UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FAIR LINES AMERICA FOUNDATION, INC., 2308 Mount Vernon Ave. Ste. 716 Alexandria, VA 22301-1328 Plaintiff, v. UNITED STATES DEPARTMENT OF COMMERCE 1401 Constitution Avenue, NW Washington, D.C. 20230; and UNITED STATES BUREAU OF THE CENSUS, 4600 Silver Hill Road Washington, D.C. 20233-3700, Defendants.	Civ. A. No. 1:21-cv-01361 (ABJ)

DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiff Fair Lines America Foundation, Inc. ("Fair Lines") has brought a procedurally improper and meritless preliminary injunction motion under the Freedom of Information Act (FOIA).[1] Defendants, the U.S. Department of Commerce ("Commerce") and the U.S. Census Bureau ("Census Bureau"), offered to brief summary judgment, but Fair Lines rejected that approach in favor of filing an improper motion that seeks to determine the ultimate issue in this case of whether Defendants have improperly withheld information in already-produced or identified records under FOIA Exemption 3 and the Census Act's confidentiality provisions. In fact, despite Fair Lines styling its motion as one for expedited processing, Defendants have already processed and released over 1,000 pages of documents, and Fair Lines has narrowed the scope of its request for emails in such a way as to render an email search unnecessary. The narrowed information Fair Lines seeks resides on a secure database and Defendants are withholding it pursuant to Exemption 3. As such, no records remain to be processed.

Fair Lines' preliminary injunction motion should be denied because Fair Lines does not, and cannot, establish any of the requisite factors for obtaining emergency injunctive relief. First, Fair Lines is unlikely to succeed on the merits. Its motion makes perfectly clear that what Fair Lines seeks is not faster processing, but the release of the information Defendants have withheld under FOIA Exemption 3 pursuant to the Census Act's confidentiality provisions, 13 U.S.C. §§ 8(b) & 9.[2] Indeed, the main thrust of Fair Lines' merits argument is not that Defendants have

[1] Mot. for Prelim. Inj. ("PI Mot."), ECF No. 8.

[2] FOIA Exemption 3 specifically exempts information from disclosure if a statute "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue." 5 U.S.C. § 552(b)(3)(A)(i). The Supreme Court has long held that information deemed confidential under 13 U.S.C. §§ 8(b) and (9)(a) is exempt from disclosure under FOIA Exemption 3. *Baldrige v. Shapiro*, 455 U.S. 345, 355 (1982).

failed to release non-exempt, responsive records—nor could it be given Defendants' productions thus far—but that "Title 13 of the Census Act does not prohibit Defendants from fulfilling Plaintiff's Request." Mem. in Supp. of PI Mot. at 17, ECF No. 8-1 ("PI Mem."). Even if Fair Lines could establish the irreparable harm required for the Court to reach a merits determination, which it cannot, it is not likely to prevail on that question. Under 13 U.S.C. §§ 8(b) & 9(a), "Congress has provided assurances that information furnished to the Secretary by individuals [for purposes of the decennial Census] is to be treated as confidential." *Baldrige*, 455 U.S. at 354. Thus, Defendants have a statutory duty to preserve the confidentiality of the data it collects as part of the decennial census. Over the last several years, the Census Bureau has been diligently, publicly, and transparently developing a complex disclosure avoidance system to meet the risks posed by the advanced technology that exists today. Without a functioning disclosure avoidance system, Census data would be left vulnerable to reconstruction and/or re-identification attacks that would significantly undermine the Census Bureau's compliance with Title 13's confidentiality provisions.

As Defendants explain in detail below and in the declaration of Dr. John M. Abowd (attached hereto as Exhibit 1), Fair Lines' interpretation of Title 13's confidentiality provisions would leave the 2020 Census Disclosure Avoidance System (DAS) vulnerable to death by a thousand cuts from FOIA requesters seeking data that might seem innocuous in a vacuum, but in the aggregate could severely undermine the foundation of the DAS. The DAS is a sensitive instrument that the Census Bureau has finely tuned over the last few years in full view of the public and scientific community. In less than a month, the Census Bureau is set to release vast quantities of data to aid in state redistricting efforts and Voting Rights Act enforcement. That release will take place pursuant not only to the Census Bureau's statutory obligations, but also to an agreement

the Census Bureau has made in separate litigation. Fair Lines nonetheless asks this Court to inflict a last-minute and potentially fatal blow to the DAS, opening the door to many more FOIA lawsuits and significantly undermining Defendants' ability to protect the confidentiality of the 2020 Census data. Nothing in the Census Act's confidentiality provisions, their legislative history, or the case law interpreting those provisions supports Fair Lines' interpretation of Title 13's confidentiality provisions. Fair Lines therefore cannot succeed on the merits.

Fair Lines also fails to demonstrate that it will be irreparably harmed in the absence of a preliminary injunction. Fair Lines argues that the information it seeks will be stale after August 16, 2021, but does not explain how that could possibly be true in light of *Wisconsin v. City of New York*, 517 U.S. 1 (1996), which involved a challenge to a decision made by the Secretary of Commerce not to use a particular statistical adjustment for the 1990 Census. There was no suggestion that the issue in that case was stale when the Supreme Court issued a decision that could have potentially altered census and redistricting data six years after the 1990 Census. Fair Lines' purported injury is also entirely speculative—it admits that disclosure could reveal no problems and "put to rest concerns about the Bureau's new methodology." PI Mem. at 3. That is not the sort of harm that qualifies as "certain and great, actual and not theoretical, and so imminent that there is a clear and present need for equitable relief to prevent irreparable harm." *League of Women Voters v. Newby*, 838 F.3d 1, 7–8 (D.C. Cir. 2016) (citation and alteration omitted).

Finally, Fair Lines cannot show that the balance of equities weighs in its favor. In a separate litigation brought by the state of Ohio, Defendants have committed to the court that they will provide redistricting data by August 16, 2021.[3] If Fair Lines succeeds here, it will likely only further postpone the release of such data, which has already been delayed beyond the March 31,

[3] *Ohio v. Raimondo*, No. 3:21-cv-00064-TMR (S.D. Ohio, May 25, 2021), ECF No. 37.

2021 statutory deadline by the global pandemic. Any further delay risks harming states and entities who are arranging to execute redistricting plans based on receipt of the redistricting data by August 16. If disclosure is ordered prior to August 16, the release of redistricting data would likely be delayed because disclosure of the withheld information would likely force a change in the DAS parameters. It would likely take months for the Census Bureau to make any adjustment. Such a delay has the potential to harm all states that rely on the Census Bureau's redistricting data. And, of greater concern, an order requiring the release of information (even after August 16) would likely destabilize the DAS. That has the very real potential to shake the public's confidence in Defendants' ability to preserve the confidentiality of respondents' information, which will have long-lasting effects on future censuses and surveys conducted by the Bureau. Simply put, if the public does not trust the Census Bureau's ability to keep its data confidential, then it will be far less likely to voluntarily provide critical data to the Census Bureau. That, in turn, will significantly harm the Bureau's ability to meet its constitutional and statutory obligations, and undermine future economic surveys on which our country and its economic engines depend. If FOIA can be used as a tool to undermine the Census Bureau's years-long effort to construct a sophisticated disclosure avoidance system that was created to satisfy Title 13's confidentiality provisions, that effort will be for naught. In no way does that serve the public interest, but instead undermines it.

