UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, Plaintiff, v. UNITED STATES DEPARTMENT OF COMMERCE, *et al.*, Defendants.	Civil Action No. 1:20-cv-02674-TJK

PLAINTIFF'S REPLY IN SUPPORT OF
MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

This is not a run-of-the-mill Freedom of Information Act ("FOIA") lawsuit. The Brennan Center's FOIA Requests and the motion for preliminary injunction currently before the Court seek production of records related to the imminent results of the 2020 Census and how they will be used to reapportion the U.S. House of Representatives for the next ten years—an issue of utmost national importance. More than three months ago, the Brennan Center submitted the FOIA Requests to Defendants, with the intent to disseminate the information received and inform public discourse. Defendants, however, have flouted their statutory obligations to promptly produce records and continue to avoid committing to any timeline for producing responsive records. Without preliminary injunctive relief, Defendants will continue to drag their feet and pay only lip service to the Brennan Center's right to expedited processing.

Defendants do not contest the urgency of the Brennan Center's Requests, but nevertheless object to promptly producing non-exempt responsive records. Defendants unpersuasively rely on their backlogs in processing FOIA requests as the leading reason that they cannot comply with the Brennan Center's requested relief. This Court, however, has routinely required agencies with predictable backlogs to promptly produce records in less time than the Brennan Center has requested here. Defendants also contend that the Brennan Center does not need the records before December 31, 2020 because the President is an insular figure whose actions relating to reapportionment are discretionary and supposedly exempt from public influence. But that argument runs counter to the longstanding understanding of our nation as a democracy and the purpose of the FOIA.

The Brennan Center has clearly explained that if timely equipped with the information requested, it will inform the public discourse about apportionment before the Administration takes potentially irreversible steps. The Brennan Center's proposed timeline is necessary to allow it the

time to receive, review, and disseminate the information and for the public to read and digest that information before it is too late. Accordingly, this Court should order Defendants to respond to the FOIA Requests and produce non-exempt responsive records by November 2, 2020—nearly four months after Defendants received the Requests.

ARGUMENT

I. THIS COURT HAS JURISDICTION AND AUTHORITY TO GRANT THE REQUESTED INJUNCTIVE RELIEF

As demonstrated in the Brennan Center's opening brief (Mem. at 18–20), preliminary injunctions are appropriate in FOIA litigation, and this Court has frequently granted such relief. *See, e.g.*, *Center for Pub. Integrity v. Dep't of Defense*, 411 F. Supp. 3d 5, 12 (D.D.C. 2019); *Wash. Post v. Dep't of Homeland Sec.*, 459 F. Supp. 2d 61, 76 (D.D.C. 2006); *Elec. Privacy Info. Center v. Dep't of Justice*, 416 F. Supp. 2d 30, 43 (D.D.C. 2006) ("*EPIC*"). The FOIA provides the District Court with jurisdiction and authority to grant injunctive relief where, as here, an agency improperly delays production of requested records. *See* 5 U.S.C. § 552(a)(4)(B) ("[T]he district court … has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant").

Defendants do not contest that they have failed to provide a substantive response to the Brennan Center's FOIA Requests within 20 working days, or the additional 10 working days generally allowed for unusual circumstances, and that the Brennan Center's administrative remedies are thus constructively exhausted. Nor do Defendants contest that despite receiving the FOIA Requests more than three months ago, they have yet to produce a single page of responsive information, even for those Requests that were ostensibly granted expedited processing.

Rather, Defendants erroneously rely on the "procedural framework" of the FOIA as an excuse for not granting the requested preliminary injunction. Opp. at 7. Defendants correctly state

that the FOIA requires requesters to reasonably describe the records sought, 5 U.S.C. § 552(a)(3)(A), which the Brennan Center did, and allows Defendants thirty days to respond to a plaintiff's complaint, 5 U.S.C. § 552(a)(4)(C). But their assertion that the Brennan Center's motion should be denied because "courts should not casually sidestep this statutory framework through issuance of preliminary relief" (Opp. at 7) is misleading. The D.C. Circuit has instructed, and this Court has recognized, that "the FOIA imposes no limits on courts' equitable powers in enforcing its terms … [and] unreasonable delays in disclosing non-exempt documents violate the intent and purpose of the FOIA, and the courts have a duty to prevent such abuses." *EPIC*, 416 F. Supp. 2d at 35 (quoting *Payne Enters. v. United States*, 837 F.2d 486, 494 (D.C. Cir.1988)). Here, where there have been and continue to be unreasonable delays in disclosing non-exempt records, this Court has a duty to prevent such continued abuse of the FOIA. *See id.*

Defendants further err in arguing that the Brennan Center's motion for preliminary injunction should be denied because the motion allegedly seeks the "full relief" that a FOIA plaintiff may obtain through litigation. Opp. at 8. Defendants do not cite to a single FOIA case to support that assertion. They instead cite two inapposite cases that had nothing to do with the FOIA. *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 n.13 (D.C. Cir. 1969) (a landlord-tenant dispute); *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (a Rehabilitation Act case). In any event, the Brennan Center's motion does not seek "full relief." Obtaining "full relief" in a FOIA case ordinarily entails a decision on the merits of an agency's claims, following full processing of a FOIA request, that one of the FOIA's exemptions permits the withholding of records that the agency has identified as responsive to the request. *See, e.g.*, *Judicial Watch, Inc. v. Dep't of the Navy*, 25 F. Supp. 3d 131, 136 (D.D.C. 2014) ("FOIA cases typically and appropriately are decided on motions for summary judgment … and the responding federal agency bears the burden of

proving that it has complied with its obligations under FOIA"). That plainly is not what the present motion seeks. Rather, it merely asks that Defendants promptly complete the administrative processing of the FOIA Requests that ordinarily occurs before litigation *commences—i.e.*, to search for responsive records, produce those for which no FOIA exemption is claimed, and identify the grounds for withholding any responsive records—and to submit a *Vaughn* Index that will enable the merits of any withholding to be promptly litigated and determined.

