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

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| UNITED TO PROTECT DEMOCRACY, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, *et al.*,<br><br>Defendants. | Civil Action No. 1:17-cv-2016 (RC) |

**MEMORANDUM IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND DEFENDANTS' MOTION TO DISMISS**

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## INTRODUCTION

The President created and charged the Presidential Advisory Commission on Election Integrity (the "Commission") with studying voter registration and voting practices to identify those practices that enhance or undermine public confidence in the election system. *See* Exec. Order No. 13,799, 82 Fed. Reg. 22,389 (May 11, 2017) [hereinafter "Exec. Order No. 13,799"]. As part of its research activities that would support its final report, on June 28, 2017, the Commission requested that states voluntarily submit voter registration data already made publicly available under their own laws. Some states have submitted data, some have not. Plaintiffs now seek a preliminary injunction to prevent the Commission from collecting data, and to require it to destroy data already collected, on the basis that such collection purportedly violates the Paperwork Reduction Act, 44 U.S.C. § 3501, *et seq*. They do so three-and-a-half months after the Commission requested information, and two-and-a-half months after the Commission began collecting information (after a court in this District denied a motion for preliminary injunction raising similar claims, a decision that has been appealed and will be argued in the D.C. Circuit on November 21, 2017). The Court should deny plaintiffs' request for preliminary relief because they have not shown their entitlement to such an extraordinary remedy. Indeed, the Court should dismiss the complaint in its entirety because the Court lacks subject-matter jurisdiction and plaintiffs fail to state a claim.

As a threshold matter, this Court lacks jurisdiction because plaintiffs have failed to establish standing. Plaintiffs rely exclusively on a theory of informational standing. However, this doctrine only applies in specific statutory contexts when a plaintiff has been deprived of information that a statute requires the government to disclose, and, by being denied that information, suffers the type of harm Congress sought to prevent. The Paperwork Reduction Act

does not satisfy these standards. Rather than being a general open records statute, it is a scheme designed to reduce the paperwork burden on the public, and its disclosure requirements are designed to improve the government's information collection processing, not to create an informational interest vested in the general public. Moreover, standing must be established for each form of relief sought. Accordingly, even if plaintiffs have informational standing to seek specific information, they do not have standing to seek an injunction requiring the Commission to cease collecting information and to destroy information already collected.

Plaintiffs' claims also fail on the merits. Their claims depend entirely on the argument that the Paperwork Reduction Act imposes obligations on the Commission. However, that Act only applies to "agencies," and the Commission is not an "agency" within the meaning of that statute because its sole purpose is to advise the President. Moreover, even if this conclusion were questionable – and it is not – plaintiffs invoke only the Court's mandamus jurisdiction, which requires that an error be "clear." Here, particularly in light of the fact that another judge of this court has already held that the Commission is not an agency under the same definition, such an error cannot be called clear. Plaintiffs' derivative claims against the Office of Management and Budget ("OMB"), which also depend on the theory that the Commission is an agency, similarly fail. Plaintiffs therefore enjoy no likelihood of success on the merits, and their complaint should be dismissed for the same reasons.

In any event, plaintiffs resoundingly fail to show that they will suffer irreparable harm in the absence of preliminary relief. Plaintiffs have – without explanation or excuse – waited three-and-a-half months from the time the Commission announced its intent to collect data to request preliminary injunctive relief. Their request is even more dilatory in light of their stated desire to seek preliminary relief before the Commission collects information. Mem. in Supp. of Prelim.

Inj. ("Prelim. Inj. Mem.") at 35, ECF No. 10. As they well know, the Commission began collecting data two-and-a-half months before they properly served this complaint. Finally, the public interest weighs against emergency injunctive relief. The President established the Commission "in order to promote fair and honest federal elections." Exec. Order No. 13,799. By collecting voter data from the states, the Commission seeks to "study the registration and voting processes used in Federal elections," as it is directed to do in the Executive Order. *Id.* Plaintiffs seek to halt this work with meritless claims while it lacks a personal stake in the outcome of this case. Accordingly, plaintiffs' motion for preliminary relief should be denied, and the Complaint should be dismissed.

## BACKGROUND

### I. STATUTORY BACKGROUND

#### A. The Paperwork Reduction Act

The Paperwork Reduction Act was enacted to reduce the burden of paperwork requests on the public. *See Dole v. United Steelworkers of Am.*, 494 U.S. 26, 32 (1990); 44 U.S.C. § 3501(1). The Act applies only to an "agency," which is defined 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," with some exceptions. *Id.* § 3502(1).

The Paperwork Reduction Act requires federal agencies seeking to collect information to first publish a notice in the Federal Register and allow 60 days for submission of comments. 44 U.S.C. § 3506(c)(2)(A); *see also id.* § 3502(3) (defining "collection of information"). After considering the submitted comments, the agency must then submit its information collection request to the Director of the Office of Management and Budget for review. *See id.*

§ 3507(c)(3). The agency must also publish a second notice in the Federal Register to inform the public that the information collection request has been submitted to OMB and that additional comments may be directed to OMB. *Id.* § 3507(a)(1)(D). OMB must allow 30 days for public comment prior to approving or disapproving an information collection request. *Id.* § 3507(b), (e)(1).

The Act also provides that "[a]ny person may request the [OMB] Director to review any collection of information conducted by or for an agency to determine, if, under this subchapter, a person shall maintain, provide, or disclose the information to or for the agency." 44 U.S.C. § 3517(b). Unless the response is "frivolous, the Director shall, in coordination with the agency responsible for the collection of information," respond within 60 days, and "take appropriate remedial action, if necessary." *Id.* The Paperwork Reduction Act does not provide a private right of action. *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 844 (9th Cir. 1999).

**B. The Administrative Procedure Act**

The APA, 5 U.S.C. §§ 701-706, establishes a waiver of sovereign immunity and a cause of action for injunctive relief for parties adversely affected either by agency action or by an agency's failure to act. *See* 5 U.S.C. § 706(1)-(2); *see also Heckler v. Chaney*, 470 U.S. 821, 828 (1985). The APA, however, has several important limitations. Section 702 declares that APA review is not available "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought" by the plaintiff. 5 U.S.C. § 702. Section 702 accordingly "prevents plaintiffs from exploiting the APA's waiver to evade limitations on suit contained in other statutes." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215 (2012).

Similarly, Section 704 requires that the person seeking APA review of final agency action have "no other adequate remedy in a court . . . ." 5 U.S.C. § 704. To preclude APA review, the alternative remedy "need not provide relief identical to relief under the APA, so long as it offers relief of the 'same genre.'" *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009) (citation omitted). The APA also explicitly excludes from judicial review those agency actions that are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Finally, while the APA allows a court to compel "agency action" that is withheld contrary to law or is unreasonably delayed, § 706(1), or to set aside "agency action" under certain circumstances, § 706(2), such claims can only proceed if a plaintiff identifies a "discrete agency action that [the agency] is required to take." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (emphasis omitted).

