UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

When construing a statute, the duty of a court "is to give effect to the intent of Congress." *Flora v. United States*, 357 U.S. 63, 65 (1958). There is no dispute that "[t]he . . . history of the Census Act reveals a congressional intent to protect the confidentiality of census information." *Baldrige v. Shapiro*, 455 U.S. 345, 358 (1982). Congress's intent is unmistakably reflected in the Census Act's confidentiality provisions, 13 U.S.C. §§ 8(b) and 9(a). The Census Bureau is charged with safeguarding the confidentiality of census information. Pursuant to that responsibility, the Bureau has, for decades, employed disclosure avoidance techniques to defend against the release of any "publication whereby the data furnished by any particular establishment or individual . . . can be identified." 13 U.S.C. § 9(a)(2). And it has assiduously avoided disclosing information "reported by, or on behalf of, any particular respondent." *Id.* § 8(b). But computer technology and processing power have grown exponentially in recent years, substantially increasing the risk of reconstruction and re-identification attacks on census data. The Census Bureau has kept pace (and tried to stay a step ahead) by developing ever-more sophisticated disclosure avoidance systems to protect the confidentiality of census information. Still, as with any information security system, if the system's foundation is undermined, the information being secured is rendered vulnerable. In this litigation, Defendants are withholding aggregated group quarter count imputation (GQCI) totals by state because the release of that data "unobscured"[1] would undermine the 2020 Census's disclosure avoidance system (the "DAS"), which in turn would put in jeopardy the Census Bureau's ability to protect the confidentiality of all census data disclosed by the public.

[1] The Census Bureau used the phrase "unobscured" in its opening brief, *see, e.g.*, Defs.' Mem. in Support of Summary J. at 3, ECF No. 13-1, as shorthand for, as a technical matter, "released as enumerated without additional disclosure avoidance procedures beyond aggregation," or, more informally, "released without going through appropriate disclosure avoidance review." This same meaning applies for this reply/opposition brief.

That is consistent with Title 13's confidentiality provisions, and therefore Defendants' invocation of Exemption 3 in this case is valid.

Fair Lines America Foundation, Inc., argues in favor of a limited interpretation of Sections 8(b) and 9(a), whereby those provisions protect only the confidentiality of information obtained directly from a census respondent. Fair Lines argues that the state GQCI totals it seeks through its narrowed FOIA request were not obtained directly from a census respondent, but instead are aggregate data the Census Bureau developed in the absence of direct responses from individuals or establishments to census inquiries. Mem. in Support of Pl.'s Opp'n and Cross-Mot. for Summary J. at 3, ECF No. 14-1 ("Opp'n"). Fair Lines admits that "the disclosure of imputed statewide GQCI data may contravene 'the Census Bureau's established disclosure avoidance rules,'" *id*. at 29 n.21, but argues that this is irrelevant because Title 13's confidentiality provisions, in combination with FOIA, do not allow Defendants to withhold the requested information.

Fair Lines is wrong on both the facts and the law. As a factual matter, imputed data, whether group quarters count data or housing count data, derives, at least in part, from census respondents, who are defined as "individual[s], or other organization[s] or entit[ies] which reported information, or on behalf of which information was reported, in response to a questionnaire, inquiry or other request of the Bureau." 13 U.S.C. § 1 (defining respondent). And even if imputed data did not derive from census respondents, it would not matter because the publication of such data unobscured by the DAS would put in jeopardy the confidentiality of all 2020 Census data, which is exactly what Title 13's confidentiality provisions prohibit. The Census Act's language and legislative history, elucidated by Supreme Court precedent, support Defendants' common sense understanding that Title 13's confidentiality provisions forbid the disclosure of any data—

whether directly or indirectly derived from a census respondent—that could lead to the identification of any census respondent. And through agency declarations attested to by the Census Bureau's Chief Scientist and Associate Director for Research and Methodology, Dr. John M. Abowd, Defendants have set forth in substantial detail the Census Bureau's judgment that the forced disclosure of GQCI totals by state unobscured by the DAS would put at risk the confidentiality of all 2020 Census data. The predictive judgment of the Census Bureau is owed deference, particularly in the absence of any credible rebuttal from Fair Lines, who admits that disclosure might contravene the DAS.

Accordingly, for the reasons set forth in Defendants' opening brief and below, Defendants' Motion for Summary Judgment should be granted and Fair Lines' Cross-Motion for Summary Judgment should be denied.

ARGUMENT

I. Fair Lines has narrowed its challenge in this litigation to Defendants' withholding of GQCI totals by state, thereby waiving its right to challenge any other aspect of Defendants' alleged conduct.