Finally, Defendants erroneously claim that this Court "routinely den[ies] requests for preliminary injunctions in FOIA cases," Opp. at 8, ignoring the plethora of precedents from this Court granting such motions. *See, e.g.*, *Am. Oversight v. Dep't of State*, 414 F. Supp. 3d 182, 185 n.5 (D.D.C. 2019) (collecting cases "where FOIA requestors have sought records to inform an imminent public debate on a matter of national concern" and obtained a preliminary injunction); *Center for Pub. Integrity*, 411 F. Supp. 3d at 12 (granting preliminary injunction and ordering production of records); *Wash. Post*, 459 F. Supp. 2d at 76 (same); *EPIC*, 416 F. Supp. 2d at 43 (same).

The cases on which Defendants rely, in which preliminary injunctions were denied (Opp. at 8), are easily distinguished. The plaintiff in *Baker v. Consumer Financial Protection Bureau* did not request expedited processing of his FOIA request and sought records for use in a class action in which he was representing private litigants, rather than to inform the public on an issue of great national importance. 2018 WL 5723146, at *2, *4 (D.D.C. Nov. 1, 2018). In *Long v. Department of Homeland Security*, plaintiffs likewise sought records only for use in litigation. 436 F. Supp. 2d 38, 42 (D.D.C. 2006). And *Electronic Privacy Information Center v. Department of Justice*, 15 F. Supp. 3d 32, 40 (D.D.C. 2014), is also inapposite, as the plaintiff's sole rationale for likely success on the merits in that case was that the agency's failure to respond to a FOIA request

within 20 days was a *per se* violation. That is not the argument the Brennan Center makes here.[1]

II. THE BRENNAN CENTER IS ENTITLED TO A PRELIMINARY INJUNCTION COMPELLING EACH DEFENDANT TO PROVIDE A COMPLETE RESPONSE TO THE FOIA REQUESTS WITHIN THIRTY DAYS FROM THE FILING OF THIS MOTION

The Brennan Center clearly established in its opening brief that it meets the preliminary injunction standard—that (1) it is likely to succeed on the merits, (2) it is likely to suffer irreparable harm in the absence of preliminary relief, and (3) the balance of equities and public interest tips in favor of granting preliminary injunctive relief. Mem. at 21–42. Defendants incorrectly suggest that the Brennan Center must meet a higher standard, showing "that extreme or very serious damage will result from the denial of the injunction," and that it fails to do so. Opp. at 7. This Court, however, has not consistently applied that higher standard, even in cases since the 2014 decision Defendants cite. *See, e.g.*, *Center for Pub. Integrity*, 411 F. Supp. 3d at 10 (granting a preliminary injunction ordering expedited processing and record production without considering a higher standard); *Protect Democracy Project Inc. v. Dep't of Defense*, 263 F. Supp. 3d 293, 297, 303 (D.D.C. 2017) (granting in part plaintiff's preliminary injunction without considering a higher standard). And even if the Brennan Center is required to satisfy that higher standard, it has done so by showing that the need for access to the requested records is exceedingly time-sensitive and that the records relate to an issue of upmost national importance. Mem. at 36–41. If the records

[1] Defendants baselessly suggest (Opp. at 14) that the present motion may be an end-run of the civil discovery process in a separate lawsuit in which the Brennan Center is representing plaintiffs challenging the schedule for completion of the 2020 Census, *Nat'l Urban League v. Ross*, No. 20-CV-5799-LHK (N.D. Cal.). That is simply not so. First, the Brennan Center submitted its FOIA Requests more than a month before commencement of that suit. Second, the subject matter of the FOIA Requests and that suit are wholly distinct: the Requests seek records related to the Administration's plans for calculating, reporting, or otherwise acting on the results of the Census process after it has been concluded, on whatever timeline the Census concludes, *see* Compl., Dkt. 1, Exs. A–I, while *National Urban League* concerns the time frame under which the federal government will conduct and complete the 2020 Census. *See* Complaint, *Nat'l Urban League v. Ross*, No. 20-CV-5799-LHK (N.D. Cal. Aug. 18, 2020).

were produced after the state-population count is delivered to the President, it would be too late for the public to act on the information. *Id.* at 35. Grave damage would be done, with potentially lasting impact on the country until the next decennial Census in 2030. *Id.*

A. The Brennan Center Is Likely To Succeed On the Merits

i. The Brennan Center Is Entitled To A Substantive Response To The FOIA Requests And Production Of Responsive Records

In its opening brief, the Brennan Center explained that it is entitled to a prompt determination on its FOIA Requests, and within 30 days of the filing of the present motion, the production of all non-exempt responsive records as well as a detailed *Vaughn* index, on the grounds that its Requests are proper, the Requests "reasonably describe" the records requested, and it is entitled to have the requested records made "promptly available." Mem. at 21–23. All but one of Defendants appears to concede that the Brennan Center's FOIA Requests are proper and reasonably describe the records requested.[2] And none of them contests that the Brennan Center is owed a substantive response to its Requests and that each and every one of them failed to provide that response within the statutorily mandated 20, or in some cases 30, day period.

