 pertaining to the process by which President Trump will report to Congress the 2020 state-population totals and number of congressional representatives to which each state is entitled thereunder, as required under 2 U.S.C. § 2a(a).
- 4) All records created on or after June 27, 2019 and relating to the 2020 Census in which there is any mention of, involvement in, or communication with any of the following persons or entities:

Persons

- Adam Korzeniewski, Senior Advisor to the Deputy Director for Policy at the U.S. Census Bureau
- Christopher C. Demuth, Sr., Hudson Institute
- Christopher J. Hajec, Immigration Reform Law Institute

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<sup>8</sup> See John M. Abowd & Victoria Velkoff, *Update on Disclosure Avoidance and Administrative Data*, U.S. Census Bureau, at 12 (Sept. 13, 2019), <https://www2.census.gov/cac/sac/meetings/2019-09/update-disclosure-avoidance-administrative-data.pdf>.

<sup>9</sup> *Id.*

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- David Dewhirst, Formerly of Department of Commerce
- Eric Ueland, White House Office of Legislative Affairs
- Eric W. Lee, Judicial Watch
- Gail Gitcho, National Republican Redistricting Trust
- Guy Harrison, National Republic Redistricting Trust
- Hans von Spakovsky, Heritage Foundation
- J. Christian Adams, Public Interest Legal Foundation and Presidential Advisory Commission on Election Integrity
- J. Justin Reimer, Republican National Committee
- Jeff Timmer, Michigan GOP
- John Fleming, White House Chief of Staff Office
- Joseph W. Miller, Restoring Liberty
- Karen Dunn Kelley, Deputy Secretary of Commerce
- Kaylan Phillips, Public Interest Legal Foundation
- Lauren Bryan, National Republican Senatorial Committee
- Mark S. Venezia, Immigration Reform Law Institute
- Michael M. Hethmon, Immigration Reform Law Institute
- Mike Walsh, Chief of Staff to the Secretary of Commerce
- Nathaniel Cogley, Deputy Director for Policy at the U.S. Census Bureau
- Peter B. Davidson, Department of Commerce
- Robert D. Popper, Judicial Watch
- Russ Vought, Deputy Director of Office of Management and Budget

Entities

- Allied Educational Foundation
- American Civil Rights Union
- American Legislative Exchange Council
- Citizens United
- Citizens United Foundation
- Conservative Legal Defense and Education Fund
- Eagle Forum Education & Legal Defense Fund
- English First Foundation
- Fair Lines America
- Family-PAC Federal
- Gun Owners Foundation
- Gun Owners of America, Inc.
- Heritage Foundation

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- Immigration Reform Law Institute
- Judicial Watch
- National Republican Congressional Committee
- Policy Analysis Center
- Polidata
- Public Advocate of the United States
- Public Interest Legal Foundation
- Project on Fair Representation
- Republican National Committee
- Republican State Leadership Committee
- Restoring Liberty Action Committee
- The Senior Citizens League

### **Request for Expedited Processing**

Requestors seek expedited processing of the above requests pursuant to 5 U.S.C. § 552(a)(6)(E) and 28 C.F.R. § 16.5(e) and rely on two justifications for the request.

The Department of Justice must process requests on an expedited basis when either (1) “[a] matter of widespread and exceptional media interest involving questions about the Government’s integrity which affect public confidence”<sup>10</sup> exists; or (2) “[a]n urgency to inform the public about an actual or alleged Federal Government activity” is made by an organization “primarily engaged in disseminating information.”<sup>11</sup> Both bases are satisfied by this request.

First, the records requested concern a matter of widespread and exceptional media interest. There has been a plethora of reporting about how the Trump Administration plans to collect citizenship data<sup>12</sup> in conjunction with the 2020 Census reporting.<sup>13</sup> Such news reporting discusses the nexus between Executive Order 13880 and the census generally, as well as focuses on how the Bureau is preparing citizenship data and how states might use that data for

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<sup>10</sup> 5 U.S.C. § 552(a)(6)(E) and 28 C.F.R. § 16.5(e)(iv).