Fair Lines has narrowed its FOIA request at issue in this litigation only to "documents identifying the total population (number of individuals) imputed statewide by the Census Bureau for group quarters for each U.S. state." Opp'n at 2 (citations omitted). Fair Lines also states in a footnote that its "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." *Id*. at 17 n.15. To the extent that Fair Lines is claiming the right to seek additional information at a later point in this litigation, it may not do so. *See Dillon v. U.S. Dep't of Justice*, 444 F. Supp. 3d 67, 86 (D.D.C. 2020) ("Plaintiff's contention that a FOIA

requester can explicitly narrow, test, and then broaden his request in this way after filing litigation sits without any firm basis in the statutory text or associated case law."). Fair Lines did not file a partial motion for summary judgment – its cross-motion seeks a final determination of its claims. *See* Opp'n at 37. Nor does the summary judgment briefing schedule to which the parties agreed and which the Court ordered on August 6, 2021, contemplate piece-meal summary judgment briefing.

There is no dispute among the parties that Defendants are in possession of the narrowed information Fair Lines seeks and have the capability of producing it. Thus, Fair Lines has raised no challenge to, and therefore waived its right to challenge, Defendants' search for responsive records. Accordingly, Defendants are entitled to summary judgment on the adequacy of its search.

All that remains then, is whether FOIA Exemption 3, in combination with Title 13's confidentiality provisions, permit Defendants to withhold the GQCI state totals.

II. FOIA Exemption 3 requires the Court to determine whether the requested information falls within the statutory scheme, and Defendants' burden is merely to show that it logically does.

The Supreme Court held in *Baldrige* that Sections 8(b) and 9(a) are non-disclosure statutes under FOIA Exemption 3. Exemption 3 permits the government to withhold information if that information is covered by a statute that either "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) ("Exemption 3(A)(i)"), or "establishes particular criteria for withholding or refers to particular types of matters to be withheld." *Id*. § 552(b)(3)(A)(ii) ("Exemption 3(A)(i)"). In *Baldrige*, the Court did not

explicitly say which subpart of Exemption 3 applies, but its language suggests that both apply.[2] The Court not only stated that Title 13 leaves "[n]o discretion to the Census Bureau on whether or not to disclose the information referred to in Sections 8(b) and 9(a)," 455 U.S. at 355, but also made clear that Sections 8(b) and 9(a) refer to "particular types of matters to be withheld"—i.e., they protect information "only to the extent that the data is within the confidentiality provisions of [the Census] Act." *Id*. at 353, 355. *Cf. CIA v. Sims*, 471 U.S. 159, 168 (1985) (determining that the National Security Act of 1947 satisfied Exemption 3(A)(ii) because it was limited to particular records, "only to the extent they contain 'intelligence sources and methods' or if disclosure would reveal otherwise protected information").

Regardless of whether Exemption 3(A)(i) or (ii) applies, once a court deems Exemption 3 to apply, it must decide whether the information requested "falls within the [statutory] scheme." *Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009). "If an agency's statements supporting exemption contain reasonable specificity of detail as to demonstrate that the withheld information logically falls within the claimed exemption and evidence in the record does not suggest otherwise, . . . the court should not conduct a more detailed inquiry to test the agency's judgment and expertise or to evaluate whether the court agrees with the agency's opinions." *Id*. This is particularly true where the question of whether the information logically falls within the claimed exemption depends on the predictive judgment of the agency. In that context, courts routinely defer to executive affidavits regarding the risk of harm, particularly where, as here, the

[2] Contrary to Fair Lines' contention, *see* Opp'n at 23 n.17, Defendants did not argue in their opening brief that only one of the two Exemption 3 provisions applied, as is evident from the citations Fair Lines selected from Defendants' opening brief.

Court is in a "'poor position to second-guess' the predictive judgments" of an agency tasked with the complex task of safeguarding the confidentiality of census data. *Id*. (citation omitted).

III. Defendants' withholding of unobscured GQCI state totals is consistent with the Census Act's statutory scheme, because the forced disclosure of such data is likely to undermine the DAS, which puts at risk the confidentiality of all census data.

Title 13's confidentiality provisions broadly protect the confidentiality of data supplied directly or indirectly by census respondents. As explained below, such data includes imputed count information, which derives, at least in part, from information reported by census respondents. The Census Bureau has developed the DAS to protect the confidentiality of such data. The Census Bureau's declarant, Associate Director for Research and Methodology and Chief Scientist Dr. John M. Abowd, has explained that the 2020 Census DAS depends on limiting the number of invariants in the system. *See* Second Abowd Decl. ¶¶ 54-61, ECF No. 13-3. Dr. Abowd has further detailed how the forced disclosure of the information requested unobscured by disclosure avoidance techniques would expose a chink in the 2020 Census DAS's confidentiality armor, which in turn would logically leave census data vulnerable to re-identification and reconstruction attacks in violation of Title 13's confidentiality provisions. *Id*.; *see also id*. ¶¶ 62-79. Fair Lines' expert, Dr. Ruggles, disagrees, but his opinion is fatally undermined by Fair Lines' admission that the disclosure of the requested data may undermine the DAS. Accordingly, the requested GQCI state totals fall within the statutory scheme of the Census Act's confidentiality provisions, and Exemption 3 provides a valid reason for Defendants to withhold such data.

