[ORAL ARGUMENT SCHEDULED FOR MAY 8, 2019]

No. 19-5031

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELECTRONIC PRIVACY INFORMATION CENTER,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF COMMERCE, et al.,
Defendants-Appellees.

On Appeal from an Order of the
U.S. District Court for the District of Columbia
Case No. 18-cv-2711-DLF

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GLOSSARY

ADD	Citation to the Addendum
APA	Administrative Procedure Act
E-Government Act	E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899
EPIC	Electronic Privacy Information Center
JA ___	Citation to the Joint Appendix
NEPA	National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*.
OMB	Office of Management and Budget
PIA	Privacy Impact Assessment
PRA	Paperwork Reduction Act

SUMMARY OF ARGUMENT

This case concerns the collection of sensitive personal information from every household in the United States. The central dispute is over when the Census Bureau must conduct the required Privacy Impact Assessments. The Bureau does not dispute it must conduct the Assessments. The question is whether the Bureau can wait until it "mails its first set of questionnaires to the public" before conducting the detailed analysis and review that section 208 of the E-Government Act requires.

That interpretation is not sensible, practicable, or logical. It would ignore the purpose of section 208 and turn the government's proposed collection of personal information into a *fait accompli*. Congress enacted the E-Government Act to "ensure sufficient protections for the privacy of personal information," § 208(a), and to "promote better informed decisionmaking by policy makers," § 2(b)(7). It is simply not possible to ensure adequate protection for personal data once collection is underway. And the only way for an assessment to inform the decisionmaking process is to conduct it *before* a final decision to collect personal data has been made. To adopt the Bureau's reading of the plain text would produce outcomes that are nonsensical.

Section 208 makes clear that agencies must assess the privacy impact of their data collection practices well in advance of collection. Section 208(b)(1)(A)

anticipates that an agency will complete the steps set out in section 208(b)(1)(B) before the agency makes a final decision to collect personal information. If an agency's decision to collect data is *final* and reviewable—as it was when the Secretary of Commerce announced his intent to collect data about citizenship—then the agency cannot argue that the collection process has not been "initiated." The lower court's interpretation of the statute is inconsistent with the plain meaning of "initiating," contrary to the express purpose of the law, and should be reversed.

The Census Bureau also argues this Court lacks jurisdiction, but the Bureau ignores specific changes to EPIC's bylaws that resolve issues left open in an earlier case about EPIC's standing. The Bureau does not even discuss the text of the current and relevant bylaws. EPIC's Members have suffered and continue to suffer injury in fact because they have been "deprived of information that, on [their] interpretation, a statute requires the government" to disclose. *EPIC v. Presidential Advisory Comm. on Election Integrity*, 878 F.3d 371, 380 (D.C. Cir. 2017).

The Census Bureau also takes issue with the scope of injunctive relief to which EPIC is entitled. But this Court's jurisdiction to grant injunctive relief as "necessary and appropriate" to "preserve status or rights pending conclusion of the review proceedings" is well established. 5 U.S.C. § 705; *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018) (quoting *University of Tex. v. Camenisch*, 451 U.S. 390, 395

(1981)). Preliminary relief necessarily includes halting the agency's collection efforts pending completion of the legally required Privacy Impact Assessments or final resolution of this case.

ARGUMENT

I. EPIC HAS ASSOCIATIONAL STANDING TO PURSUE SECTION 208 CLAIMS ON BEHALF OF ITS MEMBERS, WHOSE PERSONAL INFORMATION THE CENSUS BUREAU SEEKS TO COLLECT.

The Census Bureau offers several theories on why EPIC should not be allowed to have this case decided in federal court. These arguments lack merit and should be rejected: EPIC's current bylaws establish that it is a membership organization, and EPIC's members have suffered a concrete and particularized informational injury as a result of the Bureau's failure to conduct and publish required Privacy Impact Assessments. A party seeking a preliminary injunction must show a "substantial likelihood of standing." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015). EPIC has associational standing to sue on behalf of its Members when they face an actual or imminent, concrete, and particularized injury in fact that is caused by a defendant and redressable by a court. *Am. Library Ass'n v. FCC*, 401 F.3d 489, 492–93 (D.C. Cir. 2005); *see also Conference of State Bank Supervisors v. Office of Comptroller of Currency*, 313 F. Supp. 3d 285, 294 (D.D.C. 2018). EPIC "need not prove the merits of [the] case in order to demonstrate . . . Article III standing." *Am. Library Ass'n*, 401 F.3d at 493.

