IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER Plaintiff, v. PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, *et al.*, Defendants.	Civ. Action No. 17-1320 (CKK)

REPLY IN SUPPORT OF PLAINTIFF'S AMENDED MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

This week the Presidential Advisory Commission on Election Integrity will meet in Washington, DC. Among the items for consideration is the matter now before this Court. The Commission is seeking to collect the nation's voter records and store that data outside of the privacy laws that routinely attach to an agency of the federal government. Following the initiation of EPIC's lawsuit and widespread opposition by state election officials, the Commission suspended the program, pending the Court's decision. The Court should now enter an order enjoining the Commission from restarting this ill-conceived, poorly executed, and unlawful plan.

Plaintiff EPIC set out multiple arguments in its Amended Motion for a Temporary Restraining Order: the Defendants failed to undertake and publish a Privacy Impact Assessment; the Defendant failed to publish the Privacy Impact Assessment pursuant to the Federal Advisory Committee Act; and, the Defendants' actions violate the constitutional right to information privacy. EPIC established the necessary elements for a TRO: (1) EPIC is likely to succeed on the merits of its claims; (2) EPIC's members will suffer irreparable harm if relief is not granted; and (3) the balance of the equities and public interest favor relief.

The Defendants' opposition fails to rebut these claims. Moreover, Defendants' standing challenges fails for multiple reasons, including the obvious—the Commission seeks to obtain the voter records of every registered voter in the United States, including EPIC's members. The Commission is seeking not only the personal data of the members of the EPIC Advisory Board, but also the personal data of the vast majority of members of associations across the United States. In this case, it would be difficult to find organization members who do not have standing.

For the reasons set out in Plaintiff's Amended Motion, the responses to the Defendants' Opposition set out in Plaintiff's Reply below, the relevant law, and the record in this matter, Plaintiff's respectfully asks this Court to grant Plaintiff's motion for a preliminary injunction.

ARGUMENT

I. The Defendants' attempts to evade the APA and E-Government act fall flat because they clearly fit within the agency definition

A. The meaning of "Agency" under the APA is not governed by FOIA authorities.

Defendants try, but fail, to elude the APA's broad definition of "agency." Though Defendants spend page after page reciting the supposed parameters of the "agency" test in Part I.B.1 of their Opposition, they once again overlook that the sources cited concern (a) the definition of "agency" as applied to FOIA requests, *e.g.*, *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971); or (b) the applicability of the APA to the President himself, *e.g.*, *Franklin v. Massachusetts*, 505 U.S. 788 (1992). None of these sources support the view that the "sole function" exception applies where, as here, the actions of the EOP and its subcomponents are under APA review.

Defendants wrongly rely on *Dong v. Smithsonian* for the proposition that the "substantial independent authority" test applies to APA claims. 125 F.3d 877 (D.C. Cir. 1997). *Dong* exclusively concerned claims under the Privacy Act, *not* under the APA. *Id.* at 877. Because the Privacy Act itself only applies to government entities that meet FOIA's "agency" definition, 5 U.S.C. § 552a(a)(1) (citing § 552(e)), the *Dong* court was right to rely on the D.C. Circuit's

FOIA/"substantial independent authority" line of cases. But *Dong* does not govern the meaning of "agency" for the purposes of APA claims, which remains undiluted by *Soucie* and its progeny.

Defendants also lay great stress on the subsequent procedural history of *Alexander v. FBI*, 971 F. Supp. 603 (D.D.C. 1997). But this is an APA case, not a Privacy Act case. The eventual reversal of Judge Lamberth's "interpretation of the Privacy Act"—which, unlike the APA, depends entirely on FOIA's definition of "agency"—has no bearing on Defendants' status as APA agencies. Nor does it weaken the force of Judge Lamberth's overarching observation: that statutes which "provide citizens with better access to government records" and statutes which "provide certain safeguards for an individual against an invasion of personal privacy" serve "very different purposes" and ought to be read accordingly. *Id.* at 606.

B. The Commission and the Director are both agencies under the APA.

The Commission is assuredly an "agency" under the APA, notwithstanding Defendants' claims that it is solely "advisory." Def.'s Opp'n 27. Defendants focus exclusively on what the Commission is *supposed to do* ("study the registration and voting processes used in Federal elections," Exec. Order No. 13,799, 82 Fed. Reg. 22,389) yet ignore the what the Commission is *actually doing* (constructing a massive and unsecure database of nearly 200 million voter records). A government entity may appear "advisory" in form yet be an agency in practice where "the record evidence regarding [the Commission]'s actual functions" proves it to be exercising agency functions. *Citizens for Responsibility & Ethics in Washington (CREW) v. Office of Admin.*, 559 F. Supp. 2d 9, 26 (D.D.C. 2008), aff'd, 566 F.3d 219; *see also* Def.'s Opp'n 29 ("[T]he relevant inquiry is the function exercised . . . ."). That is precisely the scenario here. *See* Pl.'s Am. Mot. 20–21, 28–29.

The Director likewise heads an APA agency. First, Defendants' so-called "controlling authority" on the agency status of the White House Office ("WHO") arises—predictably—out of FOIA and Privacy Act claims. Def.'s Opp'n 31. As noted, these cases are inapplicable to the WHO's status as an APA agency. Second, the Director also describes his agency staff as being

part of the Office of Administration ("OA"), Herndon Declaration 3, ECF No. 38-1, to which the APA certainly applies. *Pub. Citizen, Inc. v. Lew*, 127 F. Supp. 2d 1, 5, 26 (D.D.C. 2000) (applying the APA to the OA). Finally, it may not "matter" to Defendants that the Director exercises authority over other agencies, Def.'s Opp'n 31, but it does matter to the status of the Director's office as an agency. *Cf. Pub. Citizen v. Carlin*, 2 F. Supp. 2d 1, 9 (D.D.C. 1997), *rev'd on other grounds*, 184 F.3d 900 (D.C. Cir. 1999) ("The EOP's status as an agency is also evidenced by the authority it possesses to impose requirements on all of the EOP components in certain matters."). The Director is thus subject to APA review.

