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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

----- X
:
ELECTRONIC PRIVACY :
INFORMATION CENTER, :
:
Appellant, :
:
v. : No. 19-5031
:
UNITED STATES DEPARTMENT OF :
COMMERCE, ET AL., :
:
Appellees. :
:
----- X

Wednesday, May 8, 2019
Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CIRCUIT JUDGES HENDERSON AND MILLETT, AND
SENIOR CIRCUIT JUDGE SENTELLE

APPEARANCES:

ON BEHALF OF THE APPELLANT:

JOHN L. DAVISSON, ESQ.

ON BEHALF OF THE APPELLEES:

SARAH CARROLL (DOJ), ESQ.

C O N T E N T S

ORAL ARGUMENT OF:

PAGE

John L. Davisson, Esq.
On Behalf of the Appellant

3; 39

Sarah Carroll, Esq.
On Behalf of the Appellees

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P R O C E E D I N G S

THE CLERK: Case number 19-5031, Electronic Privacy Information Center, Appellant v. United States Department of Commerce, et al. Mr. Davisson for the Appellant; Ms. Carroll for the Appellees.

JUDGE HENDERSON: Good morning.

ORAL ARGUMENT OF JOHN L. DAVISSON, ESQ.

ON BEHALF OF THE APPELLANT

MR. DAVISSON: Good morning, Your Honors, John Davisson for the Electronic Privacy Information Center. I've reserved two minutes of my time for rebuttal.

Your Honors, E-Government Act requires every federal agency that intends to collect personal data to conduct a detailed privacy impact assessment before initiating a new collection of information. Section 208 and the OMB regulations set out the requirements for those impact assessments. Assessments must be commensurate with the size, the sensitivity and the privacy risks collection; assessments must explain how the data is going to be used, protected, and possibly distributed; and most importantly, each assessment must be completed, reviewed, and made public before the Agency initiates collection of information.

JUDGE SENTELLE: That's the key thing here is they haven't initiated one yet, have they?

MR. DAVISSON: Well, Your Honor, so, the

1 initiation of, initiating a new collection of information is
2 the statutory trigger, and that --

3 JUDGE SENTELLE: Yes, and they have not collected
4 the first datum yet, have they?

5 MR. DAVISSON: That's correct, Your Honor.

6 JUDGE SENTELLE: All right. Good. So, what are
7 you doing here?

8 MR. DAVISSON: Fair enough, Your Honor. So,
9 initiating a new collection of information, and specifically
10 the phrase collection of information has to be understood in
11 the context of the provision.

12 JUDGE SENTELLE: Yes, right.

13 MR. DAVISSON: So --

14 JUDGE SENTELLE: And in the context they haven't
15 collected the first datum yet.

16 MR. DAVISSON: Well, Your Honor, that is the
17 collecting of information, or the having --

18 JUDGE SENTELLE: What relief are you praying here?

19 MR. DAVISSON: Pardon, Your Honor?

20 JUDGE SENTELLE: What relief are you praying here
21 in your complaint?

22 MR. DAVISSON: Preliminary injunction, Your Honor.

23 JUDGE SENTELLE: Preliminary injunction against
24 what?

25 MR. DAVISSON: Requiring the, the Census Bureau to

1 suspend the collection of information until it is --

2 JUDGE SENTELLE: No. Aren't you asking us to, or
3 asking the District Court to enjoin them from initiating?
4 Isn't that the term you used in your prayer for relief?

5 MR. DAVISSON: Well, they have already initiated,
6 but we are asking --

7 JUDGE SENTELLE: Isn't that what you asked for, to
8 stop them from initiating? Am I wrong about that?

9 MR. DAVISSON: Well, sorry. So, the -- just to
10 backup a little bit. Sorry. So, we argue that the
11 initiation of collection occurred on March 26, 2018, so --

12 JUDGE SENTELLE: I know you're arguing that, but
13 does that make any sense when you're asking us to prevent
14 them from initiating?

15 MR. DAVISSON: We are asking them to suspend
16 initiation, suspend collection that is already underway.
17 The collection of information, Your Honor, is a process,
18 it's clear from the --

19 JUDGE SENTELLE: How can it be the intent of
20 Congress in using the initiate to mean to check it before
21 you ever start thinking about doing it? You have to file
22 the PIA before you even think about, before you even
23 announce that you're going to be collecting.

24 MR. DAVISSON: Your Honor, that's not what
25 we're --

1 JUDGE SENTELLE: Could that possibly be the
2 meaning of Congress?

3 MR. DAVISSON: That's not, that's not the meaning
4 we're proposing. We're proposing that the PIA is due before
5 the Agency concludes its decision-making process and begins
6 the Agency process of --

7 JUDGE SENTELLE: Has it concluded its decision-
8 making process?

9 MR. DAVISSON: It has, Your Honor, it took final
10 agency action on March 26, 2018, and the Agency concedes
11 that point.

12 JUDGE SENTELLE: What did they say on March, what
13 did they do on March 28th?

14 MR. DAVISSON: They concluded that citizenship
15 information would be collected on the 2020 Census and they
16 began --

17 JUDGE SENTELLE: Yes, because they were saying
18 we're going to initiate in the 2020 Census, but they did not
19 begin collection, did they?

20 MR. DAVISSON: Your Honor, the collection of
21 information, if one refers to the collection of a debt it's
22 referring to a process that a debt collector undertakes to
23 obtain money from someone who owes the debt. In the same
24 way the collection of information is a process --

25 JUDGE MILLETT: Does the collection of a debt

1 happen before you make a demand to the person that owes the
2 debt?

3 MR. DAVISSON: The debt is not collected until the
4 information --

5 JUDGE MILLETT: No, no, the demand, until you
6 demand that they pay.

7 MR. DAVISSON: Well, I --

8 JUDGE MILLETT: But they haven't demanded that
9 anybody turn over, or say anything. Yes, I think that's
10 Judge Sentelle's point.