To establish associational standing, EPIC need only show that "(1) at least one of [its] members would have standing to sue; (2) the interests [it] seek[s] to protect are germane to the organization[']s] purposes; and (3) neither the claim asserted nor the relief requested requires the participation of individual members." *Id*. at 492. The Census Bureau does not dispute that EPIC satisfies the second and third prongs of associational standing. The Bureau argues only (1) that EPIC is not a membership organization, and (2) that none of EPIC's Members would have standing to sue in their own right. Br. Appellees 18.

The first argument is meritless because EPIC's revised bylaws establish that it is a membership organization. The second argument is wrong because EPIC's Members have suffered an actual informational injury, which this Court has held to provide standing. EPIC has also shown a substantial likelihood that its Members will imminently suffer injury to their privacy interests due to the mandatory, unlawful collection of their personal information by the Census Bureau. And the Bureau's argument that EPIC's Members lack standing to pursue preliminary relief, Br. Appellees 24–26, is inconsistent with basic principles of administrative law and judicial power.

1. EPIC is a membership organization, as its amended bylaws make clear. Compl. ¶ 10, JA 28; *Bylaws of the Electronic Privacy Information Center* (amended Jan. 26, 2018), JA 229–235. EPIC's Board of Directors—the "policy-

making body" of the organization—must be "nominated from among its Members." JA 229. Article V of EPIC's bylaws outlines the qualifications, duties, and obligations of EPIC's "Members." JA 232–33. Members must be "distinguished experts in law, technology, and public policy." JA 232. Members sit on EPIC's "Advisory Board," where they "provide guidance" for EPIC's work, "participate in the activities" of EPIC, "offer support," and "provide leadership." JA 232. All Members are required to pay dues, JA 232, and "provide an annual evaluation of the Corporation, which shall be reported to the Board of Directors at the Annual Meeting." JA 233.

The Census Bureau ignored these responsibilities and activities of EPIC's Members despite the fact that EPIC provided the bylaws as an exhibit below and in the Joint Appendix. Br. Appellees 29; *see also* JA 229–235. The Bureau's references to documents that predate EPIC's 2018 bylaws are simply not relevant to the current status of EPIC's membership. Br. Appellees 26–27, 29 n. 9. This Court previously recognized EPIC as a membership organization in *EPIC v. FAA*, 892 F.3d 1249, 1253 (D.C. Cir. 2018) (referring to "EPIC and its members"), but held that "EPIC's members fail to establish a concrete and particularized injury caused by the small drone rules." *Id*. In this case EPIC can clearly show that its Members, whose personal data will be collected by the Census Bureau, have

suffered (and will imminently suffer) injury as a result of the Government's unlawful action.

EPIC would also satisfy the "functional equivalence" test but need not do so to establish associational standing here. The cases that the Bureau cites do not concern associational standing for membership organizations. Br. Appellees 26–29. Both *American Legal Foundation v. FCC*, 808 F.2d 84 (D.C. Cir. 1987), and *Fund Democracy, LLC v. SEC*, 278 F.3d 21 (D.C. Cir. 2002), concerned the question of "whether an organization that *has no members* in the traditional sense may nonetheless assert associational standing." *Fund Democracy*, 278 F.3d at 25. The Court in *Hunt* similarly analyzed whether a non-membership organization (state commission) could sue on behalf of private farmers. *Hunt v. Washington State Apple Advertisement Commission*, 432 U.S. 333, 345 (1977). The out-of-context quote that the Census Bureau relies upon does not support the point that the Bureau is attempting to make. Br. Appellees 29. The Court in *Hunt* concluded that a state commission was equivalent to a trade association and noted that it would "exalt form over substance to differentiate between" the two. *Id*. at 345. But that logic does not work in reverse. If a corporation is structured as a membership organization under its bylaws, then that is its corporate form. There is no other "substance" to evaluate. Membership organizations have members and can sue on their behalf, as courts have held time and again since *Warth v. Seldin*, 422 U.S.