C. The EOP is a discrete agency under the APA and is accountable for the conduct of all subcomponents.

In disavowing any EOP responsibility for the conduct of EOP subcomponents, the Defendants yet again confuse the differing definitions of "agency" under the APA and the FOIA. The "component-by-component analysis" to which the Defendants refer applies only records generated by individual EOP offices, not to the *conduct* of those same offices. Indeed, courts have repeatedly reviewed the EOP's actions under the APA. *Armstrong v. Bush*, 924 F.2d 282, 291 (D.C. Cir. 1991) (applying the APA to both the EOP generally and the National Security Council specifically); *Armstrong v. Exec. Office of the President*, 810 F. Supp. 335, 338 (D.D.C. 1993) (citing *Armstrong*, 924 F.2d at 291–293) ("The Court of Appeals . . . approved of this Court's holding that the APA provides for limited review of the adequacy of the . . . EOP's recordkeeping guidelines and instructions pursuant to the FRA."); *Citizens for Responsibility & Ethics in Washington (CREW) v. Exec. Office of President*, 587 F. Supp. 2d 48, 57–58, 63 (D.D.C. 2008) (holding that the EOP was properly named as a defendant in an APA suit). The Defendants have no answer to these cases, just as they have no answer to the many cases in which the actions of subordinate agencies have been ascribed to parent agencies. Pl. Mot. 23–24.

Moreover, Defendants' position on the applicability of the APA to the EOP is both alarming and absurd. An "absence of judicial review" over the conduct of individual White House offices would lead to intolerable "anomal[ies]." *CREW v. Cheney*, 593 F. Supp. 2d 194, 215

(D.D.C. 2009). For example, in order to shield his administration's actions from scrutiny, a President could simply establish a new White House office and define its powers as being coextensive with "any government agency or employee of the United States." *CREW*, 593 F. Supp. 2d at 215 (*Armstrong v. Exec. Office of the President, Office of Admin*., 1 F.3d 1274, 1292 (D.C. Cir. 1993)). "If this definition were implemented without the possibility of judicial review," it would "functionally render the [APA] a nullity." *Id.* The Court should reject that path.

Because it is an agency responsible for the action of its constituent offices, the EOP should be enjoined from collecting personal voter data.

D. The E-Government Act applies to defendants, just as the Paperwork Reduction Act does.

Though Defendants labor to exempt themselves from the definition of "agency" under the E-Government Act of 2002, Pub. L. 107-347, 115 Stat. 2899, Title II § 208 (codified at 44 U.S.C. § 3501 note), they cannot escape the plain text and history of the provision.

First, although the FOIA's definition of agency and the E-Government Act's definition of "agency" are quite similar, they are not perfectly coextensive. *Compare* § 5 U.S.C. § 552(f)(1), *with* 44 U.S.C. § 3502(1). Crucially, the FOIA's definition "agency" identifies no government entities that are expressly excluded from the FOIA, relying instead on the APA's list of exclusions. *See* 5 U.S.C. §§ (1)(A)–(H). To the extent that any government entities are *specifically* excused from FOIA obligations, they are excused solely by legislative history. *See* H.R. Rep. No. 93-1380, at 232 (1974) (Conf. Rep.); *see also Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980).

By contrast, the E-Government Act's definition of "agency" *expressly identifies* the government entities that are excluded from the Act. § 3502(1)(A)–(D). Had Congress intended for subcomponents of the Executive Office of the President to fall outside of § 3502(1), Congress would have said so when it drafted the provision in 1980. Paperwork Reduction Act of 1980, Pub. L. No. 96-511, § 2, 94 Stat. 2812, 2813 (codified as amended at § 3502) ("PRA"). But Congress did not, and the legislative history of the Act reveals no hidden intent to make such exclusions.

The Court should decline Defendants' invitation to disregard the clear language of § 3502(1) and refuse to read into the provision a nonexistent exception for EOP subcomponents. *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (courts should not "allow[] ambiguous legislative history to muddy clear statutory language.").

Moreover, both case law and the OMB confirm that defendants are "agenc[ies]" for the purposes of the E-Government Act. The term "agency" under the E-Government Act means the same thing as it does under the PRA. And the White House Office ("WHO"), the Director of White House Information Technology ("DWHIT"), and the Commission—like other subcomponents of the EOP—are agencies subject to the PRA. *See Pub. Citizen*, 127 F. Supp. 2d at 5, 26 (ordering the OA, the U.S. Trade Representative, and the OMB to comply with "their obligations under . . . the PRA"); *see also* Herndon Decl. 1, 6, ECF No. 38-1 (interchangeably describing the Director of White House Information Technology as being part of the White House Office and the Office of Administration). The Defendants are therefore agencies subject to the E-Government Act. *See Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute"). Further, these agencies' compliance with the E-Government Act is reviewable under the APA. *See Pub. Citizen*, 127 F. Supp. 2d at 5, 26.

The OMB, which is charged with primary authority to implement the PRA, 44 U.S.C. § 3504, has long understood the EOP and its subcomponents to be agencies under the Act. The OMB has for many years issued control numbers under the PRA to the EOP, the WHO, and the Council on Environmental Quality (a further subcomponent of the EOP). *Search of Information Collection Review*, Office of Info. & Reg. Affairs.[1] Moreover, from the moment the PRA was enacted, the OMB understood the OA to be subject to the PRA's requirements. 127 Cong. Rec. S11,159, 11,159–60 (daily ed. Oct. 6, 1981) (listing the OA as an "agency" subject to the PRA). Defendants are thus agencies subject to the E-Government Act.

[1] https://www.reginfo.gov/public/do/PRASearch (last visited July 17, 2017).

