UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants.	Civil Action No. 17 Civ. 05427 (ALC)

PLAINTIFFS' OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE(S)

CASES:

PAGE(S)

PAGE(S)

PAGE(S)

PAGE(S)

PAGE(S)

PAGE(S)

PAGE(S)

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

PAGE(S)

PAGE(S)

OTHER AUTHORITIES

PAGE(S)

INTRODUCTION

The creation of the President's Advisory Commission on Election Integrity ("Commission" or "PACEI") is as an extraordinary and unlawful use of presidential power that threatens to undermine and interfere with the ability of Americans to exercise the most fundamental expression of citizenship free from intimidation. The Commission was created to legitimize and perpetuate a pernicious and toxic myth deeply rooted in our nation's history of racial vote disenfranchisement—that Latino and Black voters are disproportionately engaged in the crime of voter fraud. The PACEI is now engaged in a discriminatory investigation into purported voter fraud that has injured Plaintiffs and their constituents. The PACEI has requested complete voter files from all 50 states; stated its intention to compare those files with federal databases to identify supposed improper registrants; and communicated with agencies including the Department of Justice and the Department of Homeland Security about its investigation. Leading Commissioners have suggested that a database comparison methodology with an error rate as high as 99% and a stark racially discriminatory impact should be a model for the PACEI's investigation, and even used to target individuals for potential prosecution. In the words of Congressman John Lewis—who suffered a fractured skull while marching in Selma for the right to vote—the PACEI is a "form of harassment" and "intimidation." Doc. 66 ¶ 178.

Plaintiffs brought this action to stop that harassment and intimidation, and to eliminate the chilling effect of the Defendants' actions on those who seek to exercise their right to vote and to participate equally in the political process.[1] Defendants now move to dismiss Plaintiffs'

[1] Defendants are President Donald J. Trump, in his official capacity, the PACEI, Michael R. Pence, in his official capacity as Vice President and Chair of the PACEI, and Kris W. Kobach, in his official capacity as Vice Chair of the PACEI. Plaintiffs are the NAACP Legal Defense and Educational Fund, Inc. ("LDF"), The Ordinary People Society ("TOPS"), #HealSTL, the National Association for the Advancement of Colored People Pennsylvania State Conference

Second Amended Complaint under Rules 12(b)(1) and 12(b)(6). But the law governing the interpretation of those rules does not support the Defendants' motion. Instead, this court would need to stray far from well-established precedent and accept Defendants' invitation to rewrite federal pleading standards, in order to grant this motion. Under settled law, four points are clear:

First, Plaintiffs have adequately pleaded "injury-in-fact" that is "fairly traceable" to the creation of, and actions undertaken by, the PACEI. The PACEI's investigation has intimidated Plaintiffs' constituents and caused Plaintiffs to divert resources, which firmly establishes their standing under the precedent of this Circuit. Plaintiffs also have standing based on the stigmatic harm caused by the Commission's perpetuation of discriminatory stereotypes against their members. Finally, Defendants do not contest that Plaintiffs have suffered an injury-in-fact with respect to their claim under the Federal Advisory Committee Act ("FACA").

Second, consistent with *Arlington Heights*, Plaintiffs have pleaded facts supporting an inference that the PACEI was motivated in its creation and has been motivated in its ongoing activity, at least in part, by racial discrimination. *Vill. of Arlington Heights v. Metro Hous. Auth.*, 429 U.S. 252 (1977). This includes the President's contemporaneous statements linking voters of color to voter fraud; the sequence of events linking his discriminatory statements to his creation of the PACEI; the PACEI's unlawfully biased membership and domination by members who have used racial stereotypes to advocate restrictive voting measures; and its launch of a discriminatory investigation into voter fraud.

Third, while Defendants seek to dismiss Plaintiffs' claim that the President lacked the authority to create the PACEI, they cannot identify any constitutional or statutory provision

("Pennsylvania NAACP"), the NAACP Florida State Conference ("Florida NAACP"), the Hispanic Federation ("HF"), Mi Familia Vota ("MFV"), Southwest Voter Registration Education Project ("SVREP"), and the Labor Council for Latin American Advancement ("LCLAA").

conferring such authority upon him. Federal law prohibits the President from establishing the Commission to investigate voter fraud, because Congress has already created an independent agency, subject to various statutory requirements ensuring its impartiality, for this purpose.

Fourth, the PACEI violates FACA because it is not "fairly balanced" or insulated from being "inappropriately influenced," as that statute requires. Defendants do not even attempt to argue that the PACEI satisfies FACA's requirements. Instead, they claim that FACA is not enforceable. In fact, Plaintiffs' FACA claims can proceed *via* the Administrative Procedure Act ("APA") or writ of mandamus, and there are judicially manageable standards by which the Court can evaluate the PACEI's composition. By enacting FACA, Congress sought to impose standards of impartiality and accountability for commissions like the PACEI, and the Court is empowered to remedy Defendants' clear violations of those standards.

Defendants' motion to dismiss should be denied in its entirety.

FACTUAL BACKGROUND

As a candidate during the 2016 presidential campaign, Donald J. Trump repeatedly invoked the specter of widespread voter fraud, using unmistakable racial appeals and racially-coded language to link voters of color with such fraud. At rallies in front of predominantly white audiences, then-candidate Trump urged his supporters to ensure "other communities" did not steal the election from "us" by being vigilant against voter fraud by "illegals" and in predominantly-minority cities. Doc. 66 ¶¶ 51-62.

President Trump continued this rhetoric after his election, through his own statements and those of his surrogates in the White House. He and they repeatedly claimed, without evidence, that widespread illegal voting cost the President the popular vote. *Id*. ¶¶ 64-69. Elected officials from both major parties, state and federal election officials, and his own legal

team refuted those claims. *Id*. ¶¶ 66, 67, 73, 74. But, the President and his surrogates continued to repeat them. To take one example, after his inauguration, President Trump claimed that people at one polling place had been allowed to cast provisional ballots even though they looked like they should not be able to vote (the voters appeared to be Latino). *Id.* ¶ 70. He publicly promised to request "a major investigation into VOTER FRAUD," which he did on May 11, 2017 by establishing the PACEI. *Id*. ¶ 75.

The President has appointed 13 members to the PACEI. Plaintiffs have plausibly alleged that the President has stacked those appointees with individuals who share the President's unfounded views about voter fraud. *See id.* ¶¶ 82-152. Further, the Commission's three *de facto* leaders—Secretary Kobach, Hans von Spakovsky, and J. Christian Adams—have been engaged in virulent, and racially charged, efforts to restrict the franchise. *See id*. ¶¶ 92-115; 136-140; 143-145.

Prior to the PACEI's first official meeting, Secretary Kobach sent a letter to the Secretaries of State of every state and the District of Columbia requesting their voter registration files. *Id*. ¶ 153. This request was sent without deliberation within the PACEI, but with the input of von Spakovsky and Adams, though they had not yet been appointed to the Commission. *Id*. ¶ 166. When many Secretaries of States refused to provide the data, Secretary Kobach described their refusal as "idiotic," and President Trump claimed that the states were "trying to hide" something. *Id*. ¶¶ 156-157. Secretary Kobach later renewed the request for voter data; in response, many officials reiterated concerns that the PACEI was designed "only to intimidate voters and support President Trump's 'fantasy' that he won the popular vote," and "to shut out millions of eligible American voters." *Id*. ¶ 167.

The PACEI has obtained voter files from 19 states, Doc. 78-1 at 4, and it intends to compare state voter files to federal databases in an effort to identify purportedly improper registrants. *See id*. ¶ 158. This is similar to the Crosscheck program run by Secretary Kobach, which purports to identify people registered to vote in more than one state. *Id*. ¶ 94. Crosscheck, however, has a high error rate, and its impact falls disproportionately on minority voters: it wrongly identifies as double registrants 1 in 9 African Americans, 1 in 7 Latino Americans, and 1 in 6 Asian Americans. *Id*. ¶ 98. Yet, Secretary Kobach has touted Crosscheck as a model for the PACEI, even suggesting its use as a first step in identifying voters for prosecution. *Id*. ¶ 94.

Further, while Defendants have suggested that the PACEI is on hiatus,[2] on November 15, Commissioner Adams requested that the PACEI's Executive Director Andrew Kossack ask DOJ to provide an annual report on voter fraud cases it had pursued in the last decade, and suggested that DOJ should have prosecuted individuals for "double voting" and "non-citizen voting" based on "leads" from Crosscheck.[3]

Perhaps the clearest evidence that the PACEI lacks the balance and transparency required by law is that—in a startling and extraordinary development—one of its own Commissioners has brought suit alleging just that. Commissioner Matthew Dunlap recently filed suit against the PACEI for violating FACA, explaining how he has been denied access to records and frozen out of the PACEI's activities.[4] He explained: "the names J. Christian Adams, Hans von Spakovsky and Kris Kobach keep coming up as being the architects of the work of the commission. But

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[2] Josh Gerstein, *Judge: Trump voter fraud commission on ice till next year*, Politico (Nov. 20, 2017), https://www.politico.com/story/2017/11/20/trump-voter-fraud-commission-judge-252132.
[3] *See* Sam Levine, *After Months of Silence, a Blip of Activity from Trump's Voter Panel,* Huff. Post (Nov. 15, 2017 12:42 p.m), https://www.huffingtonpost.com/entry/trump-voter-fraud-probe panel_us_5a0c6472e4b0bc648a0f5286.
[4] *See* Compl., *Dunlap v. Pres. Advisory Comm'n Election Integ.*, 17-cv-02361 (D.D.C. Nov. 9, 2017), ECF No. 1 (Merle Decl. Ex. B).

what about the rest of us? . . . There are other members of the commission and nobody is consulting with me about what I think the issues are that we should be looking at." *Id*. ¶ 121.

