UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,

Plaintiff,

v.

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, *et al.*,

Defendants.

Civil Action No. 17-1320 (CKK)

ORDER
(July 6, 2017)

The Court hereby sets a hearing on Plaintiff's [3] Motion for a Temporary Restraining Order, to be held at **4:00 P.M.** on **July 7, 2017**, in Courtroom 28A. Counsel should be prepared to discuss the following issues in particular:

- The ownership and control of all computer systems that have or will be used in the collection, storage, and transfer of data collected at the behest of the Presidential Advisory Commission on Election Integrity, including the computer systems that are associated with the website https://safe.amrdec.army.mil/safe/Welcome.aspx, the email address ElectionIntegrityStaff@ovp.eop.gov, and the "White House computer system," ECF No. 8-1, at 3.

- The services that have or will be provided by the General Services Administration for the Presidential Advisory Commission on Election Integrity.

- The involvement of Commissioner Christy McCormick and/or the Election Assistance Commission in the decision-making process of the Presidential Advisory Commission on Election Integrity.

- The manner and extent to which the Commission expects "[r]elevant executive departments and agencies . . . to cooperate with the Commission." Executive Order No. 13,799, 82 Fed. Reg. 22,389, 22,390 (May 11, 2017).

- The authority, if any, relied upon by the Presidential Advisory Commission on Election Integrity to systematically collect voter information.

- The harm, if any, that Plaintiff or its members would suffer given Defendants' representation that only publicly available data will be collected by the Presidential

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Advisory Commission on Election Integrity.

- The harm, if any, that Defendants would suffer from conducting a Privacy Impact Assessment, and whether any factors make the disclosure of such a Privacy Impact Assessment not "practicable."

Furthermore, in undertaking its independent duty to assess its subject-matter jurisdiction over this action, *see NetworkIP, LLC v. F.C.C.*, 548 F.3d 116, 120 (D.C. Cir. 2008), the Court notes that the parties have not addressed informational standing in this case, despite Plaintiff's request for the public release of a Privacy Impact Assessment, *see Friends of Animals v. Jewell*, 828 F.3d 989 (D.C. Cir. 2016). Accordingly, the parties shall file supplemental briefing on this issue by **1:00 P.M.** on **July 7, 2017**, with each party limited to 3 pages. The parties should be prepared to discuss Plaintiff's standing to bring this suit at the hearing.

SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

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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)

REPLY IN SUPPORT OF PLAINTIFF'S EMEREGNCY MOTION FOR A TEMPORARY RESTRAINING ORDER

The Court should grant Plaintiff's motion for a Temporary Restraining Order because the Commission seeks to obtain sensitive personal data from state election officials that may not be lawfully disclosed and because the Commission has failed to establish necessary privacy safeguards for the collection of personal information.

Notwithstanding the Commission's claims to the contrary, EPIC has established standing on multiple grounds. First, the Commission seeks all of the records of registered voters in the United States and EPIC is an organization, based in the United States, comprised of registered voters. That alone is sufficient to establish standing. Second, EPIC has obtained affidavits from individual members that make clear that specific members of EPIC are subject to the actions of

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the Commission. Third, as an organization established in 1994 to "focus public attention on emerging privacy issues," there is hardly an issue of greater concern to EPIC, as an organization, than a proposal to build a database, maintained in the White House, of the nation's registered voters.

EPIC has also satisfied the requirements for the emergency relief sought. The Commission has asked state election officials to transfer massive amounts of sensitive personal data, protected by state privacy law, to an insecure website without authentication. EPIC's computer science expert confirms that popular web browsers warn users that their information may be stolen ("for example, passwords, messages or credit cards") and that the website "could put your confidential information at risk." It is difficult to construct an example of "irreparable harm" that is more self-evident.

EPIC has multiple ways in which it will prevail on the merits. Even though the Commission now seeks to hide its FACA obligations from the Court, the Commission's Charter and case law makes clear that that the Commission is subject to FACA and is an agency for purposes of the E-Government Act. And there is no effort by the Commission to deny that it failed to complete a Privacy Impact Assessment or to post a FACA notice, as EPIC alleged. Further, EPIC's claims for a violation of the constitutional right to information privacy are particularly strong in this case. The Commission has sought to compel the release of sensitive personal information, at the heart of democratic institutions and protected under state law. The Commission has proposed an insecure website to gather personal data and has denied any obligations to safeguard the data it seeks, notably disclaiming the need to conduct a Privacy Impact Assessment or to comply with the Privacy Act. The Commission has even attempted to put itself beyond the reach of the FACA and the APA. These are the circumstances, anticipated

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by the Supreme Court in *Whalen v. Roe* and *NASA v. Nelson,* where a constitutional privacy claim would be paramount.

The public interest analysis also favors EPIC because the Commission is only authorized to "study" issues concerning election integrity. There is nothing in the Executive Order or the Commission's Charter that provides authority to gather hundreds of millions of voter records from the states or to create a secret database stored in the White House. The Commission's actions, apart from its stated role, far exceed a solely "advisory" function. As evidenced by the response of state officials of both political parties to the Commission's June 28, 2017 letter, the Commission's request has in fact undermined "the American's people's confidence in the integrity of the voting processes used in federal elections." Executive Order No. 13,799, 82 Fed. Reg. 22,389, 22,389 (May 11, 2017). By the terms of the Commission's purpose and the actions undertaken by the Commission, the order EPIC seeks should be granted.

Finally, the Commission ties itself in knots when it represents to the Court that the information sought is "publicly available" (and therefore no privacy interest attaches) while simultaneously providing assurances for the Court that privacy will be protected. In a declaration for the Court, the Commission Vice Chair states, (1) that the transmission methods for the voter data is "tested and reliable," (2) that the "Commission intends to deidentify any such data prior to any public release of documents," and (3) that "the voter rolls themselves will not be released to the public by the Commission." If the data is "publicly available," why is the Commission seeking to assure the Court that privacy protections will be established?

The Commission has conceded the obvious: the privacy implications of this unprecedented demand for voter roll data from across the country are staggering. This Court

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should do no less. An order should issue enjoining the Commission from obtaining the personal information of registered voters.

ARGUMENT

In its opposition to EPIC's motion for a TRO, the Commission takes the extraordinary position that it can create a database, stored in the White House, containing sensitive personal data about every registered voter in the United States without complying with any of the laws enacted to protect personal privacy. The Commission cites decisions rejecting injunctions in circumstances that bear no resemblance to this case. The Commission does not cite a single example of a government entity that was permitted to collect and aggregate sensitive personal information without first conducting a privacy impact assessment as required under the E-Government Act. There is no such example, because government agencies are not above the law. State officials, unlike the Commission, understand the inherently sensitive nature of voter roll data, which is why many have opposed the Commission's unlawful demand. This Court should grant EPIC's emergency motion for a temporary restraining order and prohibit the collection of personal voter data pending resolution of a preliminary injunction.

This Court has held that plaintiff's are entitled to preliminary injunctive relief where, as here, they "have shown a clear likelihood of success on the merits and have satisfied the other requirements for a preliminary injunction." *Dimondstein v. American Postal Workers Union*, 964 F.Supp.2d 37, 41 (D.D.C. 2013).[1] The merits of EPIC's claim are clear and simple: the Commission violated federal law when it initiated collection of personal voter data without first conducting a PIA as required under the E-Government Act and posting a FACA notice. The Commission's excessive and unprecedented collection of personal data without adequate privacy

[1] As this Court noted in *Dimondstein*, the injunction factors have traditionally been evaluated on a "sliding scale" in this Circuit. 964 F. Supp. 2d at 41.

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safeguards would violate voters' constitutional right to informational privacy, which the Supreme Court recently acknowledged in *NASA v. Nelson*, 562 U.S. 134 (2011).

EPIC has also satisfied the other requirements for injunctive relief because EPIC has shown that the Commission's unlawful collection of personal voter data would cause an immediate and irreparable injury to EPIC and EPIC's members, and because the balance of the equities and the public interest favor injunctive relief. This Court has made clear that issuance of a TRO is appropriate, as in this case, in order "to preserve the status quo and to prevent irreparable harm." *CAIR v. Gaubatz*, 667 F. Supp. 2d 67, 79 (D.D.C. 2010).

I. The Commission has not shown that the unprecedented collection of personal voter data would be consistent with the Constitution or with federal law.

A. The Commission has failed to show that it does not fit within the clear statutory definition of "agency" and has conceded that PIA's are required under federal law.

The Commission claims that it is not subject to either the APA or the E-Government Act, but these arguments are contrary to the plain text of the statutes and not supported by any of the cases cited in the opposition. *See* Mem. Op. 9-13. The Commission fits squarely within the broad statutory definition of an "agency" in both the APA and the E-Government Act. *See Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971) (establishing the "substantial independent authority" test and finding that the Office of Science and Technology was an "agency" for the purposes of the APA); *McKinney v. Caldera*, 141 F. Supp. 2d 25, 31–34 (D.D.C. 2001) (reviewing cases applying the APA agency definition). The Commission does not dispute that if the APA and E-Government Act apply, the failure to conduct a PIA violates federal law. EPIC has therefore established a clear likelihood of success on the merits, which justifies entry of a TRO.

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The Commission acknowledges at the outset the definition of "agency" in the APA is broad. Mem. Op. 10 ("The APA defines 'agency' as 'each authority of the Government of the United States,' subject to several limitations not applicable here."). But rather than accept the plain text, the Commission attempts to rely on cases that have provided narrow exemptions for (1) the President specifically, *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992), and (2) certain close advisors to the President, *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993); *Armstrong v. Exec. Office of the Pres.*, 90 F.3d 553, 558 (D.C. Cir. 1996); *CREW v. Office of Admin.*, 566 F.3d 219, 223–23 (D.C. Cir. 2009). These cases are inapposite and do not apply to an entity such as the Commission.

Here, as in *Energy Research Foundation v. Defense Nuclear Facilities Safety Board*, the Commission satisfies the definition of "agency" because it (1) investigates, (2) evaluates, and (3) makes recommendations. 917 F.2d 581, 585 (D.C. Cir. 1990) (citing *Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971)) ("The Board of course performs precisely these functions. It investigates, evaluates and recommends[.]"); *see* Kobach Decl. 1, 3 (Commission is charged with "studying registration and voting processes"); Kobach Decl. 1 (Commission's report is to identify "which laws, rules, policies, activities, strategies, and practices that enhance or undermine Americans' confidence in the integrity of the federal election process"). Of course the Commission does a great deal more than that, too. It has announced plans to collect, store, and publish the personal data of every registered voter in the country. Kobach Letter 1–2. The Commission cannot credibly characterize this behavior as incidental to its advisory role: it is acting with the force and effect of an agency.

Eight days ago, the Commission undertook to assemble a database of personal voter information covering at least 157 million registered voters across 50 states and the District of

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Columbia. Letter from Kris Kobach, Vice Chair, PACEI, to Elaine Marshall, Secretary of State, North Carolina (June 28, 2017), Pl. Mot. TRO Ex. 3; U.S. Census Bureau, Voting and Registration in the Election of November 2016 at tbl. 4a (May 2017).[2] This sweeping depository of personal data would put the Internal Revenue Service—with its yearly haul of just 149 million individual returns—to shame. *SOI Tax Stats - Tax Stats at a Glance*, IRS (2016).[3] The Commission launched this remarkable data collection program with no apparent direction from the President, other than an instruction two months earlier to "study the registration and voting processes used in Federal elections." Exec. Order No. 13,799, 82 Fed. Reg. 22,389 (May 11, 2017).

It is simply not true, let alone "well-established," that a president's "close advisors" are categorically immune from APA review. Def. Opp'n 10 (citing a lone case, *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992), which says nothing about presidential advisors). The determination of whether an entity within the Executive Office of the President constitutes an agency depends on several factors:

> These tests have asked, variously, "whether the entity exercises substantial independent authority," *Armstrong v. Executive Office of the President,* 90 F.3d 553, 558 (D.C. Cir. 1996) (internal quotation mark omitted), "whether ... the entity's sole function is to advise and assist the President," *id.* (internal quotation mark omitted), and in an effort to harmonize these tests, "how close operationally the group is to the President," "whether it has a self-contained structure," and "the nature of its delegat[ed]" authority, *Meyer v. Bush,* 981 F.2d 1288, 1293 (D.C. Cir. 1993).

Citizens for Responsibility & Ethics in Washington (CREW) v. Office of Admin., 566 F.3d 219, 222 (D.C. Cir. 2009).

This Commission is doing far more than "advis[ing] and assist[ing];" rather, it is taking substantive steps and exercising "substantial[] independen[ce]" from the President. *Meyer*, 981

[2] https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html.
[3] https://www.irs.gov/uac/soi-tax-stats-tax-stats-at-a-glance.

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F.2d at 1293. Restating the word "advisory," as the Commission does, cannot erase this conclusion, because "the record evidence regarding [the Commission]'s actual functions" proves otherwise. *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. The Commission is creating a new database, demanding and collecting vast sums of personal voter data to place in that database, and threatening to publish that information. Kobach Letter 1–2. This is the work of an agency engaged in substantive activity, not an advisor helping the President choose between difference courses of action. *See Armstrong*, 90 F.3d at 558 (noting that the Office of Science and Technology is an "agency" because "not withstanding its proximity to the President" it exercised certain forms of "independent authority") (quoting *Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971)). The Commission is thus an agency under the APA.

Because the Commission is an "agency" under the APA, it necessarily meets the definition under the E-Government Act as well. § 3502(1). As the Commission itself concedes, the definition of "agency" used in the FOIA is broader than that of the APA, Def. Opp'n 10, and the definition of "agency" in the E-Government Act is the same as that of the FOIA. § 3502(1); Def. Opp'n 11. Thus, the E-Government Act's PIA requirement applies with full force to the Commission, as it would to any other similar Commission. For example, prior to collecting personal data by the Commission on Presidential Scholars ("a group of eminent private citizens appointed by the President to select and honor the Presidential Scholars"), a Privacy Impact Assessment was conducted and Privacy Act notices were issued. U.S. Dep't of Education, U.S. Presidential Scholars Privacy Policy and Impact Assessment (2017).[4]

Privacy Impact Assessments are a critical step that all agencies must take prior to initiating collection of personal information. In many cases, these assessments lead to changes in

[4] https://www2.ed.gov/programs/psp/applications/privacy.pdf.

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or abandonment of the agency programs under review, which are necessary to avoid inherent privacy risks. For example, the Department of Homeland Security cancelled a controversial national license plate tracking program following the initiation of a Privacy Impact Assessment. *See* Dep't of Homeland Sec., DHS-ICE-PIA-039 Acquisition and Use of License Plate Reader Data from a Commercial Service (2015);[5] Ellen Nakashima & Josh Hicks, *Department of Homeland Security Cancels National License-Plate Tracking Plan*, Washington Post (Feb. 19, 2014).[6] Similarly, the TSA was forced by Congress to shutter a controversial passenger screening program after an initial privacy assessment raised significant issues. Ryan Singel, *Congress Puts Brakes on CAPPS II*, Wired (Sept. 26, 2003) ("Congress moved Wednesday to delay the planned takeoff of a controversial new airline passenger-profiling system until an independent study [by the GAO] of its privacy implications and effectiveness at stopping terrorism can be completed.").[7]

The Commission's failure to undertake the Privacy Impact Assessment, required of all federal agencies, places at risk the privacy interests of registered voters across the country.

B. The Commission ignores the factors in this case that implicate the constitutional right to information privacy.

The Commission asserts that EPIC's claim that a constitutional right to informational privacy fails because "neither the Supreme Court nor the D.C. Circuit has held that a federal right to informational privacy exists." But that is not what the Court has said.[8] In *NASA v. Nelson*, Justice Alito, writing for the Court, said:

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[5] https://www.dhs.gov/publication/dhs-ice-pia-039-acquisition-and-use-license-plate-reader-data-commercial-service.

[6] https://www.washingtonpost.com/world/national-security/dhs-cancels-national-license-plate-tracking-plan/2014/02/19/a4c3ef2e-99b4-11e3-b931-0204122c514b_story.html.

[7] https://www.wired.com/2003/09/congress-puts-brakes-on-capps-ii/.

[8] Even the Commission's analysis of D.C. Circuit law is misleading. In fact, in *Am Fed. Of Gov't Emps., AFL-CIO v. Dep't of House & Urban Dev.* 118 F.3d 786, 791 (D.C Cir. 1997), the Court observed:

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> As was our approach in *Whalen*, we will assume for present purposes that the Government's challenged inquiries implicate a privacy interest of constitutional significance. 429 U.S., at 599, 605. We hold, however, that, whatever the scope of this interest, it does not prevent the Government from asking reasonable questions of the sort included on SF-85 and Form 42 in an employment background investigation that is subject to the Privacy Act's safeguards against public disclosure.

NASA v. Nelson, 562 U.S. 134, 147–48 (2011).

The actual holding in *Nelson* is significant in this matter for several reasons. First, the Court in *NASA v. Nelson* observed that in *Whalen v. Roe,* "the Court pointed out that the New York statute contained 'security provisions' that protected against "[p]ublic disclosure" of patients' information." 562 U.S. at 145. "The [Whalen] Court thus concluded that the statute did not violate 'any right or liberty protected by the Fourteenth Amendment.'" *Id.* (citing *Whalen v.*

> [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 court 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 this matter, the Commission has presented no such "sufficiently weighty interests" to justify the intrusion in the privacy of hundreds of millions of registered voters.

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Roe, 429 U.S. at 606). Second, the Court in *Nelson* relied on the Privacy Act's safeguards to prohibit public disclosure. Third, the Supreme Court in both *Whalen* and in *Nelson* deemed the request for information to be "reasonable."

Here the sensitive voter data sought from the states, including felony convictions and partial SSNs, is on par with the personal information at issue in *Whalen* and *Nelson,* though whether it is "reasonable" is broadly contested by state election officials across the country. *See, e.g,* Editorial, *Texas and Other States Are Right to Refuse Trump Panel's Request for Private Voter Information*, Dallas Morning News (July 7, 2017) ("Conservatives and liberals alike should be appalled that a commission brought into existence by a presidential executive order wants such sensitive personal data on the thinnest of pretexts."). It bears emphasizing that this opposition to the Commission's is from a bipartisan group of public officials most expert in the data sought and the laws that apply.

Moreover, contrary to the security methods mandated by the state statute in *Whalen*, the Commission has (1) proposed an unsecure server to receive sensitive data and (2) has disclaimed any responsibility to undertake a Privacy Impact Assessment. Most critically, the Commission has given no indication that its data collection practices are subject to the strictures of the Privacy Act, which was the key reason in *Nelson* that the Court did not reach the informational privacy claim. As Justice Alito explained in the holding for the Court:

> In light of the protection provided by the Privacy Act's nondisclosure requirement, and because the challenged portions of the forms consist of reasonable inquiries in an employment background check, we conclude that the Government's inquiries do not violate a constitutional right to informational privacy.

NASA, 562 U.S. at 764–65.