11 JUDGE SENTELLE: Exactly.

12 MR. DAVISSON: Well, Your --

13 JUDGE MILLETT: I don't think debt collection
14 helps you.

15 MR. DAVISSON: So, in the case of collection of a
16 debt there are several antecedent steps that have to happen
17 as part of the collection process, they would have to
18 identify --

19 JUDGE SENTELLE: For example, the preparation of
20 the PIA.

21 MR. DAVISSON: Pardon, Your Honor?

22 JUDGE SENTELLE: For example, the preparation of
23 the PIA, that has to happen before they initiate their
24 process under the law.

25 MR. DAVISSON: Well, so, let me point to the

1 statutory definition here. The statutory definition of
2 collection of information points to four different sub-
3 definitions, and then those definitions are further
4 developed in the OMB regulations, and the OMB regulations
5 make it clear that one of the interpretations that that
6 definition of susceptible to is a plan or an instrument
7 calling for the collection of information. And so, that is
8 precisely what has been at issue here, the Agency has begun
9 to implement a plan that it decided on over a year ago, that
10 it has a series of steps that it must take as part of the
11 collection process, they include notifying Congress pursuant
12 to Title 13 of what's going to be collected, of developing a
13 census form of notifying the OMB what information is going
14 to be collected, printing the census forms, addressing them,
15 mailing them, ensuring they'll be delivered to the
16 respondents, all these steps are a necessary part of the
17 collection of information, even though no information has
18 been collected to date. And those are the steps that were
19 initiated when the decision-making process concluded, and
20 the implementation of the collection began, again, on March
21 26th, 2018.

22 JUDGE MILLETT: I'm trying to understand given
23 that no forms are going to be mailed, or e-mailed out, so no
24 one's going to be requested to provide this information
25 before 2020, correct?

1 MR. DAVISSON: That's correct, Your Honor.

2 JUDGE MILLETT: Do you know if they go out January
3 1, or when do they go out in 2020?

4 MR. DAVISSON: I don't know the --

5 JUDGE MILLETT: All right.

6 MR. DAVISSON: -- exact date, I think --

7 JUDGE MILLETT: All right. So, at some point --

8 MR. DAVISSON: -- it's January, 2020, though.

9 JUDGE MILLETT: -- in 2020 --

10 MR. DAVISSON: Yes.

11 JUDGE MILLETT: -- no one's going to be asked to
12 disclose any information, to do anything that's going to
13 implicate their privacy, nobody is.

14 MR. DAVISSON: That's correct, Your Honor.

15 JUDGE MILLETT: And if before -- I'm trying to
16 figure out what on earth is irreparable about your injury,
17 because as long as they do as they have said these privacy
18 assessments before, and they've said they're going to do
19 them before those get mailed out, you're not irreparably
20 injured.

21 MR. DAVISSON: Well, Your Honor, the harm here --

22 JUDGE MILLETT: We've got plenty of time to
23 litigate whether, you know, the timing on this, there's
24 plenty of time to litigate a case between now and 2020, this
25 isn't normally the type of thing that would be crashing up

1 for preliminary injunction.

2 MR. DAVISSON: Your Honor, the printing of census
3 forms begins in about a month, and at that point --

4 JUDGE MILLETT: I don't care. Look, it might be a
5 royal pain for them if they were to go, I'm dubious, but
6 given the nature of these assessments, but if they were to
7 get to the very last system in December of 2019 and do the
8 privacy assessment and go whoa, maybe we shouldn't be
9 collecting this, then any injury is on them. You're not
10 irreparably injured if they have to change their mind and
11 reprint the forms without the question, right? You're not
12 injured, you're in fact happy about that. So, don't point
13 to that as your irreparable injury, as long as they make
14 their assessment before these things are mailed out you're
15 not irreparably injured.

16 MR. DAVISSON: Well, Your Honor, there is an
17 active nationwide debate right now about the census, about
18 the addition of the census --

19 JUDGE MILLETT: There sure is, but we're only
20 talking here about whether you're irreparably -- you want a
21 preliminary injunction, we're not deciding a merits issue,
22 and you have to show not just injury but irreparable injury.

23 MR. DAVISSON: Yes, Your Honor.

24 JUDGE MILLETT: You're in a narrow box here.

25 MR. DAVISSON: That's true. But there --

1 JUDGE MILLETT: And there's nothing -- what's
2 irreparable, what's not, what's irreparable that's happening
3 to you right now?

4 MR. DAVISSON: That we do not have access to
5 information about the Agency's analysis of the privacy risks
6 of --

7 JUDGE MILLETT: But you don't, you only have a
8 right to that, you don't -- let's assume everything goes out
9 January 1, 2020, you're not injured unless you don't have
10 that information by January 1, 2020.

11 MR. DAVISSON: But that's information that's
12 critical to an ongoing national --

13 JUDGE MILLETT: It doesn't matter, you don't have
14 a right, you only have a right to it coming out. You might
15 like it, you might prefer it, but you only have a statutory
16 right to have it before from my assumption January 1, 2020.

17 MR. DAVISSON: Your Honor, that's not how we read
18 the statute at all. As I've been describing, the collection
19 of information is an administrative process that includes
20 numerous steps, many of which have already been taken, more
21 of which remain to be taken.

22 JUDGE MILLETT: Well, to the extent you wanted
23 that information before the, I'm sorry, March decision,
24 2018?

25 MR. DAVISSON: March 26, 2018, yes.

1 JUDGE MILLETT: Okay. You may have wanted it
2 before that, or at the same time that decision came out, but
3 that's water under the bridge, right?

4 MR. DAVISSON: But the Agency is taking more steps
5 every day, and spending more dollars every day on this
6 process, and it is, they're going deeper --

7 JUDGE MILLETT: That's not an irreparable injury
8 to you?

9 JUDGE SENTELLE: No.

10 MR. DAVISSON: But not being able to obtain
11 information critical to EPIC's, and the understanding of
12 EPIC'S members, and the public's understanding of what the
13 Agency is doing with respect to its --

14 JUDGE SENTELLE: That wouldn't even be enough to
15 give you standing at this point, let alone irreparable
16 injury.

17 MR. DAVISSON: Your Honor, I disagree, I think
18 we've been --

19 JUDGE SENTELLE: I know you disagree, but --

20 MR. DAVISSON: Well --

21 JUDGE SENTELLE: -- see, our decision is final on
22 that, not yours. Telling me you disagree isn't, that isn't
23 getting you very far. You claim associational standing.