Defendants' main argument is that they are not required to produce responsive records and a *Vaughn* index by November 2, 2020, and that they may do so at some later, indeterminate date. *See* Opp. at 19. In so arguing, Defendants first imply that the Brennan Center is improperly conflating the deadlines for Defendants' substantive responses to its FOIA Requests with the requirement that it produce responsive records "promptly." *Id.* at 15 ("Plaintiff cannot show

[2] The only Defendant to request clarification of the Brennan Center's FOIA Request was the Census Bureau—a position that even the Bureau's parent agency, the Department of Commerce, does not join. *See* Compl., Dkt. 1, Ex. II. The Brennan Center recently responded to that outlier request for clarification, explaining in detail why the FOIA Request easily satisfies the requirement to "reasonably describe[] the agency records sought and enable[] Bureau personnel to locate them with a reasonable amount of effort." *See* Exhibit A hereto (citing 15 C.F.R. § 4.4(c)).

entitlement to the production of records just because Defendants have not responded to the requests within the typical 20-day statutory timeframe for responding to a request."). The Brennan Center, however, is not arguing that Defendants were required to produce all responsive documents within 20, or 30, days of receiving the FOIA Requests—deadlines that are now long past. As the Brennan Center explains in its opening brief, it is entitled to "prompt" production of the requested records and a *Vaughn* index. Mem. at 1, 16, 18, 21–22, 36. Given the facts of this case and the urgent need for disclosure well before the state-population totals used for calculating reapportionment are submitted to the President on December 31, 2020,[3] production of the records will not be "prompt" unless it is completed by November 2, 2020. Mem. at 36–43; *infra* II.B.

Defendants also incorrectly rely on the backlog of pending FOIA requests as justification for the delay in their responsiveness. But such a backlog does not justify Defendants' flouting of their statutory requirement to provide a substantive response to the FOIA Requests and to produce non-exempt responsive records "promptly." The FOIA unambiguously requires an agency determination on FOIA requests within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i). Absent

[3] One day before the Brennan Center filed the present motion, a District Judge in California clarified that a previously entered preliminary injunction had both enjoined the Administration from "implementing the … December 31, 2020 deadline for reporting the tabulation of the total population to the President" and reinstated the "COVID-19 Plan deadline[] of … April 30, 2021." *Nat'l Urban League v. Ross*, 2020 WL 5876939, at *9 (N.D. Cal. Oct. 1, 2020). However, on October 7, 2020, the Ninth Circuit partially stayed that preliminary injunction, allowing Defendants to attempt to meet the December 31, 2020 statutory deadline. *Nat'l Urban League v. Ross*, 2020 WL 5940346, at *8 (9th Cir. Oct. 7, 2020). Then, on October 13, 2020, the Supreme Court granted a complete stay pending appeal of the Northern District of California's preliminary injunction, allowing the Administration to both end field collection immediately and to attempt to meet the December 31, 2020 deadline. *Ross v. Nat'l Urban League*, 2020 WL 6041178 (U.S. Oct. 13, 2020). The Census Bureau's website currently represents that "[t]he Census Bureau is working hard to process the [2020 Census] data in order to deliver complete and accurate state population counts as close to the December 31, 2020, statutory deadline as possible." *2020 Census Results: Frequently Asked Questions*, CENSUS BUREAU, https://www.census.gov/content/dam/Census/newsroom/press-kits/2020/nrfu-deadline-results-faq.pdf (last visited Oct. 19, 2020).

qualifying unusual circumstances, the agency is allowed up to, but generally no more than, an additional 10 working days to complete its response. *Id.* § 552(a)(6)(B)(i)–(ii). Nowhere, does the FOIA statute suggest that a backlog is a qualifying unusual circumstance. *Id.* § 552(a)(6)(B)(iii). Indeed, the FOIA statute specifically excludes a backlog of pending requests from the definition of "exceptional circumstances" that would allow an agency additional time to complete its review of the records. *Id.* § 552(a)(6)(C)(ii) ("[T]he term 'exceptional circumstances' does not include a delay that results from a predictable agency workload of requests under this section …."). Under exceptional circumstances, the court may retain jurisdiction and allow such additional processing time, however, Defendants have apparently concluded that exceptional circumstances do not exist, as they do not advance that argument.

Courts in this District have held that a predictable agency backlog is insufficient to warrant further delay in processing FOIA requests. Although these rulings were made in cases in which agencies asserted exceptional circumstances as a basis for delay—an argument that, as noted Defendants do not assert here—they are instructive here. In *Leadership Conference on Civil Rights v. Gonzales*, another judge in this District acknowledged the agency defendant's "large backlog of pending FOIA requests," its asserted need to devote "maximum manpower on an emergency basis to other litigation and cases," and its "personnel issues." 404 F. Supp. 2d 246, 259 (D.D.C. 2005). Nevertheless, the court determined that those concerns reflected only the "existence of a predictable backlog of FOIA request[s]," and therefore granted plaintiff's summary judgment motion to expedite the FOIA requests. *Id.* at 259–61. More recently, in *Clemente v. Federal Bureau of Investigation*, the court determined that a supposed spike in FOIA requests was no more than "the 'predictable agency workload,'" and required the FBI to process 5,000 pages a month ("higher than the rate would be in an ordinary case") because the records "relate[d] to an

issue of national importance." 71 F. Supp. 3d 262, 268–69 (D.D.C. 2014).

ii. The Brennan Center Is Entitled To Expedited Processing Of The FOIA Requests On Two Independent Grounds

In its opening brief, the Brennan Center overwhelmingly established its entitlement to expedition based on the "Exceptional Interest Ground," Mem. at 24–31, and on the "Primarily Engaged in Dissemination of Information Ground," *id.* at 31–36. In fact, eight of the nine Defendants have now conceded that the Brennan Center is entitled to expedited processing of its FOIA Requests in whole or in part.[4] Defendants claim that because they have "largely granted Plaintiff's requests for expedited consideration," the Brennan Center's arguments concerning expedition are moot. Opp. at 16. This is plainly wrong. The outlier agencies that have not already purported to grant expedition with respect to the entirety of the FOIA Requests must be ordered to do so. And even more critically, *all* of the Defendants must be ordered to *actually* expedite the processing of the FOIA Requests—as opposed to doing so in name only—and to produce all responsive records not claimed to be exempt, as well as a *Vaughn* index with respect to any withheld records, by November 2, 2020.