A. Title 13's confidentiality provisions encompass GQCI data.

Section 9(a) prohibits the Secretary, or any other officer or employee of Defendants, from

"mak[ing] 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). Section 8(b) permits the Secretary to "furnish copies of tabulations and other statistical material which do not disclose the information reported by, or on behalf of, any particular respondent." *Id*. § 8(b). These provisions use broad language, which reflects Congress's intent to strenuously protect the confidentiality of census data.

Fair Lines insists that Section 9(a) must be read in a limited way because a broad reading of Section 9(a) would "swallow up Section 8(b)'s allowance for disclosure of preliminary summary or tabulated data." Opp'n at 21. But Fair Lines' reading of the statute misses the mark. Section 9(a) refers to "any publication," not only "tabulations and other statistical material," as in Section 8(b). That Congress made Section 9(a) broader than Section 8(b) is logical because its primary intent was to maintain the confidentiality of census data; secondary to that goal was affording discretion to the Secretary to release certain data, but only if doing so would not contravene the primary goal by "disclos[ing] the information reported by, or on behalf of, any particular respondent." 13 U.S.C. § 8(b). This language, as with Section 9(a), invokes Congress's intention to allow the Secretary to protect the confidentiality of census data. It does not suggest, as Fair Lines would have it, that Congress intended for the publication of tables and other statistical materials to drive Defendants' confidentiality decisions. Fair Lines' limited interpretation would create an improbable statutory scheme whereby a "small tail"—i.e., Section 8(b)—would "wag . . . a large dog"—i.e., Section 9(a). *Juluke v. Hodel*, 811 F.2d 1553, 1561 (D.C. Cir. 1987).

Section 9(a) is best read as prohibiting the publication of any data that exposes data supplied by any census respondent to any census "questionnaire, inquiry, or other request." 13

U.S.C. § 1(3). The statute's focus is not on the derivation of the data, but the consequences of the publication. If the publication of any data by Defendants would allow for the identification of data furnished by any census respondent, the Defendants are prohibited from releasing that data.

Fair Lines wrongly construes Section 9(a)(2) to prohibit Defendants from making a publication whereby the data furnished by any particular census respondent can be identified, but only if the published data comes directly by a particular respondent. Fair Lines argues that the data it seeks is not covered by Section 9(a) because it is "imputed" data, which, according to Fair Lines, is not derived directly from any particular respondent. Opp'n at 27 ("[B]y its very nature[, imputed] . . . data is not derived from individuals' responses to Census questions, but rather is created in the absence of such responses."). This is the lynchpin of Fair Lines' argument and the opinion of its expert, Dr. Steven Ruggles. *See* Decl. of Dr. Steven Ruggles, App'x A at 3, ECF No. 14-4 ("Most obviously, the counts of imputed group quarters case are not 'data furnished by any particular establishment or individual'" because "[t]he data were not furnished by anyone, which is the reason that the Census Bureau ha[s] to invent it by means of imputation"). For example, relying on Dr. Ruggles's declaration, Fair Lines argues that "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,' . . . or otherwise," because "[n]o computer is powerful enough to reverse-engineer individual data that did not exist in the first place." Opp'n at 28 (citing Ruggles Decl., App'x A at 2-6). But Fair Lines' argument is fatally flawed because imputed data is, in fact, derived, at least in part, from actual respondent data. Fair Lines' argument should also be rejected because it would require the disclosure of census data in direct contravention of Congress's intent in enacting Title 13's confidentiality provisions.

1. Imputed data is derived from data furnished by census respondents.

Baldrige explains why imputed data is covered by Title 13's confidentiality provisions. In that case, the data requested via FOIA included housing "vacancy information contained in the updated master address registers maintained by the Bureau." 455 U.S. at 351. The master address register at the time listed "addresses, householders' names, number of housing units, type of census inquiry, and, where applicable, the vacancy status of the unit." *Id*. at 350. It "was compiled initially from commercial mailing address lists and census postal checks, and was updated further through direct responses to census questionnaires, pre- and post-enumeration canvassing by census personnel, and in some instances by a crosscheck with the 1970 census data." *Id*. Similar to this case, the parties requesting the data in *Baldrige* argued that the vacancy information in the master address register was not covered by Title 13's confidentiality provisions because those provisions were "designed to prohibit disclosure of the identities of individuals who provide raw census data" and "protect[ed] raw data only if the individual respondent c[ould] be identified." *Id*. at 356. The requesting parties argued that no individual could be identified by the release of vacancy information from the register. *Id*. at 355. The Court disagreed finding that the Census Act's confidentiality provisions clearly protected more than the identity of individual respondents–it protected "the 'information' or 'data' compiled" during the census. *Id*. at 356. The Court concluded that "[a] list of vacant addresses" qualified as data compiled during the census (i.e., reported by, or on behalf of, any particular respondent) because it was initially "taken from prior censuses and mailing lists," then "verified both by direct mailings and census enumerators who go to areas not responding," and, "[a]s with all the census material, . . . updated from data obtained

from neighbors and others who spoke with the follow up census enumerators." *Id*. at 358-59. Accordingly, the Court held that the list of vacant addresses was information that Congress intended to protect. *Id*. at 358.

