UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NAACP LEGAL DEFENSE & EDUCATION FUND, INC., *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants.	17 CIV. 05427 (ALC)

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

Despite being given the chance to amend their complaint to bolster their allegations of injury, plaintiffs, which are all organizations, still have not alleged sufficient facts demonstrating they have standing or curing the deficiencies in their claims. With respect to standing, the Second Amended Complaint ("SAC") fails to establish standing for at least three reasons. First, it does not allege that the Presidential Advisory Commission on Election Integrity (the "Commission") has caused sufficient concrete "injury-in-fact" to plaintiffs' organizational activities to meet the first prong of the standing inquiry. Plaintiffs' allegations regarding future diversion of resources are too speculative to support standing. With regard to their sparse allegations concerning current efforts, those allegations are too cursory and, in any event, fail to establish that their organizations' efforts in response to the Commission are sufficiently distinct from their regular activities to create a concrete injury. Second, none of plaintiffs' alleged injuries, which stem from their own voluntary response to the Commission's alleged "chilling effect," is fairly traceable to the Commission, and thus plaintiffs fail to meet the causation prong of standing. Third, as to plaintiffs' constitutional claims, plaintiffs have not even attempted to plead facts establishing they have third-party standing to assert claims based on the constitutional rights of voters of color. Accordingly, the SAC should be dismissed for lack of subject-matter jurisdiction.

Standing is not the only issue dispositive of the case. The SAC should also be dismissed for failure to state a claim upon which relief can be granted. First, plaintiffs have not alleged facts sufficient to support a claim that the Commission was created with a discriminatory intent, and therefore their constitutional claims should be dismissed. Plaintiffs' claim that the President has violated Article II of the Constitution and impermissibly intruded into functions expressly delegated by Congress to other agencies ignores the Recommendations Clause of Article II of the

Constitution and the existence of the Federal Advisory Committee Act ("FACA"), specifically authorizing commissions such as the present one. With respect to plaintiffs' claim that the Commission violates the fair balance and inappropriate influence provisions of FACA, because FACA does not provide a private right of action, and because the Commission is not an agency subject to the Administrative Procedure Act, plaintiffs can proceed, if at all, only through the "drastic and extraordinary" writ of mandamus. But mandamus is unavailable here because plaintiffs cannot demonstrate that defendants violated a "clear, nondiscretionary duty" given that these provisions of FACA grant defendants broad discretion. In any event, this broad discretion renders these provisions non-justiciable for lack of manageable standards.

BACKGROUND

The President established the Presidential Advisory Commission on Election Integrity in Executive Order No. 13,799. 82 Fed. Reg. 22,389 (May 11, 2017) [hereinafter Exec. Order No. 13,799]; SAC ¶ 36. ECF No. 66. The Commission is charged with "study[ing] the registration and voting processes used in Federal elections," "consistent with applicable law." Exec. Order No. 13,799, § 3. The Executive Order specifies that the Commission is "solely advisory," and that it shall disband 30 days after submitting a report to the President on three areas related to "voting processes" in federal elections. *Id*. §§ 3, 6. Vice President Pence is the Chairman of the Commission. *Id.* § 2. Kansas Secretary of State Kris Kobach is the Vice Chair. SAC ¶ 38. Members of the Commission come from federal, state, and local jurisdictions and both political parties. *See* Decl. of Andrew J. Kossack ("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 [Ex. A to Federighi Decl.]; Decl. of Kris W. Kobach ("Kobach Decl.") ¶ 3, *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on*

Election Integrity ("*EPIC v. PACEI*"), No. 17-cv-1320 (CKK) (D.D.C. July 5, 2017), ECF No. 8-1 [Ex. B to Federighi Decl.].

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. 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).

Shortly thereafter, the Electronic Privacy Information Center ("EPIC") filed suit in the United States District Court for the District of Columbia, 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 ¶ 2, *EPIC v. PACEI*, ECF No. 24-1 [Ex. C to Federighi Decl.]. On July 24, 2017, the D.C. district court denied EPIC's motion for injunctive relief; this ruling is now on appeal to the Court of Appeals for the D.C. Circuit. *See EPIC v. PACEI*, No. 17-5171 (CKK) (D.C. Cir. appeal filed July 25, 2017).

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. *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 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 stated 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 [the] 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.* As of September 29, 2017, nineteen states and one county have submitted information to the Commission. *See* Document Index, *LCCR v. PACEI*, ECF No. 33-3 [Ex. D to Federighi Decl.].

The Commission has held two public meetings, one on July 19, 2017, and one on September 12, 2017. *See* PACEI Resources, https://www.whitehouse.gov/presidential-advisory-commission-election-integrity-resources (last visited Nov. 8, 2017). Materials relating to these meetings, including minutes of the first meeting and a link to the video of the first meeting, are available on the Commission's webpage. *Id.* Public comments submitted to date are also posted

on the Commission's website, *id.*, or on regulations.gov. *See* https://www.whitehouse.gov/blog/2017/07/13/presidential-advisory-commission-election-integrity (last visited Nov. 8, 2017).

Plaintiff filed this lawsuit on July 18, 2017, and their Second Amended Complaint (ECF No. 66), the operative complaint, on October 20, 2017. In the Second Amended Complaint, plaintiffs challenge the creation, composition, and operation of the Commission through four substantive claims against defendants: (1) that the creation of the Commission violated both the Fifth Amendment's equal protection component, SAC ¶¶ 181-199, and its substantive due process component, *id*. ¶¶ 181-182, 200-201; (2) that defendants have violated the Fifteenth Amendment, *id.* ¶¶ 202-205; (3) that the Commission constitutes unauthorized Presidential action, *id*. ¶¶ 206-229; and (4) that defendants violated FACA's requirements that advisory committees be "fairly balanced" and not "inappropriately influenced," 5 U.S.C. app. 2 § 5(b), SAC ¶¶ 230-240.

STANDARDS OF REVIEW

Defendants 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 (2) under Rule 12(b)(6), on the ground that plaintiffs fail 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). If "the defendant challenges only the legal sufficiency of the plaintiff's jurisdictional allegations," "the court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of plaintiff." *Robinson v. Gov't of Malay.*, 269 F.3d 133, 140 (2d Cir. 2001). "But where

evidence relevant to the jurisdictional question is before the court, 'the district court . . . may refer to [that] evidence.'" *Id.*

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 do." *Twombly*, 550 U.S. at 555. "When presented with a motion to dismiss pursuant to Rule 12(b)(6), the Court may consider documents that are referenced in the complaint, documents that the plaintiffs relied on in bringing suit and that are either in the plaintiffs' possession or that the plaintiffs knew of when bringing suit, or matters of which judicial notice may be taken." *Pehlivanian v. China Gerui Adv. Materials Grp., Ltd.*, 153 F. Supp. 3d 628, 642 (S.D.N.Y. 2015) (quoting *Silsby v. Icahn*, 17 F. Supp. 3d 348, 354 (S.D.N.Y. 2014)).

ARGUMENT

I. PLAINTIFFS LACK STANDING.

The case should be dismissed because plaintiffs have not established standing to bring their claims. The doctrine of constitutional 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). 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. *Defs. of Wildlife*, 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. Dall.*, 493 U.S. 215, 231 (1990) (citation omitted); *see also Thompson v. Cty. of Franklin*, 15 F.3d 245, 249 (2d Cir. 1994). As the party invoking federal jurisdiction, the plaintiff bears the burden of establishing standing. *Field Day, LLC v. Cty. of Suffolk*, 463 F.3d 167, 175 (2d Cir. 2006). The same rigorous standard applies to organizational plaintiffs suing either on their own behalf or on behalf of their members. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982).