The Exceptional Interest Ground for Expedition. The Brennan Center has demonstrated that *actual* expedition of its FOIA Requests is required based on the "Exceptional Interest" ground because (1) there is widespread and exceptional media interest and public interest in the information sought by the FOIA requests, and (2) there are related possible questions about the government's integrity which affect public confidence. Mem. at 24–31. Defendants do not

[4] On the day Defendants filed their opposition, the Brennan Center first learned that six of the Defendants had purportedly granted, in whole or in part, its Requests for expedited processing. *See* Brinkmann Decl., Dkt. 20-1 ¶¶ 9–10 (representing that expedition had been granted on September 4, 2020 for the FOIA Requests to OAG, ODAG, OASG (OAAG), and OLP; Curry Decl., Dkt. 20-3 ¶¶ 13–14 (representing that expedition had been granted for "parts 1, 2, and 3" (but not "part 4") of the FOIA Requests to the Commerce Department and Census Bureau). OMB has still not acted on Plaintiff's request for expedited processing. Walsh Decl., Dkt. 21 ¶ 9.

contest that there is widespread and exceptional media interest and public interest in the information sought by the FOIA Requests. *See* Opp. at 17–18. Nor do they contest that the FOIA Requests pertain to topics on which questions have been raised about the government's integrity.

Two of the Defendants, the Census Bureau and Commerce Department, make the flawed argument that they need not expedite "part 4" of the FOIA Requests, which seeks communications between or among Defendants and certain individuals employed by Defendants and individuals and organizations that may have been involved in advocating before the Executive Branch for changes in how the Census Bureau creates, compiles, or reports either the state-population totals used for reapportionment, or the reapportionment calculation itself. Opp. at 17–18; Curry Decl., Dkt. 20-3, ¶¶ 13–14; Compl., Dkt. 1, Ex. A at A-003–005, Ex. B at B-006–008. In particular, these Defendants contend that the Brennan Center "did not put forth sufficient evidence for part 4 of its request to justify expedited consideration," Opp. at 17, and that the evidence the Brennan Center has presented of widespread and exceptional media interest *does not apply* to communications with, or that mention, the entities and individuals listed in "part 4," Curry Decl. ¶ 14. That is wrong. First, many of the organizations and persons listed in "part 4" have been actively involved in advocacy of the Federal Government's push to add a citizenship question to the 2020 Census, as reflected by their (or their organization's) appearance as *amici curiae* in the Supreme Court case rejecting the administration's plan to include a citizenship question in the

2020 Census.[5] The exclusion of undocumented immigrants from the reapportionment count is undeniably related to the effort to add the citizenship question to the 2020 Census, and so there is a strong likelihood that the same entities and individuals may have lobbied or advised the Federal Government on the apportionment questions at issue in the FOIA Requests. Second, Defendants have offered no precedent for granting expedition to only some portions of a single FOIA Request. And third, six other Defendants have granted expedition of the FOIA Requests in whole, finding no basis to treat "part 4" differently.

Finally, Defendant OMB, which has "not reached a decision [on expedited processing]" makes no argument that it should not have granted expedited processing. Opp. at 19, n.11; Walsh Decl., Dkt. 21, ¶ 9. As such, it has no grounds upon which to deny the request for expedited processing and the Court should order it to expedite its response.

The Primarily Engaged In Dissemination of Information Ground For Expedition. The Brennan Center is also entitled to expedited processing of its FOIA Requests based on the "Primarily Engaged in Dissemination of Information" ground because (1) it is primarily engaged in dissemination of information, and (2) there is an urgency to inform the public about actual or alleged government activity. Mem. at 31–36. Defendants do not contest that the Brennan Center is primarily engaged in dissemination of information. Their only contention is that the timing of

[5] Of the Persons and Entities listed in "part 4" of the FOIA Requests, 34 of the 49 either submitted briefing as *amici* or petitioners, are associated with entities that submitted briefing as *amici* or petitioners, or are referenced in briefing as supporting the Administration's position on including a citizenship question in the 2020 Census. *See, e.g.*, Brief for Eagle Forum Education & Legal Defense Fund as *Amici Curiae* Supporting Petitioners, *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019) (No. 18-966), 2019 WL 1112685; Brief for Citizens United, Citizens United Foundation, English First Foundation, Public Advocate of the United States, Gun Owners Foundation, Gun Owners of America, Inc., Family-PAC Federal, Conservative Legal Defense and Education Fund, Policy Analysis Center, The Senior Citizens League, Restoring Liberty Action Committee as *Amici Curiae* Supporting Petitioners, *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019) (No. 18-966), 2019 WL 1167891.

the Brennan Center's FOIA Request "belies the conclusion that an 'urgency' warrants expedited consideration" because Executive Order 13880, which is referenced in the FOIA Requests, was signed a year before submission of the FOIA Requests. Opp. at 18–19. This argument fails. Defendants do not and cannot identify any authority suggesting that FOIA requests must be filed by a certain time to qualify as "urgent." And Defendants' insinuation that the Brennan Center should have submitted its FOIA Requests immediately after Executive Order 13880 was issued makes little sense. At that earlier time, there was no announced plan concerning whether or how to exclude undocumented immigrants from the reapportionment count. Executive Order 13880 was the initial, public directive President Trump issued to federal agencies to *begin* developing a process for collecting citizenship-status data. As discussed in greater detail below, *infra* at 20–23, it would take significant time, after issuance of the Executive Order, before any plan could be devised to gather citizenship-status data and to use, incorporate, or consider those data in connection with reapportionment. Indeed, it was not until several months after issuance of the Executive Order that any agencies started complying with the Executive Order by delivering citizenship-status data to the Census Bureau.[6] And it was not until July 21, 2020—more than a year after the Executive Order 13880 was announced and several weeks after the Brennan Center filed its FOIA Requests—that President Trump published his Presidential Memorandum to exclude certain non-citizens from the apportionment count. Far from late, then, the Brennan Center's FOIA Requests were right on time to capture records concerning a major government decision. In these circumstances, nothing about the timing of the Brennan Center's FOIA Requests diminishes its entitlement to expedited processing.