E. The General Services Administration cannot duck its independent obligations as an Agency.

Defendants, apparently eager to escape APA review, present a deeply confused version of EPIC's arguments concerning the General Services Administration ("GSA"). Def.'s Opp'n 33. The point is simple: the GSA is legally required to store any data that the Commission collects, yet the GSA failed to do so. The Charter states that the GSA is the "*Agency Responsible for Providing Support.*" Charter § 6 (emphasis added). This is entirely consistent with the plain text of the Executive Order, which assigns to the GSA—and no other entity—responsibility to provide "facilities," "equipment," and "other support services" as "may be necessary to carry out [the Commission's] mission." Exec. Order No. 13,799, 82 Fed. Reg. 22,389. The GSA, which is indisputably an agency, was also required to conduct and publish a PIA before such collection. The agency's actions—and inaction—are thus plainly unlawful under the Executive Order, the APA, and the E-Government Act and should be enjoined as such.

II. The cases cited by Defendants support EPIC's informational privacy claim.

In arguing against the claim to information privacy, the Defendants places considerable weight on *Doe v. City* of N.Y., 15 F.3d 264, 268 (2d Cir. 1994) (citing *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 493-96 (1975). The Defendants find this statement in that opinion: "there is no question that an individual cannot expect to have a constitutionally protected privacy interest in matters of public record." Opp at 34.

That was dicta, noting a point made by the defendants in that case. In *Doe*, the Second Circuit actually held "There is, therefore a recognized constitutional right to privacy in personal information." *Id.* at 267. The Second Circuit found that "Individuals who are affected with the HIV virus clearly possess a constitutional right to privacy regarding their condition." Id. The Second Circuit concluded:

> In sum, we hold that Doe has a right to privacy (or confidentiality) in his HIV status, because his personal medical condition is a matter that he is normally entitled to keep private. We also hold that Doe's HIV status did not, as a matter of law, automatically become a public record when he filed his claim with the Commission and entered into the Conciliation Agreement.

Id. at 269.

The argument that the Defendants make here is similar to the one made by New York Commission in *Doe*: by virtue of providing information to a state agency, the individual has waived whatever constitutional privacy claims she may have. The Second Circuit rejected that conclusion. It recognized a right to information privacy.

Similarly, in *Lewis v. Delarosa*, No. C 15-2689 NC (PR), 2015 WL 5935311, at *1 (N.D. Cal. Oct. 13, 2015), cited by the Commission, Def.'s Opp. 34, the magistrate judge court acknowledged a constitutional right to privacy recognized, noting that

> The Ninth Circuit has recognized a "constitutionally protected interest in avoiding disclosure of personal matters including medical information," but that interest is conditional, not absolute. *Seaton v. Mayberg*, 610 F.3d 530, 538 (9th Cir. 2010); see *In re Crawford*, 194 F.3d 954, 958-59 (9th Cir. 1999) (recognizing informational privacy as a constitutionally protected interest but one that is not absolute); *Norman-Bloodsaw v. Lawrence Berkeley Lab*., 135 F.3d 1260, 1269 (9th Cir. 1998) (stating that "[t]he constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidentiality," and [*9] holding that blood and urine tests administered to collect medical information implicated such a right under the Fifth or Fourteenth Amendments). In comparison to *Seaton* and *Norman-Bloodsaw*, Plaintiff's allegation that his right to informational privacy was violated when his non-private identification information was published on the internet is not included in even the outer confines of a federal right to informational privacy.

Lewis, 2015 WL 5935311, at *3.

Regarding *NASA v. Nelson*, 562 U.S. 134, 138 (2011), EPIC's Amended Motion provides a more complete analysis of the reasoning in in that case than the Defendants provide. See Amd. Mot 30-34. Specifically, EPIC points to Justice Alito's holding for the Court which relied on the "the protection provided by the Privacy Act's nondisclosure requirement" and the fact that the information sought was "reasonable." NASA, 562, U.S. at 159. Amd. Mot at 32. The Defendants' have specifically disavowed any privacy obligations in the collection of the state voter record information and the request is widely viewed by state election officials as "unreasonable." *See, e.g.*, Ex. 20.

Even the Commission's analysis of D.C. Circuit law is misleading. In *AFGE*, the Court found "sufficiently weighty interests" to justify the collection of certain personal information in employee surveys. *Am Fed. Of Gov't Emps., AFL-CIO v. Dep't of House & Urban Dev.*, 118 F.3d 786, 791 (D.C Cir. 1997) ("AFGE"). But the D.C. Circuit also observed:

> [S]everal of our sister circuits have concluded based on *Whalen* and *Nixon* that there is a constitutional right to privacy in the nondisclosure of personal information. *See United States v. Westinghouse Electric Corp*., 638 F.2d 570, 577-580 (3d Cir. 1980) (holding that there is a constitutional right to privacy of medical records kept by an employer, but that the government's interest in protecting the safety of employees was sufficient to permit their examination); *Plante v. Gonzalez*, 575 F.2d 1119, 1132, 1134 (5th Cir. 1978), cert. denied, 439 U.S. 1129 (1979) (identifying a "right to confidentiality" and holding that balancing is necessary to weigh intrusions); *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir. 1983), *cert. denied*, 464 U.S. 1017 (1983) (applying an intermediate standard of review to uphold a financial disclosure requirement). *See also, Hawaii Psychiatric Soc'y Dist. Branch v. Ariyoshi*, 481 F. Supp. 1028, 1043 (D. Hawaii 1979) (holding that disclosure of psychiatric records implicates the constitutional right to confidentiality); *McKenna v. Fargo*, 451 F. Supp. 1355, 1381 (D.N.J. 1978) ("The analysis in Whalen ... compels the conclusion that the defendant . . . must justify the burden imposed on the constitutional right of privacy by the required psychological evaluations.").