## II. FACTUAL BACKGROUND.

### A. The Presidential Advisory Commission on Election Integrity.

The President established the Presidential Advisory Commission on Election Integrity in Executive Order No. 13,799. Exec. Order No. 13,799; *see also* Decl. of Andrew J. Kossack ("First Kossack Decl.") ¶ 1, *Lawyers' Comm. for Civil Rights Under Law v. Presidential Advisory Comm'n on Election Integrity* ("*LCCR v. PACEI*"), No. 17-cv-1354 (CKK) (D.D.C. July 13, 2017), ECF No. 15-1 [attached hereto as Exhibit A]; Decl. of Kris W. Kobach ("First Kobach Decl.") ¶ 3, *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity* ("*EPIC v. PACEI*"), 17-cv-1320 (CKK) (D.D.C. July 5, 2017), ECF No. 8-1 [attached hereto as Exhibit B]. The Commission is charged with "study[ing] the registration and voting processes used in Federal elections," "consistent with applicable law," in order to provide a report to the President. Exec. Order No. 13,799, § 3. Vice President Pence is the Chairman of the Commission. *Id*. § 2. Kansas Secretary of State Kris Kobach is the Vice Chair of the

Commission. First Kobach Decl. ¶ 1. Members of the Commission come from federal, state, and local jurisdictions and both political parties. First Kossack Decl. ¶ 1; First Kobach Decl. ¶ 3.

In furtherance of the Commission's mandate, on June 28, 2017, Vice Chair Kobach sent letters to all fifty states and the District of Columbia requesting publicly available data from state voter rolls and feedback on how to improve election integrity. First Kobach Decl. ¶ 4. Among other things, the letters requested:

> the publicly-available voter roll data for [the State], including, if publicly available under the laws of your state, 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.

*See, e.g.*, *id.*, Ex. 3 (letter to Alabama). The Vice Chair requested responses by July 14, 2017. *Id*. ¶ 5 & Ex. 3.

Shortly thereafter, the Electronic Privacy Information Center ("EPIC") filed suit in this court before Judge Kollar-Kotelly, seeking to enjoin the Commission's collection of voter roll data on the ground that the Commission was required to, but did not, prepare a privacy impact assessment pursuant to the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899. EPIC sought a temporary restraining order and/or preliminary injunction to halt the collection of data by the Commission. On July 10, 2017, the Commission sent the states a follow-up communication requesting that the states not submit any data until the Court ruled on EPIC's motion. Third Decl. of Kris W. Kobach ("Third Kobach Decl.") ¶ 2, *EPIC v. PACEI*, 17-cv-1320 (CKK) (July 10, 2017), ECF No. 24-1 [attached hereto as Exhibit C].

The court ruled on EPIC's motion for injunctive relief on July 24, 2017, denying (without prejudice) the motion for a temporary restraining order and preliminary injunction. On July 26, 2017, Vice Chair Kobach sent a further letter to the states and the District of Columbia, renewing his request for voter roll data and directing the recipients of the letter to contact a Commission staff member for instructions as to how to submit the data securely. *See, e.g.*, Letter from Vice Chair Kobach to John Merrill, Alabama Secretary of State (July 26, 2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/letter-vice-chair-kris-kobach-07262017.pdf. Vice Chair Kobach further reiterated to the states that he was seeking only information that is already publicly available under state law, "which is information that States regularly provide to political candidates, journalists, and other interested members of the public." *Id.* Further, Vice Chair Kobach explained that "the Commission will not publicly release any personally identifiable information regarding any individual voter or any group of voters from the voter registration records" submitted and that "[t]he only information that will be made public are statistical conclusions drawn from the data, other general observations that may be drawn from the data, and any correspondence that you may send to the Commission in response to the narrative questions enumerated in [his] June 28 letter." *Id.* Vice Chair Kobach stated that "individuals' voter registration records will be kept confidential and secure throughout the duration of the Commission's existence," and that, "[o]nce the Commission's analysis is complete, the Commission will dispose of the data as permitted by federal law." *Id.*

The system that will receive the voter roll data is run by the Director of White House Information Technology ("DWHIT"). Decl. of Charles Christopher Herndon ("Herndon Decl.") ¶¶ 1, 3-5, *EPIC v. PACEI*, No. 17-cv-1320 (CKK) (July 17, 2017), ECF No. 38-1 [attached hereto as Exhibit D]. The system allows the states to directly and securely upload the data to a

server within the White House domain. *Id*. ¶ 4-5. No federal agency will play a role in this data collection, and the only people involved will be the DWHIT and a limited number of technical staff from the White House Office of Administration. *Id*. ¶ 6. As of September 29, 2017, nineteen states and one county had submitted information to the Commission. *See* Document Index, *LCCR v. PACEI*, No. 17-cv-1354 (CKK), attached as Ex. F. to Prelim. Inj. Mem., ECF No. 10-3.

On July 3, 2017, plaintiff United to Protect Democracy submitted a letter to the OMB director. Compl. ¶ 58, ECF No. 1. This letter purportedly described plaintiff's belief that Vice Chair Kobach's June 28 letters violated the procedural requirements of the Paperwork Reduction Act, and further requested that OMB review the Commission's purported collections of information and "take necessary remedial action as soon as possible." *Id.* OMB has not provided a response to this letter. *Id.* ¶ 59.

**B. Procedural History.**

Plaintiffs filed their Complaint on September 29, 2017. Compl. They raise two substantive claims. First, they plead that the Commission was subject to the Paperwork Reduction Act, *id.* ¶¶ 61-62, and, by submitting the June 28, 2017, letter requesting information from the states, failed to comply with the review procedures set out in 44 U.S.C. §§ 3506(c) and 3507(a) , *id.* ¶¶ 64-67, and that such a violation is "ongoing," *id.* ¶ 75. Second, they claim that OMB has failed to timely respond to United to Protect Democracy's July 3, 2017, letter that "outline[d] the reasons that the June 28 Letters violate the [Paperwork Reduction Act's] procedural requirements." *Id.* ¶¶ 80-82 (citing 44 U.S.C. § 3517(b)). They assert that OMB's lack of a response constitutes agency action unlawfully withheld or unreasonably delayed, in violation of the APA, 5 U.S.C. § 706(1). *Id.* ¶¶ 82-83. The Complaint seeks mandamus relief,

as well as a declaratory judgment that the Commission has violated the Paperwork Reduction Act and that OMB has failed to comply with 44 U.S.C. § 3517(b). *Id.* ¶¶ 84-87.

