IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,

Defendants.

Civil Action No. 1:18-cv-02711 (DLF)

DEFENDANTS' REPLY IN FURTHER
SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

Plaintiff's claims that it has Article III standing and that it has stated a claim upon which relief may be granted are without merit. First, with respect to standing, Plaintiff abandons any claim of organizational standing, and has made no effort to rebut Defendants' arguments that it has failed to demonstrate it has representational standing for the majority of the relief it seeks – an injunction prohibiting the implementation of a citizenship question on the 2020 Decennial Census. Plaintiff also fails to demonstrate that the individuals on its advisory board have informational standing; indeed, it fails to establish its advisory board members may be properly characterized as functional members – except by using a formal conception of the term that the Supreme Court has already rejected. Second, as this Court has already concluded, the E-Government Act did not require the Defendants to complete the process for updating their Privacy Impact Assessments ("PIAs") with regard to the 2020 Decennial Census before March 2018, and Plaintiff offers no persuasive argument why this Court's statutory interpretation is incorrect. Plaintiff's APA claims, therefore, must necessarily fail. Accordingly, this Court should dismiss Plaintiff's complaint for lack of subject-matter jurisdiction. If the Court determines that it has jurisdiction, the Court should, consistent with its Memorandum Opinion denying Plaintiff's Motion for a Preliminary Injunction, dismiss Plaintiff's complaint for failure to state a claim.

ARGUMENT

I. PLAINTIFF LACKS ARTICLE III STANDING.

Plaintiff has abandoned any claim of organizational standing asserted in its complaint, focusing instead on the alleged injuries of its purported "members" – individuals serving on Plaintiff's advisory board. *See* Pl.'s Opp'n to Defs.' Mot. to Dismiss, ECF No. 22 ("Pl.'s Opp'n"), at 19-25 (asserting Plaintiff has standing to bring suit on behalf of its "members"); *see also* EPIC, Bylaws §§ 5.01-02, *available at* https://epic.org/bylaws.pdf (designating the "distinguished

experts in law, technology, and public policy" comprising its "Advisory Board" as "Members"). But Plaintiff falls short in demonstrating that it may pursue its claims under a representational standing theory. Even assuming the individuals on Plaintiff's advisory board are properly characterized as "members," which as discussed below they are not, Plaintiff has failed to satisfy its burden of demonstrating that at least one advisory board member has "'standing for each claim [Plaintiff] seeks to press and for each form of relief that is sought.'"[1] *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017); *see also Cierco v. Mnuchin*, 857 F.3d 407, 416 (D.C. Cir. 2017) ("[A] plaintiff must demonstrate standing separately for each form of relief sought.").

A. Plaintiff Has Failed to Demonstrate the Individuals on its Advisory Board Have Standing to Sue in their Own Right.

Plaintiff fails to muster *any* argument in response to Defendants' assertion that it lacks standing to obtain the vast majority of the relief it seeks – an injunction prohibiting Defendants from taking further steps to implement a citizenship question on the 2020 Decennial Census without first completing and publishing updated PIAs for the information technology systems that will be processing respondent data.[2] Nor could it, as any claim that the addition of a citizenship

[1] Plaintiff suggests that it has standing for the simple reason that neither Defendants nor the Court questioned its standing during the preliminary injunction proceedings. *See* Pl.'s Opp'n at 18-19. But as Plaintiff acknowledges, Defendants merely assumed for purposes of resolving Plaintiff's motion for a preliminary injunction that Plaintiff "could establish it has associational standing[.]" Defs.' Opp'n to Pl.'s Mot. for Prelim. Inj., ECF No. 12, at 19. Defendants went on to expressly state that they did "not concede that Plaintiff necessarily would be able to establish standing based on the current record" and that the Court did not need to resolve the issue of standing to deny Plaintiff's motion. *Id.* at 20 n. 7. In any event, it is well established that "standing is jurisdictional and [] can never be forfeited or waived." *Bauer v. Marmara*, 774 F.3d 1026, 1029 (D.C. Cir. 2014) (citing *Steel Co. v. Citizens for a Better Env't*, 525 U.S. 83, 94-95 (1998)). As such, it may "be raised at any point in a case proceeding[.]" *Steffan v. Perry*, 41 F.3d 677, 697 n.20 (D.C. Cir. 1994) (en banc).

