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)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

U.S. CONSTITUTION

OTHER AUTHORITIES

INTRODUCTION

In this Freedom of Information Act ("FOIA") litigation, Plaintiff Fair Lines America Foundation, Inc. ("Fair Lines") seeks information from Defendants, the U.S. Department of Commerce ("Commerce") and the U.S. Census Bureau ("Census Bureau"), that "contain[s] 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." Compl. ¶ 2, ECF No. 1.[1] After a targeted search for records responsive to Fair Lines' request, Defendants processed and released over 1,000 pages of documents. Defendants redacted a portion of those records pursuant to Exemption 3 and the Census Act's confidentiality provisions, 13 U.S.C. §§ 8(b) & 9. During the course of this litigation, Fair Lines narrowed the scope of what remained of its request. The narrowed information Fair Lines seeks is confidential, resides on a secure database, and Defendants have withheld it in full pursuant to Exemption 3 and the Census Act's confidentiality provisions.

The Supreme Court has determined that information deemed confidential under 13 U.S.C. §§ 8(b) and (9)(a) is exempt from disclosure under FOIA Exemption 3, which 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). *Baldrige v. Shapiro*, 455 U.S. 345, 355 (1982). Section 8(b) permits the Secretary to "furnish copies of tabulations and other

[1] 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." Second Decl. of John M. Abowd ¶ 63, attached hereto as Ex. 1 ("Second Abowd Decl.") (citing U.S. Census Bureau "2020 Census Group Quarters", *available at* https://www.census.gov/newsroom/blogs/random-samplings/2021/03/2020-census-group-quarters.html) (last visited Sept. 9, 2021).

statistical materials" as long as they "do not disclose the information reported by, or on behalf of, any particular respondent." 13 U.S.C. § 8(b). Section 9(a) prohibits Defendants from making "any publication whereby the data furnished by any particular establishment or individual under this title can be identified." *Id*. § 9(a)(2). With those provisions, "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. As Defendants explain in detail below and in the Second Declaration of Dr. John M. Abowd,[2] their decision to withhold the group quarters information at issue is driven by this statutory duty.

The forced publication of any portion of the withheld data in this case without privacy protections may not, by itself, directly reveal the data disclosed by any particular respondent, but it would severely undermine the Census Bureau's ability to protect the confidentiality of all census data disclosed by the public in violation of Title 13's confidentiality provisions. Before the Census Bureau publishes any statistic, it applies safeguards that help prevent someone from being able to trace that statistic back to a specific individual or establishment. These safeguards are called "disclosure avoidance" methods.[3] Over the last several years, the Census Bureau has been diligently, publicly, and transparently developing a complex disclosure avoidance system to meet the risks to confidentiality posed by the advanced technology that exists today. The disclosure of

[2] Dr. Abowd's original declaration was attached as Exhibit 1 to Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction. *See* ECF No. 10-1. Fair Lines withdrew its motion, *see* ECF No. 11, before it was ruled upon. For ease of reading, Dr. Abowd's Second Declaration repeats much of his original declaration, eliminates information made irrelevant by Plaintiff's withdrawal of its prior motion, and updates his original declaration with new information relevant to Defendants' motion for summary judgment. Second Abowd Decl. at 1.

[3] U.S. Census Bureau, "Statistical Safeguards," *available at* https://www.census.gov/about/policies/privacy/statistical_safeguards.html (last visited Sept. 9, 2021).

the information withheld in this case would threaten the foundation of that system, which assumes that only a limited amount of pre-specified data will be disclosed unobscured by statistical noise.[4] The release of additional unobscured data, which Fair Lines seeks here, threatens the integrity of the 2020 Census' disclosure avoidance system (DAS) and the Census Bureau's ability to comply with Title 13's confidentiality provisions.

Without a functioning disclosure avoidance system, 2020 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. The 2020 Census 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. It is the basis upon which the Census Bureau has already and will continue to release vast quantities of data as part of the 2020 Census consistent with its confidentiality obligations.