24 MR. DAVISSON: We do, Your Honor.

25 JUDGE SENTELLE: And I don't think you have any

1 problem about being an association, I understand that, but
2 which of your members is hurt how by not having this
3 information today as opposed to in 2020?

4 MR. DAVISSON: Because, Your Honor, the Section
5 208 is designed, as Congress has said, to ensure sufficient
6 protection of the privacy of personal information --

7 JUDGE SENTELLE: Don't tell me how it's designed,
8 tell me which of your members is --

9 MR. DAVISSON: Okay, Your Honor.

10 JUDGE SENTELLE: -- on the record is injured in
11 some fashion by not having the information now.

12 MR. DAVISSON: All three of the members who have
13 entered declarations into the record, Your Honor, because
14 they --

15 JUDGE SENTELLE: How are they -- what injury
16 personal to Person A in your three, I don't remember their
17 names, but what injury personal to that person is being
18 caused by the Agency's actions that can be remedied in this
19 lawsuit?

20 MR. DAVISSON: Your Honor, the Census Bureau has
21 made it clear that it will collect the citizenship status
22 information of every person who's required to respond to the
23 census. All three of EPIC's members reside in the U.S., and
24 they are required to provide that information.

25 JUDGE SENTELLE: They haven't been required yet.

1 MR. DAVISSON: That's true. Well, the requirement
2 exists, it definitely has --

3 JUDGE SENTELLE: As a matter of fact, though, that
4 in fact is an injury common to all, you need an injury
5 personal to your client.

6 MR. DAVISSON: Well, Your Honor, the, as the Court
7 made, as the Supreme Court made clear in FEC v. Akins the
8 fact that an informational injury is widely shared does not
9 make it a generalized grievance.

10 JUDGE SENTELLE: But the informational injury
11 generally speaking is a failure by the Agency to disclose
12 information that it has.

13 MR. DAVISSON: That's correct, Your Honor.

14 JUDGE SENTELLE: Are you saying the Agency has
15 information that it's keeping from you on demand?

16 MR. DAVISSON: Well, the statute requires the
17 Agency both to develop --

18 JUDGE SENTELLE: No, no, this is a yes or no
19 question, first. You get to explain it then. But are you
20 saying that the Agency has information here that it's
21 failing to disclose on demand?

22 MR. DAVISSON: We don't know, Your Honor, because
23 they haven't produced the requisite privacy impact
24 assessment. I don't -- it's not clear what they've done --

25 JUDGE SENTELLE: So, you cannot answer a yes or no

1 question, is that correct? Unless you can answer it yes
2 you're going to have trouble having standing. I don't
3 understand an informational injury to be stated by saying
4 they don't, may not have the information that we're entitled
5 to, that brings us back to Judge Millett's questions about
6 when are you entitled to it, but --

7 MR. DAVISSON: Well, Your Honor --

8 JUDGE SENTELLE: -- I don't even see now how you
9 have alleged an injury to give your members standing.

10 MR. DAVISSON: So, it's the same type of standing
11 that supports this Court's issuance of preliminary
12 injunctions in the Environmental Impact Statement context,
13 in the National Environmental Protection Act context. There
14 the Agency --

15 JUDGE SENTELLE: There we have generally speaking
16 an affidavit from a member of the Association that says I go
17 out to a recreational park, I recreate there, and this
18 environmental problem may cause emphysema when I come out
19 there and start breathing, we have something personal to a
20 person on their failure to provide the information that the
21 NEPA is designed to provide. I'm not finding here, I'm
22 assuming that there is a right to privacy that would protect
23 your citizenship, and that's, you've got a pretty good leap
24 there to start with, but assuming that's the case I don't
25 see how you've got informational standing at this point.

1 MR. DAVISSON: Your Honor, in the same way that
2 someone who uses and enjoys a park would have their
3 aesthetic rights, or their rights of enjoyment affected by
4 an Agency action taken without a sufficient analysis of the
5 environmental factors, EPIC's members will be injured
6 because their personal data will be forcibly disclosed by an
7 agency that is not legally entitled to it on our reading of
8 the statute because the agency has not adverted to the
9 privacy consequences of that collection. It's --

10 JUDGE MILLETT: Well, an information doesn't have
11 to be in the Government's hands to have an informational
12 injury under FEC v. Akins, right? It's not that they
13 already have to have it in hand.

14 MR. DAVISSON: As in it doesn't have to already be
15 developed to --

16 JUDGE MILLETT: Exactly.

17 MR. DAVISSON: Yes. Yes.

18 JUDGE MILLETT: Right, right.

19 MR. DAVISSON: Correct, Your Honor. Yes.

20 JUDGE MILLETT: So, that's settled by the Supreme
21 Court.

22 MR. DAVISSON: Yes, Your Honor.

23 JUDGE MILLETT: Right. But it seems to me more
24 that yours is, yours is a question of -- I mean, for me this
25 is a preliminary injunction appeal irreparability, and

1 you've got plenty of time to have your fights about this.
2 I'm also just curious about, you've got the, so you've seen
3 the assessment they did on CEN08, and on page five of it
4 they talk about information contained within the major
5 applications, and they describe all the protections for the
6 major applications, many of which are listed on the next
7 page, page six. So, they say here, both for the CEN08 and
8 for everything listed in the definition of major
9 applications on page six, which is this paragraph long of
10 other CEN systems, here is what the protections are, right?
11 So, you've got this information about CEN08, and it's also
12 telling you about CEN07, CEN05, CEN11, CEN18, CEN19, CEN21,
13 CEN30, CEN36, here's what we're doing to protect your
14 privacy. So, your board members that are worried about
15 what's going to, how their information is going to be
16 handled have been told what's going to happen under CEN08
17 and under all of those that I just listed. So, now you're
18 just fighting about some incremental additional information
19 about how their citizenship information is going to be
20 handled under a few other CEN systems --

21 MR. DAVISSON: So, Your Honor --

22 JUDGE MILLETT: -- that you --

23 MR. DAVISSON: Sorry.

24 JUDGE MILLETT: -- for which you already have a
25 lot of information about because they're handling other

1 private information, you've got privacy assessments already
2 on the book. I don't understand what the increment is that
3 you think you're going to get for a couple of remaining CEN
4 systems is going to be any different from this, and any
5 different from the privacy assessments that are already out
6 there, and don't you have to show that to demonstrate an
7 irreparable injury?