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[6] *See* 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.

The Purported Grants Of Expedited Processing Have Not Been Meaningful. As noted previously, Defendants' argument that they have complied with their statutory obligations because they have purportedly begun processing the FOIA Requests is especially unavailing where, more than three months since submission of the FOIA Requests, the Brennan Center has not received a single substantive response or responsive document. For the agencies that assert that they have granted expedited processing, this is particularly concerning because the grant of expedited processing appears to not have any meaningful significance. *See, e.g.*, Curry Decl. ¶18 (noting that "searches of Census custodians for responsive documents will be completed by November 15, 2020" but failing to provide any production schedule). As the Brennan Center has established, the public has a right to the requested information with enough time to fully consider, analyze, and, perhaps, seek to alter the Administration's planned actions. *See, e.g.*, Mem. at 2. And in situations such as this, where records are needed urgently to inform the public about matters of grave significance, Courts have granted preliminary injunctions requiring the production of responsive records in a matter of days or weeks. *See, e.g.*, *Wash. Post*, 459 F. Supp. 2d at 76 (production within 10 days); *Center for Pub. Integrity*, 411 F. Supp. 3d at 15 (rolling production within 17-25 days); *EPIC*, 416 F. Supp. 2d at 43 (production or identification of responsive documents within 20 days).

B. The Brennan Center Would Be Irreparably Harmed Absent Issuance of the Requested Preliminary Injunction

The Brennan Center's opening brief established that it would be irreparably harmed absent a preliminary injunction because it would "lose the ability to inform the public of the Administration's actions … before the Census count is finalized by the Commerce Department and reported to the President" on December 31, 2020. Mem. at 36–37. Defendants do not dispute the importance of the Brennan Center's mission in seeking the requested records, conceding that

"fostering public discourse is … a worthy endeavor." Opp. at 12. Defendants, however, unpersuasively argue that the December 31, 2020 deadline for transmitting the state population totals to the President is not a significant milestone, improperly try to create a new and unprecedented requirement for showing irreparable harm in FOIA actions, and incorrectly charge the Brennan Center with attempting to manufacture its own urgency. *Id.* at 9–15. None of these arguments withstands scrutiny or undermines the Brennan Center's showing regarding irreparable injury. *First*, as already demonstrated, December 31, 2020 is a deadline after which the value of the information sought would likely be drastically reduced, resulting in irreparable harm. *Second*, precedent makes clear that irreparable harm occurs if the requester and the public are cut off from meaningful participation in a debate on an issue of national importance, without need for some further showing that such well-informed debate can or will enable the public to change the course of governmental decisions or actions. *Finally*, the timing of the Brennan Center's FOIA Requests was entirely sensible and has no bearing on analysis of irreparable injury.

i. The Brennan Center Has Established That Irreparable Harm Will Occur Absent Disclosure Well In Advance Of December 31, 2020

The Brennan Center's opening brief and declarations showed that it would be irreparably harmed if it did not receive the requested records well before the state-population totals are reported to the President, which by both statute and the Administration's current plan is to occur by December 31, 2020 (*see supra* note 3). The Brennan Center explained that it would need significant time, in advance of the President's report of the state-population totals, to analyze the disclosed records and make the information they contain available for public consumption and debate while the information is still relevant. Mem. at 38–39. The Brennan Center also showed the importance of the public receiving the information before the President reports the apportionment numbers in order to have a meaningful debate about the Administration's potential

manipulation. *Id.* And Defendants themselves concede that courts have granted preliminary injunctions in FOIA cases when there is a need for disclosure in advance of an "actual, impending deadline." Opp. at 11 n.5.

Despite all this, Defendants argue that December 31, 2020 is not a relevant deadline because after the state-population totals are reported to the President, the President must then transmit the reapportionment to Congress, and thereafter, the Clerk of the House of Representatives must then certify the apportionment of representatives to the executive of each state. Opp. at 11–12 (citing 2 U.S.C. § 2a(a)–(b)). This misses the point. The records requested by the Brennan Center would be stale and of little value after December 31, 2020, because once the state-population totals are reported to the President and the President sends the reapportionment numbers to Congress 10 days later, the reapportionment calculation is complete and what remains under the current statutory framework is only the transmission of data to the states.

Even if this Court were to accept Defendants' argument that the reapportionment process will not be substantively finalized by December 31, 2020, that would move the point of finality back by no more than 10 days, until January 10, 2021, which is the deadline for the President to transmit the state apportionment numbers to Congress. 2 U.S.C. § 2a(a). Because the President has already made clear his intention to break norms for how reapportionment is calculated—through issuance of an Exclusion Memorandum that rests on a premise that a three-judge court has held to be illegal, *New York v. Trump*, 2020 WL 5422959 (S.D.N.Y. Sept. 10, 2020), *appeal docketed*, No. 20-366 (U.S. Sept. 22, 2020), *entry scheduling arg.*, No. 20-366 (U.S. Oct. 16, 2020)—the public is entitled to know the basis for that plan as well as whether any alternative plans to manipulate those totals also exist. A full understanding of these matters is not possible without prompt access to the records that the Brennan Center has requested, well in advance of the

time the state-population totals are transferred from the Commerce Department to the President. Defendants erroneously contend that the Brennan Center has offered only broad and conclusory assertions to make this showing, *see* Opp. at 10, ignoring the plain reality that without the requested records the public would not know what actions the President plans to take in calculating the reapportionment. This is especially true given Defendants' assertion that the President maintains discretion over the apportionment. Opp. at 12–13 (citing *Franklin v. Massachusetts*, 505 U.S. 788, 799 (1992)). Irreparable harm would occur if the President were to act, beginning on December 31, 2020, without the transparency that the FOIA was enacted to ensure.