For these reasons, the Court should deny Fair Lines' motion for a preliminary injunction.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

A. The Decennial Census

"The Constitution requires an 'actual Enumeration' of the population every 10 years and vests Congress with the authority to conduct that census 'in such Manner as they shall by Law

direct.'" *Wisconsin*, 517 U.S. at 5 (quoting U.S. Const. art. I, § 2, cl. 3). Congress, in turn, "has delegated to the Secretary of the Department of Commerce the responsibility to take 'a decennial census of [the] population . . . in such form and content as he may determine.'" *Id.* (quoting 13 U.S.C. § 141(a)). "The Secretary is assisted in the performance of that responsibility by the Bureau of the Census and its head, the Director of the Census." *Id.* (citing 13 U.S.C. §§ 2, 21).

"The Constitution provides that the results of the census shall be used to apportion the Members of the House of Representatives among the States." *Id.* And "[b]ecause the Constitution provides that the number of Representatives apportioned to each State determines in part the allocation to each State of votes for the election of the President, the decennial census also affects the allocation of members of the electoral college." *Id.* "Census data also have important consequences not delineated in the Constitution: The Federal Government considers census data in dispensing funds through federal programs to the States," and the States may use the data "in drawing intrastate political districts." *Id.* at 5–6.

Today, the decennial census is a massive undertaking. Following the 2010 Census, for example, the Census Bureau published over 150 billion independent statistics about the characteristics of the 308,745,538 persons in the resident population that were enumerated in the census. Abowd Decl. ¶ 18. "Although each [decennial census] was designed with the goal of accomplishing an 'actual Enumeration' of the population, no census is recognized as having been wholly successful in achieving that goal." *Wisconsin*, 517 U.S. at 6. "Persons who should have been counted are not counted at all or are counted at the wrong location; persons who should not have been counted (whether because they died before or were born after the decennial census date, because they were not a resident of the country, or because they did not exist) are counted; and persons who should have been counted only once are counted twice." *Id.* As a result, census data

"may be as accurate as such immense undertakings can be, but they are inherently less than absolutely accurate." *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973). That is why the census necessarily requires the cooperation of the public.

B. The Census Act's Confidentiality Provisions

"[A]n accurate census," of course, "depends in large part on public cooperation." *Baldrige*, 455 U.S. at 354. But many people chafe at the notion of providing the government with their personal information. Census Bureau research shows that over half of census respondents were at least "somewhat concerned"—with 28% "very concerned" or "extremely concerned"—about the confidentiality of their census responses. Abowd Decl. ¶ 11. And "[t]hese concerns are even more pronounced in minority populations and represent a major operational challenge to enumerating traditionally hard-to-count populations." *Id.*

"To stimulate [the public's] cooperation[,] Congress has provided assurances that information furnished to the Secretary by individuals is to be treated as confidential." *Baldrige*, 455 U.S. at 354 (citing 13 U.S.C. §§ 8(b), 9(a)). In particular, sections 8 and 9 of the Census Act provide in part that: (i) "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," 13 U.S.C. § 8(b) (emphasis added); and (ii) Defendants, and their officers and employees, may not "make *any* publication whereby the data furnished by any particular establishment or individual under this title can be identified," 13 U.S.C. §§ 9(a), (a)(2) (emphasis added). Indeed, the Census Act provides that Census Bureau staff that publish information protected by section 9 "shall be" subject to fines "or imprisoned not more than 5 years, or both." 13 U.S.C. § 214. In short, "§ 8(b) and § 9(a) of the Census Act embody explicit congressional

intent to preclude *all* disclosure of raw census data reported by or on behalf of individuals." *Baldrige*, 455 U.S. at 361 (emphasis in the original).

C. The Rise of Computing Power and Its Implications for Confidentiality

In past decennial censuses, the Census Bureau protected the confidentiality of the released data by using disclosure-avoidance mechanisms such as suppression (*i.e.*, withholding data) and, in later censuses, data-swapping (*i.e.*, where certain characteristics of a number of households are swapped with those of other households as paired by a matching algorithm). Abowd Decl. ¶¶ 23–25. The 2010 decennial census employed data-swapping as its primary disclosure-avoidance mechanism, and the Census Bureau's data-swapping methodology kept the total population and total-voting-age population constant for each census block, the smallest level of census geography. *Id.* ¶ 25. This method of disclosure avoidance was considered sufficient at the time. *See id.* ¶ 26.

That is no longer the case. It has long been known that purportedly de-identified (anonymous), aggregated data—the sort of data Fair Lines seeks here—may be used to "reconstruct" the underlying raw data by a series of mathematical algorithms, though such attacks had been constrained by the limits of available computational power. The reconstructed data can then be used to re-identify respondents and the information they supplied. Abowd Decl. ¶ 31. In one famous example, Professor Latanya Sweeney revealed in 1997 that she had re-identified then-Massachusetts Governor William Weld's medical records in a purportedly de-identified public database. *See id.* ¶ 27. And as computing power becomes cheaper, more plentiful, and more accessible as it moves to the cloud, re-identification attacks have increased, and have targeted increasingly large datasets. One recent article recounted re-identification attacks on supposedly de-identified datasets as varied as German internet browsing histories, Australian medical records, New York City taxi trajectories, and London bike-sharing trips. *See* Luc Rocher *et al.*, "Estimating

the success of re-identifications in incomplete datasets using generative models," *Nature Communications* (2019);[4] *see also* Abowd Decl. ¶¶ 33–36 (collecting other examples).

The decennial census is not immune to these trends. Following the 2010 census, the Census Bureau conducted its own reconstruction experiment based on just 6.2 billion of the 150 billion independent statistics it had published. Abowd Decl. ¶ 40. The Bureau's simulated attack showed that a conservative attack scenario would allow an attacker to accurately re-identify *at least* 52 million 2010 Census respondents (17% of the population) and the attacker would have a high degree of confidence in their results with minimal additional verification or field work. *Id*. In a more pessimistic scenario, an attacker with access to higher quality commercial name and address data than those used in the simulated attack could accurately re-identify around 179 million Americans or around 58% of the population. *Id*.

D. Differential Privacy

Faced with compelling evidence demonstrating the inherent vulnerability of the 2010 Census swapping mechanism to protect against reconstruction and/or re-identification attacks, the Census Bureau began exploring the available data protection strategies that it could employ for the 2020 Census. This process was overseen by the Census Bureau's Data Stewardship Executive Policy Committee (DSEP). The three disclosure avoidance methods the Census considered were *Enhanced Data Swapping*, *Suppression*, and *Differential Privacy*. Abowd Decl. ¶ 42. The Census Bureau ultimately decided that differential privacy—a framework for quantifying the precise disclosure risk associated with each incremental release from a confidential data source—was the best tool to allow it to calibrate and allocate precise amounts of statistical noise in a way that protects privacy while maintaining the overall statistical validity of the data. *Id*. ¶ 44. Accordingly,

[4] *Available at* https://www.nature.com/articles/s41467-019-10933-3.

DSEP determined that the Census Bureau should proceed with the deployment and testing of differential privacy for use in the 2020 Census given its obligations to produce high quality statistics from the decennial census while also protecting the confidentiality of respondents' census records under 13 U.S.C. §§ 8(b) & 9. *Id.* ¶ 46.

Census announced that it planned to use differential privacy for the 2020 Census in 2018 and 2019. Abowd Decl. ¶ 54. Since then, the Census Bureau has engaged in a years-long public campaign to educate the user community and solicit their views about how differential privacy should be implemented. *Id.* ¶ 55. Census Bureau staff have made hundreds of public presentations, held dozens of webinars, held formal consultations with American Indian and Alaska Native tribal leaders, created an extensive website with plain English blog posts, and conducted regular outreach with dozens of stakeholder groups. They have made presentations to scientific advisory committees and provided substantial information to oversight entities such as the Government Accountability Office and the Office of the Inspector General. *Id.*

E. Implementing Differential Privacy for the 2020 Census: Invariants

Differential privacy is a hugely complex and technical statistical process; an explanation of all of its components is beyond the scope of this brief. But one aspect of differential privacy is critical to understand for purposes of this litigation: invariants. Invariants are data held constant when applying statistical noise. Invariants defeat privacy protections and must be limited in order to protect the integrity of the disclosure avoidance system as a whole. *Id.* ¶ 56.

