IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER. Plaintiff, v. UNITED STATES POSTAL SERVICE, *et al.* Defendants.	Case No. 1:21-cv-2156-TNM

DEFENDANTS' REPLY MEMORANDUM
IN SUPPORT OF THEIR MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

The Electronic Privacy Information Center ("EPIC") seeks in this case to enforce the E-Government Act of 2002 against the United States Postal Service ("USPS") and its component the United States Postal Inspection Service ("USPIS"). In carrying out its law-enforcement mission to protect the Postal Service and its employees and facilities, USPIS created the "Internet Covert Operations Program" ("iCOP") to gather open-source intelligence from online sources, including, EPIC alleges, through the use of facial-recognition technology provided by companies such as Clearview AI. The databases powering that technology derive from public social media posts from millions of users, including, EPIC alleges, some of its members. EPIC claims that the E-Government Act required Defendants to carry out a "Privacy Impact Assessment" ("PIA") before making use of such technology, and to comply with the Act's provision on the publication of PIAs.

As Defendants demonstrated in their opening brief, and as set out below, EPIC's claims must be dismissed. First, EPIC lacks standing to bring this case, because it identifies no concrete interest belonging to it or its members that was harmed by Defendants' alleged procedural failures. EPIC has no statutory right to the information it seeks, and it makes no allegation that the iCOP program harmed it or its members in any way aside from its alleged failure to comply with the E-Government Act's procedures.

Second, EPIC cannot seek relief under the Mandamus Act, because Defendants have no clear and indisputable duty to provide the information it seeks. The only other relief EPIC seeks is to require Defendants to follow the E-Government Act's procedures, for which it lacks standing.

Third, EPIC lacks a cause of action because the Administrative Procedure Act ("APA") does not apply to the operations of the Postal Service. Moreover, even if the APA did apply, EPIC fails to challenge any final agency action, and thus would continue to lack a cause of action.

Finally, EPIC's claims fail on the merits because the E-Government Act's PIA requirements do not apply to USPS or its component USPIS. EPIC lacks persuasive answers on each of these points, and this case continues to warrant dismissal.

ARGUMENT

I. EPIC LACKS STANDING

EPIC's position in this case is ultimately quite simple: It believes that Defendants should have followed certain procedures before creating and implementing the iCOP program. It thus asks this Court, among other things, to enjoin the iCOP program until Defendants follow those procedures. But EPIC identifies no concrete interest that those procedures protect. It conspicuously fails to argue that iCOP violates any substantive rights of EPIC or its members, or that iCOP, as currently operated, could not continue if Defendants were to complete the allegedly necessary PIA procedure.

This is thus a textbook case of an alleged "deprivation of a procedural right without some concrete interest affected by the deprivation—a procedural right *in vacuo*," which is categorically "insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009).

EPIC posits two concrete interests that it claims supply the injury-in-fact needed to anchor this case. First, it claims to have a statutory entitlement to the information that would be contained in the PIA if it prevails in this case. But that theory turns on an imaginary potential Freedom of Information Act case that EPIC might someday file, not on any actual statutory entitlement that EPIC now possesses. Second, despite the absence of any such allegations in the Amended Complaint, EPIC claims to have identified concrete privacy harms to its members caused by iCOP. But the only "substantive" privacy harm EPIC identifies is the operation of iCOP without a PIA—

in other words, without the allegedly necessary procedures. Neither argument is enough establish standing.

A. EPIC Has Not Adequately Alleged Informational Injury To Itself Or Its Members

A claim of informational injury has two components. First, the plaintiff must adequately allege that "it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it." *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016). Second, the plaintiff must also establish that "it suffers, by being denied access to that information, the type of harm that Congress sought to prevent by requiring disclosure." *Id.* Failure at either stage is fatal to any claim premised on informational injury. *See EPIC v. Pres. Advisory Comm'n on Election Integrity*, 878 F.3d 371, 378 (D.C. Cir. 2017) ("*EPIC I*") (declining to reach the first component when plaintiff's claim failed at the second step).

