UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FAIR LINES AMERICA FOUNDATION, INC., Plaintiff, v. UNITED STATES DEPARTMENT OF COMMERCE and UNITED STATES BUREAU OF THE CENSUS, Defendants.	Case No. 1:21-cv-1361-ABJ **PLAINTIFF'S STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

The Constitution requires that the federal government conduct an "actual Enumeration" of the population of the United States every ten years—known as the decennial Census—to determine the total population of each state and "apportion" the seats in the House of Representatives between the states. U.S. Const. art. I, § 2, cl. 3. In the late 1990s, the Census Bureau proposed using statistical methods to "adjust" census numbers used in the apportionment using various statistical methods. The Supreme Court rejected this method because the Census Act prohibited the proposed uses of statistical sampling in calculating the population for purposes of apportionment. *Dep't of Com. v. U.S. House of Representatives*, 525 U.S. 316, 334 (1999); *see also id.* at 349 (Scalia, J., concurring) ("[A]n apportionment census conducted with the use of 'sampling techniques' is not the 'actual Enumeration' that the Constitution requires."). Several years later, Utah challenged the Census Bureau's use of "household imputation" to fill in data on certain missing households—essentially by borrowing data from a nearby neighbor and "imputing" that information to the missing household. In a divided opinion, the Supreme Court approved this use of household imputation as not inconsistent with the Constitution's "actual Enumeration" requirement and

determined it was not a prohibited use of statistical sampling. *Utah v. Evans*, 536 U.S. 452, 457 (2002).

For the 2020 Census, the Census Bureau is now for the first time ever using a methodology it has termed "group quarters imputation" to fill in apparently missing or incomplete data for certain group housing facilities—ranging from jails, prisons, nursing homes, military bases, to colleges and universities. This methodology was not publicly revealed through any sort of notice and comment process, and to this day the methodology, nature, and extent of how many people were added (and in what states) through "group quarters imputation" remains undisclosed.

In response to the FOIA request that is the subject of this case, the Census Bureau revealed some information about their various attempts to test different methods of "group quarters imputation." For the first set of documents the Census Bureau produced, however, certain potentially crucial information about whether the Census Bureau used statistical methods in ascertaining the actual enumeration was withheld by the Census Bureau under its newly claimed interpretation of Title 13's privacy protections.

Plaintiff Fair Lines America Foundation ("Plaintiff" or "Fair Lines") is seeking information to help inform the public about the nature and extent of this new methodology. As a result, Plaintiff respectfully requests that this Court issue a preliminary injunction to enjoin Defendants the United States Department of Commerce and the United States Census Bureau ("Defendants") from continuing to violate FOIA's requirements by improperly redacting and withholding non-exempt records sought in Plaintiff's March 31, 2021 FOIA request (the "Request"). Because Defendants initially failed to communicate their determination as to whether they will comply with Plaintiff's Request within FOIA's applicable statutory timeframe prior to filing suit, Plaintiff constructively exhausted its administrative remedies, and this Court now has jurisdiction to afford all necessary

relief to Plaintiff to ensure full compliance with Plaintiff's Request.

Under these unique circumstances, with a high-stakes and time-sensitive matter like the 2020 Census, the Census Bureau's publicly announced irregularities in imputation of its group quarters data due to the COVID-19 pandemic, and the Bureau's August 16 redistricting data release deadline, time is truly of the essence—preliminary injunctive relief and the immediate public release of the requested information is necessary to avoid irreparable harm to Plaintiff, and indeed the public at large. Because Plaintiff is likely to succeed on the merits of its claims that Defendants' interpretation of Title 13's confidentiality requirements is plainly erroneous (which is a pure question of law), has demonstrated a likelihood of irreparable harm, and the balance of the equities and public interest factors favor relief for Plaintiff, this Court should grant Plaintiff's motion for a preliminary injunction. Accordingly, Plaintiff respectfully requests that this Court order that Defendants disclose all non-exempt withheld information and data responsive to Plaintiff's Request within 10 days of the Court's order (or no later than August 15, 2021) to avoid irreparable harm to Plaintiff and the American public. The disclosure requested here will likely either put to rest concerns about the Bureau's new methodology, or become evidence needed to prevent the use of improperly imputed apportionment data. If the Census Bureau is permitted to conduct these sorts of methodology changes and implementations behind closed doors and without the sunlight that FOIA and Title 13 require, electoral chaos may result from the states' reliance on potentially defective numbers in conducting redistricting.

STATEMENT OF FACTS

As the Constitution mandates, a census must be conducted every ten years "in such Manner as [Congress] shall by Law direct" to reapportion the number of seats allocated to each state in the House of Representatives. U.S. Const., art. I, § 2, cl. 3. The state population totals are

also used "to allocate federal funds to the States and to draw electoral districts." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2561 (2019). Congress has delegated the taking of the census to the Secretary of Commerce "in such form and content as he may determine," 13 U.S.C. § 141(a), with the Census Bureau being the entity primarily responsible for administering the same.

Due largely to challenges stemming from the global COVID-19 pandemic, administration of the 2020 Census has been anything but smooth. For instance, in late 2020, well after Census Day had passed, public reporting described "processing anomalies" of census records for the 2020 national tally that "if left unfixed, could miscount millions of people."[1] "[M]ajor inconsistencies" unearthed by the Census Bureau largely centered around "the information it has gathered this year about residents of college dorms, prisons and other group living quarters—a category that, for the 2020 census, included around 8 million people."[2]

Consequently, on February 12, 2021, the Census Bureau publicly announced that the first release of its redistricting data, which was originally scheduled to be delivered to the states by March 31, 2021, would be delayed until September 30, 2021.[3] On March 15, 2021, following lawsuits filed by the State of Ohio and the State of Alabama, the Census Bureau announced that there would be a public release of the "legacy format" summary redistricting data (which states

[1] Hansi Lo Wang, *Millions of Census Records May Be Flawed, Jeopardizing Trump's Bid to Alter Count*, NPR (December 5, 2020), https://www.npr.org/2020/12/05/943416487/millions-of-census-records-may-be-flawed-jeopardizing-trumps-bid-to-alter-count (accessed on July 18, 2021) [hereinafter *Millions of Census Records May Be Flawed*]; *see also* Wang, *6-Month Delay in Census Redistricting Data Could Throw Elections Into Chaos*, NPR (February 12, 2021), https://www.npr.org/2021/02/12/965823150/6-month-delay-in-census-redistricting-data-could-throw-elections-into-chaos (accessed on July 18, 2021) [hereinafter *6-Month Delay in Census Redistricting Data Could Throw Elections Into Chaos*].

[2] *Millions of Census Records May Be Flawed, supra.*

[3] Press Release, *Census Bureau Statement on Redistricting Data Timeline*, U.S. Census Bureau (Feb. 12, 2021), https://www.census.gov/newsroom/press-releases/2021/statement-redistricting-data-timeline.html (accessed on July 18, 2021) [hereinafter *Feb. 12, 2021 Census Press Release*].

are assured they can rely on for accuracy in conducting redistricting) on August 16, 2021.[4] The Bureau explained that its delays were necessary largely to allow for time to address difficulties and irregularities it encountered while gathering and tabulating group quarters data for the 2020 Census due to the COVID-19 pandemic.[5] Specifically, the Bureau's Chief of Decennial Statistical Studies Division, acknowledged on the Bureau's public website that it "had to adapt and delay some of the ways we counted group quarters because of the COVID-19 pandemic," and that, consequently, "[a]fter the end of data collection, when we began processing census data from group quarters, we realized that many of them were occupied on April 1, 2020 (the reference day for the census), but didn't provide a population count."[6] The Bureau also explained the significant impact such group quarters data discrepancies can have for obtaining an accurate population count:

> [W]hen we enumerated [group quarters] in midsummer, some group quarters said they were vacant but they were actually occupied on April 1. If not corrected, such cases could lead to an undercount. If the corrections were not properly coordinated with our procedures to remove duplicated people, they could contribute to an overcount.[7]

Accordingly, the Bureau announced that it is now using a new "group quarters count imputation"

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[4] Press Release, *U.S. Census Bureau Statement on Release of Legacy Format Summary Redistricting Data File*, U.S. Census Bureau (Mar. 15, 2021) https://www.census.gov/newsroom/press-releases/2021/statement-legacy-format-redistricting.html (accessed on July 16, 2021); Important Dates, U.S. Census Bureau, https://2020census.gov/en/important-dates.html (accessed on May 21, 2021).

[5] *Feb. 12, 2021 Census Press Release*, *supra*; *see also* Press Release, *Census Bureau Statement on Modifying 2020 Census Operations to Make Sure College Students Are Counted*, U.S. Census Bureau (Mar. 15, 2020), https://www.census.gov/newsroom/press-releases/2020/modifying-2020-operations-for-counting-college-students.html (accessed July 18, 2021) [hereinafter *Mar. 15, 2020 Census Press Release*]; Press Release, *2020 Census Operational Adjustments Due to COVID-19*, U.S. Census Bureau, https://www.census.gov/programs-surveys/decennial-census/decade/2020/planning-management/operational-adjustments.html (accessed on July 18, 2021) [hereinafter *Operational Adjustments*].

[6] Pat Cantwell, *How We Complete the Census When Households or Group Quarters Don't Respond*, U.S. Census Bureau (April 16, 2021), https://www.census.gov/newsroom/blogs/random-samplings/2021/04/imputation-when-households-or-group-quarters-dont-respond.html (accessed on July 18, 2021) [hereinafter *Pat Cantwell Statement*].

