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.	Civ. Action No. 18-2711 (DLF)

REPLY IN SUPPORT OF PLAINTIFF'S
MOTION FOR A PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
SUMMARY 1
ARGUMENT 2
I. EPIC is likely to succeed on the merits of its claims. 2
A. The Bureau cannot avoid its long overdue obligation to conduct and publish privacy impact assessments. 2
B. EPIC's claims under the APA are both ripe and well-pled. 10
II. EPIC will suffer irreparable harm absent an injunction. 13
III. The equities and public interest weigh in favor of an injunction. 18
CONCLUSION 20

TABLE OF AUTHORITIES

Cases

AARP v. U.S. EEOC,
226 F. Supp. 3d 7 (D.D.C. 2016)..... 17

Abbott Labs. v. Gardner,
387 U.S. 136 (1967)..... 10

Anglers Conservation Network v. Pritzker,
809 F.3d 664 (D.C. Cir. 2016) 11, 12

Biovail Corp. v. FDA,
448 F. Supp. 2d 153 (D.D.C. 2006)..... 17

Damarcus S. v. D.C.,
190 F. Supp. 3d 35 (D.D.C. 2016)..... 2

DIRECTV, Inc. v. FCC,
110 F.3d 816 (D.C. Cir. 1997) 2

Doe v. Bridgeport Police Dep't,
434 F. Supp. 2d 107 (D. Conn. 2006)..... 4

Friedman v. FAA,
841 F.3d 537 (D.C. Cir. 2016) 11, 13

Gen. Elec. Co. v. EPA,
290 F.3d 377 (D.C. Cir. 2002) 11

Indep. Bankers Ass'n v. Heimann,
627 F.2d 486 (D.C. Cir. 1980) 17

Jacinto-Castanon de Nolasco v. ICE,
319 F. Supp. 2d 491 (D.D.C. 2018)..... 18

Jones v. D.C. Redevelopment Land Agency,
499 F.2d 502 (D.C. Cir. 1974) 9, 13, 15, 19

Judicial Watch, Inc. v. DHS,
895 F.3d 770 (D.C. Cir. 2018) 14

League of Women Voters of the U.S. v. Newby,
838 F.3d 1 (D.C. Cir. 2016) 18

Lopez v. Davis,
531 U.S. 230 (2001)..... 11

Mylan Pharms., Inc. v. Shalala,
81 F. Supp. 2d 30 (D.D.C. 2000) 17

N. Nat. Gas Co. v. Comm'r,
44 T.C. 74 (1965) 4

Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers,
417 F.3d 1272 (D.C. Cir. 2005) 10, 11

New York, et al. v. U.S. Dep't of Commerce,
No. 18-2921, 2019 WL 190285 (S.D.N.Y. Jan. 15, 2019) 16, 19

Norton v. Southern Utah Wilderness Alliance,
542 U.S. 55 (2004) 13

Open Communities Alliance v. Carson,
286 F. Supp. 3d 148 (D.D.C. 2017) 18

Open Top Sightseeing USA v. Mr. Sightseeing, LLC,
48 F. Supp. 3d 87 (D.D.C. 2014) 17

Payne Enters., Inc. v. United States,
837 F.2d 486 (D.C. Cir. 1988) 14

Pub. Emps. For Envtl. Responsibility v. U.S. Fish & Wildlife Serv.,
189 F. Supp. 3d 1 (D.D.C. 2016) 13

SAS Inst., Inc. v. Iancu,
138 S. Ct. 1348 (2018) 7

Sierra Club v. Thomas,
828 F.2d 783 (D.C. Cir. 1987) 13

Texas Children's Hospital,
76 F. Supp. 3d 224 (D.D.C. 2014) 17

U.S. Army Corps of Eng'rs v. Hawkes Co.,
136 S. Ct. 1807 (2016) 3

Univ. of Texas Sw. Med. Ctr. v. Nassar,
570 U.S. 338 (2013) 4, 7

W. Org. of Res. Councils v. Zinke,
892 F.3d 1234 (D.C. Cir. 2018) 11

Wis. Gas. Co. v. FERC,
758 F.2d 669 (D.C. Cir. 1985) (per curiam) 15

Statutes

13 U.S.C. § 221 ..... 7, 14

44 U.S.C. § 3502(3)(A) 4, 5

44 U.S.C. § 3505 6

44 U.S.C. § 3506 6

44 U.S.C. § 3507 6

44 U.S.C. § 3510 6

44 U.S.C. § 3517 6

44 U.S.C. § 3902(a) 4, 8

Administrative Procedure Act

5 U.S.C. § 706(1) 11

5 U.S.C. § 706(2) 10

E-Government Act, Pub. L. No. 107-347, 116 Stat. 2899 (Dec. 17, 2002) (codified at 44 U.S.C. § 3501 note)