In designing the requirements for the 2020 Census Disclosure Avoidance System (DAS) the Census Bureau set certain numbers as invariant, meaning it would report these numbers unobscured by statistical noise. *Id.* ¶ 57. The invariants set for the 2020 Census are the state level population totals (the "apportionment totals" reported to the President as required by 13 U.S.C. § 141(b)), the block-level housing unit counts, and block-level occupied group quarters counts by

type. Group quarters are defined as "places where people live or stay in a group living arrangement that is owned or managed by an organization providing housing and/or services for the residents. Group quarters differ from typical household living arrangements because the people living in them are usually not related to one another. Group quarters include such places as college residence halls, residential treatment centers, skilled nursing facilities, group homes, military barracks, prisons, and worker dormitories."[5] Abowd Decl. ¶ 63. Neither the block-level housing unit nor the block-level group quarters counts that have been set as invariant include population data; they are counts of addresses. The Census Bureau did not set as invariant any other totals, including the group quarters population totals Fair Lines seeks. Abowd Decl. ¶ 57.

The Census Bureau has already evaluated the impact of the existing invariants on the stability of the DAS and the confidentiality of the data, and has accounted for those impacts in the approved DAS settings and privacy-loss budget[6] allocation for production of the redistricting data (formally, the 2020 Census P.L. 94-171 Redistricting Data Summary Files). *Id*. ¶ 60. The inclusion of additional invariants (that is, publication of additional data without privacy protections) would undermine this accounting, would render the resulting privacy guarantee represented by the privacy-loss budget allocation meaningless, and would subject census respondents to additional privacy risk. *Id*.

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[5] *See* U.S. Census Bureau (March 2021) "2020 Census Group Quarters", *available at* https://www.census.gov/newsroom/blogs/random-samplings/2021/03/2020-census-group-quarters.html (cited on July 19, 2021).

[6] The global privacy-loss budget and its allocation to each statistic produced by the TopDown Algorithm are the tools that differential privacy uses to keep track of the overall risk of confidentiality breaches. Larger global privacy-loss budgets imply increased vulnerability because statistical accuracy increases as the privacy-loss budget increases. The vulnerability of releasing statistics that are too accurate, and thus pose a confidentiality risk, is controlled by allocating the privacy-loss budget over the geographic hierarchy and across all the statistics computed at each level of the hierarchy. Abowd Decl. ¶ 58 n. 50.

The Census Bureau has subjected its differential privacy mechanisms, programming code, and system architecture to thorough outside peer review. *Id.* ¶ 61. It has also committed to publicly releasing the entire production code base. The Census Bureau has already released the full suite of implementation settings and parameters for the production code base. The Census Bureau's transparency will allow any interested party to review exactly how the algorithm was applied to the 2020 Census data, and to independently verify that there was no improper manipulation of the data. *Id.* ¶ 61.

II. FAIR LINES' COMPLAINT

In this case, Fair Lines submitted a FOIA request to obtain the following:

> All summaries, "tabulations[,] and other statistical materials," 13 U.S.C. § 8(b), derived from, summarizing, and/or otherwise relating to the original underlying group quarters population data for Census Day, April 1, 2020, received in response to the Census Bureau's 2020 Group Quarters Enumeration questionnaire regarding institutional living facilities or other housing facilities. In requesting these summaries, "tabulations[,] and other statistical materials," we do 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); instead, we seek records 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. For instance, any statewide aggregate total group quarters population tabulations of data that exclude, omit, or redact the original group quarters numbers as reported by, or on behalf of, individual institutions (i.e., tabulations where the Bureau excluded the underlying individualized raw data, or where such data can be redacted from the tabulations while producing the aggregate population totals) would be responsive to this request.

Compl. ¶ 19, ECF No. 1. Fair Lines submitted the above request to Census on March 31, 2021. *Id.* Decl. of Vernon Curry ¶ 5 (attached hereto as Exhibit 2). Fair Lines filed its Complaint on May 18, 2021. Compl. In the course of its search for responsive documents, the Census Bureau identified 988 pages of responsive records, which had been released earlier in the year to plaintiffs

in a separate lawsuit, *National Urban League v. Ross*, No. 5:20-cv-05799-LHK (N.D. Cal.). Curry Decl. ¶ 7. Prior to its release in the separate litigation, the information had been redacted by DSEP's Disclosure Review Board (DRB) in accordance with standard Census Bureau policy, to comply with the strict confidentiality requirements of 13 U.S.C. §§ 8(b) and 9. *Id*. On May 25, 2021, Defendants released the 988 pages to Fair Lines. Of those, less than 20% of the pages contained redactions pursuant to FOIA Exemptions 3 and 5. *See* Curry Decl. ¶ 9; PI Mot., Ex. 7, ECF No. 8-10 (challenging 115 redacted pages). The redacted material did not, however, indicate the specific basis for each redaction. Curry Decl. ¶ 9.

From May 27 to the present, the parties, through counsel, have engaged in extensive negotiations over the scope of Fair Lines' request and the appropriate schedule for this litigation. *See, e.g.*, PI Mot., Ex. 3, ECF No. 8-4 (email correspondence between the parties' counsel). On May 27, Fair Lines requested that Defendants identify the specific exemptions applied to each redaction. Fair Lines also noted that Defendants' first release appeared to contain no records after December 2020 and asked that Defendants identify and release any such documents. Finally, Fair Lines requested that Defendants pursue an email search of responsive records and narrowed the scope of the search to all responsive emails sent or received between March 31, 2020 and March 31, 2021. *See* PI Mot., Ex. 3 at 19; Curry Decl. ¶ 10. Fair Lines also provided a description of the information Fair Lines was targeting in pursuing its email request:

> Summaries, tabulations, and other statistical materials that demonstrate the aggregate number of individuals (or percentage of the total) that were counted or imputed as part of any 2020 Census enumeration tabulations (whether preliminary or final) as a result of group quarters imputation procedures (i.e., for unresolved group quarters), with numbers aggregated on a statewide level and on a county-wide level for each state. We also seek email or other correspondence that summarizes or identifies the same information, or includes it as an attachment.

PI Mot., Ex. 3 at 19. On June 21, 2021, Defendants filed their Answer to the Complaint. ECF No. 7.

On June 25, 2021, Defendants identified for Fair Lines the pages redacted pursuant to Exemption 3. These included all the redacted material except 18 pages for which the material redacted was merely file names, including internal pathways identifying where secure file information is located.[7] Defendants also identified the preliminary results of their initial search for responsive emails. *See* PI Mot., Ex. 3 at 12-13. On July 6, 2021, Defendants produced two additional documents, totaling 23 pages, similar to those that appeared in the initial production, but which were dated later than December 2020 (and prior to the start of Defendants' search on May 19, 2021). Defendants also provided further detail on the total number of pages of emails, attachments, and spreadsheets that resulted from their initial search for responsive emails. The numbers were extremely high—approximately 36,000 pages including non-spreadsheet attachments, and nearly 760,000 pages when including spreadsheets—and Defendants offered to discuss narrowing the scope of the email search. PI Mot., Ex. 3 at 7-8; Curry Decl. ¶ 12.