490, 511 (1975). Courts simply do not apply the functional equivalence test in cases involving traditional membership organizations. *See, e.g.*, *Sierra Club v. Jewell*, 764 F.3d 1 (D.C. Cir. 2014); *NRDC v. EPA*, 489 F.3d 1364 (D.C. Cir. 2007).

2. EPIC has also shown a "substantial likelihood" that its Members have standing to challenge the Census Bureau's data collection and failure to publish required Privacy Impact Assessments. The Bureau failed to apply the correct tests under *Friends of Animals* and *Clapper*, both of which are favorable to EPIC, to evaluate informational standing and imminent privacy injuries.

a. The Bureau correctly identifies the informational standing test articulated by this Court in *Friends of Animals v. Jewell*, 828 F.3d 989 (D.C. Cir. 2016), but fails to apply that standard to the operative facts. Br. Appellees 22.

EPIC's Members have suffered, and continue to suffer, concrete and particularized informational injuries as a result of the Census Bureau's failure to conduct and publish Privacy Impact Assessments mandated by section 208 of the E-Government Act. JA 202–10. EPIC's Members (1) are subject to the Bureau's proposed collection of information, and (2) have been denied access to, and irreparably harmed by, the Bureau's unlawful failure to publish the required Privacy Impact Assessments. *Id*.

Contrary to the Bureau's claim, the E-Government Act is directly analogous to other statutes that create "broad public rights to information." Br. Appellees 22 (referring to *FEC v. Akins*, 524 U.S. 11 (1998); *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); and *Public Citizen v. DOJ*, 491 U.S. 440 (1989)). There is no way to distinguish the FECA, the FACA, and the FOIA from the E-Government Act; all of these statutes obligate federal agencies to make information available to the public. Indeed, the section 208 publication requirement is much broader than FOIA's requirement that agencies make records available to "any person" who requests them, 5 U.S.C. § 552(a)(3)(A), because the E-Government Act requires agencies to make privacy impact assessments proactively available to the public at large.

The Bureau's claim that EPIC's Members are not the *type* of plaintiffs who can assert a right to information under the E-Government Act, Br. Appellees 22, is based on a misreading of the decision in *EPIC v. PACEI*, 878 F.3d at 378. That case, which concerned the collection and use of state voter data, determined that individuals whose personal information could be collected—i.e., residents of the particular states subject to collection—had standing. EPIC's Members will necessarily be subject to the 2020 Census collection, which is a mandatory disclosure for every household in the United States. That is not in dispute. JA 202–10.

The Census Bureau misunderstands the purpose of an Article III standing analysis when it argues that EPIC's Members would have to show "a collection of information that *threatens their privacy*." Br. Appellees 22 (emphasis added). The Bureau cannot "bootstrap standing analysis to issues that are controverted on the merits." *In re Navy Chaplaincy*, 697 F.3d 1171, 1178 (D.C. Cir. 2012) (quoting *Public Citizen v. FTC*, 869 F.2d 1541, 1549 (D.C. Cir. 1989)). Yet the agency is even trying to bootstrap the standing analysis a future *hypothetical* dispute over an assessment that does not yet exist.

A court cannot be expected to conduct a detailed Article III standing analysis of privacy risks to decide *whether it can decide* if an agency must conduct a privacy impact assessment. Standing is a threshold jurisdictional issue, not a complex factual and legal issue that would require disputes over law, evidence, and triable issues of fact. That is precisely why courts "assume arguendo" the merits of plaintiff's underlying legal claim. *Estate of Boyland v. USDA*, 913 F.3d 117, 123 (D.C. Cir. 2019).

b. Much of the Census Bureau's standing argument is dedicated to a discussion of the privacy harms that EPIC's Members would face when their personal information is collected in the 2020 Census. Br. Appellees 18–21. But that discussion misses the point entirely. The unlawful collection of personal information by the government is a concrete and particularized injury.