§ 2(b)(9) 9

§ 208(a) 7, 9

§ 208(b) 2, 4, 6, 7, 11, 12, 14, 17

Regulations

5 C.F.R. § 1320.3(c) 8

Other

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 12

Dep't of Commerce, *Office of Privacy & Open Gov't, U.S. Census Bureau Privacy Impact Assessments (PIAs) and Privacy Threshold Analysis (PTA)* (Oct. 1, 2018) 12

Joshua B. Bolten, Dir., OMB, Executive Office of the President, M03-22, Memorandum for Heads of Executive Departments and Agencies, Attachment A (Sept. 26, 2003) 2, 12

Petition for a Writ of Mandamus, *In re Dep't of Commerce*, No. 18-557, 2018 WL 5458822 (U.S. Nov. 16, 2018) 19

Petition for Writ of Certiorari Before Judgment, *U.S. Dep't of Commerce v. New York, et al.*, S. Ct. Dkt. No. 19-212 (Jan. 25, 2019) 15, 16

Submission for OMB Review, 83 Fed. Reg. 67,213 (Dec. 28, 2018) 16

SUMMARY

The Census Bureau does not deny that it must conduct and publish updated privacy impact assessments prior to the collection of citizenship status information. Instead, the Bureau argues that the agency's E-Government Act obligations lie in the distant future. The plain text of section 208 says otherwise. So, too, do the key statutory terms and the legislative purpose of the provision. Congress expected that the Bureau would conduct a comprehensive privacy review early in the process, not as the census forms were heading to the printer or delivered to the post office.

Congress made clear that federal agencies, in the management of complex record systems containing the personal data of Americans, are required to carry out and publish a detailed privacy analysis "before" "initiating" a new collection of personal data. The Bureau was obligated to conduct a privacy impact assessment before Secretary Ross's March 2018 order to add the citizenship question to the census, a new and consequential change in the management of agency record systems. EPIC has demonstrated entitlement to a preliminary injunction halting the Bureau's collection of citizenship status information pending resolution of EPIC's APA claims.

ARGUMENT

I. EPIC IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIMS.

A. The Bureau cannot avoid its long overdue obligation to conduct and publish privacy impact assessments.

The Bureau was obligated to conduct and publish fully updated privacy impact assessments before Secretary Ross made the March 2018 decision to add a citizenship question to the 2020 Census. Because the Bureau failed to do so, EPIC is likely to succeed on the merits of its E-Government Act claims.

First, the Bureau does not contest, and thus concedes, many of the arguments in EPIC's motion. *See Damarcus S. v. D.C.*, 190 F. Supp. 3d 35, 48 (D.D.C. 2016) (citing *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 829 (D.C. Cir. 1997)) ("[T]he [defendant] does not respond to this argument, and therefore, it is deemed conceded."). The Bureau concedes that the existing privacy impact assessments are not legally sufficient to permit a "new collection of [citizenship status] information" via the 2020 Census. E-Government Act § 208(b)(1)(A). The Bureau does not dispute that the collection of citizenship status information in the 2020 Census is "new" within the meaning of section 208(b)(1)(A), or that it poses "new privacy risks" requiring the completion and publication of updated privacy impact assessments. Ex. 15, Joshua B. Bolten, Dir., OMB, Executive Office of the President, M03-22, Memorandum for Heads of Executive Departments and Agencies, Attachment A § II.B.2 (Sept. 26, 2003) ("OMB Guidance"). The Bureau does not even claim that it considered the privacy implications of collecting citizenship information before the Bureau took "final agency action" to collect that information. Defs.' Opp'n 18.

Yet the Bureau insists that the obligation to complete revised privacy impact assessments is not triggered until questionnaires are sent to the public in January 2020. In the Bureau's view,

the deadline to conduct and publish the required assessments was not when the Bureau "mark[ed] the consummation of the . . . decisionmaking process" and took "final agency action" to collect citizenship status information on March 26, 2018. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016); *see also* Defs.' Opp'n 18. Rather, the Bureau believes that it will not "initiat[e] a new collection of information" until—acting pursuant to a decision made in March 2018, and using census forms finalized in June 2019—the agency physically distributes census questionnaires.

The Bureau's argument ignores the simple fact that, by 2020, the Bureau will have spent vast sums and countless hours pursuing a two-year data collection process for which the required privacy impact assessments were never conducted. The Bureau concedes that it will be unable to make any changes to census questions after June 2019, even if the agency's privacy office discovers—in the course of its "ongoing" privacy analysis—that the collection of citizenship information poses grave and unjustifiable risks to privacy that could lead to a determination to remove the question prior to the distribution of the census.

A privacy impact assessment published on the eve of the census would be effectively useless to agency decisionmakers, to Congress, and to members of the public seeking participate in the ongoing debate over the citizenship question. Therefore, under the Bureau's view of the law, the privacy impact assessment requirement of section 208 is nothing more than a box-checking exercise that can be put off until the moment that the Bureau drops the census forms in the mail.