[7] *Id.*

procedures on unresolved group quarters, including for missing characteristics such as age or race, even though that method "had never before [been] conducted" for group quarters previously.[8] As a result, tabulation and verification of the final results of the 2020 Census remains ongoing,[9] while public uncertainty about reliability of the data remains high and questions about imputation method(s) have been largely unaddressed by the Bureau.

It is regarding this 2020 Census group quarters data that Plaintiff[10] submitted a FOIA request on February 19, 2021. Ex. 1 ("Declaration of Adam Kincaid") at ¶ 5. Specifically, Plaintiff requested records demonstrating or reflecting the number of residents reported by housing facilities nationwide in response to the Census Bureau's 2020 Group Quarters Enumeration questionnaire and information about the methodology. *See* Compl. Ex. A, ECF No. 1-1. The Census Bureau denied Plaintiff's request on March 12, 2021, asserting that the requested records were exempt from disclosure under Section 9 of the Census Act. Compl. Ex. B, ECF No. 1-2.

In response to this denial, Plaintiff submitted a new FOIA request on March 31, 2021 ("the Request"). The Request clarifies that Plaintiff only seeks summaries, tabulations, and other statistical materials derived from, summarizing, or otherwise relating to the original underlying group quarters population data reported for the 2020 Census, rather than the underlying raw data itself and the methodology. *See* Compl. Ex. C, ECF No. 1-3 at 3-4. Specifically, Plaintiff stated that it does not "seek disclosure of the underlying raw group quarters population data itself as originally 'reported by, or on behalf of, any particular respondent' to the Bureau, 13 U.S.C. § 8(b),"

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[8] *Id.*

[9] *Important Dates*, *supra*.

[10] Plaintiff Fair Lines is a Section 501(c)(3) non-profit organization interested in openness and transparency in government, with an emphasis on educating the public and ensuring fair and legal enumeration, apportionment, and redistricting processes. To that end, Fair Lines reviews and publicizes records in the possession of Defendants in light of the Census Bureau's public announcements of its difficulties and various concerns regarding the gathering and counting of group quarters data for the 2020 Census. *See* Ex. 1 ("Declaration of Adam Kincaid") at ¶ 4.

nor "any 'publication whereby the data furnished by any particular establishment or individual under this title can be identified,' 13 U.S.C. § 9(a)(2)." *Id.*; *see also* Ex. 1 at ¶ 6.

Plaintiff also requested expedited processing of the Request based on its compelling need for the records and the urgency of informing the public of any irregularities in 2020 Census data given the time-sensitive nature of the redistricting process leading up to the impending election season, as well as the decennial nature of the Census Bureau's data collection. Compl. Ex. C, ECF No. 1-3 at 6-7. Finally, Plaintiff requested a fee waiver or limitation of fees because the records are likely to contribute significantly to public understanding of the operations of the Government and is for non-commercial purposes. *Id.* at 5-6.

On April 7, 2021, having received no confirmation that the Request was received by the Census Bureau, Plaintiff, through its counsel, sent an email to the Census Bureau inquiring about the status of the Request. *See* Compl. Ex. D, ECF No. 1-4. Plaintiff received two automated messages in response, eventually assigning the Request tracking number DOC-CEN-2021-001311. *See* Compl. Ex. E, ECF No. 1-5. On April 13, 2021, the Census Bureau's FOIA Section Chief affirmed that the Request had been received and that a search had commenced. *See* Compl. Ex. F, ECF No. 1-6 at 1.[11] However, after the FOIA statutory twenty-business-day deadline

[11] Confusingly, the Census Bureau created two different tracking numbers for this single Request, causing Plaintiff to receive two separate automated messages on April 7, 2021, containing the two tracking numbers. Compl. Ex. E, ECF No. 1-5. Additionally, the automated messages both indicated that the Request had been "submitted" on April 7, 2021, even though the request was submitted on March 31, 2021, to the Census Bureau's designated email address for submitting FOIA requests, Census.efoia@census.gov. Compl. Ex. F, ECF No. 1-6 at 3. Plaintiff's counsel sent an email on April 8, 2021, inquiring about these discrepancies, but did not receive a response. Then on April 12, 2021, Plaintiff received another automated message saying that one of the requests had been "processed with the following final disposition: Duplicate Request." On April 12, Plaintiff's counsel again emailed the Bureau to ask about the status of its Request and to follow up on its unanswered questions from the April 8 email, to which the Bureau on April 13, 2021 only provided a partial answer that the request was evidently forwarded to DOC, but was then closed as a duplicate request because the Census Bureau determined it was better suited to process the Request. *See id.* at 1-2.

(calculated from the date Fair Lines emailed the Request to the Census Bureau) passed on April 28, 2021, *see* 5 U.S.C. § 552(a)(6)(A)(i), Fair Lines had still received no determination from Defendants regarding the Request, including no decision on its application for expedited processing. Ex. 1 at ¶¶ 8-9.

After the April 13, 2021 email from the Census Bureau, Plaintiff received no further communications from the Census Bureau until it filed its Complaint with this Court on May 18, 2021, s*ee id.* ¶ 9; Compl. ECF No. 1, having constructively exhausted all administrative remedies. Soon after the Complaint was filed, the Bureau's FOIA Analyst sent Plaintiff's counsel an email notifying Plaintiff simply that the Bureau is "diligently working on your FOIA request." Ex. 2 ("Census Bureau's Post-Complaint Email Correspondence to Plaintiff"). Then, on May 19, 2021, this same analyst wrote another email to Plaintiff's counsel, repeating that the Bureau is "diligently working on your FOIA request" but added that "in order to conduct an email search for this request, we will need a date range for the emails to search." *Id.*

On May 25, 2021, Defendants sent a letter (dated May 24, 2021) to Plaintiff's counsel partially granting and partially denying Plaintiff's FOIA request, providing Plaintiff with 988 pages of redacted responsive records. Ex. 4 ("May 24 Census Bureau Determination Letter and Production"). Of those, 166 pages were either fully or partially redacted. *See id.* No records from 2021 were included in the production; *i.e.*, all produced (visible) records were dated December 2020 and earlier. *See id.* Defendants claimed all withheld portions were redacted "pursuant to FOIA Exemptions 3 and 5, Title 5, United States Code, Sections 552(b)(3) and (b)(5)." *Id.* Of greatest relevance to this action, Defendants asserted that information withheld under Exemption 3 is "protected by Title 13, United States Code, Section 9," which Defendants interpret to mean "requires that census records be used solely for statistical purposes and makes these records

confidential." *Id.*

Counsel for both parties met the following day in a telephonic consultation, with Plaintiff's counsel requesting that Defendants (1) review the May 25 production to clarify which exemption applied to each redaction, (2) produce all post-December 2020 responsive records, and (3) produce the responsive emails referenced in the May 19 correspondence. In a follow-up email on May 26, Plaintiff's counsel agreed to narrow the scope of the unresolved email search to "all responsive emails sent or received between March 31, 2020 and March 31, 2021," *See* Ex. 3 ("Correspondence Between Parties' Counsel") at 18-19 (5.26.21 Kossak email), and reiterated his client is seeking "only *aggregated* numbers on a statewide or county-wide level" that were counted as a result of group quarters imputation procedures. Ex. 3 at 18-19 (5.26.21 Torchinsky email). Plaintiff's counsel also clarified that Plaintiff was not requesting any exempt "underlying raw group quarters population data as originally 'reported by, or on behalf of, any particular respondent' to the Bureau," *id.* (quoting 13 U.S.C. § 8(b)), nor was Plaintiff seeking any "'publication whereby the data furnished by any particular establishment or individual under this title can be identified,'" *id.* (quoting 13 U.S.C. § 9(a)(2)), or other "'individual reports,'" *id.* (quoting 13 U.S.C. § 9(a)(3)). Both parties' counsel also discussed the remaining, but not yet produced, responsive records, all of which were created after December 2020. Ex. 3 at 16 (6.16.21 Torchinsky email).

On May 27, 2021, Defendants' counsel conveyed that his client had agreed to review the May 25 production to "determine whether they stand by those redactions" and to clarify the basis for each redaction. Ex. 3 at 18 (5.27.21 Kossak email). Defendants' counsel was unable to provide a timetable at that point for completing this process. *Id.* Plaintiff's counsel responded with a request to receive additional documents on a rolling basis as they were ready for release, to which Defendants' counsel did not reply. Ex. 3 at 18 (5.27.21 Torchinsky email). The following day, the

Census Bureau granted Plaintiff's requests for expedited processing of the FOIA request and for a fee waiver. Ex. 5 ("May 27 Correspondence Granting Expedited Processing").

On June 8, 2021, because Plaintiff had not heard from Defendants or received either the reprocessed May 25 production or any of the requested emails, Plaintiff's counsel emailed Defendants' counsel requesting an update. Ex. 3 at 17 (6.8.21 Torchinsky email). Defendants' counsel did not have an answer at that time, and eventually responded over a week later on June 16, 2021, stating that Defendants would release the re-processed May 25 production to Plaintiff by June 24, 2021. Ex. 3 at 16 (6.16.21 Kossak email). Defendants' counsel did not provide any information on the status of the requested emails at that time. *Id.* On June 21, 2021, Defendants filed an answer to Plaintiff's complaint. ECF No. 7.