118 F.3d at 792. The D.C. Circuit in *AFGE* concluded:

> Having noted that numerous uncertainties attend this issue, we decline to enter the fray by concluding that there is no such constitutional right because in this case that conclusion is unnecessary. Even assuming the right exists, the government has not violated it on the facts of this case. Whatever the precise contours of the supposed right, both agencies have presented sufficiently weighty interests in obtaining the information sought by the questionnaires to justify the intrusions into their employees' privacy.

AFGE v. HUD, 326 U.S. App. D.C. 185, 118 F.3d 786, 793 (1997).

In the matter before this Court, the Defendants have presented no such "sufficiently weighty interests." In fact, the Commission's attempt to obtain state voter records is seen by election officials as intrusive and unnecessary.

The Defendants' tautological use of the phrase "publicly available" obscures the Commission's intent and does not mitigate the privacy risks. The Commission is explicitly seeking detailed personal data maintained by the states and protected by state law. *See* Ex. 2.

Invoking the phrase "publicly available" further obscures the procedures that any requester seeking state voter records, such as the designation of files, the payment of fees, the completion of forms, and the provision of a secure transmission method would otherwise be required to follow. *See* Pl.'s Reply 16–17, ECF No. 13.

The Defendants go out of their way to discuss *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), a case that is favorable to EPIC but which Plaintiff simply chose to omit from the earlier briefing. Notably, *in Reporters Committee* the Court considered whether rap sheets stored in state record systems acquired a privacy interest when they were centralized and stored in a federal records system. Assessing the scope of exemption 7(c) in the Freedom of Information Act, the Court upheld the privacy interest. Justice Stevens writing for the Court concluded:

> Accordingly, we hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no "official information" about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is "unwarranted."

Reporters Committee, 489 U.S. at 780.

Reporter's Committee is generally viewed as a case concerning statutory construction. But to the extent that it bears on EPIC's constitutional claims, which Defendants apparently believe it does, it would weigh in favor of the relief EPIC seeks.

III. The Defendants' irreparable harm arguments ignore the mounting evidence that voters will be harmed absent an injunction.

The Defendants' contention that no irreparable harm will occur is directly contradicted by the Commission's own statements and actions, by the actions of the Arkansas Secretary of State, and by this Court's prior decisions recognizing the inherent harm caused by improper disclosure of confidential information. But the Defendants cannot escape the fact that the Commission is seeking to collect sensitive, personal information about every registered voter in America. *See* First Kobach Decl., Ex. 3. Why would the Commission demand disclosure of the SSNs, dates of birth, felony convictions, and political affiliations of voters if it did not believe that it would in

fact receive that data? The Defendants failure to address this obvious question speaks volumes. Indeed, the Defendants argument works much better in reverse, *see* Def's Opp'n 37, n.9, if the Commission does not intend to collect sensitive and confidential voter data, then they never should have requested it and they would not suffer any setback if this Court enjoins such collection. There is simply no reason to permit the Defendants to collect any voter data during the pendency of this case.

The Commission's attempts to collect personal voter data by improperly inducing states to release the records outlined in the Kobach letter are well established in the record. The Commission has clearly and repeatedly expressed its intention to collect the "last four digits of social security numbers," "political party" information, and "dates of birth" in addition to other personal voter data. First Kobach Decl. ¶ 4; Pl.'s Ex. 3. Where states have expressed resistance, the Commission has used that as an excuse to question their motives in statements to the public. *See* FOX & Friends (@foxandfriends), Twitter (Jul. 6, 2017, 3:23 am) (".@VPPressSec: For the 14 states not complying with the voter commission, what are they trying to hide? Or is this just pure partisanship?").[2] The Defendants cannot simultaneously seek to coerce states into providing sensitive voter data and then claim that it would be the states fault if the data is improperly disclosed. Def.'s Opp'n 37, n.9. The Commission has clearly expressed its intent to collect this data, and the Court has the authority to enjoin such collection where it would cause irreparable harm.

The Defendants attempted reliance on the "presumption of regularity" also fails here where we have already seen one state, Arkansas, attempt to transfer data to the Commission through an insecure system in violation of both state and federal law. *See* Ark. Code Ann. § 25-19-105(a)(1)(A) ("Except as otherwise specifically provided by this section or by laws specifically enacted to provide otherwise, all public records shall be open to inspection and copying by any *citizen* of the State of Arkansas during the regular business hours of the custodian

[2] https://twitter.com/foxandfriends/status/882907901420896256.

of the records."). The Defendants have not provided any evidence that the Commission is a "citizen" of Arkansas or could otherwise lawfully access any state voter data. Other states have similarly indicated that they will provide data to the Commission in violation of state law. For example, New Hampshire Secretary of State has said that he will share voters' names, addresses, party affiliation and voting history dating back to 2006. This violates state law, which allows for the inspection but not the transfer of voter registration data:

> Any person may view the data that would be available on the public checklist, as corrected by the supervisors of the checklist, on the statewide centralized voter registration database maintained by the secretary of state at the state records and archives center during normal business hours, but the person viewing data at the state records and archives center may not print, duplicate, transmit, or alter the data. N.H. Rev. Stat. § 654:31(III)

New Hampshire law only permits the transfer of voter registration lists to a "political party" or "political committee." N.H. Rev. Stat. § 654:31(IV).

The Commission's recent actions also validate EPIC's claims that any personal data collected can be improperly disclosed. Additionally, the Defendants have already revealed personally identifiable information by publishing the names, email addresses, and other sensitive information of members of the public who have contacted the Commission with questions and feedback. *Presidential Advisory Commission on Election Integrity Resources*, The White House (2017).[3] Many of these messages were sent prior to the Commission's July 5 publication of a notice that it "might" publish identifying information from commenters. The Presidential Commission on Election Integrity (PCEI); Upcoming Public Advisory Meeting, 82 Fed. Reg. 31,063 (July 5, 2017).