<sup>11</sup> 5 U.S.C. § 552(a)(6)(E)(II) and 28 C.F.R. § 16.5(e)(ii).

<sup>12</sup> See Abowd & Velkoff, *supra* note 8, at 12 (“[T]he President’s Executive Order 13880 commit[s] the Census Bureau to releasing Citizen Voting-Age Population (CVAP) data . . . by combining administrative data from a number of federal, and possibly state, agencies into a separate micro-data file that will contain a ‘best citizenship’ variable for every person in the 2020 census.”).

<sup>13</sup> See, e.g., Katie Rogers et al., *Trump Says He Will Seek Citizenship Information From Existing Federal Records, Not the Census*, N.Y. Times (July 11, 2019), <https://www.nytimes.com/2019/07/11/us/politics/census-executive-action.html>; Wang, *supra* note 4.

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apportioning their legislatures and/or redrawing their electoral districts.<sup>14</sup> Census Bureau policy instructs that the file used to calculate apportionment counts “does not contain any citizenship data.”<sup>15</sup> Nevertheless, Attorney General Barr stated that the Administration “will be studying” whether the data collected via Executive Order 13880 is “relevant to” whether “illegal aliens can be included for apportionment purposes.”<sup>16</sup> A challenge by the Trump Administration to the Census Bureau’s well-settled policy raises “questions about the Government’s integrity which affect public confidence.”<sup>17</sup>

Second, there is an “urgency to inform the public” about any past, present, or future actions taken by the federal government with regard to using citizenship data to calculate the apportionment.<sup>18</sup> Such urgency exists because any action taken by the government to incorporate citizenship status into the calculations for apportioning congressional seats would violate the clear command of the U.S. Constitution, mark a monumental shift in methodology for apportioning Congress, and contravene the Census Bureau’s current policy.<sup>19</sup> Modeling shows how significantly the use of citizenship data would affect apportionment.<sup>20</sup>

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<sup>14</sup> See, e.g., Brendan A. Shanahan, *Counting Everyone—Citizens and Non-Citizens—in the 2020 Census is Crucial*, Wash. Post (Mar. 12, 2020), <https://www.washingtonpost.com/outlook/2020/03/12/counting-everyone-citizens-non-citizens-2020-census-is-crucial/>; Adam Boyd, *How Census Is Building a Citizenship Database Covering Everyone Living in the U.S.*, Nextgov (Apr. 1, 2020), <https://www.nextgov.com/analytics-data/2020/04/how-census-building-citizenship-database-covering-everyone-living-us/164275>. A dispute is also currently ongoing involving whether non-citizens can be excluded from the population totals used for congressional apportionment. See *Alabama v. Dep’t of Commerce*, No. 18-CV-00772 (N.D. Ala. May 21, 2018) (Complaint).

<sup>15</sup> See Abowd & Velkoff, *supra* note 8, at 9.

<sup>16</sup> *Remarks by President Trump on Citizenship and the Census*, The White House (July 11, 2019, 5:37 p.m.), available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-citizenship-census>.

<sup>17</sup> 5 U.S.C. § 552(a)(6)(E) and 28 C.F.R. § 16.5(e)(iv). Further, the Department of Justice’s standard of interpretation is satisfied here as the citations above show that the “matter that draws widespread and exceptional media interest” is the same “matter in which there exists possible questions about the Government’s integrity that affect public confidence.” See *Am. Oversight v. Dep’t of Justice*, 292 F. Supp. 3d 501, 506 (D.D.C. 2018).

<sup>18</sup> 5 U.S.C. § 552(a)(6)(E)(II) and 28 C.F.R. § 16.5(e)(ii).