The Commission has presented this Court with informational privacy risks comparable to those that were before the Supreme Court in *Whalen v. Roe* and *NASA v. Nelson*, but with none

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of the privacy safeguards or practices that provided the Court with sufficient assurances and little evidence that the request is "reasonable." These are the circumstances where the claim of informational privacy are most compelling. The Supreme Court explained in Whalen that the "'interest in avoiding disclosure of personal matters" is an aspect of the right of privacy,' and intimated "a sufficiently grievous threat" may establish a "constitutional violation." *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977). Without a "successful effort to prevent abuse and limit access to the personal information at issue," which the disclosure amounts to to "a deprivation of constitutionally protected privacy interests" requiring the state to prove the measures are "necessary to promote a compelling state interest." *Id.* at 607 (Brennan, W., concurring).

If there were any information worthy of a constitutional shield from disclosure, it is personal information shared for the limited purpose of exercising of the right to vote. The right to vote is referenced by the U.S. Constitution five times, more than any other right. U.S. Const. amends. XIV § 5, XV § 1, XIX, XXIV § 1, XXVI § 1. The right to vote, secured only through robust voter privacy measures, is foundational to American democracy. That the Commission attempts to collect personal *voter* data en masse raises the constitutional stakes. And, without a "successful effort prevent abuse and limit access to" that data—such as the Commission's direction to use an unsecured website for the data transfer—the state must demonstrate to the Court the "necess[ity]" of the collection "to promote a compelling state interest." *Whalen*, 429 U.S. at 607. A proposal to establish a national database of sensitive voter data, gathered contrary to state privacy law, and with no assurance of privacy protection makes clear the right of informational privacy. There is little in the Supreme Court's decisions in *NASA v. Nelson* and *Whalen v. Roe*, or even the D.C. Circuit's *AFGE* opinion, to suggest otherwise.

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And regardless of whether the Commission considers itself outside of the FACA or the APA, it is not beyond the reach of the federal Constitution.

II. The Commissions unlawful and insecure collection of personal voter data would cause an irreparable injury

In response to EPIC's motion, the Commission has submitted irrelevant and self-contradictory statements regarding the irreparable harm posed by the unlawful collection of voter data, and the Commission has failed to address the obvious data security risks created by their actions. EPIC has presented evidence to show that disclosure of personal voter data would create a "great, actual, and imminent" injury, *Dimondstein*, 964 F. Supp. 2d at 49, including sworn statements by privacy and security experts. *See, e.g.*, Pl. Mot. TRO Ex. 6; Second Decl. of Harry Lewis, Ex. 11; EPIC Member Declarations, Exs. 1–9. In contrast, the Commission has submitted a declaration from a named defendant in this case with no stated background in computer science or privacy law, which includes unsupported assertions about the "security" of "file transfer" methods. *See* Decl. of Kris W. Kobach.

Absent the issuance of a TRO in this case, the Commission's actions will cause irreparable harm to EPIC and its members for three independent and distinct reasons, none of which are "speculative." First, the Commission's reliance on insecure data transfer methods poses an obvious threat to the integrity and security of the voter data. Second, the Commission itself has conceded that the personal voter data it is collecting should not be made publicly available. And third, any post-collection remedies available to voters are not adequate to address the misuse and mishandling of their personal data by the Commission.

Vice Chair Kobach concedes in his declaration that he sent "identical letters" to "secretaries of state or chief election officers in each of the fifty states and the District of Columbia," which demanded that those state officials submit personal voter data and stated that

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the officials could "submit [their] responses electronically to ElectionIntegrityStaff@ovp.eop.gov *or by* utilizing the Safe Access File Exchange" system. Kobach Decl., Ex. 3, at 2 (emphasis added). In his declaration, Kobach contradicts his own letter by claiming that he "intended" for the states to use the File Exchange website (rather than an email address) to send personal voter data to the Commission. Kobach Decl. ¶ 5. While Kobach did not offer any explanation for this discrepancy, his statement makes clear he is aware that email is not a secure method to be used for transferring personal voter data. Kobach Decl. ¶ 5. But even if state officials follow the "intent" rather than the text of Kobach's letter, voters personal data will not be secure.

As Harry Lewis, a distinguished professor of computer science at Harvard University, explains, the website referred to in the Commission's letter ("safe.amrdec.army.mil") is "not a secure website for the transfer of personal data." Second Decl. of Harry Lewis ¶ 9. In fact, when Professor Lewis attempted to access the website using common internet browsers, he was directed to clear warnings that the site was not secure. *Id.* ¶ 7–8. In Google Chrome, the warning read "Your connection is not private—Attackers might be trying to steal your information from safe.amrdec.army.mil (for example, passwords, messages, or credit cards)." *Id.* ¶ 7. In Safari, the website returned an error message that stated "Safari can't verify the identity of the website 'safe.amrdec.army.mil.' The certificate for this website is invalid. You might be connecting to a website that is pretending to be 'safe.amrdec.army.mil,' which could put your confidential information at risk." *Id.* ¶ 8.

Even the Commission's own description of the File Exchange website acknowledges that it was not designed to maximize security. Vice Chair Kobach states that the system is used "routinely by the military for large, *unclassified* data sets." Kobach Decl. ¶ 5 (emphasis added).

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The Commission has not provided any evidence that the File Exchange system is designed, or even permitted, to be used to transfer sensitive personal information. The Commission also has not established that it has the authority to use the File Exchange system for this purpose, or that it has the authority to use "the White House computer system" to store the personal data of hundreds of millions of voters. Kobach Decl. ¶ 5.

Not only do the Commission's proposed insecure data transfer methods create serious *security* risks for the sensitive personal voter data that the Commission requested, these methods are incapable of ensuring the *integrity* and accuracy of the data that the Commission receives. The Commission has not provided any evidence that the email address or the File Exchange website are capable of verifying the source and authenticity of the documents and data submitted. Criminals and other unauthorized parties are known to send fake emails "that are made to appear as if they are coming from" government accounts, including accounts within the Pentagon's "Defense Security Service." Jenna McLaughlin, *Pentagon Email Addresses Being Used in Cyber Spoofing Campaign*, Foreign Policy (May 12, 2017).[9] Nothing would stop a malicious actor—perhaps even a foreign government—from submitting fake "voter roll" data to the Commission to degrade the accuracy of the database. These are precisely the types of issues that would have been identified during a Privacy Impact Assessment, but the Commission failed to conduct one prior to initiating this proposed collection.

Even the Commission concedes that the personal voter data it seeks is sensitive and should not be released to the public. Vice Chair Kobach states in his declaration that, contrary to the text of the letter, the personal voter data submitted to the Commission "will not be released to the public." Kobach Decl. ¶ 5. But even this statement is contradicted by the sentence that

[9] http://foreignpolicy.com/2017/05/12/pentagon-email-addresses-being-used-in-cyber-spoofing-campaign/.

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proceeds it: "With respect to voter roll data, the Commission intends to de-identify any such data prior to any public release of documents." Kobach Decl. ¶ 5. It is not clear whether Vice Chair Kobach believes that voter roll data is a "document" subject to his blanket promise of public disclosure. But regardless of Kobach's semantic confusion, it is clear that the Commission will release voter data to the public. The fact that the Commission "intends" to "de-identify" the data is woefully insufficient, especially where there is no evidence that the Commission is capable of deidentifying personal data of hundreds of millions of American voters.[10] The fact that Commission "intends to maintain the data on the White House computer system"[11] does not provide any meaningful assurance of security.[12]

The Commission goes to great lengths to emphasize that it is only seeking "publicly available" information. But in fact the vast majority of personal data sought by the Commission is protected by state voter privacy laws. According to a preliminary survey by EPIC, states could

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[10] De-identification is a complex subject of research for computer science experts, and not something that can be implemented by the Commission on a whim. *See generally* Nat'l Inst. of Standards and Tech., NISTIR 8053, *De-Identification of Personal Information* (2015), http://nvlpubs.nist.gov/nistpubs/ir/2015/NIST.IR.8053.pdf.

[11] The White House's track record for information security is alarming in its own right. Evan Perez & Shimon Prokupecz, *How the U.S. Thinks Russians Hacked the White House*, CNN (Apr. 8, 2015), http://www.cnn.com/2015/04/07/politics/how-russians-hacked-the-wh/index.htm; Ellen Nakashima, *Hackers Breach Some White House Computers*, Wash. Post (Oct. 28, 2014), https://www.washingtonpost.com/world/national-security/hackers-breach-some-white-house-computers/2014/10/28/2ddf2fa0-5ef7-11e4-91f7-5d89b5e8c251_story.html; Sean Gallagher, *"Hacked" E-Mail Account of White House Worker Exposed in 2013 Password Breach*, Ars Technica (Sept. 23, 2016), https://arstechnica.com/security/2016/09/hacked-e-mail-account-of-white-house-worker-exposed-in-2013-password-breach/; Lily Hay Newman, *That Encrypted Chat App the White House Liked? Full of Holes*, Wired (Mar. 9, 2017), https://www.wired.com/2017/03/confide-security-holes/.

[12] Privacy risks to voters would arise no matter what database the government stored the information in. *See, e.g.*, Tom Vanden Brook & Michael Winter, *Hackers penetrated Pentagon email*, USA Today (Aug. 6, 2015), https://www.usatoday.com/story/news/nation/2015/08/06/russia-reportedly-hacks-pentagon-email-system/31228625/; Office of Pers. Mgmt, *OPM to Notify Employees of Cybersecurity Incident* (June 4, 2015), https://www.opm.gov/news/releases/2015/06/opm-to-notify-employees-of-cybersecurity-incident/; Elise Viebeck, *Russians hacked DOD's unclassified networks*, The Hill (Apr. 23, 2015), http://thehill.com/policy/cybersecurity/239893-russians-hacked-dods-unclassified-networks; Nicole Perlroth, *State Department Targeted by Hackers in 4th Agency Computer Breach*, N.Y. Times (Nov. 16 2014); *Veterans Affairs Data Theft*, EPIC.org (2006), https://epic.org/privacy/vatheft/.

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provide the Commission with little more than name and address of registered voters without running afoul of state law.[13] A study by the Brennan Center also finds numerous restrictions on the release of state voter rolls. Brennan Center for Justice, Examples of Legal Risks to Providing Voter Information to Fraud Commission (Jul. 2017).[14]

The Commission contends that it "has only requested data that is already public available," Def. Opp'n 8, and cites to a 2016 report of the National Conference of State Legislatures ("NCSL"). But as the NCSL actually explained, "Generally, all states provide the name and address or the registered voter. From there is gets complicated. At least 25 states limit access to social security numbers, date of birth or other identifying factors such as a drivers license number." *See* National Conference of State Legislatures, States and Election Reform (Feb. 2016).[15] The 2016 NCSL report notes also that "Texas specifically restricts the residential address of any judge in the state" and several states have a general prohibition on "information of a personal nature." *Id.*[16]

The 2016 NCSL report, cited by the Commission, goes on to explain the limitation on access to voter data, use of voter data, and costs for obtaining voter data. The NCSL explains "Beyond candidates and political parties, who can access voter lists varies state by state. Eleven states do not allow members of the public to access voter data." *Id.* at 2. Further, several states

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[13] *See e.g.* Alaska Stat. § 15.07.195 ("The following information set out in state voter registration records is confidential and is not open to public inspection: (1) the voter's age or date of birth; (2) the voter's social security number, or any part of that number; (3) the voter's driver's license number; (4) the voter's voter identification number; (5) the voter's place of birth; (6) the voter's signature."); *see also e.g.* Ind. Code § 3-7-26.4-8 (2017) ("The election division shall not provide information under this section concerning any of the following information concerning a voter: (1) Date of birth. (2) Gender. (3) Telephone number or electronic mail address. (4) Voting history. (5) A voter identification number or another unique field established to identify a voter. (6) The date of registration of the voter.").

[14] https://www.brennancenter.org/sites/default/files/analysis/Legal_Implications_of_Kobach_Request.pdf.

[15] http://www.ncsl.org/Documents/Elections/The_Canvass_ February_2016_66.pdf.

[16] *see e.g.* Kan. Stat. Ann. § 45.221(30) (exempting from the Kansas Open Records Act any "Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.").

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restrict the use of voter data. Several states limit "the use to just political purposes or election purposes." *Id.* States also typically charge requesters costs for the production of data. According to the NCSL, "the average cost for a voter list is approximately $1,825."[17]

Even names and address are not always available. The NCSL report notes that "thirty-nine states maintain address confidentiality programs designed to keep the addresses of victims of domestic violence or abuse, sexual assault or stalking out of public records for their protection." *Id.* at 2. The NCSL describes additional restrictions on the release on name and address information who are preregistered but are also minors. *Id.* at 2-3.

What then to make of a request from a Commission charged with "promoting election integrity" that asks state election officials to turn over Social Security Numbers, military status, felony convictions records, party affiliation and state voting history? The answer is provided by the response of the state officials who simply refused to release the personal data sought by the Commission.

III. The balance of the equities and the public interest favor granting EPIC's motion.

The Commission's argument that preserving the status quo by issuing a TRO would be against the public interest is illogical and contrary to well established precedent. The public interest weighs heavily against permitting an unlawful governmental action, because the public interest lies in having government agencies follow the law. *League of Women Voters*, 838 F.3d at 12. The Commission has no legitimate interest in violating the law or individuals' constitutional rights, no matter how important their governmental responsibilities. *See, e.g. Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013). While the Commission alleges that collecting personal voter

[17] The Commission made no offer in its letter to the states to pay any of the costs associated with the production of the voter roll data. The Commission instructed the state officials to provide the data by email or to an insecure website.

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data from the states is a "necessary first step" for its work, it provides no evidence to show that there is urgency to that request. The Executive Order makes clear that the Commission must operate in a way "consistent with applicable law." Exec. Order No. 13,799, § 7(f). Without the PIA as required under the E-Government Act, and in violation of the constitutional right to privacy, the Commission's collection of sensitive voter data is unlawful, and thus contrary to its stated mission.

The Commission is not tasked with enforcing election law nor empowered to investigate specific election-related crimes. The Commission is only authorized to "study" the issues outlined in the Order. Exec. Order No. 13,799, § 3. Therefore, its interest in collecting particular voter information is distinctly attenuated from its purpose, lowering its interests against the restraining order. The Commission has also failed to allege precisely how the collection and aggregation of sensitive voter data is necessary to "study" and "submit a report." Exec. Order No. 13,799, § 3.

Thus, while preventing the collection of sensitive private voter data will prevent a clear violation of federal law and an infringement of the essential constitutional right of informational privacy of voters, halting this unlawful act would not cause any harm to the Commission or the public.

IV. EPIC has standing to bring this suit.

Because EPIC has clearly demonstrated an injury in fact both to itself as an organization and to its members, EPIC has Article III standing. The Commission's arguments to the contrary are based on a misreading of the record and a misinterpretation of the law.

EPIC has organizational standing to bring this suit because the Commission's unlawful collection of personal voter data directly impairs EPIC's mission and activities: "protect[ing]

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privacy, free expression, [and] democratic values . . . ." *See About EPIC*, EPIC. org (2015).[18] EPIC's mission includes, in particular, the promotion of privacy safeguards for voter data. *See, e.g.*, *Voting Privacy*, EPIC.org (2017);[19] EPIC, Comment Letter on U.S. Election Assistance Commission Proposed Information Collection Activity (Feb. 25, 2005).[20] 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).

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—EPIC has been forced to expand its long-running efforts to protect 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);[21] (2) to seek records from the Commission concerning its collection of voter data, Letter from Eleni Kyriakides, EPIC Law Fellow, to the PACEI (July 4, 2017);[22] (3) to develop a webpage with extensive information on the Commission's activities. *Voter Privacy and the PACEI*, EPIC.org (2017);[23] and (4) respond

[18] https://epic.org/about.
[19] https://epic.org/privacy/voting/.
[20] https://epic.org/privacy/voting/register/eac_comments_022505.html.
[21] https://epic.org/privacy/voting/pacei/Voter-Privacy-letter-to-NASS-07032017.pdf.
[22] https://epic.org/privacy/voting/EPIC-17-07-04-PACEI-20170704-Request.pdf.
[23] https://epic.org/privacy/voting/pacei/.

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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 Commission's direct impact on EPIC's mission and work concerning voter privacy is precisely 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 thus adequately demonstrated organizational standing.

Contrary to the Commission's assertions, EPIC has also demonstrated an injury in fact to its members which is traceable to the Commission's conduct. EPIC therefore has associational standing.

First, EPIC can assert 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

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convictions, other voter registrations, and military status or overseas information—would cause me immediate and irreparable harm." *See* Voter Declarations, Exs. 1–9.

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* § 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

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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. 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

Plaintiff has satisfied the necessary elements to obtain the relief sought and has standing to bring this claim. Plaintiff specifically asks this Court to issue a Temporary Restraining Order to maintain the status quo so that this Court may have the opportunity to determine whether the Commission's proposed collection of personal voter data is lawful.

Respectfully Submitted,

/s/ Marc Rotenberg
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EPIC President and Executive Director

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EPIC Senior Counsel

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Dated: July 6, 2017

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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.

No: 1:17-cv-01320-CKK

ADDENDUM

PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO THE COURT'S JULY 5, 2017, ORDER

The Commission's response to this Court's Order of July 5, 2017, Dkt. 9, further underscores that EPIC is likely to succeed on the merits of its claims and that EPIC is entitled to a Temporary Restraining Order. *See* Second Declaration of Kris W. Kobach, Dkt. 11-1.

First, as the Defendants concede, Commission member Christy McCormick is also a member of the Election Assistance Commission ("EAC"). Kobach Second Decl. 2. The EAC is an agency under the APA. *Id.* at 2259. *League of Women Voters of United States v. Newby*, 838 F.3d 1, 5 (D.C. Cir. 2016) (citing *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2259 (2013)) (noting that a plaintiff could "challenge the [Election Assistance] Commission's denial [of the plaintiff's request] under the Administrative Procedure Act

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('APA').") By virtue of serving as a Commissioner of an APA-covered agency, Ms. McCormick is subject to the strictures of the APA in all official exercises of her authority—*including* while sitting on a presidential advisory commission. *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, 219 F. Supp. 2d 20, 39–40 (D.D.C. 2002) (citing *Ryan v. Dep't of Justice*, 617 F.2d 781 (D.C. Cir. 1980)). ("Thus, for the reasons articulated by the D.C. Circuit in *Ryan*, this Court holds that an action that otherwise would qualify for the APA's definition of 'agency action' does not fall outside the coverage of the APA simply because the agency head acts in an advisory capacity to the President.")

It is implausible to claim, as Mr. Kobach does, that the choice of Ms. McCormick to serve on the Commission was unrelated to her membership on the EAC—a "bipartisan commission charged with developing guidance to meet HAVA requirements, adopting voluntary voting system guidelines, and serving as a national clearinghouse of information on election administration." *About EAC*, U.S. Election Assistance Comm'n (2017).[1] Also, Mr. Kobach does not discount the possibility that additional federal agency officials will be named to the Commission. *See* Kobach Second Decl. 2.

Second, Mr. Kobach's claim that the Commission has "no plans" to "collect or store any voter registration or other elections-related data" using General Services Administration (GSA) facilities does not diminish the GSA's ordained role as the provider of "administrative services, funds, facilities, staff, equipment, and other support services as may be necessary to carry out its mission on a reimbursable basis." 82 Fed. Reg at 22,389; *see also* Def. Opp'n Ex. 2 (GSA "*shall* provide the Commission with such administrative services, funds, facilities, staff, equipment, and other support services as may be necessary to carry out its mission" (emphasis added)). Because the GSA is *required* to provide such facilities to the Commission, the GSA is accountable as an

[1] https://www.eac.gov/about-the-useac/.