ARGUMENT

I. PLAINTIFFS HAVE STANDING.

Plaintiffs have plausibly alleged all three elements of Article III standing: injury in fact, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). At the motion to dismiss stage, the court "accept[s] all well-pleaded allegations in the complaint as true and draw[s] all reasonable inferences in the plaintiff's favor." *Chabad Lubavitch of Litchfield Cty. v. Litchfield Hist. District Comm'n*, 768 F.3d 183, 191 (2d Cir. 2014); *see also Fin. Guar. Ins. v. Putnam Advisory Co.*, 783 F.3d 395, 401-02 (2d Cir. 2015) ("At the pleading stage, standing allegations need not be crafted with precise detail, nor must the plaintiff prove his allegations of injury.") (citation omitted). Likewise, "general factual allegations of injury may suffice," as the court "presume[s] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 540 U.S. at 561 (citation omitted). As long as one plaintiff has standing, Defendants' 12(b)(1) motion must fail. *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 109 (2d Cir. 2017). Here, at least one Plaintiff has standing with respect to each claim.

A. Plaintiffs Have Standing to Bring FACA Claims Because Voting Rights Organizations Have Been Excluded from the Commission.

Defendants do not dispute that Plaintiffs have suffered an injury-in-fact with respect to their FACA claims. With good reason. Where, as here, "persons or groups directly affected by the work of a particular advisory committee" do not "have some representation on the committee," they have "suffer[ed] injury-in-fact sufficient to confer standing." *Nat'l Anti-Hunger Coal. v. Exec. Comm. of President's Private Sector Survey on Cost Control*, 711 F.2d

1071, 1074 n.2 (D.C. Cir. 1983). LDF, for example, has been and continues to be directly affected by the work of the Commission given, among other things, LDF's longstanding "litigation and advocacy efforts to secure and protect the right to vote." Doc. 66 ¶ 1. As discussed below, *see infra* pp. 37-39, the Commission lacks any representation from the voting rights community. Thus, LDF (and the other Plaintiffs) have been denied their right under FACA to participate in and influence the PACEI's work. That constitutes an injury-in-fact. *See Nat'l Anti-Hunger Coal.*, 711 F. 2d at 1074 n.2.[5]

B. Plaintiffs Have Organizational Standing for all of Their Claims Because They Have Diverted Resources as a Result of the Commission's Activities.

1. Plaintiffs Have Suffered an Injury-in-Fact

"Article III's 'injury in fact' requirement 'is a low threshold,'" *Sonterra Capital Master Fund Ltd. v. Credit Suisse Grp. AG*, No. 1:15-cv-00871, 2017 WL 4250480 at *10 (S.D.N.Y. Sept. 25, 2017), which is satisfied by even "'an identifiable trifle' of harm," *Hassan v. City of New York*, 804 F.3d 277, 289 (3d Cir. 2015) (quoting opinion by then-Judge Alito). An organization's diversion of resources is an injury to the organization itself, which confers standing. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982). And "the Second Circuit [has] made clear that 'scant' evidence of 'only a perceptible impairment of an organization's activities'" is sufficient. *Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg*, 290 F.R.D. 409, 416 (S.D.N.Y. 2012) (quoting *Nnebe v. Daus*, 644 F.3d 147, 157 (2d Cir. 2011)).

a. TOPS and HF

Defendants concede that both TOPS and HF expended resources to develop and execute a response to the Commission's activities. Doc. 78-1 at 12-13. For example, in response to

[5] LDF brings only FACA claims.

concerns from constituents who have declined to register because of the PACEI, TOPS has increased its efforts to inform Black and Latino voters about lawful registration and has advised its constituents and volunteers about the Commission. Doc. 66 ¶ 4. Similarly, HF's canvassers have expended resources to address the concerns of constituents who have been intimidated from registering due to the PACEI's data collection, and HF has had to engage in training exercises with volunteers to address such concerns. *Id*. ¶¶ 19-20. These resource diversions confer Article III standing. *See, e.g.*, *Centro de la Comunidad Hispana*, 868 F.3d at 110-11 (finding organizational standing where organization "had to devote attention, time, and personnel to prepare its response to the [challenged government conduct]"); *Olsen v. Stark Homes, Inc.*, 759 F.3d 140, 158 (2d Cir. 2014) (same, where organization alleged that it "had expended resources in investigating and advocating on [its clients'] behalf"); *Ragin v. Harry Macklowe Real Estate*, 6 F.3d 898, 905 (2d Cir. 1993) (same, where organization "provid[ed] information at community seminars . . . , [and] investigat[ed] [defendants' challenged conduct]"); *Brooklyn Ctr.*, 290 F.R.D. at 417 (same, where organizations "counsel[ed] constituents, gather[ed] and coordinat[ed] information, and document[ed] problems with the [challenged government action]").

As this Court explained, the Second Amended Complaint provided clarity to "cure" the "potential defect" Defendants previously raised concerning Plaintiffs' diversion-of-resources allegations. Doc. 77 at 7. Yet, "despite acknowledging the low bar the Second Circuit has set for organizational standing in this context," Defendants "maintain their position," *id*., now contending Plaintiffs must allege that the activities to which they diverted resources "are sufficiently distinct from their regular activities" and involve "unique costs." Doc. 78-1 at 12.

These arguments run afoul of precedent. In the section of their brief discussing HF and TOPS, Defendants cite only a single out-of-circuit district court case, *see* Doc. 78-1 at 12-13,

while ignoring Second Circuit precedent that plaintiffs do not forfeit standing because the activities to which they have diverted resources are connected to their missions. On the contrary, a close connection between the diverted resources and the organization's regular activities supports standing. The Second Circuit has emphasized that "an organization shows injury-in-fact where, as here, a 'policy has impeded, and will continue to impede, the organization's ability to carry out its responsibilities.'" *Centro de la Comunidad Hispana de Locust Valley*, 868 F.3d at 110 (quoting *NYCLU v. N.Y.C. Transit Auth.*, 684 F.3d 286, 295 (2d Cir. 2011) (alterations omitted)). As such, when a nonprofit expends resources "to combat activity that harms its organization's core activities," the organization suffers an injury-in-fact. *Id*. at 111.

In any event, the Plaintiffs pleaded that their diversion of resources is a "unique cost[]" that is "sufficiently distinct from their regular activities." Doc. 78-1 at 12-13. But for the PACEI's activities, Plaintiffs would not be diverting resources to address the concerns of eligible voters who are fearful to register because of the Commission. That is all that matters. Second Circuit law is clear that Plaintiffs need not identify specific priorities on which they were unable to focus as a result of the challenged conduct. *See Nnebe*, 644 F.3d at 156.

Finally, to the extent Defendants suggest that reliance on volunteers undermines a diversion-of-resources argument, *see* Doc. 78-1 at 12-13, they are wrong. Volunteers must be trained and organized to address the challenged conduct. Contrary to Defendants' suggestion, the *Nnebe* Court made clear that the "economic injury" from an organization's diversion of resources is not limited to financial injuries, but also includes "opportunity cost[s]." *Nnebe*, 644 F.3d at 157. The time and resources TOPS and HF have diverted to trainings and counseling potential voters qualify as "some perceptible opportunity cost" to them, because they are an "expenditure of resources that could be spent on other activities." *Id*. That "constitutes far more

than simply a setback to [the organization's] abstract social interests," and thereby establishes standing. *Id.* (quoting *Havens Realty*, 455 U.S. at 379).

b. SVREP, LCLAA, MFV, Florida NAACP, Pennsylvania NAACP and #HealSTL

Although only one Plaintiff need have standing, SVREP, LCLAA, MFV, Florida NAACP, Pennsylvania NAACP, and #HealSTL have also all alleged facts establishing standing. SVREP and MFV, for example, have diverted limited organizational resources in order to counteract the Commission's harm to Latino voters and to their organizational missions to increase voter registration and turnout in the Latino community. Doc. 66 ¶¶ 24, 33. SVREP diverted resources into tailoring its education efforts, and MFV made internal changes in its operations. *Id*. ¶¶ 25, 34. Similarly, the Pennsylvania NAACP has expended resources to monitor and analyze constituent concerns about the Commission's activities. *Id*. ¶ 15.

