UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FAIR LINES AMERICA FOUNDATION, INC., Plaintiff, v. UNITED STATES DEPARTMENT OF COMMERCE and UNITED STATES BUREAU OF THE CENSUS, Defendants.	Case No. 1:21-cv-1361-ABJ **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S COMBINED OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Plaintiff Fair Lines America Foundation's ("Plaintiff" or "Fair Lines") brings its Combined Opposition to Defendants' Motion for Summary Judgment, ("Defs.' MSJ") ECF No. 13, and Cross-Motion for Summary Judgment in this Freedom of Information Act ("FOIA") action seeking information from Defendants the U.S. Department of Commerce ("Commerce") and the U.S. Census Bureau ("Census Bureau") regarding the 2020 Census. Because the law requires Defendants to produce the information Plaintiff requests, there are no genuine issues of material fact, and Defendants rely on purely speculative arguments to support their withholding the information, Plaintiff respectfully requests that its Cross-Motion for Summary Judgment be granted and that Defendants' Motion for Summary Judgment be denied.

In conducting the 2020 Decennial Census, the Census Bureau for the first time ever used a methodology it termed "Group Quarters Count Imputation" ("GQCI") to fill in apparently missing or incomplete data for certain group housing facilities—ranging from jails, prisons, nursing homes,

military bases, to colleges and universities.[1] Although the use of this new methodology has potentially very significant implications ranging from allocation of federal funds to apportionment of seats for the House of Representatives, the particulars of the GQCI methodology was not publicly revealed through any sort of notice and comment process; to this day, its nature and the extent of how many people were added (and in what states) through the GQCI methodology remains undisclosed to the public.

Due to its concerns about the Census Bureau's lack of transparency in its methodology, Plaintiff filed a FOIA Request seeking information to help inform the public about the impact of GQCI on the 2020 Census, as well as the extent to which it was employed in the enumeration. In response to Plaintiff's Request seeking "summaries, 'tabulations[,] and other statistical materials,' 13 U.S.C. § 8(b)," related to the group quarters population data for Census Day, April 1, 2020, Compl. ¶ 2, ECF No. 1, the Census Bureau revealed some information about their various attempts to test different methods of GQCI. In the first set of documents the Census Bureau produced, however, certain crucial information about the extent to which the Census Bureau used GQCI in ascertaining the actual enumeration was withheld by the Census Bureau under its new interpretation of the privacy protections of Title 13 of the Census Act, 13 U.S.C. §§ 8(b) and 9.

Through substantial narrowing of its initial Request, the information now requested by Plaintiff is simple: Plaintiff only seeks "documents identifying the total population (number of individuals) imputed statewide by the Census Bureau for group quarters" for each U.S. state. Pl. Mot. for Preliminary Inj., Ex. 3, ECF No. 8-4 at 7 (emphasis in original); *see also* Defendants'

[1] The Census Bureau defines "group quarters" 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." U.S. Census Bureau "2020 Census Group Quarters," *available at* https://www.census.gov/newsroom/blogs/randomsamplings/2021/03/2020-census-group-quarters.html) (last accessed Sept. 29, 2021).

Statement of Material Facts ("Defs.' SOF"), ECF No. 13-2 ¶ 48. Although Defendants acknowledge the existence of these aggregate numbers, and that Defendants are able to identify and extract the data from their existing records in a secure database, *see* Second Declaration of Vernon E. Curry ("Second Curry Decl."), ECF No. 13-4 ¶ 18; Defs.' SOF ¶ 52, Defendants are withholding this information from Plaintiff in full because they assert the information is exempt from disclosure pursuant to FOIA Exemption 3, 5 U.S.C. § 552(b)(3), in conjunction with 13 U.S.C. §§ 8(b) and 9. Exemption 3 exempts information from disclosure only 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) (emphasis added), or "establishes particular criteria for withholding or refers to particular types of matters to be withheld," *id.* § 552(b)(3)(A)(ii).

This case thus presents a straightforward issue of law appropriate for this Court's resolution on summary judgment: does Title 13 prevent disclosure under FOIA of state-wide aggregated data that does not contain "information reported by, or on behalf of, any particular respondent," 13 U.S.C. § 8(b), and that consists entirely of information that does not include responses from particular establishments or individuals? *Cf.* 13 U.S.C. § 9(a)(2). Plaintiff contends that the statutory language resolves the question on its own: where, as here, the requested tabulations or data by definition "do not disclose the information reported by . . . any particular respondent," 13 U.S.C. § 8(b), and no such confidential information can be identified from release of the requested data, 13 U.S.C. § 9(a)(2), the inquiry ends there, and that data is thus not "require[d] . . . [to] be withheld," 5 U.S.C. § 552(b)(3)(A)(i), under FOIA Exemption 3. The Census Bureau imputed (i.e., made up) the requested group quarters data to fill in gaps caused by the *absence* of responses from individuals or establishments to the Census; Defendants fail to meet their burden of demonstrating

how publication of numbers that it created *without individual responses* could possibly reveal or lead to identification of Title 13-protected individual responses.[2]

Attempting to circumvent the plain language of Title 13, Defendants rely exclusively on unsubstantiated speculation by the Bureau's chief scientist, John Abowd, that release of this aggregate imputed data could eventually lead to a future sophisticated breach of individuals' privacy through the methods of database re-identification and/or reconstruction. *See* Defs.' Memorandum in Supp. of MSJ, ECF No. 13-1 at 8. Defendants' conjecture about a chain of unlikely (if not impossible) events that may take place at some future time should not trump Title 13's plain requirements. The policy determination of what information Title 13 should protect belongs to Congress, and the legal determination of what information falls within the scope of its statutory protections ultimately belongs to this Court, not to the Bureau and its chief scientist. Furthermore, Dr. Abowd's assertions regarding imputed data are also completely unsubstantiated, as demonstrated by the analysis of Plaintiff's expert, Professor Steven Ruggles.[3] *See* Declaration of Dr. Steven Ruggles, Ex. 2. Professor Ruggles' determination that "[t]here is *no possible means* by which the number of imputed cases could be used in combination with other statistics to allow for identification of an individual," Expert Report of Dr. Steven Ruggles ("Ruggles Report"), Ex.

[2] In fact, the Census Bureau has historically released information concerning the number of people added to each state's population count through "household imputation" for apportionment purposes. *See* D'Vera Cohn, *Imputation: Adding People to the Census*, Pew Research Center (May 4, 2011), https://www.pewresearch.org/social-trends/2011/05/04/imputation-adding-people-to-the-census/ (last accessed Sept. 29, 2021); *Utah v. Evans*, 536 U.S. 452, 457 (2002). Defendants are thus adopting a new and unprecedented approach and interpretation of Title 13's requirements.

[3] Professor Ruggles is Regents Professor of History and Population Studies at the University of Minnesota and directs the University's Institute for Social Research and Data Innovation. His research on this subject has been published in a recognized peer-reviewed academic journal covering demography. *See* Steven Ruggles & David Van Riper, *The Role of Chance in the Census Bureau Database Reconstruction Experiment*, Population and Pol'y Rev. (2021), *available at* https://link.springer.com/article/10.1007/s11113-021-09674-3 (last accessed on Sept. 29, 2021) [hereinafter *The Role of Chance in the Census Bureau Database Reconstruction Experiment*].

2, App'x A at 5 (emphasis added), clearly contradicts Defendants' central argument that these numbers must be withheld to protect individual privacy. This alone is fatal to their motion for summary judgment. *Cf. Ambrosini v. Labarraque*, 966 F.2d 1464 (D.C. Cir. 1992) (finding that an expert's report is sufficient to defeat summary judgment where the expert states a sufficient factual basis based on his scientific knowledge and review of the case).

Simply put, Defendants cannot assert that the release of imputed group quarters data threatens to compromise private individual responses when the Census Bureau's GQCI data does not include individual responses. On the contrary, the Bureau created this data to compensate for a *lack of* individual data. Furthermore, the fact that Plaintiff only requests statewide totals of these imputed numbers, rather than county-level or institution-level totals, renders Defendants' objection even more indefensible. At a minimum, it cannot be said that Title 13 clearly "*requires* that [this data] be withheld from the public." 5 U.S.C. § 552(b)(3)(A)(i) (emphasis added). Because there is no genuine issue of material fact in this case, and the plain language of Title 13 and controlling caselaw require that this information be disclosed under FOIA, Plaintiff is entitled to summary judgment, and Defendants' motion for summary judgment must therefore be dismissed.