8 MR. DAVISSON: Yes, Your Honor. So, I'll point to
9 a few things that are missing --

10 JUDGE MILLETT: Yes.

11 MR. DAVISSON: -- from the filing of the
12 Government before the Court. The first is that it doesn't
13 explain how, it doesn't assess other alternative processes
14 for developing the same information, that's a requirement
15 under the OMB regulations that implement --

16 JUDGE MILLETT: Is that a requirement for the
17 collection of information, or for getting new technology
18 systems in?

19 MR. DAVISSON: That's an -- it's required for
20 both, it's required for --

21 JUDGE MILLETT: Well, but it's just weird, you're
22 operating like this is starting for the first time, right?
23 The Census Bureau has been collecting private information,
24 more private than your citizenship, your members, I assume
25 the members you have mentioned are not here without

1 documentation, so they're -- are they actually U.S.
2 citizens?

3 MR. DAVISSON: It's not identified in the
4 declarations --

5 JUDGE MILLETT: Right.

6 MR. DAVISSON: -- but, I mean, it's --

7 JUDGE MILLETT: I assume --

8 MR. DAVISSON: -- the Agency concedes that it's
9 personal information.

10 JUDGE MILLETT: I assume their citizenship status,
11 or their residential status is not --

12 MR. DAVISSON: Right.

13 JUDGE MILLETT: Okay. So, the Bureau collects all
14 kinds of private information, and they've been doing all
15 kinds of privacy assessments, as it explained, regularly,
16 time and again, including updates since March, 2018 about
17 how the information collected is protected, how the privacy
18 concerns and the privacy assessment are implemented. And
19 now they've said under CEN08 guess what, surprise, we have
20 all those same protections still here, even though now we're
21 asking about citizenship, and we have them for these other
22 major applications, as well. So, it's not -- you're -- I
23 guess a baseline of an awful lot of privacy assessment
24 information already in your hands, correct?

25 MR. DAVISSON: There is --

1 JUDGE MILLETT: And you're going to tell me --

2 MR. DAVISSON: Yes.

3 JUDGE MILLETT: -- there's two or three other
4 systems not mentioned on this list that you don't yet have
5 the paperwork on, but you already have privacy assessments
6 for, they just haven't said including citizenship.

7 MR. DAVISSON: Well, I don't think just saying
8 including citizenship is a commensurate analysis of the type
9 that Section 208 requires, it requires it be commensurate
10 with the sensitivity of the system, the privacy risks
11 involved, and the --

12 JUDGE MILLETT: Yes. Do you think citizenship is
13 more or less private than all the information they've been
14 collecting before about family members and status?

15 MR. DAVISSON: Your Honor, it is --

16 JUDGE MILLETT: Marital status?

17 MR. DAVISSON: -- it is a new collection of
18 information, and the Agency --

19 JUDGE MILLETT: It may be, but you just said we
20 don't, I don't know how they're going to protect the privacy
21 of it, but I think you really do.

22 MR. DAVISSON: Well, Your Honor, so, just to be
23 clear, it's, this is not simply a cyber security analysis,
24 it is not simply an analysis of whether, you know, access
25 rights have been controlled with the information collected,

1 it is a privacy impact assessment, it is, it requires the
2 Agency to consider the impact on the privacy of the
3 individuals whose data will be collected, and this analysis
4 the Agency has put before the Court recently does not
5 reflect that.

6 JUDGE MILLETT: Well, let me ask you one other
7 thing. So, I get that citizenship is new, at least it
8 hasn't been --

9 JUDGE SENTELLE: It's restored.

10 JUDGE MILLETT: -- for quite some time on the
11 census, the general census questionnaire, but it has been on
12 the long form, or the community survey form, including I
13 think in 2010, right? And so, there's got to already be,
14 they've been, they say they've been doing that all along.
15 My understanding is that in 2010 it was on what I call the
16 long form, but it has (indiscernible).

17 MR. DAVISSON: My recollection is that was true
18 for 2000 not 2010, but it has been asked in the past, yes,
19 on the long form.

20 JUDGE MILLETT: Okay.

21 MR. DAVISSON: That's correct.

22 JUDGE MILLETT: Okay. It was not asked in 2010?

23 MR. DAVISSON: I confess I don't know. I thought
24 it was not asked in 2010 but it was only asked in 2000.
25 Anyway. On the long form.

1 JUDGE MILLETT: Okay. All right. Well, if it
2 were asked in 2010, I guess I will ask them, then there
3 would already be privacy assessments out there on the census
4 question, on the citizenship question, as well, even though
5 it wouldn't be going to everybody, it would just be going to
6 three million people.

7 MR. DAVISSON: We aren't aware of no such
8 assessment.

9 JUDGE MILLETT: Okay.

10 MR. DAVISSON: I mean, the Agency hasn't put that
11 forward despite this --

12 JUDGE MILLETT: I'll ask them.

13 MR. DAVISSON: -- litigation carrying on for
14 several months.

15 JUDGE MILLETT: Okay.

16 MR. DAVISSON: Just one final point, the purpose
17 of 208 is, as the Agency concedes on page 23 of its brief,
18 to affect Agency decision-making, to information Agency
19 decision-making, and that cannot occur if an assessment is
20 being conducted after the decision-making has concluded,
21 after all the parameters of the data collection have been
22 set. So, that's, it's -- in order to serve the purpose of
23 this provision as Congress has established it is necessary
24 for the assessment to be conducted prior to that initiation
25 of a collection. Thank you.