In addition to the limitations on standing imposed by Article III's case-or-controversy requirement, there are prudential considerations that limit the challenges courts are willing to hear. *Warth*, 422 U.S. at 498; *see also Am. Psych. Ass'n v. Anthem Health Plans, Inc.*, 821 F.3d 352, 358 (2d Cir. 2016). One example of such a consideration is the doctrine of third-party standing. *Am. Psych. Ass'n*, 821 F.3d at 358. Under this doctrine, "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499.

In the SAC, the nine plaintiffs,[1] all of which are organizations, purport to sue only on their own behalf – none brings claims on behalf of its members. *See* SAC ¶¶ 1-35. To establish constitutional standing, plaintiffs have the burden to establish injury-in-fact, *i.e.*, that they, as organizations, have suffered a "concrete and demonstrable injury to [their] activities – with a consequent drain on [their] resources – constitut[ing] . . . more than simply a setback to the

[1] The plaintiffs are NAACP Legal Defense & Educational Fund ("LDF"); The Ordinary People Society ("TOPS"); #HealSTL; the Florida State Conference of Branches and Youth Units of the NAACP ("Florida NAACP"); the NAACP Pennsylvania State Conference ("NAACP Pennsylvania"); the Hispanic Federation ("HF"); the Southwest Voter Registration Education Project ("SVREP"); the Labor Council for Latin American Advancement ("LCLAA"); and Mi Familia Vota ("MFV").

organization's abstract social interests." *Havens Realty Corp.*, 455 U.S. at 378-79. This Circuit has held that, to meet this burden, an organization must demonstrate at least "a 'perceptible impairment' of an organization's activities." *Nnebe v. Daus*, 644 F.3d 147, 156-57 (2d Cir. 2011) (citation omitted). As discussed below with regard to each individual plaintiff (subsections A-D), plaintiffs fail to meet this burden. In addition, as discussed in subsection E, plaintiffs also fail the second prong of the standing inquiry, *i.e.*, that their alleged injuries are fairly traceable to government action and not the result of self-inflicted harm based on fears of hypothetical future events. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013). Finally, plaintiffs fail to satisfy the prudential requirements to have third-party standing to bring their two constitutional claims (subsection F). Accordingly, the SAC must be dismissed for lack of subject-matter jurisdiction.

A. LDF Lacks Standing Because It Does Not Allege That It is Diverting Resources Or Incurring Extra Costs To "Educat[e] Voters."

Plaintiff LDF makes a single allegation of injury, asserting that it "is educating voters about their rights in response to the work of the Commission." SAC ¶ 1. But educational activities directed towards voters are part of LDF's regular mission. *See id.* (claiming it has used "public education" strategies since its inception). LDF does not allege, as it must to establish an Article III injury, that it has suffered any "real" "economic effect," *Nnebe*, 644 F.3d at 157, as a result of the Commission's activities. *See also N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 295 (2d Cir. 2012) (organization must allege "a concrete injury as a result of the policy"). For example, LDF has not alleged that it has had to *increase* its educational activities or spend *more* money on them, even in view of the recent elections which involved many contests of significant interest and importance. Nor does LDF allege that its "'activities . . . detracted the attention of [its] staff members from their regular tasks at'" the organization. *Ragin v. Harry Macklowe Real Estate Col.*, 6 F.3d 898, 898 (2d Cir. 1993). LDF's nonspecific, cursory reference

to educational activities, part of its regular agenda, is entirely insufficient to meet its burden to establish injury-in-fact for Article III purposes. *See Baur v. Veneman*, 352 F.3d 625, 637 (2d Cir. 2003) ("[A] plaintiff cannot rely solely on conclusory allegations of injury.").

B. #HealSTL, NAACP Pennsylvania, SVREP, LCLAA, And MVA Lack Standing Because Their Claims Regarding Future Diversion Of Resources Are Too Speculative And, As To Current Efforts, Too Nonspecific.

Five plaintiffs, #HealSTL, NAACP Pennsylvania, LCLAA, SVREP, and MVA, allege primarily that they intend to, or will "imminently," have to "divert" resources in response to the Commission's work. *See, e.g.*, SAC ¶ 16 (Pennsylvania NAACP). These plaintiffs do not, however, specify when they will begin to have to divert resources, the size of this resource diversion, or even the specific tasks they will be undertaking. Most assert simply that their efforts "may" include a standard list of activities, using the same or similar language in each case. *See* SAC ¶¶ 8, 15, 23, 25. But undetermined, sometime-in-the-future resource diversion is too speculative to satisfy the requirement that threatened injury must be "certainly impending." *Clapper*, 568 U.S. at 401.

For example, #HealSTL alleges that it "*intends* to undertake activities to address the Commission's impact on its constituents, such as (1) increasing its efforts to inform African-American voters about lawful registration; (2) holding meetings and/or trainings to educate volunteers and the community served about the Commission; and (3) addressing concerns and fears of African-American voters about false accusations of 'voter fraud.'" SAC ¶ 8 (emphasis supplied). Using similar language, NAACP Pennsylvania states that it "will *imminently* undertake activities to address the Commission's impact on its constituents which *may* include (1) increasing its efforts to inform African-American voters about lawful registration; (2) holding meetings and/or trainings to educate members about the Commission; and (3) addressing concerns and fears

of African-American voters about false accusations of 'voter fraud.'" *Id.* ¶ 15 (emphasis added). Both SVREP and LCLAA assert that they "*expect*[] to divert resources to provide support for voters who fear being subjected to voter 'challenges' and prosecution as a result of the Commission's activities," *id.* ¶¶ 23, 28, and "will *imminently* be required to divert limited organizational resources." *Id.* ¶¶ 25, 29. MFV also alleges that it "will *imminently* be required to divert limited organizational resources." *Id.* ¶ 34. These allegations of "imminent" injury – unspecified as to date, amount, or precise activity – fall short of establishing the necessary "certainly impending" injury. *Clapper*, 568 U.S. at 401.

To be sure, four of these plaintiffs also allege that they have had to divert resources already. For example, NAACP Pennsylvania states that it "has already diverted resources by undertaking such activities as (1) monitoring and analyzing constituents' concerns regarding the Commission's activities to understand the impact of the Commission; and (2) creating materials to inform constituents about the Commission and encouraging them not to cancel their registration." SAC ¶ 15. SVREP states it "has diverted resources into education efforts to counteract the Commission's actions harming voters of color and SVREP's mission." *Id.* ¶ 25. MFV similarly alleges it "diverted resources to counteract the Commission's actions harming voters of color and MFV's mission." *Id.* ¶ 33. But, these allegations speak in generalities and categories of activity ("monitoring," "analyzing," "efforts") in describing what they have already done. These nonspecific, cursory allegations do not meet plaintiffs' burden to show a "real," and specific, "economic effect." *Cf. Nnebe*, 644 F.3d at 157 (finding standing based on evidence that organization "provid[ed] initial counseling, explain[ed] the suspension rules to drivers, and assist[ed] the drivers in obtaining attorneys"). It is not enough for plaintiffs to assert that they have "diverted" resources – they must allege specific facts identifying specific, concrete resources that

have been diverted and the real consequences. *See Iqbal*, 556 U.S. at 678 ("[B]are assertions . . . are conclusory and not entitled to be assumed true."); *Fullwood v. Wolfgang's Steakhouse, Inc.*, 2017 WL 377931, at *6 (S.D.N.Y. 2017) ("[C]onclusory allegation that Plaintiff was 'damaged' by Defendants' conduct [is] plainly insufficient to plead plausibly that Plaintiff suffered a concrete and particularized injury."). Moreover, each activity is consistent with the organization's existing mission, and plaintiffs have not established that they have incurred costs *beyond* their normal planned expenditures for such activities. *See EPIC v. U.S. Dep't of Educ.*, No. 12-0327 (ABJ), 2014 WL 449031, at *16 (D.D.C. Feb. 5, 2014) ("Here, the Final Rule has not impeded EPIC's programmatic concerns and activities, but fueled them. And the expenditures that EPIC has made in response to the Final Rule have not kept it from pursuing its true purpose as an organization but have contributed to its pursuit of its purpose."); *Doe v. Vill. of Mamaroneck*, 462 F. Supp. 2d 520, 542 (S.D.N.Y. 2006) (organization lacked standing where its "entire reason for being is to pursue the sort of advocacy . . . that it has pursued in this case" and, accordingly, "spending staff time and resources on . . . advocacy and advice does not work any injury to the organization").