<sup>19</sup> See U.S. Const. amend. XIV, § 2 (mandating that “[r]epresentatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state”); Abowd & Velkoff, *supra* note 8, at 9; cf. *Wisconsin v. City of New York*, 517 U.S. 1, 11–12 (1996) (approving of the Secretary’s findings that “small changes in adjustment methodology would have a large impact upon apportionment” and that any adjustment “might open the door to political tampering in the future.”). Efforts to use citizenship data in light of the Census Bureau’s policy raises the specter of political tampering.

<sup>20</sup> See *States Gaining/Losing Seats Based Upon Citizen VAP Projected to 2020*, Polidata.org, <https://www.polidata.org/census/ST017KCA.pdf> (last accessed May 17, 2020).



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The federal government's actual or alleged activity includes at least the following:<sup>21</sup> First, the government is collecting citizenship data in conjunction with the 2020 Census. President Trump signed Executive Order 13880, requesting that citizenship data be sent to the Census Bureau. Several agencies have already complied with that Order.<sup>22</sup> Second, Attorney General Barr has stated that the Justice Department would study how that data could be used in calculating apportionment. And yet, little else is known of the government's plans and whether other non-government entities may be influencing those plans. As the census is currently ongoing and the statutory deadline for calculating the apportionment is rapidly approaching, processing this request is urgent to inform the public about how the federal government is affecting their representational rights.

The Brennan Center is an organization "primarily engaged in the dissemination of information."<sup>23</sup> The Brennan Center is a think tank and public interest law center that regularly writes and publishes reports and articles and makes appearances in various media outlets regarding census-related subjects, including efforts to ensure that all people participate in the census. The opportunity to explain to the public how citizenship data may be used to calculate the apportionment is the best tool to mitigate any public fears of government abuses and thereby increase census participation. The records and communications requested are essential to that goal.

The Brennan Center certifies that the above explanation is true and correct to the best of its knowledge and belief.<sup>24</sup>

Pursuant to the applicable statute and regulations, Requestors expect the determination regarding expedited processing to be made within 10 days.<sup>25</sup>

### **Request for Fee Waiver or Limitation on Fees**

Requestors seek a waiver of all document search, review, and duplication fees because disclosure "is likely to contribute significantly to public understanding of the operations or activities of the government" and "is not primarily in the commercial interest of" the Brennan

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<sup>21</sup> 5 U.S.C. § 552(a)(6)(E)(v)(II) and 28 C.F.R. § 16.5(e)(ii).

<sup>22</sup> See Wang, *supra* note 4.

<sup>23</sup> 5 U.S.C. § 552(a)(6)(E)(v)(II) and 28 C.F.R. § 16.5(e)(ii). Requestors are "a cutting-edge communications hub, shaping opinion by taking our message directly to the press and public." *Mission & Impact*, Brennan Ctr., <https://www.brennancenter.org/about/mission-impact> (last accessed May 17, 2020).

<sup>24</sup> 5 U.S.C. § 552(a)(6)(E)(vi) and 28 C.F.R. § 16.5(e)(3).

<sup>25</sup> See 5 U.S.C. § 552(a)(6)(E)(ii)(I) and 28 C.F.R. § 16.5(e)(4).

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Center.<sup>26</sup> If the fee waiver request is not granted, the Brennan Center asks that fees be limited to reasonable standard charges for document duplication because the Center qualifies as a noncommercial scientific institution, an educational institution, and a representative of the news media.<sup>27</sup>

**A. *Disclosure Is in the Public Interest***

The records requested satisfy the three factors used by the Department of Justice when determining whether to waive fees: (i) “[d]isclosure of the requested information would shed light on the operations or activities of the government”; (ii) “[d]isclosure of the requested information would be likely to contribute significantly to public understanding of those operations or activities”; and (iii) disclosure is not “primarily in the commercial interest of” the Brennan Center.<sup>28</sup>

First, the records requested have a “direct and clear” connection with “identifiable operations or activities of the Federal Government,” namely: (1) compilation of citizenship data by the Department of Commerce pursuant to Executive Order 13880; (2) reporting of the 2020 Census results by the Secretary of Commerce and the President; and (3) communications involving employees of the Department of Commerce, Department of Justice, or outside organizations concerning details about the 2020 Census.