The D.C. Circuit has squarely foreclosed the possibility of asserting informational injury as the basis for standing to bring a claim under Section 208 of the E-Government Act. *Id.* The E-Government Act aims to protect "the privacy of personal information," not to "facilitate public oversight of record systems." *Id.* As a result, "the type of harm that section 208 of the E-Government Act seeks to prevent" is not the kind of harm that satisfies the second prong of the informational injury inquiry. *Id.*

EPIC attempts to bypass that holding by invoking the Freedom of Information Act ("FOIA"). To be clear, this is not a FOIA case: EPIC does not allege any FOIA violations, and it asks this Court to order disclosure only under the E-Government Act, not under FOIA. *See* Am. Compl. Requested Relief ¶¶ B, C, ECF 13 at 20. Nevertheless, EPIC argues that if it were to prevail in this case, it could bring a hypothetical FOIA case in the future to seek the documents that it now asks the Court to order USPS to create. *See* Pl.'s Opp. at 11, ECF 15 at 15. And given the

"longstanding rule that for standing purposes we assume the merits" of claims before the court "in favor of the plaintiff," *Waterkeeper Alliance v. EPA*, 853 F.3d 527, 533 (D.C. Cir. 2017)—which causes the first prong of the informational injury test to turn on the plaintiff's interpretation of the disclosure statute—EPIC argues that this Court must also assume the merits of its hypothetical future FOIA case in its favor as well. Pl.'s Opp. at 11, ECF 15 at 15.

The logic of Plaintiff's argument is astonishingly broad. If accepted, it would make "informational injury" standing automatic any time a plaintiff seeks any relief that would entail the creation of any agency record—and that injury would exist regardless of whether the plaintiff could ever obtain that record in an actual FOIA lawsuit. As a practical matter, *any* agency response to a court order necessitates the creation of some documentation that could, in a hypothetical future FOIA action, be deemed an agency record. And because FOIA's disclosure obligation runs to the public at large, the bottom line result of EPIC's argument would be to provide standing to any "plaintiff raising only a generally available grievance about government—claiming only harms to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him that it does the public at large." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992); *accord, e.g.*, *Public Citizen Health Research Grp. v. Pizzella*, 513 F. Supp. 3d 10, 20 (D.D.C. 2021) ("to hold that FOIA is a statute that satisfies the first requirement for informational injury would all but eviscerate the requirement."). Indeed, that is precisely the point: The D.C. Circuit has already held that EPIC has no more interest in directly enforcing Section 208 than any other member of the public, *see EPIC I*, 878 F.3d at 378, and EPIC's standing argument is merely an attempted end run of that holding.

It is thus unsurprising that EPIC points to no case in which a court has ever accepted its theory of indirect informational injury by hypothetical FOIA claim, and that this Court has rejected

the same theory on at least two occasions. *See Public Citizen*, 513 F. Supp. 3d at 21; *Judicial Watch, Inc. v. Office of Director of Nat'l Intelligence*, No. 1:17-cv-00508 (TNM), 2018 WL 1440186, at *3 (D.D.C. Mar. 22, 2018) The lone case EPIC relies on, *Waterkeeper Alliance*, concerned the "complex interplay" between two environmental statutes, one of which contained disclosure requirements "expressly tied to the other." *Waterkeeper Alliance*, 853 F.3d at 533. "None of these circumstances are present in the current case. [The E-Government Act] and FOIA are entirely different regimes, govern different conduct, and there is no express or implied interrelation between the two." *Judicial Watch*, 2018 WL 1440186, at *3. EPIC objects that USPS cannot rely on this Court's analysis in *Judicial Watch* because the Court noted that FOIA and the underlying substantive requirement that plaintiffs sought to enforce in that case "have polar opposite purposes," *id.* at *4, which EPIC claims is not the case with FOIA and the E-Government Act. In EPIC's view, the two statutes "seek to achieve the same goal of public disclosure." Pl.'s Opp. at 12, ECF 15 at 16. But the D.C. Circuit disagrees: "§ 208 is fundamentally different from statutes like [FOIA]," the information-disclosing purposes of which "stand in contrast with the stated agency-centric purposes of § 208" to ensure the privacy of personal information. *EPIC v. U.S. Dep't of Commerce*, 928 F.3d 95, 103 (D.C. Cir. 2019) ("*EPIC II*").

In any case, EPIC's argument misses the forest for the trees. It is true, as this Court held in *Judicial Watch*, that a plaintiff cannot mash statutes together to create an informational injury claim when the statutes in question "have polar opposite purposes." *Judicial Watch*, 2018 WL 1440186, at *3. But it is also the case that a plaintiff cannot, in all but the most exceptional of cases, combine even two provisions *of the same statute* to produce an informational injury claim when the provision that the plaintiff seeks to enforce does not itself satisfy the requirements of informational injury. Thus, as Defendants noted in their opening brief, in *Friends of Animals v.*

Jewell, the D.C. Circuit held that a plaintiff lacked informational standing to enforce a substantive requirement of the Endangered Species Act, even though a separate provision of the same statute contained a disclosure requirement that would have been triggered if the plaintiff had secured relief on the substantive provision. *Friends of Animals*, 828 F.3d at 993. EPIC's argument simply ignores that holding.