The same is true here. When an individual does not respond to a census inquiry, the Census Bureau uses methods, including proxy interviewing and imputation, for obtaining information about that individual. Third Decl. of Dr. John M. Abowd ¶ 4 (attached hereto as Exhibit A). The Bureau does not create these records out of thin air; the imputed records are derived from actual census responses collected from similarly-placed individuals. *Id*. ¶ 7. For the 2020 Census, for group quarters (GQs), if the Census Bureau could not obtain a particular GQ's count in the data collection, but had evidence the GQ was occupied, it inserted the GQ into the GQCI operation. *Id*. ¶ 6. The Census Bureau often had relevant information about the expected or maximum person count in the GQ from the GQ Advance Contact (an earlier 2020 Census operation) or prior Census Bureau surveys. *Id*. If so, the Bureau used this information—combined with other information from GQs of the same type and in the same state that responded—to impute a count for the GQ. *Id*. If not (that is, if such information on the nonresponding GQ was not available), the Bureau used other information from other federal records (for some college GQs) or from the data collected successfully from other GQs to impute a count. *Id*. Then, after imputing the count, the Bureau inserted characteristics for each imputed person in the GQ, based on characteristics from respondents in other GQs of the same type, often located nearby ("donor records"). *Id*. Thus, GQCI state totals are directly analogous to the information on vacancies the Supreme Court deemed confidential in *Baldrige*.

Utah v. Evans, 536 U.S. 452 (2002), the seminal decision upholding the Census Bureau's use of imputation, provides further insight. The Court described imputation using the following example: "Imagine a librarian who wishes to determine the total number of books in a library." *Id*. at 465. Now suppose "the librarian . . . tries to count every book one by one," but finds "empty shelf spaces." *Id*. The librarian may "'impute[]' to that empty shelf space the number of books (currently in use) that likely filled them . . . say, by measuring the size of nearby books and dividing the length of each empty shelf space by a number representing the average size of nearby books on the same shelf." *Id*. In this example, the nearby book, whose size and location are directly observed, is akin to donor records used in imputation, whose information must be kept confidential. Because, as *Evans* shows, imputation in the census context works by taking information on behalf of missing respondents from direct responses, it is analogous to how the vacancy information was derived in *Baldrige*. Therefore, imputed information, like the information in *Baldrige*, is information Congress intended to protect when it enacted Title 13's confidentiality provisions.

2. Even if imputed data were not derived from direct responses, Title 13's confidentiality provisions would still apply to GQCI state totals for the 2020 Census because the alternative would directly contravene Congress's intent.

Fair Lines' construction of Title 13's confidentiality provisions cannot be squared with Congress' intent. According to Fair Lines, "because the plain language of Title 13's protections do not extend to statewide tabulations of imputed data, that data is subject to mandatory disclosure under FOIA." Opp'n at 19. But that cannot be the correct reading of Title 13's confidentiality provisions. If taken to its logical extreme, Fair Lines' argument would require the Court to order

Defendants to release the requested data even if the parties and the Court knew for an absolute certainty that the publication of such data would be guaranteed to lead to the re-identification of data furnished by every census respondent. Not only would that contravene Congress's intentions, but also it would force Defendants into the untenable position of facing a Court order that would expose them to criminal liability under 13 U.S.C. § 214.

Thus, while Fair Lines attempts to portray its request for GQCI state totals as a limited one, if the Court were to adopt its interpretation of Title 13's confidentiality provisions, all imputed data created by the Census Bureau would be left exposed to unobscured disclosure. Bear in mind that even Dr. Ruggles admits that "[i]t is universally accepted in the demographic research community that imputation improves the accuracy of the population count." Ruggles Decl., App'x A at 3. Thus, under Fair Lines' interpretation, a tool the Census Bureau has been using since the 1960s, *id*., whose constitutionality was upheld in *Utah v. Evans* almost twenty years ago, *id*., and which improves the accuracy of the census, *id*., would suddenly become an unanticipated obstacle to the Census Bureau's ability to protect the confidentiality of census data. Dr. Ruggles downplays this concern by suggesting that in the past, "the Census Bureau has released detailed information—down to the block level—on the number of imputed persons in each locality." *Id*. This is not factually accurate. *See* Third Abowd Decl. ¶ 14. While a few tables of household count imputation data were released at the state level following the 2010 Census, Disclosure Review Board-approved disclosure avoidance methods in place in 2011 were applied to these tables. *Id*. ¶ 16. And, in any event, those methods were strengthened for the 2020 Census precisely because of the increased threat from reconstruction and re-identification attacks. *Id*. Fair Lines suggests that the Court ignore these broader concerns, *see* Opp'n at 28 n.19 & 29 n.21, but the Court cannot be blind

to the consequences of any ruling that would serve as a basis to hamstring Defendants' efforts to abide by Title 13's confidentiality provisions.