Further, although Plaintiffs have already diverted resources, prior injury is not required for standing purposes. Rather, an injury that is "certainly impending," or that is a "substantial risk" suffices. *Clapper v. Amnesty Int'l., USA*, 568 U.S. 398, 409, 414 n.5 (2013). SVREP, LCLAA, and MFV engage with voters and would-be registrants, some of whom are from mixed immigration status families. Doc. 66 ¶¶ 23, 28, 32. They reasonably believe that because of the racial discrimination motivating the Commission, and its request to collect personal voter information, some voters will be fearful that adverse action may be taken against them, in the form of an investigation, criminal proceeding, or immigration enforcement against friends or family members in their home. *Id.* ¶¶ 23, 28-29, 32. Plaintiffs also allege that voters and volunteers are fearful that their personal information is vulnerable in the hands of the Commission and could be stolen or hacked. *Id.* ¶ 32. Plaintiffs will need to put resources into public education, increased and tailored training for staff, organizers, and volunteers, and

counseling to voters or registrants who fear being registered to vote or voting based on the reasonable fear of how that information will be used. *Id.*

These are not speculative allegations of future diversions, but rather injuries that are "certainly impending" or at least have a "substantial risk" of occurring, thereby establishing injury-in-fact. *Clapper*, 568 U.S. at 409, 414 n.5. SVREP, LCLAA, and MFV must plan for their voter registration and get-out-the-vote programs, as these are core elements of their missions. Doc. 66 ¶¶ 22, 26, 30. For example, they will be required to redirect limited organizational resources to ensure staff and volunteers are trained on the Commission and how to address volunteer and community fears that they will be subject to investigation, prosecution, or adverse immigration enforcement actions. *See id.* ¶¶ 25, 29, 34.

2. Plaintiffs' Injury-in-Fact Is Traceable to Defendants' Conduct and Would Be Redressed by a Favorable Decision from this Court.

The remaining requirements of Article III standing are likewise satisfied: Plaintiffs' diversion of resources is caused by Defendants' conduct and would be redressed by a favorable decision from this Court. *See Lujan*, 504 U.S. at 560-61. Defendants argue that plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." Doc. 78-1 at 14 (quoting *Clapper*, 568 U.S. at 416). But Plaintiffs' harm is not "self-inflicted." *Id.* They have diverted, and will divert, resources as a direct consequence of the Commission's investigation and the fear it has instilled in voters of color. Likewise, the harm to Plaintiffs' constituents is not "speculative." *Id.* By registering, their personal information has been or is likely to be transmitted to the PACEI, which has announced its intention to use that information as part of its investigation into supposed voter fraud. *See Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014) (realistic possibility that naturalized citizens would be misidentified as ineligible voters in

database matching process established standing). Plaintiffs' diversion of resources is fairly traceable to the PACEI and its discriminatory investigation.

The cases Defendants rely on are inapposite. In *Clapper*, the harm was held speculative because plaintiffs would be subject to the challenged investigation only if a "highly attenuated chain of possibilities" occurred. 568 U.S. at 410. Here, Defendants have already collected personal voter information and stated their intent to use it. Similarly, in *Robinson v. Sessions*, No. 15-cv-6765, 2017 WL 1317124 (W.D.N.Y. Apr. 10, 2017), the plaintiffs did not allege that the government had "compiled, retained or disclosed their personal information," or that they were listed on a government database they wished to challenge. *Id*. at *1, *6-*7; *see also United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1380-81 (D.C. Cir. 1984) (plaintiffs lacked standing to challenge an order that merely authorized intelligence gathering, as they had not been subject to any allegedly illegal surveillance). Finally, in *Laird v. Tatum*, 408 U.S. 1, 9, 13 (1972), the plaintiffs alleged a subjective chill to the exercise of their First Amendment rights based solely on the government's collection of public information. By contrast, here the issue is not a subjective chill, but the objective harm caused when the government collects data with the stated intention to use it in a manner that will have a discriminatory impact, and even as a basis to target individuals for prosecution. In such cases, there is concrete injury sufficient to support standing, *see Hassan*, 804 F.3d at 292, particularly because the discriminatory investigation chills the exercise of the franchise, *see Smith v. Meese*, 821 F.2d 1484, 1494 (11th Cir. 1987).

3. Defendants' Third-Party Standing Arguments Fail.

In their motion, Defendants for the first time raise a third-party standing argument, contending that Plaintiffs' discrimination claims seek to vindicate the constitutional rights of voters of color rather than the Plaintiffs themselves. *See* Doc. 78-1 at 14-17. Defendants' novel

frame cannot disguise the fact that this argument is inconsistent with the Second Circuit's diversion-of-resources precedent. When, as here, an organization diverts resources to advocate on behalf of individuals whose rights have been violated by a government policy, the organization has standing. *See, e.g.*, *Nnebe*, 644 F.3d at 157-58 (Taxi Workers Alliance had standing to raise due process challenge to suspension hearings for taxi drivers); *Brooklyn Ctr.*, 290 F.R.D. at 415-17 (non-membership advocacy organization had standing to challenge the effect of emergency-preparedness plan on people with disabilities). Contrary to Defendants' suggestion, Doc. 78-1 at 16, an organization is not required to sue on behalf of its members. The point of diversion-of-resources standing is that the organization is bringing "suit on its own behalf." *Nnebe*, 644 F.3d at 156; *see also id*. at 158.

Even putting aside this incompatibility with Second Circuit precedent, Defendants' third-party standing argument fails. With respect to their Fifth Amendment due process claims, Plaintiffs seek to enforce their own rights in addition to the rights of voters of color. Corporations are "persons" for purposes of the Fifth Amendment's due process clause, and are therefore entitled to bring claims directly under that amendment. *See Noble v. Union River Logging R. Co.*, 147 U.S. 165, 176 (1893); *Wright Farms Constr., Inc. v. Kreps*, 444 F. Supp. 1023, 1027 n.4 (D. Vt. 1977) (discussing *Cty. of Santa Clara v. S. Pac. R.R.*, 118 U.S. 394, 396 (1886)). The racial discrimination underlying the PACEI not only violates the Fifth Amendment due process rights of voters of color. It violates the Fifth Amendment rights of non-profit organizations that register voters of color, because those organizations are targets of the same stereotypes, and their efforts to register voters and protect the franchise are similarly harmed.

As for the Fifteenth Amendment (and if necessary for the Fifth Amendment), Plaintiffs do have standing to assert the rights of voters of color. When, as here, a plaintiff has suffered an

injury-in-fact, it may advance the rights of others so long as the plaintiff "can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal." *Sec'y of State of Md. v. Munson Co.*, 467 U.S. 947, 956 (1984) (citations and internal quotation marks omitted). That standard is met when, as here: (a) the injured third-party has a close relationship with the party whose rights it seeks to advance, and (b) there is some hindrance to the other party asserting its rights. *See Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004).

First, contrary to Defendants' suggestion that third-party standing requires a fiduciary-type relationship, the Supreme Court has held that parties have the requisite "close relationship" when they share a strong common interest in vindicating a fundamental right. Thus, in *Campbell v. Louisiana*, 523 U.S. 392 (1998), and *Powers v. Ohio*, 499 U.S. 400 (1991), the Court held that white defendants had third-party standing to assert the equal protection rights of excluded Black jurors because they had a "close relationship" based on their "common interest in eliminating discrimination." *Campbell*, 523 U.S. at 398 (discussing *Powers*, 499 U.S. at 413-14). Similarly, in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Supreme Court held that a reproductive-rights activist who distributed contraceptives to an unmarried woman had the requisite "close relationship" to the unmarried people on whose behalf he was advocating. The Court explained that, just as its prior decision in *Barrows v. Jackson*, 346 U.S. 249 (1953), had found third-party standing based on "the relationship between one [a white landowner] who acted to protect the rights of a minority [i.e., prospective non-white land purchasers] and the minority itself," so too could a reproductive-rights advocate assert third-party standing as "an advocate of the rights of persons to obtain contraceptives and those desirous of doing so." *Baird*, 405 U.S. at 445.

Here, as in *Baird*, Plaintiffs have a close relationship with the minority voters on whose behalf they seek to advocate. Indeed, that relationship is far closer than the relationship between

a white defendant and a minority juror, or between a beer vendor and beer purchasers, which was also held sufficient to establish third-party standing. *See Craig v. Boren*, 429 U.S. 190, 192-197 (1976). By contrast, in the cases cited by Defendants, the Court denied third-party standing because the plaintiffs did not have *any* relationship to the individuals whose rights they sought to assert, *see Warth v. Seldin*, 422 U.S. 490, 512 (1975), or because the plaintiffs had only an anticipated *future* relationship, *see Kowalski*, 543 U.S. at 130-31.

Second, there is a hindrance to voters of color asserting their own rights, because they "may be chilled from assertion (of their own rights)" by "the publicity of a court suit." *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684 n.4 (1977) (citation and alteration omitted). Voters of color who live in mixed-status families have legitimate reason to fear that they or their family members will be targeted for investigation into supposed voter fraud or for non-voting related immigration enforcement actions. Doc. 66 ¶¶ 23, 28, 32. In light of President Trump's public use of racially intimidating rhetoric and the Commission's actions, constituents have told HF's canvassers that they do not wish to register because they do not want their personal information sent to the federal government. *Id.* ¶ 19. It would defy logic for Plaintiffs' constituents, and others who fear they may be targeted by the PACEI's investigatory practices, to expose themselves to these very harms by filing a public lawsuit. The Plaintiffs, which have a close connection to the communities they serve—particularly in their missions to protect the right to vote and to register voters—are the proper parties to assert rights on behalf of voters.