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agency for the Commission's use and misuse of those facilities. GSA is thus properly named as a Defendant and may be enjoined under the APA.

Finally, Mr. Kobach's representations concerning "Safe Access File Exchange (SAFE)" are alternately misleading or meritless. "SAFE" is not, in fact, a secure system. Second Lewis Decl., Ex. 11. Further, the claim that "States will upload data to the SAFE website" is undermined by Mr. Kobach's letter to state election officials, inviting them to transmit personal voter data via email. Kobach Letter 2. Lastly, Mr. Kobach wrongly represents that the White House is to be "responsible for collecting and storing data for the Commission," when the Executive Order establishing the Commission clearly states that it is the GSA's obligation to provide such services to the Commission. 82 Fed. Reg at 22,389.

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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)

AFFIRMATION OF MARC ROTENBERG IN SUPPORT OF THE PLAINTIFF'S REPLY BRIEF ON THE PLAINTIFF'S EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER

MARC ROTENBERG, an attorney admitted to practice before this Court, affirms the following to be true under the penalties of perjury:

1. I am the President and Executive Director of the Electronic Privacy Information Center ("EPIC") and counsel for EPIC in the above-captioned member. I submit this affirmation in support of the plaintiff's reply brief on plaintiff's motion for a temporary restraining order in the above-captioned matter.

2. Annexed hereto as Exhibit 1 is a true and correct copy of a Declaration executed by EPIC Member Kimberly Bryant on July 5, 2017.

3. Annexed hereto as Exhibit 2 is a true and correct copy of a Declaration executed by EPIC Member Julie E. Cohen on July 5, 2017.

4. Annexed hereto as Exhibit 3 is a true and correct copy of a Declaration executed by EPIC Member William T. Coleman on July 5, 2017.

5. Annexed hereto as Exhibit 4 is a true and correct copy of a Declaration executed by EPIC Member Harry R. Lewis on July 5, 2017.

6. Annexed hereto as Exhibit 5 is a true and correct copy of a Declaration executed by EPIC Member Pablo Garcia Molina on July 5, 2017.

7. Annexed hereto as Exhibit 6 is a true and correct copy of a Declaration executed by EPIC Member Peter G. Neumann on July 7, 2017.

8. Annexed hereto as Exhibit 4 is a true and correct copy of a Declaration executed by EPIC Member Bruce Schneier on July 5, 2017.

9. Annexed hereto as Exhibit 8 is a true and correct copy of a Declaration executed by EPIC Member James Waldo on July 5, 2017.

10. Annexed hereto as Exhibit 9 is a true and correct copy of a Declaration executed by EPIC Member Shoshana Zuboff on July 5, 2017.

11. Annexed hereto as Exhibit 10 is a true and correct copy of a February 2016 report by the National Conference of State Legislatures titled *It's a Presidential Election Year: Do You Know Where Your Voter Records Are?*.

12. Annexed hereto as Exhibit 11 is a true and correct copy of an Expert Declaration executed by Harry R. Lewis, Gordon McKay Professor of Computer Science at Harvard University, on July 5, 2017.

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Respectfully Submitted,

/s/ Marc Rotenberg
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EPIC President and Executive Director

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Dated: July 6, 2017

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LIST OF EXHIBITS

Exhibit 1	Declaration of Kimberly Bryant, EPIC Member (July 5, 2017)
Exhibit 2	Declaration of Julie E. Cohen, EPIC Member (July 5, 2017)
Exhibit 3	Declaration of William T. Coleman III, EPIC Member (July 5, 2017)
Exhibit 4	Declaration of Harry R. Lewis, EPIC Member (July 5, 2017)
Exhibit 5	Declaration of Pablo Garcia Molina, EPIC Member (July 5, 2017)
Exhibit 6	Declaration of Peter G. Neumann, EPIC Member (July 5, 2017)
Exhibit 7	Declaration of Bruce Schneier, EPIC Member (July 5, 2017)
Exhibit 8	Declaration of James Waldo, EPIC Member (July 5, 2017)
Exhibit 9	Declaration of Shoshana Zuboff, EPIC Member (July 5, 2017)
Exhibit 10	National Conference of State Legislatures, *It's a Presidential Election Year: Do You Know Where Your Voter Records Are?* (Feb. 2016)
Exhibit 11	Second (Expert) Declaration of Harry R. Lewis (July 5, 2017)

Exhibit 1

DECLARATION OF NAME

I, Kimberly Bryant, declare as follows:

1. My name is Kimberly Bryant. I am over 18 years old. The information in this declaration is based on my personal knowledge.
2. I am a resident San Francisco, CA.
3. I am a member of the Electronic Privacy Information Center (EPIC) advisory board. I joined EPIC because I am concerned about protecting privacy, freedom of expression, and democratic values in the information age.
4. EPIC is a non-profit, public interest research center in Washington, DC. EPIC was established to focus public attention on emerging privacy and civil liberties issues and to protect privacy, freedom of expression, and democratic values in the information age. EPIC routinely files comments with federal agencies advocating for improved privacy standards and rules. EPIC works closely with a distinguished advisory board, with expertise in law, technology and public policy. EPIC maintains one of the most popular privacy web sites in the world - epic.org.
5. I am currently registered to vote in California.

6. I do not consent to the collection of my personal data by the Commission recently created by the President of the United States.
7. 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.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Executed July 5, 2017

Kimberly Bryant
NAME

Exhibit 2

DECLARATION OF Julie E. Cohen

I, Julie E. Cohen, declare as follows:

1. My name is Julie E. Cohen. I am over 18 years old. The information in this declaration is based on my personal knowledge.
2. I am a resident of Bethesda, MARYLAND.
3. I am a member of the Electronic Privacy Information Center (EPIC) advisory board. I joined EPIC because I am concerned about protecting privacy, freedom of expression, and democratic values in the information age.
4. EPIC is a non-profit, public interest research center in Washington, DC. EPIC was established to focus public attention on emerging privacy and civil liberties issues and to protect privacy, freedom of expression, and democratic values in the information age. EPIC routinely files comments with federal agencies advocating for improved privacy standards and rules. EPIC works closely with a distinguished advisory board, with expertise in law, technology and public policy. EPIC maintains one of the most popular privacy web sites in the world - epic.org.
5. I am currently registered to vote in MARYLAND.

6. I do not consent to the collection of my personal data by the Commission recently created by the President of the United States.
7. 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.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Executed July 5, 2017

Julie E. Cohen

Exhibit 3

DECLARATION OF William T. Coleman III

I, William T. Coleman III, declare as follows:

1. My name is William T. Coleman III. I am over 18 years old. The information in this declaration is based on my personal knowledge.
2. I am a resident Los Altos, California.
3. I am a member of the Electronic Privacy Information Center (EPIC) advisory board. I joined EPIC because I am concerned about protecting privacy, freedom of expression, and democratic values in the information age.
4. EPIC is a non-profit, public interest research center in Washington, DC. EPIC was established to focus public attention on emerging privacy and civil liberties issues and to protect privacy, freedom of expression, and democratic values in the information age. EPIC routinely files comments with federal agencies advocating for improved privacy standards and rules. EPIC works closely with a distinguished advisory board, with expertise in law, technology and public policy. EPIC maintains one of the most popular privacy web sites in the world - epic.org.
5. I am currently registered to vote in Los Altos, California.

6. I do not consent to the collection of my personal data by the Commission recently created by the President of the United States.
7. 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.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Executed July 5, 2017

William T. Coleman III

Exhibit 4

DECLARATION OF Harry R. Lewis

I, Harry R. Lewis, declare as follows:

1. My name is Harry R. Lewis. I am over 18 years old. The information in this declaration is based on my personal knowledge.
2. I am a resident Brookline, Massachusetts.
3. I am a member of the Electronic Privacy Information Center (EPIC) advisory board. I joined EPIC because I am concerned about protecting privacy, freedom of expression, and democratic values in the information age.
4. EPIC is a non-profit, public interest research center in Washington, DC. EPIC was established to focus public attention on emerging privacy and civil liberties issues and to protect privacy, freedom of expression, and democratic values in the information age. EPIC routinely files comments with federal agencies advocating for improved privacy standards and rules. EPIC works closely with a distinguished advisory board, with expertise in law, technology and public policy. EPIC maintains one of the most popular privacy web sites in the world - epic.org.
5. I am currently registered to vote in Massachusetts.

6. I do not consent to the collection of my personal data by the Commission recently created by the President of the United States.
7. 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.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Executed July 5, 2017

Harry R. Lewis

Exhibit 5

DECLARATION OF PABLO GARCIA MOLINA

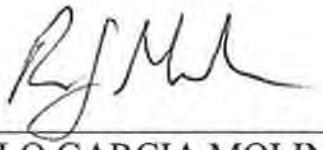
I, **PABLO GARCIA MOLINA**, declare as follows:

1. My name is **PABLO GARCIA MOLINA**. I am over 18 years old. The information in this declaration is based on my personal knowledge.
2. I am a resident of WASHINGTON, DC.
3. I am a member of the Electronic Privacy Information Center (EPIC) advisory board. I joined EPIC because I am concerned about protecting privacy, freedom of expression, and democratic values in the information age.
4. EPIC is a non-profit, public interest research center in Washington, DC. EPIC was established to focus public attention on emerging privacy and civil liberties issues and to protect privacy, freedom of expression, and democratic values in the information age. EPIC routinely files comments with federal agencies advocating for improved privacy standards and rules. EPIC works closely with a distinguished advisory board, with expertise in law, technology and public policy. EPIC maintains one of the most popular privacy web sites in the world - epic.org.
5. I am currently registered to vote in DC.

6. I do not consent to the collection of my personal data by the Commission recently created by the President of the United States.
7. 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.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Executed July 5, 2017



PABLO GARCIA MOLINA

Exhibit 6

DECLARATION OF NAME (Peter G Neumann)

I, Peter G. Neumann declare as follows:

1. My name is Peter G. Neumann. I am over 18 years old. The information in this declaration is based on my personal knowledge.
2. I am a resident Palo Alto, California.
3. I am a member of the Electronic Privacy Information Center (EPIC) advisory board. I joined EPIC because I am concerned about protecting privacy, freedom of expression, and democratic values in the information age.
4. EPIC is a non-profit, public interest research center in Washington, DC. EPIC was established to focus public attention on emerging privacy and civil liberties issues and to protect privacy, freedom of expression, and democratic values in the information age. EPIC routinely files comments with federal agencies advocating for improved privacy standards and rules. EPIC works closely with a distinguished advisory board, with expertise in law, technology and public policy. EPIC maintains one of the most popular privacy web sites in the world - epic.org.
5. I am currently registered to vote in California.

6. I do not consent to the collection of my personal data by the Commission recently created by the President of the United States.
7. 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.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Executed July 5, 2017

Peter G Neumann

Peter G Neumann 7/5/2017

Exhibit 7

DECLARATION OF BRUCE SCHNEIER

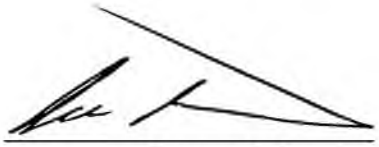
I, Bruce Schneier, declare as follows:

1. My name is Bruce Schneier. I am over 18 years old. The information in this declaration is based on my personal knowledge.
2. I am a resident of Minneapolis, Minnesota.
3. I am a member of the Electronic Privacy Information Center (EPIC) advisory board. I joined EPIC because I am concerned about protecting privacy, freedom of expression, and democratic values in the information age.
4. EPIC is a non-profit, public interest research center in Washington, DC. EPIC was established to focus public attention on emerging privacy and civil liberties issues and to protect privacy, freedom of expression, and democratic values in the information age. EPIC routinely files comments with federal agencies advocating for improved privacy standards and rules. EPIC works closely with a distinguished advisory board, with expertise in law, technology and public policy. EPIC maintains one of the most popular privacy web sites in the world - epic.org.
5. I am currently registered to vote in Minnesota.

6. I do not consent to the collection of my personal data by the Commission recently created by the President of the United States.
7. 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.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Executed July 5, 2017



Bruce Schneier

Exhibit 8

DECLARATION OF James Waldo

I, James Waldo, declare as follows:

1. My name is James Waldo. I am over 18 years old. The information in this declaration is based on my personal knowledge.
2. I am a resident Dracut, Massachusetts.
3. I am a member of the Electronic Privacy Information Center (EPIC) advisory board. I joined EPIC because I am concerned about protecting privacy, freedom of expression, and democratic values in the information age.
4. EPIC is a non-profit, public interest research center in Washington, DC. EPIC was established to focus public attention on emerging privacy and civil liberties issues and to protect privacy, freedom of expression, and democratic values in the information age. EPIC routinely files comments with federal agencies advocating for improved privacy standards and rules. EPIC works closely with a distinguished advisory board, with expertise in law, technology and public policy. EPIC maintains one of the most popular privacy web sites in the world - epic.org.
5. I am currently registered to vote in Massachusetts.

6. I do not consent to the collection of my personal data by the Commission recently created by the President of the United States.
7. 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.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Executed July 5, 2017

James Waldo

Exhibit 9

DECLARATION OF Shoshana Zuboff

I, Shoshana Zuboff, declare as follows:

1. My name is Shoshana Zuboff. I am over 18 years old. The information in this declaration is based on my personal knowledge.
2. I am a resident Nobleboro, Maine.
3. I am a member of the Electronic Privacy Information Center (EPIC) advisory board. I joined EPIC because I am concerned about protecting privacy, freedom of expression, and democratic values in the information age.
4. EPIC is a non-profit, public interest research center in Washington, DC. EPIC was established to focus public attention on emerging privacy and civil liberties issues and to protect privacy, freedom of expression, and democratic values in the information age. EPIC routinely files comments with federal agencies advocating for improved privacy standards and rules. EPIC works closely with a distinguished advisory board, with expertise in law, technology and public policy. EPIC maintains one of the most popular privacy web sites in the world - epic.org.
5. I am currently registered to vote in Maine.

6. I do not consent to the collection of my personal data by the Commission recently created by the President of the United States.
7. 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.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Executed July 5, 2017

Shoshana Zuboff

Shoshana Zuboff

Exhibit 10

NCSL
THE CANVASS
STATES AND ELECTION REFORM®

Issue 66 | February 2016

canvass (n.)

Compilation of election returns and validation of the outcome that forms the basis of the official results by a political subdivision.

—U.S. Election Assistance Commission: Glossary of Key Election Terminology

It's a Presidential Election Year: Do You Know Where Your Voter Records Are?

One of the secrets of the election world is how readily available voter data can be—and it's been making headlines lately. In late 2015, information such as name, address, party, and voting history relating to approximately 191 million voters was published online. And recently, the presidential campaign of Texas Senator Ted Cruz came under fire for a mailer in Iowa that used voter data to assign grades to voters and compared them to neighbors to motivate turnout. Voter records have always been public information, but now it's being used in new ways. Here are some key facts you need to know about the privacy (or lack of privacy) of voter information.

What voter information is public record?

All 50 states and the District of Columbia provide access to voter information, according to the U.S. Elections Project run by Dr. Michael McDonald at the University of Florida; but as with everything related to elections there are 51 different variations on what information is provided, who can access it, and how much it costs to get it.

Generally, all states provide the name and address of the registered voter. From there it gets complicated. Some states have statutory limitations on what information is available. At least 25 states limit access to social security numbers, date of birth or other identifying factors such as a driver's license number. Ten states limit the contact information, such as a telephone number or email address. Nine states include miscellaneous information like place of birth, voter identification numbers, race, gender, secondary addresses, accommodations to vote and signatures on the list of exemptions for the voter file. Texas specifically restricts the residential address of any judge in the state.

While, there are 13 states that have no codified restrictions on the information available to the public, the secretary of state may have the ability to limit information. Six states have a general prohibition on "information of a personal nature" or information related to matters of individual safety that pertain to voter records as well as all other state records.

Every state except Rhode Island as well as the District of Columbia also provide information about voter history —not who a person voted for but just if they voted (Rhode Island does not provide access to that information). Absentee voting information—ballot requests or permanent absentee lists—are also available, sometimes for an extra fee and sometimes only through municipalities or local jurisdictions. At least five states do not offer absentee voting data as part of the available voter file.

(cont. on page 2)

Inside this Issue

TO SUBSCRIBE to *The Canvass*, please email a request to TheCanvass@ncsl.org

(Voter Records, cont. from page 1)

Who can access the information?

All states allow candidates for elected offices or political parties to access voter records, typically for political purposes. Which makes sense—if you want to run for office it helps to have a list of your constituents to contact.

Beyond candidates and political parties, who can access voter lists varies state by state. Eleven states do not allow members of the public to access voter data. Several other states restrict access to state residents (11), other registered voters (7), non-profit organizations (6), and those doing research (9).

What can it be used for?

Most often, voter information can be used for "non-commercial" purposes only—in other words, an entity or person can't access the information to sell a product or a service, but can use it for anything else.

Several states are stricter, limiting the use to just political purposes or election purposes, which may or may not include voter registration drives, getting-out-the-vote and research. Further, the available uses may vary between the different users groups mentioned above. And it can be hard for states to control what happens to the data once it's been turned over.

Cost for accessing data

Accessing voter data comes with a price. "There is a wide variation in the costs that states charge for accessing this information," says McDonald.

Washington, D.C. only charges $2 for the entire voter registration list; other bargain rates include Arkansas ($2.50) and New Jersey ($2.55).

In Massachusetts, New York , Ohio, Oklahoma, Vermont, Washington or Wyoming accessing the voter is free, provided you meet the criteria.

Accessing the date is much pricier in some states. Several states charge $5,000 and Wisconsin charges $12,500. Alabama and Arizona got creative with setting their fees by charging one cent per voter, resulting in a cost of upwards of $30,000.

Ultimately, the average cost for a voter list is approximately $1,825—which isn't prohibitively expensive.

What other exceptions are there?

As mentioned above, states can restrict certain information from being released in the voter file. But states can also withhold information if a voter's information is marked as confidential.

Thirty-nine states maintain address confidentiality programs designed to keep the addresses of victims of domestic violence or abuse, sexual assault or stalking out of public records for their protection. The programs allow victims to use an alternate address, usually a government post office box, in place of their actual home address. Of those 39 states, at least 29 of them have specific references to voter registration and voter records. That means those voter records won't be included in the comprehensive list purchased from the state.

In 2015, Iowa established an address confidentiality program that includes voter records and Florida updated their address confidentiality law to include victims of stalking. This year Kentucky and New York have legislation to connect address confidentiality to voter records.

Another sensitive demographic is 16- and 17 year-olds that may be able to preregister under state law. How do you protect the information of minors? Of course the answer is complicated. Utah considers the records of preregistered voters private under

(cont. on page 3)

Voter-Shaming—How does Social Pressure Influence Voter Turnout?

Get ready to add "voter-shaming" to your vocabulary. The term has been popping up in news stories everywhere over the past month—most notably in controversial presidential campaign mail pieces that compared the voting history of Iowa voters to their neighbors. But just what is it exactly?