BACKGROUND

I. GROUP QUARTERS COUNT IMPUTATION IN THE 2020 CENSUS

A. Constitutional Framework

As the Constitution mandates, an "actual Enumeration" of the population of the United State—i.e., the decennial Census—must be conducted every ten years "in such Manner as [Congress] shall by Law direct" to reapportion the number of seats allocated to each state in the House of Representatives. U.S. Const., art. I, § 2, cl. 3. The state population totals are also used "to allocate federal funds to the States and to draw electoral districts." *Dep't of Com. v. New York*,

139 S. Ct. 2551, 2561 (2019). Congress has delegated the taking of the census to the Secretary of Commerce "in such form and content as he may determine," 13 U.S.C. § 141(a); the Census Bureau "The Secretary is assisted in the performance of that responsibility by the Bureau of the Census and its head, the Director of the Census." *Wisconsin v. City of New York*, 517 U.S. 1, 5 (1996) (citing 13 U.S.C. §§ 2, 21).

In the late 1990s, the Census Bureau proposed using statistical methods to "adjust" census numbers used in the apportionment using various statistical methods. The Supreme Court rejected this method because the Census Act prohibited the proposed uses of statistical sampling in calculating the population for purposes of apportionment. *Dep't of Com. v. U.S. House of Representatives*, 525 U.S. 316, 334 (1999); *see also id.* at 349 (Scalia, J., concurring) ("[A]n apportionment census conducted with the use of 'sampling techniques' is not the 'actual Enumeration' that the Constitution requires."). Several years later, Utah challenged the Census Bureau's use of "household imputation" to fill in data on certain missing households—essentially by borrowing data from a nearby neighbor and "imputing" that information to the missing household. In a divided opinion, the Supreme Court approved this use of household imputation as not inconsistent with the Constitution's "actual Enumeration" requirement and determined it was not a prohibited use of statistical sampling. *Utah v. Evans*, 536 U.S. 452, 457 (2002).[4]

B. Complications with 2020 Census and Group Quarters Count Imputation

Administration of the 2020 Census was fraught with setbacks and delay. For instance, in late 2020, well after Census Day had passed, public reporting described "processing anomalies" of census records for the 2020 national tally that "if left unfixed, could miscount millions of

[4] Group quarters count imputation was not raised or addressed in that lawsuit. Counsel is unaware of any prior census that "imputed" any group quarters residents.

people."[5] "[M]ajor inconsistencies" unearthed by the Census Bureau largely centered around "the information it has gathered this year about residents of college dorms, prisons and other group living quarters—a category that, for the 2020 census, included around 8 million people."[6] These complications were only compounded by the fact that 2020 was the rollout year for the Census Bureau's application of "differential privacy," or the intentional introduction of "statistical noise," *see* Second Declaration of John M. Abowd ("Second Abowd Decl."), ECF No. 13-3 ¶ 44, to the 2020 Census data in an effort to protect the confidentiality of respondents' census records under an apparently brand new interpretation of Title 13.

As a result of the processing anomalies and major inconsistencies in the group quarters data, on February 12, 2021, the Census Bureau publicly announced that the first release of its redistricting data, which was originally scheduled to be delivered to the states by March 31, 2021, would be delayed until September 30, 2021.[7] On March 15, 2021, following lawsuits filed by the State of Ohio and the State of Alabama, the Census Bureau announced that there would be a public release of the "legacy format" summary redistricting data (which states are assured they can rely on for accuracy in conducting redistricting) on August 16, 2021.[8] The Bureau explained that its

---

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

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

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

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

delays were necessary largely to allow for time to address difficulties and irregularities it encountered while gathering and tabulating group quarters data for the 2020 Census due to the COVID-19 pandemic.[9] Specifically, the Bureau's Chief of Decennial Statistical Studies Division acknowledged on the Bureau's public website that it "had to adapt and delay some of the ways we counted group quarters because of the COVID-19 pandemic," and that, consequently, "[a]fter the end of data collection, when we began processing census data from group quarters, we realized that many of them were occupied on April 1, 2020 (the reference day for the census), but didn't provide a population count."[10] The Bureau also explained the significant impact such group quarters data discrepancies can have for obtaining an accurate population count:

> [W]hen we enumerated [group quarters] in midsummer, some group quarters said they were vacant but they were actually occupied on April 1. If not corrected, such cases could lead to an undercount. If the corrections were not properly coordinated with our procedures to remove duplicated people, they could contribute to an overcount.[11]

Accordingly, the Bureau announced that it would employ new GQCI procedures for counting unresolved group quarters, even though that method "had never before [been] conducted" for group quarters previously.[12] Specifically, GQCI is a methodology (with details not yet fully made public) developed to address deficiencies in the Census Bureau's count of persons residing

---

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

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

[11] *Id.*

[12] *Id.*

in group quarters, which include college dormitories, residential treatment centers, skilled nursing facilities, group homes, military barracks, prisons, and worker dormitories. Ruggles Report, Ex. 2, App'x A at 2. When the Census Bureau identified some 43,000 group quarters units for which they lacked a population count, GQCI methods were used to assign an estimated or "imputed" population count for every unit that the Census Bureau believed to be occupied on census day. *Id.* at 2–3. The methods were also used to add population to group quarters units whose population count was "much lower" than expected. *Id.* at 3; Pl. Mot. for Preliminary Inj., Ex. 4, ECF No. 8-7 at 259.

Although the Census Bureau had never previously used imputation to estimate the size of uncounted group quarters units, imputation has been used to fill in missing information about individuals residing in households since the 1960 Census. Ruggles Report, Ex. 2, App'x A at 3. As a general matter, imputation is universally accepted in the demographic research community as a method that improves the accuracy of the population count, *id.*, and its use at the household level has been upheld by the Supreme Court, *Evans*, 536 U.S. 452. In the past, the Census Bureau has released detailed information—down to the block level—on the number of imputed persons in each locality. Ruggles Report, Ex. 2, App'x A at 3. However, the Census Bureau now argues that it cannot release the number of people added to each state through GQCI because it would allegedly violate the privacy guarantees in Title 13. *See* ECF No. 10. Public uncertainty about reliability of the data remains high and questions about the Bureau's imputation methodology remain largely unaddressed by the Bureau. *See* Ruggles Report, Ex. 2, App'x A at 3–4, 9 n.2.

II. FACTUAL BACKGROUND

A. Plaintiff Requests Information to Which It Is Entitled Under FOIA and Files Complaint Challenging Defendants' Redactions.

On March 31, 2021, Plaintiff[13] submitted a FOIA request ("the Request") seeking summaries, tabulations, and other statistical materials derived from, summarizing, or otherwise relating to the original underlying group quarters population data reported for the 2020 Census, rather than the underlying raw data itself and the methodology. *See* Compl. Ex. C, ECF No. 1-3 at 3–4. Specifically, Plaintiff stated that it does not "seek disclosure of the underlying raw group quarters population data itself as originally 'reported by, or on behalf of, any particular respondent' to the Bureau, 13 U.S.C. § 8(b)," nor "any 'publication whereby the data furnished by any particular establishment or individual under this title can be identified,' 13 U.S.C. § 9(a)(2)." Compl. Ex. C, ECF No. 1-3 at 3–4; *see also* Ex. 1 ("Second Kincaid Decl.") ¶ 6.

On April 13, 2021, the Census Bureau's FOIA Section Chief affirmed that the Request had been received and that a search had commenced. *See* Compl. Ex. F, ECF No. 1-6 at 1. However, after the FOIA statutory twenty-business-day deadline (calculated from the date Fair Lines emailed the Request to the Census Bureau) passed on April 28, 2021, *see* 5 U.S.C. § 552(a)(6)(A)(i), Fair Lines had still received no determination from Defendants regarding the Request, including no decision on its application for expedited processing. Second Kincaid Decl., Ex. 1 ¶¶ 8–9. After the April 13 email from the Census Bureau, Plaintiff received no further communications from the Census Bureau until it filed its Complaint with this Court on May 18, 2021, s*ee id.* ¶ 9; Compl. ECF No. 1, having constructively exhausted all administrative remedies, 5 U.S.C. § 552(a)(6)(C)(i).