An interpretation of Title 13's confidentiality provisions that forces the disclosure of the information withheld in this case would leave the 2020 Census DAS vulnerable to death by a thousand cuts from FOIA requesters seeking data that might seem innocuous in a vacuum, but in the aggregate 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 individuals will be far less likely to voluntarily provide critical data to the Census

[4] "Noise infusion" is a technique statisticians use to help protect the confidentiality of published data. It introduces controlled amounts of error or "noise" into the data with the goal of preserving the overall statistical validity of the resulting data while introducing enough uncertainty into the data that attackers would not have any reasonable degree of certainty that they had isolated data for any particular respondent. Second Abowd Decl. ¶ 24.

Bureau. That, in turn, will significantly harm the Bureau's ability to meet its constitutional and statutory obligations, and undermine future demographic and 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 is that what Congress intended in enacting FOIA.

For these reasons, the Court should grant Defendants' motion for summary judgment.

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 v. City of New York*, 517 U.S. 1, 5 (1996) (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. Second 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).

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. Second 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.

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

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 protected by Sections 8(b) and 9(a) through a series of mathematical algorithms. The reconstructed data can then be used to re-identify respondents and the information they supplied. Second Abowd Decl. ¶ 31. In one famous example of an attack relying solely on re-identification techniques (i.e., without needing to reconstruct the underlying data), 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. Such reconstructions are constrained by the limits of available computational power; but 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) (last visited Sept. 9, 2021); *available at* https://www.nature.com/articles/s41467-019-10933-3; *see also* Second Abowd Decl. ¶¶ 33–36 (collecting other examples).

The decennial census is not immune to these trends. In past decennial censuses, the Census Bureau protected the confidentiality of census data released publicly by using safeguards—or 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). Second 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 to protect the confidentiality of census data. *See id.* ¶ 26.

Following the 2010 census, the Census Bureau conducted a reconstruction experiment based on just 6.2 billion of the 150 billion independent statistics it had published. Second 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 this compelling evidence of the 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 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," *supra* n.4, in a way that protects privacy while maintaining the overall statistical validity of the data. *Id*. ¶ 44. Accordingly, 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. Second Abowd Decl. ¶ 54. Since then, the Census Bureau has engaged in a years-long public campaign to educate the census data 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—or unobscured by "statistical noise," *supra* n.4—when the remainder of the data is subject to noise infusion as part of disclosure avoidance. For technical statistical reasons described in detail in Dr. Abowd's declaration, *see* Second Abowd Decl. ¶ 58 & n.50, invariants must be limited in order to protect the integrity of the disclosure avoidance system. *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. 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. Second 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[5] allocation for production of the redistricting data (formally, the 2020 Census P.L. 94-171 Redistricting Data Summary Files). *Id.* ¶ 60. The privacy-loss budget serves as a promise to data subjects that attackers bent on re-identification and/or reconstruction will be limited to a certain amount of information about them through publicly released data. It balances statistical accuracy and confidentiality. *Id.* ¶ 58 & n.50. The inclusion of additional, as-yet unaccounted for invariants—e.g., in the form of the forced disclosure of unobscured data—would undermine the sensitive balance the Census Bureau has drawn, essentially rendering the resulting privacy guarantee represented by the privacy-loss budget allocation meaningless, and would subject census respondents to additional privacy risk antithetical to Title 13's confidentiality provisions. *Id.* ¶ 60.

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:

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[5] 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. Second Abowd Decl. ¶ 58 n. 50.

> 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. Fair Lines submitted the above request to Census on March 31, 2021. *Id*. Second Declaration of Vernon E. Curry ¶ 5 ("Second Curry Decl.") (attached hereto as Exhibit 2).[6] 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.). Second Curry Decl. ¶¶ 9-10. 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. Second Curry Decl. ¶¶ 9-10. On May 25, 2021, Defendants released the 988 pages to Fair Lines. *Id*. ¶ 10. Of those, less than 20% of the pages contained redactions pursuant to

[6] Mr. Curry's original declaration was attached as Exhibit 2 to Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction. *See* ECF No. 10-2. His Second Declaration updates his original declaration. *Cf. supra* n.2 (same for Second Abowd Decl.).