On June 24, Plaintiff's counsel emailed Defendants' counsel to ask when the reprocessed records would be released and if Defendants had provided any answers on the additional emails and post-December 2020 records. Ex. 3 at 14 (6.24.21 Torchinsky email). Defendants' counsel responded that the re-processed records would not be provided to Plaintiff by the promised June 24 deadline because Defendants claimed to have run into "unexpected technical difficulties" and that they hoped "to have the document available by the end of [June]." Ex. 3 at 14 (6.24.21 Kossak email). In response, Plaintiff's counsel explained that given the potentially time sensitive nature of the information contained in these records, and because the parties' agreement had been unilaterally pushed back by Defendants, he would consult with his client about seeking a preliminary injunction regarding the withheld records. Ex. 3 at 13 (6.25.21 Torchinsky email).

In a June 25 email, Defendants' counsel provided specific pages corresponding with particular justifications for the redactions from the May 25 production. Ex. 3 at 11-13 (6.25.21 Kossak email). Defendants stood by all of their redactions, and asserted that the majority of the

information withheld was redacted "to ensure that every information product released by the Census Bureau adheres to the confidentiality requirement of Title 13 and other applicable statutes," making that information all allegedly exempt from disclosure under FOIA Exemption 3. *Id.* The email also indicated Defendants had found 2,600 emails that were potentially responsive to the Request, and that Defendants would agree in the Joint Status Report due on July 20, 2021 to "using their best efforts to process 300 pages of potentially responsive records per month, with the first release of any nonexempt, responsive records by July 30, 2021." *Id.*

Having finally received explanations for the redactions in the May 25 production, and after a Zoom call between parties' counsel on June 29, 2021, Plaintiff's counsel provided Defendants' counsel with a list of redactions Plaintiff views to be improper along with an attached excerpt of those pages, with the most glaring issues arising from withholdings of summary statistical information and tabulations that Plaintiff indicated are subject to disclosure under 13 U.S.C. § 8(b). *See* Ex. 7 ("June 29 Email—Plaintiff's Challenged Redactions"). Plaintiff's counsel also requested an update on the status of the search for the responsive emails and post-December 2020 records. *Id.*

Defendants' counsel responded in a July 6, 2021 email, providing Plaintiff with just two responsive post-December 2020 records. Ex. 6 ("July 6 Additional Production"). In the same correspondence, Defendants' counsel again defended all of the redactions in the May 25 production, asserting that because of the "risk of re-identification attacks on aggregated data releases" in the modern age of computing power and sophistication, Defendants "generally avoid[] the release of intermediate work product because it can be used in combination with other intermediate work products, official publications, and the final product to re-identify individual respondents and their data items"; accordingly, Defendants maintain that release of *any* of the

aggregate or summary data withheld from Plaintiff would violate Title 13's confidentiality provisions. *See id.* Defendants' counsel asserted that Plaintiff "[has] not identified any particular reason why the redacted data is needed urgently," even though Defendants had previously granted Plaintiff's request for expedited processing on May 28, 2021. *Id.*; Ex. 3 at 17 (5.28.21 Kossak email). Finally, Defendants' counsel indicated that Defendants had identified 917 potentially responsive emails (in contrast with the "2,600 potentially responsive emails" mentioned in Defendants' June 25 email, *see* Ex. 3 at 11-12 (6.25.21 Kossak email)) consisting of 25,899 pages of material, and reaffirmed Defendants' initial offer to attempt review of 300 pages of emails per month for potential release to Plaintiff. Ex. 3 at 6-9 (7.6.21 Kossak email).[12]

On July 10, Plaintiff's counsel responded that because of the significant and time sensitive nature of Plaintiff's request, it would be seeking a preliminary injunction seeking production of the improperly withheld/redacted, non-exempt pages of the May 25 production, particularly in light of the Census Bureau's impending August 16 release of the legacy format summary data and the redistricting process that will commence in earnest immediately afterward. Ex. 3 at 6 (7.10.21 Torchinsky email). Plaintiff's counsel also proposed substantially narrowing the universe of remaining emails for searching to focus on those most urgently sought by Plaintiff, namely imputed statewide group quarters population totals, while excluding any county- or local-level numbers or tabulations, and requested an estimated production timeline under these proposed parameters. *Id.*

To date, Plaintiff has not received a single email responsive to the Request (submitted on March 31, 2021), nor has it received any of the improperly withheld pages or redacted information from the May 25 production, which prevents Plaintiff's access to information not exempt from

[12] At the production rate proposed by the Census Bureau, it would take more than 7 years for the Plaintiff to receive all of the responsive records.

disclosure under Title 13.[13]

Plaintiff here challenges only certain of the Defendants' redactions. Certain redactions, such as descriptions of internal computer file locations or information that appears to discuss only a single institution's group quarters, are not being challenged. Plaintiff attaches hereto Exhibit 7, which is an excerpt of the 988-page production containing the redacted and withheld pages Plaintiff is challenging, along with the June 29, 2021 email from Plaintiff's counsel to Defendants' counsel that provides a narrative description of many of the redacted pages along with Plaintiff's explanation of why each appears to be an improper redaction. Ex. 7.

STANDARD OF REVIEW

In addition to this Court's equitable authority to enjoin and order compliance with FOIA, FOIA itself provides a reviewing court authority "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). Plaintiff requests that this Court issue a preliminary injunction prohibiting the Defendants from continuing to redact or withhold the requested information and documents where they are not subject to a proper FOIA exemption. [14]

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[13] Defendants' frequent delays and dawdling in producing responsive documents, along with its current proposed timeline for producing the outstanding responsive emails, also run contrary to FOIA's statutory demands, especially given the pressing and time-sensitive nature of the Request and the fact that expedited processing was granted for Plaintiff's FOIA request.

[14] Separately, Plaintiff requests that the Court order that Defendants produce a *Vaughn* index describing each document claimed as exempt with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA." *Founding Church of Scientology, Inc. v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979); *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (a *Vaughn* index must "describe each document or portion thereof withheld, and for each withholding it must discuss the consequences of disclosing the sought-after information."). Additionally, Plaintiff requests that the Court order Defendants to disclose any "reasonably segregable" non-exempt portions of the fully redacted pages as required by FOIA, 5 U.S.C. § 552(b), and that if Defendants assert that a record contains non-exempt segments that are so dispersed throughout the records as to make segregation impossible, Defendants must still indicate what portion of the document is non-exempt, and describe how the

The preliminary injunction standard is well understood in this Court. This Court recently explained that "[a] preliminary injunction is 'an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.'" *Elec. Privacy Info. Ctr. v. DOJ*, 15 F. Supp. 3d 32, 38 (D.D.C. 2014) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). To obtain a preliminary injunction, the moving party must show: "(1) a substantial likelihood of success on the merits; (2) that it would suffer irreparable injury if the injunction is not granted; (3) that the balance of equities tips in its favor; and (4) that the public interest would be furthered by the injunction." *Wash. Metro. Area Transit Auth. v. Local 689, Amalgamated Transit Union*, 113 F. Supp. 3d 121, 126 (D.D.C. 2015) (citing *Winter*, 555 U.S. at 20); *see also Coalition for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 6, 7-8 (D.D.C. 2010); *Hall v. Johnson*, 599 F. Supp. 2d 1, 6 n. 2 (D.D.C. 2009). Further, the balance of the equities and public interest preliminary injunction factors "merge when the Government is the opposing party.'" *Nken v. Holder*, 556 U.S. 418, 435 (2009).

"In conducting an inquiry into these four factors, [a] district court must balance the strengths of the requesting party's arguments in each of the four required areas." *Elec. Privacy Info. Ctr.*, 15 F. Supp. 3d at 38 (internal citation and quotation marks omitted). "The District of Columbia Circuit applies a 'sliding-scale' approach to the preliminary injunction factors, meaning that 'a strong showing on one factor could make up for a weaker showing on another.'" *Indian River Cnty. v. Rogoff*, 110 F. Supp. 3d 59, 67 (D.D.C. 2015) (citation omitted). The D.C. Circuit places preeminent importance on the first and second factors, indicating that plaintiffs must "independently show both a likelihood of success on the merits and irreparable harm." *Brennan Ctr. for Justice v. Dep't of Com.*, 498 F. Supp. 3d 87, 96 (D.D.C. 2020). However, Plaintiff's

material is dispersed through the document. *See Mead Data Cent. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

"probability of success on the merits is the most critical of the criteria when considering a motion for a preliminary injunction." *Carey v. FEC*, 791 F. Supp. 2d 121, 128 (D.D.C. 2011).

Plaintiff satisfies all elements for the issuance of a preliminary injunction as demonstrated in the discussion that follows.

ARGUMENT

I. PLAINTIFF IS ENTITLED TO A PRELIMINARY INJUNCTION.

A. Plaintiff is Likely to Succeed on the Merits of its FOIA Claim.

1. Because Defendants failed to meet their statutory deadline under FOIA, Plaintiff's administrative remedies have been constructively exhausted—this Court has jurisdiction to ensure full compliance.

The Freedom of Information Act requires that each federal agency, upon receiving any reasonably articulated request that accords with the agency's published rules, "shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A). The agency has twenty business days from the date it receives the request to determine "whether to comply with such request" and to "immediately notify the person making such request" of "such determination and the reasons therefor" and of the "right of such person to appeal to the head of the agency" any adverse determination. *Id.* § 552(a)(6)(A)(i). In "unusual circumstances," the agency can provide written notice to the requestor setting forth the circumstances warranting an extension of time, and can extend this response period for no "more than ten working days." *Id.* § 552(a)(6)(B)(i). Then, FOIA again instructs that responsive, non-exempt records "shall be made promptly available to such person making such request." *Id.* § 552(a)(6)(C)(i).