C. Florida NAACP Lacks Standing Because It Has Not Identified Any New Costs That Will Be Incurred By Its Planned Training Workshops.

In addition to general allegations of activities to be undertaken in the future, SAC ¶ 11, the Florida NAACP specifically alleges that, in December, it "plans to hold training workshops with voter registration trainers who, in turn, will conduct grassroots training sessions throughout the state." *Id.* It explains that, "[d]uring these workshops and grassroots training sessions, the Florida NAACP expects to expend resources educating voters about the Commission and addressing concerns about the Commission's plans from its constituents." *Id.* But the Florida NAACP "has held and sponsored voter education, voter registration, and voter protection activities for many years." *Id.* ¶ 10. Moreover it is "operated entirely by volunteers." *Id.* ¶ 9. The Florida NAACP

does not explain whether the December training workshops are uniquely new workshops, whether (in light of the reliance on volunteers) there is any additional economic cost to the Florida NAACP from addressing the Commission's activities in these workshops, or whether including this topic will divert the volunteers from other activities.[2] *See Nnebe*, 644 F.3d at 157 (organization must show a "real" economic effect). In the absence of allegations identifying specific, unique costs to the Florida NAACP from adding Commission-related topics to its December workshops, these assertions do not establish sufficient injury to this plaintiff.

D. TOPS And HF Lack Standing Because They Have Not Alleged That Their Current Activities Are Sufficiently Distinct From Their Regular Activities.

Two plaintiffs (TOPS and HF) describe activities that have caused them to expend resources already. However, given that the activities at issue are the same type of activities these organizations regularly engage in, these organizations do not provide sufficient specifics to enable the Court to conclude that these activities resulted in an economic detriment or that employees were diverted from other tasks.

For example, TOPS alleges that it "has expended resources to answer questions about the Commission from [its] constituents and encourage them not to be intimidated by the Commission in exercising their right to register to vote and/or vote." SAC ¶ 4. It has also "incorporated a discussion of the Commission into its trainings of constituents and volunteers." *Id.* But TOPS "regularly engages in efforts to register, educate, and increase registration and turnout," *id.* ¶ 3, and its new efforts could have been folded into its existing programs with little additional expense. TOPS does not assert otherwise.

[2] Notably, these workshops may be held in conjunction with the annual State Conference. *See* NAACP Annual Conference - State Convention, http://www.flnaacp.com/event/naacp-florida-state-conference-state-convention-2 (last visited Nov. 16, 2017).

Similarly, the Hispanic Federation alleges that "HF staff and volunteers have had to expend resources addressing the[] concerns" of constituents hesitant to register to vote since the Commission began. SAC ¶ 19. HF staff and volunteers "also had to engage in role play exercises with volunteers as to how to address constituents who raised such concerns about their information being sent to the government and/or President Trump." *Id.* In addition, "HF has undertaken such activities as (1) discussing with and directing staff and volunteers on how to address and document concerns from constituents related to the activities of the Commission; and (2) addressing concerns and fears of constituents regarding registering to vote due to the activities of the Commission." *Id.* ¶ 20. But, in furtherance of its core mission, "HF conducts community voter forums; civil participation trainings; neighborhood, street-based, and programs-based voter outreach; and registration and mobilization." *Id.* ¶ 18. HF does not assert its recent work addressing voters' concerns regarding the Commission and roleplaying with volunteers has stretched the bounds of its usual activities so as to incur unique costs or has diverted staff or volunteers from other tasks. These allegations are therefore insufficient to establish the necessary organizational injury. *See EPIC*, 2014 WL 449031, at *16.

E. Plaintiffs' Alleged Injuries Are Not Fairly Traceable To Government Action.

Plaintiffs' allegations also fail to establish that any injury their organizations have incurred or imminently will occur is attributable to the government action they seek to challenge. Plaintiffs generally allege that the creation of the Commission and the Commission's actions have created a sort of "chilling effect," which purportedly has caused individuals to fail to register to vote or to de-register from a "fear" that their registration information will be used for improper purposes. *See, e.g.*, SAC at p.3, ¶¶ 4, 11, 19. In turn, this chilling effect has allegedly caused the plaintiffs to have to divert funds and personnel to counteract it. *Id.* ¶¶ 4, 11, 19.

But plaintiffs do not allege that the information collected by the Commission has yet been used for an improper purpose, or indeed for anything at all. Their chain of causation is thus based on voters' reactions to speculative fears of harm, which plaintiffs have in turn reacted to by undertaking certain measures. But it is well established that litigants "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 416; *see also Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm."); *United Presb. Church v. Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984) ("[T]he 'chilling effect' which is produced by [plaintiffs'] fear of being subjected to illegal surveillance [pursuant to an Executive Order] and which deters them from conducting constitutionally protected activities, is foreclosed as a basis for standing" by *Laird*.); *Robinson v. Sessions*, --- F. Supp. 3d ---, No. 15-cv-6765, 2017 WL 1317124, at *8 (W.D.N.Y. 2017) (plaintiffs lacked standing based on claim that they are being "chilled" from buying guns by the possibility that defendants would intercept their personal information). Indeed, the "chilling" plaintiffs purport to have identified may have many causes other than the creation of the Commission, as plaintiffs themselves recognize. *See* SAC ¶¶ 4, 15 (attributing chilling effect also to President Trump's statements). Plaintiffs' self-inflicted harm here, which stems from speculative fears of future events which have not yet occurred and may never occur, is insufficient to establish standing.

F. Plaintiffs Lack Standing To Assert The Constitutional Rights Of Others.

In Counts One and Two of the SAC, plaintiffs assert claims based on the alleged violation of the constitutional rights of voters of color. *See* SAC ¶¶ 179-205. An additional defect lies in plaintiffs' standing to assert these claims, however. Namely, as a prudential matter, they lack

third-party standing to assert the constitutional rights of others.

The Supreme Court has held that a party ordinarily "cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). There is an exception to this rule in cases where the litigant has shown that it has a "close relation" to the party whose rights are being asserted, and that there is "some hindrance to the third party's ability to protect his or her own interests." *Powers v. Ohio*, 499 U.S. 400, 411 (1991); *see also Am. Psych. Ass'n*, 821 F.3d at 358. Those restrictions stem from a "healthy concern that if the claim is brought by someone other than one at whom the constitutional protection is aimed," *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955, n.5 (1984), the courts might be "called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights," *Warth*, 422 U.S. at 500.