3. The law supports Defendants' common sense understanding of Title 13's confidentiality provisions.

Fair Lines argues that the case law supports its interpretation of Title 13's confidentiality provisions, but it is again mistaken. As Defendants argued in their opening brief, *see* Defs.' Br. in Support of Mot. for Summary J. at 18, ECF No. 13-1, the primary cases Fair Lines relies upon—*Baldrige* and *Seymour v. Barabba*, 559 F.2d 806 (D.C. Cir. 1977)—both interpret Title 13's confidentiality provisions within the context of Congress's "thrice emphatically expressed intent . . . to protect census information." *Barabba*, 559 F.2d at 809. Fair Lines cannot argue otherwise and does not attempt to do so. Rather, it takes selective quotes from these cases out of context to make it appear as though these cases adopted a limited understanding of Sections 8(b) and 9(a) when the opposite is true. For example, Fair Lines suggests that the D.C. Circuit in *Barabba* held that the Secretary could disclose "'tabulations and statistical materials of a numerical nature' in response to FOIA requests," as long they "exclud[ed] 'names and addresses of specific individuals or firms reporting data to the Census Bureau' for purposes of protecting privacy of individual respondents." Opp'n at 24 (quoting *Barabba*, 559 F.2d at 809). But that is a vast oversimplification of *Barabba*. There the court actually stated that the Secretary could release statistical data as long it did "not identify any person, corporation, or entity *in any way*." *Barabba*, 559 F.2d at 809 (emphasis added). Further, in *Baldrige*, the Supreme Court made clear that in enacting Sections 8(b) and 9(a), "Congress was concerned not solely with protecting the *identity*

of individuals," but also "expressed its concern that confidentiality of *data* reported by individuals also be preserved." *Baldrige*, 455 U.S. at 356 (emphasis added).

Fair Lines argues that neither *Baldrige* nor *Barabba* permit Defendants to withhold the requested information because Fair Lines is not asking for "raw data, nor even summaries or tabulations of such raw data." Opp'n at 26. But neither *Baldrige* nor *Barraba* were decided in a world in which huge volumes of data can be compiled and manipulated to reconstruct or re-identify data supplied directly or indirectly by individual respondents to the Census. If they had been, it stands to reason that the courts in those cases still would have concluded that Title 13's confidentiality provisions protect the publication of any information—whether raw data or otherwise—that could, "in any way" permit rogue actors to reconstruct or re-identify data supplied by individual respondents to the Census. *Barabba*, 559 F.2d at 809.

B. Defendants have shown that the forced disclosure of the requested data unobscured by disclosure avoidance techniques is likely to undermine the DAS and Fair Lines fails to rebut Defendants' predictive judgement, which is entitled to deference.

To succeed on summary judgment, Defendants have the burden of demonstrating, with "reasonable specificity of detail . . . that the withheld information logically falls within the claimed exemption and evidence in the record does not suggest otherwise." *Larson*, 565 F.3d at 865. Defendants have carried their burden. The Census Bureau's established disclosure avoidance system for the 2020 Census is based on differential privacy. That is an uncontroverted fact. The 2020 Census DAS currently protects the confidentiality of census data that has already been released, including the redistricting data that Defendants released on August 12, 2021. Second Abowd Decl. ¶ 74, ECF No. 13-3. The Census Bureau has explained in detail through Dr. Abowd's

declarations that forcing Defendants to produce the requested information unobscured "would severely compromise and weaken the confidentiality protections of the DAS, which would have cascading effects on the Census Bureau's ability to meet its confidentiality obligations under Title 13." *Id*. ¶ 57. Dr. Abowd explained that if the requested information is released unobscured, it will create an unplanned-for invariant. *Id*. Dr. Abowd further explained that "invariants defeat privacy protections and must be limited in order to protect the integrity of the system as a whole." *Id*. ¶ 56. In addition, Dr. Abowd explained that "if the Court were to order disclosure in this case, the Census Bureau's disclosure avoidance system would be exposed to challenge from other FOIA requests." *Id*. ¶ 79.[3]

1. Fair Lines has provided no evidence to show that a destabilized DAS poses no risk to the confidentiality of census data.

Fair Lines not only fails to rebut this evidence, but it concedes, crucially, that the "disclosure of imputed statewide GQCI data may contravene 'the Census Bureau's established disclosure avoidance rules.'" Opp'n at 29 n.21. Because Fair Lines does not dispute that the court-