The practice of comparing voting history to that of peers stems from a 2008 study conducted by Alan Gerber and Donald Green from Yale University and Christopher Larimer from the University of Northern Iowa entitled Social Pressure and Voter Turnout: Evidence from a Large Scale Field Experiment.

The study examined the effect of various mailings on voter turnout. Specifically, the mailers had different messages that encouraged voters to do their civic duty, indicated that the voter's vote history was being studied, listed the vote history of each member of the household, or listed the voter's vote history compared to their neighbors. The results showed that each of these "social pressures" increased voter turnout but none more so than the neighbor mailing which increased turnout by eight percent.

Candidates, campaigns and other researchers took notice of the study which has resulted in "voter-shaming" mailers popping up in places like Alaska, North Carolina and most recently in the first two presidential nominating contests in the nation—Iowa and New Hampshire. They've shown to be powerful motivators so keep an eye out for social pressure mailers coming soon to your mailbox.

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(Voter Records, cont. from page 2)

state law and Minnesota designates preregistered voters as "pending" until they become eligible in which case they are changed to "active." Only active voters are included on the public voter list. The same is true in Louisiana, Missouri, New Jersey and Rhode Island.

In states where 17-year-olds are on the active voter rolls because they'll be able to vote in the next election, their information will be treated like all the other voters. That's the case in Nebraska where 17-year-olds can register, and in some cases vote, if they turn 18 by the first Tuesday after the first Monday in November. Maine doesn't allow the public to access the voter list, but since the Pine Tree State allows 17-year-olds who will be 18 by the general election to vote in primaries, that information is included on the lists accessible to candidates and political parties. Delaware, Iowa, Nevada and Oregon have similar systems in which those under 18 are included on the list if they turn 18 by the date of the general election or are eligible to vote in primaries. Florida includes the information of preregistered voters unless an exemption is claimed.

How have legislatures responded?

Sen. Paul Doyle (CT)

In 2015, 16 bills in 12 states were introduced that dealt with some aspect of distribution and the availability of voter information . In Connecticut, Senator Paul Doyle (D) responded to constituent concerns about their voter information being publicly available online by filing legislation to specifically prohibit that information from being published on the Internet. "My constituent told me that they were going to take themselves off the voter list and de-register because of their information being available online—that's a problem," says Doyle. "I understand First Amendment concerns, but I wanted to start the discussion on the issue."

Three bills were enacted in 2015. In addition to the Florida and Iowa bills mentioned above, Alabama decided to allow state legislators to receive only one free copy of the voter list for their district rather than two.

So far in 2016, there are 13 bills in 8 states—some carried over from last year—dealing with voter information and a few those are carryovers from 2015. One of the more notable battles is being waged in Florida where Senator Thad Altman (R) has introduced legislation to make voters' residential addresses, dates of birth, telephone numbers and email addresses confidential and only available to candidates, political parties and election officials, and not to the public. Senator Altman's bill also seeks to protect all the personal information of 16-and 17-year-olds who preregister to vote. The bill has the support of the Florida State Association of Supervisors of Elections.

Sen. Thad Altman (FL)

"Right now all this data is public information," says Altman. "You can put it on the Internet or resell it. You can see someone's address, phone number, and party affiliation. There have been cases where someone received an electioneering piece that said how many times they voted. I'm concerned it could keep people from voting or registering to vote or lead to discrimination. If you want that information to be private you should have that right."

Other states are tackling this issue as well. West Virginia is considering legislation to keep private the address of law enforcement officers and their families. Massachusetts is one of the states that offers voter information for free, but now has legislation to limit public access and to charge for lists. Legislation in Kentucky seeks to remove social security numbers from the voter list. Lastly, Illinois wants to make sure you know who paid for voter information on any mailings that use your voter history.

But there are some who are concerned states may go too far in limiting access to this information. "I'm a researcher who studies voting trends to improve elections—I need access to this information," says McDonald. "There has to be a balance between privacy concerns and access."

Given some of the recent headlines, it remains to be seen how states will react to the increased concern of voter privacy. It's the information age where answers are available at the click of a button and that includes voter information.

One big number

144 million

144 million. The approximate number of eligible American voters that did not vote in the 2014 elections according to data from the U.S. Elections Project and quoted by The Pew Charitable Trusts' David Becker in the Stanford Social Innovation Review. It's one of a 15-part series called "Increasing Voter Turnout: It's Tougher Than You Think."

Becker calls for a two part approach. First—conduct research; more specifically "comprehensive surveys of the eligible electorate that never or rarely votes to assess the attitudes and behaviors of these potential voters." Then "create field experiments that test the effectiveness of various messages and modes of contact on nonvoters, maintaining a randomized control group that would receive no encouragement to vote." The end result could be a "toolkit for those seeking to engage citizens in the democratic process to reach potential voters in a highly efficient, cost-effective way."

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Election Legislation By the Numbers: 2015 and 2016

Election years are notoriously stodgy when it comes to enacting election legislation. First, a recap of 2015:

- 2,355 election-related bills were introduced.
- 241 bills in 45 states were enacted.
- 17 bills in seven states were vetoed.

Highlights included online voter registration, automatic voter registration and items related to preparing for the presidential election. For more information on what exactly was enacted in each states visit NCSL's 2015 Elections Legislation Enacted by State Legislatures webpage.

Now onto 2016:

- 1,747 election-related bills have been introduced in 42 states, including some bills from 2015 that were carried-over into 2016.
- Ten bills have been enacted already including: one in Michigan that eliminates straight-ticket voting; one in New Hampshire that allows local selectman to appoint a replacement if they can't fulfill their duties on election; four in New Jersey, which allow preregistration for 17-year- olds, standardize polling place hours and deal with other administrative issues; two in South Dakota including authorizing the use of vote centers and electronic pollbooks statewide; and one in West Virginia concerning candidate withdrawal from the ballot.
- Automatic voter registration seems to be leading the pack this year with a big increase in legislation from 2015. So far in 2016, 88 bills in 27 states have been introduced which is a 25 percent increase from last year.

- Voter ID legislation continues to be common, with 74 bills introduced so far and Missouri poised to join the ranks of strict voter ID states.
- Absentee voting issues remains popular with 68 bills pending and several states looking at early voting or no-excuse absentee voting.
- Because online voter registration is now active or authorized in 32 states plus the District of Columbia, legislation on this has taken an expected dip. Only 16 bills are in the hopper, but with high profile states like Ohio and Wisconsin considering enacting systems, online voter registration will remain a hot topic.
- Other registration issues, like preregistration for youth, same day registration and list maintenance, are still hot topics with a combined 129 bills.
- 179 bills deal with poll workers, polling places and vote centers.
- 134 bills deal with some aspect of the primary process.
- Voting equipment and technology bills total 53.
- 68 bills address election crimes.

NCSL's Elections Legislation Database is your go-to resource for all things 2016 election legislation. Stay tuned for updates throughout the year.

How many states allow a candidate to withdraw from the ballot after already qualifying?

All but six states allow candidates to withdraw after making it onto the ballot. This is generally subject to some exceptions, most often deadlines after which a candidate may not withdraw. These deadlines are usually well in advance of the election, but in some states the deadline is much closer to the election. For example, in Alabama a candidate may withdraw even after ballots have been printed for the election. In Arizona, Georgia, Hawaii, Maine, Ohio, and Wyoming candidates may withdraw after ballots have been printed, but election officials must post notice of the withdrawal in prominent locations in polling places. Only California, Kansas, New Hampshire, and Wisconsin expressly prohibit candidates from withdrawing from the ballot. Utah and Tennessee do not specifically address candidate withdrawal in statute. In Kansas the rule isn't absolute: A candidate may withdraw from the ballot if they certify to the Secretary of State that they do not reside in Kansas. In New Hampshire, a candidate may not withdraw once they have received a nomination, but they may be disqualified for age, health, or residency reasons. In Wisconsin, the name of a candidate may be removed from the ballot only if the candidate dies before the election, although a candidate may refuse to take office after being elected. For the full list contact the elections team.

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From the Chair

Assembly Member Sebastian Ridley-Thomas serves as chairman of the Elections and Redistricting Committee in the California Assembly. He represents the 54th Assembly district which is entirely in Los Angeles County and consists of communities in the western part of the city of Los Angeles. Assembly Member Ridley-Thomas spoke to The Canvass on Feb. 24.

Assembly Member Sebastian Ridley-Thomas

- "We've done a great deal on language access, accessibility for those with special needs and engaging our high school students and young people through preregistration and other means. The new motor voter law will help to add potentially 5 million people to the voter rolls, but now they have to turn out to vote."
- "We are working with several groups on legislation to give special districts more flexibility in transitioning from at-large representation to district-based representation (AB 2389). Currently, these special districts can only make this change after receiving approval from the voters. Enabling them to do it by ordinance will save time and money, especially in court costs, and help to de-escalate the tension in the courts. The residents will be better represented through this method. Communities are better served when they can elevate members of their own choosing that reflect them and their priorities."
- "Myself and Senator Ben Allen (chair of the Senate Committee on Elections and Constitutional Amendments) are among the youngest legislators and we are focused on the future, but also not leaving our peers behind. I'm proud that California is looking toward the future and making elections better and more collaborative so voters can express their will and values at the ballot box. California is the innovation hub of the world and there's no reason that can't apply to elections."

Read the full interview with Assembly Member Ridley-Thomas.

The Election Administrator's Perspective

Sue Ganje serves as the auditor for Fall River County and Oglala Lakota County (formerly Shannon County) in southwest South Dakota. She is one of two auditors in South Dakota that cover multiple counties; Oglala Lakota County doesn't have a county seat, so the administrative offices are in Fall River County. Ganje spoke to The Canvass on Feb. 18.

Fall River County/Oglala Lakota County Auditor Sue Ganje

- "Things have definitely changed. I can remember hand-counting ballots into the early morning hours and using different colored ballots and straight party voting for political parties. When I look at where we were then to where we are now—we've come a long way in elections."
- "I'm very interested in vote centers. Everywhere you go is a distance in our counties. There can be 30, 40 or sometimes 50 miles between towns. If a voter is not at the right location for voting at the time the polls close, they may have to vote a provisional ballot that may or not be counted. Vote centers would help alleviate that problem. Right now, the county cannot afford the equipment needed for a vote center but I hope there will be funding in the future."
- "I'm proud that we've helped every voter we can to cast a vote. We have a great statewide voter registration system in South Dakota. It's very easy for us to use and we have all the relevant county records right there in order to update the voter records. I think other states should be looking at our system to use."
- "I think we also have a good voter identification system. The state created a personal identification affidavit that voters who do not have IDs can sign at the polls. It works well, and the voter can then vote a regular ballot, not a provisional one. The worst thing we want to do as election officials is turn someone away from the polls. Everyone gets to vote here."

Read the full interview with Ganje.

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Worth Noting

- The Maryland Legislature has overridden the veto of Governor Larry Hogan and will now restore voting rights to felons once they have completed their prison sentence. Previously felons waited until completing parole and probation to get voting rights restored.
- Voter ID is back in the news as the Missouri Senate considers two measures to require voter identification. One is a constitutional amendment that would be sent to voters for their approval and the other would limit the types of identification that can be used. Both measures previously passed the Missouri House.
- Speaking of voter ID, NPR has a look at the issue along with the recent changes made to the state instructions on the federal voter registration form by the U.S. Election Assistance Commission (EAC).
- Politico has an excellent piece on how the recent passing of Supreme Court Justice Antonin Scalia could affect cases and court rulings related to elections and redistricting.
- The plan by the Virginia Republican Party to require loyalty oaths for voters in the Republican Presidential Primary has been scrapped after earning the ire of presidential candidate Donald Trump and others. The Old Dominion State has an open primary that lets independents participate.
- As online voter registration continues to gain steam in states, David Levine, an election management consultant, offers five key steps to getting online voter registration right in electionlineWeekly.
- Oregon, the first state in the country to have automatic voter registration, began implementing its program in January. The Beaver State has added 4,653 voters to the rolls since the law took effect.
- Nebraska is the latest state grappling with legislation allowing voters to take ballot selfies.
- A new year means a new look at why Americans aren't yet voting over the Internet or on their phones according to USA Today.
- New Mexico is on the cusp of allowing 17-year-olds to participate in primary elections if they will turn 18 by the general election.
- The uncertainty surrounding the boundaries for two North Carolina congressional districts may have an impact on military and absentee voters who have already begun early voting for the March primary.
- Straight-ticket voting could be as dead as the dodo in a few years—one of the few remaining states to allow the practice, Indiana, is looking at eliminating it.
- The Election Law Program at William and Mary Law School has a series of helpful video modules on various election issues, like campaign finance, public access to voted ballots, voting equipment malfunctions and absentee ballot disputes.

Replacing outdated voting machines is one of the hottest topics in election news right now so keep an eye on NCSL's Election Technology News Feed for all the latest on election technology and funding from around the nation. The page collects news articles on purchases, and discussions about voting systems, electronic pollbooks or other major decisions, broken down by state.

The NCSL team has been hard at work updating several of our webpages to provide the most current information: 2016 State Primary Dates, Online Voter Registration, Voter ID, Absentee and Early Voting, and Provisional Ballots.

Thanks for reading, let us know your news and please stay in touch.

—***Wendy Underhill and Dan Diorio***

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William T. Pound, Executive Director

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18-F-1517//0269

Exhibit 11

SECOND DECLARATION OF Harry R. Lewis

I, Harry Lewis, declare as follows:

1. My name is Harry R. Lewis.
2. I am Gordon McKay Professor of Computer Science at Harvard University. I have served on the faculty at Harvard for 44 years, a span which includes terms as Dean of the College and as interim Dean of the John A. Paulson School of Engineering and Applied Sciences.
3. I am the author of six books and numerous articles on various aspects of computer science, education, and technology.
4. I am a member of the Electronic Privacy Information Center (EPIC) advisory board.
5. On July 5, 2017, at approximately 6 pm EDT, I undertook to review the security of the website "safe.amrdec.army.mil," recommended by the Vice Chair of the Presidential Advisory Commission on Election Integrity in the letter of June 28, 2017 to state election officials, for the delivery of voter roll data.
6. This is the same website that the Vice Chair described in his July 5, 2017 declaration in this matter as "a secure method of transferring large files up to two gigabytes (GB) in size."

7. The Google Chrome browser returned an error message with a bright red warning mark, which stated, "Your connection is not private – Attackers might be trying to steal your information from **safe.amrdec.army.mil** (for example, passwords, messages, or credit cards)."
8. The Apple Safari browser returned an error message, which stated "Safari can't verify the identity of the website 'safe.amrdec.army.mil.' The certificate for this website is invalid. You might be connecting to a website that is pretending to be 'safe.amrdec.army.mil,' which could put your confidential information at risk."
9. It is my opinion that "safe.amrdec.army.mil" is not a secure website for the transfer of personal data.
10. I have attached to this affidavit contemporaneous screen shots of the responses from the Google Chrome browser and the Apple Safari browser I observed

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Executed July 5, 2017

Harry R. Lewis

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)

SUPPLEMENTAL BRIEF ON PLAINTIFF'S INFORMATIONAL STANDING

This Court has jurisdiction to order the Commission to disclose to EPIC a Privacy Impact Assessment for the proposed collection of personal voter data because EPIC has standing seek that record and would suffer an informational injury from nondisclosure. Compl. ¶¶ 40–49. An informational injury occurs when a plaintiff is denied information due to it under statute. *FEC v. Akins*, 524 U.S. 11, 21 (1998). As the D.C. Circuit recently explained:

> 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.

Friends of Animals v. Jewell, 828 F.3d 989, 992, (D.C. Cir. 2016). "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

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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 Supreme Court has held that plaintiffs in EPIC's position can establish standing to seek disclosure of records from an advisory committee, 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 create or record 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 defendant's 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. Complaint ¶¶ 40–49, p. 11 ¶ D. Even if the Commission seeks to duck its obligation to record a PIA—thereby denying

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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 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, Pub. L. 107–347, 116 Stat. 2899 (codified as amended at 44 U.S.C. § 3501 note), and the FACA, Pub. L. 92–463, 86 Stat. 7705 (relevant section codified at U.S.C. app. 2 § 10(b)). Compl. ¶¶ 40–49; *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 v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1095 (D.C. Cir. 2015) (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.").

Because EPIC has alleged a valid informational injury that confers standing to seek disclosure of the Commission's PIA, this Court has satisfied its duty to assess subject-matter jurisdiction over this action. *NetworkIP, LLC v. FCC*, 548 F.3d 116, 120 (D.C. Cir. 2008).

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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

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Dated: July 7, 2017

18-F-1517//0276

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 UNOPPOSED MOTION TO FILE A SUR-SURREPLY IN SUPPORT OF PLAINTIFF'S EMEREGNCY MOTION FOR A TEMPORARY RESTRAINING ORDER

Plaintiff hereby moves the Court for leave to file a sur-surreply in response to Defendants' surreply concerning Plaintiff's emergency motion for a temporary restraining order.

Defendants do not oppose Plaintiff's request to file a sur-surreply, as stated in Defendant's Motion to File a Surreply, Dkt. 16.

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

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Dated: July 7, 2017

18-F-1517//0278

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 EMEREGNCY 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.

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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

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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,

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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.

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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

18-F-1517//0283

Alan Butler, D.C. Bar # 1012128
EPIC Senior Counsel

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Dated: July 7, 2017

18-F-1517//0284

Exhibit 1

DECLARATION OF MARC ROTENBERG

I, Marc Rotenberg, declare as follows:

1. I am President and Executive Director for the Plaintiff Electronic Privacy Information Center ("EPIC").

2. Plaintiff EPIC is a non-profit corporation located in Washington, D.C. EPIC is a public interest research center, which was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values. EPIC has a particular interest in preserving privacy safeguards established by Congress, including the E-Government Act of 2002, Pub. L. 107–347, 116 Stat. 2899 (codified as amended at 44 U.S.C. § 3501 note), EPIC pursues a wide range of activities designed to protect privacy and educate the public, including policy research, public speaking, conferences, media appearances, publications, litigation, and comments for administrative and legislative bodies regarding the protection of privacy.

3. I am a member in good standing of the Bar of the District of Columbia (admitted 1990), the Bar of Massachusetts (1987), the U.S. Supreme Court (1991), the U.S. Court of Appeals—1st Circuit (2005), the U.S. Court of Appeals—2nd Circuit (2010), the U.S. Court of Appeals—3rd Circuit (1991) the U.S. Court of Appeals—4th Circuit (1992), the U.S. Court of Appeals—5th Circuit (2005), the U.S. Court of Appeals—7th Circuit (2011), the U.S. Court of Appeals—9th Circuit (2011), and the U.S. Court of Appeals—D.C. Circuit (1991).

4. I have taught Information Privacy Law continuously at Georgetown University Law Center since 1990.

5. I am co-author with Anita Allen of a leading casebook on privacy law.

6. In my capacity as President and Executive Director, I have supervised both EPIC's response to the Department's rulemaking and EPIC'S participation in all stages of litigation in the above-captioned matter.