FOIA's requirement that records be made "promptly available" after an agency's determination "typically [means] within *days or a few weeks* of a 'determination', not months or years." *CREW v. FEC*, 711 F.3d 180, 188-89 (D.C. Cir. 2013) (Kavanaugh, J.) (quoting 5 U.S.C.

§ 552(a)(3)(A), (a)(6)(C)(i)) (emphasis added). "[A]n agency's failure to comply with the FOIA's time limits is, by itself, a violation of FOIA . . . ." *Gilmore v. U.S. Dep't of Energy*, 33 F.Supp.2d 1184, 1187 (N.D. Cal. 1998) (citation omitted). Even if a delay in processing a request results from "bureaucratic mishandling rather than intentional obfuscation" that is not enough on its own to "make the delay reasonable" under the statute. *See Munger, Tolles & Olson LLP v. U.S. Dep't of Army*, 58 F. Supp. 3d 1050, 1056 (C.D. Cal. 2014).

When the agency does not respond by the statutory deadline, the requestor may sue in federal court without exhausting internal agency appeal processes, as Plaintiff did here. 5 U.S.C. § 552(a)(6)(C)(i) ("Any person making a request to any agency for records . . . shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph."); *Nurse v. Sec'y of the Air Force*, 231 F. Supp. 2d 323, 328 (D.D.C. 2002) ("The FOIA is considered a unique statute because it recognizes a constructive exhaustion doctrine for purposes of judicial review upon the expiration of certain relevant FOIA deadlines.").

Because Defendants violated FOIA by failing to communicate their determination within the statutory deadlines, and only produced records after Plaintiff filed its complaint in this Court, administrative remedies have been exhausted, and this Court can maintain jurisdiction to ensure that Defendants properly and completely fulfill Plaintiff's Request. Plaintiff's Request at issue in this litigation was emailed on March 31, 2021 to the Census Bureau's designated email address for receiving FOIA requests, Census.efoia@census.gov, *see* Compl. Ex. F, ECF No. 1-6, and the April 28, 2021 deadline of twenty business days passed without receipt of any notification of Defendants' determination whether to comply with the Request prior to filing the Complaint, 5 U.S.C. § 552(a)(6)(A)(i). Defendants thus violated FOIA's plain statutory deadlines, and the

doctrine of constructive exhaustion of administrative remedies permits this Court to exercise jurisdiction over this action to ensure the agency fully complies with all of FOIA's requirements.

2. Because Plaintiff's Request explicitly seeks non-exempt records, Title 13 of the Census Act does not prohibit Defendants from fulfilling Plaintiff's Request.

Congress's intent in enacting FOIA was to implement "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *U.S. Dep't of Def. v. Fed. Lab. Rels. Auth.*, 510 U.S. 487, 494 (1994) (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976)). Accordingly, FOIA "creates a strong presumption in favor of disclosure," *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1049 (3d Cir. 1995), requiring "the fullest possible disclosure of an agency's records." *Larson v. Dep't of State*, No. 1:02cv01937 (PLF), 2005 U.S. Dist. LEXIS 35713, at *7 (D.D.C. Aug. 10, 2005). Consistent with FOIA's demanding disclosure requirement, FOIA's nine "narrowly-tailored exemptions," *Larson*, 2005 U.S. Dist. LEXIS 35713, at *7, have been "consistently given a narrow compass," *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989). The agency "bears the burden of establishing the applicability of the claimed exemption." *Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 57 (D.C. Cir. 2003).

As explained above, the Census Bureau denied Plaintiff's previous February 19, 2021 FOIA request in its entirety, citing 13 U.S.C. § 9 and stating that Title 13 "requires that census records be used solely for statistical purposes and makes these records confidential." Compl. Ex. B, ECF No. 1-2 at 1. In response, Plaintiff filed its subsequent March 31, 2021 Request at issue here only seeking disclosure of data that Title 13 expressly permits. Indeed, Plaintiff's Request states with unmistakable clarity that it does not seek non-exempt data whatsoever: Plaintiff's Request expressly states that it does not "seek disclosure of the underlying raw group quarters

population data itself as originally 'reported by, or on behalf of, any particular respondent' to the Bureau, 13 U.S.C. § 8(b), nor do we seek any 'publication whereby the data furnished by any particular establishment or individual under this title can be identified,' 13 U.S.C. § 9(a)(2)." Compl. Ex. C, ECF No. 1-3 at 3. Plaintiff's Request also clarifies that it does not request examination of protected underlying "individual reports," 13 U.S.C. § 9(a)(3), at all. Rather, it only seeks summaries, "tabulations[,] and other statistical materials," 13 U.S.C. § 8(b), "*deriving from* or summarizing the originally reported raw data, and/or records with data that has been *reformulated* or *repurposed* by the Bureau in a form such that the underlying data can no longer be identified with a particular establishment or individual." Compl. Ex. C, ECF No. 1-3 at 3. Because Plaintiff does not request data that is exempt from disclosure under the Census Act, the Census Bureau cannot rely on that Act's exemptions to effectively deny Plaintiff's request through targeted redactions and withheld records.

Nevertheless, in its 988-page May 25 production, the Census Bureau withheld and redacted nearly all of Plaintiff's requested non-exempt summary data interspersed throughout the production, essentially amounting to a constructive denial of Plaintiff's Request. The overwhelming majority of Defendants' redactions and withheld records cite Title 13 as providing a statutory bar to disclosure of all Census data, allegedly making it exempt from production under FOIA Exemption number 3. Such redactions, and in many instances fully withheld records, are tantamount to the Bureau's earlier denial of Plaintiff's February request because the effect is the same: release of the requested statistical information has been denied. *Cf. Thomas v. HHS*, 587 F. Supp. 2d 114, 115-16 (D.D.C. 2008) (finding that request had been constructively denied after FDA failed to provide him with a determination and stopped replying to his letters).

In subsequent email deliberations between the parties' counsel, Defendants' counsel has

since clarified the Census Bureau's extreme and sweeping interpretation of the scope of Title 13's confidentiality provisions: Defendants maintain that beyond withholding personally identifying information, the Bureau must also account for "complementary disclosure" where the release of intermediate data that "does *not appear to contain* individually identifiable information, but *could result* in identifying individuals when those data are coupled with other information in existing Census Bureau publications or other publicly available information." *See* Ex. 3 at 6-9 (7.6.21 Kossak email) (emphasis added). Defendants argue that their all-encompassing approach to confidentiality of any preliminary Census data is necessary because the Bureau "has to keep up with the technology to maintain the public's confidence" in maintaining confidentiality; accordingly, the Bureau "generally avoids the release of intermediate work product [that] can be used in combination with other intermediate work products, official publications, and the final product to re-identify individual respondents and their data items," and thus refuses to release any of Plaintiff's requested intermediate summary or tabulated group quarters data. *See id.*

The problem with Defendants' sweeping interpretation of Title 13's confidentiality provisions, however, is that it conflicts directly with Title 13 itself. As will be shown below, the Bureau's interpretation of Title 13 faces several insurmountable hurdles: the plain language of the disclosure exemptions found in Sections 8 and 9 of the Census Act, together with controlling caselaw and the clear mandates of FOIA itself, all plainly permit the release of *some* Census data, *see* 13 U.S.C. § 8(b), in stark contrast with Defendants' blanket denial of any "intermediate work product" data that "could result" in identifying individuals when combined with other information in existing publications or publicly available information. Besides lacking any factual support beyond Defendants' bald assertion, the Bureau's speculation has no basis in the law itself, and thus cannot support Defendants' sweeping redactions of essentially all "intermediate" group quarters

imputation data sought by Plaintiff in the Request. Furthermore, Defendants themselves used an inconsistent method of data redaction in their own 988-page May 25 production, further casting doubt on the supposed grounding of their decisions in the law's mandates. For these reasons, Plaintiff is likely to succeed on the merits of its claim that Defendants misinterpret Title 13's confidentiality provisions, a pure question of law, and thus that Defendants have unlawfully withheld or redacted information subject to disclosure under FOIA.

a. Defendants' withholding of summary and aggregated data in the May 25 production is contrary to Title 13's plain language.

"[T]he starting point for [a court's] analysis is the statutory text." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003). And where, as here, the words of the statute are unambiguous, the "judicial inquiry is complete." *Connecticut Nat'l Bank* v. *Germain,* 503 U.S. 249, 254 (1992) (citation omitted).

The plain language of Sections 8 and 9 of Title 13 unambiguously permits the Secretary of Commerce to release some Census data, including "copies of tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent," 13 U.S.C. § 8(b), as Plaintiff has explicitly requested here, while excluding the underlying raw data originally "*furnished by* any particular establishment or individual" that would identify such an individual, *id.* § 9(a)(2), or "individual reports," *id.* § 9(a)(3), from disclosure or publication. The statute is unmistakably clear in its meaning: it protects the confidentiality of personally identifiable information and raw data as originally furnished by individuals or establishments to the Census Bureau, while permitting disclosure of other tabulations and summary statistical materials that do not disclose such individual information. Defendants' interpretation that these provisions prohibit release of *all* intermediate work product is contradicted

by the express statutory provisions.