[3] Fair Lines repeatedly refers to Dr. Abowd's declaration as "conclusory" and argues as a result that it cannot support summary judgment for Defendants. *See, e.g.*, Opp'n at 28 n.20. It is self-evident that Dr. Abowd's carefully detailed 79-paragraph-long declaration is anything but conclusory. Dr. Abowd's declaration is meticulously supported with citations to numerous resources. Moreover, unlike Dr. Ruggles, a solitary academic whose opinion reflects only his own mind, Dr. Abowd's declaration represents the Census Bureau's institutional concerns. Contrary to Fair Lines' assertions, Dr. Abowd does not have "unchecked authority to determine what information is protected from disclosure under Title 13." Opp'n at 31 (citation omitted). Dr. Abowd is just one of twelve career senior executives who comprise the Data Stewardship Executive Policy Committee (DSEP). Third Abowd Decl. ¶ 1. DSEP has five supporting committees, one of which is the Disclosure Review Board (DRB). It is the DRB's mission to ensure that the Census Bureau protects Title 13 respondent confidentiality. *Id*. ¶ 2. And it is the DRB, not Dr. Abowd alone, who reviews and clears all Census Bureau microdata, tabulation, and research result table releases under its purview for confidentiality protection. *Id*.

ordered disclosure of GQCI state totals may contravene the 2020 Census DAS, it cannot credibly rebut Defendants' position that disclosure will risk compromising the integrity of the disclosure avoidance system. And while Dr. Ruggles opines that "[i]nformation about imputation . . . would not add to the list of invariants," he directly contradicts himself—in the previous sentence, no less—by conceding that "under the 2020 disclosure avoidance rules, the only 'true' numbers released are (1) total population at the state level; (2) total number of housing units at the block level, but not the population at the block level; and (3) total number of group quarters for seven types at the block level, but not the population in group quarters." Ruggles Decl., App'x A at 4-5; *see also* Third Abowd Decl. ¶ 21 ("[B]ecause the GQCI statistics cannot be derived from the current approved set of invariants . . . they would constitute 52 new invariants.") Dr. Ruggles admits that "[a]side from these invariants, all other statistics released from the 2020 Census will have deliberate error introduced to the counts." Ruggles Decl., App'x A at 5. Fair Lines seeks imputed group quarters totals that do not have deliberate error introduced to the counts.[4]

Further, Fair Lines recognizes that "other future FOIA requests may impermissibly risk disclosure of confidential individual data." Opp'n at 28 n.19. Although Fair Lines argues that such a future event "has no bearing on this Court's determination of whether Plaintiff's Request

[4] It is true that, even with the release of the GQCI information as an invariant, differentially private noise would still remain in the total GQ population counts. Third Abowd Decl. ¶ 22. But, as Dr. Abowd explains, the kind of uncertainty that would remain in the total GQ population counts if the GQCI information were released without differentially private noise, is not comparable to differentially private uncertainty. *Id*. Some uncertainty may remain, but it would not be easily quantified, and unlike with carefully structured differentially private noise, it would not be possible to promise that the additional disclosure risk from the published statistics remained small and controlled. *Id*. Sources of uncertainty that cannot quantifiably limit disclosure risk are not suitable for use as part of a disclosure avoidance system. *Id*.

does so," *id*., the Court absolutely has the right to take such a risk into consideration. In fact, that is the basis of the mosaic effect theory. *See Whitaker v. U.S. Dep't of Justice*, No. 18-CV-01434 (APM), 2020 WL 6075681, at *5 (D.D.C. Oct. 15, 2020) ("A mosaic theory posits that separate disclosures of otherwise innocuous information could be assembled by a requester or other person to reveal . . . [the larger puzzle.] Thus, the only way to prevent anyone from constructing the broader 'mosaic' is to shield each individual piece from disclosure."). Dr. Ruggles opines that the mosaic effect generally does not apply in this case, but provides no explanation for why that is true other than to mischaracterize a source Defendants cited to explain the concept's broad support. *See* Ruggles Decl., App'x A at 5 (opining incorrectly that OMB Memorandum M-13-13 has no application). He states that the mosaic effect is not relevant in this case because, he opines, "[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." *Id*. But Dr. Ruggles provides no reasoning to support this statement. In contrast, Dr. Abowd explains that unobscured information about imputed persons directly compromises data from direct respondents because the Census Bureau usually substitutes data from another member of the group quarters facility, household or a nearby household (known as "donor records") when imputing characteristic data. Third Abowd Decl. ¶ 20. Providing unobscured imputed information derived from donor records puts those nearby individual donor's data at risk. *Id*.

2. Fair Lines' expert's critique of the Census Bureau's simulated reconstruction attack is irrelevant in this FOIA action.

Fair Lines' rebuttal evidence from its expert does not go to whether the integrity of the DAS is put at risk by the forced unobscured disclosure of the requested information, but whether

the Census Bureau's decision to install a differential privacy-based disclosure avoidance system was sound.[5] Fair Lines' counsel attempted this sort of challenge through a preliminary injunction in a prior case he helped bring against Defendants. *See Alabama v. U.S. Dep't of Commerce*, No. 3:21-cv-211-RAH-ECM-KCN, 2021 WL 2668810, *1 (M.D. Ala. June 29, 2021) ("Plaintiffs requested a preliminary injunction against the Bureau's plan to use 'differential privacy' . . . in the processing of 2020 Census data, on the grounds that it violates the Census Act, the Administrative Procedure Act ("APA"), and the Individual Plaintiffs' due process and equal protection rights under the Fifth Amendment.") (internal citations omitted). In that case, Dr. Ruggles submitted an expert report containing many of the same conclusions he has supplied in his expert declaration in this case. *Compare* Decl. of Dr. Steven Ruggles, App'x A at 6, ECF No. 94-6, *Alabama v. U.S. Dep't of Commerce*, No. 3:21-cv-211-RAHECM-KCN (M.D. Ala.), *with* Ruggles's Decl., App'x A at 9, ECF No. 14-4. The court in that case did not address the merits of the plaintiffs' position because it denied plaintiffs' preliminary injunction motion for jurisdictional and prudential reasons. *Alabama*, 2021 WL 2668810, *4. The plaintiffs in *Alabama* did not appeal that determination and eventually voluntarily dismissed the action.