On July 10, 2021, Fair Lines proposed substantially narrowing the email search to the following:

> we propose substantially narrowing the scope of the universe of emails to focus on those most needed by our client. Specifically, our client requests narrowing the email search to only seek documents identifying the total population (number of individuals) imputed statewide by the Census Bureau for group quarters. We seek these group quarters totals, both resolved and unresolved, tabulated by state. To be clear, we don't request county-level or local-level numbers—only state-level group quarters imputation figures. We also do not seek any household imputation numbers, or numbers reflecting demographic factors like age, race, or sex.

[7] Fair Lines does not challenge these redactions. *See* PI Mem. at 42 n.27.

PI Mot., Ex. 3 at 6; Curry Decl. ¶ 13. In a follow-up communication on July 12, 2021, Fair Lines' counsel suggested that this "information must have been finalized before the state population totals were announced in mid-April, so I believe the timeframe when that document would have been produced internally would be sometime in the 90 days between mid-January and mid-April." PI Mot., Ex. 3 at 4; Curry Decl. ¶ 14. After discussing Fair Lines' narrowing proposal internally, the Census Bureau determined that it had no reason to believe that the narrowed information would likely be found on email, as Census considered it Title 13 information. All Title 13 information is kept on a secure database and agency rules do not permit it to be transmitted except via encrypted and secure methods. Curry Decl. ¶ 15; *see also* Abowd Decl. ¶ 70. Defendants informed Fair Lines that the narrowed information would not likely be found on email as Census considered it Title 13 information that would only be found on a secure database. Curry Decl. ¶ 16. Fair Lines then filed its motion for preliminary injunction. *Id*. ¶ 17. The Census Bureau has identified the secure database containing the information requested by Fair Lines as narrowed, and is withholding it in full pursuant to FOIA Exemption 3 and 13 U.S.C. §§ 8(b) and 9. *Id*. ¶ 18.

III. APPLICATION OF CONFIDENTIALITY PROVISIONS TO THE GROUP QUARTERS DATA AT ISSUE IN THIS LAWSUIT

The Census Bureau produced 988 pages of responsive information to Plaintiff in late May 2021 and 23 pages of responsive information on July 6. Defendants redacted information only from the 988 pages. This redacted information consisted of material considered by the Census Bureau in assessing the need to make processing adjustments because of anomalies in the group quarters population arising from disruptions in the 2020 Census production schedule. Abowd Decl. ¶ 62. These assessments were made by a group at the Census Bureau called the Data Quality EGG, or Executive Governance Group. The Data Quality EGG consists of Census Bureau subject matter experts and senior executives charged with ensuring the quality of the information produced

in the 2020 Census. In late 2020, the Data Quality EGG reviewed various production data relating to the Group Quarters population. *Id*.

The EGG reviewed statistical summaries for certain specific group quarters facilities and totals by state. The review indicated anomalies that prompted the EGG to direct the Decennial Statistical Studies Division to develop a method to correct those anomalies, a method that came to be called "Group Quarters Count Imputation," or GQCI. Abowd Decl. ¶ 64. Count imputation is a commonly used technique in censuses and surveys for addressing the problem of missing or contradictory data. Missing and contradictory data during enumeration has been a recurring problem for the decennial census since 1790, and the Census Bureau has routinely used various forms of count imputation to address these challenges for census apportionment data since the 1960 Census. *Id*. ¶ 65; *see Utah v. Evans*, 536 U.S. 452 (2002) (upholding the Census Bureau's use of count imputation).

To address identified deficiencies in group quarters data for the 2020 Census, GQCI used information from the group quarters enumeration records, group quarters advance contact records, and administrative data to determine whether records were double counted, appropriately counted, or missing. The GQCI resolved the status of group quarters addresses for frame eligibility (occupied or not; unoccupied group quarters are deleted from the census frame) and, if occupied, the status of persons residing in the group quarters —eliminating duplicates and imputing missing persons. Abowd Decl. ¶ 66.

The redactions challenged by Fair Lines relate to data the Census Bureau reviewed that led it to develop GQCI, and to internal documents where the Census Bureau, through multiple drafts, developed the specifications for the GQCI program. The Disclosure Review Board reviewed these documents and, following standard Census Bureau procedure, applied the necessary disclosure

avoidance procedures, including redactions, to allow the documents to be made public. Abowd Decl. ¶ 67. The data in the previously-released documents relate to specific facilities, such as the group quarters address and population counts for specific colleges and dormitories. Others are state-level numbers reflecting the group quarters address and population totals enumerated for that state compared with benchmarks. Prior to release in a separate litigation, these data were either rounded or redacted to ensure that the released information cannot be used, in combination with other available or published information, to recalculate specific information about the individuals residing in those group quarters facilities. *Id*. ¶ 68.

As Dr. Abowd details in his declaration, *id*., this process of protecting against indirect disclosure of personally identifiable information through the use of complementary disclosure avoidance methods is required under 13 U.S.C. §§ 8(b) and 9 to protect against disclosures of individual census responses, and has been recognized as a necessary cornerstone of responsible statistical disclosure limitation since 1972. *Id*. The risk of re-identification when complementary disclosure avoidance is not applied has more recently been called the "mosaic effect," whereby an attacker can piece together disparate information from multiple sources to recover confidential information. *Id*. Under the Office of Management and Budget's Memorandum M-13-13, federal agencies are required to consider the risks of the mosaic effect when performing their disclosure reviews: "Before disclosing potential PII or other potentially sensitive information, agencies must consider other publicly available data – in any medium and from any source – to determine whether some combination of existing data and the data intended to be publicly released could allow for the identification of an individual or pose another security concern."[8] Abowd Decl. ¶ 68. *See also*

[8] OMB Memorandum M-13-13, *available at* https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2013/m-13-13.pdf pp. 4-5 (last visited on July 24, 2021).

44 U.S.C. § 3511(a)(2)(E) (requiring that guidance be established to provide criteria for agency heads to use to determine "whether a particular data asset should not be made publicly available," "including the risk that information in an individual data asset in isolation does not pose a security risk but when combined with other available information may pose such a risk").

The disclosure avoidance applied to the data released to Fair Lines was performed in accordance with the Census Bureau's disclosure-avoidance rules for the release of summary statistics, and cleared for public release by the Disclosure Review Board. Abowd Decl. ¶ 69.

STANDARD OF REVIEW

Preliminary injunctive relief "is 'an extraordinary remedy never awarded as of right.'" *Friends of Animals v. U.S. Bur. of Land Mgmt.*, 233 F. Supp. 3d 53, 59-60 (D.D.C. 2017) (quoting *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008)); *see Munaf v. Geren*, 553 U.S. 674, 689 (2008) ("A preliminary injunction is an extraordinary and drastic remedy") (citation omitted). It "should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion." *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004).

A party moving for a preliminary injunction must establish (1) a substantial likelihood of success on the merits; (2) that it would suffer irreparable injury if the injunction is not granted; (3) that an injunction would not substantially injure other interested (nonmoving) parties; and (4) that the public interest would be furthered by the injunction. *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995). The final two "factors merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). Although the D.C. Circuit has not yet definitively decided "whether the 'sliding scale' approach remains valid after *Winter*," *League of Women Voters*, 838 F.3d at 7, "the Court of Appeals has ruled that a failure to show a likelihood of success on the merits is sufficient to defeat a motion for a preliminary injunction." *Uranga v. U.S. Citizenship & Immigr. Servs.*, No. CV 20-0521 (ABJ), 2020 WL

7230675, at *5 (D.D.C. Dec. 8, 2020) (citing *Ark. Dairy Coop Ass'n, Inc. v. U.S. Dep't of Agric.*, 573 F.3d 815, 832 (D.C. Cir. 2009); *Apotex, Inc. v. FDA*, 449 F.3d 1249, 1253–54 (D.C. Cir. 2006)). This Circuit has also emphasized that a showing of irreparable harm is an independent prerequisite for a preliminary injunction. *Id.*; *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).