Although Defendants may argue that Section 9's prohibition on "use [of] the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied," *id.* § 9(a)(1), should be interpreted to protect all intermediate data from release, this interpretation is also atextual and contrary to established canons of statutory construction. While Section 9(a)(1) prohibits the Secretary or other DOC employees' "use" of any furnished information for purposes other than designated statistical purposes, it does not expressly prohibit "publication" of all intermediate information—by contrast, Section 9(a)(2) only prohibits "publication" of personally identifiable data "*furnished* by any *particular establishment or individual*," *id.* § 9(a)(2) (emphasis added), but certainly does not prohibit the "use" of such information internally. Accordingly, when Congress intended to protect certain data from *publication* to third parties, it knew how to do so, and did so explicitly. Principles of statutory interpretation require such provisions instead to be interpreted "to give effect, if possible, to every clause and word," *Duncan v. Walker*, 533 U.S. 167, 174 (2001), and to "avoid statutory interpretations that render provisions superfluous." *United States v. Anderson*, 15 F.3d 278, 283 (2d Cir. 1994). If "use" is construed to mean the same thing as "publication," Section 9(a)(2) becomes entirely duplicative of Section 9(a)(1).

Furthermore, an overbroad interpretation of Section (9)(a)(1) directly conflicts with Section 8(b)'s permitted disclosure of tabulations and other statistical materials that do not contain personally identifiable information. Accordingly, Section 9(a)(1)'s prohibition of the Secretary's "use" of "the information furnished" under Title 13 for non-statistical purposes should be interpreted harmoniously with its surrounding provisions, and not so broadly as to contradict the plain text of the other provisions and to render the rest of the statutory disclosure scheme

meaningless. *See Maracich v. Spears*, 570 U.S. 48, 68 (2013) ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory. . . . [T]here can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously.") (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 180 (2012)). The judicial inquiry is thus complete on the statutory text alone.

If Congress intended to create an exemption to disclosure for all preliminary Census data, whether tabulations or raw data, it easily could have done so, *see generally Norinsberg v. U.S. Dep't of Agric.*, 162 F.3d 1194, 1200 (D.C. Cir. 1998) ("Had the Congress intended to [incorporate additional statutory requirements], it could have done so expressly."). Indeed, it would have been far simpler to create a blanket confidentiality requirement for all intermediate data (as Defendants assert) than the more detailed and nuanced scheme the statute currently provides. But that is not what Congress did, and this Court should not reinterpret Title 13's express language to match Defendants' preferred understanding of the confidentiality provisions to bar public disclosure about never before used "group quarter imputation," nor should it ignore FOIA's demands to accord with Defendants' preferred disclosure regime.

Importantly, while Section 8(b) uses discretionary, rather than mandatory, language for disclosure—"the Secretary may furnish"—FOIA *requires* that the Bureau promptly furnish any non-exempt responsive records to a FOIA request. Thus, the requested records at issue here, if they exist, must be promptly provided to Plaintiff. 5 U.S.C. § 552(a)(3)(A) ("[E]ach agency, upon any request for records . . . *shall* make the records promptly available to any person." (emphasis added)). Accordingly, any "tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent" must be turned over to Plaintiff in accordance with its FOIA request, even if the data is intermediate work product. In combination,

FOIA and Title 13 do not leave room for agency discretion when it comes to withholding such summary statistical materials from a FOIA requester.[15]

b. Defendants' interpretation of Title 13 is inconsistent with controlling caselaw.

As caselaw affirms, Section 8(b) of the Census Act permits the Secretary of Commerce to "furnish copies of tabulations and other statistical materials which do not disclose information reported by, or on behalf of, any particular respondent." *In re England*, 375 F.3d 1169, 1178 (D.C. Cir. 2004) (citation omitted); *see also* 14 Am Jur 2d Census § 9 ("The Secretary of Commerce may also furnish copies of tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent, and may make special statistical compilations and surveys for . . . private persons . . . upon payment of the actual or estimated cost of such work."); *Baldrige v. Shapiro*, 455 U.S. 345, 354-55 (1982) (holding that while "the Secretary [of Commerce] *may* furnish copies of tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent," "raw data *reported by or on behalf of individuals* [is] . . . not available for disclosure" (emphasis added)).

The D.C. Circuit has squarely addressed the question of what data can be disclosed under Title 13, determining that Sections 8(b) and 9(a) permit the Secretary of Commerce to provide

[15] As Plaintiff's counsel communicated to Defendants' counsel on June 29, 2021, many of the redactions that Defendants are insisting upon are demonstrably not protected by Title 13, meaning that FOIA requires they be made promptly available to Plaintiff. For instance, the titles of five fully withheld pages from the production is "County Distribution of 2020 Census – GQ Person Ratios Before and After Imputation." This title demonstrates that the redacted distributions contain imputed group quarters numbers aggregated on a county level, and thus do not disclose confidential raw data reported by particular respondents, making them subject to disclosure under FOIA. *See* Ex. 7 (citing May 25 production). Another redacted page, titled "Summarizing the Map," by its own description includes summary data rather than raw data with personally identifiable information or data reported by individual respondents. *See id.*

"private persons" with "tabulations and statistical materials of a *numerical* nature" in response to FOIA requests, while excluding "names and addresses of specific individuals or firms reporting data to the Census Bureau" for purposes of protecting privacy of individual respondents. *Seymour v. Barabba*, 559 F.2d 806, 809 (D.C. Cir. 1977) (emphasis added). As the Court further explained:

> While a list of names and addresses might be considered to be a "tabulation," yet this would be contrary to the usual understanding. Our understanding of a "tabulation" is a *computation to ascertain the total of a column of figures*, or perhaps counting the names listed in a certain group, rather than supplying the individual names and addresses. This interpretation is made even clearer by the reference in subsection 8(b) to "tabulations and other statistical materials."
>
> We think the authority of the Secretary here to disclose is an authority to disclose numerical statistical data which does not identify any person, corporation, or entity in any way. *Totals*, perhaps *subtotals* and *divisions by categories*, but nevertheless merely *numerical* figures are within this meaning. Individual names and addresses are not.

Id. (emphasis added). Here, because Plaintiff seeks tabulations (*i.e.*, computations of total imputed group quarters data) and statistical materials "of a numerical nature," *id.*, rather than personally identifiable information from the underlying raw data, these records are not exempt from disclosure by the Census Act and must therefore be produced. 5 U.S.C. § 552(a)(3)(A) ("[E]ach agency, upon any request for records . . . *shall* make the records promptly available to any person." (emphasis added)).

In their July 6 email to Plaintiff's counsel, Defendants rely on the Supreme Court's ruling in *Baldrige v. Shapiro* to support their contention that Title 13 exempts essentially limitless swaths of summary-level data from disclosure, thereby exempting such data as is responsive to Plaintiff's FOIA request. Ex. 3 at 7-8 (7.6.21 Kossak email). *Baldrige*, however, bolsters Plaintiff's argument that the data being withheld by Defendants is not raw census data and is therefore ineligible for exemption from disclosure requirements. In *Baldrige*, a county requested disclosure of the Census Bureau's master address register, "a listing of such information as addresses, householders' names,

number of housing units, type of census inquiry, and, where applicable, the vacancy status of the unit." 455 U.S. at 349. At issue was whether the register was exempt from disclosure under Exemption 3 and Title 13 sections 8(b) and 9(a), the former of which directs the Secretary to "not disclose the information reported by, or on behalf of, any particular respondent" and the latter of which prohibits publication "whereby the data furnished by any particular establishment or individual under this title can be identified." Such census responses or identifying information are considered raw census data exempt from disclosure. *Id.*

Despite being "compiled initially from commercial mailing address lists and census postal checks," the master address register in *Baldrige* "was updated from data obtained from neighbors and others who spoke with the follow-up census enumerators," meaning it "include[d] data reported by or on behalf of individuals." *Id.* at 358–59. As such, the Court held that the register included raw census data and therefore fell under section 8(b)'s exemption from disclosure.

Similarly, in *Seymour v. Barabba*, the D.C. Circuit reviewed a FOIA request for Census Bureau data including the names and addresses of certain companies. The court held that not only is such information clearly exempt under Title 13, section 9(a)'s prohibition on releasing identifying information, but also that it is separate from the "tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent" that the Secretary may produce under section 8(b). *Seymour*, 559 F.2d at 808-09. In drawing this distinction, the court clarified that Title 13 requires courts to treat individualized identifying information differently from higher-level computations and summaries that do not implicate the same privacy concerns.

Taken together, *Baldrige* and *Seymour* establish that information provided directly by census participants and identifying information such as names and addresses are both exempt from

disclosure under Exemption 3 and Title 13 sections 8(b) and 9(a). Plaintiff's Request here, however, asks for neither kind of data. Instead, the Request seeks state-level summaries and tabulations *derived* from the raw census data, representing the kind of higher-level analytical information distinguished by the *Seymour* court as not being exempt under Title 13. Defendants' attempts to cast such non-individualized information as exempt from disclosure is therefore without support in the courts' interpretations of these exemptions. The summary data and aggregate calculations sought implicate none of the same concerns regarding individual participants' identification, as by their very nature they provide only aggregate numbers and general trends. The D.C. Circuit's opinion in *Seymour* particularly indicates such data should be considered separately from identifying information, undermining Defendants' attempt to conflate the two types of data, and further bolstering Plaintiff's case for disclosure under FOIA.

Binding caselaw thus also demonstrates that Plaintiff is likely to succeed on the merits of its FOIA claim—contrary to Defendants' extreme and unfounded position, Plaintiff is entitled to the numerical, summary data and tabulations sought in its Request that is subject to disclosure under Title 13.

c. Defendants' inconsistent approach to redactions further undermines their claims that their particular redactions from the May 25 production are required by Title 13.