IV. The Defendants fail to rebut the evidence EPIC has provided, which establishes informational and organizational injuries as well as associational standing as required under Article III.

The Defendants' standing arguments ignore the well-pled allegations in EPIC's Second Amended Complaint as well as the supplementary evidence provided in this case, including

[3] https://www.whitehouse.gov/presidential-advisory-commission-election-integrity-resources.

declarations by EPIC's Executive Director and the individual declarations of Members of the EPIC Advisory Board. Rather than respond to these exhibits that are in the record, the Defendants misconstrues the D.C. Circuit's recent decision in *Friends of Animals* and misrepresent EPIC's structure, purpose, and relationship to its members. But the Court need not follow the Defendants down these rabbit holes. The record clearly shows that EPIC has established informational standing, organizational standing, and associational standing on behalf of its members.

A. EPIC has established informational standing.

The Court should reject the Defendants' proposed interpretation of informational injury under Article III because it would produce an absurd result. The Defendants' argument is based on the flawed premise that no plaintiff can challenge an agency's failure to produce a record as required by law when the agency refuses to create it. Def.'s Opp'n 15. Such a sweeping argument would be contrary to the Supreme Court's holding in *Public Citizen* and is not supported by the D.C. Circuit's recent decision in *Friends of Animals*. Not only is the Defendants' view contrary to precedent, it would undermine the purpose of the E-Government Act, which is to ensure the protection of personal data prior to its acquisition, and produce illogical results.

EPIC has properly asserted standing based on the well-pled allegation that Defendants' failure to release a Privacy Impact Assessment for the proposed collection of personal voter data would cause an informational injury to EPIC and directly impact EPIC's organizational mission and public education functions. Second Am. Compl. ¶¶ 5, 67–76. An informational injury occurs when a plaintiff is denied information due to it under statute. *FEC v. Akins*, 524 U.S. 11, 21 (1998). The D.C. Circuit explained in *Friends of Animals v. Jewel* , 828 F.3d 989, 992, (D.C. Cir. 2016) that:

> A plaintiff suffers sufficiently concrete and particularized informational injury where the plaintiff alleges that: (1) it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it, and (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure.

Id. "Anyone whose request for specific information has been denied has standing to bring an action; the requester's circumstances—why he wants the information, what he plans to do with it, what harm he suffered from the failure to disclose—are irrelevant to his standing." *Zivotofsky v. Sec'y of State*, 444 F.3d 614, 617 (D.C. Cir. 2006). Further, denial of "timely access" to information constitutes an "informational injury" to which the government can "make no serious challenge to the injury and causation elements . . . of standing." *Byrd v. EPA*, 174 F.3d 239, 243 (D.C. Cir. 1999).

The Defendants' attempt, in a footnote, to distinguish the D.C. Circuit's decision in *PETA v. USDA*, 797 F.3d 1087 (D.C. Cir. 2015), reveals the incoherence of their proposed informational injury test. Def.'s Opp'n 15, n.1. Just like the plaintiffs in *PETA*, EPIC has established that the Defendants' failure to release a privacy impact assessment "directly conflicted with its mission of public education" and investigations into government privacy practices. *PETA*, 797 F.3d at 1095. The Defendant concedes that the court in *PETA* found there was Article III standing even without an express statutory guarantee to "preexisting information," Def's Opp'n 15, n.1, which means that EPIC has an even stronger standing claim that PETA. There can be no question that the organizational and informational injury in this case is "self-evident," Def's Opp'n 8, where EPIC's core mission is to "focus public attention on emerging privacy and civil liberties issues" by conducting "oversight and analysis of government activities," Second Am. Compl. ¶ 5. By refusing to release a Privacy Impact Assessment as required by law, the Defendants have increased the burden on EPIC to conduct its "oversight and analysis" in a more costly and resource-intensive way that would not otherwise be necessary. See Decl. of Eleni Kyriakides.

The cases cited in the opposition are easily distinguishable and do not support the improperly narrow scope of informational injury that the Defendants assert here. Both *Friends of Animals v. Jewell*, 828 F.3d 989, 992, (D.C. Cir. 2016), and *Am. Farm Bureau v. EPA*, 121 F. Supp. 2d 84, 94 (D.D.C. 2000), involved enforcement of "statutory deadline provision[s]" rather than disclosure provisions. The court in *Friends of Animals* went out of its way to draw this distinction. 828 F.3d at 993 ("Friends of Animals's complaint seeks to have the court order

compliance with section 4(b)(3)(B)'s deadline requirement, not its disclosure requirement."). Unlike the Endangered Species Act at issue in *Friends of Animals*, the E-Government Act provision at issue in this case requires the creation and disclosure of a Privacy Impact Assessment by the agency *prior to* initiating the collection of personal information. E-Government Act § 208(b) ("An agency shall take actions described under paragraph (B) *before* . . . initiating a new collection of information . . . ."). Where, as here, Congress has required the creation of a document prior to a specifically defined agency action, and the agency has taken that action, a plaintiff in EPIC's position can assert an informational injury for failure to disclose the document. *See* Def.'s Opp'n 16 (citing *Friends of Animals* test showing that the precondition for disclosure had not been met in that case).

Indeed, EPIC's asserted informational injury is consistent with the Supreme Court's holding in *Public Citizen* that failure to produce records from an advisory committee gives rise to an informational injury, even if those records do not yet exist. *Pub. Citizen v. DOJ*, 491 U.S. 440, 447 (1989). In *Public Citizen*, the plaintiff-appellants sought to compel a committee to disclose, *inter alia*, (1) its charter and (2) advance notices of future committee meetings. *Id.* at 447–48. None of these putative government records existed at the time the plaintiff sought them because the committee disputed that it had any statutory obligation to record or file them. *Id.* Nonetheless, the Court held that the plaintiffs had Article III standing to demand their disclosure:

> Appellee does not, and cannot, dispute that appellants are attempting to compel [the defendants] to comply with [the Federal Advisory Committee Act]'s charter and notice requirements . . . . As when an agency denies requests for information under the Freedom of Information Act, refusal to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue.