EPIC's Members also have a constitutional right to privacy. This includes the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; *see also Carpenter v. United States*, 138 S. Ct. 2206 (2018). The right to privacy includes a constitutionally protected interest in "avoiding disclosure of personal matters," *Whalen v. Roe*, 429 U.S. 589, 599 (1977); *see also NASA v. Nelson*, 562 U.S. 134, 147 (2011) ("As was our approach in *Whalen*, we will assume for present purposes that the Government's challenged inquiries implicate a privacy interest of constitutional significance."); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 455 (1977) ("[W]hen Government intervention is at stake [individuals] are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity."). The right to informational privacy is "implicit in the concept of ordered liberty" that arises under the Fourteenth Amendment. *Whalen*, 429 U.S. at 599 n.23.

Whether an individual's right to privacy has been violated by a particular government action is ultimately a merits determination. But a certainly impending threat of unlawful collection clearly rises to the level of injury necessary to satisfy the Article III "case or controversy" requirement. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

3. The Census Bureau's argument that EPIC's Members lack standing, Br. Appellees 24–26, misunderstands the scope of judicial authority. Section 705 ("Relief pending review") authorizes a "reviewing court" to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705. A preliminary injunction is an "exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). "The purpose of such interim equitable relief is not to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward." *Id.* (internal citations omitted).

A preliminary injunction is not a distinct "form of relief" that requires a separate standing analysis. If it were, courts would have to evaluate standing to carry out other essential court functions such as discovery orders, stay orders, hearing orders, and procedural motions. That is not the law.

None of the cases cited by the Census Bureau support the agency's theory that a court must evaluate standing separately to grant preliminary injunctive relief. *Common Cause v. Federal Election Commission*, 108 F.3d 413 (D.C. Cir. 1997), and *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), concerned the ultimate relief that the plaintiffs' sought and are not relevant to the Bureau's

argument about relief pending review. The Court in *EPIC v. PACEI* also did not conduct a separate standing analysis of the proposed preliminary injunctive relief. Instead, the Court referred directly to EPIC's *Complaint* and the ultimate relief sought, not to the scope of the proposed preliminary injunction. 878 F.3d at 380 (citing EPIC's Complaint at 12, 15). And here, unlike in *EPIC v. PACEI*, the ultimate relief that EPIC seeks is tied directly to its Members' interests in obtaining information under section 208. JA 51 (requesting that the court order defendants to "suspend," "revoke," or "remove" the question "until the Defendants have conducted, reviewed, and published the full and complete Privacy Impact Assessments required by Section 208(b) of the E-Government Act").

The Bureau's reliance on *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), is puzzling given that courts have jurisdiction and authority to issue preliminary injunctions to ensure agency compliance with procedural requirements. In *Summers*, a group of plaintiffs challenged the Forest Service's failure to give prior notice and provide a period for public comment prior to approving a salvage sale of timber in the Sequoia National Forest. 555 U.S. at 491. As the Supreme Court ultimately explained, the "District Court granted a preliminary injunction against the Burnt Ridge salvage-timber sale," and the parties subsequently "settled their dispute" over the approval of that project. *Id*. The fact that the plaintiffs had failed to allege an injury in fact based on any *other*

project—which the Court deemed necessary to challenge the ongoing application of the Forest Service regulations—was irrelevant to whether the lower court had jurisdiction to enter a *preliminary* injunction blocking the sale (which no one disputed in that case). *See id.*

EPIC has therefore established Article III standing to pursue its claims concerning the Bureau's unlawful failure to conduct and publish required Privacy Impact Assessments.

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

The Bureau initiated a "new collection" of personally identifiable information when Secretary Ross took final agency action to collect citizenship data on March 26, 2018. That is the date by which the Bureau was required to complete the necessary Privacy Impact Assessments, but failed to do so. Accordingly, EPIC is likely to succeed on the merits of its claims.

The Bureau attempts to skirt the section 208 obligation by rebranding. Despite their very name—*privacy impact assessments*—the Bureau insists that the assessments mandated by section 208 are actually concerned only with the "security" of personal data that agencies collect. Br. Appellees 35. That is false, as Congress, the Office of Management and Budget, and the Bureau's Chief Privacy Officer all make clear.