[2] "By declining to respond to [Defendants'] argument[s] . . . [Plaintiff] has conceded the issue[.]" *Wang v. Washington Metro. Area Transit. Auth.*, 206 F. Supp. 3d 46, 65-66 (D.D.C. 2016) (mem.); *see also Hopkins v. Women's Div., Gen. Bd. of Global Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003) ("[W]hen a plaintiff files an opposition to a dispositive motion and addresses only certain

question threatens the privacy interests of Plaintiff's advisory board members is "pure speculation" and as such does not confer standing to obtain an injunction prohibiting Defendants from implementing the question until after updated PIAs have been made publicly available. *See* Defs.' Mem. in Support of Mot. to Dismiss ("Defs.' Mem."), ECF No. 20-1, at 11-12 (citing *Clapper v. Amnesty Int'l USA*, 568 US 398, 417 (2013); *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 619 (S.D.N.Y. 2019), *cert. granted*, 139 S. Ct. 953 (2019)).

Moreover, as this Court has already held, an order halting Defendants' implementation of a citizenship question on the 2020 Decennial Census "'cannot redress a[] [purported] informational injury under the E-Government Act.'" *Elec. Privacy Info. Ctr. v. U.S. Dep't of Commerce* ("*EPIC*"), 356 F. Supp. 3d 85, 96 (D.D.C. 2019) (mem.), *appeal filed*, No. 19-5031 (D.C. Cir. Feb. 19, 2019) (quoting *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity* ("*EPIC v. PACEI II*") 878 F.3d 371, 380 (D.C. Cir. 2017), *cert. denied*, 139 S. Ct. 791 (2019)); *see also EPIC v. PACEI II*, 878 F.3d at 380 (explaining in the context of Plaintiff's section 208 challenge to the collection of publicly available voter data by the former Presidential Advisory Commission on Election Integrity that "ordering the defendants *not* to collect voter data only *negates* the need (if any) to prepare a[] [privacy impact] assessment, making it *less* likely that EPIC will obtain the information it" seeks to obtain (emphasis in original)). Indeed, where an agency has allegedly failed to publish a required report, the remedy, if any, is to order publication of the report – not to enjoin the underlying agency action. *Cf. Common Cause v. Federal Election Comm'n*, 108 F.3d 413, 418 (D.C. Cir. 1997) (holding that a theory of informational injury did not

arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded.").

give a plaintiff standing to request that an agency "'get the bad guys,' rather than disclose information").

In apparent recognition of this Court's conclusion that an injunction prohibiting Defendants from implementing the citizenship question would not remedy an informational injury, Plaintiff appears to focus on its request to compel publication of a PIA specifically addressing the citizenship question (only one of the five claims for relief it seeks in its Complaint). *See* Pl.'s Opp'n at 20-22. But as Defendants explained in their opening memorandum, the D.C. Circuit has held that section 208 does not create a broad public right to information.[3] *See* Defs.' Mem. at 13-15; *see also EPIC v. PACEI II*, 878 F. 3d at 378-79 (holding that section 208 "does not confer [an] informational interest on EPIC"). Rather section 208 expressly seeks to protect individuals' privacy "by requiring an agency to fully consider their privacy before collecting their personal information." *EPIC v. PACEI II*, 878 F.3d at 378. The alleged denial of access to information without a corresponding concrete and particularized injury to individual privacy is, therefore, "not the type of harm Congress sought to prevent by requiring disclosure[,]" if practicable, of a PIA before an agency initiates a new collection of information. *Id.* (quoting *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016) (en banc)); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 & n.7 (1992) (explaining that plaintiffs have standing to "enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs" but that