Nearly two weeks after filing their Complaint, on October 11, 2017, plaintiffs filed a motion for a preliminary injunction with an expedited hearing request. Prelim. Inj. Mem. Plaintiffs served the complaint by hand delivery on October 13, 2017. *See* Aff. of Serv., ECF No. 15.

## STANDARDS OF REVIEW

### I. PRELIMINARY INJUNCTION

"The standard for issuance of the extraordinary and drastic remedy of a temporary restraining order or a preliminary injunction is very high." *Jack's Canoes & Kayaks, LLC v. Nat'l Park Serv.*, 933 F. Supp. 2d 58, 75 (D.D.C. 2013) (citation omitted). An interim injunction is "never awarded as of right," *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008), and "should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion," *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004). A party moving for a temporary restraining order or a preliminary injunction "must demonstrate '(1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction is not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction.'" *Jack's Canoes*, 933 F. Supp. 2d at 75-76 (quoting *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995)). When, as here, the government is opposing a motion for a preliminary injunction, the third and fourth factors merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).[1]

[1] "The D.C. Circuit has, in the past, followed the 'sliding scale' approach to evaluating preliminary injunctions. . . . The continued viability of the sliding scale approach is highly questionable, however, in light of the Supreme Court's holding in *Winter v. Nat. Res. Def.*

## II. MOTION TO DISMISS

Defendants also seek dismissal of this case (1) under Federal Rule of Civil Procedure 12(b)(1), on the ground that the Court lacks subject-matter jurisdiction because plaintiffs lack standing and because mandamus jurisdiction is inappropriate, and (2) under Rule 12(b)(6), on the ground that plaintiff fails to state a claim upon which relief may be granted. When a defendant files a motion under Rule 12(b)(1), the plaintiff bears the burden of demonstrating the existence of subject-matter jurisdiction. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Courts should "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (citations omitted). "Although a court must accept as true all the factual allegations contained in the complaint when reviewing a motion to dismiss pursuant to Rule 12(b)(1)," the factual allegations in the complaint "will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim." *Wright v. Foreign Serv. Griev. Bd.*, 503 F. Supp. 2d 163, 170 (D.D.C. 2007) (citations omitted). The Court "may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction." *Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

In order to withstand a motion to dismiss under Rule 12(b)(6), a complaint must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not

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*Council*, 555 U.S. 7, 22 (2007)." *Singh v. Carter*, 185 F. Supp. 3d 11, 16 (2016) (citing *In re Navy Chaplaincy*, 738 F.3d 425, 428 (D.C. Cir. 2013), for the proposition that all four prongs of the preliminary injunction standard must be met before injunctive relief can be granted). In any event, regardless of which standard is applied, preliminary injunctive relief is inappropriate here.

do." *Twombly*, 550 U.S. at 555. The plaintiff must, accordingly, plead facts that allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged" and offer "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. "In determining whether a complaint states a claim, the court may consider the facts alleged in the complaint, documents attached thereto or incorporated therein, and matters of which it may take judicial notice." *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006).

## ARGUMENT

### I. PLAINTIFFS LACK STANDING.

Plaintiffs have failed to establish the necessary Article III standing to bring this suit, and accordingly the case should be dismissed for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) (and, therefore, this Court should conclude it lacks jurisdiction to issue a preliminary injunction). The doctrine of standing, an essential aspect of the Article III case-or-controversy requirement, demands that a plaintiff have "a personal stake in the outcome of the controversy [so] as to warrant his invocation of federal-court jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (citation omitted). At its "irreducible [constitutional] minimum," the doctrine requires a plaintiff, as the party invoking the Court's jurisdiction, to establish three elements: (1) a concrete and particularized injury-in-fact, either actual or imminent, (2) a causal connection between the injury and defendants' challenged conduct, and (3) a likelihood that the injury suffered will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560. Facts demonstrating each of these elements "must affirmatively appear in the record" and "cannot be inferred argumentatively from averments in the [plaintiff's] pleadings."

*FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (citation omitted); *see also Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002).

Plaintiffs rest their standing claim with respect to all counts and defendants exclusively on the theory that they have informational standing. Specifically, they assert standing on the basis that the Commission has deprived them of information they are allegedly entitled to under the Paperwork Reduction Act. *See* Prelim. Inj. Mem. at 16-20. Informational standing, however, is a "narrowly defined" theory of standing. *Common Cause v. FEC*, 108 F.3d 413, 420 (D.C. Cir. 1997). It "arises only in very specific statutory contexts," *Ass'n of Am. Physicians & Surgeons, Inc. v. FDA*, 539 F. Supp. 2d 4, 15 (D.D.C. 2008) (citation omitted), where a plaintiff establishes 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). "It is not enough, however, to assert that disclosure is required by law. Only if the statute grants a plaintiff a concrete interest in the information sought will he be able to assert an injury in fact." *Nader v. Fed. Election Comm'n*, 725 F.3d 226, 229 (D.C. Cir. 2013); *see also Friends of Animals*, 828 F.3d at 992 ("In some instances a plaintiff suffers the type of harm Congress sought to remedy when it simply seeks and is denied specific agency records. In others, a plaintiff may need to allege that nondisclosure has caused it to suffer the kind of harm from which Congress, in mandating disclosure, sought to protect individuals or organizations like it.") (internal citations omitted).

As an initial matter, it is not clear what precise, statutorily-mandated information plaintiffs claim they have been deprived of. They cite to 44 U.S.C. § 3506(c)(1)(A), which requires an agency to "review each collection of information before submission to the Director

for review under this subchapter," *see also* Prelim. Inj. Mem. at 17, but by its terms this provision does not require the agency to publicly disclose the results of this review. Nor does 5 C.F.R. § 1320.10, a regulation which discusses "[c]learance of collections of information" by OMB, and is cited by plaintiffs, Prelim. Inj. Mem. at 17, require disclosure of information regarding the proposed collection. That procedural provision merely states that agencies shall "forward a notice to the Federal Register stating that OMB approval is being sought. The notice shall direct requests for information, including copies of the proposed collection of information and supporting documentation, to the agency." 5 C.F.R. § 1320.10(a). In other words, the regulation states that members of the public should contact the agency for information, but does not define what constitutes "supporting documentation" in this context, much less provide a substantive *right* of access to the information produced pursuant to 44 U.S.C. § 3506(c)(1)(A).