Finally, by inconsistently redacting data from the May 25 production, Defendants undermine their own claims that their particular withheld data from the May 25 production were required by Title 13. Instead, their redactions of data appear arbitrary and not governed by standards required by law. To illustrate, in 77 highly similar statistical summary pages for group quarters titled "GQTYPCUR," particular kinds of data (including significant amounts of summary data) are also inconsistently redacted throughout. For instance, some pages have every piece of

data fully redacted from the page, while on other surrounding pages Defendants redacted the exact same types of data. *See* Ex. 7. Moreover, on some pages, the range and mean data points were not redacted, where on other pages Defendants partially or fully redacted those data. *See id.*

A consistent approach to redaction should yield uniform applications and outcomes for the same kinds of data; because Defendants' redactions are all over the map on these statistical summary pages, it further undermines Defendants' position that their chosen redactions were required by law. This arbitrariness adds further support for Plaintiff's likelihood of success on the merits.

3. As Defendants implicitly acknowledged by granting Plaintiff's application for expedited processing in the first place, an injunction and order requiring expedited production of improperly withheld portions of its Request is appropriate here to inform an imminent public debate on a matter of national concern.

Plaintiff seeks a preliminary injunction compelling expedited processing of the improperly redacted portions of its FOIA request and that, pursuant to the court's equitable powers to order agencies to act within a particular time frame, *see Landmark Legal Found. v. EPA*, 910 F. Supp. 2d 270, 275 (D.D.C. 2012), this Court order this process to be completed within ten days of the issuing of its order, or before August 15, 2021, whichever is earlier. Defendants argue that a preliminary injunction is not an appropriate vehicle for challenging improperly withheld or redacted records because injunctive relief would be akin to a "decision on the merits." Ex. 3 at 1 (7.16.21 Kossak email). However, this case is akin to the line of precedents where there was an urgency to inform the public of actual or alleged federal government activities, and where courts thus granted preliminary injunctive relief and ordered production of withheld documents.

For instance, as this Court recently recognized in *American Oversight v. U.S. Department of State*, courts in this district have granted preliminary injunctions in cases like this one, and

ordered production of non-exempt documents by specific dates, where "FOIA requestors have sought records to inform an imminent public debate on a matter of national concern." 414 F. Supp. 182, 185 n.5 (D.D.C. 2019). *See, e.g.*, *Elec. Privacy Info. Ctr. v. U.S. Dep't of Justice*, 416 F. Supp. 2d 30 (D.D.C. 2006) (ordering release of records related to the Bush Administration's legal justifications for its warrantless wiretapping program in the course of ongoing congressional hearings); *Wash. Post v. U.S. Dep't of Homeland Sec.*, 459 F. Supp. 2d 61 (D.D.C. 2006) (ordering release of records of visitors to the White House and the Vice President's residence *within a period of 10 days* because of the impending midterm elections to be held within a month) (*vacated as moot by subsequent consent motion*, *Wash. Post v. Dep't of Homeland Sec.*, No. 06-5337, 2007 U.S. App. LEXIS 6682, at *1 (D.C. Cir. Feb. 27, 2007)); *Leadership Conf. on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246 (D.D.C. 2005) (ordering release of data regarding the DOJ's responses to election-related civil rights violations in advance of the imminent expiration of the Voting Rights Act).[16]

The Census Bureau's delay in releasing its redistricting population data, arising from the Bureau's novel use of count imputation for tabulating group quarters data, and its publicly acknowledged irregularities resulting from the same, are exactly the kinds of issues subject to current and "imminent public debate on a matter of national concern" justifying an order that Defendants produce non-exempt documents by a date certain.

For instance, the subject matter of Plaintiff's Request has been the subject of widespread media attention. As the Census Bureau has publicly announced, the first release of its "legacy format" summary redistricting data to the states for the 2020 Census has been delayed until August

[16] *See generally Ctr. for Pub. Integrity v. U.S. Dep't of Defense*, 486 F. Supp. 3d 317 (D.D.C. 2020) (ordering release of withheld documents because they were not protected under privileges and therefore not exempt under FOIA).

16, 2021 (with the final release of the redistricting data scheduled to occur on September 30, 2021)[17] to allow for time to address difficulties and irregularities it encountered while gathering and tabulating group quarters data for the 2020 Census, explaining that challenges resulted largely from the COVID-19 pandemic.[18] As described above, in an April 16, 2021 publication on its website by the Chief of the Decennial Statistical Studies Division, the Bureau publicly acknowledged that it "had to adapt and delay some of the ways we counted group quarters because of the COVID-19 pandemic," and explained that, consequently, "[a]fter the end of data collection, when we began processing census data from group quarters, we realized that many of them were occupied on April 1, 2020 (the reference day for the census), but didn't provide a population count."[19] The Bureau also explained the significant impact such group quarters data discrepancies can have for obtaining an accurate population count:

> [W]hen we enumerated [group quarters] in midsummer, some group quarters said they were vacant but they were actually occupied on April 1. If not corrected, such cases could lead to an undercount. If the corrections were not properly coordinated with our procedures to remove duplicated people, they could contribute to an overcount.[20]

Accordingly, the Bureau decided to use some sort of "count imputation" procedures on unresolved group quarters, including for missing characteristics such as age or race, that it "had never before conducted" for group quarters previously.[21]

This data has profound implications for the apportionment of seats in the House of Representatives and the amount of federal funding each State receives for various programs, as well as for the process of drawing electoral districts. It therefore goes without saying that the

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[17] Important Dates, U.S. Census Bureau, *supra*.
[18] *Feb. 12, 2021 Census Press Release*, *supra*; *see also Mar. 15, 2020 Census Press Release*, *supra*; *Operational Adjustments*, *supra*.
[19] *Pat Cantwell Statement*, *supra*.
[20] *Id.*
[21] *Id.*

Census Bureau's announcements of irregularities, discrepancies, and novel methods of "count imputation" for group quarters, coupled with the resulting significant delay in releasing the data, is a matter of imminent public debate and national concern. It has also caused many in the media and public to call into question the soundness and reliability of the Bureau's methods, and has thus adversely affected public confidence in the 2020 Census data. For instance, NPR reported that the Census Bureau identified what it described as "processing anomalies" of records for 2020's national tally that "if left unfixed, could miscount millions of people."[22] The report went on to describe how the Bureau had "unearthed major inconsistencies in the information it has gathered this year about residents of college dorms, prisons and other group living quarters—a category that, for the 2020 census, included around 8 million people."[23] Not surprisingly, numerous other large media outlets have covered similar stories of exceptional importance and national interest connected to these irregularities and delays, provoking public skepticism of the accuracy and lawfulness of the Bureau's data collection methods, and questions about whether the resultant delays in redistricting threaten to throw future elections into chaos.[24]

Regarding the urgency of Plaintiff's Request, the time-sensitive nature of it is similar to that in *American Oversight*, where this Court granted the plaintiff's motion for a preliminary

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[22] *Millions of Census Records May Be Flawed, supra*; *see also 6-Month Delay in Census Redistricting Data Could Throw Elections Into Chaos*, *supra*.

[23] Wang, *Millions of Census Records May Be Flawed, supra.*

[24] *See, e.g.*, *Mike Schneider, Census Bureau Says Data Irregularities Being Fixed Quickly*, AP (Dec. 3, 2020), https://apnews.com/article/us-news-censuses-census-2020-32fd4322e680365c1de69ab63fc92133 (accessed on July 18, 2021); Reid Wilson, *Census to Delay Data Delivery, Jeopardizing Redistricting Crunch*, The Hill (Feb. 12, 2021), https://thehill.com/homenews/campaign/538649-census-to-delay-data-delivery-jeopardizing-redistricting-crunch (accessed on July 18, 2021); Tara Bahrampour, *Can Americans Trust the Results of the 2020 Census?* Wash. Post (Apr. 26, 2021), https://www.washingtonpost.com/local/social-issues/census-2020-delays-trump/2021/04/22/3a03fbe8-a154-11eb-a7ee-949c574a09ac_story.html (accessed on July 18, 2021).

injunction and ordered release of all expedited, non-exempt documents within in less than one month's time. 414 F. Supp. 3d at 187. Specifically, the plaintiff in that case sought records that went to the heart of an issue Congress was then considering in its inquiry into whether the President of the United States had committed impeachable offenses. *Id.* at 183-84. The Court determined that because the impeachment inquiry was "in full swing" and expected to "conclude by Christmas," time was "clearly of the essence," making the "harm in agency delay . . . more likely to be irreparable." *Id.* at 186-87. Central to this Court's determination there was the fact that, even though the agency had granted expedited processing of the plaintiff's request, the agency had only offered "a very preliminary and incomplete estimate of the number of potentially responsive documents" and had "not even begun to process them." *Id.*

Separately, because Defendants have already granted Plaintiff's application for expedited processing, apparently acknowledging the urgency of its request, *see* Ex. 5, injunctive relief and expedited production of the non-exempt withheld records and data is justified here. To obtain expedited processing under the statute, Plaintiff needed to show a "compelling need," 5 U.S.C. § 552(a)(6)(E)(i), which can be demonstrated by showing, *inter alia*, that the requester is a "person primarily engaged in disseminating information" and that there is an "urgency to inform the public concerning actual or alleged Federal Government activity." *Id.* § 552(a)(6)(E)(v)(II). Alternatively, pursuant to 5 U.S.C. § 552(a)(6)(E)(i)(II), DOC regulations also allow for expedited processing where a request involves "[a] matter of widespread and exceptional media interest involving questions about the Government's integrity which affect public confidence." 15 C.F.R. § 4.6(f)(1)(iii). Defendants' grant of Plaintiff's application for expedited processing is thus an implicit acknowledgment of the accuracy of Plaintiff's argument for a court order of immediate or expedited production of the withheld data. In order is necessary, however, because of Plaintiff's

urgency to inform the public about a matter of widespread and exceptional media interest, *i.e.*, the delay and irregularities in the Census group quarters data and its implications for the accuracy of the apportionment count and redistricting.