This view of Bureau's the privacy impact assessment obligations is completely at odds with the plain meaning, statutory context, and purpose of section 208. The statute states plainly that the obligation arises from "*initiating* a new collection of information." E-Government Act §

208(b)(1)(A)(ii) (emphasis added). This phrasing compels the conclusion that a "collection of information" is a *process* that is first "initiat[ed]," then carried out, then completed. *Id.*; *cf.* 44 U.S.C. § 3902(a) (distinguishing between the "initiating, carrying out, [and] completing [of] an[] audit or investigation"). It is not a discrete event that occurs when the agency takes the final step of soliciting or obtaining information. Indeed, it would make little sense for Congress to choose a six-word phrase ("initiating a new collection of information") if a more obvious three-word phrase (*e.g.*, "collecting new information") would suffice. *See Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013) ("Congress' choice of words is presumed to be deliberate[.]").

This reading is further confirmed by the statutory definition of "collection of information." Notably, 44 U.S.C. § 3502(3)(A) defines "collection of information" in terms of gerunds: "the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions[.]" *Contra* Defs.' Opp'n at 11 (misidentifying the gerunds in § 3502(3)(A) as participles). Congress's use of these gerunds further signifies that that the "collection of information" is a process, not a one-off action. *See, e.g.*, *Doe v. Bridgeport Police Dep't*, 434 F. Supp. 2d 107, 116 (D. Conn. 2006) ("First, the gerund 'injecting' . . . connotes 'the process of injection,' in contrast to 'to inject,' which connotes, to a greater degree, the specific and direct act of introducing a substance into a human body parenterally."); *N. Nat. Gas Co. v. Comm'r*, 44 T.C. 74, 78 (1965) ("The word 'acquiring' (in the regulation) is a gerund and as such its use . . . is indicative of a continuing transaction and is a clear recognition that the acquisition of possession may be a gradual process[.]"). Indeed, the Bureau concedes that the

"obtaining" (and thus, the collection) of information is a process that starts before any data is actually acquired. Defs. Opp'n at 13.[1]

Here, the process of "obtaining" citizenship information—or at a bare minimum, the process of "*causing* [citizenship information] to be obtained"—began when the Bureau took final agency action on March 26, 2018. 44 U.S.C. § 3502(3)(A) (emphasis added). That is the date after which the Bureau was inevitably bound to obtain citizenship information, barring a superseding order from a court or a revocation by the agency. The Bureau's analogy to a wedding invitation therefore fails. Unlike a couple that has finalized its wedding invitations, but which has yet to print or mail them, Secretary Ross set in motion an agency process that would necessarily end with the Bureau's acquisition of citizenship data (absent an intervention). To the extent that the decennial census can be analogized to a wedding invitation at all, it is as though a couple has placed an order with a full-service printer that will mail invitations on a particular date unless the couple cancels the order. It is no stretch to say that such a couple has "commenced the soliciting" of RSVPs.

Moreover, the Bureau's interpretation of section 208 cannot be squared with other provisions in Title 44, Chapter 35 ("Coordination of Federal Information Policy") that use the phrase "collection of information." By the Bureau's telling, a "collection of information" only comes into existence once an agency "actually starts to ask the public to submit . . . information." Defs.' Opp'n at 11. Yet Chapter 35 uses the phrase "collection of information" at least twenty

[1] The Bureau claims that the "obtaining" of citizenship information will begin when Bureau starts to "mail or distribute census forms to individuals." Defs.' Opp'n at 11. However, the Bureau offers no justification for this arbitrary temporal line. The Bureau will not actually "obtain" citizenship information until completed questionnaires are returned, just as the Bureau did not actually "obtain[]" citizenship information by announcing its final decision on March 26, 2018. Yet at both stages, the *process* of collecting and obtaining citizenship information has been initiated, which is sufficient to trigger section 208.

times to refer to "collection[s]" for which no information has been solicited or obtained. *See* 44 U.S.C. § 3505 (noting agencies' obligation to internally "review . . . collections of information," even though no information has been solicited or obtained) 44 U.S.C. §§ 3506(c)(1)(A), (c)(1)(A)(i), (c)(1)(A)(v), (c)(3) (detailing agencies' obligation to internally "review each collection of information," even though no information has been solicited or obtained); 44 U.S.C. §§ 3507(d)(4)(A), (d)(4)(B), (d)(4)(C), (d)(4)(D), (d)(4)(D)(i), (d)(4)(D)(i)(ii), (d)(6), (e)(1), (h)(2), (h)(2)(A), (h)(2)(B), (j)(1), (j)(1)(A), (j)(1)(B)(iii) (detailing the OMB Director's authority to approve or reject certain "collection[s] of information" for which no information has been solicited or obtained); 44 U.S.C. § 3517(a) (noting the OMB Director's power to review "collections of information" for which no information has been solicited or obtained). Indeed, 44 U.S.C. § 3510(a) specifically distinguishes between "a collection of information" (*i.e.*, the process) and the "information obtained by" that collection (*i.e.*, the results of the process). If the Bureau's proposed interpretation of E-Government Act § 208(b)(1)(A)(ii) were correct, none of these statutory references to a "collection of information" would make sense.