On May 25, 2021, Defendants sent a letter (dated May 24, 2021) to Plaintiff's counsel

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

partially granting and partially denying Plaintiff's FOIA request, providing Plaintiff with 988 pages of redacted responsive records. Pl. Mot. for Preliminary Inj., Ex. 4, ECF Nos. 8-5 to 8-7. Of those, 166 pages were either fully or partially redacted. *See id.* No records from 2021 were included in the production; *i.e.*, all produced (visible) records were dated December 2020 and earlier. *See id.* Defendants claimed all withheld portions were redacted "pursuant to FOIA Exemptions 3 and 5, Title 5, United States Code, Sections 552(b)(3) and (b)(5)." *Id.* Of greatest relevance to this action, Defendants asserted that information withheld under Exemption 3 is "protected by Title 13, United States Code, Section 9," which Defendants interpret to mean "requires that census records be used solely for statistical purposes and makes these records confidential." *Id.*

B. Parties' Counsel Confer Over Production and Plaintiff Agrees to Narrow Scope of Requested Information.

Counsel for both parties met on May 26, 2021, in a telephonic consultation, with Plaintiff's counsel requesting that Defendants (1) review the May 25 production to clarify which exemption applied to each redaction, (2) produce all post-December 2020 responsive records, and (3) produce the responsive emails referenced in the May 19 correspondence. In a follow-up email on May 26, Plaintiff's counsel agreed to narrow the scope of the unresolved email search to "all responsive emails sent or received between March 31, 2020 and March 31, 2021," *see* ECF No. 8-4 at 19–20 (5.26.21 Torchinsky email), and reiterated his client is seeking "only *aggregated* numbers on a statewide or county-wide level" that were counted as a result of group quarters imputation procedures. *Id.* Plaintiff's counsel also clarified that Plaintiff was not requesting any exempt "underlying raw group quarters population data as originally 'reported by, or on behalf of, any particular respondent' to the Bureau," *id.* (quoting 13 U.S.C. § 8(b)), nor was Plaintiff seeking any "'publication whereby the data furnished by any particular establishment or individual under this title can be identified,'" *id.* (quoting 13 U.S.C. § 9(a)(2)), or other "'individual reports,'" *id.*

(quoting 13 U.S.C. § 9(a)(3)). Both parties' counsel also discussed the remaining, but not yet produced, responsive records, all of which were created after December 2020. *See* ECF No. 8-4 at 16–17 (6.16.21 Torchinsky email).

On May 27, 2021, Defendants' counsel conveyed that his client had agreed to review the May 25 production to "determine whether they stand by those redactions" and to clarify the basis for each redaction. ECF No. 8-4 at 19 (5.27.21 Kossak email). Defendants' counsel was unable to provide a timetable at that point for completing this process. *Id.* Plaintiff's counsel responded with a request to receive additional documents on a rolling basis as they were ready for release, to which Defendants' counsel did not reply. *See id.* (5.27.21 Torchinsky email). The following day, the Census Bureau granted Plaintiff's requests for expedited processing of the FOIA request. Pl. Mot. for Preliminary Inj., Ex. 5, ECF No. 8-8.

On June 8, 2021, because Plaintiff had not heard from Defendants or received either the reprocessed May 25 production or any of the requested emails, Plaintiff's counsel emailed Defendants' counsel requesting an update. ECF No. 8-4 at 18 (6.8.21 Torchinsky email). Defendants' counsel did not have an answer at that time, and eventually responded over a week later on June 16, 2021, stating that Defendants would release the re-processed May 25 production to Plaintiff by June 24, 2021. *Id.* at 17 (6.16.21 Kossak email). Defendants' counsel did not provide any information on the status of the requested emails at that time. *Id.* On June 21, 2021, Defendants filed an answer to Plaintiff's complaint. ECF No. 7.

On June 24, 2021, Plaintiff's counsel emailed Defendants' counsel to ask when the reprocessed records would be released and if Defendants had provided any answers on the additional emails and post-December 2020 records. ECF No. 8-4 at 15 (6.24.21 Torchinsky email). Defendants' counsel responded that the re-processed records would not be provided to Plaintiff by

the promised June 24 deadline because Defendants claimed to have run into "unexpected technical difficulties" and that they hoped "to have the document available by the end of [June]." *Id.* at 15 (6.24.21 Kossak email). In response, Plaintiff's counsel explained that given the potentially time sensitive nature of the information contained in these records, and because the parties' agreement had been unilaterally pushed back by Defendants, he would consult with his client about seeking a preliminary injunction regarding the withheld records. *Id.* at 14 (6.25.21 Torchinsky email).

In a June 25 email, Defendants' counsel provided specific pages corresponding with particular justifications for the redactions from the May 25 production. *Id.* at 12–14 (6.25.21 Kossak email). Defendants stood by all of their redactions and asserted that the majority of the information withheld was redacted "to ensure that every information product released by the Census Bureau adheres to the confidentiality requirement of Title 13 and other applicable statutes," making that information all allegedly exempt from disclosure under FOIA Exemption 3. *Id.* The email also indicated Defendants had found 2,600 emails that were potentially responsive to the Request, and that Defendants would agree in the Joint Status Report due on July 20, 2021, to "using their best efforts to process 300 pages of potentially responsive records per month, with the first release of any nonexempt, responsive records by July 30, 2021." *Id.*

Having finally received explanations for the redactions in the May 25 production, and after a Zoom call between parties' counsel on June 29, 2021, Plaintiff's counsel provided Defendants' counsel with a list of redactions Plaintiff views to be improper along with an attached excerpt of those pages, ECF No. 8-4 at 10–11, with the most glaring issues arising from withholdings of summary statistical information and tabulations that Plaintiff indicated are subject to disclosure under 13 U.S.C. § 8(b). *See* Pl. Mot. for Preliminary Inj., Ex. 7, ECF No. 8-7. Plaintiff's counsel also requested an update on the status of the search for the responsive emails and post-December

2020 records. ECF No. 8-4 at 11.

Defendants' counsel responded in a July 6, 2021 email, providing Plaintiff with only two responsive post-December 2020 records. *See* Pl. Mot. for Preliminary Inj., Ex. 6, ECF No. 8-9. In the same correspondence, Defendants' counsel again defended all of the redactions in the May 25 production, asserting that because of the "risk of re-identification attacks on aggregated data releases" in the modern age of computing power and sophistication, Defendants "generally avoid[] the release of intermediate work product because it can be used in combination with other intermediate work products, official publications, and the final product to re-identify individual respondents and their data items"; accordingly, Defendants maintain that release of *any* of the aggregate or summary data withheld from Plaintiff would violate Title 13's confidentiality provisions. *See id.* Defendants' counsel asserted that Plaintiff "[has] not identified any particular reason why the redacted data is needed urgently," even though Defendants had previously granted Plaintiff's request for expedited processing on May 28, 2021. *Id.*; ECF No. 8-4 at 18 (5.28.21 Kossak email). Finally, Defendants' counsel indicated that Defendants had identified 917 potentially responsive emails (in contrast with the "2,600 potentially responsive emails" mentioned in Defendants' June 25 email, *see* ECF No. 8-4 at 12–13 (6.25.21 Kossak email)) containing 25,899 pages of material, and reaffirmed Defendants' initial offer to attempt review of 300 pages of emails per month for potential release to Plaintiff. ECF No. 8-4 at 7–10 (7.6.21 Kossak email).[14]

On July 10, 2021, Plaintiff's counsel responded that because of the significant and time sensitive nature of Plaintiff's request, it would be seeking a preliminary injunction requesting production of the improperly withheld/redacted, non-exempt pages of the May 25 production,