1 JUDGE HENDERSON: Ms. Carroll.

2 ORAL ARGUMENT OF SARAH CARROLL, ESQ.

3 ON BEHALF OF THE APPELLEES

4 MS. CARROLL: May it please the Court, Sarah
5 Carroll on behalf of the Government. I'd like to start off
6 with Judge Millett's question to make sure I don't forget
7 about it. You're right the Census Bureau does ask about
8 citizenship, it was on the long form. My understanding is
9 that the long form --

10 JUDGE MILLETT: In 2010?

11 MS. CARROLL: What's that?

12 JUDGE MILLETT: In 2010?

13 MS. CARROLL: My understanding, I can double check
14 this, but I think the long form was replaced with the
15 American Community Survey in 2005, I believe. I'll let you
16 know if I'm wrong about that. And it's been, the
17 citizenship question has been on the American Community
18 Survey since 2005, there are published privacy impact
19 assessments about the American Community Survey, so you're
20 absolutely right that there is public information about how
21 citizen information is protected.

22 JUDGE MILLETT: So, you've already done privacy
23 assessments about asking, does that go to what, three
24 million people? How many people get that?

25 MS. CARROLL: I don't know the exact number, but

1 that sounds right to me.

2 JUDGE MILLETT: You've already got privacy
3 assessment. Do you use the same technology systems to
4 process the, I keep calling it the long form, the ACS form?

5 MS. CARROLL: My understanding, which I can,
6 again, confirm is that it's a separate system, so, you know,
7 it's not the exact same privacy impact assessment that will
8 apply to storage of citizenship information in CEN08 and the
9 other systems that hold decennial census information, but as
10 I think Your Honor's basic point that there is a whole lot
11 of information out there about this already is correct.

12 I also want to sort of dispel this notion that I
13 think EPIC has been trying to promote that the Census
14 Bureau, you know, just hasn't thought about privacy, hasn't
15 thought about how it's going to protect this sort of
16 information. What the Census Bureau does is data
17 collection. And again, as Your Honor noted, the Census
18 Bureau collects a whole lot of sensitive information,
19 information that --

20 JUDGE SENTELLE: Yes.

21 MS. CARROLL: -- is not, certainly not
22 meaningfully less sensitive than the citizenship question.
23 And the Census Bureau takes privacy and information security
24 extremely seriously, it has privacy impact assessments for I
25 think about probably a couple dozen information systems that

1 are publicly available, it reviews and updates these
2 frequently, and EPIC, you know, EPIC can, there is no legal
3 basis for EPIC to come in and say you need to change your
4 well developed system for looking at the privacy and
5 information security protections associated with your
6 systems every time that you are simply thinking about adding
7 a new question to the 2020 decennial census, the American
8 Community Survey, or anything else.

9 JUDGE MILLETT: And we're, so, we're here on a
10 P.I., and irreparable injury, injury or irreparable injury
11 are both sort of threshold basis for just denying a P.I.,
12 correct?

13 MS. CARROLL: Yes, absolutely.

14 JUDGE MILLETT: And so, we could decide, I think
15 under our prior EPIC decision involving the same statute,
16 you can, you can affirm the denial of a P.I. just as much
17 for a failure to show irreparable injury as you could for
18 whether you showed standing or not at the plausibility level
19 in District Court.

20 MS. CARROLL: I would think that -- so, we think,
21 to be clear, that EPIC does not have standing, and I would
22 think that since that's a jurisdictional issue this Court
23 would have to.

24 JUDGE MILLETT: Well, in the prior EPIC decision
25 they decided that there wasn't a substantial likelihood of

1 standing --

2 MS. CARROLL: Right.

3 JUDGE MILLETT: -- but didn't dismiss the whole
4 case, just said that's a basis for denying the P.I.

5 MS. CARROLL: Yes. Yes. I'm sorry, I might
6 have --

7 JUDGE MILLETT: And I don't know why if --

8 MS. CARROLL: -- misunderstood you.

9 JUDGE MILLETT: -- if they, you know, they have to
10 do uber standing to get a P.I. if you think of irreparable
11 injury in that, that uber component of standing to get a
12 P.I., a plain old injury isn't enough, they have to have --

13 MS. CARROLL: Right.

14 JUDGE MILLETT: -- irreparable injury, and it
15 seems to me that that would be a sufficient basis as well
16 for denying a P.I.?

17 MS. CARROLL: That may well be, and we also think
18 the Court could deny the P.I., and should deny the P.I. on
19 the basis that EPIC has not shown a substantial likelihood
20 of standing.

21 JUDGE MILLETT: Right.

22 MS. CARROLL: EPIC has not shown any concrete
23 privacy threat --

24 JUDGE MILLETT: Or, I mean, even just irreparable
25 injury, if you try to figure out what's sort of the easiest

1 way out, and I'm just assuming, I'm just thinking this
2 through --

3 MS. CARROLL: Right.

4 JUDGE MILLETT: -- it just seems to me you have
5 this very, very high showing of injury that's required here,
6 you have to have an exceptional, I think that's why we even
7 do the substantial likelihood language, but it's a
8 substantial, you have to have irreparable injury --

9 MS. CARROLL: Right. Right. A preliminary
10 injunction is an extraordinary remedy --

11 JUDGE MILLETT: Right.

12 MS. CARROLL: -- never rewarded of rights, so EPIC
13 is wrong on the merits, but you're absolutely right that
14 they have to show a really strong special injury to qualify
15 for a preliminary injunction.

16 JUDGE MILLETT: And do you have any information
17 about the time frame for the, the privacy assessments that
18 are still outstanding?

19 MS. CARROLL: So, the Census Bureau is in the
20 process of reviewing those, and figuring out whether updates
21 are needed. I expect that they will be completed by January
22 of 2020, I don't have any reason to doubt that.