[3] Plaintiff's reliance on the district court's decision in *Electronic Privacy Information Center v. Presidential Advisory Commission on Election Integrity* to argue otherwise is misplaced. *See* Pl.'s Opp'n at 21 (citing *EPIC v. PACEI I*, 266 F. Supp. 3d 297, 313-14 (D.D.C. 2017), *aff'd on other grounds*, 878 F.3d 371 (D.C. Cir. 2017), *cert. denied*, 139 S. Ct. 791 (2019)). Although the district court found that an agency's failure to comply with section 208 conferred informational standing, the D.C. Circuit disagreed. *See EPIC v. PACEI II*, 878 F.3d at 374-75, 378-79 (holding that Plaintiff did not have informational standing to press its section 208 claim because Congress, in enacting the provision, intended to prevent harm to individual privacy not provide public access to agency record systems and information that is of social interest).

"persons who have no concrete interests affected" have no such procedural right). Accordingly, the individuals on Plaintiff's advisory board have not suffered a concrete and particularized informational injury sufficient to confer standing to sue in their own right. *See Friends of Animals*, 828 F.3d at 992.[4]

Plaintiff contends that Defendants, and by extension the D.C. Circuit, overlook the purposes of the E-Government Act writ large, which include "provid[ing] enhanced access to Government information" and "mak[ing] the Federal Government more transparent and accountable." Pl.'s Opp'n at 23 (quoting E-Gov. Act § 2(b)(9), (11)). It is Plaintiff's argument, however, that ignores a well-established canon of statutory construction – "'that the specific governs the general.'" *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)). This "is particularly true where . . . Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *Howard v. Pritzker*, 775 F.3d 430, 438 (D.C. Cir. 2015) (citations omitted). The E-Government Act addresses a wide range of electronic Government activities and thus, as reflected in section 2, was enacted for numerous purposes. *See generally* E-Gov. Act, Pub. L. No. 107-347, 116 Stat. 2899 (2002). But Congress, in enacting section 208, the Act's "Privacy Provisions," expressly declared that the purpose of the section is to "ensure sufficient protections for the privacy of personal information as agencies implement citizen-centered electronic Government." E-Gov. Act § 208(a). As the D.C. Circuit recognized, this specific purpose for the Act's provisions addressing individual privacy as it relates to the

[4] "A plaintiff suffers a sufficiently concrete and particularized informational injury where the plaintiff alleges that: (1) it has been deprived of information that, on its interpretation, a statute requires the government of a third party to disclose to it, and (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure." *Friends of Animals*, 828 F.3d at 992.

collection of personally identifying information governs the evaluation of any claim made under section 208. *See EPIC v. PACEI II*, 878 F.3d 378-79.

Further, as Defendants' noted in their opening memorandum, the only issue before the Court is one of timing. *See* Defs.' Mem. at 13. As this Court recently concluded, "publishing a PIA shortly before commencing a new collection of information" or even "belatedly would support" the E-Government Act's general purpose of "mak[ing] the Federal Government more transparent and accountable" and "would inform citizens why their data is being collected, how it is secured, and with whom it will be shared." *EPIC*, 356 F. Supp. 3d at 95. Thus, whether Defendants complete and publish an updated PIA addressing the citizenship question before or after they distribute the 2020 Decennial Census questionnaires has no bearing on the informational interests of Plaintiff's advisory board members.

Additionally, Plaintiff argues that its advisory board members "will be irreparably harmed by the Census Bureau's failure to disclose information that is highly relevant to an ongoing and highly public matter." Pl.'s Opp'n at 20 (internal quotations, brackets, and citation omitted). The individuals on Plaintiff's advisory board, however, already have access to a great deal of information regarding both the citizenship question and the manner in which the Census Bureau protects private data. Section 208 indicates that a PIA should address "what information is to be collected," "why the information is being collected," "the intended use of the agency of the information," "with whom the information will be shared," "what notice or opportunities for consent would be provided to individuals regarding what information is collected and how that information is shared," "how the information will be secured," and "whether a system of records is being created under" the Privacy Act. E-Gov. Act § 208(b)(2)(B)(ii). The agency record underlying the March 2018 decision to reinstate a citizenship question address many of these