Plaintiffs next refer to 44 U.S.C. § 3507, which sets out a provision for public notice and comment regarding agency information collections. *See* Prelim. Inj. Mem. at 18. Failure to comply with notice and comment requirements is, however, only a potential basis for a procedural injury, not a basis for informational injury. In *Summers v. Earth Island Institute*, 444 U.S. 488 (2009), the Supreme Court held that an agency's failure to comply with public comment requirements was a mere "procedural" injury that did not constitute an Article III injury-in-fact. *Id.* at 496-98. Such purported procedural injuries, allegedly suffered by the plaintiffs, do not constitute informational injury. As the Ninth Circuit recognized in *Wilderness Soc'y, Inc. v. Rey*, 622 F.3d 1251, 1259 (9th Cir. 2010), "[n]otice, of course, is a form of information (information that certain projects are being proposed)[;] however Congress's *purpose* in mandating notice in the context of the [Act] was not to disclose information but rather to allow the public opportunity to comment on the proposals. Notice is provided as a predicate

for public comment." Section 3507 provides the same function. Furthermore, "[e]ven though these rights necessarily involve the dissemination of information, they are not thereby *tantamount* to a right to information per se." *Id.* Here, as in *Wilderness Society*, plaintiffs "reframe[] every procedural deprivation in terms of informational loss." *Id.* at 1260. "This approach would allow an end run around the Supreme Court's procedural injury doctrine and render its direction in *Summers* meaningless." *Id.* Nor have plaintiffs complained that the alleged procedural violation has actually caused them concrete injury; they do not, for example, claim that the collection of publicly available information by the Commission injures them in some way.

In any event, plaintiffs have not demonstrated that they have suffered "the type of harm Congress sought to prevent by requiring disclosure" in the context of the Paperwork Reduction Act. Unlike, for example, the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the disclosure provision of the Federal Advisory Committee Act ("FACA"),5 U.S.C. app 2 § 10(b), which are general open records statutes, the Paperwork Reduction Act is a more specific provision without a general "open records" purpose. The Paperwork Reduction Act is a "comprehensive scheme designed to reduce the paperwork burden" on individuals, states, and local governments, *Dole*, 494 U.S. at 933, and to improve the quality, benefit, and cost-effectiveness of federal government information, *see* 44 U.S.C. § 3501(1) – (11) (discussing purposes of the Paperwork Reduction Act). These requirements are designed to improve the government's information collection processes, rather than to create an informational interest in the general public. *See, e.g.*, *Bensman v. U.S. Forest Serv.*, 408 F.3d 945, 958 (7th Cir. 2005) ("In short, statutes like FOIA and FACA that have served as the basis for informational standing have a goal of providing information to the public; the [Appeals Reform Act's] goal is simply to

increase public participation in the decision-making process."). Consistent with this scheme, the Paperwork Reduction Act provides administrative and judicial protections for injured parties, which are "persons" from whom information collection is improperly sought, and not for members of the public generally. 44 U.S.C. § 3512; *see also Ass'n of Immig'n Attorneys v. INS*, 675 F. Supp. 781, 785 (S.D.N.Y. 1987) (holding that the Association and its attorney members lacked standing because they did not have a direct interest in the matters covered by the form at issue).

There is more. Even assuming that plaintiffs do have informational standing to seek the specific Federal Register disclosures set out in 44 U.S.C. § 3507 – and they do not – they do not have standing to seek an injunction requiring the Commission to cease collecting information and to destroy information already collected, which is the relief they actually seek in their complaint and motion. *See* Compl. Prayer for Relief ¶ 1; *see also* Prelim. Inj. Mem. at 1. As the Supreme Court has repeatedly explained, "a plaintiff must demonstrate standing separately for each form of relief sought." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (quotation marks omitted). Plaintiffs cannot, therefore, use their purported informational injury as a substitute for standing to challenge the action that they actually seek to enjoin. Were it otherwise, plaintiffs could routinely seek to enjoin any government action by asserting that the action must be preceded by a published notice, even when the proposed action causes them no injury at all.

Statutes often authorize government agencies to take prescribed actions only after issuing certain documents. In such cases, plaintiffs challenging the ultimate agency action must demonstrate standing by showing that they would be injured by the contemplated action. Plaintiffs who establish standing in this fashion are entitled to challenge the agency's failure to

comply with procedural requirements such as the publication of reports that are the prerequisite for agency action. For example, in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Supreme Court explained that a plaintiff has standing to "enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs." *Id.* at 572.

The Supreme Court has rejected, however, the notion of "standing for persons who have no concrete interests affected," *i.e.* those who would not be affected by the substantive agency action allegedly colored by the procedural violation. *Lujan*, 504 U.S. at 572 n.7. In a similar vein, the Court in *Summers*, 555 U.S. 488, held that a group of plaintiffs lacked standing to challenge the failure to provide notice and an opportunity to comment on a particular category of proposed agency actions. The Court reiterated that "deprivation of a procedural right without some concrete interest that is affected by the deprivation – a procedural right *in vacuo* – is insufficient to create Article III standing." *Id.* at 496. Plaintiffs have not alleged that they have been injured or will be imminently injured by the Commission's collection of publicly available voter information from the states. *See* Prelim. Inj. Mem. at 18-20. Plaintiffs therefore lack standing to challenge the data collection at issue here, or to require the destruction of such data, regardless of whether they might have a cognizable interest in reviewing and responding to a Federal Register notice had one been published.

## II. THE COMMISSION IS NOT AN AGENCY FOR THE PURPOSES OF THE PAPERWORK REDUCTION ACT; HENCE, THE COURT LACKS MANDAMUS JURISDICTION AND PLAINTIFFS' CLAIMS FAIL ON THE MERITS.

The Paperwork Reduction Act only applies to "agencies." *See* 44 U.S.C. § 3502(1). However, the Presidential Advisory Commission on Election Integrity is an advisory body; it is not an agency. *See Elec. Privacy Info. Ctr.* ("*EPIC*") *v. Presidential Advisory Comm'n on Election Integrity*, No. 17-1320 (CKK), 2017 WL 3141907 (D.D.C. July 24, 2017), *appeal*

*docketed*, No. 17-5171 (D.C. Cir. July 27, 2017). Accordingly, the Paperwork Reduction Act does not apply to its activities.

### A. The Commission is Not an Agency.

#### 1. Entities Within the Executive Office of the President Are Agencies Only if They Exercise Substantial Independent Authority.

"Agency" is defined for the purposes of the Paperwork Reduction Act to mean "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. This definition is materially indistinguishable from the definition that appears in the FOIA, 5 U.S.C. § 552(f)(1).[2] The Supreme Court has squarely held that under the FOIA definition, the President and "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President are not included within the term 'agency.'" *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (quotation marks omitted).

The Supreme Court's holding in *Kissinger* has its roots in an earlier decision from the D.C. Circuit. In *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), the court considered the definition of "agency" under the APA which then, as now, is defined as any "authority of the Government of the United States, whether or not it is within or subject to review by another

[2] *Compare* 44 U.S.C. § 3502(1) ("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, but does not include [certain entities not relevant here]"), *with* 5 U.S.C. § 552(f) ("'agency' as defined in section 551(1) of this title includes 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").

agency." *Id.* at 1073 (quoting 5 U.S.C. § 551(1)). This circuit concluded that the APA "apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions." *Id.* Following this reasoning, the court held that the FOIA, which at the time incorporated the APA's definition of "agency," applied to the Office of Science and Technology Policy ("OSTP"), which is an entity within the Executive Office of the President. *Id.* at 1073-74. It reasoned that OSTP's function was not merely to "advise and assist the President," but it also had an "independent function of evaluating federal programs," and therefore was an agency with substantial independent authority that was therefore subject to the APA. *Id.* at 1075.