The Bureau's arguments are further undermined by the statutory context of the phrase "initiating a new collection of information[.]" E-Government Act § 208(b)(1)(A)(ii). The preceding clause of the E-Government Act sets out a different trigger for privacy impact assessments: agencies must complete an assessment before "developing or procuring information technology that collects, maintains, or disseminates information that is in an identifiable form[.]" § 208(b)(1)(A)(i). Notably, this is not a requirement to complete an assessment before "using" or "activating" or "deploying" a new IT system. The obligation attaches much sooner than that, at a point when the results of the assessment can still inform the agency's decisionmaking process. Section 208 thus forces an agency to consider the privacy implications of a proposed system

before the agency commits to a potentially wasteful, ill-advised, or unlawful acquisition decision.

So too with the requirement for assessing the privacy impact of any "new collection[s] of information." E-Government Act § 208(b)(1)(A)(ii). In order to "ensure sufficient protections for the privacy of personal information," E-Government Act § 208(a), Congress required agencies to conduct, review, and publish an assessment *before* initiating the collection process. It would be strange indeed for Congress to impose a rigorous, early-stage assessment requirement for new IT systems while allowing new collections of personal information to go unexamined by agencies until the very last minute. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018) (quoting *Univ. of Texas Sw. Med. Ctr.*, 570 U.S. at 353) ("'[J]ust as Congress' choice of words is presumed to be deliberate' and deserving of judicial respect, 'so too are its structural choices.'"). If Congress actually intended this result, the law would have simply required agencies to complete an assessment before "*collecting* new information." Instead, Congress treated the "collection of information"—like the introduction of a new IT system—as a process that is initiated before any personal data is actually collected. And in both cases, Congress required privacy impact assessments to be conducted and published before the process begins.

The Bureau's remaining arguments fare no better. First, the Bureau fails to show why Secretary Ross's final decision to collect citizenship information is not a requirement to disclose "facts or opinions" to "third parties or the public." Defs.' Opp'n at 13. Unless the OMB (or the judiciary) actively intervenes to prevent the collection of information that Secretary Ross has ordered the Bureau to perform, members of the public will inevitably come under an obligation to disclose their citizenship status via the 2020 Census. *See* 13 U.S.C. § 221(a)–(b) (requiring all persons over 18 to respond to census questions); 44 U.S.C. § 3507(c)(3) ("If the [OMB] Director

does not notify the agency of a denial or approval within the 60-day period . . . the approval may be inferred.").

Second, the Bureau erroneously attempts to distinguish the OMB's interpretation of the phrase "collection of information," even though the agency relies on that same regulation four paragraphs earlier. *Compare* Defs.' Opp'n at 14 (citing 5 C.F.R. § 1320.3(c)), *with* Defs.' Opp'n at 11 (citing 5 C.F.R. § 1320.3(c)). And indeed, the OMB's view that a "collection of information" includes "a plan and/or an instrument" is entirely consistent with the text of the Paperwork Reduction Act. 5 C.F.R. § 1320.3(c). As noted, a "collection of information" under 44 U.S.C. § 3502(3)(A) is *a process* that begins when an agency makes a final decision—*i.e.*, introduces a definite plan or instrument—to undertake collection. In ordering the Bureau to add a citizenship question to the 2020 Census, Secretary Ross assuredly introduced (in fact, finalized) a plan calling for the collection of citizenship status information.

Third, the Bureau cites no support for its view that that an agency "initiat[es] a plan" to collect information only when it *carries out* the plan. Defs.' Opp'n at 15. In fact, that interpretation is foreclosed by the Paperwork Reduction Act, which distinguishes between "initiating" a process and "carrying out" or "completing" a process. *See* 44 U.S.C. § 3902(a). Likewise, the Bureau falsely accuses EPIC of "contort[ing]" OMB regulations to argue that a privacy impact assessment is due before an agency "has [even] started *planning* to collect information." Defs.' Opp'n at 15. But EPIC made no such argument. EPIC did not even use the word "planning" in its motion. As EPIC explained, the relevant trigger is the agency's introduction of "a *definite* '*plan* . . . calling for the collection or disclosure of information[.]'" Mem. Supp. Pl.'s Mot. at 21 (quoting 5 C.F.R. § 1320.3(c)) (emphasis added).

Finally, the Bureau's proposed timeline for its privacy impact assessment obligations is incompatible with the purposes of section 208. Congress enacted section 208 to (1) "to make the Federal Government more transparent and accountable" and (2) "to ensure sufficient protections for the privacy of personal information[.]" E-Government Act §§ 2(b)(9), 208(a). Neither of these objectives would be served if the assessment requirement did not mature until the very last minute—potentially months or years after an agency had made the final decision to collect personal information. The entire point of an impact assessment is to "ensure that decisions about federal actions w[ill] be made only after responsible decisionmakers ha[ve] fully adverted" to the "consequences of the[ir] actions." *Jones v. D.C. Redevelopment Land Agency*, 499 F.2d 502, 512 (D.C. Cir. 1974). That will not happen if an assessment can be completed *after* the agency has made a final decision and *after* a potentially "irretrievable commitment of resources." *Id.* (quoting *Lathan v. Volpe*, 455 F.2d 1111, 1121 (9th Cir. 1971)). Moreover, it is entirely possible that a comprehensive privacy impact assessment would lead to the conclusion that the citizenship question should not be asked in light of the record evidence that the agency may choose to use the data gathered for purposes entirely unrelated to the tabulation of the census. Reading section 208 in the way that the Bureau urges would render it a functional nullity and undermine the express purposes of the statute. The Court should decline to do so.