EPIC thus has no cognizable interest in the information it seeks under the statute that forms the actual basis for its claims. Nor does *Waterkeeper Alliance* authorize EPIC to conjure up a cognizable interest by hypothesizing a potential FOIA claim that it might someday bring. EPIC thus cannot proceed on its informational injury theory.

B. EPIC Has Not Adequately Alleged Any Privacy Injury To Any Of Its Members

"[T]o plausibly show a privacy injury, EPIC must allege harm that is distinct from the simple failure to comply with the procedural requirements of § 208" of the E-Government Act. *EPIC II*, 928 F.3d at 102. "In the privacy context, such harm would ordinarily stem from the disclosure of private information." *Id.*

Because the Amended Complaint and its supporting declarations allege injuries to EPIC and its members stemming from their inability to access the information that would be contained in a PIA, but do not allege any other injuries, Defendants, in their opening brief, had not understood EPIC to allege "an underlying privacy harm attributable to the lack of a PIA." Def.s' Mot. at 14, ECF 14-1 at 23. EPIC now claims that it "has demonstrated injury in fact by virtue of the privacy harms suffered by its Members." Pl.'s Opp. at 12, ECF 15 at 16. But EPIC never explains what those alleged "privacy harms" might be.

EPIC observes that while a privacy harm sufficient to confer standing would *ordinarily* stem from a harmful disclosure of private information, disclosure to the general public is not

necessarily required. *See* Pl.'s Opp. at 13, ECF 15 at 17 (citing *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2388 (2021) and *Shelton v. Tucker*, 364 U.S. 479, 486 (1960)). The cases EPIC cites, however, involved challenges to laws requiring private individuals or organizations to disclosure information to the government. *See Americans for Prosperity*, 141 S. Ct. at 2379 (challenge to regulation providing that "charitable organizations must disclose to the state Attorney General's Office the identities of their major donors."); *Shelton*, 364 U.S. at 480 (challenge to "[a]n Arkansas statute [that] compels every teacher, as a condition of employment in a state-supported school or college, to file annually an affidavit listing without limitation every organization to which he has belonged or regularly contributed within the preceding five years."). The particular disclosure requirements challenged in those cases chilled the plaintiffs' First Amendment right to free association. *Americans for Prosperity*, 141 S. Ct. at 2388. Because they infringed on an underlying substantive privacy right, the disclosure mandates could not validly be imposed, regardless of the procedure followed in imposing them.

EPIC makes no similar allegation here that the iCOP program causes substantive privacy harms to it or its members, and it never alleges that the program could not continue to operate in exactly its current form if Defendants had complied with the PIA procedure allegedly required by Section 208. If iCOP itself violated EPIC's privacy rights, the issuance of a PIA would be irrelevant; it would not cure the allegedly improper use of facial recognition technology. EPIC specifically argues that its members' images are likely contained in the Clearview AI database, and that Defendants' alleged use of that database "would necessarily have involved the comparison of images against facial recognition templates extracted from EPIC's Members." Pl.'s Opp. at 13, ECF 15 at 17. But EPIC never argues or alleges that Clearview AI violated any privacy rights of EPIC or its members in assembling its database, and the Government Accountability Office report

it cites in the Amended Complaint states that Clearview AI "uses images publicly available on the internet."[1] Nor does EPIC make any argument or allegation that the government, if it follows the allegedly requisite procedures, may not make use of Clearview AI or similar systems. The D.C. Circuit has "previously expressed 'grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information,' at least 'where the information is collected by the government but not disseminated publicly.'" *EPIC II*, 928 F.3d at 102 (quoting *Am. Fed'n of Gov't Employees v. HUD*, 118 F.3d 786, 791, 794 (D.C. Cir. 1997)). In this case, EPIC seems to gesture toward a far more expansive substantive privacy right—a right against the government's collection or use of information that an individual has voluntarily disseminated publicly—but this Court need not reach the issue, because EPIC ultimately alleges and argues only procedural violations of the E-Government Act. EPIC argues, for example, that Defendants "procured and used information technology that likely processed the personal information of EPIC's Members—yet failed to conduct a required analysis of the resulting privacy risks." Notably, EPIC does not argue that Defendants could not use such technology after conducting the relevant analysis. Pl.'s Opp. at 13, ECF 15 at 17. Likewise, the Amended Complaint alleges that, "[b]y procuring facial recognition and social media tools and using those tools to collect and process personal information without first publishing [a PIA] . . . Defendants have unlawfully denied EPIC's Members—and by extension, EPIC—a full and timely assessment of how their privacy interests would and will be affected." Am. Compl. ¶¶ 63, 71, ECF 13 at 15-16, 17-18. EPIC does not allege