Section 208, by its very terms, is focused on "ensur[ing] sufficient protections for the *privacy* of personal information[.]" E-Government Act § 208(a) (emphasis added). One of the many ways that the statute does this is by requiring agencies to "address" through a privacy impact assessment "how [personal] information will be secured" if it is ultimately collected. E-Government Act § 208(b)(2)(B)(ii)(VI). These are the "measures to protect the security of personal data" to which the Bureau refers. Br. Appellees 35. But section 208 requires much more than a cybersecurity analysis. It also compels an agency to examine, prior to the initiation of any data collection, "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"; "whether a system of records is being created under . . . the 'Privacy Act'"; and—crucially—"what notice or opportunities for consent would be provided to individuals regarding what information is collected and how that information is shared[.]" E-Government Act § 208(b)(2)(B)(ii); *see also* OMB Guidance, ADD 34–39 (further detailing the privacy analysis that agencies must undertake).

These considerations in section 208 are largely irrelevant to the *security* of personal information once collected, but they are absolutely central to the *privacy* impact of an agency's decision to collect (or not collect) individuals' personal data. To illustrate the point: even if the Bureau could demonstrate to a certainty that

nude photos of census respondents would be secured against unauthorized access by third parties, a *privacy* impact assessment would reveal such a data collection to be a gross invasion of privacy. An impact assessment would therefore prevent the collection of such personal information. The Bureau certainly could not wait until the forms asking for nude photos were "in the mail" to conduct the required privacy analysis.

This distinction is also apparent from Congress's decision to codify and intertwine section 208 with the Paperwork Reduction Act, 44 U.S.C. § 3501 note. The PRA, like the E-Government Act, is designed to "minimize" "burden[s] for individuals" and to "ensure the greatest possible public benefit" from the federal government's collection of information. 44 U.S.C. §§ 3501(1)–(2); *see also* E-Government Act § 208(a). Both statutes are concerned, first and foremost, with the impact of the government's information collection activities on *individuals*—not simply the technological safeguards in place once data is collected. By contrast, the security of data in the possession of the federal agencies is primarily regulated by the Federal Information Security Modernization Act ("FISMA"), 44 U.S.C. § 3551 *et seq.*, which is designed to "ensur[e] the effectiveness of information security controls over information resources[.]" § 3551(1). But section 208 is a privacy-centric statute, not a clone of FISMA.

The core focus of section 208—forcing agencies to assess *privacy* risks before deciding to collect personal information—is further apparent from the implementing OMB regulations. As the OMB explains: "A PIA is one of the most valuable tools Federal agencies use to ensure compliance with *applicable privacy requirements* and *manage privacy risks*." OMB, *OMB Circular A-130: Managing Information as a Strategic Resource* (2016), app. II at 10, ADD 30 (emphases added). The OMB also instructs that the purpose of a privacy impact assessment is "to ensure handling conforms to applicable legal, regulatory, and policy requirements *regarding privacy*" and "to examine and evaluate protections and alternate processes for handling information to *mitigate potential privacy concerns*." *Id.* at 34, ADD 29 (emphases added). Even the Bureau's own Chief Privacy Officer notes the distinction between data security and privacy. *See* JA 245 ("I am responsible for providing guidance to the Census Bureau programs on matters concerning confidentiality, data stewardship and safeguards, [and] *privacy and privacy compliance*[.]" (emphasis added)).

Section 208 thus makes clear the far-reaching importance of privacy impact assessments. Nevertheless, the Bureau attempts to dodge its obligation to evaluate the privacy implications of collecting citizenship data from every person in the country, insisting that it will not "initiat[e] a new collection of information" until 2020. None of the Bureau's arguments are persuasive.