23 JUDGE MILLETT: But you don't have any sense of
24 whether it may be sooner than that?

25 MS. CARROLL: I don't know for sure, and I, you

1 know, the Census Bureau, of course, is extraordinarily busy
2 right now, and I don't want to commit to any timelines
3 faster than that. But the Bureau certainly is actively
4 working on these things, and, you know, as --

5 JUDGE SENTELLE: When do they actually begin the
6 collection of data?

7 MS. CARROLL: My understanding is that a few first
8 census forms may be sent out in January of 2020, most of it
9 is after that, but January of 2020 I understand to be the --

10 JUDGE SENTELLE: It would begin in January?

11 MS. CARROLL: -- beginning date. Yes.

12 JUDGE SENTELLE: Okay. I didn't recall that
13 having been that early in previous years.

14 MS. CARROLL: Right. I think, so Census Day is in
15 April, but I, my understanding is that there are a few forms
16 that are for sort of special circumstances that go out
17 earlier than that.

18 I do want to be sure to touch on standing because
19 we think it's an important issue, you know, the District
20 Court that oversaw a trial in the merits census litigation
21 found that Plaintiffs there lacked standing to challenge the
22 citizenship question on privacy grounds, and the Plaintiffs
23 there, again, as Your Honor, alluded to, Plaintiff
24 organizations submitted affidavits saying that they had
25 members who were individuals who were either undocumented,

1 or had family members who were undocumented, but the
2 District Court nonetheless said in light of the, you know,
3 extraordinary restrictions on disclosure that the Census Act
4 imposes, as well as the criminal penalties that that Act
5 imposes it would be pure speculation to suggest that those
6 people would be injured. And EPIC, you know, comes in with
7 affidavits that are quite cursory, and --

8 JUDGE MILLETT: Well, theirs is a different,
9 though, if they're focused on informational injury, and that
10 you have a right, it's like a HIPAA type right, you know, I
11 have this private information, and I have a right under this
12 statute to know how it's being handled. Now there can be
13 statutory debates as there certainly have been about timing
14 when you're, in what time frame are you entitled to get this
15 information. But I assume you don't dispute, I mean, you
16 don't dispute that the assessments need to be done before
17 the questionnaires go out in the mail, correct?

18 MS. CARROLL: We haven't disputed that --

19 JUDGE MILLETT: Right, you don't dispute --

20 MS. CARROLL: -- for purposes of this litigation.

21 JUDGE MILLETT: -- that, and you don't dispute
22 that once you've done those privacy assessments you need to
23 publish them, and they have a right to sue them consistent
24 with whatever limitations on sensitive information we
25 might --

1 MS. CARROLL: Right, the statute says --

2 JUDGE MILLETT: -- have to withhold under --

3 MS. CARROLL: -- if practicable they should be --

4 JUDGE MILLETT: Yes, yes, yes.

5 MS. CARROLL: -- published.

6 JUDGE MILLETT: Right.

7 MS. CARROLL: And I don't expect that it will be

8 impracticable to publish them.

9 JUDGE MILLETT: And you've already, well, you've

10 already done the CEN08 --

11 MS. CARROLL: Right.

12 JUDGE MILLETT: -- ones, so that --

13 MS. CARROLL: Right.

14 JUDGE MILLETT: -- and you've done tons of these

15 privacy assessments all over the place, including --

16 MS. CARROLL: Yes.

17 JUDGE MILLETT: -- for the citizenship question,

18 so --

19 MS. CARROLL: Yes.

20 JUDGE MILLETT: -- it seems to me that there's no

21 dispute that they have a right to see this information, and

22 to have this information, it's just a question of timing.

23 MS. CARROLL: So, a couple of responses to --

24 JUDGE MILLETT: For injury purposes.

25 MS. CARROLL: Right. A couple of responses to

1 that. First of all, I want to be very clear that if the
2 Court thought they had informational standing of course the
3 only remedy that they would have standing to seek is as you
4 say disclosure of information not to try to halt the
5 citizenship question or anything like that. And second --

6 JUDGE MILLETT: So, you'd have to have at a
7 minimum irreparable injury --

8 MS. CARROLL: Yes.

9 JUDGE MILLETT: -- to do that, and they don't have
10 that.

11 MS. CARROLL: Absolutely. Right. And second, we
12 read this Court's prior Section 208 decision in EPIC's case
13 from about a year and a half ago as saying that the
14 statutes, that Section 208 does not create a broad public
15 informational right like FOIA or FACA does, we read the
16 Court's decision to hold that a person, Congress created a
17 concrete right to information in people whose privacy is
18 actually threatened, where privacy is at stake in a
19 meaningful way, and here there is no reason to think that
20 EPIC's advisory board will have a privacy injury of any
21 kind. So, we actually don't think that the injury that EPIC
22 is claiming on behalf of its advisory board is the type that
23 Congress meant to --

24 JUDGE MILLETT: They're not the people that were
25 meant to be protected by this statute? I mean, the statute

1 is not written at all narrowly, it's that people, it's like
2 look, technologies happen, right, and the Government's going
3 to have to get on board with this, and it's going to lead to
4 a proliferation of both information collected, and
5 processed, and moved through the Government, and as I read
6 the Government Act it said folks have, what folks have a
7 right to do, or what you as a Government have to do is be
8 cognizant of the privacy issues, do this assessment, and
9 they have a right to know that the Government has thought
10 about what it's doing privacy-wise, and here's what it's
11 doing to protect that information, that they have rights.
12 It's not just people who have what we would call, you know,
13 very sensitive private information, right, it's handling of
14 personal information.

15 MS. CARROLL: So, we have read the decision
16 differently to --

17 JUDGE MILLETT: I'm just talking about the
18 statute. I thought you were -- I'm just talking about what
19 the statute says.