In *Kissinger*, the Supreme Court concluded that despite the fact that the definition of "agency" in the FOIA specifically referenced "the Executive Office of the President," "[t]he legislative history is unambiguous . . . in explaining that the 'Executive Office' does not include the Office of the President." *Kissinger*, 445 U.S. at 156. Rather, Congress did not intend "agency" to encompass "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." *Id.* (quoting H.R. Rep. No. 93-1380, at 15 (1974) (Conf. Rep.)). That Conference Report further specified that "with respect to the meaning of the term 'Executive Office of the President' the conferees intend[ed] the result reached in *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971)." *See Rushforth v. Council of Econ. Advisers*, 762 F.2d 1038, 1040 (D.C. Cir. 1985) (quoting H.R. Rep. 93-1380, at 14); *see also Meyer v. Bush*, 981 F.2d 1288, 1291 n.1 (D.C. Cir. 1993) (explaining Congress had codified the D.C. Circuit's analysis of EOP entities in *Soucie* in the 1974 FOIA Amendments).

The controlling question in determining whether an entity within the Executive Office of the President is an "agency," for purposes of both the APA and the substantively identifical

definition shared by the FOIA and the Paperwork Reduction Act, therefore, is whether "the entity in question 'wield[s] substantial authority independently of the President.'" *Citizens for Responsibility & Ethics in Wash.* ("*CREW*") *v. Office of Admin.*, 566 F.3d 219, 222 (D.C. Cir. 2009) (quoting *Sweetland v. Walters*, 60 F.3d 852, 854 (D.C. Cir. 1995)); *see EPIC*, 2017 WL 3141907, at *11 ("The most important consideration appears to be whether the 'entity in question wielded substantial authority independently of the President.'" (quoting *CREW*, 566 F.3d at 222)). This principle is rooted in separation of powers concerns. The Supreme Court has expressly held that the President's actions are not subject to the APA, as such a review would infringe upon a coordinate branch. *See Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992); *see also Detroit Int'l Bridge Co. v. Gov't of Can.*, 189 F. Supp. 3d 85, 99-100 (D.D.C. 2016) (separation of powers concerns "bar review [of the President's actions] for abuse of discretion" in performance of statutory duties (citation omitted)). These concerns are equally present when exempting entities within the Executive Office of the President that have the sole function of advising and assisting the President, as such an exemption "may be constitutionally required to protect the President's executive powers." *See Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 909-10 (D.C. Cir. 1993).

The D.C. Circuit has repeatedly considered whether EOP entities "wielded substantial authority independently of the President"[3] in order to determine whether they are subject to the

[3] The D.C. Circuit has used various tests to formulate its inquiry: "These tests have asked, variously, 'whether the entit[ies] exercise[] substantial independent authority,' 'whether . . . the entit[ies'] sole function is to advise and assist the President,' 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 delegate[d] authority.' However the test has been stated, common to every case in which we have held that an EOP unit is [an agency] . . . has been a finding that the entity in question 'wielded substantial authority independently of the President.'" *CREW*, 566 F.3d at 222-23 (internal citations omitted).

FOIA. *CREW*, 566 F.3d at 222 (quoting *Sweetland*, 60 F.3d at 854). Courts have looked to whether these EOP entities have independent regulatory or funding powers or are otherwise imbued with significant statutory responsibilities. For example, as previously mentioned, OSTP was determined to be an agency because it had independent authority to initiate, fund, and review research programs and scholarships. *Soucie*, 448 F.2d at 1073-75. Other courts have found the Council for Environmental Quality ("CEQ") to be an agency because it has the power to issue guidelines and regulations to other federal agencies, *Pac. Legal Found. v. Council on Envtl. Quality*, 636 F.2d 1259, 1262 (D.C. Cir. 1980), and the Office of Management and Budget to be an agency because it has a statutory duty to prepare the annual federal budget, as well as a Senate-confirmed Director and Deputy Director. *Sierra Club v. Andrus*, 581 F.2d 895, 902 (D.C. Cir. 1978) ("Congress signified the importance of OMB's power and function, over and above its role as presidential advisor, when it provided[] . . . for Senate confirmation of the Director and Deputy Director of OMB."), *rev'd on other grounds*, 442 U.S. 347 (1979).

But many other EOP entities – including the Commission – lack such independent authority. For example, President Reagan's Task Force on Regulatory Relief, which was comprised of senior White House staffers and cabinet officials who headed agencies, was not itself an agency because, while it reviewed proposed rules and regulations, it could not itself *direct* others to take action. *Meyer*, 981 F.2d at 1294 ("[W]e see no indication that the Task Force, *qua* Task Force, directed anyone . . . to do anything."). The Council of Economic Advisors ("CEA") similarly lacks regulatory or funding power, and therefore is not an agency. *Rushforth*, 762 F.2d at 1042. Nor is the National Security Council ("NSC") an agency, because it only advises and assists the President in coordinating and implementing national security policy. *Armstrong v. Exec. Office of the President*, 90 F.3d 553, 560-61 (D.C. Cir. 1996). The

Office of Administration ("OA"), which provides "operational and administrative support of the work of the President and his EOP staff," including IT support, is not an agency, *CREW*, 566 F.3d at 24-25, nor is the Executive Residence Staff, which supports the President's ceremonial duties, *see Sweetland*, 60 F.3d at 854. The White House Office is similarly not an agency, *see Sculimbrene v. Reno*, 158 F. Supp. 2d 26, 35-36 (D.D.C. 2001), and neither is the White House Counsel's Office, *Nat'l Sec. Archive v. Archivist of the U.S.*, 909 F.2d 541, 545 (D.C. Cir. 1990), which is within the White House Office. In short, under this Circuit's authority, EOP entities that implement binding regulations (CEQ), grant funding (OSTP), or have important statutorily defined functions (OMB) constitute agencies; those that advise the President (CEA, Task Force), coordinate policy among different entities (NSC), provide administrative support for the President's activities (OA, Executive Residence), or constitute his closest advisors (White House Office) do not.

### 2. The "Substantial Independent Authority" Test Applies to the Paperwork Reduction Act.

Under well-settled principles, these essentially identical definitions of "agency" set out in the Paperwork Reduction Act and the FOIA should be interpreted consistently. The Paperwork Reduction Act was passed in 1980, after the FOIA was amended to include its current definition of "agency," which, then as now, excludes entities within the Executive Office of the President that do not exercise "substantial independent authority." *Kissinger*, 445 U.S. at 156. "[W]hen judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006) (alteration and citation omitted).