Id. at 449. EPIC is in the same position as Public Citizen: seeking public disclosure of an advisory committee document which the Commission must by law record (here, a Privacy Impact Assessment). That the Commission has failed to record such a document is no bar to EPIC's information-based standing, just as it was no bar in *Public Citizen*. *Id.* at 449.

Notably, the court in *Public Citizen* found standing despite the Defendants' contention that a favorable decision "would likely [not] redress the [plaintiffs'] alleged harm because the . . . records they wish to review would probably be" unavailable to them. *Id.* at 449. Here, by contrast, a favorable decision would redress EPIC's informational injury by forcing the Commission to comply with its recording and disclosure obligations. Second Am. Compl. ¶¶ 67–76, p. 15 ¶ D. Even if the Commission seeks to duck its obligation to record a PIA—thereby denying EPIC the ability to review such a document—*Public Citizen* is explicit that EPIC's "potential gains [would] undoubtedly [be] sufficient to give [it] standing" to demand disclosure. *Id.* at 451.

EPIC also easily satisfies the test in *Friends of Animals* for informational injury standing. First, EPIC has alleged that it was "deprived of information that . . . a statute requires the government . . . to disclose to it," *Friends of Animals*, 828 F.3d at 992. EPIC—by itself and through its members—was denied access to Commission information under the E-Government Act of 2002, 44 U.S.C. § 3501 note, and the FACA, U.S.C. app. 2 § 10(b). Second Am. Compl. ¶¶ 5, 67–76; *see* 5 U.S.C. § 706(1); *Am. Friends Serv. Comm. v. Webster*, 720 F.2d 29, 57 (D.C. Cir. 1983) (finding plaintiffs in an APA suit "[met] the 'zone of interests' test for standing" because the agency's violations of a records statute obstructed the "public's expected access to records"). Second, the harm EPIC has suffered is one that "Congress sought to prevent": a denial of "citizen access to Government information." Pub. L. 107–347, 116 Stat 2899, 2899; *see also* Pub. L. 92–463, 86 Stat. 770, 770 ("[T]he public should be kept informed with respect to the . . . activities . . . of advisory committees[.]"). EPIC has thus alleged a valid informational injury. *See PETA*, 797 F.3d at 1095 (holding "denial of access to . . . information" was a "cognizable injury sufficient to support standing" in APA suit); *Am. Historical Ass'n v. NARA*, 516 F. Supp. 2d 90, 107 (D.D.C. 2007) ("Plaintiffs have standing to pursue their claim that the delay [in obtaining access to records] . . . violates the APA.").

B. EPIC has established organizational standing.

The Defendants' opposition to EPIC's organizational standing claims rests on a fundamental misreading of EPIC's complaint, EPIC's declaration, and EPIC's website. A brief review of these materials in the record, and an understanding of EPIC's core mission, makes clear that EPIC's organizational standing claim is "self-evident" and does not require special supplemental pleadings as the Defendants concede. Def.'s Opp'n 8. However, EPIC is more than happy to supplement the record in this case to further support its organizational standing claim. EPIC has already suffered a "concrete and demonstrable injury to [its] activities – with a consequent drain on [its] resources" that meets the *NAHB v. EPA* test, 667 F.3d 6, 11 (D.C. Cir. 2011). Specifically, EPIC has diverted resources to investigating the Commission's collection of all Americans' voter records, a program whose secrecy has directly impaired EPIC's mission. *See* Kyriakides Decl..

EPIC's core mission and activities—namely, "public education" and the "protect[ion of] privacy, free expression, [and] democratic values . . . ," are unquestionably harmed by the Defendants behavior in this case. *See About EPIC*, EPIC. org (2015).[4] EPIC's mission includes, in particular, educating the public about the government's record on voter privacy and promoting safeguards for personal voter data. *See, e.g.*, *Voting Privacy*, EPIC.org (2017);[5] EPIC, Comment Letter on U.S. Election Assistance Commission Proposed Information Collection Activity (Feb. 25, 2005).[6] The Commission's failure to carry out a Privacy Impact Assessment and disregard for the informational privacy rights of U.S. voters have thus injured EPIC by making EPIC's "activities more difficult" and creating a "direct conflict between the [Commission's] conduct and [EPIC's] mission." *Nat'l Treasury Empls. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996).

The cases cited by the Defendants in opposition are entirely distinguishable. Def.'s Opp'n 9–11. EPIC's organizational injuries in this case bear no relationship to the "pure issue-advocacy"

[4] https://epic.org/about.
[5] https://epic.org/privacy/voting/.
[6] https://epic.org/privacy/voting/register/eac_comments_022505.html.

claims dismissed by prior courts. *See Nat'l Consumer League v. Gen. Mills, Inc.*, 680 F. Supp. 2d 132, 136 (D.D.C. 2010) (dismissing issue advocacy claims where the challenged agency action provided a means to carry out the organizational mission); *Ctr. for Law & Educ. V. Dep't of Educ.*, 396 F.3d 1152, 1162 (D.C. Cir. 2005) (rejecting a claim based on "pure issue-advocacy" activities).

The decision in EPIC's prior challenge to changes in specific Department of Education regulations is similarly irrelevant to the issue in this case. That case did not involve agency action that *inhibited* EPIC's ability to inform the public about emerging privacy issues or to conduct oversight of government activities. *EPIC v. Dep't of Educ.*, 48 F. Supp. 3d 1, 23 (D.D.C. 2014) (finding that the challenge to the regulations was part of EPIC's advocacy mission). Unlike the "advocacy" activities at issue in these earlier cases, Defendants' refusal to disclose information and the resulting burden to EPIC's public education and oversight mission in this case clearly creates a "concrete and demonstrable" injury similar to what the D.C. Circuit recently recognized in *PETA*.