ARGUMENT

I. FAIR LINES IS NOT ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF THAT WOULD AFFORD IT ULTIMATE RELIEF

The traditional purpose of a preliminary injunction is to "preserve the status quo" so that the court can issue a meaningful decision on the merits. *Cobell v. Kempthorne*, 455 F.3d 301, 314 (D.C. Cir. 2006) (citation omitted). Indeed, a preliminary injunction "is a stopgap measure, generally limited as to time, and intended . . . 'to preserve the relative positions of the parties until a trial on the merits can be held.'" *Sherley v. Sebelius*, 689 F.3d 776, 781–82 (D.C. Cir. 2012) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)). FOIA injunctions, of the kind Fair Lines seeks here, depart from this purpose. While Fair Lines purports to seek expedited processing, *see, e.g.*, PI Mem. at 34, there are simply no records left to be processed. Defendants have already produced 1,011 pages. And Fair Lines' narrowing of its email search request to only "documents identifying the total population (number of individuals) imputed statewide by the Census Bureau for group quarters," has resulted in Defendants' determination that such an email search would be fruitless. Curry Decl. ¶¶ 13, 15. Defendants have no reason to believe that the information Fair Lines seeks is likely to be found in any regular email because the Census Bureau considers such information Title 13 confidential, and all Title 13 information is kept on a secure database. *Id.* ¶ 15. The Census Bureau has identified such information on its secure platform, but is withholding it under Exemption 3. *Id.* ¶ 18. So, there simply is no processing to expedite.

What Fair Lines actually seeks is an adjudication on the merits of Defendants' application of FOIA Exemption 3 to the records at issue, which would "alter, rather than preserve, the status quo by commanding some positive act." *Elec. Privacy Info. Ctr. v. U.S. Department of Justice*, 15 F. Supp. 3d 32, 39 (D.D.C. 2014) (cleaned up). Such mandatory injunctions are disfavored as a general matter and should not be issued except in truly extraordinary circumstances, which FOIA requests rarely pose. *See, e.g., id.* (mandatory injunctions require "the moving party [to] meet a higher standard than in the ordinary case by showing clearly that he or she is entitled to relief or that extreme or very serious damage will result from the denial of the injunction" (citations omitted)); *see also Nat'l Conf. on Ministry to the Armed Forces v. James*, 278 F. Supp. 2d 37, 43 (D.D.C. 2003) ("A district court should not issue a mandatory preliminary injunction unless the facts and law clearly favor the moving party." (citation omitted)). This case does not present such extraordinary circumstances.

As binding precedent dictates, a preliminary injunction should not be a way for a plaintiff to short-circuit the litigation process and obtain the full relief it seeks on the merits. *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 n.13 (D.C. Cir. 1969) ("[A] preliminary injunction should not work to give a party essentially the full relief he seeks on the merits.") (per curiam); *see also Camenisch*, 451 U.S. at 395 ("[I]t is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits."). Yet in this case, an order enjoining an agency from withholding information pursuant to FOIA Exemption 3 based on Title 13's confidentiality provisions is the ultimate relief Fair Lines seeks. *See* PI Mem. at 42-43. Granting ultimate relief in the guise of a preliminary injunction is improper. *See, e.g., Daily Caller v. U.S. Department of State*, 152 F. Supp. 3d 1, 6–7 (D.D.C. 2015). This is particularly true in the FOIA context where preliminary injunctive relief of the sort Fair Lines seeks is impossible to reverse once disclosure

is ordered. *Cf. Aronson v. U.S. Department of Hous. & Urb. Dev.*, 869 F.2d 646, 648 (1st Cir. 1989) ("To issue the preliminary injunction discloses the names, permanently injuring the interest HUD seeks to protect; to deny the preliminary injunction harms Aronson only by potentially delaying his obtaining the information he seeks (should he eventually prevail).").

Nor does Fair Lines identify a single FOIA case in which a court has entered a preliminary injunction granting the movant ultimate relief. *See* PI Mem. at 27-28. The primary case Fair Lines relies on is *American Oversight v. U.S. Department of State*, 414 F. Supp. 3d 182 (D.D.C. 2019), but the court in that case merely permitted some expedited processing; it did not even touch on the agency's application of any FOIA exemptions. The rest of Fair Lines' case law on this topic is similarly inapposite. *See* PI Mem. at 28.[9] Worse, Fair Lines misleadingly cites to *Center for Public Integrity v. U.S. Department of Defense*, 486 F. Supp. 3d 317 (D.D.C. 2020), in support of its argument that courts have granted preliminary injunctions in similar situations. PI Mem. at 28 n.16. The decision Fair Lines' cited was a ruling on summary judgment, after the court had denied the exact sort of preliminary relief that Fair Lines seeks here. *See Center for Public Integrity v. U.S. Department of Defense*, No. 1:19-cv-03265-CKK (D.D.C. Dec. 13, 2019), ECF No. 20 (denying plaintiff's motion to enforce preliminary injunction, which sought an order requiring the agency to release potentially exempt information, because "the issue of disputed exemptions will have to

[9] *Elec. Privacy Info. Ctr. v. U.S. Department of Justice*, 416 F. Supp. 2d 30, 43 (D.D.C. 2006) (ordering only the completion of processing and that the agency provide plaintiff with a *Vaughn* Index "stating its justification for the withholding of any documents . . . within 30 days"); *Wash. Post v. U.S. Dep't of Homeland Sec.*, 459 F. Supp. 2d 61, 64 (D.D.C. 2006) (explaining that the plaintiff requested the release of all responsive records which are not exempt from disclosure, not an order denying the agency's application of any exemption) *vacated as moot by subsequent consent motion*, *Wash. Post v. U.S. Department of Homeland Sec.*, No. 06-5337 (D.C. Cir. 2007)); *Leadership Conf. on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260-61 (D.D.C. 2005) (granting summary judgment in part for the agency on their application of certain exemptions, and merely ordering expedited processing of other requested records).

be litigated," and "the Court will require a *Vaughn* index . . . [and] summary judgment briefing or cross-briefing on the disputed exemptions").[10] And the court in that case actually upheld the agency's application of FOIA Exemption 3 on summary judgment. *Ctr. for Pub. Integrity*, 486 F. Supp. 3d at 328-330.

That is why courts in this district routinely deny requests for preliminary injunctions in FOIA cases. *See, e.g.*, *New York Times v. Defense Health Agency*, Civ. A. No. 21-cv-566 (BAH), 2021 WL 1614817, *5 (D.D.C. Apr. 25, 2021) (citing cases). Given the relief Fair Lines seeks in this case, the Court should similarly deny Plaintiff's motion for a preliminary injunction.

II. FAIR LINES HAS FAILED TO MEET ITS HEAVY BURDEN TO SHOW ENTITLEMENT TO EMERGENCY, MANDATORY RELIEF

Putting aside the many good reasons to deny preliminary injunctive relief in a FOIA case, Fair Lines here has also failed to carry its heavy burden of proving an entitlement to that extraordinary form of relief. *Elec. Privacy Info. Ctr.*, 15 F. Supp. 3d at 39. Fair Lines is not likely to succeed on the merits of its claim because the Census Bureau's efforts to comply with Title 13's confidentiality provisions are perfectly consistent with what Congress intended in enacting the provisions. Likewise, Fair Lines cannot show that it will suffer irreparable injury if it is denied an injunction. And the balance of equities and the public interest favor Defendants.