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

particularly in light of the Census Bureau's impending August 16 release of the legacy format summary data and the redistricting process that would commence in earnest immediately afterward. ECF No. 8-4 at 7 (7.10.21 Torchinsky email). Plaintiff's counsel also proposed substantially narrowing the scope of Defendants' search, now requesting that they provide "documents identifying the total population (number of individuals) imputed statewide by the Census Bureau for group quarters." *Id.* (emphasis in original). Plaintiff further stated that "[w]e 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." *Id.*

C. Plaintiff Files and Withdraws Motion for Preliminary Injunction.

On July 19, 2021, Fair Lines filed a motion for preliminary injunction, in which it sought an order requiring Defendants "to produce all responsive non-exempt records and data improperly withheld from the May 25 production within 10 days of the date of the Court's Order, or before August 15, 2021, whichever is earlier." Fair Lines' Mot. for Preliminary Inj. at 1, ECF No. 8. Fair Lines also requested that the Court order Defendants to "produce all non-exempt responsive records and data from Defendants' identified potentially responsive emails (that have not yet been produced to Plaintiff) as soon as practicable, and order Defendants to produce a Vaughn Index specifically describing in detail each record and portion thereof withheld as exempt within the same timeframe." *Id.*

Three days earlier, on July 16, 2021, Defendants' counsel informed Fair Lines that they had "no reason to believe" the requested information would appear in an email because that in formation is kept on a secure database (the Decennial Response Processing System). ECF No. 8-

4 at 2 (7.16.21 Kossak email). Defendants have since conceded that an appropriate query against the Decennial Response Processing System can extract the number of individuals imputed for group quarters, aggregated for each state. Second Curry Decl. ¶ 18; Defs.' SOF ¶ 52.

On July 26, 2021, Defendants filed their opposition to Plaintiff's motion for preliminary injunction. Defs.' Opp'n, ECF No. 10. On July 28, 2021, Plaintiff filed a notice stating that it was withdrawing its preliminary injunction motion. ECF No. 11. Plaintiff indicated that it was doing so because of Defendants' "suggestions and implicit threats that they may decide to delay their already-delayed August 16, 2021 public release date of the 'legacy' format redistricting data, as a consequence of Plaintiff's Motion for Preliminary Injunction before this Court." *Id.* at 2; *see also* ECF No. 10 at 38 ("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. The Census Bureau cannot ascertain the length of the delay, but [it could be] potentially for as long as six months beyond August 16, 2021." (citing First Abowd Decl. ¶¶ 75–76)).

D. Briefing of Summary Judgment Motions.

On July 29, 2021, the Court issued a Minute Order that the parties must meet and confer and propose a schedule for further proceedings. After the parties met and conferred, on August 6, 2021, the Court approved the parties' joint proposed schedule for briefing summary judgment, ECF No. 12. On September 10, 2021, Defendants filed their motion for summary judgment. ECF No. 13.

Separately, on August 2, 2021, the Census Bureau's FOIA office issued to Plaintiff a final determination in response to its FOIA request. Second Curry Decl. ¶ 19. This letter informed Plaintiff that in addition to the productions made, there were certain records responsive to their

narrowed request for imputed group quarter information, tabulated by state, that could be extracted from a database with an appropriate query. *Id.* The letter also informed Plaintiff that those records (52 in total, one for each of the 50 states, one for the District of Columbia, and one for Puerto Rico) were withheld in full pursuant to FOIA Exemption 3 in conjunction with 13 U.S.C. §§ 8(b) and 9. Second Curry Decl. ¶ 19. Additionally, some of the redacted data from the 988-page May 25 production includes state-level group quarters numbers reflecting population totals enumerated for that state. Second Abowd Decl. ¶ 68.

Plaintiff's substantially narrowed request at this stage is simple: it now only seeks these aggregated GQCI numbers on a statewide level.[15] The only redactions from the 988-page production it now challenges are Defendants' redactions of such statewide totals of imputed group quarters data.[16] To date, Defendants have refused to produce any statewide group quarters population data in response to the modified Request, and Plaintiff has not received any of the improperly withheld pages or redacted information from the May 25 production containing that same data, preventing Plaintiff's access to information not exempt from disclosure under Title 13. Second Kincaid Decl., Ex. 1 ¶ 14.

STANDARD OF REVIEW

Summary judgment is appropriate if the moving party demonstrates that "no genuine dispute [about] any material fact" exists and that it "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When applying this standard, the court must view the evidence and draw reasonable inferences from the underlying facts as established in the record in the light most

[15] As noted in its counsel's May 26, 2021 email to Defendants' counsel, Plaintiff's agreement to narrow the scope of its request should in no way be construed as waiving its right to pursue the other information sought in its original request should it deem it necessary to do so later on. ECF No. 8-4 at 19–20.

[16] Redacted descriptions of internal computer file locations, individual institutions' group quarters data, are not being challenged by Plaintiff.

favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). An issue of fact is "genuine" "if the evidence is such that a reasonable jury could return a verdict for the non-moving party" on the issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. *Id.*

"When more than one party moves for summary judgment, each party must carry its own burden of proof." *Nat'l Ass'n of Home Builders of the United States v. Babbit*, 949 F. Supp. 1, 3 (1996). "On cross-motions for summary judgment, the court shall not grant summary judgment unless one of the parties is entitled to judgment as a matter of law." *Id.* When the unresolved issues are preliminarily legal, however, summary judgment is particularly appropriate. *Id.*

The moving party bears the initial burden of production on a motion for summary judgment to make a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When the moving party will also bear the burden of proof at trial, summary judgment is appropriate against the moving party if it "fails to make a showing sufficient to establish the existence of an element essential to that party's case." *See id.* at 322. In FOIA cases, "[t]he burden [of proof] is, of course, on the agency resisting disclosure." *EPA v. Mink*, 410 U.S. 73, 93 (1973) (citing 5 U.S.C. § 552(a)(3)).

ARGUMENT

I. PLAINTIFF'S REQUESTED INFORMATION IS NOT EXEMPT UNDER TITLE 13 OF THE CENSUS ACT.

A. Title 13's Plain Language Protects the Confidentiality of Information Reported by Individual Respondents, Not Statewide Tabulations of Imputed Numbers—FOIA Thus Requires Disclosure of Plaintiff's Requested Information.

"[T]he starting point for [a court's] analysis is the statutory text." *Desert Palace, Inc. v.*

Costa, 539 U.S. 90, 98 (2003). Thus, when interpreting statutory language, "a court should always turn first to one, cardinal canon before all others. . . . courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 253-54 (1992). Accordingly, "when the statute's language is plain, the sole function of courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms" as Congress drafted it. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). "[I]f the statutory language is unambiguous and the statutory scheme is coherent and consistent," the court's inquiry ends there. *Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 450 (2002); *Germain*, 503 U.S. at 254 (holding that the "judicial inquiry is complete" where the words of a statute are unambiguous). Here, because the plain language of Title 13's protections does not extend to statewide tabulations of imputed data, that data is subject to mandatory disclosure under FOIA. This alone is sufficient for the Court to grant Plaintiff's motion for summary judgment, as explained further below.

1. FOIA's strong presumption of disclosure and the plain language of Title 13 together show Plaintiff's requested data is not exempt.

As a threshold matter, "[t]he FOIA mandates broad disclosure of government records to the public, subject to nine enumerated exemptions. . . . Given the FOIA's broad disclosure policy, the United States Supreme Court has consistently stated that FOIA exemptions are to be narrowly construed." *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (internal citations and quotation marks omitted). This "strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). FOIA's language and construction reflects Congress's purpose and "general philosophy of full agency disclosure unless information is exempted under *clearly delineated statutory language*." *Dep't of Air Force* v. *Rose,* 425 U.S. 352, 360-361 (1976) (quoting S. Rep. No. 813,

89th Cong., 1st Sess., 3 (1965)) (emphasis added).