20 JUDGE SENTELLE: Yes.

21 MS. CARROLL: Right. Okay. The statute, I mean,
22 the statutes sets out purposes about --

23 JUDGE MILLETT: Otherwise you wouldn't be doing
24 all these privacy assessments.

25 MS. CARROLL: Right, right. Yes, that's right.

1 But this Court interpreted the statute in this case from a
2 year and a half ago, and we had read the Court's decision to
3 suggest that, you know, the Court held very clearly that
4 EPIC as an organization did not have informational standing
5 to compel you --

6 JUDGE SENTELLE: Yes. But that dealt in part at
7 least with the nature of the organizational structure of
8 EPIC. That has been changed since then. As far as their
9 base eligibility to be an organization for purposes of
10 associational standing, can you really rely on that prior
11 decision? They have not changed so that they have members.
12 We've said before when you don't have members you can't have
13 associational standing. Now they have membership.

14 MS. CARROLL: Right, so --

15 JUDGE SENTELLE: I'd say at least entitled to
16 assert associational standing.

17 MS. CARROLL: So, to be clear, I was not referring
18 to the decision to say that EPIC lacks organizational
19 standing as an organization, I was drawing more on what I
20 understood to be the Court's interpretation of the statute
21 more broadly. But we do think that this --

22 JUDGE SENTELLE: Well, you seemed in your brief to
23 rely in the resistance to associational standing on the
24 prior decision where we said they couldn't have it if they
25 didn't have members, so they couldn't act for their members.

1 Now, they have now changed their, and I use organizational
2 in a lay sense, not in the technical sense before and of the
3 term of art, but they have not changed their organizational
4 structure, again using organization in a lay sense, not in
5 the term of art, but they have not changed it in such a
6 fashion that they do have membership, so isn't that prior
7 decision (indiscernible) on, as far as that first question
8 is concerned?

9 MS. CARROLL: So, we do not think that they have
10 changed their organizational structure in a way that makes
11 them a genuine membership organization. You know, the
12 purpose of associational standing --

13 JUDGE SENTELLE: I'm not sure I see why not. I
14 was a little surprised the fact you were taking that tack in
15 the brief. I don't see why they didn't do exactly what they
16 needed to do to become a membership association for purposes
17 of establishing that sort of standard.

18 MS. CARROLL: A membership association represents
19 a constituency of people out in the world who share some
20 distinct interests --

21 JUDGE SENTELLE: So, you're saying their members
22 are not people, or they're not in the world?

23 MS. CARROLL: We're saying that they're, the
24 people they have now legal members are their advisory board,
25 they are not a constituency.

1 JUDGE SENTELLE: Well, so what?

2 MS. CARROLL: There are other --

3 JUDGE SENTELLE: Why can't an advisory board be
4 composed of constituents?

5 MS. CARROLL: You know, if the Court disagrees
6 with us on this there are, of course, many other grounds on
7 which we think that the preliminary injunction --

8 JUDGE MILLETT: Well, you made the argument, I'm
9 just trying to understand your argument.

10 JUDGE SENTELLE: Yes.

11 MS. CARROLL: Okay. So --

12 JUDGE SENTELLE: Why can't it, the board of
13 advisors and members be coterminous?

14 MS. CARROLL: Because a membership association is
15 supposed to represent people out in the world, members of
16 the public who band together to --

17 JUDGE SENTELLE: Are you saying their people are
18 not, their members of the board are not people, or they're
19 not in the world, or they're not part of the public?

20 MS. CARROLL: I'm saying that kinship to the
21 organization is not the relationship that members have to an
22 organization, they are an advisory board, they don't have
23 the --

24 JUDGE SENTELLE: Well, I don't see why an advisory
25 board and members can't be coterminous. I didn't find in

1 your brief an explanation of that. I'm not hearing you
2 explain it now.

3 MS. CARROLL: I think that --

4 JUDGE SENTELLE: If they had a six-member board of
5 advisors you might have an argument, but did you look at the
6 list of their board of advisors?

7 MS. CARROLL: It's fairly long, but these are --

8 JUDGE SENTELLE: Yes, it is.

9 MS. CARROLL: -- these are advisory board members,
10 these are not members. And if you look at the --

11 JUDGE MILLETT: Who do you think they picked to be
12 on their advisory board?

13 JUDGE SENTELLE: Yes. Have you ever seen an
14 advisory board that wasn't composed of members?

15 MS. CARROLL: Well, boards have members in one
16 sense, but those are not members in the sense that a
17 membership organization has members.

18 JUDGE MILLETT: Are you saying that you have to
19 have an advisory board plus one non-advisory board member to
20 be an association?

21 MS. CARROLL: We think that they would have to
22 have a constituency of members of the public who join and --

23 JUDGE MILLETT: Why? Why can't you have where two
24 or three are gathered in the name, right? Why can't, why
25 isn't that enough? It could be a really small association.

1 JUDGE SENTELLE: Yes.

2 JUDGE MILLETT: But that's everybody in the
3 country who cares about something, and they've gathered
4 together, and because it's small, you know, if you're a
5 member, you also have to do some work.

6 MS. CARROLL: I don't dispute that the membership
7 of a membership organization could be small. But here
8 EPIC's advisory board doesn't have any of the practical
9 indicia of --

10 JUDGE MILLETT: They pay dues.

11 JUDGE SENTELLE: What practical --

12 MS. CARROLL: -- membership, but --

13 JUDGE SENTELLE: -- indicia does it not have?
14 They pay dues, they call themselves members.

15 MS. CARROLL: They pay dues that they have never
16 quantified, they might be a dollar a year, they don't elect
17 the organization's leadership. If you look at even the
18 amended bylaws, this is J.A. 229 and 231, it's not the
19 advisory board that elects the board of directors and the
20 officers, it's the board of directors that does this.
21 Again, I, you know --

22 JUDGE SENTELLE: Do you have any case that says
23 that it's necessary for the total membership to be involved
24 in the particular selection of a board of directors in order
25 to be an association?

1 MS. CARROLL: The Supreme Court decision in Hunt
2 says that that's one of the, one of the signs that something
3 is --

4 JUDGE SENTELLE: Not just an indicator, it's a
5 sign, but is it, it may be sufficient but not necessary, I
6 don't know of anything in Hunt that says that they have to
7 be involved in the election of the board of directors in
8 order to be an association.