Nor can plaintiffs claim that the "substantial independent authority" test applies only to the FOIA (a claim they have not actually made, *see* Prelim. Inj. Mem. at 22-23). Rather, the D.C. Circuit has explicitly rejected this argument that *Kissinger*'s definition of "agency" should be limited only to the FOIA. "[T]he Court of Appeals made clear in *Dong v. Smithsonian* that the Privacy Act's definition of 'agency' is to be interpreted coextensively with the term as used in FOIA." *Alexander v. FBI*, 691 F. Supp. 2d 182, 189 (D.D.C. 2010) (citing *Dong v. Smithsonian Inst.*, 125 F.3d 877, 878-79 (D.C. Cir. 1997)), *aff'd*, 456 F. App'x 1 (D.C. Cir. 2011). And this definition excludes entities within the White House that do not exercise substantial independent authority. *Wilson v. Libby*, 535 F.3d 697, 708 (D.C. Cir. 2008). The claim that the FOIA's legislative history is unique, therefore, is incorrect. *See Alexander*, 691 F. Supp. 2d at 189 (concluding that its previous belief that "the different purposes of the FOIA and the Privacy Act counseled against extending case law that had exempted EOP components from FOIA disclosure requirements in light of the statute's plain language" . . . "is no longer the correct one"). Plaintiffs offers no reason why this holding would not apply to the Paperwork Reduction Act, which, like the Privacy Act, shares a materially identical definition to the FOIA.

Finally, plaintiffs pointedly (and appropriately) do not bring an APA claim against the Commission, which, like the Paperwork Reduction Act, applies only to "agency" action. *See* Prelim. Inj. Mem. at 27. Indeed, plaintiffs argue that they could not bring such a claim, because the APA is not an "adequate alternative remedy." *Id.* Plaintiffs' implicit acknowledgement that the Commission is not an agency subject to the APA, particularly when the definition of "agency" for purpose of the APA and the Paperwork Reduction Act should be interpreted coextensively to require the entity exercise substantial independent authority, *see Soucie*, 448 F.2d at 1067, provides further reason why this claim should be rejected.

### 3. The Presidential Commission is Not an Agency.

The Commission is not an agency subject to the Paperwork Reduction Act, because it lacks "substantial independent authority in the exercise of specific functions." *Soucie*, 448 F.2d at 1073. The Commission reports directly to the President and is "solely advisory." Exec. Order No. 13,799 § 3; *see also* Charter, Presidential Advisory Commission on Election Integrity ¶ 4, https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/commission-charter.pdf ("The Commission will function solely as an advisory body."); *see also EPIC*, 2017 WL 3141907, at *11 ("[T]he Executive Order indicates that the Commission is purely advisory in nature . . . ."). It is chaired by the Vice President (Exec. Order No. 13, 799 § 2a), a constitutional officer who is also not an agency. *See Wilson*, 535 F.3d at 707-08 (holding that the Office of the Vice President was not an agency under the Privacy Act); *Dong*, 125 F.3d at 878 (Privacy Act definitions incorporates FOIA definitions). As plaintiffs themselves note, "much of the Commission's operations and communications have been run out of the Office of the Vice President." Prelim Inj. Mem. at 21. The Commission's purpose is to "submit a report to the President" that identifies rules and activities that enhance and undermine the "American people's confidence in the integrity of the voting process used in Federal elections" and to identify "vulnerabilities in voting systems . . . that could lead to improp[rieties]." Exec. Order No. 13,799 § 3(a)-(c). It will then disband. *Id.* § 6. The Commission has no regulatory, funding, or enforcement powers, nor does it have any independent administrative responsibilities. Instead, it exists solely to provide research and advice to the President. "No independent authority is imbued upon the Commission by the Executive Order, and there is no evidence that it has exercised any independent authority that is unrelated to its advisory mission." *EPIC*, 2017 WL 3141907, at *11. It is not, therefore, an "agency."

This conclusion accords with controlling D.C. Circuit case law. The Council of Economic Advisors, like the Commission, gathers information, develops reports, and makes recommendations to the President. *See* 15 U.S.C. § 1023(c). The Council is not an agency, as defined by the FOIA's materially indistinguishable definition, as it, like the Commission, "has no regulatory power under the statute," "[i]t cannot fund projects based on [its] appraisal, . . . nor can it issue regulations." *Rushforth*, 762 F.2d at 1043. And in *Meyer*, the D.C. Circuit held that the President's Task Force on Regulatory Relief, which, like this Commission, was chaired by the Vice President, was not an agency, because while it reviewed federal regulations and made recommendations, it did not have the power to "direct[] anyone . . . to do anything." 981 F.2d at 1294. The Commission here is situated the same way. In any event, even apart from the functional test establishing that the Commission exists to advise and assist the President, and is therefore not an "agency" under the Paperwork Reduction Act, it is clear that an entity cannot be at once both an advisory committee (as plaintiffs claim the Commission is) and an agency. *See Heartwood, Inc. v. U.S. Forest Serv.*, 431 F. Supp. 2d 28, 36 (D.D.C. 2006) (noting that an "advisory committee cannot have a double identity as an agency") (quoting *Wolfe v. Weinberger*, 403 F. Supp. 238, 242 (D.D.C. 1975)).

Nor does the involvement of federal officials or federal agencies in an advisory committee transform that committee into an "agency." In *Meyer*, the Presidential Task Force at issue included "various cabinet members . . . [who were] unquestionably officers who wielded great authority as heads of their departments." 981 F.2d at 1297. But that did not turn the Task Force into an agency; the relevant inquiry is the function exercised, not the job title. The court of appeals concluded that "there is no indication that when *acting as the Task Force* they were to

exercise substantial independent authority . . . . Put another way, the whole does not appear to equal the sum of its parts." *Id.* (emphasis added).

Similarly, the mere presence of a federal agency that provides some administrative support – but does not exercise "substantial independent authority" – does not transform an otherwise non-agency "whose sole function is to advise and assist" into an agency. *Meyer*, 981 F.2d at 1297-98. Were it otherwise, every advisory committee that received support from federal employees or agencies – *i.e.*, all of them, *see* 5 U.S.C. app. 2 § 10(e) (requiring advisory committees to have support from a designated federal officer or employee) – would be an agency, a conclusion impossible to square with this Circuit's precedent. *See, e.g.*, *Meyer*, 981 F.2d at 1296 (Presidential Task Force on Regulatory reform was not an agency); *Judicial Watch v. Dep't of Energy*, 412 F.3d 125, 127 (D.C. Cir. 2005) (Vice President Cheney's National Energy Policy Development Group was not an agency). Consistent with these decisions, and with the *EPIC* court's conclusion, this Court should hold that the Commission is not an agency for the purposes of the Paperwork Reduction Act, meaning that the Act's requirements do not apply.