The Bureau's construction of section 208 fails as a matter of plain meaning, statutory interpretation, and Congressional purpose. EPIC has shown that the Bureau's obligation to conduct and publish privacy impact assessments for the collection of citizenship information is long overdue. Thus, EPIC is likely to prevail on the merits of its claims.

B. EPIC's claims under the APA are both ripe and well-pled.

EPIC's claims are also likely to succeed because—*contra* the Bureau—they are ripe for review and satisfy the requirements for an action under the APA.

First, the Bureau's ripeness arguments rest on the premise that the Bureau is "not yet required to publish" privacy impact assessments. Defs.' Opp'n at 17. But as noted, the Bureau was required to complete these assessments months ago and failed to do so. Moreover, the Bureau has refused to cure its unlawful conduct despite multiple warnings from EPIC. *See* Mem. Supp. Pl.'s Mot. at 12–13. As a result, this matter presents no risk of "premature adjudication" or undue "judicial interference" that might otherwise justify postponing judicial review. *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1281 (D.C. Cir. 2005) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967)). Indeed, the Bureau does not dispute that a section 208 claim is ripe once the "threshold" for publishing a privacy impact assessment has "passed." Defs.' Opp'n at 17. EPIC has also demonstrated the significant hardship that its members will suffer from the Bureau's ongoing noncompliance with section 208. *See* Mem. Supp. Pl.'s Mot. at 26–33. Given the Bureau's failure to complete required privacy impact assessments since March of last year, there is little sense in delaying judicial review any longer.

Second, EPIC's claim under 5 U.S.C. § 706(2) is likely to succeed because the Bureau's initiation of a new collection of information was "not in accordance with law" and was done "without observance of procedure required by law." The Bureau seems to misunderstand EPIC's claim under § 706(2) (Count I). EPIC does, indeed, challenge "the Secretary's March 26, 2018, decision to direct the Census Bureau to include a citizenship question on the 2020 Decennial Census[.]" *E.g.*, Compl. ¶ 65 ("By placing a citizenship question on the 2020 Census and initiating the process of collecting personal data concerning citizenship status, the Defendants

have unlawfully begun to develop a new or significantly modified collection of information[.]"); Compl. at 27 (asking the Court to "[h]old unlawful and set aside the Defendants' decision to collect citizenship data through the 2020 Census").

By adding the citizenship question to the 2020 Census without first conducting and publishing the necessary privacy impact assessments, Secretary Ross unlawfully "initiat[ed] a new collection of information" in violation of E-Government Act § 208(b)(1)(A)(ii). And as the Bureau freely concedes, Secretary Ross's decision constitutes final agency action. Defs.' Opp'n at 18. EPIC is therefore likely to succeed on its § 706(2) claim. Although EPIC welcomes the Bureau's promise to "review[] and update[]" the applicable privacy impact assessments, this assurance does not cure the Bureau's unlawful conduct, make the Bureau's actions any less final, or mitigate EPIC's injuries. *See Nat'l Ass'n of Home Builders*, 417 F.3d at 1282 (*Gen. Elec. Co. v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002)) ("[I]f the possibility . . . of future revision in fact could make agency action non-final as a matter of law, then it would be hard to imagine when any agency rule . . . would ever be final as a matter of law."); *Friedman v. FAA*, 841 F.3d 537, 545 (D.C. Cir. 2016) ("The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.").

Third, EPIC's claim under 5 U.S.C. § 706(1) is likely to succeed because the Bureau has unlawfully failed to complete privacy impact assessments that it is required to conduct and publish. Under E-Government Act § 208(b)(1), an "agency shall" "conduct," "review, and "make . . . publicly available" each privacy impact assessment *before* "initiating a new collection of information." These are quintessentially "specific, unequivocal command[s]." *W. Org. of Res. Councils v. Zinke*, 892 F.3d 1234, 1241 (D.C. Cir. 2018); *see also Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 671 (D.C. Cir. 2016) (citing *Lopez v. Davis*, 531 U.S. 230, 241 (2001))

("Ordinarily, legislation using 'shall' indicates a mandatory duty while legislation using 'may' grants discretion."). The Bureau, in arguing otherwise, confuses its own misreading of section 208 for equivocality on the part of Congress. Defs.' Opp'n at 19. With the word "shall," Congress left no doubt that agencies *must* take the steps set forth in E-Government Act § 208(b)(1)(B). *See Anglers Conservation Network*, 809 F.3d at 671 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 112 (2012)) ("The traditional, commonly repeated rule is that 'shall' is mandatory and 'may' is permissive . . . .").