Contrary to Defendants' argument, the plain language of Sections 8 and 9 of Title 13 unambiguously permits the Secretary of Commerce to release some Census data in response to FOIA requests, including "copies of tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent," 13 U.S.C. § 8(b), as Plaintiff has explicitly requested here. By contrast, these sections expressly protect the underlying raw data originally "furnished by any particular establishment or individual" from identification, *id.* § 9(a)(2), or "individual reports," *id.* § 9(a)(3), from disclosure or publication. The statute is unmistakable in its meaning: it protects the confidentiality of personally identifiable information and raw data as originally furnished by individuals or establishments to the Census Bureau, while permitting disclosure of other tabulations and summary statistical materials that do not disclose such individual information. Principles of statutory interpretation require such provisions to be interpreted "to give effect, if possible, to every clause and word," *Duncan v. Walker*, 533 U.S. 167, 174 (2001), and to "avoid statutory interpretations that render provisions superfluous," *United States v. Anderson*, 15 F.3d 278, 283 (2d Cir. 1994). Yet Defendants' interpretation that these provisions prohibit release of all intermediate work product, or *any* responses that would create additional invariants in the Census Bureau's data set, is directly contradicted by the express statutory provisions of Title 13.

Specifically, Defendants' overbroad interpretation of Section (9)(a)(2) directly conflicts with Section 8(b)'s permitted disclosure of tabulations and other statistical materials that do not disclose personally identifiable information. Section 9(a)(2) prohibits "mak[ing] any publication" whereby personally identifiable data "*furnished* by any *particular establishment or individual*" can be identified. *Id.* § 9(a)(2) (emphasis added). Accordingly, in using this language Congress most

naturally protected against publications of confidential personal data to third parties (or from which confidential personal information could be readily determined by third parties), not against all publications that the Census Bureau deems could potentially lead to the discovery of personally identifiable information through whatever attenuated series of hypothetical future events it may anticipate. Section 9(a)(2) must be interpreted harmoniously with its surrounding provisions, and not so broadly as to render the rest of the statutory disclosure scheme meaningless. *See Maracich v. Spears*, 570 U.S. 48, 68 (2013) ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory. . . . [T]here can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously.") (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 180 (2012)). Adopting the Census Bureau's expansive interpretation that any data introducing new invariants to its differential privacy framework is automatically exempt from disclosure under Title 13 if the Census Bureau so determines, regardless of whether that data was "furnished by any particular . . . individual," would permit Section 9(a)(2)'s restriction to swallow up Section 8(b)'s allowance for disclosure of preliminary summary or tabulated data, rendering the latter provision inoperative and meaningless in the FOIA context.

If Congress intended to create an exemption to disclosure for all preliminary Census data, whether tabulations or raw data reported by individuals, it easily could have done so. *See generally Norinsberg v. U.S. Dep't of Agric.*, 162 F.3d 1194, 1200 (D.C. Cir. 1998) ("Had the Congress intended to [incorporate additional statutory requirements], it could have done so expressly."). Indeed, it would have been far simpler to create a blanket confidentiality requirement for all intermediate data (as Defendants essentially assert) than the more detailed and nuanced scheme the statute currently provides. But that is not what Congress did, and this Court

should not reinterpret Title 13's express language to bar public disclosure of never-before-used "group quarter imputation" numbers, nor should this Court ignore FOIA's express demands to accord with Defendants' preferred understanding of the confidentiality provisions or to prevent disclosure of *any* data that would increase the number of invariants the Bureau set for a particular Census. The judicial inquiry is thus complete on the statutory language alone, and disclosure is required.

2. Because Defendants fail to meet their burden of demonstrating that Plaintiff's requested information is clearly exempt under Title 13, it must be disclosed under FOIA.

Importantly, while Section 8(b) uses discretionary, rather than mandatory, language for disclosure—"the Secretary may furnish"—FOIA *requires* that the Bureau promptly furnish any non-exempt responsive records to a FOIA request. Thus, the requested records at issue here must be promptly provided to Plaintiff. 5 U.S.C. § 552(a)(3)(A) ("[E]ach agency, upon any request for records . . . *shall* make the records promptly available to any person." (emphasis added)). Accordingly, any "tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent" must be turned over to Plaintiff in accordance with its FOIA request, even if that release increases the number of invariants in Defendants' data set. Where there is no credible risk that underlying raw data will be identified because of disclosure, FOIA and Title 13 in conjunction do not leave room for agency discretion when it comes to withholding such summary statistical materials from a FOIA requester.

By contrast, adoption of Defendants' interpretation of these statutes would mean that the agency would enjoy full, unchecked discretion over what data it turns over in response to FOIA requests. As long as the Bureau determines that there is a risk of ultimate disclosure through database re-identification or reconstruction, no matter how small or attenuated, Defendants

maintain the Bureau's decision must be deferred to. The plain meaning of FOIA and Title 13 stand for a contrary proposition: because Title 13 allows for disclosure of statewide totals of imputed group quarters data as Plaintiff requests, Defendants must disclose that data pursuant to FOIA.

Even if this Court determines that Title 13 is ambiguous regarding whether Plaintiff's requested data is protected against disclosure, Defendants still bear the burden of demonstrating that the requested data is clearly exempt under Title 13. FOIA Exemption 3 permits information to be withheld under a statutory exemption if the statute "*requires* that the matters [i.e., the requested information] be withheld from the public in such a manner *as to leave no discretion* on the issue" for the agency. 5 U.S.C. § 552(b)(3)(A)(i) (emphasis added).[17] Because at a minimum it cannot be said that the language Title 13 so clearly "requires" Defendants to withhold all imputed statewide group quarters data "as to leave no discretion" for the agency to decide whether it could be released at all, Defendants' argument still fails under the best-case scenario for them. Accordingly, whether Title 13 clearly allows the data to be disclosed as Plaintiff contends, or whether it is ambiguous regarding whether imputed statewide data is protected, the result is the same: Defendants must produce Plaintiff's requested data in either event.

B. Defendants' Interpretation of Title 13 is Inconsistent with Controlling Caselaw.

As controlling caselaw demonstrates, Section 8(b) of the Census Act permits the Secretary of Commerce to "furnish copies of tabulations and other statistical materials which do not disclose

[17] The other basis for withholding information under Exemption 3, that the statute "establishes particular criteria for withholding or refers to particular types of matters to be withheld," 5 U.S.C. § 552(b)(3)(A)(ii), is inapplicable here because Title 13 says nothing about particular criteria for the agency to determine the parameters of when 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), nor does it refer to "particular types of matters" like imputed data or group quarters data that must be categorically must be withheld. This is likely why Defendants only argue the first basis for Exemption 3 throughout their summary judgment brief. *See* ECF No. 13-1 at 6; *see also* Defs.' SOF ¶ 59.

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

The D.C. Circuit has addressed the question of what data can be disclosed under Title 13. It held that Sections 8(b) and 9(a) permit the Secretary of Commerce to provide "private persons" with "tabulations and statistical materials of a *numerical* nature" in response to FOIA requests, while excluding "names and addresses of specific individuals or firms reporting data to the Census Bureau" for purposes of protecting privacy of individual respondents. *Seymour v. Barabba*, 559 F.2d 806, 809 (D.C. Cir. 1977) (emphasis added). As the Court further explained:

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

Id. (emphasis added). Here, because Plaintiff seeks statewide "totals" (*i.e.*, computations of total

imputed group quarters data) and statistical materials "of a numerical nature," *id.*, and this data in no way includes or discloses personally identifiable information from underlying data reported by individuals (because there is no underlying individual data for imputed numbers), Plaintiff's requested imputed data is not exempt from disclosure by the Census Act and must therefore be produced. 5 U.S.C. § 552(a)(3)(A) ("[E]ach agency, upon any request for records . . . *shall* make the records promptly available to any person." (emphasis added)).