[10] *See also Robbins v. U.S. Bureau of Land Mgmt.*, 219 F.R.D. 685, 688 (D. Wyo. 2004) ("[T]he plaintiff seeks the production of documents it has previously been denied access to by the BLM. Now, in the instant motion, the plaintiff moves the Court to compel the production of the very documents that [this FOIA] litigation is about. If the Court granted plaintiff's motion, it would convert the discovery motion into a dispositive motion and dispose of the case. The time is not yet ripe for the determination of dispositive motions. Therefore, the Court finds that the instant motion is premature and will deny the motion.").

A. Plaintiff Has Not Demonstrated a Likelihood of Success on the Merits

Before a court may enter a preliminary injunction, "[i]t is particularly important for the movant to demonstrate a substantial likelihood of success on the merits," because "absent a substantial indication of likely success on the merits, there would be no justification for the [C]ourt's intrusion into the ordinary processes of administration and judicial review." *Hubbard v. United States*, 496 F. Supp. 2d 194, 198 (D.D.C. 2007) (citation omitted).

The decennial enumeration is an attempt to determine the true population of the United States, and "[t]hese figures may be as accurate as such immense undertakings can be." *Gaffney*, 412 U.S. at 745. But as a practical matter, census data "are inherently less than absolutely accurate." *Id.* "Although Congress has broad power to require individuals to submit [census] responses, an accurate census depends in large part on public cooperation." *Baldrige*, 455 U.S. at 354. "To stimulate that cooperation Congress has provided assurances that information furnished to the Secretary by individuals is to be treated as confidential." *Id*. (citing 13 U.S.C. §§ 8(b), 9(a)). Specifically, section 8(b) of the Census Act provides that 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." 13 U.S.C. § 8(b). And section 9(a) further provides that the Secretary and Commerce officials generally may not "make 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).

Congress "[t]hrough the Census Act, . . . delegated its broad authority over the census to the Secretary," *Wisconsin*, 517 U.S. at 19, leaving it to the Secretary to safeguard the information provided by the public in the decennial census. "The Secretary is assisted in the performance of that responsibility by the Bureau of the Census and its head, the Director of the Census." *Id.* at 5

(citing 13 U.S.C. §§ 2, 21). Defendants take this responsibility seriously—as they must: A federal statute provides that Census Bureau staff that publish information protected by 13 U.S.C. § 9 "shall be" subject to fines "or imprisoned not more than 5 years, or both." 13 U.S.C. § 214. And the Supreme Court has long held that information deemed confidential under Sections 8(b) and (9)(a) are exempt from disclosure under FOIA Exemption 3. *Baldrige*, 455 U.S. at 355. FOIA Exemption 3 "applies to matters that are 'specifically exempted from disclosure by [another] statute" if that statute "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue" or "establishes particular criteria for withholding or refers to particular types of matters to be withheld." *Ctr. for Pub. Integrity*, 486 F. Supp. 3d at 328 (quoting 5 U.S.C. § 552(b)(3)). The only question here is whether the information Defendants have redacted falls within the confidentiality provisions of Sections 8(b) and (9)(a). The answer is yes.

Fair Lines argues in favor of a cramped reading of Sections 8(b) and (9)(a) that prohibits Defendants from keeping up with technological advances, *see* PI Mem. at 19-26, but its interpretation is antithetical to Congress's intentions. As the Supreme Court has explained, "the . . . history of the Census Act reveals a congressional intent to protect the confidentiality of census information." *Baldrige*, 455 U.S. at 358. Section 8(b) accomplishes this by "prohibit[ing] disclosure of data provided 'by, or on behalf of,' any respondent"; and "[b]y protecting data revealed 'on behalf of' a respondent, Congress further emphasized that the data itself was to be protected from disclosure." *Id*. at 356 (quoting 13 U.S.C. § 8(b)). Section 9(a) accomplishes the goal of assuring confidentiality by prohibiting Defendants from making 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) (emphasis added), or permitting "anyone other than the sworn officers and employees of the Department . . . to examine the individual reports." 13 U.S.C. § 9(a)(3).

The plain language of Title 13's confidentiality provisions evidences Congress's intent that Defendants protect from publication (i.e., disclosure) information that can be used to identify data supplied by a particular establishment or individual. We now live in an era where quantum computers are becoming a reality and, using the computing power that exists today, it is possible to reverse-engineer releases of aggregated data to identify individual data, as Dr. Abowd explains in his declaration. *See generally* Abowd Decl. ¶¶ 28-41. Title 13's confidentiality provisions provide the Secretary the flexibility to address technological advances and should be read in harmony with the discretion Congress imbued in the Secretary when delegating the responsibility to conduct the census "'in such form and content as [s]he may determine.'" *Wisconsin*, 517 U.S. at 5 (quoting 13 U.S.C. § 141(a)).

The Census Bureau has been engaged in the process of protecting against re-identification for decades. For the 1990 Census, the Census Bureau began using a technique known as noise infusion to safeguard respondent confidentiality. Noise infusion helps to protect the confidentiality of published data by introducing controlled amounts of error or "noise" into the data. The goal of noise infusion is to preserve the overall statistical validity of the resulting data while introducing enough uncertainty that attackers would not have any reasonable degree of certainty that they had isolated data for any particular respondent. Abowd Decl. ¶¶ 24-25. The Census Bureau's noise infusion techniques have become more sophisticated over the last two decades to keep pace with technology. As Dr. Abowd explains in detail in his declaration, following the 2010 census, the Census Bureau conducted its own reconstruction experiment and determined that the disclosure avoidance system it had used for that census was no longer sufficient. *Id*. 26. The reality is that even though the majority of the Census Bureau's data products are aggregated data releases, over the past decade, such releases have become increasingly vulnerable to sophisticated

"reconstruction attacks" that have emerged as computing power has improved and become more widely available. Abowd Decl. ¶ 30.

The Census Bureau has decided that differential privacy is the best disclosure avoidance tool to meet today's threats. *Id.* ¶ 43. And, as discussed above, to protect the integrity of a differential privacy-based disclosure avoidance system as a whole, invariants must be limited to a defined set of data. The invariants for the 2020 Census did not include group quarters population data. Forcing the Census Bureau to produce such numbers in unredacted form now would severely compromise and weaken the confidentiality protections of the DAS, which would have cascading effects on the Census Bureau's ability to meet its confidentiality obligations under Title 13. Abowd Decl. ¶ 57. The inclusion of additional invariants (in other words, publication of additional data without privacy protections) would subject Census respondents to unquantified additional privacy risk. *Id.* ¶ 60.

Further, this case cannot be viewed in a vacuum. If the Court agrees with Fair Lines that Title 13's confidentiality provisions do not permit the Census Bureau to account for the mosaic effect, then the Census Bureau's disclosure avoidance system will be utterly exposed to all manner of FOIA requests. Because the DAS depends on having limits to the number of invariants in the data set, any new FOIA suit that forces the disclosure of additional data would effectively create new invariants that expose the 2020 Census data to greater risk of reconstruction and re-identification attacks. Courts elsewhere in the FOIA context understand this risk. *See Whittaker v. U.S. Department of Justice*, No. 18-CV-01434 (APM), 2020 WL 6075681, at *5 (D.D.C. Oct. 15, 2020) ("The [mosaic] theory 'finds support in both Supreme Court and D.C. Circuit precedent' and '[a]s a result, in cases implicating national security, courts have permitted the government to rely on [a mosaic approach] to justify withholding agency records that form only a small piece of

the larger puzzle.'" (quoting *Shapiro v. U.S. Dep't of Justice*, 239 F. Supp. 3d 100, 115 (D.D.C. 2017?). In this case, the subject is group quarters population data, but there is virtually no limit to the other types of data FOIA requesters could seek. And there is no way for the Census Bureau to account for the introduction of unexpected invariants imposed through the guise of FOIA requests because the DAS is based on a defined and limited universe of invariants.