matters. *See, e.g.* Letter from Wilbur Ross, Secretary, U.S. Dep't of Commerce, to Karen Dunn Kelley, Under Secretary of Economic Affairs, U.S. Dep't of Commerce, Mar. 26, 2018, ECF No. 8-4, Ex. 1. Defendants' publicly available PIAs, which Defendants regularly update, provide additional information about Defendants' robust data-security measures, the exceptionally narrow circumstances in which census information may be shared, and the applicability of the Privacy Act. *See, e.g.*, U.S. Dep't of Commerce, U.S. Census Bureau, Privacy Impact Assessment for the CEN08 Decennial Information Technology Division (DITD), Sept. 27, 2018, *available at* http://www.osec.doc.gov/opog/privacy/Census%20PIAs/CEN08_PIA_SAOP_Approved.pdf.

Plaintiff's attempts to analogize section 208 to the National Environmental Policy Act ("NEPA") are also misplaced. Plaintiff asserts that, in NEPA, Congress required agencies to prepare environmental impact statements relatively early in their decisionmaking processes and that this Court should construe the E-Government Act to do the same. *See* Pl.'s Opp'n at 24-25. As discussed below, Plaintiff's reliance on NEPA does not aid its arguments about the proper interpretation of the E-Government Act. *See infra* at 14. And more relevantly for purposes of standing, Plaintiff cites no case in which a court has allowed a plaintiff to bring suit under NEPA on a pure theory of informational standing, where the plaintiff lacked standing to challenge the underlying proposed agency action. *See Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996) (en banc) (explaining that, in "suits demanding preparation of an" environmental impact statement under NEPA, "the plaintiff must show that the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff"); *id.* at 667 (describing the "pertinent[] standing question" in a NEPA suit as "whether the underlying government act demonstrably increased some specific risk of environmental harm to the interests *of the plaintiff*"); *Foundation on Econ. Trends v. Lyng*, 943 F.2d 79, 84 (D.C. Cir. 1991) ("[W]e

have never sustained an organization's standing in a NEPA case solely on the basis of 'informational injury,' that is, damage to the organization's interest in disseminating the environmental data an impact statement could be expected to contain.").

Indeed, in *Committee of 100 on Federal City v. Foxx*, 87 F. Supp. 3d 191 (D.D.C. 2015), on which Plaintiff seeks to rely, the plaintiffs contended that they would suffer concrete harms – "noise, vibrations, air pollutants, and other environmental impacts"; "a loss in the value of [one member's] home"; risk to life and property in the event of a rail spill; and "the removal of trees and the closure of parks and other recreation areas" – from a construction project as to which the government had allegedly failed to complete a required environmental impact statement. 87 F. Supp. 3d at 202. Here, by contrast, Plaintiff identifies no concrete and non-speculative harm to the individuals on its advisory board from failure to publish a PIA by March 2018.

B. Plaintiff is Not a Membership Organization or its Functional Equivalent.

Even if Plaintiff had demonstrated that the individuals on its advisory board have standing to sue in their own right, Plaintiff cannot proceed on a theory of representational standing because it is not a membership organization or its functional equivalent. Plaintiff contends that the 2018 amendments to its bylaws, in which it deemed the individuals on its advisory board "members" and required them to pay an unspecified amount of dues pursuant to an unspecified schedule gave it the necessary "indicia of membership" to transform it into a traditional membership organization. *See* Pl.'s Opp'n at 20, 25; *see also* EPIC, Bylaws §§ 5.01-03. But it would "exalt form over substance," *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 345 (1977), if a watchdog organization or think tank could transform itself into a membership organization simply by giving its board members an additional title and charging them a fee. There is no indication that the 2018 changes to Plaintiff's bylaws are anything other than formal. For example,

while the apple growers and dealers in *Hunt* were the sole source of funding for the apple commission's activities, strengthening the "indicia of membership" in that case, 432 U.S. at 344-45, there is no sign that the "dues" paid by the individuals on Plaintiff's advisory board are anything other than nominal.[5] Similarly, the apple growers and dealers in *Hunt* elected the commission's leadership. *Id.* Here, however, it does not appear that the individuals on Plaintiff's advisory board elect Plaintiff's leadership or otherwise have voting rights – they merely "provide guidance" to Plaintiff. EPIC Bylaws § 5.02.

