

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ELECTRONIC PRIVACY INFORMATION CENTER

Plaintiff,

v.

PRESIDENTIAL ADVISORY COMMISSION ON
ELECTION INTEGRITY; MICHAEL PENCE, in his
official capacity as Vice Chair of the Presidential Advisory
Commission on Election Integrity; KRIS KOBACH, in his
official capacity as Vice Chair of the Presidential Advisory
Commission on Election Integrity; EXECUTIVE OFFICE
OF THE PRESIDENT OF THE UNITED STATES;
OFFICE OF THE VICE PRESIDENT OF THE UNITED
STATES; GENERAL SERVICES ADMINISTRATION

Defendants.

Civ. Action No. 17-1320 (CKK)

**PLAINTIFF’S SUR-SURREPLY IN SUPPORT OF PLAINTIFF’S EMERGENCY
MOTION FOR A TEMPORARY RESTRAINING ORDER**

Contra the arguments set forth in the Commission’s Surreply, EPIC has associational standing by virtue of representing the interests of its Advisory Board members, many of whom face certainly impending injury as a result of the Commission’s collection of personal voter data. EPIC also enjoys organizational standing because its programmatic activities have been “perceptibly”—indeed, significantly—impaired by the Commission’s nationwide collection of private data, *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 920 (D.C. Cir. 2015). Finally, the Commission’s suggested limitation on the temporary restraining order that may issue from this Court is groundless.

First, 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 individuals whose declarations were cited in EPIC’s Reply Brief are formally identified as “members” of the organization. Declaration of Marc Rotenberg ¶¶ 8–12, Ex. 1. 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 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 place overwhelming 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 Commission’s argument that EPIC cannot assert an injury on behalf of its members because of certain state responses to the Commission’s unlawful demand is not supported by the record and is directly contradicted by the Commission’s own submissions. In support of its argument, the Commission refers 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.

The only primary source document that the Commission cites is a letter and announcement from Maine Secretary of State Dunlap, which refers to fact that the personal voter data sought by the Commission is protected under state law. Def. Surreply, Exs. 2, 3. But EPIC is not seeking review of the decisions of individual state officials—EPIC is seeking to enjoin the Commission from unlawful collection of personal voter data. The fact that state officials in Maine and elsewhere have called into question the legality of the Commission’s request only further support’s EPIC’s irreparable injury claim and undercuts the Commission’s claim that the TRO would harm the public interest. Def. Opp’n 16. If the personal voter data that the Commission has requested cannot be lawfully disclosed by the states, then it would clearly be in the public interest to enjoin the unlawful collection of that voter data.

Finally, the Commission’s proposed limitation on the TRO sought is without foundation. Not two weeks ago, the Supreme Court refused to disturb significant portions of a nationwide preliminary injunction against the President’s executive order “suspending entry of nationals from six designated countries for 90 days,” even though only small number of citizens or lawful permanent residents were plaintiffs in the case. *Trump v. Int’l Refugee Assistance Project*, No. 16-1436, 2017 WL 2722580, at *1 (U.S. June 26, 2017); Exec. Order. No. 13769, 82 Fed. Reg. 8977 (Mar. 6, 2017). This case, like *Trump*, poses an extraordinary harm of nationwide reach requiring that the Commission’s conduct be fully enjoined. Moreover, the Commission cannot—without first unlawfully collecting the data sought—ensure that no EPIC member’s personal voter data will be collected, which would defeat the very purpose of the TRO that EPIC seeks.

See 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.”). A full stop on the Commission’s collection of personal voter data is thus “necessary to provide complete relief to the plaintiffs.” *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation omitted).

In sum, the arguments in the Commission’s Surreply are meritless. First, as EPIC set out in detail in its Reply, the injuries to EPIC’s organizational endeavors are both real and significant—a fact which the Commission fails to refute in its single conclusory sentence on the matter. Def. Surreply 19–21. Second, EPIC is a membership organization of which the individuals serving on EPIC’s Advisory Board are members. Rotenberg Decl. ¶¶ 8–12. Third, those individuals meet the definition of members as required for associational standing. *See, e.g., Resident Advisory Bd. v. Rizzo*, 425 F. Supp. at 1010. Fourth, the declarations submitted with EPIC’s Reply, along with the Commission’s July 14 deadline for aggregating the nation’s personal voter data, make clear that EPIC’s member-declarants face certainly impending injury, notwithstanding opposition to the Commission’s demand from certain state officials. Finally, the Commission’s proposed limitation on a TRO is unsupported by case law and would be ill-advised under the circumstances.

EPIC has therefore established Article III standing to bring this action, which the arguments in the Commission’s Surreply do nothing to subvert.

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

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

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