FOIA Exemptions 3 and 5. *Id.* ¶ 11; *see also* Pl.'s Mot. for Preliminary Inj. ("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. Second Curry Decl. ¶ 11.

From May 27 through mid-July, the parties, through counsel, 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; Second Curry Decl. ¶ 12. 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. Second Curry Decl. ¶ 14.

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.

PI Mot., Ex. 3 at 6; *see also* Second Curry Decl. ¶ 16. 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; *see also* Second Curry Decl. ¶ 16. After reviewing Fair Lines' narrowing proposal, 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. Second Curry Decl. ¶ 17; *see also* Second Abowd Decl. ¶ 70. Defendants informed Fair Lines that the narrowed information would

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

not likely be found on email as Census considered it Title 13 information that would only be found on a secure database. Second Curry Decl. ¶ 19.

Fair Lines then filed its motion for preliminary injunction. PI Mot. Defendants opposed Fair Lines' motion on July 26, 2021. ECF No. 10. Two days later, on July 28, 2021, Fair Lines withdrew its motion. *See* ECF No. 11. The Court issued an order on July 29, 2021, requiring the parties to meet and confer and propose a schedule for proceeding. The parties did so, and the Court entered a minute order adopting the schedule on August 6, 2021. Meanwhile, on August 2, 2021, the Census Bureau issued to Fair Lines a final determination in which the Bureau stated that in addition to the productions made, there were records responsive to Fair Lines' narrowed request for imputed group quarter information, tabulated by state, but that the Bureau was withholding them in full pursuant to Exemption 3 in conjunction with Title 13's confidentiality provisions. Second Curry Decl. ¶ 19.

STANDARD OF REVIEW

The FOIA represents a "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (citation omitted). "Congress recognized, however, that public disclosure is not always in the public interest." *CIA v. Sims*, 471 U.S. 159, 166-67 (1985). So, in enacting the FOIA, Congress "provided nine specific exemptions under which disclosure could be refused." *FBI v. Abramson*, 456 U.S. 615, 621 (1982). While these "exemptions are to be narrowly construed," *id*. at 630, courts must still give them "meaningful reach and application," *John Doe Agency*, 493 U.S. at 152.

A motion for summary judgment is the procedural vehicle by which FOIA cases are typically decided. *Brayton v. Off. of U.S. Trade Rep.*, 641 F.3d 521, 527 (D.C. Cir. 2011). Summary judgment may be afforded to an agency "in a FOIA case if it demonstrates that no

material facts are in dispute, it has conducted an adequate search for responsive records, and each responsive record that it has located has either been produced to the plaintiff or is exempt from disclosure." *Miller v. U.S. Dep't of Justice ["DOJ"]*, 872 F. Supp. 2d 12, 18 (D.D.C. 2012) (citing *Weisberg v. DOJ*, 627 F.2d 365, 368 (D.C. Cir. 1980)). Courts review agency responses to FOIA requests de novo. 5 U.S.C. § 552(a)(4)(B).

A court may award summary judgment in a FOIA action on the basis of information provided by the agency through declarations that describe "the documents and the justifications for nondisclosure with reasonably specific detail;" that "demonstrate that the information withheld logically falls within the claimed exemption[s];" and that are "not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Mil. Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981) (footnote omitted). 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). "An agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Judicial Watch, Inc. v. U.S. Dep't of Defense*, 715 F.3d 937, 941 (D.C. Cir. 2013) (per curiam) (citation omitted).