Defendants rely on the Supreme Court's review of the legislative history in *Baldrige v. Shapiro* to support their contention that Title 13 exempts essentially limitless swaths of summary-level data from disclosure, thereby exempting the statewide GQCI data responsive to Plaintiff's FOIA request. ECF No. 13-1 at 24.[18] *Baldrige*, however, bolsters Plaintiff's argument that because the data being withheld by Defendants is not raw census data, and indeed does not even aggregate or summarize raw census data, it is ineligible for exemption from FOIA's disclosure requirements. In *Baldrige*, a county requested disclosure of the Census Bureau's master address register, "a listing of such information as addresses, householders' names, number of housing units, type of census inquiry, and, where applicable, the vacancy status of the unit." 455 U.S. at 349. At issue was whether the register was exempt from disclosure under Exemption 3 and Title 13 sections 8(b)

[18]As Defendants concede, the Supreme Court in *Baldrige* did not address the question raised in this litigation. ECF No. 13-1 at 25. Nevertheless, Plaintiff agrees that the legislative history cited therein and relied on by Defendants is instructive here because it clearly indicates Congressional intent behind Title 13 to protect the "confidentiality of data reported *by individuals*," 455 U.S. at 356 (emphasis added), which data is not implicated by GQCI data because imputed data was invented by Defendants because of the *absence of data reported by individuals*. *See* Ruggles Report, Ex. 2, App'x A at 3. Defendants have failed to put forward any plausible explanation of how individual data is implicated by the release of such statewide totals of imputed data, and instead ask this Court to take them at their word because their expert, Dr. Abowd, asserts without support that individually reported data could be at risk. In fact, Professor Ruggles' published research shows that the conclusions reached by Dr. Abowd are wrong. *See The Role of Chance in the Census Bureau Database Reconstruction Experiment*, https://link.springer.com/article/10.1007/s11113-021-09674-3 (last accessed on Sept. 29, 2021).

and 9(a), the former of which directs the Secretary to "not disclose the information reported by, or on behalf of, any particular respondent" and the latter of which prohibits publication "whereby the data furnished by any particular establishment or individual under this title can be identified." Such census responses or identifying information are considered raw census data exempt from disclosure. *Id.* Despite being "compiled initially from commercial mailing address lists and census postal checks," the master address register in *Baldrige* "was updated from data obtained from neighbors and others who spoke with the follow-up census enumerators," meaning it "include[d] data reported by or on behalf of individuals." *Id.* at 358–59. As such, the Court held that the register included raw census data and therefore fell under section 8(b)'s exemption from disclosure.

Defendants' reliance on *Seymour v. Barabba* fares no better. In *Seymour*, the D.C. Circuit reviewed a FOIA request for Census Bureau data including the names and addresses of certain companies. The court held that not only is such information clearly exempt under Title 13, section 9(a)'s prohibition on releasing identifying information, but also that it is separate from the "tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent" that the Secretary may produce under section 8(b). *Seymour*, 559 F.2d at 808-09. In drawing this distinction, the court clarified that Title 13 requires courts to treat individualized identifying information differently from higher-level computations and summaries that do not implicate the same privacy concerns. *See id.*

Taken together, *Baldrige* and *Seymour* establish that information provided directly by census participants and identifying information such as names and addresses are both exempt from disclosure under Exemption 3 and Title 13 sections 8(b) and 9(a). Plaintiff's modified Request at issue here, however, asks for neither kind of raw data, nor even for summaries or *tabulations* of such raw data. Instead, the Request seeks state-level summaries and tabulations imputed *separately*

from raw census data (keeping in mind that imputed data contains *no* individual census responses), which is even further than the kind of higher-level analytical information that the *Seymour* court described as being not exempt under Title 13. Defendants' attempts to cast such aggregate, non-individualized information as exempt from disclosure because of recent advancements in technology is without support in the courts' interpretations of these exemptions. The imputed data here do not even come close to implicating the same concerns regarding confidentiality of individual participants' responses at issue in those cases, as by its very nature this data is not derived from individuals' responses to Census questions, but rather is created in the absence of such responses. *See* Ruggles Report, Ex. 2, App'x A at 3 ("The data were not furnished by anyone, which is the reason that the Census Bureau had to invent it by means of imputation. Because the units were never counted, the Census Bureau was forced to guess the number of persons in each unit using a new methodology[.]"). The D.C. Circuit's opinion in *Seymour* particularly indicates that the law treats such data as distinct from identifying information found in raw data, undermining Defendants' attempt to conflate the two types of data, and further bolstering Plaintiff's case for disclosure under FOIA.

Binding caselaw thus supports that, contrary to Defendants' sweeping and unprecedented interpretation of Title 13, Plaintiff is entitled to the imputed group quarters totals sought in its Request.

C. Disclosure of Statewide Imputed Group Quarters Data Poses No Threat to Individual Privacy or Confidentiality Protected by Title 13.

Notwithstanding Title 13's plain language, confirmed by controlling caselaw, Defendants insist that this Court should interpret Title 13's confidentiality provisions to respond to recent technological advances and computing power that pose a new, heightened risk of "reverse-engineer[ing] releases of aggregated data to identify individual data" that did not exist before. ECF

No. 13-1 at 26. Defendants argue that even if this data may seem "innocuous in a vacuum," disclosure of data in response to various FOIA requests would "leave the 2020 Census DAS vulnerable to death by a thousand cuts from FOIA requesters seeking data that . . . in the aggregate would likely destabilize the DAS." *Id.* at 8. This argument fails, however, because as Plaintiff's expert report of Professor Steven Ruggles demonstrates, disclosure of statewide imputed group quarters data poses no threat to confidentiality of individual responses, whether in combination with other data through the "mosaic effect," *see* ECF No. 13-1 at 30, or otherwise. Ruggles Report, Ex. 2, App'x A at 2–6. No computer is powerful enough to reverse-engineer individual data that did not exist in the first place.[19] Without this critical piece of Defendants' argument (i.e., the serious threat that publication of the requested data threatens identification of individual responses), the foundation of Defendants' argument collapses. On this basis alone, Plaintiff is entitled to judgment as a matter of law, and Defendants' motion for summary judgment should be dismissed.

1. Defendants' conjecture about the threat of re-identification and reconstruction attacks from disclosure of state-level imputed group quarters data is unsupported and without merit.

Relying on the conclusory statements of the Census Bureau's chief scientist, John Abowd,[20] Defendants speculate that "[t]he disclosure of the data withheld in this case unobscured

[19] Although Defendants' response to other future FOIA requests may impermissibly risk disclosure of confidential individual data, that question is not before the Court, and thus has no bearing on this Court's determination of whether Plaintiff's Request does so.

[20] Such conclusory assertions from Dr. Abowd's declaration regarding individuals' confidentiality that might eventually be violated from this disclosure in combination with future unknown disclosures of data are insufficient to meet Defendants' burden on summary judgment. In reviewing this Court's decision on a cross-summary judgment motion in a FOIA case, the D.C. Circuit determined that the CIA's response with a "single, conclusory affidavit . . . [was] insufficient to carry the CIA's burden on summary judgment to prove that no substantial and material facts are in dispute and that it is entitled to judgment as a matter of law." *Morley v. CIA*, 508 F.3d 1108, 1122 (D.C. Cir. 2007) (cleaned up); *see also Matta v. Snow*, Civil Action No. 02-862 (CKK), 2005 U.S. Dist. LEXIS 36194, at *66 (D.D.C. Dec. 16, 2005) (finding that an affidavit

by disclosure avoidance techniques would [introduce] another [group quarters population] invariant. . . . [t]hat would expose a chink in the 2020 Census [Disclosure Avoidance System's] confidentiality armor, which in turn would leave data vulnerable to re-identification and reconstruction in violation of Title 13's confidentiality provisions." ECF No. 13-1 at 27. Specifically, Defendants argue that the data would be left vulnerable because of the "mosaic effect" whereby an attacker can piece together disparate information from multiple sources to recover confidential information. Id. at 30. Defendants are mistaken in their assertion that introduction of a group quarters population introduces an invariant that poses a risk of re-identification or reconstruction of individual responses.[21] As Professor Ruggles explains, "[i]nformation about imputation . . . would not add to the list of invariants, since the group quarters population counts would still have noise infusion; knowing about the size of the imputed population would not allow anyone to infer the true size of the group quarters population." Ruggles Report, Ex. 2, App'x A at 5. In other words, because the *imputed* population by definition does not reveal the size of the actual group quarters population, it is the same as any other data where statistical noise was introduced for purposes of differential privacy, disqualifying it from categorization as a true population invariant for purposes of disclosure avoidance. *Id.*

Defendants, in reliance on Dr. Abowd's declaration, also assert that the "release of state-level summaries can compromise these protections, most easily in the case of small states or for

---

is "worthless in the summary judgment context" where it relies on the affiant's "purported belief based on his own speculation"); *Fitzgerald v. Corrections Corp. of Am.*, 403 F.3d 1134, 1143-45 (10th Cir. 2005) ("[C]onclusory allegations without specific supporting facts have no probative value" and a conclusory affidavit is "insufficient to support summary judgment.") (internal citations and quotations omitted).