[1] U.S. Gov't Accountability Office, *Facial Recognition Technology: Federal Law Enforcement Agencies Should Better Assess Privacy and Other Risks* (June 3, 2021) at 7, *available at* https://www.gao.gov/assets/gao-21-518.pdf (last visited January 14, 2022); *see also* Am. Compl. ¶ 23 & n.31, ECF 13 at 8 (citing GAO report).

that using such tools after publishing a PIA would violate the privacy rights of EPIC or any of its members.

In short, the privacy harm EPIC alleges is both speculative and purely procedural, and thus cannot satisfy the injury-in-fact requirement of Article III. *EPIC II*, 928 F.3d at 102.

C. EPIC And Its Members' Alleged Injuries Are Not Redressable

As Defendants explained in their opening brief and above, the only injury that EPIC has alleged in this case is lack of access to information caused by Defendants' alleged failure to comply with Section 208 of the E-Government Act. Def.s' Mot. at 14-15, ECF 14-1 at 23-24; *see also* Am. Compl. ¶¶ 62-64, 69-71, 75-76, ECF 13 at 15-19; Hartzog Decl. ¶¶ 14-15, ECF 13-5 at 4; Gropper Decl. ¶¶ 14-15, ECF 13-6 at 4-5. That injury is not "redressable" because the relief sought—ordering Defendants to follow Section 208's PIA procedure, and to halt the iCOP program until that is done—would not "likely alleviate" that injury. *Fla. Audobon Soc'y v. Bentsen*, 94 F.3d 658, 663-64 (D.C. Cir. 1996) (en banc).

That is because Section 208 does not, on its own terms, require the publication of a PIA. As EPIC does not dispute, Section 208 allows Defendants to withhold all or part of a PIA if, in their judgment, publication would not be "practicable" or would risk "sensitive" information, including information that could potentially hamper law-enforcement efforts. E-Government Act §§ 208(b)(1)(B)(iii), (b)(1)(C). EPIC seeks sufficient information about the workings of the iCOP programs to facilitate a "full and timely assessment of how [its members'] privacy interests would and will be affected," Am. Comp. ¶¶ 63, 71, ECF 13 at 16, 18, but it does not allege that Section 208 requires such full disclosure of PIAs, or even of sufficient information to permit members of the general public (or social media users like EPIC's members) to assess the program's impact on their privacy interests.

EPIC returns to its hypothetical future FOIA case in an effort to sidestep this difficulty, arguing that it has "plausibly asserted that it would obtain pursuant to the FOIA some or all of the privacy impact assessments ordered by this Court," and that this Court must assume the success of its potential future FOIA claim because EPIC's "view of the law" is dispositive for standing analysis. Pl.'s Opp. at 5, ECF 15 at 19.

That argument misunderstands what it means for the Court to "assume, in analyzing standing, that [plaintiff] will prevail on the merits." *Estate of Boyland v. United States Dep't of Agriculture*, 913 F.3d 117, 124 (D.C. Cir. 2019). The Court "must provisionally treat the conduct plaintiff[] challenge[s] as in fact unlawful, but we do not assume away other, unchallenged constraints—whether of fact or law." *Id.* Here, the Court must assume, for purposes of the standing analysis, that Section 208 applies to Defendants and that it obliges them to create a PIA for the iCOP program. But the Court need not "assume away" the "unchallenged constraint" of Section 208's limitations on its publication provision. Nor need the Court assume the merits of a hypothetical future case that EPIC might bring under a different statute to seek documents that do not yet exist, or make any assumption that potential redactions to those as-yet non-existent records will be disallowed. Without such unjustified assumptions, EPIC cannot demonstrate that ordering Defendants to comply with Section 208 would "likely" alleviate the only injury its Amended Complaint actually alleges, namely informational injury.

EPIC's claim that Defendants "do not even engage with the other relief requested" thus misses the mark. Pl.'s Opp. at 15, ECF 15 at 19. Enjoining the iCOP program pending the completion of a PIA would not yield any more information for EPIC or its members than merely ordering the completion of a PIA, and the claim that doing so would "mitigate the risk of ongoing privacy harms to EPIC's Members" falls apart in light of EPIC's failure to allege any such harms.