ARGUMENT

I. DEFENDANTS CONDUCTED AN ADEQUATE SEARCH FOR RESPONSIVE RECORDS

The adequacy of any FOIA search is "dependent upon the circumstances of the case." *Schrecker v. DOJ,* 349 F.3d 657, 662 (D.C. Cir. 2003) (quoting *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)); *Citizens for Responsibility & Ethics in Wash. ["CREW"] v. DOJ*, 978 F. Supp. 2d 1, 7 (D.D.C. 2013) (noting that "[i]n some cases . . . agencies are not required to make such a detailed showing: they may categorically deny FOIA requests 'when the range of

circumstances included in the category characteristically support[s] an inference that the statutory requirements for exemption are satisfied." (citing *Nation Mag., Wash. Bureau v. U.S. Customs Serv.,* 71 F.3d 885, 893 (D.C. Cir. 1995)).

When conducting a search in response to a FOIA request, an agency must conduct a "reasonable search." *Oglesby v. U.S. Dep't of Army,* 920 F.2d 57, 68 (D.C. Cir. 1990). An agency is not required to search every records system, but need only search those systems in which it believes responsive records are likely located. *Id*. A FOIA search is sufficient if the agency makes "a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Nation Mag.,* 71 F.3d at 890 (citation omitted). The adequacy of the search is determined by whether it was "reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant." *SafeCard Servs.,* 926 F.2d at 1201.

To demonstrate the reasonableness of its search, the agency may submit non-conclusory affidavits that explain in reasonable detail the scope and method of the agency's search. *Steinberg v. DOJ,* 23 F.3d 548, 551 (D.C. Cir. 1994). To be sufficiently detailed, an agency's affidavits must describe "what records were searched, by whom, and through what process." *Id*. at 552. These affidavits are afforded a "presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *SafeCard Servs.,* 926 F.2d at 1200 (citation omitted).

Applying these principles, Defendants are entitled to summary judgment with respect to the adequacy of their searches. As detailed in the Second Declaration of Vernon E. Curry, the Census Bureau's FOIA office received Fair Lines' request. Its first step in its search process involved contacting Kathleen Styles, Chief, Decennial Communications and Stakeholder

Relationships. Second Curry Decl. ¶ 7. Ms. Styles was the logical first step as she has extensive familiarity with the data and records produced by the 2020 Census program and had participated in the production of similar documents in a separate litigation active in late 2020/early 2021, *National Urban League v. Ross*, No. 5:20-cv-05799-LHK (N.D. Cal.) ("*NUL*"). Second Curry Decl. ¶¶ 7-9. Ms. Styles then reached out to other individuals most knowledgeable about the Group Quarters Count Imputation process, including the Chief of the Decennial Statistical Studies Division, and a Special Assistant to the Associate Director, to gather more information about the likely location of responsive records. *Id.* ¶ 7. After consultation with Ms. Styles, the Census FOIA office concluded that the Office of the Associate Director for Decennial Programs ("ADDP") was the only operating unit likely to have records responsive to this request. *Id.* ADDP is a large directorate within the Census Bureau with over a thousand employees and contractors and was responsible for conducting the 2020 Census. *Id.* It was the logical place to search for responsive documents. *Id.*

Ms. Styles was aware from her work on the *NUL* litigation that the only non-confidential data responsive to Fair Lines' request was likely to be found in a tranche of documents produced in the *NUL* matter. *Id.* ¶ 8. She informed the Census Bureau's FOIA office that the Data Quality Executive Guidance Group ("Data Quality EGG") had reviewed preliminary processing numbers for Group Quarters tabulations in late 2020/early 2021 and that for purposes of the *NUL* litigation, the materials considered by the Data Quality EGG had been reviewed by the DRB and rounded or redacted in accordance with standard DRB policy. *Id.* Ms. Styles coordinated with the Population Division's Chief Demographer and then directed a targeted search of the materials produced in the *NUL* litigation. *Id.* ¶ 9. A Census Bureau staffer conducted a manual review of the *NUL* production to identify all documents within that production related to group quarters data. *Id.* Ms.