Second, disclosure of the records requested would “contribute significantly to public understanding of those operations or activities” because detailed information about how the federal government plans to use citizenship data in apportionment is not “in the public domain,” and because disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in the subject.”<sup>29</sup> Aside from Attorney General Barr’s brief remarks about using citizenship data for apportionment purposes, little is known about how the federal government plans to use data gathered under Executive Order 13880 for apportionment purposes or whether groups outside the government have been involved in discussions about how to use that data. The records requested will reveal those discussions. Moreover, the Brennan Center has both “expertise in the subject area” of the decennial census and apportionment, and the “ability and intention to effectively convey information to the public”<sup>30</sup> about the 2020 Census

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<sup>26</sup> 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(k).

<sup>27</sup> See 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 28 C.F.R. 16.10(c)(1)(i), (c)(3), (d)(1).

<sup>28</sup> 28 C.F.R. § 16.10(k)(2)(i)–(iii).

<sup>29</sup> *Id.* § 16.10(k)(2)(ii), (ii)(A)–(B).

<sup>30</sup> *Id.* § 16.10(k)(2)(ii)(B).

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through its reports and frequently visited website.<sup>31</sup> All of these factors will ensure that the information requested will contribute significantly to public understanding of the operations and activities of the federal government.

Third, the records requested are “not primarily in the commercial interest of” the Brennan Center.<sup>32</sup> The Brennan Center is a 501(c)(3) non-profit organization and does not seek the records requested for commercial use.<sup>33</sup> Instead, the Center plans to analyze, publish, and publicly disseminate the records requested at no cost. Moreover, the Department of Justice “ordinarily will presume that when a news media requester has satisfied the requirements of paragraphs (k)(2)(i) and (ii) of [the fee waiver] section, the request is not primarily in the commercial interest of the requester.”<sup>34</sup> As explained in further detail below, the Brennan Center qualifies as a representative of the news media because it is an “entity that [] gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.”<sup>35</sup> And as explained above, the Center has met the first two fee-waiver requirements. It has therefore presumptively satisfied the third requirement.

For these reasons, the Brennan Center’s request for a fee waiver should be granted.

**B. *The Brennan Center is a Noncommercial Scientific Institution***

Even if the Brennan Center’s request for a fee waiver is not granted, fees should be limited to standard charges for document duplication because the Center qualifies as a noncommercial scientific institution.<sup>36</sup> The Brennan Center is a noncommercial scientific institution because it conducts social scientific research into the American justice system and American democracy, the results of which are intended to inform the American public, not “promote any particular product or industry.”<sup>37</sup> As stated on its website, the Center is “an independent, nonpartisan law and policy organization” that conducts “rigorous research to

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<sup>31</sup> See, e.g., Kelly Percival, *Federal Laws that Protect Census Confidentiality*, Brennan Ctr. (Feb. 20, 2019), <https://www.brennancenter.org/our-work/research-reports/federal-laws-protect-census-confidentiality>.

<sup>32</sup> 28 C.F.R. § 16.10(k)(2)(iii).

<sup>33</sup> See, *Financial & Legal Information*, Brennan Ctr., <https://www.brennancenter.org/about/financial-legal-information> (last accessed May 18, 2020).

<sup>34</sup> 28 C.F.R. § 16.10(k)(2)(iii)(B).

<sup>35</sup> *Id.* § 16.10(b)(6).

<sup>36</sup> See 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 28 C.F.R. § 16.10(c)(1)–(3).

<sup>37</sup> 28 C.F.R. § 16.10(b)(5).