II. MANDAMUS JURISDICTION IS NOT AVAILABLE BECAUSE DEFENDANTS HAVE NO DUTY TO DISCLOSE PRIVACY IMPACT ASSESSMENTS

Mandamus relief is an extraordinary remedy available only when "(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff." *Baptist Mem'l Hosp. v. Sebelius*, 603 F.3d 57, 62 (D.C. Cir. 2010). The "duty" in question must be "ministerial and the obligation to act peremptory, and clearly defined." *13th Regional Corp. v. Dep't of the Interior*, 654 F.2d 758, 760 (D.C. Cir. 1980) (quoting *United States ex erl. McLennan v. Wilbur*, 283 U.S. 414, 420 (1931)). A duty is "ministerial" only if it is "so plainly prescribed as to be free from doubt and equivalent to a positive command"; if instead it "involv[es] the character of judgment or discretion," it "cannot be controlled by mandamus." *Consolidated Edison Co. of N.Y. Inc. v. Ashcroft*, 286 F.3d 600, 605 (D.C. Cir. 2002) (quoting *Wilbur v. United States*, 281 U.S. 206, 218-19 (1929)).

Rather than dispute this basic framework, EPIC simply ignores the requirement that a duty susceptible to mandamus be ministerial and not subject to the exercise of judgment or discretion. It identifies three duties that, in its view, may be compelled by mandamus because they "leave little room for agency discretion": to (1) "conduct," (2) "review," and (3) "in most cases publish a privacy impact assessment." Pl.'s Opp. at 21, ECF 15 at 25. The first two are irrelevant, because even if the Court were to grant mandamus relief, it would resolve only an alleged "deprivation of a procedural right without some concrete interest that is affected by the deprivation" and would have no real-world effect on any concrete interest of EPIC's. *Summers*, 555 U.S. at 497. EPIC thus lacks standing to seek, and this Court lacks jurisdiction to grant, mandamus relief ordering Defendants to merely conduct or review a PIA.

Mandamus could still be available if Defendants had a ministerial duty to *publish* a PIA, without any exercise of judgment or discretion. They do not. Indeed, it is difficult to imagine a

duty farther from being ministerial than Section 208's instruction to publish PIAs "if practicable," even without taking account of the agency's discretion to "modif[y] or waive[]" publication to protect "sensitive" information. E-Government Act §§ 208(b)(1)(B)(iii), (b)(1)(C).

EPIC has two responses, neither of which succeeds. First, it invokes the non-sequitur that mandamus actions are not "ruled out whenever the statute allegedly creating the duty is ambiguous.'" *Lovitky v. Trump*, 949 F.3d 753, 760 (D.C. Cir. 2020) (quoting *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005)). But there is no contradiction in a statute unambiguously leaving a matter to agency discretion, and that is precisely what Section 208 does: It unambiguously leaves publication decisions for PIAs to the agency's discretion regarding practicability and the need to protect sensitive information.

Second, EPIC invokes this Court's decision in *EPIC v. Nat'l Security Comm'n on Artificial Intelligence*, 466 F. Supp. 3d 100, 123 (D.D.C. 2020) ("*NSCAI II*") for the proposition that the possibility of invoking an exemption to a publication requirement does not grant "blanket relief from the mandatory duty of disclosure." Pl.'s Mem. at 22, ECF 15 at 26. That case said no such thing. *NSCAI II* granted mandamus relief ordering a Commission to comply with the requirements of the Federal Advisory Committee Act ("FACA"). Specifically, the Court ordered the Commission to "provide timely notice of its meetings, to open them to the public, and to make its records available for public inspection and copying." *NSCAI II*, 466 F. Supp. 3d at 123.

EPIC's argument stems from the third requirement, to make the Commission's records "available for public inspection and copying," which, as the *NSCAI II* Court noted, is subject to FOIA and its exemptions. *Id.* at 112. But "[u]nlike FOIA," the provision requiring FACA committees to make their records public "looks forward. It requires committees to take *affirmative steps* to make their records public, even absent a request." *Id.* (emphasis added). The Court ordered

the Commission to take those affirmative steps, not to disclose any particular record notwithstanding the possible applicability of a FOIA exemption. *Id.* at 123. Unlike Section 208's publication provision, FACA provides that committee records "shall be available for public inspection," a requirement that the committee is not free to waive if it determines compliance to be impracticable or likely to disclose sensitive information.