C. Plaintiffs Have Associational Standing for all of Their Claims Because of the Stigmatic Harm Caused by the Commission's Creation and Activities.

Plaintiffs have standing for an independent reason: the racially discriminatory message sent by the PACEI, in and of itself, constitutes an injury-in-fact.

"[D]iscrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as . . . less worthy participants in the political community, can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (citation omitted). Thus, "[t]here can be no doubt that" the "stigmatizing injury often caused by racial discrimination . . . is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing." *Allen v. Wright*, 468 U.S. 737, 755 (1984), *abrogated in part on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014); *see also Shaw v. Reno*, 509 U.S. 630, 650 (1993) (apportionment schemes that separate voters into different districts based on race "injure[] voters" because they, *inter alia*, "reinforce[] racial stereotypes"). The message conveyed by the Government through the PACEI perpetuates the pernicious stereotype that Black and Latino voters are disproportionately likely to commit the crime of voter fraud. *Cf. Rabiea v. Stein*, 875 N.Y.S.2d 823 (TABLE), 823, 2008 WL 5381468 (Sup. Ct. Dec. 23, 2008) (citing *Liberman v. Gelstein*, 605 N.E.2d 344 (N.Y. 1992)) (statements falsely claiming someone committed perjury are *per se* defamatory such that the law presumes damages).

In cases involving stigmatic harms, courts require plaintiffs to have personally been subject to the government's conduct. *See Allen*, 468 U.S. at 755; *see also, e.g., United States v. Hays*, 515 U.S. 737, 745, 747 (1995) (voter who lives inside a racially gerrymandered district has standing to challenge it; voters who live outside the district do not). Here, the PACEI has requested, and obtained, the entire state voter files for at least nineteen states, including Florida and Pennsylvania. *See* Merle Decl. Ex. A at 8-9; Doc. 78-1 at 4. That means the voter

information for members of the Florida and Pennsylvania NAACP chapters have been sent to the PACEI. As such, the Plaintiffs' members have personally been injured by government conduct (the request for voter information to further a discriminatory investigation) conveying a racially stigmatic message, and they have standing to challenge that conduct. *See Hays*, 515 U.S. at 747.

Defendants may respond by noting that the PACEI is collecting data for voters from these states regardless of race, but that is irrelevant. An investigation based on the presumption that voters of color are likely to commit voter fraud "reinforces racial stereotypes," *Shaw*, 509 U.S. at 650, and Plaintiffs have plausibly alleged that the PACEI intends to use those voter files in a database comparison that will adversely impact voters of color. Doc. 66 ¶ 102. It does not matter that a large number of minority voters have been subject to the same harm. "Harm to all—even in the nuanced world of standing law—cannot be logically equated with harm to no one." *Hassan*, 804 F.3d at 291 (discussing *FEC v. Akins*, 524 U.S. 11, 24 (1998), and *Massachusetts v. EPA*, 549 U.S. 497, 526 n.24 (2007)).

Moreover, the Florida and Pennsylvania NAACP chapters may properly bring these claims on behalf of their members under the doctrine of associational standing. Consistent with that doctrine's three traditional requirements, (a) their members would have standing to sue in their own right for the reasons discussed above; (b) the interests the NAACP chapters seek to protect are germane to their purpose as organizations devoted to voting rights, *see* Doc. 66 ¶¶ 9, 11, 13, 15; and, (c) given the inherently stigmatizing nature of racial stereotypes, neither the claim asserted nor the relief requested requires the participation of individual members in the suit. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

Finally, contrary to Defendants' suggestions, *see* Doc. 78-1 at 7, Plaintiffs' Complaint does allege injury to their members. *See* Doc. 66 ¶ 11 (noting stigma suffered by "Florida

NAACP and its members"); *id.* ¶ 15 (same, respecting Pennsylvania NAACP); *see also June-Il Kim v. SUK Inc.*, No. 12 CIV. 1557 ALC, 2013 WL 656844, at *4 (S.D.N.Y. Feb. 22, 2013) (plaintiffs need plead facts, not legal theories, in their complaints). As elaborated by the President of the Pennsylvania NAACP in a declaration, President Trump's "statements did more than degrade entire groups of citizens—they made minorities seem like second class citizens and more likely to commit crimes." Merle Decl. Ex. C ¶ 11; *see also Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (declarations may be considered in adjudicating a 12(b)(1) motion).

For the foregoing reasons, Plaintiffs' well-pleaded allegations regarding the stigmatic harm caused by the PACEI is sufficient to establish standing. Just as a court would immediately entertain a challenge to a presidential commission founded on the proposition that Black and Latino individuals are predisposed to commit other crimes, it must not wait to consider a challenge to a government commission founded on, and with the purpose of perpetuating, the racial stereotype that Black and Latino people are predisposed to commit voter fraud.

II. PLAINTIFFS HAVE PLEADED VIABLE CONSTITUTIONAL AND STATUTORY CLAIMS.

To survive a motion to dismiss, Plaintiffs need only allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The court accepts "all factual allegations in the complaint as true, and draws inferences from those allegations in the light most favorable to the plaintiff." *Feldheim v. Fin. Recovery Servs., Inc.*, 257 F. Supp. 3d 361, 365 (S.D.N.Y. 2017). Plaintiffs are not required to set out "detailed factual allegations," but must plead more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555. Plaintiffs have met their burden. For each claim, they have pleaded "factual content . . . [that] allows the court to draw the reasonable inference that the defendant[s are] liable." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

A. Plaintiffs Plausibly Allege that the PACEI was Created and Operates with a Racially Discriminatory Purpose.

The detailed facts and allegations in Plaintiffs' Complaint more than sufficiently plead the claim that the PACEI's creation and activities have been motivated by racial discrimination. Plaintiffs have thus stated a plausible claim under the Fifth and Fifteenth Amendments.

To allege a constitutional violation, Plaintiffs need only plead that race was one "motivating" factor in the creation or operation of the PACEI, not that it was the "'dominant' or 'primary'" purpose. *Arlington Heights*, 429 U.S. at 265; *see also Rogers v. Lodge*, 458 U.S. 613, 616 (1982). "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266; *see also Mhany Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 606 (2d Cir. 2016). Relevant evidence includes contemporaneous statements by decisionmakers; the sequence of events leading to the challenged decision; whether the impact bears more heavily on one race than another; departures from the normal decisionmaking process; and the historical background of the decision. *Arlington Heights*, 429 U.S. at 267-68.

Plaintiffs have set forth extensive allegations of discrimination under these factors. Indeed, although a "victim of discrimination is . . . seldom able to prove his or her claim by direct evidence and is usually constrained to rely on the cumulative weight of circumstantial evidence," *Rosen v. Thornburgh*, 928 F.2d 528, 533 (2d Cir. 1991), Plaintiffs identify both kinds of evidence. The direct evidence includes extraordinary statements by the President of the United States suggesting that voters of color are more likely to commit voter fraud. Defendants may not disregard those statements because they supposedly do not represent the President's "best and most considered thoughts." Doc. 78-1 at 19.

1. *President Trump's Contemporaneous Statements Provide Direct and Circumstantial Evidence of Intentional Discrimination.*

Both prior to and after his election in November 2016, President Trump not only made unsubstantiated allegations of widespread voter fraud, he used both racially-charged and explicit rhetoric linking voter fraud to predominantly-minority communities and "illegals." Yet, Defendants attempt to characterize Plaintiffs as arguing that any discussion of voter fraud is always racially discriminatory, *see* Doc. 78-1 at 18, and they compare this case to *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), which did not involve allegations of racial discrimination. In so doing, Defendants simply ignore the unrefuted evidence tying the President's allegations about voter fraud to a racially discriminatory motive.

President Trump's use of racially-coded language and racial appeals began on the campaign trail. For example, at a rally in Ambridge, Pennsylvania, candidate Trump urged his overwhelmingly white supporters to "watch *other communities*" to prevent the election from being "stolen from *us*." Doc. 66 ¶ 54 (emphases added). At another rally in Altoona, Pennsylvania, which is 94% white, he directed his supporters to "[g]o to certain areas and watch and study and make sure other people don't come in and vote five times . . ." *Id.* ¶ 55. Similarly, at a rally in front of a predominantly white audience in Wilkes-Barre, Pennsylvania, candidate Trump stated, "I just hear such reports about Philadelphia . . . I hear these horror shows, and we have to make sure that this election is not stolen from *us* and is not taken away from *us.*" *Id.* ¶ 57 (emphasis added). He added for emphasis, "Everybody knows what I'm talking about." *Id.*

Continuing this theme at a rally in Colorado Springs, Colorado less than a month before the election, candidate Trump stated: "Voter fraud is all too common, and then they criticize us for saying that . . . But take a look at Philadelphia, what's been going on, take a look at Chicago, take a look at St. Louis." Doc. 66 ¶ 59. People of color make up 55-70% of the populations in

the three cites targeted by candidate Trump. *Id.* ¶ 60. The message was clear: these majority-minority cities are the hotbeds of voter fraud. By speaking in teams of "us" (his white audiences) and "other communities" (predominantly-minority cities), candidate Trump "utilized code words to communicate" race-based discrimination. *Mhany Mgmt.*, 819 F.3d at 610; *see also Goosby v. Town Bd. of Hempstead*, 180 F.3d 476, 503-04 (2d Cir. 1999) (at-large voting violated the Voting Rights Act in part because of "[r]acial appeals" during campaigns).