First, the Bureau cherry-picks definitions of "initiate" to minimize the significance of the Secretary's decision, purposefully bypassing other definitions that better align with the purposes of section 208(b)(1)(A). Br. Appellees 30. To read "initiate" as narrowly as the Bureau does—i.e., as describing the first moment that data is actually solicited or collected—is inconsistent with a statute designed to "promote better informed *decisionmaking* by policy makers[.]" E-Government Act § 2(b)(7). The Bureau's reading would make the phrase "initiat[e] a new collection of information" the functional equivalent of "conduct [a new] collection of information," 44 U.S.C. § 3507(a)—a "readily available and apparent alternative" that Congress notably declined to use in section 208. *Knight v. Comm'r*, 552 U.S. 181, 188 (2008). Consider also the straightforward definitions of "initiate" provided by multiple authoritative sources on the English language (all cited by the lower court): "introduce, set going, give rise to, originate," Oxford English Dictionary (2019); "to cause or facilitate the beginning of: set going," Merriam-Webster (2019); and "[o]riginate, introduce," Black's Law Dictionary (6th ed. 1990).

In an attempt to shore up its view of the word "initiat[e]," the Bureau points to another use of that term in E-Government Act § 214(c). But EPIC's reading of the word "initiate" is completely consistent with section 214(c). The OMB, like an agency under section 208, plainly satisfies the obligation to "initiate" a process

when it takes *final agency action* with respect to that process. Moreover, nothing in section 214(c) suggests that the OMB—as opposed to "the Federal Emergency Management Agency" and "State, local, and tribal governments"—is responsible for actually carrying out pilot projects once it has initiated them. *Id.*; *see* 44 U.S.C. § 3902(a) (distinguishing between the "initiating" of a process from the "carrying out" or "completing" of that process).

The Bureau also characterizes Secretary Ross's March 26, 2018 decision as a "mere[] announce[ment]" insufficient to constitute "initiat[ion]" of a process, Appellee Br. 32, but the Bureau forgets that final agency action is a "consummation of the agency's decisionmaking . . . from which legal consequences will flow[.]" *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)).

Second, the Bureau would rewrite the phrase "initiating a new collection of information" as initiating the "*collecting*" of new information. Br. Appellees 31. But the Act makes clear that the agency's delayed schedule is at odds with Congressional intent. Congress understood that the "collection of information" by a federal agency—subject to regulation, budgeting, and IT procurement procedures—is a complex administrative undertaking that begins well before any data is actually gathered. Long before any personal data is stored in a federal agency record system, the agency is required to go through steps that include

design and development, review by the OMB, notice to Congress (in the case of the decennial census), and of course the completion of the required privacy impact assessment(s). The statutory definition of "collection of information" underscores this point: "collection of information" embraces the antecedent steps of "*causing* [information] to be obtained" and "*requiring* the disclosure . . . of [information]." 44 U.S.C. § 3502(3)(A) (emphases added).

Here, the collection process began when the agency decided—or took final agency action—to collect citizenship status information on March 26, 2018. From Secretary Ross's order flowed the first steps of collection, which include notifying Congress of the Bureau's final agency action under 13 U.S.C. § 141(f)(2); designing census questionnaire with the citizenship question included; and soon (if the Bureau prevails in litigation) printing, addressing, and mailing the census forms. These steps are an indispensable part of the agency's "collection of [citizenship status] information," without which data cannot be obtained. E-Government Act § 208(b)(1)(A)(ii). The collection of citizenship status information was therefore initiated more than a year ago, when Secretary Ross set the process in motion.

The Bureau's proposed deadline for the required Privacy Impact Assessments—"when the census forms are mailed," Br. Appellees 31—is neither logical nor practicable. When the Census Bureau transfers census questionnaires to

the postal service for delivery, it has yet to actually "solicit[]" or "collect[]" any information from the public. 44 U.S.C. § 3502(3)(A); *see also Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 223 (1992) (quoting Black's Law Dictionary 1393 (6th ed. 1990)) ("'Solicitation,' commonly understood, means '[a]sking' for, or 'enticing' to, something[.]"). No questions will be "asked" of census respondents until the postal service delivers the questionnaires on behalf of the Census Bureau days later and the respondents read the questions as printed. And if a recipient simply ignores the questions posed by the Bureau (or if the completed response was lost in the mail), the agency will never in fact "collect" their personal information.