The Bureau points to the phrase "if practicable" to argue that the obligation to publish relevant privacy impact assessments is somehow less than unequivocal. E-Government § 208(b)(1)(B)(iii). But the Bureau makes no attempt to explain how publication would be impractical *here*. In other words: section 208(b)(1)(B)(iii) creates a narrow "impracticability" exception to an otherwise universal requirement that assessments be published—an exception that does not apply in this case. The Bureau would be hard-pressed to argue otherwise, given that it routinely publishes privacy impact assessments for all five of the relevant CEN systems. Dep't of Commerce, *Office of Privacy & Open Gov't, U.S. Census Bureau Privacy Impact Assessments (PIAs) and Privacy Threshold Analysis (PTA)* (Oct. 1, 2018).[2] Moreover, the OMB—in interpreting section 208(b)(1)(B)(iii)—has limited the "impracticability" exception to assessments that would "reveal classified (i.e., national security) information or sensitive information (e.g., potentially damaging to a national interest, law enforcement effort or competitive business interest)[.]" Ex. 15, OMB Guidance § II.C.3.a.iii.1. Thus, the words "if practicable" do not diminish the Bureau's mandatory duty to complete and publish updated assessments for the collection of citizenship information.

[2] http://www.osec.doc.gov/opog/privacy/Census-pias.html.

The Bureau's attempt to avoid judicial review of its failure to act is also misplaced. Defs.' Opp'n at 18 n.6. This is not a case where an agency has an open-ended obligation to act but "has simply not yet taken action[.]" *Id.* Rather, the Bureau had a fixed deadline to conduct and publish the relevant privacy impact assessments—March 26, 2018—and missed that deadline. Nothing the Bureau does now (or in the future) can change the fact that the Bureau refused to act when it was required to. Thus, the Court can undertake review of the Bureau's failure to act "as though the agency had denied the requested relief[.]" *Friedman*, 841 F.3d at 545 (quoting *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987)).

Finally, despite the Bureau's suggestion to the contrary, EPIC is not undertaking a "broad programmatic attack" against the Bureau's privacy practices. Defs.' Opp'n at 19 (quoting *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004)). EPIC is solely challenging the Bureau's premature decision initiating a collection of citizenship information and the Bureau's unlawful failure to conduct and publish required privacy impact assessments. Compl. ¶¶ 64–78.

II. EPIC WILL SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION.

The Census Bureau misunderstands the purpose of section 208 and the nature of the irreparable injury that EPIC and its members are suffering as a result of the Bureau's failure to meet the privacy impact assessment obligations. The Bureau's arguments are also chronologically inconsistent—it cannot be the case that EPIC was too late in seeking an injunction, Defs.' Opp'n 21–23, and simultaneously too early to state a claim under section 208, Defs.' Opp'n 24–26. And the Bureau's defense ignores the directly analogous rulings on irreparable injury in the environmental impact assessment context. *See* Mem. Supp. Pl.'s Mot. 30–31 (citing *Jones*, 499 F.2d at 502; *Pub. Emps. For Envtl. Responsibility v. U.S. Fish & Wildlife Serv.*, 189 F. Supp. 3d 1, 2 (D.D.C. 2016)).

Under the Bureau's view of the law, "the earliest that [EPIC's] members could demonstrate injury is January 2020 when the Census Bureau first begins mailing or otherwise transmitting the 2020 Decennial Census questionnaire to the public." Defs.' Opp'n. 26. But that makes no sense. As the Bureau well knows, it will be far too late by January 2020 for an adequate evaluation of the census collection process. Neither the Bureau nor any individual who will receive the questionnaire could meaningfully review or propose modifications to the collection of information *after* the materials have been sent. The Bureau recognizes that once it sends out the questionnaires, individuals will be legally obligated to respond. *See* Defs.' Opp'n 14 (quoting 13 U.S.C. § 221(a)). If individuals who will be required to provide personal data to the Census Bureau are not given access to the agency's privacy impact assessments *before* the Bureau finalizes its plans to collect the data, then they will have no opportunity to protect their rights and will thus be irreparably injured. After all, "stale information is of little value." *Judicial Watch, Inc. v. DHS*, 895 F.3d 770, 778 (D.C. Cir. 2018) (quoting *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988)). Moreover, the Bureau's failure to conduct required privacy impact assessments means that the agency never in fact assessed whether the data collection should go forward prior to its decision "initiating a new collection of information." E-Government Act § 208(b)(1)(A).