After the election, President Trump repeatedly claimed that he lost the popular vote only because 3-5 million votes were cast by "illegal" voters (all apparently for his opponent). Doc. 66 ¶ 64. In a meeting after his inauguration, a member of Congress challenged those assertions and pointed out the lack of any such evidence. In response, President Trump recounted a (false) anecdote in which he said that people who cast provisional ballots at one polling place did not look like they should have been permitted to vote. President Trump further named several Latin American countries from which the provisional voters might have come. *Id.* ¶ 65. In other words, even "after taking th[e] oath and formally assuming the responsibilities imbued in his office," Doc. 78-1 at 19, President Trump made an unequivocally racist statement about who looks American, and tied that stereotype to his unfounded claims of voter fraud.

Defendants assert vaguely that "[s]uch early statements may not represent the President's best and most considered thoughts." Doc. 78-1 at 19. But, the law considers those statements highly probative of discrimination because they are "contemporary statements" by the most important decisionmaker in this case. *Arlington Heights*, 429 U.S. at 268; *see also McCreary County v. ACLU of Ky.*, 545 U.S. 844, 866 (2005) (courts may not "turn a blind eye to the context in which [a] policy arose") (citation omitted); *Rivera v. Inc. Vill. Of Farmingdale*, 784 F.

Supp. 2d 133, 148-49 (E.D.N.Y. 2011) (considering campaign materials as probative of discriminatory intent).

Finally, Defendants invoke the "presumption of regularity" that attaches to government officials' conduct. Doc. 78-1 at 19. But the purpose of the *Arlington Heights* framework is to identify those cases in which circumstantial and direct evidence of discrimination illuminate the motivations of governmental actors. Defendants cite no authority for their claim that the President is entitled to a heightened presumption of regularity, *see id.*, and his unambiguously discriminatory message defeats whatever presumption Defendants would propose.

2. The Unmistakable Sequence of Events and the Predictable Impact

The Plaintiffs' allegations regarding the "specific sequence of events leading up [to] the challenged decision," and the "impact of the official action" in the creation and operation of the Commission further support an inference of intentional discrimination. *Arlington Heights*, 429 U.S. at 266, 267.

Plaintiffs have alleged that the day after President Trump's election, Secretary Kobach contacted him regarding a proposal to restrict voting by amending the National Voter Registration Act of 1993 (NVRA) to permit documentary proof of citizenship requirements for voter registration; they met later that month to discuss Kobach's ideas.[6] Similar to President Trump, Secretary Kobach has used highly racialized rhetoric to urge restrictive voting laws. He has warned against "replacing American voters with newly legalized aliens," because "if you look at it through an ethnic lens. . . over the long term, you've got a locked-in vote for

[6] *See* Christopher Ingraham, *Vice chair of Trump's voter fraud commission wants to change federal law to add new requirements for voting, email shows*, Wash. Post (July 17, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/07/17/vice-chair-of-trumps-voter-fraud-commission-wants-to-change-federal-law-to-make-it-harder-to-vote-email-shows/?utm_term=.ebd8b2119d8e.

socialism." Doc. 66 ¶ 110. Secretary Kobach has also overseen the Crosscheck program, the racially discriminatory impact of which is estimated to result in 1 in 9 Black voters and 1 in 7 Latino voters incorrectly identified as double registrants. *Id.* ¶¶ 97-98. And, as the Tenth Circuit explained, Secretary Kobach implemented a policy in Kansas that amounted to a "mass denial of a fundamental constitutional right" to vote based on "pure speculation" regarding the "number of aliens on the voter rolls." *Id*. ¶ 104.

Then, in January 2017—just two days after asserting that people who appeared Latino looked like they should not be able to vote—President Trump promised to launch "a major investigation into VOTER FRAUD, including . . . those who are illegal." Doc. 66 ¶ 68a; *see id.* ¶ 65. In February 2017, the President simultaneously declared that his voter fraud allegations had already been proven correct and that he was creating a commission to "look at the registration," which he had decided would be chaired by the "honor[ed]" Vice President Pence.[7] That same month, senior policy advisor Stephen Miller asserted as "fact" that "there are massive numbers of non-citizens who are registered to vote," and—invoking Secretary Kobach—insisted that the President's allegations of widespread voter fraud are "correct 100%." *Id.* ¶ 69. On May 11, 2017, the President followed through with this promise and created the PACEI. *Id*. ¶ 75.

Plaintiffs have also pleaded that the PACEI's actions have reflected the discrimination that motivated its creation. On June 28, and again on July 26, 2017, Secretary Kobach sent letters requesting voter roll data from each of the 50 states and the District of Columbia. Doc. 66

[7] Ashley Parker, *Trump says Pence will head investigation into voting irregularities, despite no evidence of fraud,* Wash Post (Feb. 5, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/02/05/trump-says-pence-will-head-investigation-into-voting-irregularities-despite-lack-of-evidence-of-fraud/?tid=a_inl&utm_term=.2a92e3830136; David Sherfinski, *Mike Pence: It will be 'my honor' to lead voter fraud commission,* Wash. Times (Feb. 6, 2017) https://www.washingtontimes.com/news/2017/feb/6/mike-pence-it-will-be-my-honor-lead-voter-fraud-co/; *see also* Doc. 66 ¶ 68b.

¶ 154. Defendants admit they have collected the data of 19 states and 1 county thus far. Doc. 78-1 at 4; *see also* Merle Decl. Ex. A at 8-9. A spokesperson for Vice President Pence acknowledged that the PACEI intends to compare the state voter rolls against federal databases, including the Department of Homeland Security's database of purported non-citizens, to identify supposed ineligible registrants. Doc. 66 ¶ 158. The Commission intends to take this action despite the likelihood that its methodology will lead to a disproportionately high number of false positives for voters of color, similar to the results of the crosscheck methodology championed by Secretary Kobach. *Id*. ¶¶ 159-160. Given Secretary Kobach's (*see* id. ¶ 94) and Commissioner Adams's statements endorsing Crosscheck,[8] it is also reasonable to infer that the PACEI will attempt to check state databases against one another for purported double registrants, despite the known racially discriminatory impact of that process.

To be clear, the issue here is not that Secretary Kobach "runs a crosscheck system." Doc. 78-1 at 19. The issue is that Secretary Kobach has touted that methodology as a model for the Commission notwithstanding the evidence that it will *not* create a reliable list of people who may have committed voter fraud, but *will* disproportionately target Black and Latino voters.

Finally, Plaintiffs' allegations that the use of racially discriminatory methodologies is, of course, likely to have a racially disparate effect, which is another *Arlington Heights* factor not contested by Defendants. Indeed, adverse effects can and should be presumed when, as here, discriminatory intent infects the application of a facially neutral policy. *See Doe v. Vill. of Mamaroneck*, 462 F. Supp. 2d 520, 543 (S.D.N.Y. 2006).

[8] Levine, *supra* note 3. This statement was reported after Plaintiffs filed the Second Amended Complaint.

3. Departures from the Normal Decisionmaking Process

Plaintiffs' allegations regarding the PACEI's departures from the normal decisionmaking process further support an inference of discrimination. *See Arlington Heights*, 429 U.S. at 267-68. As discussed below, Plaintiffs allege that the President violated FACA by stacking the PACEI with Commissioners who share the President's unsubstantiated views of widespread voter fraud, some of whom have also made statements evidencing racial bias. In response, Defendants contend a regulation requiring fair-and-balanced representation plans does not technically apply to presidential commissions. *See* Doc. 78-1 at 20. But, even if that is correct, the President was obligated to comply with FACA. He did not.

4. The History of Voter Fraud as a Pretext for Racial Discrimination in Voting

Even though *Arlington Heights* states that "the historical background of the [challenged] decision," is relevant in analyzing discriminatory purpose, 429 U.S. at 267, Defendants ignore this factor and Plaintiffs' well-pleaded allegations. Doc. 78-1 at 18. Throughout our nation's history, government officials have repeatedly invoked "voter fraud" to justify racially discriminatory voting restrictions—from poll taxes, literacy tests, and all-white primaries to recent decisions by federal courts holding that two states used voter fraud as a pretext to justify discriminatory voting laws. Doc. 66 ¶¶ 190-192. Nor is this case the first time that the federal government has used voter fraud as a pretext for racially discriminatory investigations. *See United States v. Gordon*, 817 F.2d 1538, 1540 (11th Cir. 1987), *opinion vacated in part on reh'g*, 836 F.2d 1312 (11th Cir. 1988) (finding racially discriminatory selective prosecution of voter fraud, relying in part on DOJ statement of new investigation policy "brought on by the 'arrogance on the part of blacks.'").

* * *

The task of assessing whether government action was motivated, at least in part, by racial discrimination or stereotypes, "is an inherently complex endeavor, one requiring the trial court to perform a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (quoting *Arlington Heights*, 429 U.S. at 266). Courts should not treat allegations of discrimination differently from any other ultimate question of fact, *USPS Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983), and the dismissal of Plaintiffs' fact-intensive allegations and claims at the pleading stage would be inappropriate.