Styles then reviewed the material and confirmed that the staffer had identified the universe of responsive documents. *Id.* The Census Bureau's FOIA office ultimately identified 988 pages of responsive records created between March 31, 2020 and December 31, 2020. *Id.* ¶ 9. An additional search completed after a further discussion between Ms. Styles and the Chief Demographer in the Population division identified an additional 23 pages of responsive documents. *Id.* ¶ 14. Defendants have produced these 1,011 pages to Fair Lines. *Id.*

As discussed above, Fair Lines eventually narrowed its request to only "documents identifying the total population (number of individuals) imputed statewide by the Census Bureau for group quarters." Second Curry Decl. ¶ 16. 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.* ¶ 17. The Census Bureau has identified such information on its secure platform, but is withholding it under Exemption 3. *Id.* ¶ 19.

By taking these steps, Defendants employed a reasonable and adequate search of every location where responsive records could reasonably be expected to be maintained.

II. DEFENDANTS' WITHHOLDINGS UNDER EXEMPTION 3 ARE LAWFUL

Defendants properly withheld the information at issue here in compliance with Title 13's confidentiality provisions, and, therefore, FOIA's Exemption 3. Defendants are thus entitled to summary judgment.

A. Congress Did Not Intend for FOIA to Impinge upon Defendants' Broad Flexibility to Protect the Confidentiality of Census Data Pursuant to Title 13's Confidentiality Provisions

FOIA's 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 v. U.S. Dep't of Defense*, 486 F. Supp. 3d 317, 328 (D.D.C. 2020) (quoting 5 U.S.C. § 552(b)(3)). The Supreme Court has long held that information deemed confidential under Sections 8(b) and (9)(a) of the Census Act are exempt from disclosure under FOIA Exemption 3. *Baldrige*, 455 U.S. at 355. 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.

As the Supreme Court has explained, "[t]he . . . 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), which provides that the Secretary "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), 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." *Baldrige*, 455 U.S. at 356 (quoting 13 U.S.C. § 8(b)). In using such language, "Congress further emphasized that the *data* itself was to be protected from disclosure," not simply the identity of the respondent. *Id*. (emphasis added). Section 9(a) further assures 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), and by permitting only "the sworn officers and employees of the Department . . . to examine the individual reports." *Id*. § 9(a)(3).

Title 13's confidentiality provisions evidence Congress's clear intent that Defendants protect from publication (*i.e.*, disclosure) information that can be used to identify data supplied by a particular establishment or individual. And the case law examining those provisions, while limited, strongly supports an expansive interpretation that favors confidentiality over disclosure.

For example, 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," as opposed to the type of aggregate data requested here, that was a reflection both of the information request at issue 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; *see also id*. at 358 ("The prohibitions of disclosure of 'material which might disclose information reported by, or on behalf of, any respondent' extends both to 'public and private entities'") (quoting S. Rep. No. 94-1256 at 4 (1976)). The Census Bureau's disclosure avoidance efforts are consistent with that legislative history.

In *Seymour v. Barabba*, 559 F.2d 806 (D.C. Cir. 1977), the D.C. Circuit wrote that "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. The D.C. Circuit issued *Seymour* far before the era of supercomputing. But the fundamental premise behind *Seymour* is adaptable to the current advanced states of technology. In that case, 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. *Id*. Thus, both *Baldrige* and *Seymour* instruct that courts examining Title 13's confidentiality provisions do so consistent with Congress's intent to protect census information.

We now live in an era where, using the computing power that exists today, it is possible to reverse-engineer releases of aggregated data to identify individual data, *see generally* Second Abowd Decl. ¶¶ 28-41, and Title 13's confidentiality provisions are not so narrowly drawn as to inhibit the Secretary from being able to address such technological advances. That is consistent 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)).

This should come as no surprise to anyone who has been following the Census Bureau's work over the past several decennial censuses. 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. Second 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. *Id.* ¶ 30.