II. PLAINTIFF FAILS TO STATE A CLAIM.

"[T]he E-Government Act requires agencies to conduct (and, if practical, release) a PIA only before '*initiating* a new collection of information." *EPIC*, 356 F. Supp. 3d at 89 (quoting E-Gov. Act. § 208(b)(1)(A)(ii) (emphasis added)). As this Court has already concluded,

> '[I]nitiating' the collection of information . . . means more than just announcing a decision to collect information at some point in the future. It requires at least one instance of obtaining, soliciting, or requiring the disclosure of information, which . . . will not occur until the Bureau mails its first batch of Census questionnaires to the public.

Id.; *see also id.* at 95 ("[T]he Court interprets 'initiating a new collection of information 'to require at least one instance of 'obtaining, causing to be obtained, soliciting, or requiring the disclosure . . . of facts or opinions.' This interpretation is fatal to plaintiff's APA claims.") (internal citations omitted and ellipses original). This conclusion is correct, and Plaintiff does not persuasively rebut it in its opposition brief, just as it did not do so during the preliminary injunction briefing. While

[5] Plaintiff relies entirely on the re-characterization of its advisory board members to demonstrate that it is a membership organization. Indeed, a tax form posted on Plaintiff's website states that Plaintiff did not "have members" in 2017 and that "governance decisions of the organization" are not "reserved to (or subject to approval by) members, stockholders, or persons other than the governing body." Form 990, Return of Organization Exempt From Income Tax, at 6 (part VI, section A, questions 6 and 7b), *available at* https://epic.org/epic/EPIC-2017-990.pdf.

Plaintiff never directly quarrels with Defendants' textual argument – itself enough to dispose of this complaint – it nonetheless advances a scattershot collection of arguments against this Court's statutory interpretation. None succeed. Accordingly, this Court should dismiss Plaintiff's complaint for failure to state a claim.[6]

A. The Census Bureau Has Not "Initiated a New Collection of Information."

Plaintiff first points to "the statutory context of the phrase 'initiating a new collection of information.'" Pl.'s Opp'n at 29. It claims that "[s]ection 208 expressly distinguishes between the moment when an agency 'initaite[s] a new collection of information' and the latter point in time at which the information '*will* be collected, maintained, or disseminated[.]'" *Id.* (quoting E-Gov. Act § 208(b)(1)(A)(ii) (emphasis original to Plaintiff's brief). From this, it argues that "Congress understood these to be two independent events – the former occurring at the very beginning of the information collection process, the latter occurred when information is actually solicited or obtained." *Id.*

But the actual full text of the statute belies this conclusion. The complete clause that Plaintiff cites requires the agency to conduct a PIA before "initiating a new collection of information that (I) will be collected, maintained, or disseminating using information technology and (II) includes any information in an identifiable form permitting the physical or online contacting of a specific individual, if identical questions have been posed to, or identical reporting requirements imposed on, 10 or more persons, other than agencies, instrumentalities, or employees

[6] Plaintiff acknowledges that this Court "ruled that EPIC had not shown a likelihood of success on the merits," but states that "the Court did not reach a conclusive determination on EPIC's E-Government Act claims." Pl.'s Opp'n at 26. It further notes that, unlike for a preliminary injunction, the motion to dismiss stage requires only that EPIC's claim be "plausible on its face." *Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662,678 (2009)). But because this Court's earlier ruling was a matter of law (e.g., a pure question of statutory interpretation), its reasoning applies equally here, regardless of the procedural posture or standard of review.

of the Federal Government." E. Gov. Act § 208(b)(1)(A)(ii). In this context, the phrase "will be collected, maintained, or disseminating" refers to and modifies the *method of collection* (i.e. "using information technology") required to trigger the E-Government Act's requirements, not, as Plaintiff suggests, to the timing of the collection. Plaintiff attempts to create two separate timing requirements when there is actually only a single timing requirement ("initiating a new collection of information") and a method of collection requirement (that the information be "collected, maintained, or disseminated using information technology").