B. Plaintiffs Plausibly Stated a Claim for Arbitrary Government Action in Violation of Due Process.

The "touchstone of due process is protection of the individual against arbitrary action of government." *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998) (citation omitted); *see also Leebaert v. Harrington*, 332 F.3d 134, 139 (2d Cir. 2003). Defendants focus on the shocks-the-conscience standard that has been employed in cases involving discrete acts by government officials such as the forced pumping of a suspect's stomach. Doc. 78-1 at 20. But the Supreme Court has held that substantive due process is also violated when policy or regulatory actions are taken without any reasonable justification in the service of a legitimate objective. *See Lewis*, 523 U.S. at 846; *see also Leebaert*, 332 F.3d at 139-40 n.2 (distinguishing between government regulation and discrete acts by officials); Doc. 66 ¶¶ 181, 200. Here, there is no reasonable justification for the Commission. Plaintiffs plausibly allege that it was instead created to bolster the false claim that widespread voter fraud cost the President the popular vote. Doc. 66 ¶¶ 75, 87. This has been refuted by studies, election experts, and officials from both parties. *See id.* ¶¶ 45-48, 73-74. It is the essence of irrational, and therefore unconstitutional, government action. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005).

C. Plaintiffs Plausibly Pleaded that the President Exceeded His Authority in Creating the PACEI in Violation of Article II of the Constitution.

It is axiomatic that "the executive branch, like the Federal Government as a whole, possesses only delegated powers." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (1952) (Jackson, J., concurring). Therefore, as in any other case, "[t]he President's power, if any, to issue" the Executive Order creating the PACEI, "must stem either from an act of Congress or from the Constitution itself." *Id*. at 585 (majority opinion). However, the Constitution grants authority over federal elections to Congress, and Congress established an independent agency, the Election Assistance Commission ("EAC"), to investigate voter fraud. Unlike the PACEI, the EAC has numerous safeguards to ensure fairness and accountability. By empowering the PACEI to do what Congress created the EAC to do—and by stacking it with biased members subject to none of the EAC's safeguards—President Trump unlawfully contravened the will of Congress. The Constitution does not permit such encroachment.

1. The President Lacks the Authority to Create Executive Committees to Investigate Individuals.

When the government investigates individuals, the potential for abuse and overreach is particularly acute. Even when investigations do not result in formal prosecutions, targeted individuals may suffer severe consequences. *See, e.g.*, Martin H. Redish & Christopher R. McFadden, *Huac, the Hollywood Ten, and the First Amendment Right of Non-Association*, 85 Minn. L. Rev. 1669, 1678-89 (2001). It has long been understood that proper accountability and oversight are critical for agencies empowered to investigate individuals, and the Constitution does not authorize the creation of unaccountable presidential committees to do so.

Defendants do not argue otherwise. Instead, Defendants insist that there are "no factual allegations that the Commission has begun to or intends to investigate individuals," and that this case is about "the manner in which the President receives advice." Doc. 78-1 at 21, 28, 38.

This is wishful thinking belied by the Defendants' own actions. The Commission has requested the complete voter registration files from every state, and a spokesperson for Vice President Pence acknowledged that it intends to compare those voter files with federal databases to identify supposedly ineligible voters. Doc. 66 ¶¶ 154, 158. Even assuming the state voter files are "publicly available data," Doc. 78-1 at 21, a DHS database that the PACEI intends to compare them to is not. And, by its nature, the purpose of this endeavor is to generate a list of specific people who allegedly registered improperly, which constitutes an investigation into individuals.

Plaintiffs have also pleaded that these are not the only steps the Commission has taken as part of its investigation. It has communicated with DHS concerning "potential future coordination/overlap between entities," and with DOJ on "several issues," including data collection. Doc. 66 ¶¶ 168-69; *see also* Merle Decl. Ex. A at 39:748. The PACEI also employed a researcher (before his arrest on unrelated charges) on secondment from the Office of the Special Counsel, an independent investigative and prosecutorial agency. *See* Doc. 66 ¶ 170.

Moreover, Secretary Kobach has even suggested that the database matching process could lead to prosecutions. In his opening remarks at the PACEI's first meeting, he claimed that the unreliable Crosscheck program "develops leads where it appears that the same person may have actually voted twice." Merle Decl. Ex. D. Secretary Kobach then stated that "[a]fter further investigation, a prosecution for double-voting may be appropriate." *Id.* He concluded: "I'm confident that this commission will be equally successful [as the crosscheck program] on the national level." *Id.*[9] And, as referenced above, just three weeks ago Commissioner Adams

[9] Because Secretary Kobach's statements at this administrative meeting are a matter of public record, they are subject to judicial notice and properly considered in adjudicating Defendants' 12(b)(6) motion without converting it to one for summary judgment. *See, e.g., Thomas v. Westchester Cty. Health Care Corp.*, 232 F. Supp. 2d 273, 276 (S.D.N.Y. 2002).

emailed the PACEI's Executive Director Kossack, requesting that Kossack ask DOJ for an annual report on election crimes. Adams claimed that some of the matches from Crosscheck had been brought to the attention of federal officials but not led to prosecutions.[10] "Of course when you don't prosecute crimes, you tend to have more crimes," he wrote.[11]

2. The President Lacks the Authority to Circumvent the EAC.

The Constitution assigns Congress authority over federal elections. *See* U.S. Const. Art. I, § 4, cls. 1, 4. In the Help America Vote Act (HAVA), Congress exercised its authority by creating an independent agency, the EAC, to study election integrity issues, including "[m]ethods of voter registration, maintaining secure and accurate lists of registered voters," and "methods of identifying, deterring, and investigating voting fraud in elections for Federal office." 52 U.S.C. § 20981(b)(3), (6). Congress authorized the EAC to hold hearings, take testimony, and secure information from other federal agencies. *Id.* § 20925(a), (b). Congress also ensured that the EAC is balanced and accountable. Among other things, HAVA requires the EAC's four Commissioners to be appointed with the advice-and-consent of the Senate; requires each EAC Commissioner to have expertise in the administration or study of elections; prohibits more than two Commissioners from belonging to the same party; and prohibits the EAC from acting without the agreement of at least three Commissioners. *Id.* §§ 20923(a), (b); 20928.

In April 2017, Matthew Masterson, the Republican Chair of the EAC, made clear the election was not characterized by widespread fraud, stating: "The process had integrity. It was extremely well administered." Doc. 66 ¶ 74a. Unwilling to accept that conclusion, President Trump created the PACEI the following month. *Id.* ¶ 75. President Trump's Executive Order directs the PACEI to study "those vulnerabilities in voting systems and practices used for

[10] Levine, *supra* note 3.
[11] *Id.*

Federal elections that could lead to improper voter registrations and improper voting, including fraudulent voter registrations and fraudulent voting." Exec. Order No. 13,799 § 3(c), 82 Fed. Reg. 22389, 22389 (May 11, 2017). In other words, the President directed the PACEI to investigate what Congress had already established the EAC to investigate.

By circumventing the body created by Congress to investigate voter fraud, the President has "take[n] measures incompatible with the expressed or implied will of Congress." *Youngstown Sheet*, 343 U.S. at 637 (Jackson, J., concurring). As such, his power is at "its lowest ebb," and he "can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id*. "Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Id*. at 638.

The Constitution does not provide any such preclusive power here. Defendants do not claim the PACEI is justified by any of President's enumerated powers in Section 2 of Article II—this is not a case involving the armed forces or international treaties where the Constitution assigns primacy to the President. Instead, Defendants contend the Take Care Clause authorizes the establishment of the PACEI because it permits the President to "investigate" and "check the[] efforts" of the EAC. Doc. 78-1 at 22. That argument fails for two reasons. First, it is a post-hoc justification that "reeks of afterthought." *Miller-El v. Dretke*, 545 U.S. 231, 246 (2005). Nothing in the Executive Order, or in any statement of the President or the PACEI, suggests the Commission's mission is to review the work of the EAC.

Second, Defendants' position is premised on a serious misunderstanding of the Take Care Clause. "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his

power." *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring) (citation omitted). Congress did not enact a law authorizing the President to create a commission to investigate the EAC, so the Take Care Clause does not permit the President to do so. *Independent Meat Packers Ass'n v. Butz*, 395 F. Supp. 923 (D. Neb. 1975)—the sole authority cited by Defendants on this point—is not to the contrary. *Butz* did not even involve a presidential advisory committee. Instead, *Butz* concerned the President's power to obtain information *from* existing executive branch agencies, specifically by issuing inflation impact statements with new rules. *See id.* at 932; Exec. Order No. 11821, 39 Fed. Reg. 41501, 1974 WL 186804 (Nov. 27, 1974) (Pres.). *Butz* does not suggest the Take Care Clause authorizes new presidential commissions to act as internal affairs bureaus over independent agencies created by Congress.

Here, as in *Youngstown Sheet*, "[t]he President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President." 343 U.S. at 588 (majority opinion). Therefore, it is not supported by the Take Care Clause. *Id*.