Moreover, contrary to EPIC's implication, the Court expressly did not consider any argument that the possibility that one or more FOIA exemptions may apply to some or all of the committee's records somehow made the duty to make those records available to the public not "ministerial." "[T]he Government's sole argument" on the plaintiff's right to relief and the committee's duty to act "[wa]s that the Commission is not an 'advisory committee' under FACA." *Id.* at 122.[2] Even if the Court had considered and rejected the argument EPIC posits, it would not control here: Defendants' argument is not merely that they may be able to redact some portions of the PIA subject to well-defined statutory criteria, but rather that the decision to publish at all is expressly left to their judgment and discretion regarding practicability and the protection of sensitive information.[3]

The whole point of mandamus relief is to order an agency to carry out a specific nondiscretionary action, no ifs, ands, or buts. That is why EPIC cannot point to a single case ordering mandamus with respect to agency action *only if practicable* (in the agency's judgment).

[2] The Court also considered and rejected the argument that the plaintiff had not adequately pled which claims entitled it to mandamus relief, *NSCAI II*, 466 F. Supp. 3d at 122, but that argument is also irrelevant to the argument Defendants rely on here, about the discretionary nature of the alleged "duty" EPIC seeks to enforce.

[3] To the extent EPIC seeks mandamus relief ordering Defendants merely to make a determination whether publishing a PIA for the iCOP program would be practicable, or would risk disclosing sensitive information, that too is foreclosed because EPIC lacks standing to seek such purely procedural relief.

Since that is all that Section 208 requires of agencies in terms of publishing PIAs, and its only other commands go to matters of pure procedure over which EPIC lacks standing, EPIC's mandamus claim fails—regardless of the availability of any other means to seek relief.

III. EPIC LACKS A CAUSE OF ACTION UNDER THE APA, WHICH DOES NOT APPLY TO DEFENDANTS

"[E]xcept as specifically provided in the [Postal Reorganization] Act, the USPS is not subject to the requirements of the APA." *Nat'l Easter Seal Soc'y v. USPS*, 656 F.2d 754, 767 (D.C. Cir. 1981); *accord, e.g.*, *N. Air Cargo v. USPS*, 674 F.3d 852, 858 (D.C. Cir. 2012) ("the Postal Service is exempt from review under the Administrative Procedure Act").

Despite these repeated and unambiguous holdings, EPIC points to no provision of the Postal Reorganization Act ("PRA") that might be read to permit APA review in this case. Instead, EPIC argues that the PRA provides only that the APA shall not "apply to the exercise of *the powers of the Postal Service*," 39 U.S.C. § 410(a) (emphasis added), and posits that USPIS, despite being a component of USPS, somehow exercises a free-floating "independent grant of law enforcement authority" that is not a "power of the Postal Service." Pl.'s Opp. at 19, ECF 15 at 23.

EPIC's theory seems to stem from the placement of the PRA in Title 39 of the U.S. Code (which generally deals with the Postal Service), as distinct from the "[i]nvestigative powers of Postal Service personnel," which are set out more fully in Title 18 (generally dealing with crimes and criminal procedure). *See* 18 U.S.C. § 3061; *see also* Pl.'s Opp. at 19, ECF 15 at 23 (USPIS "operates under both the limited grant of authority in [the PRA] and under the general law enforcement authority of the federal government 18 U.S.C. § 3061.").

But EPIC goes on to suggest that only some of USPIS's authority set out in 18 U.S.C. § 3061 does not qualify as "power[] of the Postal Service." Specifically, EPIC argues, Section 3061, in subsection (a), generally authorizes Postal Inspectors to serve warrants, make arrests,

carry firearms, and seize property, and then limits those powers to the circumstances set out in subsection (b). 18 U.S.C. § 3601. Subsection (b)(1) permits the exercise of those powers "in the enforcement of laws regarding property in the custody of the Postal Service, property of the Postal Service, the use of the mails, and other postal offenses," while subsection (b)(2) permits their exercise more broadly "in the enforcement of other laws of the United States." *Id.* § 3061(b). Subsection (b)(2), however, applies only "to the extent authorized by the Attorney General pursuant to agreement between the Attorney General and the Postal Service . . . if the Attorney General determines that violations of such [other] laws have a detrimental effect upon the operations of the Postal Service." *Id.* § 3061(b)(2). EPIC argues that "[w]hen the Service acts pursuant to that broader authority, it is not exercising 'the powers of the Postal Service'" for purposes of the PRA. Pl.'s Opp. at 19, ECF 15 at 23.