Because Fair Lines is "primarily engaged in disseminating information" and is likely to succeed in demonstrating an "urgency to inform the public concerning actual or alleged Federal Government activity," 5 U.S.C. § 552(a)(6)(E)(v)(II), this likewise provides an independent basis for granting the preliminary injunctive relief sought by Plaintiff here.

First, while the statute does not define the meaning of a primary disseminator of information, Plaintiff is similar to non-partisan public policy groups that this Court has determined qualify for expedited processing, in that Plaintiff "regularly writes, publishes, and disseminates information." *Brennan Ctr.*, 498 F. Supp. 3d at 9. Indeed, as a Section 501(c)(3) non-profit organization committed to educating the public on fair and legal redistricting, Fair Lines regularly writes, publishes, and disseminates news and information about its comprehensive data gathering, processing, and deployment efforts pertaining to apportionment and redistricting, as well as updating the public on relevant litigation and legal developments throughout the country, while also strategically investing in and publishing academic research. *See* Compl. Ex. C, ECF No. 1-3 at 5-6. In all of these information disseminating activities, Fair Lines is committed to providing public education in the fields of demography, political science, geographic information systems, and legal studies, all while promoting open and transparent government and public accountability by monitoring the activities of policymakers and officials through FOIA requests. *Id.* at 7. Fair Lines uses information gathered from its FOIA requests, and its analysis of that information, to educate the public through reports, press releases, and other media. Fair Lines also publicizes the materials it gathers on its public website and promotes their availability on social media platforms.

Id. Accordingly, Plaintiff is primarily engaged in dissemination of information and meets this statutory requirement.[25]

Second, there is an "urgency to inform the public" here concerning both actual and alleged Federal Government activity, 5 U.S.C. § 552(a)(6)(E)(v)(II), namely concerning the Census Bureau's publicly acknowledged irregularities in the group quarters data for the 2020 Census, especially considering the Census Bureau's unprecedented use of count imputation methods for tabulating unresolved group quarters in the context of the COVID-19 pandemic. This is a matter of current exigency to the American public because these irregularities could lead to gross over- or under-counting of different group quarters populations, and as the media stories and other sources listed above detail, threaten to sow chaos in both redistricting and the upcoming elections. The public has an urgent need to be informed about the reliability (or unreliability) of this data from informed sources like Plaintiff. Furthermore, undue delay threatens to compromise Plaintiff's significant interest in informing the public concerning the soundness and accuracy of the 2020 Census data and imputation processes currently being employed. Finally, given the Census Bureau's impending August 16 release date of the legacy format summary redistricting data to the states for 2020, which will officially commence nationwide redistricting of congressional seats, the public's need to be informed regarding the accuracy of the Census Bureau's data is urgent in every sense of the word.

Accordingly, Plaintiff has demonstrated that this is the kind of exceptional case where injunctive relief regarding redactions and withheld documents from a production is merited; the court should therefore order that Defendants expedite processing of the withheld data under 5

[25] Other courts have found that organizations akin to Fair Lines meet this standard for expedited processing, *see, e.g.*, *Protect Democracy Project v. U.S. Dep't of Def.*, 263 F. Supp. 3d 293, 298-300 (D.D.C. 2017); *Leadership Conf. on Civil Rights*, 404 F. Supp. 2d at 260.

U.S.C. § 552(a)(6)(E)(v).

Furthermore, to obtain preliminary relief by a particular date, Plaintiff must show that it is likely entitled to have the agency finish processing its request by that particular date. *Protect Democracy Project*, 263 F. Supp. 3d at 301; *Brennan Ctr.*, 498 F. Supp. 3d at 99. Because this analysis overlaps significantly with the "irreparable harm" factor, *Brennan Ctr.*, 498 F. Supp. 3d at 99, Plaintiff incorporates here its arguments outlined *infra*.

Defendants' failure to properly expedite processing of Plaintiff's request with respect to the withheld documents is particularly egregious because the agency has publicly acknowledged the unprecedented irregularities that Plaintiff seeks to investigate—the fact that the 2020 group quarters data is known to be highly suspect makes the imminent release of Plaintiff's requested records all the more time sensitive and pressing, because it demonstrates a likely need for action on the part of Plaintiff, the public, and Defendants to correct any errors. Without a court-ordered date for production, Plaintiff and the public "may not otherwise have access" to the records, *Am. Oversight*, 414 F. Supp. 3d, in time for corrective action to be taken by the Bureau before legislative redistricting and the impending elections are fully underway.

Just as the impeachment inquiry at issue in *American Oversight* was in "full swing," warranting expedited production of responsive documents in less than one month's time, *id.* at 186-87, here the Census Bureau has publicly announced that it is currently working to correct problems arising from its group quarters imputation methods and data irregularities. The high stakes of such irregularities in terms of the impact on apportionment and redistricting cannot be overstated. The records sought here pertain to a problem that is not only ongoing, but literally in full swing with the August 16, 2021 legacy data release date drawing near. However, in contrast with the records sought *American Oversight*, Plaintiff's requested records here involve a matter

significantly more complicated and intricate: the accuracy of complex statistical methods used to accumulate and tabulate data affecting the count (and by extension, the vote) of potentially millions of individuals living throughout the entire United States. Thus, while a court-ordered production deadline of a little more than a month's time was deemed sufficient in *American Oversight*, Plaintiff here submits that it will need as much time as possible to (1) discover any problems or irregularities with the agency's tabulations or imputation methods, and (2) take action to ensure that corrective measures are implemented by the Bureau in time to prevent irreparable harm to Plaintiff and the public with impending elections that could be directly impacted. As this Court recognized, it is not enough for the public to have awareness of the government's actions of national importance; it is a "structural necessity in a real democracy" that the public have "*timely* awareness" because "stale information is of little value." *Id.* at 186 (quoting *Payne Enters. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988)) (cleaned up).

Accordingly, given the time sensitivity of the Census Bureau's impending August 16, 2021 deadline to release the data states need to begin redistricting, Plaintiff requests a court-ordered production deadline of non-exempt responsive data and records from the May 25 production by August 15, 2021, or ten days after the Court's order granting preliminary relief, whichever is earlier. Otherwise, the records requested risk becoming "of little value" to Plaintiff and the public because they will be powerless to do anything to bring about change to the defective process or data, making the harm from inaction more likely to be irreparable, as argued further below. *Id.; see also Brennan Ctr.*, 498 F. Supp. 3d at 101. Defendants' delay in complying with Plaintiff's manifestly compliant Request fully demonstrates the necessity of a preliminary injunction here. The agency has shown no urgency in taking action to fulfill Plaintiff's Request and will likely continue dragging its feet until it will eventually become too late for Plaintiff to take meaningful

action and conduct sufficient analysis of the requested records.

Because Plaintiff has shown a likelihood of success on the merits of its claim that Defendants err in their interpretation of Title 13's confidentiality provisions, and thus have withheld non-exempt documents manifestly subject to disclosure under FOIA, this Court should grant Plaintiff's motion for preliminary injunctive relief with an order requiring Defendants to release non-exempt records and data withheld or redacted in response to Plaintiff's Request within 10 days of the Court's order (or no later than August 15, 2021).

B. Plaintiff Will Suffer Irreparable Harm Absent Preliminary Injunctive Relief.

In the absence of a preliminary injunction, Plaintiff will suffer irreparable harm because it will be prevented from receiving information which it is legally entitled to receive under FOIA, and from fulfilling its purpose of informing the public of this matter of highest national concern, until such time as the requested information is no longer relevant or actionable. The D.C. Circuit has established "a high standard" for demonstrating irreparable injury, requiring plaintiffs to show that their injury is "both certain and great; it must be actual and not theoretical." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006); *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). The core of this inquiry is, of course, the irreparability of the harm. A harm is deemed irreparable when "there can be no do over and no redress." *League of Women Voters v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016) (citation omitted). Here, if states are allowed to redistrict using flawed Census Bureau group quarters data, then there would be no conceivable redress for Plaintiff's harm.

Plaintiff has demonstrated that its harm will quickly become irreparable in the absence of judicial intervention. On March 31, 2021, Plaintiff submitted a FOIA request to Defendants seeking records "*deriving from* or summarizing" the responses received to the Census Bureau's

2020 Group Quarters Enumeration questionnaire. Compl., ECF No. 1, ¶ 19. Plaintiff deliberately worded its request in such a way that it is *not* seeking the underlying raw group quarters data that is exempt from disclosure under the Census Act, yet Defendants' first production of records erroneously redacted large swaths of non-exempt information. *See* Exhibit 4. Plaintiff requested, and was granted, expedited processing due to its concern that Defendants would delay providing all documents responsive to the Request for so long that Plaintiff will be unable to adequately inform the public about the content of the requested records and any potential flaws in the group quarters data before the states' redistricting process is in full swing. *Id.* ¶ 20. While the award of expedited processing was welcome, its benefits will not be realized if Defendants continue to illegally withhold the very information needed to accomplish Plaintiff's goal. Plaintiff has raised its objections to specific redactions to no avail, with Defendants standing by their initial determinations despite clear inconsistencies even within the collection of records provided to Plaintiff on May 25. Plaintiff has done all that it can to obtain the release of the improperly withheld information on its own, and without the prompt intervention of this Court Defendants have shown they will not release the group quarters data before Plaintiff suffers irreparable harm from these redactions.