The only other constitutional provision cited by Defendants is the Recommendation Clause. As Defendants stress, that clause gives the President the authority to "recommend[] laws he thinks wise." *Youngstown Sheet*, 343 U.S. at 587. But the power to recommend legislation does not—as Defendants apparently suggest—carry with it an unmentioned and unlimited power to create duplicate entities to investigate issues and then advise the President. If it did, the Framers would not have needed to include the Opinion Clause, which authorizes the President to "require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices." U.S. Const. art. II, cl. 1. In any event, whatever significance the Recommendation Clause could have if this were a "zone of

twilight" case where Congress had not spoken, it does not support the kind of "conclusive and preclusive" authority to circumvent Congress's exercise of its specifically delegated authority. *Youngstown Sheet*, 343 U.S. at 637-38 (Jackson, J., concurring).

Finally, Defendants seek to justify the PACEI by pointing to FACA. But, while FACA acknowledges the existence of presidential advisory commissions in general, it does not authorize any particular commission, much less one that would contravene Congress's establishment of an independent agency. FACA establishes various reporting, transparency, and balance requirements that apply to presidential advisory committees, and it makes clear that only Congress or the President may authorize the creation of such committees. *See* 5 U.S.C. app. 2 §§ 6(b)-(c), 9(a)(1). That is not the same as authorizing the President to create investigatory advisory committees on any subject he wishes. Indeed, when Congress has intended to provide a specific grant of authorization to the President to create advisory committees, it has done so *expressly*, and with respect to a limited subject matter. *See* 22 U.S.C. § 502 (stating that "[t]he President is authorized to create such advisory committees as in his judgment may be of assistance in carrying out" duties with respect to Inter-American relations); *id*. § 2456(d) (stating that "[t]he President is authorized to create . . . advisory committees concerning" foreign study programs); *id*. § 2103(e) (stating that "[t]he President is authorized" to create advisory committees concerning health sciences).

FACA's general language contemplating the existence of presidential advisory committees, by contrast, does not authorize the President to circumvent HAVA's specific statutory scheme authorizing the EAC to investigate issues of voter registration and voter fraud. *See NLRB v. Sw. Gen., Inc.*, 137 S. Ct. 929, 941 (2017) ("It is a commonplace of statutory construction that the specific governs the general.") (citation and alteration omitted).

Plaintiffs have plausibly pleaded that the PACEI's creation constitutes unauthorized presidential action.

D. Plaintiffs Pleaded Legally Sufficient FACA Claims that are Enforceable Under the APA and via Mandamus.

Defendants cannot dispute that Plaintiffs adequately pleaded violations of FACA's "fairly balanced" and "inappropriate influence" provisions. Instead, they contend the federal judiciary lacks the power to adjudicate their violations of federal law. However, courts routinely hold that FACA claims are reviewable in federal court. This case is no exception. Absent judicial review, executive officials could violate FACA with impunity, thereby thwarting the statute's purpose of enhancing "the public accountability of advisory committees," *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 459 (1989); *see* 5 U.S.C. app. 2 § 2(b); S. Rep. No. 92-1098 at 4 (1972).

1. The Commission Is an "Agency" Subject to Judicial Review Under the APA.

As Defendants concede, the APA provides a remedy when an agency violates FACA. Doc 78-1 at 23. Under the APA, an "agency" is broadly defined to include any "authority of the Government of the United States." 5 U.S.C. § 701(b)(1). The PACEI, which was established by Executive Order and exercises federal power, is therefore an "agency" whose violations of FACA may be remedied under the APA.[12]

In arguing otherwise, Defendants rely on the holding in *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), that if an entity's "sole function were to advise and assist the President, that might be taken as an indication that . . . [it is] not a separate agency." *Id.* at 1071 n.9, 1075. But

[12] Defendants' passing assertion (Doc 78-1 at 30) that an entity cannot be an "agency" under the APA and an "advisory committee" subject to FACA is wrong. The case Defendants rely on, *Heartwood, Inc. v. U.S. Forest Service*, 431 F. Supp. 2d 28 (D.D.C. 2005), focuses solely on the definition of "agency" in FACA—rather than in the APA, which is what matters—and was rejected by a later decision in the same district. *Ctr. for Biolog. Diversity v. Tidwell*, 239 F. Supp. 3d 213, 221 (D.D.C. 2017).

Soucie and its progeny concern the interpretation of "agency" in FOIA, 5 U.S.C. § 552(f), and in *id.* § 551(1), not in the APA. *See also Dong v. Smithsonian Inst.*, 125 F.3d 877 (D.C. Cir. 1997) (discussing *Soucie* in the context of the Privacy Act, which borrows the definition of agency from § 552(f), and cross-references § 551(1)). In the APA, "Congress wanted to avoid a formalistic definition of 'agency' that might exclude any authority within the executive branch that should appropriately be subject to the requirements of the APA." *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991) ("*Armstrong I*").[13]

Consistent with this distinction, the D.C. Circuit has held government authorities to be "agencies" for purposes of the APA—and therefore subject to judicial review—even when they did not meet the *Soucie* test. *Compare Armstrong I*, 924 F.2d at 297 (APA authorizes judicial review of National Security Council ("NSC") actions), *with Armstrong v. Exec. Office of the President*, 90 F.3d 553, 557-67 (D.C. Cir. 1996) ("*Armstrong III*") (NSC not "agency" under FOIA because it fails *Soucie* test); *see also Pub. Citizen v. U.S. Trade Rep.*, 5 F.3d 549, 550 (D.C. Cir. 1993); *Citizens for Resp. & Ethics in Wash. v. Exec. Office of the President*, 587 F. Supp. 2d 48, 57-58, 63 (D.D.C. 2008) ("*CREW*").

In any event, even under *Soucie*, PACEI is an agency, because it does far more than "advise and assist the President." *Main Street Legal Servs. v. Nat'l Sec. Council*, 811 F.3d 542, 548-53 (2d Cir. 2016). The Commission is authorized to "study [] registration and voting processes" and to identify which "laws, rules, policies, activities, strategies, and practices" enhance or undermine Americans' "confidence in the integrity of" the federal election process.

[13] The statutory history leaves no doubt on this point. The term "agency" as used in the APA is "defined substantially" as it was in the Federal Reports Act of 1942, and the Federal Register Act, *see* APA, Legislative History, S. Doc. No. 248, at 12-13 (1946), both of which expressly encompassed "commission[s]," Federal Reports Act, Pub. L. No. 77-831 § 7(a), 56 Stat. 811, 1079-80 (1942); Federal Register Act, Pub. L. No. 74-220 § 4, 49 Stat. 417, 501 (1935).

Exec. Order 13,799 §§ 3, 3(a), 82 Fed. Reg. at 22389. As part of its investigation, the PACEI has already requested and received extensive state voter data, communicated with other federal agencies, and stated its intent to engage in database matching. *See supra* p. 23-4. Because the Commission investigates, evaluates, and makes recommendations, it is an "agency" even under the *Soucie* test. *See Energy Research Found. v. Def. Nuclear Facilities Board*, 917 F.2d 581, 585 (D.C. Cir. 1990); *see also Soucie*, 448 F.2d at 1073 n.15 (entity that "investigates, evaluates and recommends, but does not adjudicate," is an agency).

Defendants cannot plausibly characterize these actions as incidental to the PACEI's advisory role, and "any authority within the executive branch" engaged in such sweeping conduct is "appropriately [ ] subject to the [APA's] requirements." *Armstrong I*, 924 F.2d at 289. Indeed, according to Defendants, the PACEI is checking up on the EAC, Doc. 78-1 at 22, 26, which confirms that it is an agency. *Pac. Legal Found. v. Council on Envtl. Quality*, 636 F.2d 1259, 1263 (D.C. Cir. 1980) (entity that evaluates federal programs is agency).

2. Plaintiffs' FACA Claims May Also Be Enforced via Mandamus.

FACA imposes "discrete, non-discretionary duties," which means it may also be enforced by mandamus. *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 736 F. Supp. 2d 24, 31 (D.D.C. 2010); *see also Freedom Watch, Inc. v. Obama*, 807 F. Supp. 2d 28, 33 (D.D.C. 2011); *CREW*, 587 F. Supp. 2d at 63; *Judicial Watch, Inc. v. Nat'l Energy Policy Grp.*, 219 F. Supp. 2d 20, 43 (D.D.C. 2002), *abrogation on other grounds recognized by Tidwell*, 239 F. Supp. 3d at 221. A statute "imposes a mandatory duty" when it uses the word "shall," *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016), and "nearly every provision of . . . FACA that explains the statutory duties of advisory committees, . . . includes the word 'shall.'" *Judicial Watch*, 736 F. Supp. 2d at 31. That includes the provisions Plaintiffs rely on here. *See* 5 U.S.C. app. 2 §§ 5(b)(2), (3).