Indeed, seeking to collect personal information by mailing questionnaires to the public *before* assessing the risk of data collection would defeat the purpose of section 208. *See OMB Circular*, app. II at 10, ADD 30 ("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[.]"). The Bureau's suggested deadline for the required Privacy Impact Assessments is thus nonsensical. For the purposes of section 208, there is nothing special about the mailing of census forms; it is simply one of the steps that occurs *after* the Bureau has completed the required Privacy Impact Assessments and initiated a new collection of personal information.

Third, the Bureau insists that Congress must have meant privacy impact assessments to be conducted at an early stage for IT systems, yet only at the very last second for "new collection[s] of information." E-Government Act 208(b)(1)(A). Br. Appellees 33. *Contra OMB Circular*, app. II at 10, ADD 30 (requiring the completion of privacy impact assessments from the "earliest stages of the agency activity"). But "just as Congress' choice of words is presumed to be deliberate' and deserving of judicial respect, 'so too are its structural choices.'" *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018) (quoting *Univ. of Texas Sw. Med. Ctr.*, 570 U.S. 338, 353 (2013)). It would make little sense for Congress, in successive subparagraphs, to quietly impose radically different privacy safeguards for IT systems and collections of information. Nor does the Bureau offer any evidence that Congress so intended. Instead, the parallel structure of the two adjacent provisions—one requiring an impact assessment before an agency commits resources to an IT system, the other requiring an impact assessment before an agency commits resources to a collection of information—is a strong indication that the two statutory triggers should be read harmoniously. And indeed, such a reading matches the plain-text meaning of "initiating a new collection of information" in section 208(b)(1)(A)(ii).

The Bureau also objects to the distinction Congress drew in section 208 between the moment that an agency "initiat[es] a new collection of information"

and the discrete point, later in time, at which information "will be collected." Br. Appellees 34–35 (quoting E-Government Act § 208(b)(1)(A)(ii)). The Bureau suggests that Congress's use of different tenses (present and future) is meant to distinguish between *methods* of collection rather than the order of events in the collection process (first "initiation," and later "collect[ing]"). *Id.* at 35. But the "initiation of a . . . collection" and the "collect[ing]" of data are temporally distinct occurrences, as the text of the statute makes clear.

Fourth, the Bureau contends that the environmental impact statements of the National Environmental Policy Act "NEPA" are not analogous to the privacy impact assessments of the E-Government Act because the former is required as soon as an action is "proposed." Br. Appellees 33–34. But EPIC did not argue that federal agencies must conduct privacy impact assessments as soon as they "propose" a collection of information. EPIC simply stated, consistent with the language of section 208, that an agency must conduct and publish an impact assessment "before initiating a new collection of information." Under both NEPA and the E-Government Act, Congress is concerned with ensuring that an agency has "fully adverted" to the consequences of an action before the agency commits itself to that action. *Jones v. D.C. Redevelopment Land Agency*, 499 F.2d 502, 512 (D.C. Cir. 1974); *see also OMB Circular*, app. II at 10, ADD 30 ("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[.]").

Finally, the Bureau mischaracterizes EPIC's argument concerning the timing of privacy impact assessments. Br. Appellees 31, 34, 36. But EPIC's argument tracks the language of section 208: an agency need only "conduct," "review," and "publish" a privacy impact assessment "before initiating a new collection of"—i.e., taking final agency action to collect—personal information. E-Government Act §§ 208(b)(1)(A), (B) ("Responsibilities of Agencies"). EPIC has never suggested that "considering," "propos[ing]," or "planning" triggers those duties, as the Bureau contends. Br. Appellees 31, 34, 36.

Because the Bureau has unlawfully failed to conduct and publish required Privacy Impact Assessments before initiating the collection of citizenship status information, EPIC is likely to succeed on the merits of its claims.

III. EPIC READILY SATISFIES THE REMAINING PRELIMINARY INJUNCTION FACTORS.

The Bureau likewise fails to rebut the irreparable harm that EPIC suffers from the Bureau's actions or the overwhelming equitable and public interest in disclosure of the required Privacy Impact Assessments.