The D.C. Circuit's environmental impact statement cases make clear that when the agency's decisionmaking process ends without the requisite assessment being conducted and published, plaintiffs may suffer irreparable harm. The Bureau concedes that the Secretary of Commerce's March 26, 2018, order to collect citizenship data in the 2020 Census was a reviewable final agency action. Defs.' Opp'n. 18. The March 2018 Order by Secretary Ross therefore concluded the decisionmaking process and triggered the Bureau's legal obligation to

conduct the requisite privacy impact assessments and make those assessments publicly available under section 208. As the D.C. Circuit explained in *Jones*, the irreparable injury "matures simultaneously . . . at the time the agency is" obligated to file the assessment and fails to do so because the harm stems from "the failure of decision-makers to take [the required] factors into account" as the law requires. 499 F.2d at 512. The court's equitable intervention is necessary "before there has been an 'irretrievable commitment of resources'" to ensure that the assessment is "not merely a justification for a fait accompli." *Id*. But there is no way for EPIC or its members to ensure that the Bureau has incorporated an adequate privacy assessment into the decisionmaking process if judicial review is not available until the collection of information has already begun.

The Bureau's main argument against EPIC's straightforward informational injury claim—that the motion should be denied because of a "delay in seeking relief," Defs.' Opp'n 21–23—is based on a misreading of relevant cases and a misunderstanding of the irreparable injury in this case. There is nothing "unsubstantiated and speculative" about the harm that EPIC and its members suffer as a result of the Bureau's refusal to conduct a privacy impact assessment. *Wis. Gas. Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam). Both parties agree that EPIC's members cannot currently review the Bureau's updated assessments because they do not exist. Both sides also agree that the Bureau will begin printing the 2020 Census forms in June 2019 (in less than four months). Indeed, the Department of Commerce has requested extraordinary relief in the United States Supreme Court because of the uniquely urgent circumstances surrounding the census. *See* Petition for Writ of Certiorari Before Judgment, *U.S. Dep't of Commerce v. New York, et al.*, S. Ct. Dkt. No. 19-212 (Jan. 25, 2019). In its petition, the Government contends that the census case out of the Southern District of New York "'is a matter

of national importance' with 'massive and lasting consequences,'" because the census "occurs only once a decade, with no possibility of a do-over." *Id*. (quoting *New York, et al. v. U.S. Dep't of Commerce*, No. 18-2921, 2019 WL 190285, at *4 (S.D.N.Y. Jan. 15, 2019)). The injury that EPIC's members face is irreparable precisely because the census collection will be impossible to stop after the forms are printed in June.

The Bureau also recognizes that EPIC did not rest on its laurels during the period between Secretary Ross's March 2018 Order and the Motion for a Preliminary Injunction. EPIC advocated forcefully—both directly with the Bureau and through congressional and judicial oversight bodies—that the agency had failed to meet its obligations under the E-Government Act and had failed to assess the privacy impact that the proposed collection of citizenship data would have on hundreds of millions of individuals. Mem. Supp. Pl.'s Mot. 12–13. Meanwhile, the Bureau released two privacy impact assessments in 2018 but failed to address the collection of citizenship data in either assessment. Bachman Decl. ¶ 9. When the Bureau failed to respond to EPIC's comments or to rescind the citizenship question, EPIC filed this suit. The Bureau continued to move forward with the planned collection and submitted its materials for review by the Office of Management and Budget under the Paperwork Reduction Act. Submission for OMB Review, 83 Fed. Reg. 67,213 (Dec. 28, 2018). At that point, after EPIC had repeatedly called on the Bureau to conduct the required privacy impact assessment, it became clear that the court would need to intervene to prevent the agency from running out the clock.

The cases that the Bureau cites are simply not on point here: none of those cases involved a plaintiff who was advocating for a federal agency to comply with the law through multiple oversight mechanisms (executive, legislative, and judicial) prior to seeking emergency relief. Indeed, courts have found that when a plaintiff makes a "diligent pursuit of a variety of avenues

for reversing a policy," their delay in seeking preliminary injunctive relief "does not give rise to an inference that the harm is not irreparable and imminent." *Texas Children's Hospital v. Burwell*, 76 F. Supp. 3d 224, 245 (D.D.C. 2014). Courts are instead concerned with delays that are extensive and unexplained (*e.g.*, a twelve-year delay in *Indep. Bankers Ass'n v. Heimann*, 627 F.2d 486, 488 (D.C. Cir. 1980)), or cases where a delay renders the dispute moot. The delay in *Open Top Sightseeing* was especially egregious because the plaintiff requested that the court indefinitely delay a hearing on its own preliminary injunction motion. *Open Top Sightseeing USA v. Mr. Sightseeing, LLC*, 48 F. Supp. 3d 87, 90–91 (D.D.C. 2014). This was not only "dilatory" but also harmful to the defendant because "the mere presence of the motion for injunctive relief [caused] a chilling effect on their business and hiring practices." *Id*. The unexplained delays in the other cases cited by the Bureau—*AARP v. U.S. EEOC*, 226 F. Supp. 3d 7 (D.D.C. 2016); *Biovail Corp. v. FDA*, 448 F. Supp. 2d 153 (D.D.C. 2006); *Mylan Pharms., Inc. v. Shalala*, 81 F. Supp. 2d 30 (D.D.C. 2000)—were not a significant factor in the irreparable harm analysis, since none of the plaintiffs had established harm in the first place.