7. The statements contained in this declaration are based on my own personal knowledge.

8. EPIC works with an Advisory Board consisting of nearly 100 experts from across the United States drawn from the information law, computer science, civil liberties and privacy communities.

9. Members of the EPIC Advisory Board must formally commit to joining the organization and to supporting the mission of the organization.

10. Members of the EPIC Advisory Board make financial contributions to support the work of the organization.

11. Members of the EPIC Advisory Board routinely assist with EPIC's substantive work. For example, members provide advice on EPIC's projects, speak at EPIC conferences, and sign on to EPIC amicus briefs.

12. In this matter, EPIC represented the interests of more than 30 members of the EPIC Advisory Board, who signed a Statement to the National Association of State Secretaries in Opposition to the Commission's demand for personal voter data.

Under penalty of perjury, I declare that the foregoing is true and correct to the best of my knowledge and belief.

Marc Rotenberg
EPIC President and Executive Director

Executed this 7th day of July, 2017

18-F-1517//0287

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)

[PROPOSED] ORDER

Upon consideration of Plaintiff's Motion to File a Sur-surreply in Support of Plaintiff's Emergency Motion for a Temporary Restraining Order, it is hereby

ORDERED that the motion is granted.

Date: _____

Time: _____

_____
Colleen Kollar-Kotelly
United States District Judge

18-F-1517//0288

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.	Civil Action No. 1:17-cv-1320 (CKK)

DEFENDANTS' SUPPLEMENTAL BRIEF
REGARDING THE DEPARTMENT OF DEFENSE

In response to Plaintiff's Amended Complaint (which has not been served in accordance with Fed. R. Civ. P. 4), ECF No. 21, and in compliance with this Court's Order, ECF No. 22, Defendants respectfully submit that the entry of a temporary restraining order against the Department of Defense ("DOD") would be improper:

1. Defendants respectfully update the Court of two factual developments since the July 7, 2017 hearing.

    a. In order not to impact the ability of other customers to use the DOD Safe Access File Exchange ("SAFE") site, the Commission the Commission has decided to use alternative means for transmitting the requested data. Third Kobach Decl. ¶ 1. The Commission no longer intends to use the DOD SAFE system to receive information from the states, and instead intends to use

18-F-1517//0289

alternative means of receiving the information requested in the June 28, 2017, letter *Id.* Director of White House Information Technology is repurposing an existing system that regularly accepts personally identifiable information through a secure, encrypted computer application within the White House Information Technology enterprise. *Id.* The system is anticipated to be fully functional by 6:00 pm EDT today. *Id.*

b. Today, July 10, 2017, the Commission also sent the states a follow-up communication requesting the states not submit any data until this Court rules on plaintiff's TRO motion. *Id.* ¶ 2. Furthermore, the Commission will not send further instructions about how to use the new system pending this Court's resolution of the TRO motion. *Id.*

c. The Commission will not download the data that Arkansas already transmitted to SAFE and this data will be deleted from this site. *Id.* ¶ 3.

2. In light of these factual developments, any relief against DOD would be inappropriate because DOD systems will not be used by the Commission, and thus an order against DOD would not redress EPIC's supposed injury. *See, e.g., Gerber Prods. Co. v. Vilsack*, No. 16-1696-APM, 2016 WL 4734357, at *5 (D.D.C. Sept. 9, 2016) ("No order directed against [defendants] alone could cure the harm claimed by Plaintiff.").

3. Furthermore, DOD was not the subject of Plaintiff's motion for a TRO. While Plaintiff is entitled to amend its complaint as a matter of right, *see* Fed. R. Civ. P. 15(a)(1)(A), it must also amend and serve its TRO motion making clear what relief it seeks against DOD and why it is entitled to such relief. *See* LCvR 65(a). DOD, in

18-F-1517//0290

turn, should be given the opportunity to respond before any order is entered against it, including the opportunity to articulate what harm could be caused by the entry of a restraining order.

Dated: July 10, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Director

/s/ Joseph E. Borson
CAROL FEDERIGHI
Senior Trial Counsel
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Counsel for Defendants

18-F-1517//0291

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.	Civil Action No. 1:17-cv-1320 (CKK)

THIRD DECLARATION OF KRIS W. KOBACH

I, Kris W. Kobach, declare as follows:

As described in my declaration of July 5, 2017, I am the Vice Chair of the Presidential Advisory Commission on Election Integrity ("Commission"). I submit this third declaration in support of Defendant's supplemental brief regarding the addition of the Department of Defense ("DOD") as a defendant in plaintiff's Amended Complaint. This declaration is based on my personal knowledge and upon information provided to me in my official capacity as Vice Chair of the Commission.

1. In order not to impact the ability of other customers to use the DOD Safe Access File Exchange ("SAFE") site, the Commission has decided to use alternative means for transmitting the requested data. The Commission no longer intends to use the DOD SAFE system to receive information from the states, and instead intends to use alternative means of receiving the information requested in the June 28, 2017, letter. Specifically, the Director of White House Information Technology is repurposing an existing system that regularly accepts

personally identifiable information through a secure, encrypted computer application within the White House Information Technology enterprise. We anticipate this system will be fully functional by 6:00 p.m. Eastern today.

2. Today, the Commission sent the states a follow-up communication requesting the states not submit any data until this Court rules on this TRO motion. A copy of this communication is attached hereto as Exhibit A. The Commission will not send further instructions about how to use the new system pending this Court's resolution of this TRO motion.

3. The Commission will not download the data that Arkansas already transmitted to SAFE and this data will be deleted from the site.

4. Additionally, I anticipate that the President will today announce the appointment of two new members of the Commission, one Democrat and one Republican.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

***

Executed this 10th day of July 2017.

Kris Kobach

Kris W. Kobach

18-F-1517//0293

EXHIBIT A

From: FN-OVP-Election Integrity Staff
Sent: Monday, July 10, 2017 9:40 AM
Subject: Request to Hold on Submitting Any Data Until Judge Rules on TRO

Dear Election Official,

As you may know, the Electronic Privacy Information Center filed a complaint seeking a Temporary Restraining Order ("TRO") in connection with the June 28, 2017 letter sent by Vice Chair Kris Kobach requesting publicly-available voter data. See *Electronic Privacy Information Center v. Presidential Advisory Commission on Election Integrity* filed in the U.S. District Court for the District of Columbia. Until the Judge rules on the TRO, we request that you hold on submitting any data. We will follow up with you with further instructions once the Judge issues her ruling.

Andrew Kossack
Designated Federal Officer
Presidential Advisory Commission on Election Integrity
ElectionIntegrityStaff@ovp.eop.gov

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.	Civil Action No. 1:17-cv-1320 (CKK)

DEFENDANTS' SUPPLEMENTAL BRIEF
REGARDING THE DEPARTMENT OF DEFENSE

In response to Plaintiff's Amended Complaint (which has not been served in accordance with Fed. R. Civ. P. 4), ECF No. 21, and in compliance with this Court's Order, ECF No. 22, Defendants respectfully submit that the entry of a temporary restraining order against the Department of Defense ("DOD") would be improper:

1. Defendants respectfully update the Court of two factual developments since the July 7, 2017 hearing.

    a. In order not to impact the ability of other customers to use the DOD Safe Access File Exchange ("SAFE") site, the Commission the Commission has decided to use alternative means for transmitting the requested data. Third Kobach Decl. ¶ 1. The Commission no longer intends to use the DOD SAFE system to receive information from the states, and instead intends to use

alternative means of receiving the information requested in the June 28, 2017, letter *Id.* Director of White House Information Technology is repurposing an existing system that regularly accepts personally identifiable information through a secure, encrypted computer application within the White House Information Technology enterprise. *Id.* The system is anticipated to be fully functional by 6:00 pm EDT today. *Id.*

b. Today, July 10, 2017, the Commission also sent the states a follow-up communication requesting the states not submit any data until this Court rules on plaintiff's TRO motion. *Id.* ¶ 2. Furthermore, the Commission will not send further instructions about how to use the new system pending this Court's resolution of the TRO motion. *Id.*

c. The Commission will not download the data that Arkansas already transmitted to SAFE and this data will be deleted from this site. *Id.* ¶ 3.

2. In light of these factual developments, any relief against DOD would be inappropriate because DOD systems will not be used by the Commission, and thus an order against DOD would not redress EPIC's supposed injury. *See, e.g., Gerber Prods. Co. v. Vilsack*, No. 16-1696-APM, 2016 WL 4734357, at *5 (D.D.C. Sept. 9, 2016) ("No order directed against [defendants] alone could cure the harm claimed by Plaintiff.").

3. Furthermore, DOD was not the subject of Plaintiff's motion for a TRO. While Plaintiff is entitled to amend its complaint as a matter of right, *see* Fed. R. Civ. P. 15(a)(1)(A), it must also amend and serve its TRO motion making clear what relief it seeks against DOD and why it is entitled to such relief. *See* LCvR 65(a). DOD, in

18-F-1517//0297

turn, should be given the opportunity to respond before any order is entered against it, including the opportunity to articulate what harm could be caused by the entry of a restraining order.

Dated: July 10, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Director

/s/ Joseph E. Borson
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Counsel for Defendants

18-F-1517//0298

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.	Civil Action No. 1:17-cv-1320 (CKK)

THIRD DECLARATION OF KRIS W. KOBACH

I, Kris W. Kobach, declare as follows:

As described in my declaration of July 5, 2017, I am the Vice Chair of the Presidential Advisory Commission on Election Integrity ("Commission"). I submit this third declaration in support of Defendant's supplemental brief regarding the addition of the Department of Defense ("DOD") as a defendant in plaintiff's Amended Complaint. This declaration is based on my personal knowledge and upon information provided to me in my official capacity as Vice Chair of the Commission.

1. In order not to impact the ability of other customers to use the DOD Safe Access File Exchange ("SAFE") site, the Commission has decided to use alternative means for transmitting the requested data. The Commission no longer intends to use the DOD SAFE system to receive information from the states, and instead intends to use alternative means of receiving the information requested in the June 28, 2017, letter. Specifically, the Director of White House Information Technology is repurposing an existing system that regularly accepts

personally identifiable information through a secure, encrypted computer application within the White House Information Technology enterprise. We anticipate this system will be fully functional by 6:00 p.m. Eastern today.

2. Today, the Commission sent the states a follow-up communication requesting the states not submit any data until this Court rules on this TRO motion. A copy of this communication is attached hereto as Exhibit A. The Commission will not send further instructions about how to use the new system pending this Court's resolution of this TRO motion.

3. The Commission will not download the data that Arkansas already transmitted to SAFE and this data will be deleted from the site.

4. Additionally, I anticipate that the President will today announce the appointment of two new members of the Commission, one Democrat and one Republican.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

***

Executed this 10th day of July 2017.

Kris Kobach

Kris W. Kobach

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EXHIBIT A

From: FN-OVP-Election Integrity Staff
Sent: Monday, July 10, 2017 9:40 AM
Subject: Request to Hold on Submitting Any Data Until Judge Rules on TRO

Dear Election Official,

As you may know, the Electronic Privacy Information Center filed a complaint seeking a Temporary Restraining Order ("TRO") in connection with the June 28, 2017 letter sent by Vice Chair Kris Kobach requesting publicly-available voter data. See *Electronic Privacy Information Center v. Presidential Advisory Commission on Election Integrity* filed in the U.S. District Court for the District of Columbia. Until the Judge rules on the TRO, we request that you hold on submitting any data. We will follow up with you with further instructions once the Judge issues her ruling.

Andrew Kossack
Designated Federal Officer
Presidential Advisory Commission on Election Integrity
ElectionIntegrityStaff@ovp.eop.gov

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. _____

ARTHENIA JOYNER; MIKE SUAREZ; JOSHUA A. SIMMONS; BRENDA SHAPIRO; LUIS MEURICE; THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, INC.; FLORIDA IMMIGRANT COALITION, INC.,
Plaintiffs,

versus

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY; MICHAEL PENCE, in his official capacity as 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; EXECUTIVE OFFICE OF THE VICE PRESIDENT OF THE UNITED STATES; TIM HORNE,** in his official capacity as Administrator of the General Services Administration; **MICK MULVANEY,** in his official capacity as Director, Office of Management and Budget; **KEN DETZNER,** in his official capacity as Florida Secretary of State,
Defendants.
_____/

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF, WITH REQUEST FOR EXPEDITED TREATMENT

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I. PRELIMINARY STATEMENT

1. This action is brought on behalf of Florida voters and organizations involved and interested in the fair conduct of elections in Florida and elsewhere throughout the United States. This litigation challenges the legality of the actions of the Presidential Advisory Commission on Election Integrity and the legality of its directive requesting voter registration information of state-registered voters in Florida and throughout the United States.

2. This suit proceeds pursuant to the Administrative Procedure Act ("APA") (5 U.S.C. §§ 551-706), the Federal Advisory Committee Act ("FACA") (5 U.S.C. app. 2), the Paperwork Reduction Act ("PRA") (44 U.S.C. § 3501), the Declaratory Judgment Act (28 U.S.C. § 2201, *et seq.*), and the United States Constitution, seeking injunctive and declaratory relief, and other appropriate relief to prevent the unauthorized collection of state voter information data and to prohibit the Florida Secretary of State and other similarly situated officials of other states from providing state voter data to the Presidential Advisory Commission on Election Integrity (the "Presidential Advisory Commission" or "Commission") and any other person or entity acting

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pursuant to the request or directives of the Presidential Advisory Commission.

3. At issue in this lawsuit is the request by the Presidential Advisory Commission to collect, aggregate, and potentially disseminate a massive volume of state-maintained voter information, including personal identification information and private data that citizens are required by law to furnish to state officials solely to pursue their First Amendment constitutional right to vote. The challenged requests made to state elections officials infringe voters' First Amendment rights. The requests also constitute an unjustified invasion of privacy not authorized under the Constitution and laws of the United States or the individual states. The actions of the Presidential Advisory Commission have occurred in the absence of a required Privacy Impact Assessment. Importantly, the Presidential Advisory Commission's request for voter information preceded any authorized meeting of the Commission.

II. JURISDICTION, STANDING, AND VENUE

4. This court has jurisdiction under its general federal question jurisdiction, 28 U.S.C. § 1331, and specific jurisdiction over claims arising under the Administrative Procedure Act, 5 U.S.C. §§ 702 & 704.

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5. The Court has jurisdiction over claims for violations of the Paperwork Reduction Act. *See Livestock Mktg. Ass'n v. U.S. Dep't of Agriculture*, 132 F. Supp. 2d 817, 831 (D.S.D. 2001); *see also Alabama-Tombigbee Rivers Coal. v. Dep't of Interior*, 26 F. 3d 1103 (11th Cir. 1994) (holding that "'[a]bsent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction'" because it is inappropriate "to allow the government to use the product of a tainted procedure" in violation of federal statutes) (internal citation omitted)).

6. The Declaratory Judgment Act (28 U.S.C. § 2201) authorizes courts to issue declaratory judgments.

7. This court has personal jurisdiction over all defendants.

8. Plaintiffs have standing to commence this action under the Administrative Procedure Act ("APA"), which confers standing to any party adversely affected by government action. 5 U.S.C. § 702 (1988).

9. Plaintiffs also have standing pursuant to the Federal Advisory Committee Act (5 U.S.C. app. 2). *Miccosukee Tribe of Indians of Fla. v. S. Everglades Restoration Alliance*, 304 F.3d 1076, 1080–81 (11th Cir. 2002).

10. The Plaintiffs are authorized to seek compliance with the Separation of Powers. *Id.*

11. Plaintiffs have standing for a private cause of action for violation of the Paperwork Reduction Act of 1995, in that, "[t]he protection provided by this section may be raised in the form of a complete defense, bar, *or otherwise at any time* during the agency administrative process or judicial action applicable thereto." (emphasis added). 44 U.S.C. § 3512(b); *see also Livestock Mktg. Ass'n*, 132 F. Supp. 2d at 831 (holding that there is a private right of action under the Paperwork Reduction Act because the court "[could] not imagine language that would be more expansive.").

12. Plaintiffs' privacy interests are also adversely affected by the federal government action that is the subject of this complaint.

13. Venue is proper in the Southern District of Florida under 5 U.S.C. § 703 and 28 U.S.C. § 1391 as a place where the challenged conduct is occurring with respect to Florida voters.

14. All conditions precedent to bringing this action have occurred, have been waived, or would be a useless act and are accordingly waived.

III. PARTIES

15. Plaintiff Senator Arthenia Joyner (retired), is a resident and voter of Hillsborough County, Florida, and a member in good standing of The Florida Bar. She sues in her individual capacity. Senator Joyner formerly served as a member of the Florida House of Representatives, representing the 59th House District from 2000 through 2006, and as a member of the Florida Senate representing the 19th Senate District from 2006 through 2016. As a member of the Florida Senate from 2014 through 2016, Senator Joyner served as the Florida Senate Minority Leader. Senator Joyner has long been a passionate advocate for civil rights and justice during the entirety of her political and legal careers, and within her private life. Senator Joyner is concerned about the disclosure of private information and how such disclosures may violate the law and the civil rights of all people. She opposes the dissemination, collection, and potential distribution of her voter and identity information.

16. Plaintiff Councilman Mike Suarez, is a resident and voter of Hillsborough County, Florida. He sues in his individual capacity. Councilman Suarez represents District 1 in the Tampa (Florida) City

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Council and is the immediate past Chair of the Tampa City Council, having served in that position from 2016 through 2017. Councilman Suarez is a third-generation Tampa resident who is concerned about the protection of personal voter and identification information and privacy rights for himself as a registered voter, and for his constituents throughout the City of Tampa. He opposes the dissemination, collection, and potential distribution of his voter and identity information.

17. Plaintiff Joshua A. Simmons is a resident and voter in Broward County, Florida, in the Southern District of Florida. He sues in his individual capacity. He opposes the dissemination, collection, and potential distribution of his voter and identity information.

18. Plaintiff Brenda Shapiro is a resident and voter in Miami-Dade County, Florida, in the Southern District of Florida. She sues in her individual capacity. She is an active voter, a practicing attorney, and has been a leader in civic affairs in Miami, where she has served as Chair of both the City of Miami's Community Relations Board and the City of Miami's Civilian Investigative Panel. She is concerned about the circulation of her voting history and her personal information, and she is especially concerned about the misuse of that information. She

opposes the dissemination, collection, and potential distribution of her voter and identity information.

19. Plaintiff Luis Meurice is a resident and voter in Miami-Dade County, Florida, in the Southern District of Florida. He is a 38-year member of the International Longshoremen's Association, its Florida Legislative Director, and President of ILA Local 2062. He is also District Vice President of South Florida AFL-CIO. He is active in Movimiento Democracia, a non-profit organization advocating for freedom and democracy for all people. He sues in his individual capacity. He opposes the dissemination, collection, and potential distribution of his voter and identity information.

20. Plaintiff The American Civil Liberties Union of Florida, Inc. ("ACLU of Florida" or "ACLU") is a non-profit, §501(c)(3) membership organization. The ACLU is dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws, including laws protecting access to the right to vote. Since 1965, the ACLU, through its Voting Rights Project, has litigated more than 300 voting rights cases and has a direct interest in ensuring that all eligible citizens are able to access the franchise and are not removed from voter

rolls, and in empowering those targeted by vote suppression. The ACLU of Florida is a state affiliate of the national American Civil Liberties Union and is domiciled in the State of Florida, with its principal place of business in Miami-Dade County, Florida, within the Southern District of Florida. The ACLU of Florida has over 50,000 members and has litigated numerous cases, either through direct representation or as amicus curiae, to protect the fundamental right to vote.