Fair Lines' counsel and Dr. Ruggles, through Fair Lines' FOIA request, are seeking another bite at that apple. But FOIA is not the proper vehicle through which an agency policy decision, such as Defendants' decision to employ a differential privacy-based disclosure avoidance system, can be challenged. *Cf. Ocasio v. Merit Systems Protection Board*, No. 17-5085, 2018 WL

[5] This is clear from the portion of Dr. Ruggles's declaration in which he spends five pages arguing that "[d]ifferential privacy is a poor fit for the protection of census data." Ruggles Decl., App'x A at 18-23.

1391868, at *1 (D.C. Cir. Mar. 14, 2018) (per curiam) (rejecting a FOIA requestor's attempt to use FOIA litigation "to challenge the decision by an administrative law judge in a Merit Systems Protection Board proceeding," because "a FOIA action is not the appropriate vehicle to do so"); and *Wolf v. CIA*, 569 F. Supp. 2d 1, 11 (D.D.C. 2008) (noting the distinction between a FOIA action, which "assesses the sufficiency of the agency's search for documents," and a "proposed APA claim" regarding the agency's compliance with recordkeeping laws, as being radically different in scope and nature). The Court has no authority in this case to order the Census Bureau to stop using its differential privacy-based disclosure avoidance system. FOIA merely affords courts "jurisdiction to enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).

Thus, the Court must take as a given that the Census's 2020 DAS is based on differential privacy. It is not the Court's role in this FOIA action to make an assessment of whether the Census Bureau's decision to use such a system was sound. That might serve as the basis of an APA arbitrary-and-capricious challenge under 5 U.S.C. § 706(2)(A), but such a challenge would have to be reviewed under the APA's "narrow standard of review" under which "a court is not to substitute its judgment for that of the agency." *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020) (citations omitted). Under such a challenge, the Defendants would have the benefit of a "highly deferential [standard that] . . . presumes agency action to be valid." *Defs. of Wildlife & Ctr. for Biological Diversity v. Jewell*, 815 F.3d 1, 9 (D.C. Cir. 2016) (internal punctuation omitted). That deference would be "particularly strong" as it is whenever "the [agency] is evaluating scientific data within its technical expertise." *Am. Wildlands*

v. Kempthorne, 530 F.3d 991, 1000 (D.C. Cir. 2008) (citing *Int'l Fabricare Inst. v. EPA,* 972 F.2d 384, 389 (D.C. Cir. 1992)); *Troy Corp. v. Browner,* 120 F.3d 277, 283 (D.C. Cir. 1997) (courts "review scientific judgments of the agency 'not as the chemist, biologist, or statistician that [they] are qualified neither by training nor experience to be, but as a reviewing court exercising [its] narrowly defined duty of holding agencies to certain minimal standards of rationality.'") (quoting *Ethyl Corp. v. EPA,* 541 F.2d 1, 36 (D.C. Cir. 1976)). In fact, under an arbitrary and capricious standard, when the record reflects the "conflicting views" of experts, the law affords an agency the "discretion to rely on the reasonable opinions of its own qualified experts." *See Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989); *Mississippi v. EPA*, 744 F.3d 1334, 1348 (D.C. Cir. 2013) (stating "it is not our job to referee battles among experts").

3. In this highly technical area that calls for an agency's predictive judgment, deference is owed to the agency.

The deference that would be afforded to Defendants in an APA challenge is the sort of deference that should be given to Defendants in this case, in the same way it is afforded to executive branch affidavits in FOIA cases in the national security context, where "courts lack the expertise necessary to second-guess . . . agency opinions [assessing the harm that could be caused by disclosure]." *Am. Civil Liberties Union v. U.S. Dep't of Defense*, 628 F.3d 612, 619 (D.C. Cir. 2011). Fair Lines notes that this deference has not been extended "to an agency's invocation of Title 13 (pursuant to Exemption 3) for protecting the confidentiality of data," Opp'n at 33, but fails to otherwise explain why the two contexts are not analogous. Further, this sort of deference has been extended to agencies in other FOIA contexts. For example, prior to the Supreme Court's decision in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), in order to

justify withholding information pursuant to Exemption 4,[6] the government had to show that disclosure of the information would cause a government contractor substantial competitive harm. "In reviewing an agency's determination as to substantial competitive harm," the courts "recognize[d] that predictive judgments are not capable of exact proof, and [they] generally defer[red] to the agency's predictive judgments as to the repercussions of disclosure." *United Techs. Corp. v. U.S. Dep't of Defense*, 601 F.3d 557, 563 (D.C. Cir. 2010) (cleaned up). Thus, such deference has been extended outside of the national security context in FOIA cases and there is no reason not to extend it in this context as well.