Finally, the Bureau attempts to argue that various *dicta* from Freedom of Information Act ("FOIA") cases undercut the legal entitlement of EPIC's members to access the Census Bureau's privacy impact assessments prior to the final decision to collect a new category of sensitive information. Defs.' Opp'n 23–24. But unlike the FOIA, the E-Government Act provides that information must be published by a specified time: *before* an agency initiates a new collection of information. E-Government Act § 208(b)(1). The fact that the Bureau now plans to "update its PIAs, including the PIA for CEN08, over the coming months," Defs.' Opp'n 24, does not weigh against granting EPIC's motion for a preliminary injunction. If anything, the fact that the Bureau already recognizes the need to update these privacy impact assessments shows that the equities

weigh in EPIC's favor. Ultimately, the Census Bureau's irreparable harm argument collapses into its merits argument: if the court agrees that the Bureau was required to conduct and publish a privacy impact assessment *before* Secretary Ross' March 2018 order, then the agency's arguments against irreparable harm all fall apart.

III. THE EQUITIES AND PUBLIC INTEREST WEIGH IN FAVOR OF AN INJUNCTION.

The Census Bureau concedes that both the agency's own interests and the public interest will be served by completion of adequate privacy impact assessment. Defs.' Opp'n 27–28. The fact that the Bureau now "anticipate[s] that updated assessments will be made publicly available on the Department of Commerce website on or before March 2019" does not counsel against relief from this Court. Defs.' Opp'n 28. Rather, that fact weighs in favor of an injunction: the Bureau has already begun the process required to comply with the law and to eventually remove the need for a preliminary injunction.

Courts have made clear that where an injunction does "'not substantially injure other interested parties,' the balance tips in the movant's favor." *Jacinto-Castanon de Nolasco v. ICE*, 319 F. Supp. 2d 491, 503 (D.D.C. 2018) (quoting *League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016)). And a defendant "cannot suffer harm from an injunction that merely ends un unlawful practice." *Id*. (quoting *Open Communities Alliance v. Carson*, 286 F. Supp. 3d 148, 179 (D.D.C. 2017)). Here the Census Bureau has not even attempted to identify any injury that the agency or any other "interested" party would suffer as a result of the Court preliminarily enjoining collection of citizenship data. Instead, the Bureau says "the public interest lies in permitting Defendants to continue to comply with the E-Government Act." Defs.' Opp'n 28.

There can be no question that the public is better off when it has access to fulsome, adequate, and up-to-date privacy impact assessments. One of the core purposes of section 208 of the E-Government Act is to ensure that the public has such information. The public also benefits from *EPIC* having access to that information, because EPIC serves an important public education function. EPIC's mission is "to focus public attention on emerging privacy and civil liberties issues" and to conduct "oversight of government activities that impact individual privacy, free expression, and democratic values." Compl. ¶ 5. Therefore, the interests of the individuals whose data will be collected by the Bureau are served both by the public release of an adequate privacy impact assessment *and* by EPIC's access to that assessment.

The public interest also favors injunctive relief at this stage to avoid the wasteful "commitment of resources" by the Census Bureau that would result if the agency had to unwind the citizenship data collection after the fact. *Jones*, 499 F.2d at 512 (quoting *Lathan*, 455 F.2d at 1121). The Bureau has argued in its other cases that "finalizing the decennial census questionnaire is time-sensitive" and that it is "important to resolve as soon as possible" the key legal issues concerning the 2020 Census. Petition for a Writ of Mandamus at 15, *In re Dep't of Commerce*, No. 18-557, 2018 WL 5458822 (U.S. Nov. 16, 2018). If no injunction issues prior to final judgment in this case, the Bureau will likely expend significant resources collecting citizenship data—which this Court may later deem unlawful. *See New York*, No. 18-2921, 2019 WL 190285, at *121 ("[T]he whole point of the parties' and the Court's haste in this litigation is that the census questionnaires have not yet been printed and that ordering any remedy after they are printed would result in significantly greater disruption and expense.").

Because the balance of the equities and the public interest strongly favor a halt to the Census Bureau's implementation of the citizenship question, EPIC has shown that it is entitled to a preliminary injunction.

CONCLUSION

For the foregoing reasons, the Court should grant EPIC's motion for a preliminary injunction.

Respectfully Submitted,

MARC ROTENBERG, D.C. Bar #422825
EPIC President and Executive Director

ALAN BUTLER, D.C. Bar #1012128
EPIC Senior Counsel

/s/ John Davisson
JOHN DAVISSON, D.C. Bar #1531914
EPIC Counsel

ELECTRONIC PRIVACY
INFORMATION CENTER
1718 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20009
(202) 483-1140 (telephone)
(202) 483-1248 (facsimile)

Attorneys for Plaintiff EPIC

Dated: February 5, 2019