Whether read to exclude all powers under Section 3061, or merely those under subsection (b)(2), from the "powers of the Postal Service," EPIC's argument has little to recommend it. To begin, "powers of the Postal Service" is not a defined term in the PRA, and the most natural reading of the phrase is that it refers to exactly what it says: the powers exercised by the Postal Service, including its components such as USPIS. If Congress had intended to withhold from APA review only those powers set out in the PRA, it could easily have said so, by substituting "the powers set out in this section," or even "in this title," for "the powers of the Postal Service." That it chose not to do so suggests that it intended the exemption to have broad applicability.

Nor is it clear what powers EPIC considers USPIS to be exercising when it acts under subsection (b)(2), if not the powers of the Postal Service. EPIC refers to "an independent grant of law enforcement authority," but it does not say from whom. Pl.'s Opp. at 19, ECF 15 at 23. One possibility is Congress, but *all* of USPIS's powers ultimately stem from Congress, so it is not clear

why the powers granted by Congress in the PRA, *see* 39 U.S.C. § 404(a)(6), would count as "powers of the Postal Service" but those granted in Section 3061 (or just those granted in subsection (b)(2)) would not. Alternatively, EPIC might have in mind a delegation of law enforcement authority from the Attorney General. But that argument is a poor fit with both the text and structure of Section 3061. Textually, subsection (b)(2) limits USPIS's power to enforce "other laws" to circumstances in which "the Attorney General determines that violations of such laws have a detrimental effect upon the operations of the Postal Service" (a limitation EPIC neglects to quote), rather than permitting the general enforcement of federal law subject to the Attorney General's control. 18 U.S.C. § 3061(b)(2). Structurally, Section 3061 lists a defined set of powers in subsection (a), and the role of the Attorney General is to authorize the use of those powers in certain circumstances, not to delegate the powers themselves. *Id.* § 3061.

More broadly, the nature of the powers that USPIS exercises under Section 3061 weighs against the application of the APA. Subsection (a) contains a limited list of specified powers, to serve warrants, make arrests, carry firearms, and seize property. *Id.* § 3061(a). It is difficult to imagine that Congress wanted to subject the use of those powers to the APA in any circumstance, still less that Congress wanted APA review of arrests or warrants when USPIS investigates, for example, bribery of a postal employee under 18 U.S.C. § 201 pursuant to an agreement with the Attorney General under subsection (b)(2),[4] but *not* when it investigates mail fraud under subsection (b)(1).

[4] *See* Memorandum of Understanding – Investigatory Authority and Procedures of Treasury and Justice Bureaus and the Postal Service under 18 U.S.C. §§ 1956 and 1957, *available at* https://www.justice.gov/archives/jm/criminal-resource-manual-2186-memorandum-understanding-investigatory-authority-and-procedures (last visited January 14, 2022).

Even if APA review were available in some circumstances for USPIS actions under subsection (b)(2), at least two additional hurdles stand in the way of review of EPIC's claims in this case. First, EPIC has not plausibly alleged that any aspect of the iCOP program actually "fall[s] under [USPIS's] broader grant of authority under Title 18." Pl.'s Opp. at 19, ECF 15 at 23. As noted above, USPIS's grant of authority under Title 18 is limited to the powers specified in subsection (a), to serve warrants, make arrests, carry firearms, and seize property. 18 U.S.C. § 3061(a). EPIC does not make any allegation that USPIS did any of those things in creating or operating the iCOP program. Since USPIS is not alleged to have served any warrant, made any arrest, carried any firearms, or seized any property as part of the iCOP program, it must have been operating under its general authority to "investigate postal offenses and civil matters relating to the Postal Service." 39 U.S.C. § 404(a)(6). That power is housed in the PRA, which even EPIC seems to agree means that it is not subject to APA review.

Second, even if APA review were available for actions under subsection (b)(2), and even if some aspect of the iCOP program were to have been carried out under that authority, EPIC would still need to demonstrate that the actions it seeks to challenge constitute "final agency action." 5 U.S.C. § 704. Without final agency action, "there is no doubt that [a plaintiff] would lack a cause of action under the APA." *Reliable Automatic Sprinkler Co., Inc. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 731 (D.C. Cir. 2003). "Agency actions are final if two independent conditions are met: (1) the action 'mark[s] the consummation of the agency's decisionmaking process'" and "(2) it is an action 'by which rights or obligations have been determined, or from which legal consequences will flow.'" *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1267 (D.C. Cir. 2018) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). EPIC cannot meet that second condition, for much the same reason that it lacks standing—its interest in this case is purely

procedural, with no concrete stakes for EPIC or its members. EPIC does not, and could not, allege that the creation and implementation of the iCOP program determined any rights or obligations, or that any legal consequences flow from it. Even without the PRA's APA exemption, EPIC would thus still lack a cause of action.