Here, plaintiffs do not have a sufficiently "close relation" to the voters of color whose constitutional rights they seek to vindicate. *See* SAC ¶ 183. Indeed, plaintiffs do not have any defined, formal "relationship" whatsoever with these voters. Plaintiffs are organizations that work in various communities of low-income, minority, or vulnerable populations to register and educate voters and to increase voter registration; however, for the most part, they do not claim those individuals as "members." *See, e.g.*, *id.* ¶¶ 1 (LDF is "educating voters"), ¶¶ 2-4 (discussing TOPS' "community efforts" and referring to voters as "constituents"), ¶¶ 6-8 (same with regard to #HealSTL), *id.* ¶ 22 (SVREP "sponsors" voter registration efforts). In the course of those community outreach efforts, plaintiffs interact with voters of color. But these community outreach efforts do not create any formal representational or fiduciary relationship between plaintiffs and individual voters, such as an attorney-client or even teacher-student-type relationship. Plaintiffs'

situation is thus distinguishable from cases where the courts have historically permitted third-party standing – cases in which "[t]rustees bring suits to benefit their trusts; guardians ad litem bring suits to benefit their wards; receivers bring suit to benefit their receiverships; assignees in bankruptcy bring suit to benefit bankrupt estates; [and] executors bring suit to benefit testator estates." *Sprint Commc'ns Co., LP, v. APCC Servs. Inc.*, 554 U.S. 269, 287-88 (2008); *see also Kowalski*, 543 U.S. at 131 (attorney-client relationship); *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 841 n.44 (1977) (foster parents on behalf of foster children). Plaintiffs have thus not established the necessary "close" relationship. *See Kowalski*, 543 U.S. at 131 (holding that attorneys did not have a "close relationship" with alleged future "clients"; "indeed, they have no relationship at all"); *W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100, 110 (2d Cir. 2008) (holding that "the investment advisor-client relationship" was not sufficiently close).

Plaintiffs have also not established that there is any hindrance that would prevent aggrieved voters from asserting their own constitutional rights. *See Powers*, 499 U.S. at 411. Plaintiffs have not alleged any "daunting" or "considerable practical" barriers, *id.* at 414-15 – or indeed, any barriers at all – to voters' ability to protect their own rights. Indeed, it is possible that voters could seek to have some of the present plaintiffs (those that are "membership" organizations) represent them in a suit similar to the present one, but in which those organizations would be seeking to proceed as representatives of their members, rather than, as here, on their own behalf. *See* SAC ¶ 9 (Florida NAACP's members include predominantly African-American and other minority residents of Florida), ¶ 13 (Pennsylvania NAACP's members include predominantly African-American and minority residents of Pennsylvania). Tellingly, those plaintiffs do not claim to be proceeding on such a basis. A suit in which individual voters are conspicuously absent should not

be used as a vehicle to adjudicate the constitutional rights of such voters. Accordingly, plaintiffs' constitutional claims should also be dismissed on prudential grounds.

II. PLAINTIFFS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

A. Plaintiffs Have Failed To State A Claim For Relief Under The Fifth Amendment's Due Process Clause (Count I) Or The Fifteenth Amendment (Count II).

In Count I, plaintiffs claim that the Commission's creation and the actions it has taken to date are "motivated by racial discrimination," SAC ¶ 183, and "serve[] as a means to advance racial discrimination," *id.* ¶ 193, in violation of the equal protection component of the Fifth Amendment's Due Process Clause. *Id.* ¶ 182. For such a claim to survive a motion to dismiss, however, a plaintiff must plead "facts sufficient to support a finding of racially discriminatory intent or purpose that would plausibly give rise to an entitlement to relief." *Hayden v. Paterson*, 594 F.3d 150, 163 (2d Cir. 2010) (quoting *Iqbal*, 556 U.S. at 679). Disparate impact alone is not sufficient to show an intent to discriminate, *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1221 (2d Cir. 1987); instead, plaintiffs must allege that defendants have taken action *because of* the adverse effects upon an identifiable group, *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979); *see also Pyke v. Cuomo*, 2006 WL 3780808, at *4 (N.D.N.Y. Dec. 21, 2006) ("Government action also violates principles of equal protection if it was motivated by discriminatory animus and its application results in a discriminatory effect.") (citing *Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195, 204 (2d Cir. 2006)). Plaintiffs have not alleged facts that, taken together, plausibly show that the creation of the Commission was motivated by racial discrimination against voters of color.

In general, "[p]roving the motivation behind official action is often a problematic undertaking." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985). To begin, plaintiffs focus their

argument on the fact that candidate and later President Trump discussed the possibility of voter fraud in the 2016 election. *E.g.*, SAC ¶¶ 43-68. They also highlight statements from some other Commission members discussing the importance of preventing voter fraud, either in the 2016 election or more generally. *E.g.*, *id.* ¶¶ 90-91, 94, 105, 112, 114-15, 136-39, 143-44. Plaintiffs contrast these discussions of voter fraud to cases, which occurred in different contexts than those found here, where courts have found that measures that had been styled as preventing voter fraud were promulgated with a discriminatory intent. *See id.* ¶¶ 190-91 (citing *Veasey v. Abbott*, 830 F.3d 216, 237 (5th Cir. 2016) and *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016)). Plaintiffs also suggest that a concern about voter fraud is suspect because "[n]umerous studies have shown that 'voter fraud' is extremely rare." SAC ¶ 45.

In essence, then, plaintiffs argue that because voter fraud was an espoused concern of the President and several members of the Commission, and because voter fraud is not a problem, allegations about voter fraud must necessarily be taken to be code for an intent to discriminate on the basis of race. *See* SAC ¶¶ 189-92. This premise does not plausibly follow. Indeed, the Supreme Court has rejected the premise that a desire to prevent voter fraud necessarily embodies an intent to discriminate. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008) (Stevens, J., plurality) ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.").

In any event, President Trump's statements as a candidate, as President-elect, and as a new President, are not a proper basis for inferring discriminatory intent with respect to the formation

of the Commission five months after his presidency began. These statements occurred before or shortly after the President assumed office and took the prescribed oath to "preserve, protect, and defendant the constitution," U.S. Const. Art. II, § 1, Cl. 7. Such early statements may not represent the President's best and most considered thoughts after taking this oath and formally assuming the responsibilities imbued in his office. Nor do such early statements necessarily reveal the position of government officials, as they are made without the benefit of advice from an as-yet unformed Administration. *See Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) ("[O]ne would be naïve not to recognize that campaign promises are – by long democratic tradition – the least binding form of human commitment."). Finally, a "presumption of regularity" attaches to all federal officials' actions. *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14 (1926). The presumption, which is magnified here by respect for the head of a coordinate Branch, counsels crediting the Order's stated purposes, absent the clearest showing to the contrary.

Nor does the appointment of certain Commissioners plausibly show a discriminatory intent on the part of the Commission or the President. Plaintiffs claim that some Commissioners are interested in voter fraud laws or serve on organizations that "promote restrictive voting laws." *E.g.*, SAC ¶¶ 112. But merely holding these views does not plausibly evince a discriminatory intent, much less one attributable to the Commission. Neither does the fact that the Vice Chair runs a crosscheck system that allegedly has "false positives . . . disproportionately likely to be voters of color." *Id.* ¶ 99. Even assuming that these facts, if true, show discriminatory effect on the basis of color, discriminatory effect is not enough for a constitutional violation. *Hayden*, 594 F.3d at 162-63. In any event, isolated statements or actions by individual Commissioners do not show that the *Commission* was constituted to intentionally discriminate.

Plaintiffs' other factual allegations similarly fail to show plausible evidence of an intent to discriminate. Plaintiffs claim that the President departed from the requirements of Executive Order No. 12,838 and 41 C.F.R. § 102-3.60(b)(3) in constituting the Commission. SAC ¶¶ 187-88. Both of these provisions, however, only apply to *agency-created* committees, not, as here, Presidential committees. Plaintiffs also say that, in certain circumstances, courts have held that racially-suppressive voting measures were justified by relying on unsubstantiated claims of voter fraud. *Id.* ¶¶ 189-192. But whatever the particular contexts of those state laws, these examples cannot be used to generalize to a conclusion that *any* claim about voter fraud is necessarily motivated by discrimination. *See Crawford*, 553 U.S. at 194-96. Finally, plaintiffs allege that the Commission has had a "chilling effect" on voters. SAC ¶¶ 171-178, 194-198. But there are no factual allegations that this chilling effect, if real, has a disproportionate effect on voters of color, and even if it did, disproportionate effect is insufficient for an equal protection claim. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

Plaintiffs' cursory claim that defendants have violated the Fifth Amendment's substantive due process clause, SAC ¶ 200, should also be dismissed. "[O]nly the most egregious official conduct," conduct that "shocks the conscience," will subject the government to liability for a substantive due process violation based on executive action. *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). That is not the case here. And, for the reasons above, plaintiffs have also failed to state a claim under the Fifteenth Amendment, which provides that the right to vote shall not be denied or abridged on account of race or color. U.S. Const., Amend. XV. An actionable Fifteenth Amendment claim also requires evidence of discriminatory intent, which, as discussed above, is lacking here. *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) ("[R]acially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation.")

superseded by statute as recognized in Thornburg v. Gingles, 478 U.S. 30, 35 (1986); *Butts v. N.Y.C.* 779 F.2d 141, 143 n. 1 (2d Cir. 1985) ("[T]he standard for a fourteenth amendment violation is the same as the standard for a fifteenth amendment violation.").