The Census Bureau has decided that differential privacy is the best disclosure avoidance tool to meet today's reconstruction and re-identification threats. *Id.* ¶ 43. 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. The disclosure of the data withheld in this case unobscured by disclosure avoidance techniques would essentially render group quarters population data another invariant. That would expose a chink in the 2020 Census DAS's confidentiality armor, which in turn would leave data vulnerable to re-identification and reconstruction in violation of Title 13's confidentiality provisions.

So, as described in detail in Dr. Abowd's declaration and below, the Census Bureau performed disclosure avoidance methodologies (i.e., redactions and rounding) on the data released to Fair Lines, and withheld imputed group quarter population totals per state, in accordance with the Census Bureau's established disclosure avoidance rules for the release of summary statistics.

B. Defendants' Application of Exemption 3 Maintains the Integrity of the 2020 Census DAS Consistent with the Duties Imposed on the Census Bureau Pursuant to Title 13's Confidentiality Provisions

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. Second 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. Second 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. Second 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. Second Abowd Decl. ¶ 67. The data in the 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. *Id*.

Prior to release, 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. For example, while ranges are typically redacted (e.g., PI Mot., Ex. 7 at 47), according to DRB rules, some ranges could be alternatively protected through rounding (e.g., PI Mot., Ex. 7 at 57). *See* Second Abowd Decl. ¶ 69. The disclosure avoidance techniques performed on the data were 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 DRB. *Id*. ¶ 69. Pursuant to the disclosure avoidance rules established by the DRB, the number of unweighted record counts, or counts by category, may be reported if they are rounded, with the coarseness of rounding contingent on the underlying number of records. *Id*. Means for unweighted count data may be reported with up to four significant digits, though decimals must often be redacted as they can be used to calculate the underlying number of counts used as the denominator for calculation of the mean. *Id*. Quartile distributions, maxima, and minima for unweighted counts are generally suppressed, as are statistics calculated from those counts (e.g., a range, which is calculated by subtracting the minimum from the maximum of the distribution; alternatively, ranges can be reported if they are appropriately rounded). *Id*. In certain cases, additional redactions may also be required, depending on the characteristics or geographic detail of the data being summarized.

Id. 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. *Id*.

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. Second Abowd Decl. ¶ 68. 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] Second Abowd Decl. ¶ 68. *See also* 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").

[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 Sept. 9, 2021).

In addition to performing disclosure avoidance on the released documents, Defendants have withheld in their entirety state-by-state totals that reflect the number of individuals added to the 2020 Census totals by the GQCI process. Second Abowd Decl. ¶ 70. The Census Bureau maintains this information on a secure file space because it is considered Title 13 confidential and all Title 13 confidential information must be safe-guarded in such a way pursuant to Census Bureau policy. *Id*. If the Census Bureau released these numbers unobscured as Fair Lines has requested, the numbers would have to be considered invariant by the 2020 Census DAS. *Id*. ¶ 71. But the 2020 Census DAS does not consider them invariant and therefore the disclosure of such data without redaction, rounding, or other disclosure avoidance procedure would significantly weaken the privacy protections of the DAS, compromise the confidentiality protections used for redistricting data, and undermine the Census Bureau's efforts to fulfill its duties under Title 13's confidentiality provisions for future 2020 Census data releases. *Id*.

In general, releasing further group quarters population data that have not been processed through the DAS, such as the information requested by Fair Lines, would greatly compromise the confidentiality for all respondents living in the block groups containing group quarters (both those respondents residing in group quarters and those in non-group quarters housing units). *Id*. ¶ 72. The release of unintended exact information that has not been accounted for by the DAS—the data requested by Fair Lines—provides information about these populations above and beyond the controlled statistics produced by the DAS. *Id*. Even the release of state-level summaries can compromise these protections, most easily in the case of small states or for less common types of group quarters facilities. *Id*. For example, if there were only one of particular type of group quarters facility within a geographic area (e.g., a single military/maritime vessel within a state), then unprotected state-level GQCI statistics for that type of group quarters could easily be

leveraged to undermine the disclosure protections afforded to the tabulated Census data for that group quarters facility in the published census data products, thus exposing the personal information of the facility's residents. *Id*. Unprotected GQCI statistics for larger numbers of group quarters within a state can similarly be disclosive, though the calculations to leverage these data in a privacy attack would require a bit more effort. *Id*. This is why the DRB, acting on instructions from the Data Stewardship Executive Policy Committee, applied its disclosure avoidance rules to the state-level summaries. *Id*.