Moreover, even if Plaintiff was correct that section 208(b)(1)(A)(ii)(I)'s reference to "will be collected, maintained, or disseminated" constitutes a separate timing requirement – and it is not – its argument would still fail. In order to accept the argument that subsection (I) constituted a separate timing requirement (and Defendants do not believe that it does), Plaintiff would also have to accept that subsection (II), which includes the requirement that "identical questions have been posed to, or identical reporting requirements imposed on, 10 or more persons" *also* constitutes a timing requirement, since that provision refers to questions having *already* been posed (i.e., includes a temporal element). To do otherwise would be inconsistent with the structure of the statute, per Plaintiff's interpretation. But because section 208(b)(1)(A)(ii) requires that all of these elements – (1) "initiating a new collection of information" that (2) "will be collected, maintained or disseminated using information technology," and (3) includes identifiable information "if identical questions have been posed to, or identical reporting requirements imposed on, 10 or more persons" – be satisfied before a PIA must, if practicable be published, and because those elements have indisputably not yet been satisfied (since no questions have been posed), Plaintiff's argument should be rejected.

Next, Plaintiff returns to an argument it advanced during its preliminary injunction motion, where it drew a distinction between section 208(b)(1)(A)(i), which requires a PIA before "developing or procuring information technology," and section 208(b)(1)(A)(ii), which has no such requirement, and concluding that "[i]t would be strange indeed for Congress to require early-stage privacy impact assessments for new IT systems while allowing new collections of personal information to go unexamined by agencies until the very last minute." Pl.'s Opp'n at 29-30. But as this Court already concluded, "one could just as easily draw the opposite inference and conclude that when Congress wants to require a PIA at a preliminary stage, like development or procurement, it does so explicitly." *EPIC*, 356 F. Supp. 3d at 93. Congress's use of preliminary language in section 208(b)(1)(A)(i) only underscores the absence of such language from section 208(b)(1)(A)(ii).

Plaintiff also states that if Congress intended a PIA's publication obligation to attach before "conduct[ing] a new collection of information," Congress could have done so by using language to that effect. Pl.'s Opp'n at 30 (citing 44 U.S.C. § 3507(a)). By not doing so, Plaintiff argues, "Congress recognized the 'collection of information' is a process that *culminates*, not *begins*, with the actual collecting of information." *Id.* But this conclusion is a non-sequitur. The actual *obtaining* of information is not the trigger for the E-Government Act, rather "Defendants acknowledge that an agency has 'iniat[ed] the collection of information' once it makes the request of a member of the public, even if it has yet to receive an answer (in this context, when the Census Bureau mails the questionnaire but before it receives a response)." Defs.' Mem. at 23. It is starting the solicitation of information that is the trigger – hence Congress's borrowing of the definition set out at 44 U.S.C. § 3502(3)(A).

Plaintiff next points to the fact that the Paperwork Reduction Act also uses the phrase "collection of information" "to refer to 'collection[s]' for which no information has been solicited or obtained." Pl.'s Opp'n at 30. But as Defendants have already noted, this is because, in the Paperwork Reduction Act context, "collection of information" can sometimes be used as a verb, and sometimes be used as a noun to describe a package of information that must be submitted to OMB for approval, *e.g.*, 44 U.S.C. § 3506(c)(1)(A) (agency shall "review each collection of information before submission to the Director [of OMB]), 44 U.S.C. § 3507(a)(2) (discussing OMB approval of "the proposed collection of information"). Nor does it make sense to unquestioningly adopt these Paperwork Reduction Act-specific understandings in the E-Government Act context. *See EPIC*, 356 F. Supp. 3d at 93 ("[I]t would be nonsensical to import these specialized, regulation-specific uses to § 208, which plainly uses 'the collection of new information' to describe an event"). Plaintiff's attempts to cite to the Paperwork Reduction Act's *regulations*, Pl.'s Opp'n at 31, similarly fail, as this Court has already concluded. *See EPIC*, 356 F. Supp. 3d at 93-94.