B. Plaintiffs Have Failed To State A Claim That The President Has Acted Outside His Constitutional Powers (Count III).

Plaintiffs' claim that the President has violated Article II of the Constitution (governing executive powers) and impermissibly intruded into functions expressly delegated by Congress to the Election Assistance Commission should also be dismissed. First, plaintiffs claim generally that the President had no authority under Article II to form a Commission "to launch investigations that target individual citizens absent specific authorization by Congress." SAC ¶ 211. But the Commission's collection of data is not the "launch" of an investigation targeting individuals. The collection of publicly available data is part of the Commission's legitimate function to gather information to inform its study and eventual report to the President. *See Nat'l Anti-Hunger Coal. v. Exec. Comm. of the President's Private Sector Survey on Cost Control*, 557 F. Supp. 524, 529 (D.D.C. 1983) ("Before the Committee can produce final recommendations, it must gather information, explore options with agencies to get comments and reactions, and evaluate alternatives."). FACA itself clearly provides that the President may establish a Presidential Advisory Commission and does not limit the subjects that may be addressed. 5 U.S.C. app. 2 § 2(B), (4). Plaintiffs do not plead facts that would show that the data the Commission collects will be used for anything but the Commission's legitimate purpose of studying elections– there are no factual allegations that the Commission has begun to or intends to investigate individuals. SAC ¶ 214.

Second, plaintiffs contend that the Commission impermissibly intrudes into functions expressly delegated by Congress to the Election Assistance Commission under the National Voting Rights Act, 52 U.S.C. §§ 20501-20511. SAC ¶¶ 215-227. But there is no basis for a claim that the

EAC is the *only* organization that may examine issues related to elections. Moreover, such a claim would infringe on the President's ability to take care as to how the laws are executed – pursuant to this constitutionally granted power, the President can investigate the administration of executive agencies or check their efforts. *See Indep. Meat Packers Ass'n v. Butz*, 395 F. Supp. 923, 932 (D. Neb. 1975) (Section 3 of Article II "by necessity, gives the President the power to gather information on the administration of executive agencies"). Further, section 3 of Article II also grants the President broad power to recommend legislation to Congress, which would necessarily be on subjects as to which Congress has power to regulate under the Constitution. *See* Recommendations Clause, art. II, § 3 ("He shall . . . recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("The Constitution limits [the President's] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."); *see also Ass'n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 908 (D.C. Cir. 1993) ("*AAPS*") (FACA advisory committees "to some extent always implicate proposed legislation"). And the existence of the very federal laws relied upon by plaintiffs shows that *both* the states *and* the federal government possess authority in this area and requires rejection of plaintiffs' claim that the Commission's work intrudes "upon dignity of states under Tenth Amendment." SAC ¶ 228; *see, e.g., Foster v. Love*, 522 U.S. 67, 69 (1997) ("The Elections Clause of the Constitution, Art. I, § 4, cl. 1, . . . invests the States with responsibility for the mechanics of congressional elections, . . . , but only so far as Congress declines to preempt state legislative choices.").

In sum, Count Three of the Second Amended Complaint ignores section 3 of Article II of the Constitution and the existence of FACA specifically authorizing commissions such as the present one, and is based on ungrounded speculation that the Commission will conduct investigations into individuals. These claims are frivolous and should be dismissed.

C. Plaintiffs Have Failed To State A Claim Under FACA And The APA (Counts IV & VII).

1. Any FACA Claim Must Lie Under The APA Because FACA Does Not Provide A Private Right of Action.

FACA does not explicitly provide a private right of action, *see* 5 U.S.C. app 2 § 1 *et seq*., and, as every court to consider the matter has concluded, there is no basis to infer such a right. "[P]rivate rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. . . . Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander v. Sandoval*, 532 U.S 275, 286-87 (2001) (internal citations omitted); *see also Republic of Iraq v. ABB AG*, 768 F.3d 145, 170-71 (2d Cir. 2014) (applying *Sandoval*). Since *Sandoval*, every court to have explicitly considered the question has concluded that FACA does not provide a private right of action. *See, e.g.*, *Int'l Brominated Solvents Ass'n v. Am. Conf. of Governmental Indus. Hygienists, Inc.*, 393 F. Supp. 2d 1362, 1376-78 (M.D. Ga. 2005) ("Congress did not intend for FACA to permit a private right of action."); *Freedom Watch, Inc. v. Obama*, 807 F. Supp. 2d 28, 32-33 (D.D.C. 2011) (collecting cases holding that "FACA does not create a private right of action because there is no evidence of Congressional intent to confer a private remedy for FACA violations."); *Pebble Ltd P'ship v. EPA*, No. 3:13-cv-171, 2015 WL 12030515, at *2 (D. Alaska June 4, 2015). Accordingly, plaintiffs can only proceed, if at all, under the APA or under mandamus, as they themselves acknowledge (*see* SAC ¶¶ 250-254 (APA allegations), ¶¶ 246-249 (mandamus allegations)). As discussed below, however, neither avenue is available here.

2. The Commission Is Not An Agency Subject To The APA And FACA.

a. The definition of "agency."

The APA defines an "agency" as "each authority of the Government of the United States," subject to several limitations not applicable here. 5 U.S.C. § 551(1). The courts have consistently recognized that, while the APA definition of "agency" may be broad, it does not encompass entities within the Executive Office of the President ("EOP") whose function is merely to advise and assist the President. In *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), the D.C. Circuit first considered the definition of "agency" under the APA. The court concluded that the APA "apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions." *Id*. at 1073. Following this reasoning, the court held that the Freedom of Information Act ("FOIA"), which at the time incorporated the APA's definition of "agency," applied to the Office of Science and Technology Policy ("OSTP"), an entity within EOP. *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 thus was an agency with substantial independent authority that was subject to the APA. *Id*. at 1075.

The Supreme Court has subsequently confirmed the principle that entities that "advise and assist the President" and that lack "substantial independent authority" are not "agencies." In *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980), the Court considered the scope of the FOIA definition of "agency," which had been amended in 1974, after *Soucie*, to its current version. Then, as now, the FOIA definition stated that, for FOIA purposes, "'agency' as defined in [5 U.S.C. §] 551(1) . . . 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." 5 U.S.C. § 552(f)(1). The Court concluded that, despite this language, "[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*." *Main St. Legal Servs., Inc. v. Nat'l Sec. Council*, 811 F.3d 542, 547 (2d Cir. 2016) (quoting Conf. Rep. at 154).

The rationale for these decisions 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 Lunney v. United States*, 319 F.3d 550, 555 (2d Cir. 2003) ("[T]he President is not an agency" whose actions are subject to review under the APA.). These concerns are equally present when considering the status of entities within EOP that have the sole function of advising and assisting the President – an exemption for such entities from operation of the APA "may be constitutionally required to protect the President's executive powers." *AAPS*, 997 F.2d at 909-10.