The U.S. Supreme Court has recognized in the context of FOIA that a well-informed public is "a structural necessity in a real democracy," a rule so broad that citizens are generally entitled to the information requested unless an applicable statutory exception applies. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). The timing of disclosure also matters a great deal under FOIA. The value of particular data can fluctuate over time, and if a disclosing agency delays release of the requested data for long enough then it can eventually lose *all* of its value. *See Payne Enters.*, 837 F.2d at 494 (noting that "stale information is of little value"). Without a

preliminary injunction from this Court, it is likely that the information sought by Plaintiff in its March 31, 2021 Request will eventually lose substantial value because states will commence redistricting without access to that data, new maps will be drawn, and elections will be held based on data that is possibly fundamentally flawed, and no one will be any the wiser. The harmful effects of the states' reliance on potentially faulty group quarters imputation numbers becomes exponentially worse with every passing day, increasing the costs of correcting the numbers and the maps drawn based on them, as states get closer to completing their redistricting processes. Thus, the longer Defendants can stall in turning over any improperly redacted information, the less likely it becomes that any inaccurate apportionment data can be promptly fixed and properly used without massive financial and logistical costs for numerous states throughout the Union. And even if such apportionment errors could eventually be mitigated, additional irreparable harm could result from the public relations havoc that such an unwieldy, delayed exercise could create, leading to reputational damage to our country's electoral system in the eyes of an electorate that is already grappling with doubts about the soundness and integrity of its elections.

The national implications of a defective decennial census make this an exceptional FOIA case, the kind in which "the primary value of the information lies in its ability to inform the public of ongoing proceedings of national importance." *Ctr. for Pub. Integrity v. U.S. Dep't of Def.*, 411 F. Supp. 3d 5, 12 (D.D.C. 2019). Once the Census Bureau publicly releases its legacy format data, with the imputed group quarters numbers baked in, on August 16, the clock of irreparable harm will begin to exponentially speed up as states frantically begin the already delayed redistricting process in preparation for next year's impending election season. Hence, a preliminary injunction is now the only remedy that will adequately protect Plaintiff's right to receive the improperly withheld data at a time when it will still be of full use to Plaintiff.

Plaintiff will suffer irreparable harm in the absence of preliminary injunctive relief because it will be prevented from disseminating important information to the public before a nationwide redistricting process is well underway based on flawed data provided by the Bureau, making the harm more and more difficult to mitigate with each passing day. Plaintiff "seeks records relating to an important public debate and discussion about a process that will come to an end relatively soon." *Brennan Ctr.*, 498 F. Supp. 3d at 103. The entry of a preliminary injunction is therefore necessary to protect Plaintiff (and members of the public that Plaintiff informs) from ongoing, increasing, and irreparable harm.

C. The Balance of the Equities and the Public Interest Favor Granting an Injunction.

The balance of the equities and public interest preliminary injunction factors "merge when the Government is the opposing party." *Nken*, 556 U.S. at 435. Here, any burden that Defendants will incur in terms of processing redacted data and records during an administrative backlog is outweighed by Plaintiff's superior interest in obtaining information and informing the public concerning "an issue of the highest national concern." *Ctr. for Pub. Integrity*, 411 F. Supp. 3d at 15. The injury that Plaintiff will suffer if the requested information is not released in a timely manner is imminent, substantial, and irreparable. Defendants' obstinance with regard to the improperly redacted data indicates that Defendants are uninterested in voluntarily complying with their statutory obligation to produce the requested non-exempt records. In the absence of an injunction that forces Defendants to immediately comply with federal law, Plaintiff will continue to suffer that ongoing and irreparable injury.

Courts weighing the grant of a preliminary injunction "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Vill. Of Gambell*, 480 U.S. 531, 542 (1987). Unlike Plaintiff, who will

suffer a substantial and irreparable harm to their ability to timely inform the public concerning a matter of the greatest public concern, Defendants' only harm from an injunction would come in the form of potential processing delays in other FOIA matters. Although this kind of injury might suffice in some scenarios to tip the balance in Defendants' favor, it does not do so here.[26]

This Court need not look far to find a precedent that is directly on point. The D.C. Circuit recently rejected this very form of injury in a case where a plaintiff sought records related to the 2020 decennial census, the same topic of public concern at issue here. *See Brennan Ctr.*, 498 F. Supp. 3d at 103. In that case, the Court held that the defendant agencies' burden in responding to the FOIA request was "outweighed by the [plaintiff]'s pressing need for the information and the public interest in being informed on a matter—the 2020 census and reapportionment of seats in the House of Representatives—that is *of the highest national concern*." *Id.* (quotation omitted) (emphasis added). Faced with a matter "of the highest national concern," even the increased delays that might result for other FOIA requestors pale in comparison to the harm that Plaintiff will suffer if its request is not timely fulfilled. While "[t]he grant of a preliminary injunction in this case will likely place Plaintiff's request ahead of others in Defendants' FOIA queues, … the extraordinary circumstances presented in this case warrant such line-cutting." *Ctr. for Pub. Integrity*, 411 F. Supp. 3d at 14.

In this case, Defendants' potential harms (such as they are) are outweighed by the overriding public interest in receiving information concerning an issue of vital national importance: the 2020 decennial census and concomitant redistricting of congressional districts

[26] Although Defendants may argue that release of summary data has potential to create harm due to the risk of re-identification of individual respondents and their data items, this "injury" is largely speculative and unsubstantiated. The Court need not take Defendants at their word that such a risk is real or substantial without further elaboration or explanation as to how significant a threat is posed by release of such aggregate, summary-level data that Title 13 does not protect from release.

nationwide. Plaintiff's request is simple; it seeks only information to which it is legally entitled under FOIA. Defendants have demonstrated no inclination to provide the withheld data requested on *any* timetable, much less at a date when it can still usefully inform the public debate over redistricting. In cases where federal agencies refuse to satisfy their obligations under FOIA regarding a matter "of the highest national concern," it is necessary that a court step in to ensure the timely release of the requested information.

Defendants' inexcusable obstruction through these redactions is also contrary to FOIA's express legislative purpose of creating an *expedient* mechanism of providing access to government records. *See Pennsylvania v. United States*, Civil Action No. 05-1285, 2006 U.S. Dist. LEXIS 101810, at *18 (W.D. Pa. Nov. 22, 2006) ("Consistent with the purpose of creating an expedient mechanism for disseminating information and holding government agencies accountable, FOIA directs government agencies to promptly produce any requested materials . . . ."). Even if FOIA's rapid production requirements are demanding for agencies, that is a policy determination Congress made in enacting FOIA's time limits. Indeed, when Congress increased the limit for responding to FOIA requests from 10 days to 20 days, it repeatedly "expressed concerns about agencies delaying their responses" to FOIA requests when doing so. *Beagles v. Watkins*, No. 16-506 KG/CG, 2017 U.S. Dist. LEXIS 143723, at *9 (D.N.M. Sep. 6, 2017). Furthermore, Congress increased the time limits "to make them more realistic," which "signaled the priority Congress placed on agency compliance with the time limits." *Id.*; *Gilmore*, 33 F.Supp. 2d at 1187 (explaining Congress "took these deadlines very seriously" and thus required timely agency responses).

Beyond violating FOIA's textual requirements and contravening its clear purpose, Defendants' obstruction is particularly egregious given the context of the prominence and high

stakes of the 2020 Census, concerns the Bureau has publicized regarding its group quarters data collection and imputation methods largely due to the COVID-19 pandemic, and the fast-paced timeframe for apportionment and redistricting, all of which are central to this Request. Practical and judicial economy considerations also favor Plaintiff's requested relief here: absent some form of immediate relief for clear and blatant FOIA violations like these, the message communicated to agencies is that statutory production deadlines and requirements can be circumvented by over-redaction and withholding of documents they do not wish to produce. Agencies will thus have minimal incentive to comply with their FOIA obligations until they are brought into court, further driving up expensive FOIA litigation costs and unnecessarily wasting judicial resources.

Therefore, Plaintiff respectfully requests that this Court grant the requested preliminary injunction to vindicate the Plaintiff's right and the public's interest in the census data requested.

CONCLUSION

For the foregoing reasons, this Court should GRANT Plaintiff's Motion for a Preliminary Injunction and (1) declare that FOIA and Sections 8 and 9 of Title 13 require Defendants to produce tabulations and statistical materials which do not disclose the information reported by or on behalf of any particular respondent, as requested by Plaintiff, including intermediate work product and data without personally identifiable information; (2) order Defendants to immediately identify all non-exempt records and data that were improperly redacted or withheld from the May 25 production;[27] (3) order Defendants to produce all responsive non-exempt records and data from that production within 10 days of the date of the Court's Order, or before August 15, 2021, whichever is earlier; (4) order Defendants to produce all responsive records and data from

[27] To be clear, the Plaintiff is not asserting that every redaction from the May 25 production is improper. Certain redactions—such as internal computer file location descriptions and some of the pages that clearly discuss responses from a single group quarters facility or from individual respondents—are not being challenged in this action.

Plaintiff's proposed narrowed scope of the identified responsive emails from the parties' counsels' negotiations as soon as practicable; and (5) order Defendants to produce a *Vaughn* Index specifically describing in detail each record and portion of each record withheld as exempt within the same timeframe.

Dated: July 19, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that, on this 19th day of July 2021, the foregoing Statement of Points and Authorities in Support of Plaintiff's Application for Preliminary Injunction was filed electronically with the Clerk of Court using the CM/ECF system. The system instantaneously generated a Notice of Electronic Filing which served all counsel of record.

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