Plaintiff further contends that, "[t]he plain meaning of the phrase 'initiating a new collection' is clear from analogy to other complex legal and administrative processes." Pl.'s Opp'n at 31-32 (citing State Department adoption publication and Coast Guard assessment duty under 6 U.S.C. § 394). But as this Court has already concluded, "in the legal context, . . . Courts routinely use the phrase 'initiating an action' to refer to the filing of the complaint." *EPIC*, 356 F. Supp. 3d at 90-91. "That is because 'initiating' normally means 'beginning' – in the law as everywhere else. And there is a meaningful difference between deciding or preparing to bring a lawsuit and actually *initiating* it." *Id.* at 91.

Nor do the isolated instances that Plaintiff points to suggest differently. For example, 6 U.S.C. § 394 merely requires that the Coast Guard issue regulations that "shall require that before initiating a comprehensive evaluation" – that is, before *beginning* to conduct a comprehensive evaluation – an agency contact point shall consider" various contracting proposals. 6 U.S.C. § 394(b). The statute does not require that an agency consider those factors before even *deciding* to conduct a comprehensive evaluation. Likewise here, an agency must conduct a PIA before *beginning* a new collection of information by soliciting or obtaining information. Plaintiff also relies on the website of the U.S. Embassy in Ethiopia to assert that a couple "initiates an adoption" when it completes the requisite agency paperwork to begin the adoption process – not months or years later when the couple meets or takes custody of their child." Pl.'s Opp'n at 31. Putting aside the questionable relevance of this website to the proper interpretation of the E-Government Act, the website does not support Plaintiff's interpretive approach. It does not suggest that prospective adoptive parents "initiate an adoption" when they begin considering whether to adopt, when they decide to adopt, or even when they undergo a suitability review by the U.S. government – they do so when they submit formal papers to a court. *See Submitting a Case*, U.S. Embassy in Ethiopia, *available at* https://et.usembassy.gov/u-s-citizen-services/child-family-matters/adoption/who-can-adopt/submitting-a-case/, ("To comply [with Ethiopian law] the adoption dossier submitted by prospective adoptive parents to the Federal First Instance Court (FFIC) to initiate an adoption will need to include the PAIR [Pre-Adoption Immigration Review] letter issued by USCIS.").

Finally, Plaintiff resorts to an argument that the purpose of the E-Government Act is inconsistent with this Court's statutory interpretation. Pl.'s Opp'n at 32-34. "But '[e]ven the most formidable argument concerning the statute's purposes could not overcome the clarity' of 'the statute's text.'" *EPIC*, 356 F. Supp. 3d at 94 (quoting *Kloeckner v. Solis*, 568 U.S. 41, 55 n.4

(2012)). Indeed, this Court has already correctly concluded that "here the statutory purpose and plain text are perfectly compatible." *EPIC*, 356 F. Supp. 3d at 94; *see also id.* at 94-95 (discussing section 208 statutory purpose).

Three additional points are worth addressing with respect to Plaintiff's policy argument. First, Plaintiff repeatedly analogizes to the National Environmental Policy Act ("NEPA"). *See, e.g.*, Pl.'s Opp'n at 32. But, as discussed above, "the E-Government Act and NEPA are hardly analogous." *EPIC*, 356 F. Supp. 3d at 94. As this Court has already explained, "[a]lthough they both require a form of 'impact' assessment, the role and timing of these assessments differ sharply." *Id.* at 94-95; *see also id.* at 95 (further explaining differences between NEPA and the E-Government Act).