Further, the *Soucie* and *Kissinger* analyses of "agency" apply to both the APA and the FOIA. To begin, *Soucie* itself was a case interpreting the APA's definition of "agency." *See Soucie*, 448 F.2d at 1073 ("The statutory definition of 'agency' is not entirely clear, but the APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions."). The D.C. Circuit has since made clear that this definition applies to the APA generally. *See Dong v. Smithsonian Inst.*, 125 F.3d 877, 881 (D.C. Cir. 1997)

("Our cases . . . requir[e] that an entity exercise substantial independent authority before it can be considered an agency for [5 U.S.C.] § 551(1) purposes.").

In this Circuit, the controlling questions in determining whether an entity within EOP is an "agency" for the purposes of the APA is whether the entity's "sole function" is to advise and assist the President and whether the entity in question wields "substantial independent authority."[3] *Main St. Legal Servs.*, 811 F.3d at 547. In conducting this analysis, courts (primarily in the D.C. Circuit) have looked to whether the EOP entity at issue has independent regulatory or funding powers or are otherwise imbued with significant statutory responsibilities. OSTP, for example, was an agency because it had independent authority to initiate, fund, and review research programs and scholarships. *Soucie*, 448 F.2d at 1073-75. The D.C. courts have also 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 OMB 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), *rev'd on other grounds*, 442 U.S. 347 (1979).

[3] The D.C. Circuit, which the other circuits generally follow on this issue, *see, e.g., Main Street Legal Servs.*, 811 F.3d at 547, 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 delegat[ed] 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.'" *Citizens for Responsibility & Ethics in Wash. ("CREW") v. Office of Admin.*, 566 F.3d 219, 222 (D.C. Cir. 2009) (citations omitted). Thus, the D.C. Circuit has primarily focused on the "substantial independent authority" test. *EPIC v. PACEI*, No. 17-cv-1320, 2017 WL 3141907, at *11 (D.D.C. 2017) ("The most important consideration appears to be whether the 'entity in question wielded substantial authority independently of the President.'") *appeal filed*, No. 17-5171 (D.C. Cir. July 27, 2017).

But many other EOP entities lack such independent functions or 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, there was "no indication that the Task Force, qua Task Force, directed anyone . . . to do anything." *Meyer v. Bush*, 981 F.2d 1288, 1294 (D.C. Cir. 1993). The Council of Economic Advisors ("CEA") similarly lacks regulatory or funding power, and therefore is not an agency. *Rushforth v. Council of Econ. Advisors*, 762 F.2d 1038, 1042 (D.C. Cir. 1985). 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); *Main St. Legal Servs.*, 811 F.3d at 553 (the NSC "is not an agency subject to the FOIA because its sole statutory function is to advise and assist the President"). 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 224-25, nor is the Executive Residence Staff, which supports the President's ceremonial duties, *see Sweetland v. Waters*, 60 F.3d 852, 854 (D.C. Cir. 1995). 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). In short, EOP entities that implement binding regulations (CEQ), grant funding (OSTP), or have important statutory functions (OMB) constitute agencies; those that advise the President (CEA, Task Force), coordinate policy (NSC), provide administrative support (OA, Executive Residence), or constitute the President's closest advisors (White House Office) do not.

b. The Commission's function is to advise and assist and it does not exercise substantial independent authority.

The Commission is not an agency subject to the APA because its "sole function" is to provide advice to the President, *Kissinger*, 445 U.S. at 156, and it lacks "substantial independent authority in the exercise of specific functions." *Soucie*, 448 F.2d at 1073. Accordingly, plaintiffs lack a cause of action under the APA for violations of FACA.

The Commission was established by and reports directly to the President, and is chaired by the Vice President (Exec. Order No. 13,799, § 2), a constitutional officer who is also not an agency. *See Wilson v. Libby*, 535 F.3d 697, 707-08 (D.C. Cir. 2008). As stated expressly in both the Executive Order and the Commission's charter, the Commission's role is "solely advisory." Exec. Order No. 13,799, § 3; *see also* The White House, Charter; Presidential Advisory Commission on Election Integrity (June 23, 2017), ¶ 4, https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/commission-charter.pdf ("The Commission will function solely as an advisory body."). This language thus make clear "that the sole function . . . conferred on the [Commission] is advisory to, and not independent of, the President." *Main St. Legal Servs.*, 811 F.3d at 549; *see also EPIC*, 2017 WL 3141907, at *11 ("[T]he Executive Order indicates that the Commission is purely advisory in nature.").

Nor does the Commission possess any "independent authority." The Commission is directed 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. 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. The Commission is not, therefore, an "agency."

This conclusion accords with case law from the D.C. Circuit, the Circuit most familiar with the status of entities within the Executive Office of the President. 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). But the Council is not an agency, as it, like the Commission, "has no regulatory power under the statute," "[i]t cannot fund projects . . . , 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.

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. "[T]here is no indication that when acting as the Task Force they were to exercise substantial independent authority." *Id.*

Similarly, the mere presence of a federal agency (here, GSA) that provides 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) – would be an agency, a

conclusion impossible to square with precedent. 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 APA, it is clear that an entity cannot be at once both an advisory committee (as plaintiff claims 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)).

Finally, neither the Office of the Vice President nor the umbrella unit, the Executive Office of the President, is itself a discrete "agency." The D.C. Circuit has concluded that the Office of the Vice President is not an agency under the Privacy Act and FOIA. *See Libby*, 535 F.3d at 707-08; *Schwarz v. Dep't of Treasury*, 131 F. Supp. 2d 143, 147-48 (D.D.C. 2001), *aff'd*, 2001 WL 674636 (D.C. Cir. May 10, 2001). That court has also held that the EOP in its entirety is not the proper unit of analysis for determining whether an EOP entity is an "agency." "[I]t has never been thought that the whole Executive Office of the President could be considered a discrete agency under FOIA." *United States v. Espy*, 145 F.3d 1369, 1373 (D.C. Cir. 1998). Indeed, were it otherwise, none of the *Soucie* case law would make sense: if a party could simply sue the "EOP," there would be no need for a component-by-component analysis.

3. The Fair Balance And Inappropriate Influence Provisions Of FACA Are Nonjusticiable.

Even if the Court were to conclude that plaintiffs had a cause of action for violation of FACA either under FACA or the APA, plaintiffs' FACA claims should still be dismissed as plaintiffs' allegations that the President has violated the neutrality requirements of section 5 of FACA, *see* SAC ¶¶ 230-240, even if true (which they are not), are non-justiciable. As set forth above, the "fair balance" provision, section 5(b)(2) of FACA, directs that the President or creating agency of an advisory committee must "require the membership of the advisory committee to be

fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." The "inappropriate influence" provision, section 5(b)(3), requires that the President or creating agency put in place "appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment." These provisions are non-justiciable for lack of manageable standards for determining what is a "fair balance" and what is "inappropriate influence." *See Pub. Citizen v. Nat'l Advisory Comm. on Microbiological Criteria for Foods*, 886 F.2d 419, 426 (D.C. Cir. 1989) (Silberman, J., concurring in the judgment).[4]

As explained, because "FACA contains no provision for judicial review, the availability of such review must derive from the APA." *Fertilizer Inst. v. EPA*, 938 F. Supp. 52, 54 (D.D.C. 1996) (citations omitted). But, although the APA "embod[ies] a basic presumption of judicial review," *Lincoln v. Vigil*, 508 U.S. 182, 190 (1993), review is unavailable where "statutes preclude judicial review" or "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(1)-(2). The latter is the case where "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Judicial review under the Mandamus Act similarly requires a meaningful standard by which to evaluate whether a defendant has a clear duty to take certain action. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 217 (1962). As discussed further below, section 5(b) of FACA does not provide such standards. *See generally Nat'l Anti-Hunger Coal.*, 557 F. Supp. at 530 (FACA is "another example of unimpressive legislative drafting. It is obscure,