21. Plaintiff Florida Immigrant Coalition, Inc. ("FLIC") is a non-profit membership organization and coalition of more than 65 membership organizations and over 100 allies. FLIC was founded in 1998 and formally incorporated in 2004. More than an organization, "FLIC" is a strategic multi-racial, intergenerational social movement working for the fair treatment of all people, including immigrants. FLIC is domiciled in the State of Florida, with its principal place of business in Miami-Dade County, Florida, within the Southern District of Florida. Its members are residents of Florida and elsewhere.

22. Defendant Presidential Advisory Commission is an advisory commission of the United States government within the meaning of the Federal Advisory Committee Act (5 U.S.C. app. 2 § 10). It is a

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subcomponent of the Executive Office of the President of the United States. The Office of Management and Budget and the General Services Administration, along with the Presidential Advisory Commission are agencies or the equivalent thereof within the meaning of 44 U.S.C. § 3502 and the APA, 5 U.S.C. § 701.

23. Defendant Michael Pence is the Vice President of the United States and the Chair of the Presidential Advisory Commission. He is sued in his official capacity as Chair of the Presidential Advisory Commission.

24. Defendant Kris Kobach is the Secretary of State of Kansas, and the Vice Chair of the Presidential Advisory Commission. Vice Chair Kobach has a lengthy history of attempting to suppress the right to vote within his home state of Kansas. For example, in *League of Women Voters of United States v. Newby*, 838 F.3d 1, 13 (D.C. Cir. 2016), the U.S. Court of Appeals for the District of Columbia Circuit rejected Secretary Kobach's arguments that proof of citizenship should be required when registering to vote because there is "precious little record evidence" that failure to present citizenship leads to fraudulent registration by non-citizens. Similarly, in *Fish v. Kobach*, 840 F.3d 710

(10th Cir. 2016), the U.S. Court of Appeals for the Tenth Circuit upheld the district court's injunction against Secretary Kobach, requiring him to register voters whose voter registrations were rejected for failure to provide documentary proof of citizenship. The Tenth Circuit explained that Mr. Kobach's actions and the Kansas statutory scheme amounted to a "mass denial of a fundamental constitutional right" for more than 18,000 voters. Moreover, the Tenth Circuit explained that Secretary Kobach's "assertion that the 'number of aliens on the voter rolls is likely to be in the hundreds, if not thousands' is pure speculation." *Id.* at 755. He is sued in his official capacity as Vice Chair of the Presidential Advisory Commission.

25. Defendant Executive Office of the President of the United States ("EOP") is an agency within the meaning of 44 U.S.C. § 3502 and the APA, 5 U.S.C. § 701.

26. Defendant Office of the Vice President of the United States ("OVP") is a subcomponent of EOP and constitutes an agency within the meaning of 44 U.S.C. § 3502 and the APA, 5 U.S.C. § 701.

27. Defendant Tim Horne is the Administrator of the U.S. General Services Administration ("GSA"), an agency within the

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meaning of 44 U.S.C. § 3502 and the APA, 5 U.S.C. § 701. The GSA is charged with providing the Presidential Advisory Commission "such administrative services, funds, facilities, staff, equipment, and other support services as may be necessary to carry out its mission ...." (Exhibit A). Exec. Order. No. 13,799, 82 Fed. Reg. 22,389, 22,390 (May 11, 2017). He is sued in his official capacity.

28. Defendant Mick Mulvaney is the Director of the Office of Management and Budget ("OMB"), an office within the Executive Office of the President of the United States. The OMB Director reports to the President, Vice President, and the White House Chief of Staff. The OMB is tasked with promulgating the Federal Regulations to effectuate the mandates of the Paperwork Reduction Act. He is sued in his official capacity.

29. Defendant Ken Detzner is the Florida Secretary of State, charged with the statutory responsibilities of maintaining and securing Florida voter information. He is sued in his official capacity.

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IV. FACTS

The President and His Administration Propagate Baseless Accusations About Widespread Voter Fraud

30. President Trump has a long history of propagating baseless conspiracy theories about voter fraud, ostensibly in order to suppress the right to vote. As a presidential candidate and now as President, Mr. Trump repeatedly, and baselessly, spoke about widespread voter fraud across the country, including supposed votes cast by dead people, people voting multiple times, people voting in multiple states, and, supposed votes cast by "illegal immigrants."[1]

31. In August 2016, then-Candidate Trump told an audience that:

> The only way they can beat me, in my opinion, and I mean this 100 percent, is if in certain sections of the state, they cheat, OK . . . So I hope you people can sort of not just vote . . . (but also) go around and look and watch other polling places and make sure that it's 100 percent fine.

Sachelle Saunders, *Donald Trump wants to fight voter fraud with observers*, Orlando News 6 (August 17, 2017), http://www.clickorlando.com/news/politics/trumps-call-for-poll-

[1] Attached as Exhibit B is a compilation of public statements by or on behalf of the President promoting the existence of voter fraud in connection with the 2016 election, despite no legitimate supportive facts or evidence.

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observers-could-cause-trouble. Similarly, on October 1, 2017, then-Candidate Trump told an audience to:

> watch your polling booths because I hear too many stories about Pennsylvania, certain areas. . . . We can't lose an election because of, you know what I'm talking about.

Robert Farley, *Trump's Bogus Voter Fraud Claims*, FactCheck.org (October 19, 2016), http://www.factcheck.org/2016/10/trumps-bogus-voter-fraud-claims/. These are just two examples, of many, of Mr. Trump encouraging people to go to polling sites to intimidate voters.

32. As another example, on October 17, 2016, then-Candidate Trump stated:

> They even want to try to rig the election at the polling booths. And believe me, there's a lot going on. Do you ever hear these people? They say there's nothing going on. People that have died 10 years ago are still voting. Illegal immigrants are voting. I mean, where are the street smarts of some of these politicians? ... So many cities are corrupt, and voter fraud is very, very common.

Tribune news services, *Trump wrongly insists voter fraud is 'very, very common,'* Chicago Tribune (Oct. 17, 2016), http://www.chicagotribune.com/news/nationworld/politics/ct-donald-trump-voter-fraud-20161017-story.html.

33. On November 27, 2016, shortly after the election, the President-Elect continued his baseless accusations about voter fraud, claiming without evidence that he actually won the national popular vote if "illegal" votes were deducted from the total. The President-Elect tweeted:

> In addition to winning the Electoral College in a landslide, I won the popular vote if you deduct the millions of people who voted illegally.

Donald J. Trump (@realDonaldTrump), Twitter (Nov. 27, 2016, 3:30 p.m.), *https://twitter.com/realDonaldTrump/status/802972944532209664*. ABC News declared this statement "False," because "Trump offered no proof to back up this claim, and ABC News, which monitored all 50 states for voting irregularities on election night, has found no evidence of widespread voter fraud."

34. Soon after the inauguration, on January 25, 2017, President Trump tweeted:

> I will be asking for a major investigation into VOTER FRAUD, including those registered to vote in two states, those who are illegal and....
>
> even, those registered to vote who are dead (and many for a long time). Depending on results, we will strengthen up voting procedures!

Donald J. Trump (@realDonaldTrump), Twitter (Jan. 25, 2017, 7:10 am), https://twitter.com/realDonaldTrump/status/824227824903090176; Donald J. Trump (@realDonaldTrump), Twitter (Jan. 25, 2017, 7:13 am), https://twitter.com/realDonaldTrump/status/824228768227217408.

35. With these tweets, the President stated his intention to create what would later become the Presidential Advisory Commission.

The Presidential Advisory Commission Attempts to Collect State Voter Information

36. The Presidential Advisory Commission was established by Executive Order No. 13,799 on May 11, 2017 (the "Executive Order"). 82 Fed. Reg. 22,389 (Exhibit A). Its Charter is attached as Exhibit C.

37. The Executive Order instructs the Presidential Advisory Commission to "study the registration and voting processes used in Federal elections." (Exhibit A). 82 Fed. Reg. at 22,389. The Executive Order does not contain any authority to collect personal voter data, to initiate investigations, or to seek the disclosure of state voter data.

38. On June 28, 2017, the Vice Chair of the Commission initiated a process to collect detailed voter information, including personal identifying information, from all 50 States and the District of Columbia. This request had never occurred before, notwithstanding the

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existence of the U.S. Election Assistance Commission created by the Help America Vote Act of 2002. 52 U.S.C. §§ 20921-20930.[2]

39. Prior to all of the Presidential Advisory Commission's members being publicly named and sworn in, and before any duly noticed meetings, Vice Chair Kobach stated during a phone call with Presidential Advisory Commission members that "a letter w[ould] be sent today to the 50 States and District of Columbia on behalf of the Commission requesting publicly-available data from state voter rolls. . . ." (Exhibit D). Press Release, Office of the Vice President, Readout of the Vice President's Call with the Presidential Advisory Commission on Election Integrity (June 28, 2017).

40. According to the U.S. Census, state voter rolls include the names, addresses, and other personally identifiable information of as many as 157 million registered voters nationwide. U.S. Census Bureau, *Voting and Registration in the Election of November 2016* at tbl. 4a

[2] The U.S. Election Assistance Commission is empowered to conduct periodic studies of election administration including, among other things "[n]ationwide statistics and methods of identifying, deterring, and investigating voting fraud in elections for Federal office" and "[m]ethods of voter registration, maintaining secure and accurate lists of registered voters (including the establishment of a centralized, interactive, statewide voter registration list linked to relevant agencies and all polling sites), and ensuring that registered voters appear on the voter registration list at the appropriate polling site." 52 U.S.C. § 20981.

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(May 2017), https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html.

41. Florida law makes certain voter information confidential and exempt from disclosure under any circumstances. Social security numbers, driver's license numbers, and the source of voter registration application cannot be released under any circumstances. § 97.0585, Florida Statutes (2016). Additionally, other voter information is confidential under certain circumstances. For instance, victims of domestic violence and stalking who are participants in the Attorney General's Address Confidentiality Program are exempt from public disclosure of voter registration information. § 97.0585(3). Also, categories of high-risk professionals can be exempt from disclosure of personal information including address, photograph, and date of birth.

42. The Florida Department of State, Division of Elections, is required to redact all protected exempt information for any requests for production of voter information.

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43. One of the Vice Chair's letters, dated June 28, 2017, was sent to Florida Secretary of State Ken Detzner. (Exhibit E).[3]

44. These letters include a request for voter identifying information, including the "full first and last names of all registrants, middle names or initials if available, addresses, dates of birth, political party (if recorded in your state), last four digits of social security number if available, voter history (elections voted in) from 2006 onward, active/inactive status, cancelled status, information regarding any felony convictions, information regarding voter registration in another state, information regarding military status, and overseas citizen information." *Id.*

[3] That same day of June 28, 2017, the U.S. Department of Justice sent a letter to every state covered by the National Voter Registration Act, 52 U.S.C. § 20501 ("NVRA") seeking "all statutes, regulations, written guidance, internal policies, or database user manuals that set out the procedures" each state has relating to various programs including, among other things, removing voters from voter registration rolls. The letter also discusses coordination between "state voter registration lists with state agency records on felony status and death." However, the DOJ letter does not appear to specifically request information about specific identifiable voters. A copy of the letter sent to Washington Secretary of State Kim Wyman is attached as Exhibit F and is believed to be representative of the letters to all states covered by the NVRA. Given the nearly identical timing and subject matter of the DOJ's letter and the Presidential Advisory Commission's letter, it appears that the Presidential Advisory Commission exists to obtain records that would be otherwise unavailable to the DOJ for the purpose of enacting policies and procedures to suppress the vote across the entire country.

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45. The Vice Chair's letters also sought "[w]hat evidence or information [the state had] regarding instances of voter fraud or registration fraud" and "[w]hat convictions for election related crimes ha[d] occurred in [the] state since the November 2000 federal election." (Exhibit E).

46. According to the Presidential Advisory Commission, "any documents that are submitted to the full Commission w[ould] also be made available to the public." (Exhibit E).

47. According to the letters, the states' responses to the Presidential Advisory Commission are due by July 14, 2017. (Exhibit E).

48. The letter does not list a physical address for the Presidential Advisory Commission, leading some states, including Florida, to address the written response to the Vice Chair at his state government address in Topeka, Kansas. Withholding a physical address from the Commission's correspondence leads to records being produced at a location other than the federally identified address of the Presidential Advisory Commission.

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49. The URL (https://safe.amrdec.army.mil/safe/Welcome.aspx) provided by the Presidential Advisory Commission for the transmission of voter registration data and information is a non-secure site, subjecting voters to having personal identifying information made available on the Internet and thus making them potential victims of identity theft. Visitors to this URL are informed that the "connection is not secure" and are warned about "your information . . . being stolen." (Exhibit G).

Florida Leads the Nation in Fraud and Identity Theft, Making it Especially Imperative that Personal Voter Data be Secure

50. The procedures being employed by the Presidential Advisory Commission and the other federal Defendants leave the Plaintiffs and, in the case of the organizational Plaintiffs, their members, open to fraud and identity theft.

51. Florida leads the country in complaints for fraud and identity theft, and has for more than a decade. Maria LaMagna, *Residents of these states are most vulnerable to identity theft*, Market Watch (July 9, 2017), http://www.marketwatch.com/story/residents-of-these-states-are-most-vulnerable-to-identity-theft-2017-07-07; William E. Gibson & Donna Gehrke-White, *Florida leads nation in fraud, ID*

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theft, South Florida Sun-Sentinel (Mar. 3, 2015), http://www.sun-sentinel.com/news/florida/fl-florida-leading-fraud-id-theft-20150303-story.html. Additionally, among metropolitan areas across the United States, South Florida produces the most cases of fraud and identity theft. *Id.*

52. The federal Defendants' actions will serve to further compound this problem if the states transmit the requested voter data to the Presidential Advisory Commission.

53. Florida officials stated, in response to media inquiries about possible data breaches during the 2016 election, that "'Florida's online elections databases and voting systems remained secure in 2016," and Florida has "secured its databases and put in firewalls to protect information, and the state has 'no indication that any unauthorized access occurred.'" Jeff Pegues, *Election databases in several states were at risk during 2016 presidential campaign*, CBS News (June 13, 2017), http://www.cbsnews.com/news/election-databases-in-several-states-were-at-risk-during-2016-presidential-campaign/.

54. Florida is also in the process of implementing a new online voter registration platform. There has been considerable legislative

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debate about the platform's implementation, specifically to address security concerns to protect the public. Amy Sherman, *Is online voter registration more secure? Florida state senator says yes*, Politifact (Jan. 23, 2015), http://www.politifact.com/florida/statements/2015/jan/23/jeff-clemens/online-voter-registration-more-secure-florida-stat/.

55. Florida's efforts to secure voter registration data and, therefore, its voters (including the Plaintiffs), from among other things, identity theft, will be undermined if personalized voter data is amassed and centralized into a non-secure federal database, as requested by the Presidential Advisory Commission.

Opposition by States to Presidential Advisory Commission's Demand for Voter Identifying Information

56. At the present time, numerous state elections officials have publicly announced their intention to oppose the demand for personal voter data. Philip Bump & Christopher Ingraham, *Trump Says States Are "Trying to Hide Things" from His Voter Fraud Commission. Here's What They Actually Say*, Wash. Post (July 1, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/07/01/trump-says-states-are-trying-tohide-things-from-his-voter-fraud-commission-heres-what-they-actually-say/.

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57. California Secretary of State Alex Padilla announced his state would "not provide sensitive voter information to a committee that has already inaccurately passed judgment that millions of Californians voted illegally. California's participation would only serve to legitimize the false and already debunked claims of massive voter fraud . . . ." Press Release, *Secretary of State Alex Padilla Responds to Presidential Election Commission Request for Personal Data of California Voters* (June 29, 2017), http://www.sos.ca.gov/administration/news-releases-and-advisories/2017-news-releases-and-advisories/secretary-state-alex-padilla-responds-presidential-election-commission-request-personal-data-california-voters/.

58. Kentucky Secretary of State Alison Lundergan Grimes stated that "Kentucky w[ould] not aid a commission that is at best a waste of taxpayer money and at worst an attempt to legitimize voter suppression efforts across the country." Bradford Queen, *Secretary Grimes Statement on Presidential Election Commission's Request for Voters' Personal Information*, Kentucky (last accessed July 3, 2017) http://kentucky.gov/Pages/Activity-stream.aspx?n=SOS&prld=129.

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59. Virginia Governor Terry McAuliffe had "no intention of honoring [the] request." Terry McAuliffe, *Governor McAuliffe Statement on Request from Trump Elections Commission* (June 29, 2017), https://governor.virginia.gov/newsroom/newsarticle?articleid=20595.

60. Mississippi Secretary of State Delbert Hosemann said, of the Vice Chair's letter: "My reply would be: They can go jump in the Gulf of Mexico, and Mississippi is a great state to launch from. Mississippi residents should celebrate Independence Day and our state's right to protect the privacy of our citizens by conducting our own electoral processes." Tal Kopan, *Pence-Kobach voting commission alarms states with info request*, CNN (July 1, 2017), http://www.cnn.com/2017/06/30/politics/kris-kobach-voter-commission-rolls/index.html.

61. Despite several requests directed to the Florida Secretary of State to determine the State of Florida's position regarding the Presidential Advisory Commission request, Florida's Secretary of State only on the evening of July 6, 2017, announced that Florida will comply with the request by producing only publicly available information. Associated Press, *Florida to hand over some voting information to*

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commission investigating voter fraud, Local 10 South Florida (July 6, 2017), https://www.local10.com/news/politics/florida-to-hand-over-some-voting-information-to-commission-investigating-voter-fraud. As of the time of this filing, Plaintiffs have no reason to believe the requested information has yet been provided to the Presidential Advisory Commission by the State of Florida. Nor is it clear exactly what voter information the State of Florida intends to transmit to the Commission. The Florida Secretary of State's letter confirming Florida's intention to produce voter information is attached as Exhibit H.

62. Public opposition to the Presidential Advisory Commission's request is mounting. Voting technology professionals wrote state election officials to warn that "[t]here is no indication how the information will be used, who will have access to it, or what safeguards will be established." Letter from EPIC to Nat'l Ass'n of State Sec'ys (July 3, 2017), https://epic.org/privacy/voting/pacei/Voter-Privacy-letter-to-NASS-07032017.pdf.

63. After public opposition to the Presidential Advisory Commission's request began to mount, the Vice Chair wrote an article for Breitbart News, in which he conceded that "information like the last

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four numbers of a voter's social security number" is "private," but that "[t]he Commission didn't request that information. Thus, there is no threat that the Commission's work might compromise anyone's privacy." Kris W. Kobach, *Kobach: Why States Need to Assist the Presidential Commission on Election Integrity*, Brietbart News (July 3, 2017), http://www.breitbart.com/big-government/2017/07/03/kobach-why-states-need-to-assist-the-presidential-commission-on-election-integrity/. (Exhibit I). To the contrary, the Vice Chair's June 28, 2017 letter to the 50 States and the District of Columbia specifically requests, among other things, the "last four digits of social security number[s]." (Exhibit E).