Even if it were true (contrary to the foregoing) that December 31, 2020 were not a deadline after which public awareness and understanding of the information at issue would have far less value, the Brennan Center's showing of irreparable harm would still be more than sufficient to warrant issuance of the requested preliminary injunction. In *Center for Public Integrity v. Department of Defense*, another judge in this District held that "the lack of a precise end-date for the impeachment proceedings [was] not detrimental to Plaintiff's claim of irreparable harm." 411 F. Supp. 3d at 13. That the proceedings were "*intended* to conclude by the end of the year" was sufficient to establish irreparable harm. *Id.* (emphasis added). The Census Bureau has publicly committed to "deliver complete and accurate state population counts as close to the December 31, 2020, statutory deadline as possible" (*see supra*, note 3) and the President is scheduled by federal statute to finalize the reapportionment calculation between December 31, 2020 and January 10, 2021. Thus, because reapportionment is of "immense national concern," the Brennan Center has plainly established that it and the public would suffer irreparable injury absent preliminary injunctive relief. *Center for Pub. Integrity*, 411 F. Supp. at 13.

Defendants' argument that the Brennan Center is engaging in speculation when it argues that expedition is required to uncover potential manipulation of the reapportionment well before December 31, 2020 (Opp. at 12–13) is also unavailing. As discussed below, this Court has held in similar circumstances that a showing of irreparable injury need not include anything beyond a demonstration that the value of the information in the requested records to public understanding and debate would be diminished by delay. And because one of the key purposes of the FOIA is to enable the public to uncover government misconduct that would otherwise be hidden, conditioning preliminary injunctive relief on the plaintiff's showing actual wrongdoing would put the cart before the horse. *See Citizens for Responsibility & Ethics in Wash. v. Dep't of Justice*, 436 F. Supp. 3d 354, 361 (D.D.C. 2020) ("Neither FOIA nor the departmental regulations require the requester to prove wrongdoing by the government in order to obtain documents on an expedited basis."). Additionally, as demonstrated *supra*, the President has already openly declared his intent to manipulate the count in at least one way.

ii. Defendants Err In Suggesting That The Brennan Center Cannot Show Irreparable Injury Without Also Demonstrating That Greater Public Awareness Could Alter The Outcome Of The 2020 Reapportionment

The Brennan Center's opening submission established it would be irreparably harmed if it could not inform the public about matters related to the Census and reapportionment before the President receives the state-population totals. Mem. at 36–41. Defendants attempt to add an unprecedented hurdle for showing irreparable harm, suggesting that in circumstances like these the plaintiff must prove that public dialogue could "change the ultimate outcome," "influence a cognizable body of decision-makers," or have some "effect on the instant policy prerogatives of the Executive." Opp. at 12–13. Defendants' position is, at bottom, that the public does not deserve to know about the details of governmental activity, including potential government misconduct, if that activity is within the realm of Presidential discretion. *Id.* This argument flies in the face of

the fundamental purposes of the FOIA, which are to inform the public about "what their government is up to," *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004) (internal citation omitted), and "guarantee[] the right of persons to know about the business of their government," H.R. Rep. 93-876, at 6269; *see also Center for Effective Gov't v. Dep't of State*, 7 F. Supp. 3d 16, 29 (D.D.C. 2013) (rejecting argument that the President can act without public oversight because "it is without question that FOIA is broadly conceived … to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands") (cleaned up).

Precedent makes clear that irreparable harm occurs if the ability to inform and allow the public to meaningfully debate an important issue is postponed until after a particularly relevant government action or activity has already transpired. The Brennan Center has established that the opportunity for meaningful debate concerning reapportionment will end by December 31, 2020, based on Defendants' own representations about when they intend to act. So, to mitigate the irreparable harm already occurring each day the Census moves forward without an informed public able to access relevant government records, Defendants should be compelled to produce the requested records well in advance of that key date. *See Center for Pub. Integrity*, 411 F. Supp. 3d at 13 (finding that the plaintiffs were being irreparably harmed each day impeachment proceedings moved forward while defendants delayed producing the requested records).

None of the cases cited by Defendants require anything more than showing that the public would be cut off from participating in debate and having the opportunity to act upon the information. Opp. at 12–13. In *Center for Public Integrity*, Judge Kollar-Kotelly explained the primary value of records "lies in [the requester's] ability to *inform* the public of ongoing

proceedings of national importance," such that the public can "shar[e] those knowledgeable opinions with their elected leaders." 411 F. Supp. 3d at 12 (emphasis added). Likewise, in *Washington Post v. Department of Homeland Security*, Judge Urbina highlighted that "FOIA was created to foster public *awareness*" about critically important issues so that the public has the "ability to make its views known in a timely fashion" through various channels. 459 F. Supp. 2d at 74–75 (emphasis added). These and other cases show that irreparable injury arises when the requester and the public are deprived of the opportunity to be aware of, to understand, and to discuss governmental activity as that activity unfolds, regardless of whether or not it can be demonstrated that that awareness, understanding, and discussion will change the course of that unfolding activity. *See* H.R. Rep. 93-876, at 6268 ("An informed public makes the difference between mob rule and democratic government.").