As a result, Fair Lines' contrary interpretation would effectively neuter Title 13's confidentiality provisions, which is a significant indication that its interpretation is wrong. *Cf. Duncan v. Walker*, 533 U.S. 167, 174, (2001) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."). Fair Lines' answer to that is, essentially, too bad; that Congress should have contemplated the rise of supercomputing and created an exemption for all preliminary Census Data. PI Mem. at 22. But the Supreme Court has made clear that federal courts are governed by statutes as enacted, not by "the limits of the drafters' imagination." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020). And, as explained above, the plain text of the Census Act prohibits Defendants from making any disclosure "whereby the data furnished" by a respondent "*can be identified*" 13 U.S.C. § 9(a)(2) (emphasis added), which is exactly what Fair Lines' interpretation would allow. In any event, the sort of exemption Fair Lines suggests would not only be overbroad, but it would still fail to account for reconstruction attacks.

Fair Lines argues that *Baldrige* and *Seymour v. Barabba*, 559 F.2d 806 (D.C. Cir. 1977), supports its position, but it is mistaken. In *Baldrige*, the Supreme Court rejected the proposition that "the confidentiality provisions protect raw data only if the individual respondent can be identified." *Baldrige*, 455 U.S. at 355. While the focus in *Baldrige* was on protecting what the Court termed "raw data," that was a reflection both of the information request at issue in the case

and of the technology at the time. As a result, the Supreme Court in *Baldrige* did not address the question raised in this litigation. But the Court's review of the legislative history of the Census Act is instructive: after reviewing that history, the Court concluded that "Congress was concerned not solely with protecting the identity of individuals," but also with preserving the "confidentiality of data reported by individuals." *Id*. at 356. There is no doubt that the Census Bureau's disclosure avoidance efforts are consistent with that legislative history.

As for *Seymour*, Fair Lines' own quotation of that case, *see* PI Mem. at 24, supports Defendants' position: "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." 559 F.2d at 809. From this, Fair Lines concludes that "[i]n 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." PI Mem. at 25. But that ignores the mosaic effect problem, Abowd Decl. ¶ 68, which renders "higher-level computations" subject to the same privacy concerns. Rather, *Seymour* is instructive for the same reason as *Baldrige*—the court of appeals rejected the plaintiffs' narrow reading of Section 9(a) after highlighting the "thrice emphatically expressed intent of Congress to protect census information" in the Census Act's legislative history. *Seymour*, 559 F.2d at 809. Fair Lines here similarly seeks a narrow interpretation of Title 13's confidentiality provisions that both *Baldrige* and *Seymour* rejected.

Fair Lines' back-up merits argument is that Defendants' purportedly inconsistent redacting of data from the May 25 production undermines their position that the redactions are necessary. To Fair Lines, Defendants' redactions "appear arbitrary and not governed by standards required by law." PI Mem. at 26. They are nothing of the sort. As described in detail in Dr. Abowd's

declaration, the disclosure avoidance performed on the data released to Fair Lines was performed in accordance with the Census Bureau's established disclosure avoidance rules for the release of summary statistics and cleared for public release by the Census Bureau's Disclosure Review Board (DRB). Abowd Decl. ¶ 69. Those rules are complex, *see id*., but they are not arbitrary. Certain data are generally suppressed, as are statistics calculated from those counts (e.g., a range), and additional information may also require redaction, depending on the characteristics or geographic detail of the data being summarized. *Id*. Conversely, the Disclosure Avoidance Officers performing the disclosure reviews may, depending on the characteristics of the data being summarized, use their expert judgement to identify alternative disclosure avoidance mechanisms to apply. For example, while ranges are typically redacted (e.g., ECF No. 8-10, Page 47 of 118), according to DRB rules, some ranges could be alternatively protected through rounding (e.g., ECF No. 8-10, Page 57 of 118). *See* Abowd Decl. ¶ 69.

Accordingly, there was nothing arbitrary about Defendants' redactions. They were entirely rules-based. Fair Lines' argument is not supported by any expert analysis. Rather, it is based on its own laymen's examination of the material. In the FOIA context, agency declarations are accorded "a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (internal citations omitted). Here, Fair Lines' statements about the arbitrariness of Defendants' redactions is unsupported speculation that cannot overcome Dr. Abowd's detailed declaration.

For all of these reasons, Fair Lines is unlikely to succeed on the merits of its challenge to Defendants' application of Exemption 3. Therefore, its motion for preliminary injunctive relief should be denied.

B. Fair Lines Has Not Shown It Will Suffer Irreparable Harm

Fair Lines fares no better in showing that it will suffer irreparable harm, the most determinative factor in the preliminary injunction analysis. "[T]he basis of injunctive relief in the federal courts has always been irreparable harm." *CityFed*, 58 F.3d at 747 (quoting *Sampson v. Murray*, 415 U.S. 61, 88 (1974)). The D.C. Circuit "has set a high standard for irreparable injury." *In re Navy Chaplaincy*, 534 F.3d 756, 766 (D.C. Cir. 2008) (citation omitted). The harm must be "certain and great, actual and not theoretical, and so imminent that there is a clear and present need for equitable relief to prevent irreparable harm." *League of Women Voters*, 838 F.3d at 7–8 (citation and alteration omitted). In the context of a mandatory injunction, like the one sought here, Plaintiff "must meet a higher standard than in the ordinary case by showing clearly that [the movant] is entitled to relief or that extreme or very serious damage will result from the denial of the injunction." *Elec. Privacy Info. Ctr.*, 15 F. Supp. 3d at 39 (quoting *Columbia Hosp. for Women Found. v. Bank Tokyo-Mitsubishi, Ltd.*, 15 F. Supp. 2d 1, 4 (D.D.C. 1997)).

Plaintiff has the burden to put forth sufficient evidence to satisfy this high standard. "The movant cannot simply make 'broad conclusory statements' about the existence of harm. Rather, [the movant] must 'submit[ ] . . . competent evidence into the record . . . that would permit the Court to assess whether [the movant], in fact, faces irreparable harm . . . . '" *Aviles-Wynkoop v. Neal*, 978 F. Supp. 2d 15, 21 (D.D.C. 2013) (quoting *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008)); *see also id.* (concluding that plaintiff failed to make a showing of sufficient irreparable harm where she submitted no competent evidence). And a plaintiff must show "the alleged harm will directly result from the action which the [plaintiff] seeks to enjoin," as "the court must decide whether the harm will *in fact* occur[ ]." *Wis. Gas. Co. v. Federal Energy Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam).

Here, Fair Lines has not presented any evidence that "extreme or very serious damage will result from the denial of the injunction." *Elec. Privacy Info. Ctr.*, 15 F. Supp. 3d at 39. Rather, Fair Lines engages in rank speculation. For example, Fair Lines argues in one section of its brief that "irregularities could lead to gross over- or under-counting of different group quarters populations," PI Mem. at 33; and yet, it argues in another section that disclosure could also "put to rest concerns about the Bureau's new methodology." *Id*. at 3.

Similarly, Fair Lines argues 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 impeding elections that could be directly impacted." *Id*. at 35. It is clear that Fair Lines is simply fishing for irregularities in the Census Bureau's GQCI in order to raise challenges in federal court to Defendants' methods. But, as this Court has recognized, "FOIA was not intended to be a discovery tool for civil plaintiffs." *Neary v. Fed. Deposit Ins. Corp.*, 104 F. Supp. 2d 52, 58 (D.D.C. 2015) (Berman Jackson, J.) (cleaned up). Fair Lines cannot fabricate irreparable harm by claiming that it needs information quickly in order to determine whether there is any problem in the first place.