9 MS. CARROLL: I also don't know of a case that
10 says that is an absolutely necessary condition, but we think
11 it's a bit odd that a month after this Court's prior
12 decision EPIC amended its bylaws in what we view is a pretty
13 superficial way.

14 JUDGE MILLETT: So, you think it's all a rouse?

15 MS. CARROLL: It seems, I mean, one --

16 JUDGE MILLETT: Bad faith, they're trying to fraud
17 on --

18 MS. CARROLL: I'm not accusing them --

19 JUDGE MILLETT: -- the Court, or what?

20 MS. CARROLL: No, I'm not accusing them --

21 JUDGE MILLETT: No.

22 MS. CARROLL: -- of bad faith or fraud.

23 JUDGE MILLETT: Well, they're allowed to
24 reorganize.

25 MS. CARROLL: You know --

1 JUDGE MILLETT: Companies reorganize all the time.
2 Right? Groups can reorganize.

3 MS. CARROLL: Okay. Again, you know --

4 JUDGE MILLETT: They learned the lesson.

5 MS. CARROLL: -- this is not necessarily a hill on
6 which I wish to die on, it just struck us as peculiar, and
7 it was something that we wanted to raise with the Court.
8 I'm --

9 JUDGE HENDERSON: All right.

10 MS. CARROLL: -- happy to answer any other
11 questions the Court may have.

12 JUDGE HENDERSON: Thank you. Does Mr. Davisson
13 have any time?

14 THE CLERK: Mr. Davisson does not have any time
15 remaining.

16 JUDGE HENDERSON: All right. Why don't you take
17 two minutes?

18 ORAL REBUTTAL OF JOHN L. DAVISSON, ESQ.

19 ON BEHALF OF THE APPELLANT

20 MR. DAVISSON: Thank you, Your Honor. I just want
21 to hit a few quick points. I have a couple of pieces of
22 information concerning --

23 JUDGE MILLETT: Have you looked at the privacy
24 assessment that was done for the citizenship question on the
25 American Community Surveys?

1 MR. DAVISSON: I think I have read it at some
2 point, but it's been a little while, Your Honor. But it's,
3 this is a different collection --

4 JUDGE MILLETT: So, there are privacy assessments
5 out there by the Census Bureau covering the citizenship
6 question, but it's just going to three or four million
7 people instead of the entire country.

8 MR. DAVISSON: We have not looked at that
9 assessment closely to analyze it for adequacy, but it
10 concerns a different collection of information.

11 JUDGE MILLETT: No, have your people who want
12 the -- have your members who want this information looked at
13 that and said I still have some sort of quantum gap in
14 information that I'm lacking --

15 MR. DAVISSON: Well, Your Honor --

16 JUDGE MILLETT: -- about how the Government's
17 going to handle my citizenship information that is
18 substantial enough to get me a P.I.?

19 MR. DAVISSON: Your Honor, it is a different
20 collection of information, it may be similar in nature
21 but --

22 JUDGE MILLETT: No, it's collecting the exact same
23 piece of information we're talking about here.

24 MR. DAVISSON: For a different --

25 JUDGE MILLETT: It's done --

1 MR. DAVISSON: -- purpose. It claims, the Agency
2 is claiming that the purpose of this is to develop block
3 level citizenship.

4 JUDGE MILLETT: Yes, the census stuff is even,
5 maybe even more protected because they're using the American
6 Community Survey for more analytical reasons, right? Do you
7 dispute that the Census Bureau information would be, do you
8 have any plausible good faith basis for believing that the
9 census, collection of that same piece of information by the
10 same entity for broader disclosure as part of the general
11 census would be in any way less protected?

12 MR. DAVISSON: Well, Your Honor, the burden rests
13 on the Agency under Section --

14 JUDGE MILLETT: Do you have any plausible basis
15 for -- this is an informational case, and you have --

16 MR. DAVISSON: That's correct, Your Honor.

17 JUDGE MILLETT: -- a lot of information, and a lot
18 of information out there, and they've done a lot of privacy
19 assessments both for the census and for the ACS, and I guess
20 I'm wondering why they, what they, what quantum of
21 information it is that they think is missing?

22 MR. DAVISSON: There is specific --

23 JUDGE MILLETT: You have to show irreparable
24 injury.

25 MR. DAVISSON: That's correct, Your Honor. So,

1 the specific information that is missing from all the
2 documentation that's been published to date, it does not
3 explain how, it does not explain what other methods of
4 obtaining block level --

5 JUDGE MILLETT: Well, you didn't challenge the ACS
6 privacy assessment.

7 MR. DAVISSON: Because this is a different
8 collection of information, we're concerned with the
9 collection of information, it is nationwide, it affects
10 every member of EPIC, it affects every person who resides in
11 the United States.

12 JUDGE MILLETT: Okay.

13 MR. DAVISSON: So, it simply is a different
14 collection. I just wanted to add two quick pieces of
15 information concerning associational standing. The first is
16 that EPIC's dues are \$100 a year; and the second is that
17 we're not arguing -- excuse me, that this Court has held,
18 rather, that 208 is designed to protect individuals, and it
19 does that by assuring that they will have access to
20 information prior to the initiation of collection of
21 information by an agency, and it assures them that their
22 privacy is being protected, that their personal data will be
23 in good hands when it is collected if at all by an agency.

24 JUDGE MILLETT: All right. Well, do you mind,
25 would either one of you, I guess maybe the Government, be

1 able to send in a letter telling us how many people have
2 gotten the ACS surveys that include the, or even if it was
3 long form, since the E-Government Act was passed how many
4 have gotten --

5 MS. CARROLL: Okay.

6 JUDGE MILLETT: -- the citizenship question?

7 MS. CARROLL: Sure.

8 JUDGE MILLETT: Do you mind? Sorry.

9 MR. DAVISSON: If there are no further questions.

10 JUDGE HENDERSON: All right.

11 MR. DAVISSON: Thank you.

12 (Whereupon, at 10:46 a.m., the proceedings were
13 concluded.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

Paula Underwood

Paula Underwood

May 11, 2019
Date

DEPOSITION SERVICES, INC.