C. The Court Should Defer to Defendants' Expert Assessment that the Disclosure of the Withheld Material Would Undermine the 2020 Census DAS in Violation of Title 13's Confidentiality Provisions

Dr. Abowd's declaration is owed deference. In the national security and law enforcement context, where the mosaic theory of harm at the heart of this case is traditionally invoked, courts "consistently defer[] to executive affidavits," particularly when the executive branch "invokes FOIA Exemptions 1 and 3." *Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 927-28 (D.C. Cir. 2003). The reason for this is two-fold. First, the assessment of harm "'is entrusted to [national security leaders like] the Director of Central Intelligence, not to the courts.'" *Am. Civil Liberties Union v. U.S. Dep't of Defense*, 628 F.3d 612, 619 (D.C. Cir. 2011) (quoting *Fitzgibbons v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990)). And second, "[b]ecause courts lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case," they "accord substantial weight to an agency's affidavit concerning the details of the classified status of [a] disputed record." *Id.* (internal citations omitted).

The same principles apply here. The deference courts give to the Commerce Secretary regarding census-related disputes arises "from the wide discretion bestowed by the Constitution upon Congress, and by Congress upon the Secretary." *Wisconsin*, 517 U.S. at 23. This is the case

even where experts on statistical methodologies may disagree. *See id*. (citing *Tucker v. U.S. Dep't of Commerce*, 958 F.2d 1411, 1418 (7th Cir. 1992), wherein Plaintiffs seeking statistical adjustments to Census data were deemed to be improperly "asking [courts] to take sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical adjustment to the census headcount"). And as far as expertise goes, "disputes regarding the Bureau's use of statistics in taking the census 'are best resolved not by the courts but by the Bureau itself, whose experience with prior censuses and expertise in the collection and analysis of statistical information render it especially qualified to make the appropriate decisions.'" *City of L.A. v. U.S. Dep't of Commerce*, 307 F.3d 859, 876 (9th Cir. 2002) (quoting *City of Phila. v. Klutznick*, 503 F. Supp. 663, 676 (E.D.Pa.1980)).

Here, the Census Bureau's experts have spent years publicly and transparently crafting a disclosure avoidance system to face today's threats. Forcing the Census Bureau to produce the data withheld in this litigation would severely compromise and weaken the confidentiality protections of the DAS. Second Abowd Decl. ¶ 57. And if Title 13's confidentiality provisions are construed narrowly to preclude the Census Bureau from accounting 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, particularly in national security and law enforcement matters, understand this mosaic-effect risk and permit the government to rely on it to justify withholdings. *See Whittaker v. DOJ*, 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. DOJ*, 239 F. Supp. 3d 100, 115 (D.D.C. 2017)).

Here, the inclusion of additional invariants (in other words, publication of additional data without privacy protections) would subject Census respondents to unquantified additional privacy risk, Second Abowd Decl. ¶ 60, which would have cascading deleterious effects on the Census Bureau's ability to meet its confidentiality obligations under Title 13. That would be inconsistent with Congress' intent in enacting Title 13's confidentiality provisions and Congress' intent in establishing exemptions, such as Exemption 3, to disclosure under FOIA.

CONCLUSION

For these reasons, the Court should grant Defendants' motion for summary judgment.

Dated: September 10, 2021

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgement with the Clerk of the Court through the ECF system on September 10, 2021. This system provided a copy to and effected service of this document on all parties.

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