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identify problems and provide in-depth empirical findings and compelling analyses of pressing legal and policy issues.”<sup>38</sup>

**C. *The Brennan Center is an Educational Institution***

If the Brennan Center’s request for a fee waiver is not granted, fees should be limited to standard duplication fees because the Center also qualifies as an educational institution.<sup>39</sup> The Brennan Center qualifies as an educational institution because it is affiliated with the New York University School of Law, which is a “school that operates a program of scholarly research” falling under the Department of Justice’s definition of an “[e]ducational institution.”<sup>40</sup>

**D. *The Brennan Center is a Representative of the News Media***

Finally, if fees are not waived, they should be limited to standard duplication fees because the Brennan Center also qualifies as a representative of the news media.<sup>41</sup> Representatives of the news media are not limited only to traditional media outlets like newspapers and periodicals.<sup>42</sup> Rather, a representative of the news media is defined as “any person or entity that [] gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work and distributes that work to an audience.”<sup>43</sup> Moreover, posting content to a public website can qualify as a means of distributing it for the purposes of qualifying as a representative of the news media.<sup>44</sup>

The Brennan Center regularly publishes news articles and research reports on its website, [brennancenter.org](https://www.brennancenter.org), which was visited by 1.9 million people in 2019.<sup>45</sup> The Center gathers information about the American political system, synthesizes that research, and reports that

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<sup>38</sup> *Research & Reports*, Brennan Ctr, <https://www.brennancenter.org/our-work/research-reports> (last accessed May 18, 2020). See, e.g., Laura Royden & Michael Li, *Extreme Maps*, Brennan Ctr. (May 9, 2017), <https://www.brennancenter.org/our-work/research-reports/extreme-maps>; Ames Grawert, *Crime Trends: 1990-2016*, Brennan Ctr. (Apr. 18, 2017), <https://www.brennancenter.org/our-work/research-reports/crime-trends-1990-2016> (examining crime statistics at the national and city level during the last quarter century).

<sup>39</sup> See 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 28 C.F.R. § 16.10(c)(1)–(3).

<sup>40</sup> 28 C.F.R. § 16.10(b)(4).

<sup>41</sup> See 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 28 C.F.R. § 16.10(c)(1)–(3).

<sup>42</sup> See *Cause of Action v. FTC*, 799 F.3d 1108, 1119-1120 (D.C. Cir. 2015) (citing *Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381 (D.C. Cir. 1989)).

<sup>43</sup> 5 U.S.C. § 552(a)(4)(A)(ii) and 28 C.F.R. § 16.10(b)(6).

<sup>44</sup> See *Cause of Action*, 799 F.3d at 1123.

<sup>45</sup> See *2019 Annual Report* 15, Brennan Ctr. (2019), [https://www.brennancenter.org/sites/default/files/2020-04/2019\\_\\_AnnualReport.pdf](https://www.brennancenter.org/sites/default/files/2020-04/2019__AnnualReport.pdf).

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information to the public. It therefore plainly falls within the definition of a representative of the news media and should be exempt from all fees associated with this request except for standard duplication fees.

In the event you deny our waiver request, please contact us if you expect the costs to exceed the amount of \$500.00.

\* \* \*

To the extent that some of the requested records may be available before other records, please provide responsive records on a rolling basis as they become available.

If you determine that any requested record or portion of a requested record is exempt from disclosure, please identify each such record or portion of such record and the basis for the asserted exemption by reference to specific exemptions of FOIA. We expect release of all nonexempt records and segregable portions of otherwise exempt records. We reserve the right to appeal a decision to withhold any information.

Thank you for your prompt attention to this matter. Please copy all responsive records and furnish copies in electronic format by email or U.S. mail to undersigned counsel for the Requestors at:

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Wilmer Cutler Pickering Hale and Dorr LLP  
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As indicated above, we are applying for expedited processing of this request. Notwithstanding your determination of expedited processing, we would appreciate a response within twenty days of receipt of this request consistent with 5 U.S.C. § 552(a)(6)(A)(i).

Respectfully,

/s/ Patrick Carome

Patrick Carome

Mikayla C. Foster

Jared V. Grubow

Christian Ronald

Rieko H. Shepherd

*Counsel for Requestors*