In any event, even if the existence of irreparable harm were dependent on the Brennan Center identifying one or more ways in which a better-informed public could influence the outcome of the reapportionment process that follows from the 2020 Census, it is readily apparent that such pathways do, in fact, exist. Despite Defendants' assertions, the President is not an insular figure whose actions (and their consequences) cannot be influenced or altered by public opinion, political processes, and countervailing actions from other centers of power within our democratic system. For example, timely equipped with the information within the requested records, members of the public *can* make their views known to their congressional representatives, who could then hold hearings on the propriety of the Administration's conduct in shifting the norms for reapportionment or take legislative action to block the President's plans (to the extent that current law does not already bar them). The public could even convince the President to change course,

as he has done time and again when confronted with public outcry.[7] But the public's opportunity to meaningfully participate in these efforts will expire, or at least be greatly diminished, come December 31, 2020 on the administration's own announced schedule. Thus, in this respect as well, the Brennan Center has established "a cognizable" and irreparable "harm" by showing that further delay beyond November 2, 2020 in releasing the requested records would cut-off the public's meaningful ability to understand and potentially have an impact on these momentous events. *See EPIC*, 416 F. Supp. 2d at 40–41.

iii. Defendants' Argument Regarding The Timing Of The Brennan Center's Submission Of Its FOIA Requests Is Meritless

The Brennan Center's FOIA Requests are aimed at understanding how the Administration has planned and is continuing to plan to use citizenship data to affect reapportionment, or has otherwise planned to manipulate the reapportionment calculation. The Brennan Center explained this in its opening brief: its "pending Freedom of Information Act requests concern[ed] the Trump Administration's plans for calculating the reapportionment of the U.S. House of Representatives following the conclusion of the 2020 Census." Mem. at 1. Defendants do not dispute that the Brennan Center's FOIA Requests are aimed at reapportionment, not at the collection of citizenship data itself. Opp. at 1, 12–13. Nevertheless, Defendants argue that the Brennan Center delayed submitting its FOIA Requests for a year after the issuance of Executive Order 13880, and that its doing so undermines its showing of irreparable harm. *Id.* at 14–15. Defendants are wrong for two reasons. *First*, they cite no authority (and the Brennan Center is aware of none) suggesting that a

[7] *See, e.g.*, Miriam Jordan & Anemona Hartocollis, *U.S. Rescinds Plan to Strip Visas from International Students in Online Classes*, N.Y. TIMES (July 16, 2020), https://www.nytimes.com/2020/07/14/us/coronavirus-international-foreign-student-visas.html; Farida Jhabvala Romero, *After Public Outcry, Trump Administration Resumes Processing Protections for Sick Immigrants*, KQED (Sept. 20, 2019), https://www.kqed.org/news/11775521/after-public-outcry-trump-administration-resumes-processing-protections-for-sick-immigrants.

FOIA requester's entitlement to expeditious access to government information depends somehow on when the requester submitted its request, rather than on whether the requested records pertain to imminent and critically important government activity about which there are profound public interest and concerns. *Second*, the timing of the Brennan Center's FOIA Requests about how the government plans to use the citizenship data collected as a result of Executive Order 13880 was not only entirely sensible, but also presciently *preceded* the President's Exclusion Memorandum, which was the first formal proclamation of the Executive Branch's intent to exclude certain non-citizens from the apportionment counts.

Indeed, had the Brennan Center submitted its FOIA Requests when Defendants now suggest it should have submitted them (*i.e.*, in the summer of 2019), few if any responsive records could have been found or produced, because as of that point in time there presumably had been little or no discussion within Defendant agencies regarding whether, how, or to what extent the citizenship data to be collected pursuant to the then newly-minted July 11, 2019 Executive Order 13880 would or could be used in connection with reapportionment. The Attorney General's prospective statement in July 2019 that the Administration "would be studying" these issues, Mem. at 5; Opp at 14, only underscores this point. And the President's announcement of the July 21, 2020 Exclusion Memorandum a few weeks *after* the Brennan Center's FOIA Requests were submitted shows that by July 2020 the Administration had in fact been actively discussing plans to affect reapportionment. 85 Fed. Reg. 44,679 (July 23, 2020). A year-earlier request would not have encompassed many of the records most pertinent to the Executive Branch's plans regarding consideration of citizenship data in connection with reapportionment.

The lack of merit in Defendants' timing argument is especially apparent if one considers a hypothetical alternative scenario in which the Brennan Center had submitted FOIA Requests for

precisely the same records a couple of weeks *later*, on the heels of the President's issuance of the Exclusion Memorandum. Had the Brennan Center done that, and had it cited the Exclusion Memorandum as the impetus for its Requests, Defendants obviously could not argue that the Brennan Center's interests in access to the requested records, and its exposure to irreparable harm from delaying such access, were somehow diminished because it had not submitted the Requests months earlier. The fact that the Brennan Center had the foresight to submit its Requests even before the Exclusion Memorandum was issued shows that, far from acting without a sense of urgency, it acted proactively and gave Defendants extra time to respond to its Requests in advance of the December 31, 2020 deadline.

Further undermining Defendants' suggestion that the Brennan Center should be penalized for not filing its FOIA Requests even sooner than early July 2020 is the fact that in April 2020 the Census Bureau had announced that, in light of the pandemic, it intended to request an extension of the deadline for transmitting the state-population totals to the President from December 31, 2020 to April 30, 2021.[8] And that remained the Census Bureau's posture on timing of reapportionment until August 3, 2020, well after the Brennan Center submitted its FOIA Requests. Since then, the deadlines relating to apportionment have remained in flux, with the Administration fighting through multiple injunctions to end the Census earlier than anticipated in the days leading up to and after the filing of the present Motion. *See supra* note 3. Thus, if anything, it was the Administration's actions abandoning its extended timeline for completing the 2020 Census, and not the timing of the FOIA Requests, that has created the need for this Court to swiftly intervene in order to mitigate irreparable harm.