[4] As explained below, Judge Silberman's concurrence in *Microbiological*, that "fairly balanced" and inappropriate influence claims under FACA § 5(b) are nonjusticiable, has been widely relied upon.

imprecise, and open to interpretations so broad that in the present context . . . it would threaten to impinge unduly upon prerogatives preserved by the separation of powers doctrine . . . The Act leaves a myriad of questions unanswered, especially concerning the extent to which Congress intended to interfere with the President's formulation of policy.").

a. The fair balance provision does not provide a meaningful standard

First, the "fair balance" provision in section 5(b)(2) does not define "fairly balanced," nor does it specify how a "fairly balanced" membership on an advisory committee is to be achieved, in terms of either the type of representatives or their number. As an initial matter, "even before the points of view on an advisory committee can be balanced at all – 'fairly' or otherwise – it must first be determined *which* points of view should be balanced." *Microbiological*, 886 F.2d at 426 (Silberman, J., concurring). And there is no "principled basis for a federal court to determine which among the myriad points of view deserve representation on particular advisory committees." *Id.* The "relevant points of view on issues to be considered by an advisory committee are virtually infinite." *Id.*; *Doe v. Shalala*, 862 F. Supp. 1421, 1430 (D. Md. 1994) ("For the Court to become entangled in determining which viewpoints must be represented is for the Court to arbitrarily substitute its judgment for that of the agency.").

There is similarly no "principled way" to determine whether those views are fairly balanced. *Microbiological*, 886 F.2d at 428. Such a determination would require the court to make "arbitrary judgments" about "which organizations or individuals qualified as bona fide" representatives of particular policy views. *Id.* at 428-29; *see also Fertilizer Inst.*, 938 F. Supp. at 54 (finding the "fair balance" provision nonjusticiable because it would raise "difficult questions" such as, "What qualifications must someone have in order to be deemed an adequate representative of the chemical producers? What if there is a diversity of views among different

chemical producers – whose views would then represent the industry?"). Such a task is a "hopelessly manipulable" political question that is "best left to the executive and legislative branches of government." *Ctr. for Policy Analysis on Trade & Health ("CPATH") v. Office of U.S. Trade Representative*, 540 F.3d 940, 945 (9th Cir. 2008).

And even if Congress intended that there be judicial review of agency compliance with the "fairly balanced" requirement, such review would be constitutionally suspect since Congress may not constitutionally confer on the judiciary the power to make policy choices unguided by statutory standards. *Microbiological*, 886 F.2d at 430 n.6; *cf. Metcalf v. Nat'l Petroleum Council*, 553 F.2d 176, 190 (D.C. Cir. 1977) ("[T]o supervise the membership . . . of federal advisory committees on a continual basis and to alter the composition of these committees according to our subjective determinations as to 'fair balance'" would place the court in the "[inappropriate] role as the 'continuing monitors of the wisdom and soundness of Executive action.'").

The weight of authority has therefore concluded that "fairly balanced" claims under § 5(b)(2) of FACA are nonjusticiable. *See CPATH*, 540 F.3d at 945 (FACA fails to "articulate what perspectives must be considered when determining if the advisory committee is fairly balanced[;]" the statute, therefore, "provide[s the court] with no meaningful standards to apply."); *Nat'l Parks Conservation Ass'n v. U.S. Dep't of Interior*, No. 2:11-CV-578-FTM-29SPC, 2012 WL 3589804, at *8-9 (M.D. Fla. Apr. 12, 2012) ("[T]here is no indication from the provisions of the Organic Act, [or] FACA, that there is a meaningful standard to apply when considering whether the Secretary complied with the 'fairly balanced' requirement imposed by FACA."); *see also Sanchez v. Pena*, 17 F. Supp. 2d 1235, 1238 (D.N.M. 1998) ("[T]he task of creating a 'fair balance' . . . is a political one left to the discretion of the agency by statute and, under the alleged facts of this case, is not a justiciable issue."); *Fertilizer Inst.*, 938 F. Supp. at 54 ("For the Court to become

entangled in determining what represents a 'fair balance' would require the Court to arbitrarily substitute its judgment for that of the agency. No meaningful standards are available to assist the Court in making such determinations."); *Doe v. Shalala*, 862 F. Supp. at 1430 ("The balance of judicial opinion holds that, by reason of the lack of judicial standards to address alleged 'imbalances' of membership on such committees, Courts will not decide the issue; it is non-justiciable." (citing, *inter alia*, *Microbiological*, 886 F.2d at 425)); *Pub. Citizen v. Dep't of Health & Human Servs.*, 795 F. Supp. 1212, 1220-21 (D.D.C. 1992) (citing *Microbiological*, 886 F.2d at 426). There are no decisional standards here for the Court to apply concerning the appropriate "balance" of the Commission.[5] Accordingly, plaintiffs' fair balance claims are not justiciable.

b. The inappropriate influence provision does not provide a meaningful standard.

Congress also did not define "inappropriately influenced" or "special interest," nor did it specify any procedures to assure that the "advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest,"

[5] FACA's legislative history provides no guidance. The report of the House Committee on Government Operations notes why §§ 5(b)(2) and 5(b)(3) were added to FACA, explaining its view that "[o]ne of the great dangers in the unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns," and that "[t]estimony received at hearings before the Legal and Monetary Affairs Subcommittee pointed out the danger of allowing special interest groups to exercise undue influence upon the Government through the dominance of advisory committees which deal with matters in which they have vested interests." H.R. Rep. No. 92-1017, at 6 (1972). But the report does not supply any standard for the Court to apply to determine if an advisory committee is fairly balanced (or if a special interest has exerted improper influence on an advisory committee). Nor does an earlier House Committee on Government Operations Report, which offered that "[t]he members and staff on an advisory group need also to be free from vested interests and obligations that would impair the judgments and decisions of the committee. They must be able to examine programs in a fresh and critical way and reach conclusions that agencies might not." H.R. Rep. No. 91-1731, at 18 (1970). The Conference Report, *see* H.R. Rep. No. 92-1403 (1972) (Conf. Rep.), and the Senate Report, *see* S. Rep. No. 92-1098, at 10 (1972), say nothing at all relevant to the present topic.

within the meaning of section 5(b)(3). As a result, this Court has no meaningful standards by which to measure whether this requirement has been met either.

To determine whether an advisory committee's advice and recommendations have been inappropriately influenced by the appointing authority or special interests, a reviewing court would need to answer at least three questions. First, the Court would need to determine "when an interest is 'special' as opposed to 'general[.]'" *Microbiological*, 886 F.2d at 430 (Silberman, J., concurring). But a court does not "have any way to determine what [special interest] means for purposes of judicial review [as] . . . virtually anyone in the United States . . . [c]ould have . . . a special interest with regard to some – perhaps all – advisory committees." *Id.* at 430-31.

Second, a court must be able to determine when a special interest (or the appointing authority) exerted "inappropriate influence." *Colo. Envtl. Coal. v. Wenker*, 353 F.3d 1221, 1231 (10th Cir. 2004) (per curiam). At issue in *Wenker* were federal regulations requiring the Secretary of the Interior to create Resource Advisory Councils ("RACs") to make recommendations regarding federal land use policy. *Id.* at 1223-24. Applying *Heckler v. Chaney*, 470 U.S. at 830, the court found no meaningful standard of review. *Wenker*, 353 F.3d at 1231. The court explained that "[t]he problem we have with this claim centers on the word 'inappropriate,'" given that the applicable statute and the relevant regulations had "call[ed] for various special interest groups to recommend candidates for appointment to the RACs" and that "[i]t goes without saying that the special interests will recommend nominees who agree with their point of view." *Id.* Consequently, the question became: "what does § 5(b)(1)-(3) mean when it prohibits only 'inappropriate' influence?" *Id.* The Court concluded that "[t]he statute does not give us any guidance as to when

the line is crossed between appropriate and inappropriate influence." *Id.*[6]; *see also Microbiological*, 886 F.2d at 431 (asking, "[W]hat legally discernible principles could be employed to determine when a particular special interest is overly represented – when its influence is 'inappropriate?'") (Silberman, J., concurring).