**B. Mandamus Is Unavailable to Plaintiffs.**

As plaintiffs recognize, if this Court were to grant relief to plaintiffs in the form of an order against the Commission, it could only be through "drastic and extraordinary" writ of mandamus. *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004); *see also* Prelim Inj. Mem. at 25. But mandamus does not apply here: as the Supreme Court and D.C. Circuit have repeatedly recognized, application of mandamus in a presidential context raises serious constitutional concerns. Those concerns inform the mandamus analysis, where, in any event, plaintiffs have not shown their "clear and indisputable' right to relief.

### 1. The mandamus standards are stringent.

A writ of mandamus is "a drastic [remedy], to be invoked only in extraordinary situations." *N. States Power Co. v. U.S. Dep't of Energy*, 128 F.3d 754, 758 (D.C. Cir. 1997) (quoting *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980)). The mandamus statute provides that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. Mandamus relief is appropriate only if "(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff." *Baptist Med. Ctr. v. Sebelius*, 603 F.3d 57, 62 (D.C. Cir. 2010). The party seeking mandamus "has the burden of showing that "'its right to issuance of the writ is clear and indisputable." *N. States Power Co.*, 128 F.3d at 758 (citation omitted). Even if the plaintiff overcomes all these hurdles, whether mandamus relief should issue is discretionary." *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005).

### 2. Plaintiffs have not satisfied these stringent standards.

Some courts have assumed, but not definitively held, that mandamus claims may lie against the Vice President and other non-agency participants on presidential advisory committees for purposes of enforcing FACA. *See, e.g., Judicial Watch v. Nat'l Energy Policy Dev. Grp.*, 219 F. Supp. 2d 20, 44 (D.D.C. 2002) (holding that "it would be premature and inappropriate to determine whether the relief of mandamus [against the Vice President] will or will not issue" at the motion to dismiss stage"), *re'vd on other grounds*, 334 F.3d 1096 (D.C. Cir. 2003). Nonetheless, mandamus is not appropriate here.

Here, plaintiffs' allegations resoundingly fail the mandamus analysis. As discussed above, the weight of the case law establishes that the Commission is not an agency subject to the

Paperwork Reduction Act. Accordingly, the Commission has no legal duty that can be violated. But even if there was arguably a legal duty under the Paperwork Reduction Act – and there is not – plaintiffs have not established that there is a *clear* duty and a commensurate *clear* right to relief. As discussed above, the D.C. Circuit's case law indicates that entities subject to a substantively identical definition of "agency" as under the Paperwork Reduction Act are not "agencies" unless they exercise substantial independent authority. And Judge Kollar-Kotelly, in a related case, has already held that the Commission is not likely to be considered an agency under that very test. *See EPIC*, 2017 WL 3141907. Thus, at the very least, the question of whether the Commission is an "agency" is an open one. "And open questions are the antithesis of the 'clear and indisputable' right needed for mandamus relief." *In re Al-Nashiri*, 835 F.3d 110, 137 (D.C. Cir. 2016).

As all three initial elements of mandamus are mandatory, *see In re Cheney*, 406 F.3d at 729, and plaintiffs have not satisfied the first two elements, this Court need not reach the issue of whether there is an adequate remedy at law. In any event, plaintiffs do not claim that the APA applies to the Commission, *see* Prelim In. Mem. at 27-28, and it does not, and the Paperwork Reduction Act does not provide a private right of action. *See Alegent Health-Immanuel Med. Ctr. v. Sebelius*, 34 F. Supp. 3d 160, 169-70 (D.D.C. 2014).

**C. Plaintiffs' Derivative Claims Against OMB Are Not Likely to Succeed.**

Finally, plaintiffs claim that OMB has not complied with its obligations under the Paperwork Reduction Act. Plaintiffs point to 44 U.S.C. § 3517(b), which states that "[a]ny person may request the Director to review any collection of information conducted by or for an agency to determine if, under this subchapter, a person shall maintain, provide, or disclose the information to or for the agency." The Director shall "in coordination with the agency

responsible for the collection of information," respond within 60 days, unless the request is frivolous. *Id.* § 3517(b)(1). They say that OMB's lack of response to their inquiry under this subsection violated the Paperwork Reduction Act, and thus the APA.

This provision only applies to a collection of information *conducted by or for an agency*. And, as discussed above, the Commission is not an agency. Accordingly, OMB was under no obligation to respond, nor could it "take appropriate remedial action," 44 U.S.C. § 3517(b)(2), against an entity not subject to the Paperwork Reduction Act. Plaintiffs therefore fail to state a claim. Moreover, even if the Commission is an agency, and it is not, section 3517(b) only states that a person may request that OMB review a collection of information to determine if "a person *shall* maintain, provide, or disclosure the information to or for the agency." *Id.* § 3517(b) (emphasis added). The word "shall" generally connotes a mandatory duty on the part of the regulated party, in this case, the states to whom the Commission addressed Vice Chair Kobach's letter. *See, e.g.*, *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016). But here, the Commission has only *requested* that states voluntarily provide information; it has imposed no duty or obligation. *See* Prelim Inj. Mem. at 7; *EPIC*, 2017 WL 3141907, at 11 ("[The Commission's] request for information is just that – a request – and there is no evidence that [it has] sought to turn the request into a demand, or to enforce the request by any means."). Accordingly, section 3517(b)'s provision allowing for clarification of whether a person must respond to a mandatory collection does not come into question (or, alternatively, plaintiffs request would be termed "frivolous," since they admit that the Commission's request is voluntary, not mandatory). Under either construction, plaintiffs do not state a claim.

Nor can plaintiffs attempt to compel OMB to "take appropriate remedial action, if necessary," 44 U.S.C. § 3517(b)(2), pursuant to section 706(1) of the APA, which allows a

reviewing court to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1). This provision, which reflects the common law writ of mandamus, is subject to "strict limits," and a court may exercise judicial review "only if a federal agency has a ministerial or non-discretionary" duty amounting to "a specific, unequivocal command." *Anglers Conserv. Network v. Pritzker*, 809 F.3d 664, 670 (D.C. Cir. 2016) (quoting *Norton*, 542 U.S. at 64).

Section 3517(b)(2) of the Paperwork Reduction Act does not meet this standard. That provision does not define a *specific* obligation on the part of OMB; rather, it only directs the agency to take "appropriate remedial action," whatever that might be. The nature of what action is "appropriate" is left to OMB to decide, and therefore, cannot be compelled under section 706(1). *See Norton*, 542 U.S. at 654 ("Thus, when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be."). Thus, the Court is prohibited from granting the relief plaintiffs seek – an order requiring OMB to take specific, concrete actions against the Commission. *See* Compl. Prayer for Relief ¶ 5. Nor, in any event, does section 3517(b)(2) require OMB to take specific action at all. The provision only states that OMB shall take appropriate action "if necessary," again, without specifying the circumstances under which action should be considered necessary (or by whom). This generalized requirement does not provide the specificity necessary for a section 706(1) claim to lie.