Second, Plaintiff points to OMB's regulations, which it characterizes as "requir[ing] an agency to conduct a privacy impact assessment when the agency is *considering* whether to collect personal data. Pl.'s Opp'n at 33 (citing OMB Circular, app. II at 10). But that is not what the OMB Circular A-130 says. Instead, it states that, "Agencies shall conduct and draft a PIA with sufficient clarity and specificity to demonstrate that the agency fully considered privacy and incorporated appropriate privacy protections from the earliest stages of the agency activity and throughout the information life cycle." OMB Circular A-130, App. II, at 10, https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/OMB/circulars/a130/a130revised.pdf. The plain text of this OMB Circular, then, simply suggests that the agency should *consider* privacy throughout the PIA process – not that it must publish a PIA at that "earliest stage[]," as Plaintiff argues. This provision provides Plaintiff no relief.

Lastly, Plaintiff's argument necessarily assumes that requiring an early PIA is appropriate policy. *See* Pl.'s Opp'n at 33. But this is not so – indeed, it is certainly reasonable for Congress

to want to have ensured that the agency had considered the technical and privacy considerations as close as possible to the actual date of collection. The E-Government Act requires that the PIA address "how the information will be secured," E-Gov. Act § 208(b)(2)(B)(ii)(VI). But it makes sense for that assessment to be calibrated to the state of the IT world at the time the information is collected – not the state of the world as it might have been years earlier, when the decision to collect information was first materializing. Freezing the assessment at an early point, as Plaintiff suggests, would not be consistent with the Congress's goal of "ensur[ing] that [agencies] have sufficient protections in place before they [collect personal information]." *EPIC*, 356 F.3d at 94.

B. Plaintiff Does Not State a Claim Under the APA.

As this Court has already determined, this Court's interpretation of section 208 is "fatal to plaintiff's APA claims." *EPIC*, 356 F. Supp. 3d at 95. "The Bureau did not act contrary to the E-Government Act by deciding to collect citizenship data before conducting, reviewing, or releasing a PIA addressing that decision. *See* 5 U.S.C. § 706(2). Nor have the Defendants 'unlawfully withheld' agency action by declining to conduct or release a PIA earlier than they were required to under the statute. *See id.* § 706(1)." *EPIC*, 356 F. Supp. 3d at 95. That is enough to resolve this suit.

But Plaintiff's APA claims may be dismissed for other reasons as well. First, as stated in Defendants' opening brief, "the Census Bureau's non-issuance of a final PIA with regard to the citizenship question does not constitute final agency action." Defs.' Mem. at 28; *see also Trudeau v. FTC*, 456 F.3d 178, 184-85 (D.C. Cir. 2006) (final agency action is a necessary requirement for a plaintiff to state a cause of action under the APA). Plaintiff argues that the Secretary's March 2018 decision to include a citizenship question on the 2020 Decennial Census questionnaire constitutes final agency action, *see* Pl.'s Opp'n at 34-35 – a point with which Defendants do not

disagree, *see* Defs.' Mem. at 28. But Plaintiff is silent in its opposition as to the actual decision at issue here – whether the Census Bureau has published a final PIA for the expected 2020 Decennial Census questionnaire, including the intended citizenship question, that addresses any additional privacy concerns posed by reinstating a collection of citizenship information. And here, it is undisputed that the Bureau has not published a final PIA (because it need not yet do so), and intends to continue to update the relevant PIA(s) as necessary prior to initiating the collection of information. Absent final agency action indicating that the PIA for the 2020 Decennial Census questionnaire is finalized, Plaintiff's section 706(2) claim must be dismissed.

Moreover, Plaintiff's section 706(1) claim must be dismissed because, as discussed above, section 208(b) does not *unequivocally* require the Census Bureau to publish *any* PIA regarding the 2020 Decennial Census questionnaire at this time. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) ("[A] claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*."). Absent "a specific, unequivocal command," *id.* at 63, Plaintiff's section 706(1) claim must be dismissed, and the statutory language here does not favor Plaintiff (unequivocally or otherwise).

CONCLUSION

For the aforementioned reasons, the reasons set forth in Defendants' opening memorandum, and consistent with the Court's Memorandum Opinion denying Plaintiff's Motion for a Preliminary Injunction, the Court should dismiss Plaintiff's complaint in its entirety.

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Respectfully submitted,

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