64. The President also responded to the news that numerous states were objecting to the production of voter data to the Presidential Advisory Commission, tweeting:

> Numerous states are refusing to give information to the very distinguished VOTER FRAUD PANEL. What are they trying to hide?

Donald J. Trump (@realDonaldTrump), Twitter (July 1, 2017, 6:07am), *https://twitter.com/realDonaldTrump/status/881137079958241280.*

Absence of Privacy Impact Assessment

65. Under the E-Government Act of 2002 (18 Pub. L. 107-347, 116 Stat. 2899 (codified as amended at 44 U.S.C. § 3501 note)), every agency "initiating a new collection of information that (I) will be collected, maintained, or disseminated using information technology; and (II) includes any information in an identifiable form permitting the physical or online contacting of a specific individual" is required to complete a Privacy Impact Assessment ("PIA") before initiating such collection. 44 U.S.C. § 3501 note ("Privacy Impact Assessments").

66. The agency must "(i) conduct a privacy impact assessment; (ii) ensure the review of the privacy impact assessment by the Chief Information Officer, or equivalent official, as determined by the head of the agency; and (iii) if practicable, after completion of the review under clause (ii), make the privacy impact assessment publicly available through the website of the agency, publication in the Federal Register, or other means." *Id.*

67. The Presidential Advisory Commission is an agency subject to the E-Government Act because it is an "establishment in the

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executive branch of the Government," a category that "includ[es] the Executive Office of the President." 44 U.S.C. § 3502(1).

68. A Privacy Impact Assessment for a "new collection of information" must be "commensurate with the size of the information system being assessed, the sensitivity of information that is in an identifiable form in that system, and the risk of harm from unauthorized release of that information." § 3501 note ("Privacy Impact Assessments"). The PIA must specifically address "(I) what information is to be collected; (II) why the information is being collected; (III) the intended use of the agency of the information; (IV) with whom the information will be shared; (V) what notice or opportunities for consent would be provided to individuals regarding what information is collected and how that information is shared; [and] (VI) how the information will be secured ...." *Id.*

69. Under FACA, "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by [an] advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the

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agency to which the advisory committee reports until the advisory committee ceases to exist." 5 U.S.C. app. 2 § 10(b).

70. The Commission has not conducted a Privacy Impact Assessment for its collection of state voter data.

71. The Commission has not ensured review of a PIA by any Chief Information Officer or equivalent official.

72. The Commission has not published a PIA or made such an assessment available for public inspection.

73. The U.S. Congress has made no finding of a problem that would warrant creation of a nationwide voter database. There has been no congressional finding of a systemic and nationwide problem with voter registration files and voter history, including evidence of voter fraud, to justify the collection of state voter history and voter registration information by the federal government.

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COUNT I

Violations of the Federal Advisory Committee Act, 5 U.S.C. App. 2, *et seq.*

Against Presidential Advisory Commission, Pence, Kobach, Executive Office of the President, Executive Office of the Vice President, Horne, and Mulvaney

74. Plaintiffs restate and incorporate paragraphs 1-73.

75. The Executive Order specifically contemplates that the Presidential Advisory Commission is governed by the Federal Advisory Committee Act, 5 U.S.C. App. 2, *et seq.* ("FACA"). *See* Executive Order 82 Fed. Reg. 22,389 at § 7(c) (Exhibit A). The Presidential Advisory Commission's Charter also states that the Commission "is established in accordance with . . . the Federal Advisory Committee Act[.]" (Exhibit C at ¶ 2). The first notice of any meeting of the Presidential Advisory Commission published in the Federal Register, which was published on July 5, 2017, also states that the Commission was "established in accordance with the Federal Advisory Committee Act (FACA), 5 U.S.C. App. . . ." 82 Fed. Reg. 31,063 (Exhibit J) (the "First Meeting Notice").

76. However, Defendant Presidential Advisory Commission and the other federal Defendants have failed to comply with numerous of the FACA's clear requirements. Among other things, these Defendants

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(a) failed to properly notice and conduct meetings, (b) failed to provide opportunities for public participation and input, (c) failed to make its membership fully known, (d) failed to make documents available to the public, and (e) conducted unlawful business not authorized by the Executive Order or any statute prior to all of the Commission's members being appointed and sworn in and without input or participation from the public or even most of the Commission's members.

77. "Because FACA's dictates emphasize the importance of openness and debate, the timing of such observation and comment is crucial to compliance with the statute. Public observation and comment must be contemporaneous to the advisory committee process itself. . . . If public commentary is limited to retrospective scrutiny, the Act is rendered meaningless." *See Alabama-Tombigbee Rivers Coal. v. Dep't of Interior*, 26 F.3d 1103, 1106 (11th Cir. 1994).

78. According to the Eleventh Circuit, "injunctive relief [is] the only vehicle that carries the sufficient remedial effect to ensure future compliance with FACA's clear requirements." *Id.* at 1107. It is the responsibility of the courts to see that the FACA is followed, even where

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there are only "minor transgressions" of the FACA and where "the subject matter is serious" and "the objective is worthy." *Id.* at n.9. "Because the matters are so serious and of such great concern to so many with differing interests, it is absolutely necessary that the procedures established by Congress be followed to the letter." *Id.*

79. "[T]o allow the government to use the product of a tainted procedure would circumvent the very policy that serves as the foundation of the Act." *Id.*

80. *First*, the Presidential Advisory Commission and the other federal Defendants, including the Vice President and the Vice Chair on behalf of the Commission, began conducting official business prior to ever holding a meeting for which a notice was published in the Federal Register, prior to the appointment and swearing in of all of its members, and prior to any public participation or input being permitted.

81. The first meeting of the Commission for which a notice was published in the Federal Register is presently scheduled to take place on July 19, 2017. At that meeting, the Commission's members will be sworn in.

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82. Yet, on June 28, 2017, the Vice Chair issued letters to the chief elections officials of all 50 States and the District of Columbia seeking personal information about every registered voter in the country, the effect of which would be to amass and centralize a federal voter database not authorized by the Executive Order or any statute, thereby indicating one or more earlier meetings of the Commission have taken place without any notice published in the Federal Register.

83. According to the Press Release, Office of the Vice President, Readout of the Vice President's Call with the Presidential Advisory Commission on Election Integrity (June 28, 2017), attached as Exhibit D, additional telephonic meetings, for which there was no notice published in the Federal Register, were unlawfully held. During the conference call with the Commission's members, the Vice Chair told the other members about the letters he sent to the 50 States and the District of Columbia on behalf of the Commission requesting voter data.

84. Thus, the Vice President and the Vice Chair acted unilaterally on behalf of the Presidential Advisory Commission, without the consent or participation of the public or even the majority of the members of the Commission, in sending the letters seeking voter

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registration and personal information about every registered voter in the country, in violation of the FACA.

85. In fact, the Vice Chair's June 28, 2017 letter to each of the 50 States and the District of Columbia, which is printed on Presidential Advisory Commission letterhead and which bears the Seal of the President of the United States, requests that each jurisdiction receiving the letter respond by July 14, 2017, which is prior even to the first meeting of the Commission for which notice was published in the Federal Register, which is scheduled for July 19, 2017.

86. *Second,* the Presidential Advisory Commission and the other federal Defendants have failed to name all of its members before it began conducting business, in violation of the FACA.

87. Pursuant to 5 U.S.C. App. 2 § 2(b)(5), "the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees."

88. Yet, as of July 9, 2017, various news reports have indicated that 11 members of the Commission have been appointed, including the Vice President as Chair, and including the Vice Chair. News reports also indicate that one of the members has since resigned from the

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Commission, leaving the Commission with 10 members as of this date. Pursuant to the Executive Order, the Commission will have "no more than 15 additional members" besides the Vice President, for a maximum possible total of 16 members. To date, it is unclear whether additional members have been or will be appointed to the Commission, bringing the total above 10. To date, the Commission's members' swearing-in ceremony has not yet taken place because it is noticed for July 19, 2017, even though the Commission has already begun conducting business in violation of the FACA.

89. *Third*, the Presidential Advisory Commission and the other federal Defendants have failed to comply with the FACA's requirements regarding advance notice of meetings.

90. Pursuant to 41 C.F.R. § 101-6.1015(b), a regulation implementing the FACA:

> (b) *Committee meetings.* (1) The agency or an independent Presidential advisory committee shall publish at least 15 calendar days prior to an advisory committee meeting a notice in the FEDERAL REGISTER, which includes:
> (i) The exact name of the advisory committee as chartered;
> (ii) The time, date, place, and purpose of the meeting;
> (iii) A summary of the agenda; and
> (iv) A statement whether all or part of the meeting is open to the public or closed, and if closed, the reasons why, citing

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> the specific exemptions of the Government in the Sunshine Act (5 U.S.C. 552(b)) as the basis for closure.
>
> (2) In exceptional circumstances, the agency or an independent Presidential advisory committee may give less than 15 days notice, provided that the reasons for doing so are included in the committee meeting notice published in the FEDERAL REGISTER.

91. The Presidential Advisory Commission and its affiliated federal Defendants have violated 41 C.F.R. § 101-6.1015(b) in multiple regards, by holding meetings that were not noticed in the Federal Register whatsoever and taking action based upon those un-noticed meetings, including:

a. Holding one or more meetings consisting solely of the Vice Chair and/or the Vice President (and possibly other members of the Trump administration, but not including the majority of the members of the Presidential Advisory Commission) that were not noticed in the Federal Register, which led to the Vice Chair sending out letters seeking voter information from all 50 States and the District of Columbia on June 28, 2017, all without the participation or input of the public or even the majority of the Commission's members; and

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b. Holding one or more telephonic meetings that were not noticed in the Federal Register and that did not allow for public participation or input.

92. The meetings of the Commission referenced in the preceding paragraph violate 41 C.F.R. § 101-6.1015(b) for failing to provide any notice in the Federal Register whatsoever.

93. The Presidential Advisory Commission and its affiliated federal Defendants have also violated 41 C.F.R. § 101-6.1015(b) with regard to the first meeting for which a notice was published in the Federal Register, because the notice is legally deficient.

94. The first notice of any meeting of any kind of the Presidential Advisory Commission was published in the Federal Register on July 5, 2017, giving notice of an open meeting to take place on July 19, 2017. 82 Fed. Reg. 31,063 (Exhibit J) (the "First Meeting Notice"). Accordingly, even this First Meeting Notice violates 41 C.F.R. § 101-6.1015(b) in that it provides less than 15 days notice of the meeting and provides no reasons or exceptional circumstances for doing so, in violation of the FACA.

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95. *Fourth*, the Presidential Advisory Commission and the other federal Defendants have failed to comply with the FACA's requirement that members of the public be permitted to attend the Commission's open meetings in person.

96. Pursuant to 41 C.F.R. § 101-6.1021(b), a regulation implementing the FACA:

> The agency head, or the chairperson of an independent Presidential advisory committee, shall ensure that— . . . (b) The meeting room size is sufficient to accommodate advisory committee members, committee or agency staff, and interested members of the public[.]

97. The Presidential Advisory Commission and its affiliated federal Defendants have violated 41 C.F.R. § 101-6.1021(b) with regard to its earlier un-noticed meetings in multiple regards, including by:

a. Holding one or more meetings of the Commission that were not noticed in the Federal Register, in which the meeting room was not sufficient to accommodate interested members of the public (and in which the majority of the Commission's members were not even in attendance); and

b. Holding one or more telephonic meetings of the Commission that were not noticed in the Federal Register, in

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which the meeting room was necessarily not sufficient to accommodate interested members of the public because the meetings took place by telephone, and thus there was no meeting room.

98. The Presidential Advisory Commission and its affiliated federal Defendants have also violated 41 C.F.R. § 101-6.1021(b) with regard to the first meeting for which a notice was published in the Federal Register, because the notice is legally deficient.

99. The First Meeting Notice states that the meeting "will be open to the public through livestreaming on https://www.whitehouse.gov/live." This indicates that interested members of the public will not be permitted to attend and observe the meeting in person, in violation of 41. C.F.R. § 101-6.1021(b).

100. *Fifth*, the Presidential Advisory Commission and the other federal Defendants, including the Vice President, have failed to comply with the FACA's requirements to provide reasonable public participation in the Commission's activities.

101. Pursuant to 41 C.F.R § 101-6.1011(b), a regulation implementing the FACA, "[t]he chairperson of an independent

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Presidential advisory committee shall comply with the Act and this subpart and shall: . . . (b) [f]ulfill the responsibilities of an agency head as specified in paragraphs (d), (h) and (j) of §101–6.1009 . . . ." 41 C.F.R. § 101-6.1009(h), referenced therein, provides that:

> The head of each agency that uses one or more advisory committees shall ensure: . . . (h) The opportunity for reasonable public participation in advisory committee activities[.]

102. Thus, the Presidential Advisory Commission's refusal to allow in-person attendance at its meetings, along with the Commission having taken action by, at a minimum, sending letters to all 50 States and the District of Columbia seeking voter data to amass and centralize a federal voter database, without any public participation or input, violates the Vice President's obligations as the Chair of the Commission under the FACA to provide for reasonable public participation in the Commission's activities.

103. The Vice President's and Vice Chair's unilateral actions on behalf of the Presidential Advisory Commission, without even the input of the majority of the Commission's members, in seeking to collect voter data from all 50 States and the District of Columbia to amass and centralize a federal voter database without first (a) making known the

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final makeup of the Commission's members, (b) holding any meetings for which notice(s) were published in the Federal Register, (c) swearing in the Commission's members, or (d) providing any opportunity for public comment, participation, or input, necessarily violates the FACA because "[p]ublic observation and comment must be contemporaneous to the advisory committee process itself." *See Alabama-Tombigbee Rivers Coal.*, 26 F.3d at 1106.

104. *Sixth*, the Presidential Advisory Commission and the other federal Defendants have failed to make available for public inspection a privacy impact assessment for the collection of voter data.

105. *Seventh*, the Defendants have failed to comply with 5 U.S.C. app. 2 § 10(b), which provides that "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist."

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106. As just one example, the Vice Chair's June 28, 2017 letter to each of the 50 States and the District of Columbia, which is printed on Presidential Advisory Commission letterhead and which bears the Seal of the President of the United States, does not contain any physical address for the Commission. As a result, certain documents are being sent to the Vice Chair at his state government address in Topeka, Kansas, rather than at "a single location in the offices of the advisory committee" in Washington, D.C., as in the case of Florida Secretary of State Ken Detzner's July 6, 2016 response to the Vice Chair attached hereto as Exhibit H. It is unclear whether the Vice Chair and the other Commission members have transmitted, and whether they will transmit, all records received by them individually or on behalf of the Commission to the Commission's office for public record keeping purposes. Unless the Defendants are enjoined to comply with all laws, including those of the FACA pertaining to access to documents, Plaintiffs and the public at large will necessarily lack confidence that the Commission is operating with the requisite transparency and in the sunshine.

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107. Defendants may have committed additional violations of the FACA not presently known to the Plaintiffs, especially in light of the Defendants' various violations of the FACA that have kept the public in the dark about the Presidential Advisory Commission's conduct.

108. Plaintiffs are, individually and in their representative capacities, adversely affected and aggrieved by the Defendants' actions and inaction.

109. Unless the Court declares the actions of the Presidential Advisory Commission, the Vice President, the Vice Chair, and the other federal Defendants to be illegal and enters an order or orders granting injunctive relief to require the Defendants to follow all legal requirements, Plaintiffs, individually and in their representative capacities, will be entered, without their prior knowledge or consent, into an unauthorized national database—the use of which has not been explained—controlled by the whims of the Commission's directors, that is not authorized by any statute or even the Executive Order, and that is the product of numerous violations of the FACA.

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COUNT II

Exceeding the Authority of the Executive Order

Against Presidential Advisory Commission, Pence, Kobach, Executive Office of the President, Executive Office of the Vice President, Horne, and Mulvaney

110. Plaintiffs restate and incorporate paragraphs 1-73.

111. By Executive Order, the purported mission of the Presidential Advisory Commission is to "study the registration and voting processes used in Federal Elections." The Presidential Advisory Commission is then to submit a report identifying laws and actions that "enhance" or "undermine" the American people's confidence in voting systems used for federal elections. It is also supposed to identity and report vulnerabilities in voting systems and practices used for federal elections.

112. The Executive Order does not empower the Presidential Advisory Commission to amass and centralize a federal database of voters and then publicize it.

113. Through its letters to the 50 States and the District of Columbia, the Presidential Advisory Commission has breached and exceeded its authority under the Executive Order by, *inter alia*,

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(a) Seeking to amass and centralize a federal database of voters with personal and of voters that includes party affiliation, voting history, social security number, military history, criminal history, and address.

(b) Seeking to place this voter data on an unsecure or otherwise suspect server.

(c) Seeking to make the data that it obtains public.

(d) Violating Section 5 of the Executive Order. That is, by creating a federal database, the Commission is duplicating the work of existing government entities, namely the States and the District of Columbia, as well as the *independent commissions* such as the Federal Election Commission and the U.S. Elections Assistance Commission.

114. Plaintiffs are, individually and in their representative capacities, adversely affected and aggrieved by Defendants' actions and inaction.

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COUNT III

Breaches and Violations of Constitutional Separation of Powers and Article II

Against Presidential Advisory Commission, Pence, Kobach, Executive Office of the President, Executive Office of the Vice President, Horne, and Mulvaney

115. Plaintiffs restate and incorporate paragraphs 1-73.

116. Pursuant to the U.S. Constitution, the powers of the three branches are separated.

117. The Framers of the Constitution placed Congress's power in Article I. Executive power follows in Article II.

118. Under the U.S. Constitution, Congress is given the power to enforce and protect, through legislation, the right to vote and the election system. The U.S. Constitution gives no power to the Executive Branch concerning the election system or its integrity. Any power the Executive does have to enforce the right to vote or to protect the electoral process is its general enforcement power and its obligation to execute and enforce Congressional acts and laws – *faithfully*.

119. Under Article I, Congress is given the exclusive federal power to make laws and regulate elections: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be

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prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . ." Art. I, § 4, U.S. Const.

120. Under the 14th, 15th, 19th, 24th, and 26th Amendments to the U.S. Constitution, the right to vote was secured for African-Americans, women, 18-year olds, and poll taxes were eliminated. In each Amendment, Congress was given the power to enforce these rights with legislation. Each of these Amendments conclude with nearly identical language: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The Executive is not mentioned.

121. Using its Article I Powers, Congress has created the exclusive legal regime over the enforcement of elections and the right to vote, to safeguard the integrity of the voting systems, and to otherwise regulate the integrity of elections. Such legislation includes, *inter alia*: The Voting Rights Act of 1965; The National Voter Registration Act of 1993 (Motor Voter Law); and the Help America Vote Act of 2002. These laws are aimed at protecting election integrity and the right to vote. The U.S. Court of Appeals for the Eleventh Circuit explained that the

Help America Vote Act "represents Congress's attempt to strike a balance between promoting voter access to ballots on the one hand and preventing voter impersonation fraud on the other." *Fla. State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1168 (11th Cir. 2008).