Defendants argue that this Court should exercise its discretion to deny mandamus because applying FACA to a presidential commission could raise constitutional concerns. Doc. 78-1 at 37-38. But it would "be premature and inappropriate to determine whether . . . mandamus . . . will or will not issue" at the motion to dismiss stage. *Nat'l Energy*, 219 F. Supp. 2d at 44. In any event, applying FACA raises no constitutional concerns. Where, as here, "the President formally convenes a[ ]. . . committee pursuant to [ ]FACA, he cannot claim that enforcement of the Act's requirements would unconstitutionally impede his ability to perform his functions." *Nat'l Anti-Hunger Coal. v. Exec. Comm. of President's Private Sector Survey on Cost Control*, 711 F.2d 1071, 1073 n.1 (D.C. Cir. 1983). That is particularly true given that Defendants rely on FACA as the supposed source for the President's authority to appoint the PACEI in the first place. Doc. 78-1 at 1-2. The President could have asked White House staff to study these issues, or DOJ to conduct the desired review. He instead chose to create an advisory committee, with the thinnest veneer of bipartisanship and composed of purported experts stacked to ensure the Commission's work would reach only one conclusion. Even if the President had the authority to create such a commission, *but see supra* pp. 27-33, the consequence is that the Commission is subject to FACA's requirements. Finally, Defendants' constitutional argument is grounded in their incorrect premise that the PACEI is solely advisory, *see* Doc. 78-1 at 2, when it is in fact acting in an investigatory capacity.

If this Court concludes no other remedy is available, mandamus will be appropriate for Plaintiffs' FACA claims. In the meantime, Defendants' motion to dismiss should be denied.

3. Plaintiffs' FACA Claims are Justiciable.

Agency "action [is] presumptively reviewable." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchack*, 567 U.S. 209, 225 (2012). Here, Plaintiffs properly stated a claim asking this Court to review whether the PACEI is "fairly balanced" and not

"inappropriately influenced by the appointing authority"—requirements Congress specifically imposed on all advisory committees, including those created by the President. 5 U.S.C. app. 2, §§ 5(b)(2)-(3), 6. Yet, Defendants insist the Court cannot do so. In Defendants' view, these requirements establish "no meaningful standard" by which to judge the PACEI's composition, such that the PACEI's conduct is unreviewable under either the APA or mandamus. *See* Doc. 78-1 at 31. But the provisions of FACA at issue here are comparable to legal standards routinely applied by courts, and they surely supply *some* law to apply. Plaintiffs' claims are therefore justiciable. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (claims nonjusticiable for lack of manageable standards under the APA when there is "no law to apply"), *abrogated in part on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

a. Plaintiffs' "fairly balanced" claim is justiciable.

FACA requires that advisory committee commissions be, *inter alia*, "fairly balanced in terms of the points of view represented." 5 U.S.C. app. 2 § 5(b)(2). That is not a meaningless standard with "no law to apply." *Overton Park*, 401 U.S. at 410. Indeed, it is at least as manageable as the standards at issue in *Overton Park* itself, which turned on whether there were "feasible and prudent" alternatives to the use of public parkland, and whether an approved program had undertaken all possible planning to "minimize harm" to a park. *Id*. at 41.

Nor have courts had difficulty deriving manageable standards for adjudicating fairly-balanced claims under FACA. As one court put it, "[w]hen evaluating the fairly balanced standard, a court must determine whether the committee's members 'represent a fair balance of viewpoints given the functions to be performed.'" *Lorillard, Inc. v. FDA*, No. 11-cv-440, 2012 WL 3542228, at *2 (D.D.C. Aug. 1, 2012) (quoting *Pub. Citizen v. Nat'l Adv. Comm. on Microbiolog. Criteria*, 886 F.2d 419, 423 (D.C. Cir. 1989)). That standard is easily applied here. In fact, this Commission does not present even a plausible veneer of balance.

The Commission's primary function is to assess the integrity of our electoral system, including most prominently the issue of voter fraud. Exec. Order No. 13, 799, 82 Fed. Reg. at 22389. Yet, the President stacked the PACEI with individuals who have (contrary to all available evidence) taken the public position that voting fraud is rampant and underreported. *See* Doc. 66 ¶¶ 89-91 (Vice President Pence); 92-111 (Kobach); 112-115 (Blackwell); 127-28 (Gardner); 129-30 (Lawson); 131-32 (McCormick); 133-34 (Rhodes); 136-40 (von Spakovsky); 143 (Adams). Further, Plaintiffs have plausibly alleged that the Commission is controlled by three Commissioners who have a preordained view that widespread voting fraud exists and have advocated for highly restrictive voting measures to address it. Doc. 66 ¶ 121. By contrast, the Commission lacks any representation of voters whose right to the franchise would be limited by restrictive voting laws. *Id.* ¶¶ 147-49. And the few Commissioners who do not agree with its leaders' views have been, in Commissioner Dunlap's words "precluded from meaningful participation;" they have been kept it the dark about what the Commission is investigating and how it is doing so. *See, e.g.*, Merle Decl. Ex. B at 12, 20. As such, there is no meaningful possibility for the type of transparent, honest debate between views that FACA contemplates. *See, e.g.*, *Cummock v. Gore*, 180 F.3d 282, 291 (D.C. Cir. 1999) ("[A]n interpretation of FACA that permitted a given advisory committee to exclude a disfavored member would fly in the face of the principle established by [the statute's substantive] requirements."); *Nat'l Anti-Hunger Coal. v. Exec. Comm. of Pres. Priv. Sector Survey on Cost Control*, 566 F. Supp. 1515, 1517 (D.D.C. 1983) (advisory committee on food policy not fairly balanced when it lacked any representation on behalf of food stamp recipients). Considering these well-pleaded facts in light of the "functions to be performed" leaves no doubt that the PACEI is not "fairly balanced," and Plaintiffs have stated a claim.

Defendants do not engage with these facts. Instead, they argue FACA's "fairly balanced" requirement is categorically non-justiciable based primarily on a single-judge opinion that no circuit has ever adopted. *See* Doc. 78-1 at 32-33 (quoting *Nat'l Adv. Comm. on Microbiolog. Criteria*, 886 F.2d at 426 (Silberman, J., concurring in the judgment)). The *only* circuit court that ever found a particular application of this statutory provision to be non-justiciable noted that its decision was limited to the specific committee and legal regime before it. *See Ctr. for Policy Analysis on Trade & Health (CPATH) v. Office of U.S. Trade Rep.*, 540 F.3d 940, 945-46 (9th Cir. 2008). In every other case in which a court of appeals has considered this question, the fairly-balanced question presented was found justiciable. *See, e.g., Colo. Envtl. Coal. v. Wenker*, 353 F.3d 1221 (10th Cir. 2004); *Cargill, Inc. v. United States*, 173 F.3d 323 (5th Cir. 1999); *Alabama-Tombigbee Rivers Coal. v. Dep't of Interior*, 26 F.3d 1103 (11th Cir. 1994); *Nat'l Anti-Hunger Coal.*, 711 F.2d 1071.

Nor do the few district court opinions Defendants rely upon support their argument that this FACA provision is merely aspirational. Most of those opinions dealt with committees tasked with examining nuanced scientific or policy questions that could be approached from several different vantage points. *See, e.g., Doe v. Shalala*, 862 F. Supp. 1421, 1430 (D. Md. 1994); *Fertilizer Inst. v. EPA*, 938 F. Supp. 52, 53 (D.D.C. 1996). By contrast, Plaintiffs' claim is based on the fact that the PACEI is dominated by members who have pre-judged the primary question the Commission is charged with investigating.

As is true with any standard, there may be close cases in determining whether an advisory committee is "fairly balanced." *See Cody v. Cox*, 509 F.3d 606, 610-11 (D.C. Cir. 2007) (the "difficulty of defining the boundaries" of a statutory standard does not make it nonjusticiable, even when the statute uses "permissive and indeterminate" language). This is not one of them.

The PACEI is a textbook example of a commission whose membership does not contain a fair balance of viewpoints in light of the function to be performed.

b. Plaintiffs' "inappropriately influenced" claim is justiciable.

This Court can also readily adjudicate Plaintiffs' claim that the PACEI is subject to inappropriate influence in violation of 5 U.S.C. app. 2 § 5(b)(3). Defendants suggest that there is no meaningful standard by which to evaluate what level of outside influence is "appropriate," but that ignores the many decisions judging agency action by exactly that standard. *See, e.g.*, *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015) (recognizing that the word "appropriate" was a "classic broad and all-encompassing term that . . . includes consideration of all the relevant factors" and holding that a regulation was *not* "appropriate"). Indeed, courts frequently apply broad standards such as "reasonable," "substantial compliance," "in the public interest," or "high-quality and cost effective." *See, e.g.*, *City of New York v. Slater*, 145 F.3d 568, 570-71 (2d Cir. 1998); *Cox*, 509 F.3d at 610-11, *Arent v. Shalala*, 70 F.3d 610, 614 (D.C. Cir. 1995).

Here, Plaintiffs have plausibly alleged that the PACEI has been "inappropriately influenced" in violation of FACA. By ensuring that the PACEI is dominated by Commissioners who share his unfounded views of widespread voter fraud, President Trump effectively applied a litmus test in service of his preferred, pre-ordained result. Thus, as with the "fair balance" requirement, even assuming there may be hypothetical cases in which it would be difficult to determine if a commission was "inappropriately influenced," this is not one of them. Given the brazen, secretive, and exclusionary way in which the PACEI was created and has operated to date, that standard's application here is straightforward and judicially manageable.

CONCLUSION

Defendants' motion to dismiss should be denied.

Respectfully submitted this 8th day of December 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS with this Court using the CM/ECF system, which provides notice of this filing to all registered CM/ECF users.

Dated: December 8, 2017

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