[21] While Plaintiff does not dispute that disclosure of imputed statewide GQCI data may contravene "the Census Bureau's established disclosure avoidance rules," *id.* at 29, that is not the test for whether information is protected from disclosure under Title 13.

less common types of group quarters facilities." ECF No. 13-1 at 31. Defendants offer only one concrete example of how disclosing state-level summaries of imputed population data can jeopardize the confidentiality of the actual population:

> 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 GQ in the published census data products, thus exposing the personal information of the facility's residents.

ECF No. 13-1 at 31–32 (citing Second Abowd Decl. ¶ 72). However, as Professor Ruggles states from his own independent analysis, "[t]his far-fetched scenario actually poses zero disclosure risk." Ruggles Report, Ex. 2, App'x A at 4. Professor Ruggles offers the following explanation:

> Even if it were somehow possible to infer the number of imputed cases in a particular group quarters unit, that would in no way compromise the disclosure guarantees of Title 13. If we knew, for example, that the GQCI added 42 persons to a vessel in Delaware, that information could not possibly reveal any particular person's identity or individual census responses; these imputed cases do not describe actual people, but rather they are invented to substitute for actual data on people that is not available.

Id. Accordingly, "it would not be possible for the data from particular respondents (whether establishments or individuals) to be identified from the release of the state-level *imputed* data the Plaintiff requests here." *Id.* Professor Ruggles concludes that any "assertion that the 2020 Census data will be left vulnerable to reconstruction and/or re-identification attacks by malicious intruders is [] without merit" because Plaintiff's requested data "could not conceivably pose a risk of disclosing information about any particular individual or establishment in the real world." *Id.*

Defendants also contend that in withholding Plaintiff's requested data, they are also fulfilling their duty as a federal agency under the Office of Management and Budget's ("OMB") Memorandum M-13-13 "to consider the risks of the mosaic effect when performing their disclosure reviews . . . 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." ECF No 13-1 at 30 (citing Second Abowd Decl. ¶ 68). However, this argument similarly fails because the OMB's rule "does not apply" in this case because "[t]he number of imputed group quarters residents is not 'potential PII or other potentially sensitive information,' since it does not describe the actual characteristics of any person or establishment." Ruggles Report, Ex. 2, App'x A at 5.

2. Congress and this Court determine what information is protected by Title 13 and subject to disclosure under FOIA, not the Census Bureau or its expert.

Defendants cite a Ninth Circuit case in support of their proposition that because statistical methodologies may disagree in this area, and the Census Bureau has "expertise in the collection and analysis of statistical information," the Court should defer to John Abowd's expert judgment and determination of what data must not be disclosed to protect individual privacy. *See* ECF No. 13-2 at 32–33 (citing *City of L.A. v. U.S. Dep't of Commerce*, 307 F.3d 859, 876 (9th Cir. 2002)). Defendants essentially argue that because Dr. Abowd is the lead expert of the agency with the greatest expertise on this issue, he should have unchecked authority to determine what information is protected from disclosure under Title 13. *See id.* Besides the manifest absurdity of such an approach to interpreting confidentiality provisions of statutes, the Ninth Circuit's reasoning is distinguishable because there it applied to the court's application of the Administrative Procedure Act to determine whether the Secretary of Commerce's decision was arbitrary and capricious, which could only be found if the agency's decision was "so implausible that it could not be ascribed to a difference in view or the product of agency expertise," *id.* at 874, a highly deferential standard.

By contrast, here no such deference is merited for the agency's expert's interpretation of Title 13's protections. As the D.C. Circuit has determined, "each courtroom comes equipped with

a 'legal expert,' called a judge, and it is his or her province alone to [determine] legal standards." *Burkhart v. Washington Metropolitan Area Transit Authority*, 112 F.3d 1207, 1213 (D.C. Cir. 1997). Accordingly, although "an expert may offer his opinion as to facts that, if found, would support a conclusion that the legal standard at issue was satisfied," that expert "may not testify as to whether the legal standard has been satisfied." *Id.* at 1212–13. Yet that is exactly what happened with Defendants' statement of material facts in reliance on Dr. Abowd's declaration of what he deems Title 13 requires. In addition to his rampant, unsupported speculation about the dangers of disclosing imputed group quarters data, Dr. Abowd's declaration "clearly contains impermissible legal conclusions" about what Title 13 requires, which is the "legal issue at the heart of the parties' respective motions for summary judgment." *United States ex rel. El-Amin v. George Wash. Univ.*, Civil Action No. 95-2000 (JGP), 2005 U.S. Dist. LEXIS 18900, at *4–5 (D.D.C. Aug. 29, 2005). Defendants in turn cite these legal conclusions in their separate statement of material facts, couching them as undisputed "facts." *See, e.g.*, Defs.' SOF 66, 80, 86–87, 90–92, 99–102, 105. However, such "statements of fact" amount to nothing more than "impermissible conclusion[s] that the legal standard in fact had been [satisfied]." *El-Amin,* 2005 U.S. Dist. LEXIS 18900 at *5. This Court should not give them the controlling weight that Defendants wrongly contend is required by the statute.

Defendants also cite several FOIA national security cases to support their contention that this Court should simply defer to Dr. Abowd's declaration because he has invoked the "mosaic" theory of harm (which is frequently argued in national security cases) in a census-related dispute. Memorandum in Supp. of MSJ, ECF No. 13-1 at 27 (citing *Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 927-28 (D.C. Cir. 2003)). While it is true that "in the FOIA context, [courts] have consistently deferred to executive affidavits predicting harm to national security," *ACLU v. United*

States DOD, 628 F.3d 612, 624 (D.C. Cir. 2011), this narrow line of caselaw is limited to the specific context of FOIA's national security exemption, FOIA Exemption 1 (5 U.S.C. § 552(b)(1)), where the "danger [of disclosure] is particularly grave," *Fensterwald v. CIA*, 443 F. Supp. 667, 669 (1977). While this heightened deference has been extended to cases involving Exemption 3 that incorporate the National Security Act of 1947, which requires the CIA Director to protect "intelligence sources and methods" from unauthorized disclosure, *see Halperin v. CIA*, 629 F.2d 144 (D.C. Cir. 1980) (citing 50 U.S.C § 403-3(c)(7)), this heightened deference has not been extended to apply to an agency's invocation of Title 13 (pursuant to Exemption 3) for protecting confidentiality of census data, much less for protecting aggregate imputed group quarters data.

Defendants similarly suggest that deference to Dr. Abowd is appropriate here because this case implicates a carefully-crafted disclosure avoidance system where "experts on statistical methodologies may disagree," *see* ECF No. 13-1 at 32–33, and courts lack the necessary expertise to second-guess the agency's opinion here, *see id.* at 32. These points are also refuted by Professor Ruggles in his report when he explains that

> [d]espite the obfuscating and highly technical arguments offered by the Census Bureau, this is not in fact a highly technical question in which different experts on statistical methodologies may simply disagree. At its core, the concept is actually very simple: no statistical expertise is needed to understand the basic logical point that aggregate numbers comprised entirely of data that *was not* provided by an establishment or individual in the first place cannot later be used to identify data that *was* provided by an establishment or individual.

Ruggles Report, Ex. 2, App'x A at 5-6. Thus, although the intricacies of the Census Bureau's disclosure avoidance system and use of differential privacy are undoubtedly complex, and Defendants clearly seek to benefit from that complexity for purposes of this litigation, the dispositive issue of this case (*i.e.*, whether confidentiality of individual responses is threatened by release of state-wide imputed group quarters data) is simple both as a matter of law and of logic.

Contrary to Defendants' assertions, this Court is more than capable of determining whether Plaintiff's requested records fall within the scope of information protected by Title 13.