122. The Executive Branch has limited, enumerated powers under Article II of the U.S. Constitution.

123. Nowhere in the Constitution or through Acts of Congress is the Executive granted or delegated any power to amass and centralize a national database of voters that includes party affiliation, voting history, social security numbers, military history, criminal history, address, or any other of the personal data the Presidential Advisory Commission requested.

124. To the extent the Executive has implied or express powers through the enforcement and execution of Congressional Acts – including its limited and delegated authority to establish *sunshine, transparent, out-in-the-open* commissions under FACA – nowhere does Congress or the Constitution contemplate that the Executive can amass and centralize a national voter database.

125. The Commission's acts here are unprecedented.

126. One of the Executive's duties is that "he shall take care that the laws be faithfully executed." The Executive – through the Presidential Advisory Commission – is not faithful to the execution of any law. Rather, the Executive is pursuing a widely disputed complaint that millions voted illegally in the 2016 election.

127. The creation and the activities of the Executive's Presidential Advisory Commission unconstitutionally intrude into the Article I powers of Congress over the electoral system, its authority over the protection of the vote, and its authority over the integrity of the election system. The presidential creation of the Presidential Advisory Commission and its ongoing activities violate the separation of powers of the U.S. Constitution.

128. These actions have exceeded the scope of the Executive's Article II powers and have otherwise breached Article II.

129. These transgressions of Separation of Powers principles as well as Article II limitations and duties include, *inter alia*, the following acts and omissions:

a. Using the Presidential Advisory Commission to amass and centralize a federal database with personal and private information of voters.

b. Creating a commission that is not tied to any of the Executive's enumerated Article II powers or to any congressional enactment or authorization.

c. Creating the Presidential Advisory Commission based on a myth of voter fraud and without any legitimate factual finding to support its purported mission.

d. Creating the Presidential Advisory Commission as a ruse to do what the Executive cannot otherwise do – amass and centralize a federal database with personal and private voter information.

e. Failing to faithfully execute any law through the creation of and workings of the Presidential Advisory Commission.

f. Failing to prevent the commission from exceeding its purported authority and purpose as set forth in Section 5 of the Executive Order. That is, by creating a federal

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database, the Presidential Advisory Commission is duplicating the work of existing government entities, namely the states and other existing, independent election commissions such as the U.S. Election Assistance Commission and Federal Election Commission.

g. Failing to prevent the Presidential Advisory Commission from exceeding its purported authority and purpose as set forth in the Executive Order. The Order does not direct the Presidential Advisory Commission to amass and centralize a federal database of voters' personal and private information.

h. Failing to prevent the Presidential Advisory Commission from not disclosing its work materials and full membership as required under the Federal Advisory Committee Act, and to otherwise adhere to the FACA disclosure and sunshine requirements as more fully set forth in Count I.

i. Failing to prevent the commission from exceeding its purported authority and purpose as set forth in Section 5

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of the Executive Order. That is, by creating a commission whose goal, *in the written word*, is to protect voting integrity through study of the registration process and voting processes in Federal Elections, the Presidential Advisory Commission is duplicating the work of existing government entities, namely the states and other existing, independent election commissions such as the U.S. Election Assistance Commission and Federal Election Commission.

j. The creation and the activities of the Presidential Advisory Commission unconstitutionally intrude into the Article I powers of Congress over the electoral system, its authority over the protection of the vote, and its authority over the integrity of the election system. The Presidential Advisory Commission's actions violate the separation of powers delineated in the U.S. Constitution.

k. Failing to faithfully execute FACA.

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COUNT IV

Violation of The Paperwork Reduction Act, 44 U.S.C. § 3501, *et seq.*

Against Presidential Advisory Commission, Pence, Kobach, Executive Office of the President, Executive Office of the Vice President, Horne, and Mulvaney

130. Plaintiffs restate and incorporate paragraphs 1-73.

131. The Paperwork Reduction Act of 1995 ("PRA") was designed for multiple purposes, but most notably was intended to minimize the burden on the public and on state governments, to ensure the "greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the Federal Government." 44 U.S.C. § 3501 (2017).

132. For purposes of the PRA, "the term 'agency' means any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency . . . ." 44 U.S.C. § 3502 (2017). The Presidential Advisory Commission is not otherwise specifically excluded. More particularly, the Executive Office of the

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President is specifically included as an agency bound by the requirements of the PRA.

133. Agencies, such as the Presidential Advisory Commission, when seeking information from more than 10 respondents, must receive approval from the Office of Management and Budget ("OMB") prior to the collection of information.

134. The OMB is tasked with promulgating the Federal Regulations to effectuate the mandates of the PRA.

135. Prior to its collection of information directed at more than ten respondents, namely each of the 50 States and the District of Columbia, the Presidential Advisory Commission must strictly comply with statutory prerequisites. *See* 44 U.S.C. § 3506 (2017).

136. This includes, in part, preparing for the Director of the OMB a review that identifies the plan for collection of information, inventory, and control numbers for each item, and that:

> (iii) informs the person receiving the collection of information of –
>
> (I) the reasons the information is being collected;
>
> (II) the way such information is to be used;
>
> (III) an estimate, to the extent practicable, of the burden of the collection;
>
> (IV) whether responses to the collection of information are voluntary, required to obtain benefit, or mandatory; and

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> (V) the fact that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number.

44 U.S.C. § 3506(c)(1)(B)(iii).

137. The PRA also requires that the agency must "provide 60-day notice in the Federal Register, and otherwise consult with members of the public and affected agencies concerning each proposed collection of information," 44 U.S.C. § 3506(c)(2)(A), and to solicit comments from the public in order to, in pertinent part:

> (i) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility;
> (ii) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;
> (iii) enhance the quality, utility, and clarity of the information to be collected; and
> (iv) minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology[.]

Id.

138. Defendants' have not complied with, nor have they attempted to comply with, any of the required actions of the PRA.

139. Defendants' collection of the information sought prior to complying with the requirements of the PRA is arbitrary, capricious, an

abuse of discretion, or otherwise not in accordance with law under 5 U.S.C. § 706(2)(a) and short of statutory right under 5 U.S.C. § 706(2)(c).

140. The Commission is prohibited from collecting information unless in advance of the collection of information the agency has completed all prerequisites pursuant to the prior sections and other items set forth in 44 U.S.C. § 3507.

141. Plaintiffs are, individually and in their representative capacities, adversely affected and aggrieved by Defendants' actions and inaction.

142. The only remedy that will grant full relief to Plaintiffs for these violations of the Paperwork Reduction Act is an order enjoining the Defendants to comply with the PRA prior to the collection of any information by the Presidential Advisory Commission.

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COUNT V

Violation of Florida Statute § 97.0585: Information Regarding Voters and Voter Registration Confidentiality

Against Presidential Advisory Commission and Detzner

143. Plaintiffs restate and incorporate paragraphs 1-73.

144. The Florida Constitution guarantees the right of privacy to all persons, Art. I, § 23, Florida Constitution:

> Right of privacy.—Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

145. Florida law provides for the confidentiality of certain voter information and voting registration data in § 97.0585, Florida Statutes:

> Public records exemption; information regarding voters and voter registration; confidentiality.—
>
> (1) The following information held by an agency as defined in s. 119.011 is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution and may be used only for purposes of voter registration:
>
> (a) All declinations to register to vote made pursuant to ss. 97.057 and 97.058.
>
> (b) Information relating to the place where a person registered to vote or where a person updated a voter registration.

> (c) The social security number, driver license number, and Florida identification number of a voter registration applicant or voter.
>
> (2) The signature of a voter registration applicant or a voter is exempt from the copying requirements of s. 119.07(1) and s. 24(a), Art. I of the State Constitution.
>
> (3) This section applies to information held by an agency before, on, or after the effective date of this exemption.

146. The Presidential Advisory Commission's request for voter identifying information includes information deemed confidential under Florida law.

147. The Florida Secretary of State is obligated by the Florida Constitution and laws to preserve and maintain the confidentiality of exempt voter registration information. The Florida Secretary of State must be prohibited from disclosing the private, protected confidential information to the Presidential Advisory Commission. Minimally, the Florida Secretary of State must be enjoined to comply with the requirements in Fla. Stat. § 119.07(1)(d) by redacting any private, protected confidential information to the Presidential Advisory Commission.

148. On July 6, 2017, Defendant Detzner issued a press statement indicating he would comply with the Commission's request

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for personal voter registration information from Florida's voter database. Defendant Detzner also stated that in doing so, he will comply with the restrictions set forth in § 97.0585 which prohibit the sharing of a voter's social security number and Driver's License number. To ensure Defendant Detzner complies with § 97.0585, and to prohibit the Commission from attempting to obtain that protected information from any other source, Plaintiffs seek an injunction pursuant to § 97.0585 to preclude disclosure of the social security numbers and Driver's License numbers of Florida voters.

149. At the time of this filing, it is not known whether the Florida Secretary of State has already transmitted the voter data to the Commission, and if so whether he has transmitted only that information permitted to be disclosed under Florida constitutional and statutory provisions cited above, nor whether the transmission of data has been made using a secure method of transmission.

150. To the extent the Presidential Advisory Commission seeks disclosure of private voter information, the request for information is contrary to Florida law.

151. Plaintiffs are, individually and in their representative capacities, adversely affected and aggrieved by Defendants' actions and inaction.

REQUESTED RELIEF

Plaintiffs request that this Court:

A. Order expedited consideration;

B. Declare that the Presidential Advisory Commission and its members have violated the FACA and enjoin the Presidential Advisory Commission and its members from conducting any business unless and until the FACA is fully complied with, and further enjoin all of the federal Defendants from utilizing the products of any materials or information obtained or produced in violation of the FACA;

C. Declare and hold unlawful and set aside Defendants' authority to collect personal voter data from the states;

D. Order Defendants to halt collection of personal voter data;

E. Order Defendants to securely delete and properly disgorge any personal voter data collected or subsequently received;

F. Order Defendants to promptly conduct a privacy impact assessment prior to the collection of personal voter data;

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G. Declare that the Presidential Advisory Commission and its members have violated the PRA and enjoin the Presidential Advisory Commission and its members from conducting any business unless and until the PRA is fully complied with, and further enjoin all of the federal Defendants from utilizing the products of any materials or information obtained or produced in violation of the PRA;

H. Order Defendant Florida Secretary of State to withhold voter-identifying information from the Presidential Advisory Commission;

I. Award costs and reasonable attorney's fees incurred in this action; and

J. Grant such other relief as the Court may deem just and proper.

Dated: July 10, 2017

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, INC., 1600 20th Street NW Washington, DC 20009, Plaintiff, v. UNITED STATES DEPARTMENT OF THE ARMY, 104 Army Pentagon, Room 2E724 Washington, DC 20310, Defendant.	)	Civil Action No.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This action is brought to enjoin ongoing and imminent violations of the Privacy Act by the United States Department of the Army (Army). The Privacy Act prohibits any agency from collecting, using, maintaining, or disseminating records describing how any individual exercises rights guaranteed by the First Amendment. At the request of the Vice Chair of the Presidential Advisory Commission on Election Integrity (Commission), many states will soon submit, and at least one already has submitted, such information to the Army. By accepting this data, the Army will violate the Privacy Act's prohibition on collecting such information; if the Army allows the Commission to download this data, it will violate the Privacy Act's prohibition on disseminating this information. Furthermore, once the Commission downloads this information from the Army, there will be no remedy at law for the Army's violation of the Privacy Act. Therefore, Public Citizen, on behalf of its members, sues to enjoin the Army from collecting, using, maintaining, or disseminating this data, in violation of the Privacy Act.

JURISDICTION AND VENUE

2. This Court has jurisdiction under 28 U.S.C. § 1331, 5 U.S.C. § 552a(g)(1)(D), and 5 U.S.C. § 702. Venue is proper under 5 U.S.C. § 552a(g)(5) and 28 U.S.C. § 1391.

PARTIES

3. Plaintiff Public Citizen, Inc., is a non-profit consumer advocacy organization with members and supporters nationwide. Public Citizen engages in research, advocacy, media activity, and litigation related to, among other things, government accountability and protection of consumer rights. Public Citizen brings this suit on behalf of its members who are upset by the collection of data describing how they exercise rights guaranteed by the First Amendment, and who have fear and anxiety related to how the Commission intends to use the information, including their voting histories and political affiliations.

4. Defendant Army is an agency of the federal government of the United States. The Army maintains systems of records subject to the Privacy Act.

STATUTORY FRAMEWORK

5. Section (e)(7) of the Privacy Act mandates that an agency "maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity." 5 U.S.C. § 552a(e)(7). This prohibition applies to any agency that maintains any system of records, even if the specific record is not incorporated into a system of records. *See Gerlich v. U.S. Dep't of Justice*, 711 F.3d 161, 169 (D.C. Cir. 2013); *Albright v. United States*, 631 F.2d 915, 919 (D.C. Cir. 1980).

6. The Privacy Act defines a "record" as "any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his

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education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph." 5 U.S.C. § 552a(a)(4).

7. The Privacy Act defines "maintain" as "maintain, collect, use, or disseminate." *Id.* § 552a(a)(3).

8. The Privacy Act incorporates the definition of "agency" found in the Freedom of Information Act, *id.* § 552a(a)(1), which in turn defines "agency" as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." *Id.* § 552(f).

FACTUAL BACKGROUND

9. The Commission was established by executive order on May 11, 2017. Exec. Order No. 13799, 82 Fed. Reg. 22,389 (May 11, 2017).

10. Under Executive Order 13799, the Commission is directed to "study the registration and voting processes used in Federal elections" and "submit a report to the President that identifies … (a) those laws, rules, policies, activities, strategies, and practices that enhance the American people's confidence in the integrity of the voting processes used in Federal elections; (b) those laws, rules, policies, activities, strategies, and practices that undermine the American people's confidence in the integrity of the voting processes used in Federal elections; and (c) those vulnerabilities in voting systems and practices used for Federal elections that could lead to improper voter registrations and improper voting, including fraudulent voter registrations and fraudulent voting."

11. The Commission charter mirrors the substantive terms of Executive Order 13799.

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12. Executive Order 13799 names the Vice President as the Chair of the Commission, "which shall be composed of not more than 15 additional members." *Id.* Additional members are appointed by the President, and the Vice President may select a Vice Chair of the Commission from among the members. *Id.* Vice President Pence has named Kansas Secretary of State Kris Kobach to serve as Vice Chair of the Commission.

13. On June 28, 2017, Vice Chair Kobach sent a letter to the Secretaries of State for all 50 states and the District of Columbia requesting data from state voter rolls. The data requested includes political party and voter history from 2006 onwards (collectively, the Protected Records), as well as full name, address, date of birth, last 4 digits of social security number, active/inactive voter status, cancelled voter status, information regarding any felony conviction, information regarding voter registration in another state, information regarding military status, and information regarding overseas citizenship. The Vice Chair noted that "any documents that are submitted to the full Commission will also be made available to the public." The letter provided that responses should be submitted by July 14, 2017, "electronically to ElectionIntegrityStaff@ovp.eop.gov or by utilizing the Safe Access File Exchange ('SAFE'), … a secure FTP site the federal government uses for transferring large data files."

14. On July 5, 2017, in response to litigation initiated by the Electronic Privacy Information Center (EPIC) in the United States District Court for the District of Columbia challenging the Commission's requests for the records (*EPIC v. Presidential Advisory Commission on Election Integrity*, No. 17-1320), Vice Chair Kobach submitted a declaration stating that the records would be submitted through SAFE, and that only narrative responses would be submitted by email. The declaration clarified that the only "documents" that would be made publicly available would be the narrative responses. It also stated that "[w]ith respect to voter roll data, the

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Commission intends to de-identify any such data prior to any public release of documents." Vice Chair Kobach also stated that no state had yet provided information through SAFE.

15. On July 6, 2017, Vice Chair Kobach submitted a second declaration answering questions posed by the judge in *EPIC*. In his declaration, Vice Chair Kobach explained that the SAFE website is operated by the United States Army Aviation and Missile Research Development and Engineering Center (AMRDEC), a component of the Army. Vice Chair Kobach further explained that states will upload the records to SAFE, and the Commission staff will download the records from the website onto White House computers.

16. Some Secretaries of States and other state officials have stated that they will not comply with the request; others have stated that they will provide the information requested by the Commission if not prohibited by their states' laws. Others have not publicly responded.

17. On, July 7, 2017, attorneys for the government stated in a hearing in the *EPIC* case that on July 6, 2017, Arkansas had uploaded voter data to SAFE, where it is being stored.

18. Once the Protected Records are downloaded into the White House computers by the Commission, there will be no adequate remedy available for the violations of the Privacy Act.

FIRST CLAIM FOR RELIEF
(Privacy Act)

19. The Privacy Act permits suit when an agency "fails to comply with any … provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual." 5 U.S.C. § 552a(g)(1)(D).

20. The Protected Records constitute records describing how individuals exercise their rights guaranteed by the First Amendment.

21. The Protected Records are not within the scope of any authorized law enforcement activity.

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22. Under the Privacy Act, the Army cannot collect, use, maintain, or disseminate the Protected Records.

23. Plaintiff's members are adversely affected by the Army's violation of the Privacy Act.

24. Once the Protected Records have been provided to the Commission, plaintiff will be unable to remedy its continuing harm and thus will suffer irreparable harm absent an injunction.

25. Plaintiff is entitled to relief enjoining the Army from collecting, maintaining, and disseminating the Protected Records and directing the Army to expunge any Protected Records that are in its possession or come into its possession.

SECOND CLAIM FOR RELIEF
(Administrative Procedure Act)

26. The Administrative Procedure Act (APA) provides that a reviewing court may set aside final agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

27. The Army's decision to collect, maintain, and disseminate the Protected Records in violation of the Privacy Act is a final agency action that is not in accordance with law.

28. Once the Protected Records have been provided to the Commission, plaintiff will be unable to remedy its continuing harm and thus will suffer irreparable harm absent an injunction.

29. If relief is unavailable under the Privacy Act, plaintiff is entitled to declaratory and injunctive relief under 5 U.S.C. § 706 enjoining the Army from collecting, maintaining, and disseminating the Protected Records and directing the Army to expunge any Protected Records that are in its possession or come into its possession.

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PRAYER FOR RELIEF

Wherefore, plaintiff requests that this Court:

A. Declare that the defendant's maintenance of the Protected Records violates the Privacy Act and, in the alternative, the APA;

B. Enjoin the Army from collecting, maintaining, using, or disseminating the Protected Records;

C. Order the Army to expunge all Protected Records collected prior to entry of the Court's order;

D. Award plaintiff its costs and reasonable attorney fees; and

E. Grant all other appropriate relief.

Dated: July 10, 2017

Respectfully submitted,

/s/ Sean M. Sherman

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,

Plaintiff,

v.

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, *et al.*,

Defendants.

Civil Action No. 17-1320 (CKK)

ORDER
(July 10, 2017)

The Court has received Defendants' [24] response to this Court's [23] Order. In light of the representations made therein, Plaintiff shall file a response by **9:30 A.M.** on **July 11, 2017**, indicating how they intend to proceed in this matter.

SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

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