Fair Lines suggests that the information will be stale or of little value if it is produced later than August 15, 2021, because "they will be powerless to do anything to bring about change to the defective process or data." PI Mem. at 35 & 37-38. But, again, Fair Lines is purely speculating that the data is "defective." And, in any event, Supreme Court precedent, including *Wisconsin v. City of New York*, 517 U.S. 1 (1996), shows that a legal challenge to a statistical method used (or not used as was the case in *Wisconsin*) by the Census Bureau in its enumeration efforts can last for years and years; so, there is little evidence that Fair Lines or the public will be powerless to "do

anything to bring about change," PI Mem. at 35, in the absence of a preliminary injunction. *See also Utah v. Evans*, 536 U.S. 452, 479 (2002) (upholding the Census Bureau's use of a statistical technique in the 2000 census against a challenge by Utah, which had lost a Congressional house seat due to the use of the method); and *Franklin v. Mass*., 505 U.S. 788, 806 (1992) (rejecting a challenge to the Secretary's allocation of overseas federal employees in the 1990 census).

Fair Lines further argues that, "if states are allowed to redistrict using flawed Census Bureau group quarters data, then there would be no conceivable redress for [its] harm." PI Mem. at 36. First, it is far from clear how a *state's* use of flawed redistricting data harms a 501(c)(3) organization like Fair Lines. Second, the Census does not require states to use its data. In fact, some states, such as Alabama, have specific statutory provisions that allow them to conduct their own state-run census, and courts have expressed doubt about those states' standing to challenge the Census Bureau's work. *See Alabama v. U.S. Dep't of Commerce*, No. 3:21-cv-211-RAH-ECM-KCN, 2021 WL 2668810, *6 at n.3 (M.D. Ala. June 29, 2021) (expressing doubt about Alabama's standing to challenge the Census Bureau's use of differential privacy given the state's statutory authority to conduct its own census). Since "redistricting is primarily the duty and responsibility of the State," *Abbot v. Perez*, 138 S. Ct. 2305, 2324 (2018), Fair Lines cannot claim an injury if the states decide, despite all the media coverage critical of the Census Bureau cited by Fair Lines, *see* PI Mem. at 30 & nn. 22-24, to proceed with redistricting using the Census Bureau's data in the absence of the disclosure of the withheld information in this case.

C. The Public Interest and the Balance of the Equities Also Caution Against Granting Fair Lines' Request for a Preliminary Injunction

Along with alleged harm to Plaintiff, the Court must consider whether a preliminary injunction of the sort demanded by Fair Lines would be in the public interest or harm nonlitigants.

See Al-Fayed v. CIA, 254 F.3d 300, 303 (D.C. Cir. 2001). Here, those criteria likewise weigh against a preliminary injunction.

As Dr. Abowd explains, were the Court to order the release of the redacted information in the records already produced, or produce unredacted the state-by-state GQCI totals, the effect on the schedule for delivering redistricting data would likely be substantial. Abowd Decl. ¶¶ 75-76. The Census Bureau cannot ascertain the length of the delay, but to account for the addition of another invariant if this Court were to grant the relief that Fair Lines is seeking, the Census Bureau's Data Stewardship Executive Policy Committee would need to review and evaluate the impact of the new invariant on the privacy-loss accounting, test the stability of the new invariant on DAS processing, and potentially determine a new privacy-loss budget for the redistricting data product that factors in the additional privacy risk resulting from the invariant. That, in turn would require re-tuning the DAS algorithms to ensure fitness-for-use for the identified priority use cases, applying those settings in production, and then subjecting the results to expert subject matter review prior to the production of data. Even if this process were to be expedited and no algorithmic stability issues were to occur as a result of the inclusion of the new invariant, this process would likely delay the release of the redistricting data—potentially for as long as six months beyond August 16, 2021. *Id.* ¶ 76. And this all assumes no other FOIA cases are successful in forcing disclosure of other data, which would create new invariants and likely lead to further delay.

Such a delay would injure all states that plan to use the Census Bureau's data in aid of their redistricting process. Fair Lines' counsel of record is no stranger to this problem: He is also a counsel of record for a group of plaintiffs who, along with the State of Alabama, filed a motion for a preliminary injunction in March 2021, seeking an order enjoining Defendants both from using differential privacy and from delaying the release of the redistricting data to the States. *See, e.g.*,

Alabama v. U.S. Dep't of Commerce, No. 3:21-cv-211 (M.D. Ala. Mar. 11, 2021), ECF No. 3 at 3-4. As plaintiffs explained in that case, "States like Alabama are already facing a time-crunch in their redistricting schedules due to Defendants' delay. Redistricting will thus begin as soon as the Bureau delivers the population tabulations." *Id*. at 4. Granting relief to Fair Lines will only result in further delays for those states "facing a time-crunch." To that end, in a separate litigation in the Southern District of Ohio, as part of a joint motion to hold the case in abeyance following an appeal to the Sixth Circuit, Defendants have agreed to provide Ohio with redistricting data no later than August 16, 2021. *See Ohio v. Raimondo*, No. 3:21-cv-00064-TMR (S.D. Ohio, May 25, 2021), ECF No. 37 (Joint Motion); *see also Ohio v. Raimondo*, 848 F. App'x 187, 188 (6th Cir. 2021) (finding that "Ohio suffered (and continues to suffer) an informational injury because the Secretary failed to deliver Ohio's data as the Census Act requires" on April 1, 2021).

Thus, the Court must balance the speculative harm that might befall Fair Lines in the absence of immediate disclosure, with the likely harm that would befall states if the Court orders disclosure and the Census is forced to delay the release of redistricting data to account for an additional invariant in their disclosure avoidance system.

It is also not possible to overstate how detrimental an adverse order would be to the Census Bureau as an institution. Such an order would stand for—and would be used to support—the proposition that any plaintiff may use FOIA to force the disclosure of data and thereby force the Census Bureau to account for unexpected invariants. As Fair Lines is well aware, "an accurate census depends in large part on public cooperation." *Baldrige*, 455 U.S. at 354. If Defendants' ability to meet their statutory obligations to protect Census Bureau data is constrained, the public's trust in the confidentiality of its census response will be undermined, people will be less likely to respond to future censuses, and the accuracy of the census will necessarily suffer as a result. *See*

Abowd Decl. ¶¶ 10-15, 77. *See also Baldrige*, 455 U.S. at 361 n.17 ("Even though the city might not be able to identify the individuals who originally gave the information, there would nonetheless be the *appearance* that confidentiality had been breached." (emphasis in original)).

Finally, granting an injunction at this preliminary stage would only encourage a flood of copycat actions. Courts have consistently recognized that disruption to normal processing schedules constitutes real harm to the public interest, and is inconsistent with FOIA's scheme. *See, e.g., The Nation Magazine v. U.S. Department of State*, 805 F. Supp. 68, 74 (D.D.C. 1992) (entry of a preliminary injunction expediting a FOIA request over other pending requests "would severely jeopardize the public's interest in an orderly, fair, and efficient administration of [ ] FOIA"); *Elec. Privacy Info. Ctr.*, 15 F. Supp. 3d at 47 ("[A]llowing [a plaintiff] to jump to the head of the line would upset the agency's processes and be detrimental to the other expedited requesters, some of whom may have even more pressing needs."); *Protect Democracy Project v. U.S. Department of Defense*, 263 F. Supp. 3d 293, 303 (D.D.C. 2017) ("[R]equiring production by a date certain, without any factual basis for doing so, might actually disrupt FOIA's expedited processing regime rather than implement it.").

CONCLUSION

For these reasons, the Court should deny Plaintiff's motion for a preliminary injunction.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing Opposition to Plaintiff's Motion for Preliminary Injunction with the Clerk of the Court through the ECF system on July 26, 2021. This system provided a copy to and effected service of this document on all parties.

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