Finally, section 5(b)(3) "on its face, is directed to the establishment of *procedures* to prevent 'inappropriate' external influences on an already constituted advisory committee by outside special interests or the appointing body." *Microbiological*, 886 F.2d at 430. A court would thus need to put itself in the shoes of the President or agency administrator and determine how, preemptively, to prevent special interests (whatever they are) from exerting inappropriate influence (whatever that is). Courts are ill-suited to craft such safeguards out of whole cloth, as doing so is "really an executive branch function." *Fertilizer Inst.*, 938 F. Supp. at 54-55.

FACA provides this Court with no meaningful standard against which to answer any of these three questions and, as a result, determine whether the Commission is being inappropriately influenced by the President or special interests. It would be of no moment if plaintiffs were able to craft a standard that they believe to be wise and reasonable. What is important is that the statute does not set forth meaningful guidance for the Court to follow in answering such questions as what constitutes a special interest, when influence becomes inappropriate, and what sorts of steps must be taken to prevent special interests (or the appointing authority) from exerting inappropriate influence. Resort to any other authority would amount to the Court "mak[ing] a policy judgment,

[6] In reaching its conclusion, the Tenth Circuit broke ranks with the Fifth Circuit, which found section 5(b)(3) to be justiciable. *See Cargill, Inc. v. United States*, 173 F.3d 323 (5th Cir. 1999). Its explanation of *why*, however, was scant. It stated only that section 5(b)(3) is more "objective" than the "fairly balanced" requirement, which it also found to be justiciable, *see id.*at 335. The explanation for that conclusion, in turn, was hardly persuasive – and, indeed, was rejected by *CPATH*, 540 F.3d at 946 ("[T]he *Cargill* decision offers little explanation *why* FACA's fairly balanced requirement is justiciable.").

and an arbitrary one at that, as to the optimum character of the Advisory Commi[ssion]," *Microbiological*, 886 F.2d at 431, which is an "utterly nonjudicial task.," *id.* at 427.

D. Mandamus And Declaratory Relief Are Unavailable (Counts V & VI).

Given the unavailability of an APA cause of action here, if this Court were to grant relief to plaintiffs under FACA, it could only be through the "drastic and extraordinary" writ of mandamus. *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, at 380 (2004). However, mandamus is not appropriate here. A writ of mandamus is "a drastic [remedy], to be invoked only in extraordinary situations." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). Mandamus relief is appropriate only if three requirements are met: "(1) a clear right in the plaintiff to the relief sought; (2) a plainly defined and peremptory duty on the part of the defendant to do the act in question; and (3) no other adequate remedy available." *Lovallo v. Froehlke*, 468 F.2d 340, 343 (2d Cir. 1972). The party seeking mandamus has the burden of showing "a clear and indisputable right to its issuance." *Escaler v. CIS*, 582 F.3d 288, 292 (2d Cir. 2009) (citations omitted). Even if the plaintiff overcomes all these hurdles, the district court must also consider whether mandamus relief should issue as a matter of its discretion. *See Cheney*, 542 U.S. at 381.

With respect to the first two factors, plaintiffs cannot demonstrate that defendants violated a "clear, nondiscretionary duty" imposed by FACA or that plaintiffs have a clear right to relief.[7] As indicated above, far from establishing the clear, nondiscretionary duty on the part of defendants, the fair balance and inappropriate influence provisions of FACA give defendants wide discretion on this issue and do not support a finding of a "clear duty" or "clear right to relief." In any event, because applying FACA to a presidential commission raises serious constitutional concerns, even

[7] As all three initial elements of mandamus are mandatory, *see In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005), 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.

if plaintiffs satisfied the mandamus standards – and they do not – this Court should decline to exercise mandamus as a matter of discretion.

Defendants do not concede that the FACA can be constitutionally applied to presidential commissions, such as this Commission, which was created by the President and is chaired by the Vice President, a constitutional officer. 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. *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."), *rev'd on other grounds*, 334 F.3d 1096 (D.C. Cir. 2003). Nonetheless, the Supreme Court and numerous judges have noted that the application of FACA to govern the manner in which the President receives advice "present[s] formidable constitutional difficulties." *Pub. Citizen*, 491 U.S. at 466; *see also Cheney*, 542 U.S. at 385 ("[T]he Executive's constitutional responsibilities and status are factors counseling judicial deference and restraint in the conduct of litigation against it."); *In re Cheney*, 334 F.3d 1096, 1113 (D.C. Cir. 2003) (Randolph, J., dissenting) ("As applied to committees the President establishes to give him advice, FACA has for many years teetered on the edge of constitutionality."), *vacated and remanded*, 542 U.S. 367 (2004); *Nadar v. Baroody*, 396 F. Supp. 1231, 1234 (D.D.C. 1975) ("To hold that Congress intended to subject meetings of this kind to press scrutiny and public participation with advance notice on formulated agendas, etc., as required by [FACA], would raise the most serious questions under our tripartite form of government as to the congressional power to restrict the effective discharge of the President's business.").

Applying FACA to this Commission established by the President raises identical separation of powers concerns to those repeatedly identified by courts, including the Supreme Court. Accordingly, any argument to proceed against the Commission under the mandamus statute needs to be balanced against the serious constitutional implications of regulating the manner in which the President receives advice; that balance counsels against application of FACA via mandamus here. *Cheney*, 542 U.S. at 382 ("[S]eparation-of-powers considerations should inform a [court's] evaluation of a mandamus petition involving the President or the Vice President."); *see also In re Cheney*, 406 F.3d at 727 ("Although we do not reach the question whether applying FACA to Presidential committees . . . would be constitutional, separation-of-powers considerations have an important bearing on the proper interpretation of the statute."). To be sure, the Commission has agreed voluntarily to abide by the provisions of FACA. *See* Charter ¶ 13. But to proceed under a mandamus theory on the basis of plaintiffs' allegations would have grave consequences for the operation of the Offices of the President and Vice-President. Allowing suits of this nature would mean that a President's or Vice President's attempts to obtain advice and consultation would be frequently interrupted by litigation, frustrating their ability to obtain timely and valuable advice and information. Moreover, the President's use of beneficial advisory groups would be greatly chilled if all that was required to impose the burden of litigation on the government was a complaint that stated that FACA violations occurred. *See Pub. Citizen*, 491 U.S. at 466 (recognizing that applying FACA to meetings between Presidential advisors and private citizens "present[s] formidable constitutional difficulties"); *AAPS*, 997 F.2d at 908-10 (finding that applying FACA and its disclosure requirements to a task force set up by the President would seriously burden the President's Article II right to confidential communications). "It is well established that 'a President's communications and activities encompass a vastly wider range of

sensitive material than would be true of any ordinary individual.'" *Cheney*, 542 U.S. at 381 (quoting *United States v. Nixon*, 418 U.S. 683, 715 (1974)). As the Supreme Court explained in *Cheney*, this does not mean that the President is above the law. The point is, rather, that, "the public interest requires that a coequal branch of Government . . . give recognition to the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties." *Id*. at 382 (citations omitted).

Accordingly, the Court should decline to issue mandamus both because plaintiffs have not established clear right to relief under the FACA provisions cited and as a matter of discretion. Finally, plaintiffs' claim under the Declaratory Judgment Act is also unavailing because declaratory relief is not an independent cause of action. *See In re Joint E. & S. Dist. Asbestos Litig*., 14 F.3d 726, 731 (2d Cir. 1993).

CONCLUSION

For the foregoing reasons, the Second Amended Complaint should be dismissed.

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