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[8] Press Release, Department of Commerce Secretary W. Ross and Census Bureau Director S. Dillingham Statement on 2020 Census Operational Adjustments Due to COVID-19 (April 13, 2020), https://www.census.gov/newsroom/press-releases/2020/statement-covid-19-2020.html.

C. The Equities And The Public Interest Weigh Heavily in Favor of Granting The Requested Preliminary Injunction

The Brennan Center's opening brief demonstrated that there is "overriding public interest … in the general importance of an agency's faithful adherence to its statutory mandate." Mem. at 41; *Protect Democracy Project*, 263 F. Supp. 3d at 301 (internal citation omitted). The Brennan Center also showed that given the exceptional interest in the 2020 Census and reapportionment, *see* Mem. at 13–14 (citing exceptional media interest), rapid disclosure of the requested records will create a public benefit fulfilling FOIA's purpose "to ensure an informed citizenry." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Defendants do not dispute that the public interest will be well-served by a timely disclosure of the requested records. Instead, they focus only on supposed unfairness to other FOIA requestors not before this Court, as well as some alleged risk of inadvertent disclosure of exempt records, that they claim would flow from issuance of the requested preliminary injunction. Opp. at 21–23. Time and again, courts have found these two arguments unpersuasive.

Defendants unpersuasively argue that it would be unfair to other FOIA requesters to allow the Brennan Center to "cut the line," rather than relegating its Requests to Defendants' ordinary first-come–first-serve regimen for handling FOIA requests. Opp. at 21 ("[T]he organization ignores the public interest of the other requestors who would not be moved to the front of the line."). Judges in this District have routinely allowed for precisely such prioritization when confronted with FOIA requests for records that, like those at issue here, are urgently needed to inform public understanding regarding issues of great national importance. In *Washington Post*, for example, the defendant agency similarly argued that "the public would be harmed by expedited processing because a preliminary injunction would place this plaintiff's FOIA request ahead of the requests of others." 459 F. Supp. 2d at 75–76. Judge Urbina found "[t]his argument []

unconvincing" because "the public's interest in expedited processing of the plaintiff's request outweighs any general interest that it has in first-in-first-out processing of FOIA requests." *Id.* at 76. More recently, Judge Kollar-Kotelly concluded that "the hardship on other FOIA requesters" by placing plaintiff's request "ahead of others in Defendants' FOIA queues" "is not a bar to relief." *Center for Pub. Integrity*, 411 F. Supp. 3d at 14. And the fact that Defendants already have in their queues FOIA requests for the same or similar documents (Opp. at 22; Walsh Decl. Dkt. 21 ¶ 14) only strengthens the Brennan Center's argument as, "[i]n processing the documents responsive to Plaintiff's FOIA requests, Defendants will also be completing some of the work necessary for processing the other, similar FOIA requests." *Center for Pub. Integrity*, 411 F. Supp. 3d at 14–15.

Defendants' other argument, that processing the records on such a compressed schedule may result in inadvertent disclosures, is equally unconvincing. Opp. at 23. In *EPIC v. Department of Justice*, the court concluded that "[v]ague suggestions that inadvertent release of exempted documents *might* occur are insufficient to outweigh the very tangible benefits that FOIA seeks to further—government openness and accountability." 416 F. Supp. 2d at 42. In so holding, Judge Kennedy explained that "Congress has already weighed the value of prompt disclosure against the risk of mistake by an agency and determined that twenty days is a reasonable time period, absent exceptional circumstances, for an agency to properly process *standard* FOIA requests." *Id.* In the present case, that twenty-day period elapsed long ago. And nearly all Defendants agree that expedited processing of the FOIA Requests at issue here is appropriate. Opp. at 4–5. Yet Defendants attempt to hide behind their own delays in processing the Requests to say now, nearly four months after the Requests were first submitted, that they cannot complete processing of the requests in a timely fashion. Defendants raise no national security concerns with respect to potential inadvertent disclosure, so "[i]f the documents are more of an embarrassment than a secret,

the public should know of our government's" conduct. *Am. Civil Liberties Union v. Dep't of Defense*, 339 F. Supp. 2d 501, 504–05 (S.D.N.Y. 2004).

Defendants' concerns about inadvertent disclosure, together with the extensive secrecy that has shrouded much of the Administration's activities and plans regarding the 2020 Census and reapportionment, also highlight concerns that Defendants may attempt to withhold many of the requested documents based on unwarranted claims of exemption. Indeed, one of the Defendants (OLC) has already predicted "that the responsive records in this case are very likely to contain a high proportion of material that is exempt from mandatory disclosure under the FOIA." *See* Colborn Decl., Dkt. 20-2 ¶ 21. This is why a detailed *Vaughn* index is part of the relief sought by the present motion, as immediate availability of such an index will be necessary to enable the parties to litigate, and the Court to promptly adjudicate, any excessive exemption claims in time for disclosure of improperly withheld materials to occur before year-end. Defendants' contention that it is inappropriate to order production of a *Vaughn* index in a motion for preliminary injunction is not supported by case law. Opp. at 11 n.7; *see, e.g.*, *EPIC*, 416 F. Supp. 2d at 43 (ordering a *Vaughn* index within 30 days); *Am. Civil Liberties Union*, 339 F. Supp. 2d at 505 (same).

In sum, the preliminary injunction sought is in the public interest and will not overly burden Defendants.

CONCLUSION

For all of the foregoing reasons, and those set forth in the Brennan Center's opening brief, the requested preliminary injunction should be issued.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Patrick J. Carome, hereby certify that on October 19, 2020, a true and correct copy of the foregoing document was filed electronically with the United States District Court for the District of Columbia. Notice of this filing has been sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access the filing through the Court's ECF system.

/s/ Patrick J. Carome
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