Like the plaintiffs in *PETA v. USDA*, 797 F.3d 1087 (D.C. Cir. 2015), EPIC has had to expend organizational resources "in response to, and to counteract, the effects of defendants' alleged [unlawful conduct]." *Id.* at 1097. Simply to preserve the status quo—wherein the federal government was *not* illegally aggregating the personal voter data of nearly 200 million Americans, and wherein EPIC was better able to educate the public about the privacy safeguards in place on all major federal databases of personal information—EPIC has been forced to expand its long-running work on voter privacy. For example, EPIC has had (1) to draft and seek expert sign-ons for a letter urging state election officials to "protect the rights of the voters . . . and to oppose the request from the PACEI," Letter from EPIC et al. to Nat'l Ass'n of State Sec'ys (July 3, 2017);[7] (2) to seek records from the Commission concerning its collection of voter data, *see* Kyriakides Decl., (3) to develop a webpage with extensive information on the Commission's

[7] https://epic.org/privacy/voting/pacei/Voter-Privacy-letter-to-NASS-07032017.pdf.

activities. *Voter Privacy and the PACEI*, EPIC.org (2017); [8] and (4) respond to numerous requests from state election officials, citizen organizations, and news organizations concerned about the impact of the Commission's request for voter data on personal privacy.

The Defendants actions have had a direct impact on EPIC's mission and work and imposed a strain on EPIC's resources to fulfill its public education and oversight mission. This is the type of "concrete and demonstrable injury to" EPIC's "organizational activities" that courts have long deemed sufficient for standing. *Havens*, 455 U.S. at 379; *see also PETA*, 797 F.3d 1087 (holding that a non-profit animal protection organization had standing under *Havens* to challenge the USDA's failure to promulgate bird-specific animal welfare regulations); *Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129 (D.C. Cir. 2006) (finding that a health advocacy organization had organizational standing under *Havens* to challenge an FDA regulation). EPIC has established organizational standing under Article III.

C. EPIC has established associational standing.

The Defendants' attempt to distinguish EPIC from other membership organizations fails as well, Def's Opp'n 12–13, and the "formal" relationship between EPIC and its members is a matter of public record that cannot be seriously disputed, *see* EPIC, *Advisory Board* (2017).[9] The programmatic guidance and financial support that EPIC's members provide is similarly a matter of public record. *See* EPIC, *2017 EPIC Champion of Freedom Awards Dinner* (2017) (listing EPIC's Advisory Board members as the primary supporters of EPIC's annual awards dinner);[10] Br. of Amici Curiae EPIC, Thirty Technical Experts and Legal Scholars, and Five Privacy and Civil Liberties Organizations in Support of Petitioner, *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (No. 15-1194).[11] There is also no doubt that EPIC's members, most of whom are registered voters in the United States, will suffer a concrete and particularized injury when the

[8] https://epic.org/privacy/voting/pacei/.
[9] https://epic.org/epic/advisory_board.html.
[10] https://epic.org/june5/.
[11] https://epic.org/amicus/packingham/packingham-amicus-EPIC.pdf.

Defendants improperly collect their sensitive personal information.[12] Based on the record in this case, EPIC easily satisfies both the traditional membership test and the "functional" three-part test under *Washington Legal Foundation v. Leavitt*, 477 F. Supp. 2d 202, 208 (D.D.C. 2007).

The Defendant cannot seriously contend that EPIC "does not appear to serve a specialized segment of the community." Def.'s Opp'n 13. EPIC is a privacy organization, whose core constituents are "members" of the "distinguished advisory board, with expertise in law, technology, and public policy." EPIC, *About EPIC* (2017).[13] If EPIC does not serve a "specialized segment of the community," then it is not clear what membership organization does. The fact that EPIC does not leave membership open to the broader public, Def.'s Opp'n 12, only further supports its specialized nature.

Furthermore, members of EPIC's Advisory Board qualify as "members" for the purposes of Article III standing because they occupy the same roles and fulfill the functions as the "members" that have repeatedly supported associational standing in this Circuit. *See, e.g.*, *Sierra Club v. Fed. Energy Regulatory Comm'n*, 827 F.3d 59, 65 (D.C. Cir. 2016); *Ctr. for Biological Diversity v. EPA*, No. 14-1036, 2017 WL 2818634, at *6 (D.C. Cir. June 30, 2017). All of the above-named declarants are formally identified as "members" of the organization. Declaration of Marc Rotenberg ¶ ¶ 8–12, Ex. 38. More importantly, these EPIC members play a functional role in "selecting [EPIC's] leadership, guiding its activities, [and] financing those activities." *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 26 (D.C. Cir. 2002); *see also Hunt v. Washington State*

[12] EPIC has established associational standing on behalf of numerous EPIC members whose privacy is threatened by the Commission's unlawful collection of personal voter data. Voter Declaration of Kimberly Bryant, Ex. 1; Voter Declaration of Julie E. Cohen, Ex. 2; Voter Declaration of William T. Coleman III, Ex. 3; Declaration of Harry R. Lewis, Ex. 4; Voter Declaration of Pablo Garcia Molina, Ex. 5; Voter Declaration of Peter G. Neumman, Ex. 6; Voter Declaration of Bruce Schneier, Ex. 7; Voter Declaration of James Waldo, Ex. 8; Voter Declaration of Shoshana Zuboff, Ex. 9. As each of the above-named EPIC members has attested: "The disclosure of my personal information—including my name, address, date of birth, political party, social security number, voter history, active/inactive or cancelled status, felony convictions, other voter registrations, and military status or overseas information—would cause me immediate and irreparable harm." *See* Voter Declarations, Exs. 1–9.

[13] https://epic.org/epic/about.html.