## III. PLAINTIFFS HAVE NOT DEMONSTRATED IRREPARABLE HARM.

Plaintiffs' motion for a preliminary injunction should also be denied because plaintiffs have not established that they will suffer irreparable injury absent preliminary relief. The D.C.

Circuit "has set a high standard for irreparable injury." *In re Navy Chaplaincy*, 534 F.3d 756, 766 (D.C. Cir. 2008) (citation omitted). It is a "well known and indisputable principle[]" that a "unsubstantiated and speculative" harm cannot constitute "irreparable harm" sufficient to justify injunctive relief. *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam).

As a threshold matter, plaintiffs' claim for a preliminary injunction ought to fail because of their delay in seeking relief. "Courts have found that '[a]n unexcused delay in seeking extraordinary injunctive relief may be grounds for denial because such delay implies a lack of urgency and irreparable harm." *Open Top Sightseeing USA v. Mr. Sightseeing, LLC*, 48 F. Supp. 3d 87, 90 (D.D.C. 2014) (quoting *Newdow v. Bush*, 335 F. Supp. 2d 265, 292 (D.D.C. 2005)). Here, the Commission announced its request for data on June 30, 2017 (and litigation had begun in the *EPIC* case on July 3, 2017, which was the same date plaintiffs sent a letter to OMB). The Commission re-submitted its request for data to the states on July 24, 2017, after the *EPIC* court denied a motion for a preliminary injunction. And yet, plaintiffs did not properly serve their Complaint until October 13, 2017 (having filed, but not served, their preliminary injunction motion two days earlier) – three-and-a-half months after the Commission announced its intent to collect data, and two-and-a-half months after the collection had begun. This delay – which they make no attempt to explain – *see* Prelim. Inj. Mem. at 34-35 – should be fatal to their motion. "The D.C. Circuit has found that a delay of forty-four days before bringing action for injunctive relief was 'inexcusable,' and 'bolstered' the 'conclusion that an injunction should not issue,' particularly where the party seeking an injunction had knowledge of the pending nature of the alleged irreparable harm." *Open Top Sightseeing USA*, 48 F. Supp. 3d at 90 (quoting *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975); *see also AARP v. U.S. EEOC*, 226 F. Supp. 3d 7, 22 (D.D.C. 2016) (plaintiff's "unexplained delay in bringing this suit weights against

a finding of irreparable harm"); *Biovail Corp. v. U.S. Food & Drug Admin.*, 448 F. Supp. 2d 154, 165 (D.D.C. 2006) ("The delay in filing this suit further undermines any showing of irreparable injury"); *Mylan Pharms., Inc. v. Shalala*, 81 F. Supp. 2d 30, 44 (D.D.C. 2000) (delay of two months in bringing action "militates against a finding of irreparable harm").

Nor can plaintiffs attempt to excuse their delay by pointing to the fact that while they submitted a letter to OMB on July 3, 2017, a response was not due under 44 U.S.C. § 3517(b) for sixty days. For starters, plaintiffs seek the bulk of their relief against the *Commission*, where the OMB letter would have no effect (and, indeed, the letter indicates that plaintiffs had actual notice of the data collection). And even with respect to OMB, the sixty days ran on September 1, 2017, which was still forty-two days *before* plaintiffs bothered to properly serve the complaint. That unexcused delay alone weights against injunctive relief. *See Fund for Animals*, 530 F.2d 987.

Plaintiffs, in any event, fail to show irreparable injury. They assert that they will be irreparably harmed in the absence of preliminary relief because they need to gather information so they may "participate in a concrete, knowledgeable way" in the decision-making process surrounding the collection of publicly available information by the Commission. Prelim. Inj. Mem. at 35. But this type of "public debate" interest has been rejected by courts within this district in the context of FOIA. "It is also clear from case law that a movant's general interest in being able to engage in an ongoing public debate using information that it has requested under FOIA is not sufficient to establish that irreparable harm will occur unless the movant receives immediate access to that information." *Elec. Privacy Info. Ctr. v. DOJ*, 15 F. Supp. 3d 32, 46-47 (D.D.C. 2014); *see also Judicial Watch, Inc. v. Dep't of Homeland Sec.*, 514 F. Supp. 2d 7, 10 (D.D.C. 2007). There is another fundamental problem. Plaintiffs say that "this relief becomes unattainable if the Commission's data collection occurs before this Court resolves Plaintiffs'

claims." Prelim Inj. Mem. at 35. But the data collection has *already begun*, and has been ongoing since July 24, 2017, after Judge Kollar-Kotelly denied EPIC's motion for a preliminary injunction. Indeed, the Commission has already received publicly available voter data from nineteen states. *See* Document Index, *LCCR v. PACEI*, No. 17-cv-1354 (CKK), attached as Ex. F to Pl.'s Prelm. Inj. Mem. Had plaintiffs truly believed that relief would be unattainable if not received before the Commission's data collection occurred, the time to seek injunctive relief would have been *before* the Commission's data collection occurred. But plaintiffs waited two-and-a-half months after that date to seek relief. That delay further cuts against their claim of irreparable injury.

## IV. THE BALANCE OF HARMS AND THE PUBLIC INTEREST WEIGH AGAINST INJUNCTIVE RELIEF.

A party seeking a temporary restraining order or preliminary injunction must also demonstrate "that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. "These factors merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

Here, the public interest cuts against an injunction. The President charged the Commission with the important task of "study[ing] the registration and voting processes used in Federal elections." Exec. Order No. 13,799, § 3. The Commission must prepare a report that identifies laws that either enhance or undermine the American people's confidence in the integrity of the voting processes used in Federal elections. The Commission must also examine "those vulnerabilities in voting systems and practices used for Federal elections that could lead to improper voter registrations and improper voting." *Id.*

As a necessary first step toward achieving these objectives, the Commission requested that information from the states be provided on a voluntary basis. Plaintiff seeks to enjoin these

steps, despite the fact that a court within this district has already denied a similar motion for preliminary injunctive relief to collect such data. The public interest lies in favor of allowing the Commission to move forward to satisfy its directive.

## CONCLUSION

For the foregoing reasons, the Court should deny plaintiffs' motion for a preliminary injunction and grant defendants' motion to dismiss the complaint.

Dated: November 9, 2017

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on November 9, 2017, I have electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of electronic filing to the parties.

/s/ *Joseph E. Borson*
JOSEPH E. BORSON