IV. DEFENDANTS ARE NOT SUBJECT TO THE E-GOVERNMENT ACT

To establish that Defendants are subject to the E-Government Act, EPIC must show both that Defendants are agencies as defined by the Act, *and* that the PRA does not preclude the Act's application to Defendants. It is not enough for EPIC to persuade the Court that the E-Government Act, standing alone, would apply to Defendants, because "the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). If the general definitional provisions of the E-Government Act suggest that it covers Defendants, but the specific exemption provisions of the PRA say otherwise, the PRA's more specific command governs.

Defendants set out at length in their opening brief the reasoning that has persuaded every court to have considered the question thus far that USPS is not an "agency" as defined in E-Government Act, while acknowledging this Court's analysis of a related but distinct question in *EPIC v. National Security Commission on Artificial Intelligence*, 419 F. Supp. 3d 82, 86 (D.D.C. 2019) ("*NSCAI I*"). *See* Def.s' Mot. at 22-26, ECF 14-1 at 31-35. But the Court need not reach that issue, because the PRA exempts Defendants from the E-Government Act regardless, and EPIC has no persuasive response on that point.

As Defendants' opening brief explained, the PRA exempts Defendants from any "federal law dealing with public or Federal contracts, works, officers, employees, budgets, or funds," subject only to limited exceptions specified in Title 39, none of which apply to the E-Government Act. 39 U.S.C. § 410(a). That provision "was meant to be a broad exemption," as the other

provisions of the PRA confirm. *Nat'l Easter Seal Soc'y*, 656 F.2d at 767. Congress, in the PRA, felt the need to specify that statutes such as FOIA and the Privacy Act *do* apply to the Postal Service, notwithstanding the PRA's general exemption provision. "All of these sections would have been superfluous if section 410(a)'s exemption included only laws that on their face deal with federal contracts, etc." *Id.*

EPIC argues that the fact "that Congress believed it necessary to list two particular sections of Title 5 in § 410(a) demonstrates that some federal statutes are still beyond the broad exemptive language of that provision." Pl.'s Opp. at 16, ECF 15 at 20 (citing *Nat'l Easter Seal Soc'y*, 656 F.2d at 766). EPIC reasons that because the E-Government Act's purpose relates to "information collection practices" and "the protection of privacy," it is not a law concerning "public or Federal contracts, property, works, officers, employees, budgets, or funds." *Id.* But the only case EPIC cites, *National Easter Seal Society*, stands for precisely the opposite logic.

In that case, the petitioner argued that the PRA's exemption provision was "worded to exempt the USPS only from those provisions of chapters 5 and 7 of title 5 that deal with federal contracts, property, etc.," and that the APA's procedural provisions thus continued to apply. *Nat'l Easter Seal Soc'y*, 656 F.2d at 766. The D.C. Circuit agreed that chapters 5 and 7 of Title 5 "are broad general sections not limited to specific subject areas such as federal contracts, property, or employees," but went on to note that the same is true of FOIA and the Privacy Act and Title 5's open meetings provision, all of which Congress specifically made applicable to the Postal Service; "[n]one of these statutes are any more related to federal contracts, property, or employees than is the APA," and "[t]here would have been no need for Congress to specify that these laws were not included in section 410(a) if petitioners' interpretation of section 410(a)"—which mirrors EPIC's—"were correct." *Id.* at 767. *See also Am. Postal Workers Union, AFL-CIO v. USPS*, 541

F. Supp. 2d 95, 95-96 (D.D.C. 2008) (the PRA was intended to provide "a broad exemption from many of the laws that constrain the day-to-day administration of other federal agencies.").

The D.C. Circuit has thus squarely rejected EPIC's only argument, that the PRA exempts Defendants only from statutes that "on their face deal with federal contracts, etc." *Nat'l Easter Seal Soc'y*, 656 F.2d at 767. This Court should give effect to Congress' determination to exempt USPS and its components from the "system of proceduralized review that Congress uses for overseeing the operations of the administrative state," including the E-Government Act. *Am. Postal Workers*, 541 F. Supp. 2d at 98.

CONCLUSION

For the foregoing reasons, the Court should dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction because Plaintiff lacks standing, and cannot rely on the Mandamus Act. Should the Court conclude that Plaintiff has standing, however, it should dismiss under Rule 12(b)(6) because Plaintiff lacks a cause of action under the APA, and because the E-Government Act does not apply to USPS.

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Respectfully submitted,

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