Apple Adver. Comm'n, 432 U.S. 333 (1977) (holding that the Washington State Apple Advertising Commission had standing to file suit on behalf of apple growers and dealers because it was "the "functional equivalent of a traditional membership organization."); *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 129 F.3d 826 (5th Cir. 1997) (holding that nonprofit environmental protection corporation with no legal members under the corporate laws of the District of Columbia had standing to file suit on behalf of individuals who voluntarily identified as "members" and played a role in funding and selecting the corporation's leadership). Here, the members of the EPIC Advisory Board commit to the mission of the organization, participate in the work of the organization, and provide financial support to the organization. Rotenberg Decl. ¶ ¶ 8–12.

Defendants have placed considerable weight on the term "advisory" in the titles of EPIC's members, but this distinction is meaningless for Article III standing purposes. Def. Surreply 2–3. First, emphasis on this term ignores the direct and material role that advisory board members play in EPIC's operation, as described above. Moreover, the word "advisory" is not a magic talisman that strips an organization of associational standing where the organization would otherwise enjoy it. *See, e.g.*, *Resident Advisory Bd. v. Rizzo*, 425 F. Supp. 987, 1010 (E.D. Pa. 1976) ("Resident *Advisory Board*" enjoyed associational standing to sue on behalf of members (emphasis added)), *modified on other grounds*, 564 F.2d 126 (3d Cir. 1977); *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1110–1112 (9th Cir. 2003) (holding that beneficiaries of organization's work were the "the functional equivalent of members for purposes of associational standing" where they "composed more than 60 percent of the *advisory council*" of that organization (emphasis added)); *State of Connecticut Office of Prot. & Advocacy for Persons with Disabilities v. Connecticut*, 706 F. Supp. 2d 266, 284 (D. Conn. 2010) (holding that state office enjoyed associational standing to sue on behalf of the beneficiaries of its work given that those beneficiaries comprised least 60 percent of the "*Advisory Council*"; given the "specified functions of the *Advisory Council*"; and given "the influence of the *Advisory Council*" over the office's work (emphasis added)).

The Defendants' argument that EPIC cannot assert an injury on behalf of its members because of certain state responses to the Commission's unlawful demand, Def's Opp'n 13–14, is not supported by the record and is directly contradicted by the Defendants' own submissions. In support of its argument, the Commission referred to EPIC's webpage on the Commission, which provides the public with information about the June 28, 2017 letter and subsequent developments. Def. Surreply 2. EPIC's webpage, which was not authored and has not been reviewed by any state official, lists states that have expressed *opposition* to the Commission's unlawful demand for personal voter data. Def. Surreply, Ex. 1 at 5. The Commission uses the term "reject," but cites no evidence that supports the conclusion that the Commission will not follow through on its plan to collect comprehensive personal voter data—as evidenced by the letters sent on June 28, 2017—to all 50 states and the District of Columbia. *See* Kobach Decl. ¶¶ 4–6. In fact, the Vice Chair has indicated that it is his "belief that there are inaccuracies in those media reports with respect to various states." Kobach Decl. ¶ 6.

Second, EPIC's members will necessarily suffer injuries in fact if the Commission is allowed to carry out its plans. As EPIC has explained, the unlawful collection and aggregation of state voter data, standing alone, constitutes an injury in fact. Pl. Mem. 17; *Council on Am.-Islamic Relations v. Gaubatz*, 667 F. Supp. 2d 67, 76 (D.D.C. 2009) (holding that the wrongful disclosure of confidential information is a form of injury); *Hosp. Staffing Sols., LLC v. Reyes*, 736 F. Supp. 2d 192, 200 (D.D.C. 2010) ("This Court has recognized that the disclosure of confidential information can constitute an irreparable harm because such information, once disclosed, loses its confidential nature."). Though it is unlawful for the Commission to obtain voter data without (1) conducting a PIA and (2) adhering to constitutional strictures on the collection of personal information, that is *precisely* what the Commission promises to do—and by a date certain (July 14). The injuries to EPIC's members are thus "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 133 (2013). The Government cannot confidently assert that it will do something yet dismiss the inevitable result as pure "speculati[on]." Def. Opp'n 6.

Third, the Commission's characterization of the data it seeks ("publicly available") is meaningless in the Article III standing context. The Commission has no legal authority to collect the personal voter data it has requested. *See* 44 U.S.C. § 3501 note. If it nevertheless collects that data, the Commission has broken the law and caused an injury in fact. *See CAIR*, 667 F. Supp. 2d at 76; *Hosp. Staffing Sols*, 736 F. Supp. 2d at 200. It does not matter that a particular state might disclose its voter data to some *other* requester under some *other* circumstances: *this* requester—the Commission—is barred by law from gathering this data without sufficient constitutional and statutory privacy safeguards. Nor can the Commission use the existing vulnerability of voter data at the state level to justify an even greater risk to voter privacy at the federal level. Def. Opp'n 7, ECF No. 8. A lesser harm does not excuse a greater one, and it certainly does not erase an injury in fact.

This Court consequently has jurisdiction to decide this case under Article III.

CONCLUSION

The Emergency Motion for a Temporary Restraining Order and Preliminary Injunction should be granted, and Defendants should be restrained from collecting state voter data prior to the completion of a Privacy Impact Assessment.

Respectfully Submitted,

/s/ Marc Rotenberg
MARC ROTENBERG, D.C. Bar # 422825
EPIC President and Executive Director

ALAN BUTLER, D.C. Bar # 1012128
EPIC Senior Counsel

CAITRIONA FITZGERALD*
EPIC Policy Director

JERAMIE D. SCOTT, D.C. Bar # 1025909
EPIC Domestic Surveillance Project Director

ELECTRONIC PRIVACY INFORMATION CENTER
1718 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20009
(202) 483-1140 (telephone)
(202) 483-1248 (facsimile)

Attorneys for Plaintiff EPIC

** Pro hac vice motion pending*

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