Defendants' reliance on *Wisconsin v. City of New York*, 517 U.S. 1, 23 (1996) to argue that this Court must defer to Dr. Abowd's expertise is equally unavailing. *See* ECF No. 13-1 at 32–33. True, the Constitution does bestow "wide discretion [over *apportionment decisions* and the *conduct of the census*] upon Congress, and by Congress upon [the Secretary of Commerce.]" *Wisconsin*, 517 U.S. at 23. However, besides the fact that *Wisconsin* was not a FOIA case and had nothing to do with Title 13, Defendants fail to grapple with the full implications of that case: it is *Congress* that is the source of the discretion Secretary enjoys over the conduct of the census, and Congress here has spoken clearly through both Title 13 and FOIA. Specifically, in enacting Title 13, Congress created a scheme permitting disclosure of any Census "tabulations and other statistical materials" that do not reveal information reported by individual respondents, and FOIA requires the Secretary to disclose all such information that does not fall under a specific exemption. 5 U.S.C. § 552(a)(3)(A) ("[E]ach agency, upon any request for records . . . shall make the records promptly available to any person."). Congress enjoys wide discretion under the Constitution to prevent disclosure of all preliminary Census data, or alternatively to grant the Secretary full discretion to determine what kinds of data is subject to protection in the implementation of its disclosure avoidance procedures. Instead, Congress has clearly delineated the boundaries of what kinds of data the Secretary can and cannot publish under Title 13. Nowhere did Congress give the Census Bureau discretion to rewrite the statute and eliminate disclosure of any data that it deems unacceptable due to the introduction of additional "invariants" to its complex disclosure avoidance system, especially where such information poses no threat of identification of particular establishments' or individuals' raw data.

Of equal importance, "[i]n enacting FOIA, Congress struck the balance it thought right—generally favoring disclosure, subject only to a handful of specified exemptions—and did so across the length and breadth of the Federal Government." *Milner v. Dep't of the Navy*, 562 U.S. 562, 571 n.5 (2011). These "limited exemptions do not obscure the basic policy [of Congress] that disclosure, not secrecy, is the dominant objective of the Act." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). Accordingly, "[t]he judicial role is to enforce that congressionally determined balance rather than . . . to assess case by case, department by department, and task by task whether disclosure interferes with good government." *Milner*, 562 U.S. at 571 n.5. Rather than wading into the various policy arguments that Defendants put forward regarding the necessity of preventing disclosure to implement their differential privacy scheme most effectively, this Court should limit its role to enforcing the laws as Congress enacted them. As discussed above, FOIA provides that unless a statutory confidentiality requirement (like Title 13) is so clear that it "leave[s] no discretion on the issue" of disclosure of records by the agency, 5 U.S.C. § 552(b)(3)(A)(i), those records are not properly exempt under Exemption 3. Because, at a minimum, Title 13 does not clearly *prohibit* disclosure of Plaintiff's requested state-level imputed data, this Court should require disclosure here in accordance with what FOIA dictates and the congressional policy favoring disclosure.

3. Contrary to the Census Bureau's determination that it cannot release imputed data based on results of its experiment on re-identification attacks, release of Plaintiff's requested data poses no credible threat to confidentiality.

Finally, Dr. Abowd asserts in his declaration that "[t]he results from the Census Bureau's 2016-2019 research program on simulated reconstruction-abetted re-identification attack were conclusive, indisputable, and alarming," Second Abowd Decl. ¶ 40, which ultimately led to the Bureau's position that it cannot release any actual counts of any data (whether real or invented),

except for its few pre-determined invariants, due to the threat of database reconstruction and reidentification, *see* Ruggles Report, Ex. 2, App'x A at 4–5. However, as Professor Ruggles states in his report, "[m]y own analysis found that the Census Bureau's experiment failed to demonstrate a credible threat to confidentiality of individual responses." *Id.* at 6. To the contrary, Professor Ruggles concludes that "we can be confident that malicious intruders pose no realistic threat of harm if the imputed group quarters counts were publicly disclosed at the state *or even sub-state level*." *Id.* (emphasis added). Because there is no realistic threat to individual privacy from release of imputed group quarters data at the *sub-state level*, any threat from releasing only state-level imputed data is virtually non-existent.

Accordingly, because disclosing state-level imputed GQCI data poses no risk to confidentiality of individual (or establishment) census responses, Defendants' interpretation of Title 13 fails as a matter of law. Although Defendants ultimately bear the burden of establishing that the requested information is protected from disclosure under Title 13, they fail to meet their burden of proof for the reasons outlined above. Defendants' total reliance on conclusory determinations of their expert John Abowd, without additional support, as well as their effort to couch these legal conclusions as undisputed factual statements, is inadequate to demonstrate that they are entitled to judgment as a matter of law.[22] For these reasons, Defendants' motion for

[22] In the alternative, however, if this Court determines that Dr. Abowd's assertions about potential threats to confidentiality of individual responses from the disclosure of this data do qualify as material facts rather than mere statements of opinion or legal conclusions, Plaintiff disputes these "facts" based on the analysis from the report of its own expert, Professor Steven Ruggles. *See* Ruggles Report, Ex. 2, App'x A. Because a genuine issue of fact would then exist under these circumstances regarding the factual question of whether individual privacy is implicated by the release of imputed state-wide group quarters data, Plaintiff would require an opportunity to conduct additional discovery, including deposing Dr. Abowd because his opinion from his declaration provides the full basis and support for each of Defendants' "statements of fact" about the risks to Defendants' disclosure avoidance system. Plaintiff would then challenge these asserted facts with its own expert's testimony and through additional discovery. *See CREW v. U.S. Dep't of Justice*, 2006 U.S. Dist. LEXIS 34857, at *7-*8 (D.D.C. 2006) (observing that discovery can be

summary judgment must therefore be dismissed. Furthermore, because there is no genuine issue regarding Plaintiff's entitlement to its requested information, Plaintiff's cross-motion for summary judgment should be granted.

CONCLUSION

Because there is no genuine issue of material fact, the plain language of Title 13 and FOIA requires disclosure of Plaintiff's requested information, and disclosure of imputed state-wide group quarters data does not threaten the confidentiality of individual census responses in the way Defendants contend, this Court should grant Plaintiff's Cross-Motion for Summary Judgment and deny Defendants' Motion for Summary Judgment.

Dated: October 1, 2021

Respectfully submitted,

/s/ Jason Torchinsky
Jason Torchinsky (D.C. Bar No. 976033)
jtorchinsky@holtzmanvogel.com
Jonathan P. Lienhard (D.C. Bar No. 474253)
jlienhard@holtzmanvogel.com
Kenneth C. Daines (D.C. Bar No. 1600753)
kdaines@holtzmanvogel.com
HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK PLLC
15405 John Marshall Highway
Haymarket, VA 20169
Phone: (540) 341-8808
Fax: (540) 341-8809
Counsel for Plaintiff

granted in a FOIA case "when a factual dispute exists and the plaintiff has called the affidavits submitted by the government into question"); *Local 3, Int'l Bhd. of Elec. Workers v. NLRB*, 845 F.2d 1177, 1179 (2d Cir. 1988) ("Discovery in a FOIA action is permitted in order to determine . . . *whether [the documents] withheld are exempt from disclosure*." (emphasis added)).

CERTIFICATE OF SERVICE

I do hereby certify that, on this 1st day of October 2021, the foregoing Statement of Points and Authorities in Support of Plaintiff's Combined Opposition to Defendants' Motion for Summary Judgment and Cross-Motion for Summary Judgment was filed electronically with the Clerk of Court using the CM/ECF system. The system instantaneously generated a Notice of Electronic Filing which served all counsel of record.

/s/ Jason Torchinsky
Jason Torchinsky (D.C. Bar No. 976033)
jtorchinsky@holtzmanvogel.com
Jonathan P. Lienhard (D.C. Bar No. 474253)
jlienhard@holtzmanvogel.com
Kenneth C. Daines (D.C. Bar No. 1600753)
kdaines@holtzmanvogel.com
HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK PLLC
15405 John Marshall Highway
Haymarket, VA 20169
Phone: (540) 341-8808
Fax: (540) 341-8809
Counsel for Plaintiff