First, the Bureau's attempts to discount the informational and privacy injuries suffered by EPIC's Members fail because EPIC will suffer irreparable harm absent the publication of the required Privacy Impact Assessments—records

which contain information "highly relevant to an ongoing and highly public matter." *EPIC v. Presidential Advisory Comm'n on Election Integrity*, 266 F. Supp. 3d 297, 319 (D.D.C.), *aff'd on other grounds*, 878 F.3d 371. EPIC's Members will also suffer irreparable harm from the imminent and unlawful acquisition of their personal information by the Census Bureau. *See, e.g.*, *Lomont v. Summers*, 135 F. Supp. 2d 23, 25 (D.D.C. 2001) (holding that plaintiff had sufficiently alleged a "privacy injury" where plaintiff challenged a regulation requiring him to submit personal information to the ATF as a condition of manufacturing or transferring particular firearms), *aff'd sub nom. Lomont v. O'Neill*, 285 F.3d 9 (D.C. Cir. 2002).

Second, the Bureau's argument that the injunction sought would not redress the informational harm EPIC's Members will suffer misunderstands the scope of the preliminary relief that EPIC is seeking. Unlike the permanent injunction that the *EPIC v. PACEI* Court addressed, 878 F.3d at 380, here EPIC seeks a preliminary injunction that would last only "until the Defendants have conducted, reviewed, and published the full and complete Privacy Impact Assessments required by Section 208(b) of the E-Government Act." JA 51. Such an order would leave the Bureau one of two choices: (1) complete and publish the Privacy Impact Assessments required by section 208; or (2) abandon the collection of citizenship status information entirely, which would remove the legal obligation to produce

privacy impact assessments. In either event, EPIC's informational harm would be more likely to be redressed.

Third, the Bureau's representation that it will eventually complete the required Privacy Impact Assessments does not remedy EPIC's irreparable harms. Br. Appellees 37. EPIC's irreparable harms stem from the Defendants' failure to disclose particular information when the law requires that information to be disclosed, which makes EPIC entitled to relief *now*—not simply at the Bureau's leisure. *See 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)) ("[S]tale information is of little value[.]"). This is all the more important where Congress has created a statutory right for people to learn of the possible risks that could flow from the collection of their personal information by the federal government, yet a particular agency has chosen to go forward with data collection without first completing the steps required by section 208.

Moreover, the Bureau has already violated its January 30, 2019 representation to the lower court that it would complete revised Privacy Impact Assessments addressing the privacy risks of citizenship data collection by "late February or early March of 2019" (in the case of CEN08) or "within the next two months" (in the case of the other CEN systems). JA 248, 250; *see also* 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) (showing no new privacy impact assessments since 2018).[2]

Finally, the Bureau fails to identify any equitable interest that would actually be harmed by the requested injunction, asserting simply that it would be "extraordinary" for the Court enjoin the Secretary's (unlawful and uninformed) collection of citizenship status information. Br. Appellees 39. As this Court has made clear, "there is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters of United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (citing *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 511-12 (D.C. Cir. 2016); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013)). And the fact that the Supreme Court is considering an entirely separate set of legal disputes over the citizenship question has no relevance to the equities at stake in this appeal. Thus, there are no harms on the Bureau's side of the scale "to overcome the much more substantial countervailing harms" facing EPIC and the public. *Newby*, 838 F.3d at 13.

In sum, the irreparable harms that EPIC's Members will suffer, the balance of the equities, and the public interest all favor a halt to the Census Bureau's

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

implementation of the citizenship question and the issuance of the requested injunction.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the lower court and issue a preliminary injunction halting the implementation of the Defendants' March 26, 2018 decision to add a citizenship question to the 2020 Census.

Respectfully Submitted,

Dated: April 9, 2019

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing reply brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). The brief is composed in a 14-point proportional typeface, Times New Roman, and complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(ii) and D.C. Cir. R. 32(e), because it contains 6,022 words, excluding parts of the brief exempted under Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1).

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CERTIFICATE OF SERVICE

I, Alan Butler, hereby certify that on April 9, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. The following participants in the case will be served by email and the CM/ECF system:

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