To avoid this deferential standard, Fair Lines calls upon its own expert to explain that this is not a highly technical issue, although that same expert spends six pages of his expert report explaining in technical statistical terms the errors he believes the Census Bureau made in its simulated reconstruction experiment. *See* Ruggles Decl., App'x A at 10-16. Dr. Ruggles's criticism of the Census Bureau's simulated reconstruction experiment is, in any event, not credible because he admittedly lacks the full context to analyze it. As he notes, he has not had access to "a full description of their experiment," "some details remain obscure," and "[t]here are no peer-reviewed publications explaining their methodology." *Id*. at 9. While he states that the Census Bureau has released "a more detailed description of the experiment," he still does not claim to have the full details necessary to make an accurate assessment of the experiment. Rather, he simply deduces that the experiment did not demonstrate a risk of reconstruction by comparing the results to what he terms a "null model of random guessing." *Id*. at 11. However, his null model is flawed.

[6] Exemption 4 prohibits the disclosure of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

Dr. Abowd details the methodological flaws in Dr. Ruggles's null model in his Third Declaration. *See* Third Abowd Decl. ¶¶ 23-31. Dr. Ruggles's experiment's primary flaw is that it compares apples to oranges. . In Dr. Ruggles's experiment he essentially tests whether he can randomly guess an age/sex combination in a census block. *Id*. ¶ 25. But that is not how reconstruction works. A malicious attacker is not going to randomly guess. A valid reconstruction experiment tests whether one can find each person in the reconstructed data, not whether one can find a person with random characteristics in a given census block. *Id*. ¶ 26. The meaninglessness of Dr. Ruggles's experiment is shown by replacing his random guesser with a one-note guesser who always guesses the same age/sex combination. *Id*. ¶ 27. One would expect that one-noted guesser to be a very poor guesser of population characteristics, but as Dr. Abowd shows, under Dr. Ruggles's methodology, the one-note guesser does even better than the random guesser. *Id*. It has a matching rate of 57% even though the most common age/sex combination is shared by less than 1% of the U.S. population. *Id*. That disconnect reflects the significant flaws in Dr. Ruggles's methodology, not any flaws in the Census Bureau's simulated reconstruction experiment.

But, to reiterate, the Court's job in this FOIA action is not to referee a battle between Dr. Abowd and Dr. Ruggles about the merits or flaws of the Census Bureau's simulated reconstruction experiment. Nor does Fair Lines suggest that such a deep dive into statistical theory is necessary.[7]

[7] Although Fair Lines states that "there is no genuine issue of material fact in this case," Pl.'s Statement of Material Facts Not in Genuine Dispute at 9, ECF No. 14-2, it says in a final footnote that discovery might be merited to enable it to challenge the Census Bureau's determination of the risks disclosure poses to the DAS. *See* Opp'n at 36 n.22. The cases Fair Lines cites are inapposite. In neither *CREW v. U.S. Dep't of Justice*, No. Civ. 05-2078, 2006 WL 1518964 (D.D.C. June 1, 2006), nor *Local 3, Int'l Bhd. Of Elec. Workers v. NLRB*, 845 F.2d 1177 (2d Cir. 1988), did the

See Opp'n at 33 (characterizing the dispute in this case "as simple both as a matter of law and of logic"). At bottom, this is a legal dispute about the breadth of Title 13's confidentiality provisions. If the Court concludes, as it should, that Title 13's confidentiality provisions apply to imputed data, it should rule in Defendants' favor. There is no legitimate factual dispute about the risks concomitant with the disclosure of such data. Defendants have shown that a destabilized DAS poses a significant risk to the confidentiality of census data, and Fair Lines has failed to rebut that common sense conclusion.

CONCLUSION

For the reasons stated above, Defendant respectfully request that this Court grant judgment in Defendants' favor and deny Fair Lines' cross-motion for summary judgment.

court permit discovery into an agency's predictive judgment in the absence of bad faith (or something close to it). Indeed, FOIA actions are typically resolved without discovery. *See Wheeler v. CIA*, 271 F.Supp.2d 132, 139 (D.D.C.2003) ("Discovery is generally unavailable in FOIA actions."). "When allowed, the scope of discovery is usually limited to the adequacy of the agency's search and similar matters." *Voinche v. FBI*, 412 F. Supp. 2d 60, 71 (D.D.C. 2006). This is not such a case.

November 2, 2021

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing Reply in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiff's Cross-Motion for Summary Judgment with the Clerk of the Court through the ECF system on November 2, 2021. This system provided a copy to and effected service of this document on all parties.

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