No.

IN THE

Supreme Court of the United States

ELECTRONIC PRIVACY INFORMATION CENTER,

Petitioner,

v.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 8, 2019

Decided June 28, 2019

No. 19-5031

ELECTRONIC PRIVACY INFORMATION CENTER,
APPELLANT

v.

UNITED STATES DEPARTMENT OF COMMERCE AND
BUREAU OF THE CENSUS,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:18-cv-02711)

John Davisson argued the cause for the appellant. With him on the briefs were *Alan Butler* and *Marc Rotenberg*.

Sarah Carroll, Attorney, U.S. Department of Justice, argued the cause for appellees. With her on the brief was *Mark B. Stern*, Attorney.

Before: HENDERSON and MILLETT, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* SENTELLE.

SENTELLE, *Senior Circuit Judge*: On March 26, 2018, the Department of Commerce announced that a citizenship question would be added to the 2020 Census. The Electronic Privacy Information Center (EPIC) contends that, before this announcement was made, its members were entitled to a Privacy Impact Assessment by law. EPIC sued to enjoin the addition of the question on this basis, and now appeals the district court's denial of its motion for a preliminary injunction. Because EPIC lacks standing, we remand to the district court with instructions to dismiss.

I. Background

A. The E-Government Act

In 2002, Congress passed the E-Government Act to modernize and regulate the government's use of information technology. Pub. L. No. 107-347, 116 Stat. 2899 (codified at 44 U.S.C. § 3501 note) (hereinafter "E-Government Act"). The Act outlines eleven purposes. Nine involve improving government efficiency, organization, and decision-making. E-Government Act § 2(b). In addition to these predominantly agency-centric goals, however, the Act also aims to "provide increased opportunities for citizen participation in Government," and "[t]o make the Federal Government more transparent and accountable." §§ 2(b)(2), (9).

Section 208 of the Act contains privacy provisions. Its stated purpose is to "ensure sufficient protections for the privacy of personal information as agencies implement citizen-centered electronic

Government." E-Government Act § 208(a). To effectuate this purpose, § 208 requires federal agencies to conduct, review, and, "if practicable," publish, a Privacy Impact Assessment (PIA) before "initiating a new collection of information" that involves personally identifiable information that will be "collected, maintained, or disseminated using information technology." § 208(b)(1)(A)–(B). A "collection of information" is defined as "obtaining, causing to be obtained, soliciting, or requiring the disclosure ... of facts or opinions" through "identical questions posed to ... ten or more persons." 44 U.S.C. § 3502(3)(A). The word "initiating" is not defined by statute.

A PIA required by a new collection of information must address, at a minimum: what information will be collected, why it is being collected, how it will be used, how it will be secured, with whom it will be shared, whether a system of records is being created under the Privacy Act, and what "notice or opportunities for consent" will be provided to those impacted. E-Government Act § 208(b)(2)(B)(ii).

B. The Census

To apportion representatives among the several States, the Census Clause of the United States Constitution requires an "actual Enumeration" of the United States population. U.S. Const. art. I, § 2, cl. 3. The census occurs every ten years, "in such Manner as [Congress] shall by Law direct." *Id.* Pursuant to this command, Congress passed a series of census laws directing the Secretary of Commerce to conduct a decennial census and establishing the Census Bureau as an agency within the Department of Commerce. 13 U.S.C. §§ 2, 141(a). These laws give the Secretary broad authority to "obtain such other census

information as necessary." *Id.* § 141(a). The census has historically included a wide variety of demographic questions, often including questions about citizenship status. With few exceptions, a refusal to answer "any of the questions" on the census is a violation of law. 13 U.S.C. § 221.

The Census Bureau operates at least six information technology (IT) systems that process, store, and disseminate personally identifiable information from census responses. The primary system used for the census is called "CEN08." This system shares information with five other systems: "CEN21," "CEN05," "CEN11," "CEN13," and "CEN18." The Bureau maintains a PIA for each system on a publicly-available website. Because the use of the systems changes regularly, the Bureau reviews and updates each assessment at least once per year.

C. The Challenge

On March 26, 2018, the Secretary of Commerce, Wilbur Ross, announced that a citizenship question would be added to the 2020 Census. A variety of legal challenges to the merits of that decision followed.

This case presents a narrow question: when does the addition of the citizenship question need to be addressed in a PIA? The parties agree that the E-Government Act requires the government to complete a PIA before "initiating a new collection of information." E-Government Act § 208(b)(1)(A)(ii). Their disagreement involves the meaning of the word "initiating." The Census Bureau believes that it does not initiate a collection of information until it solicits information from the public. If this is correct, then the Bureau is not required to produce PIAs until questionnaires are mailed out in 2020. The Government has consistently

provided assurances, both before the district court and here on appeal, that the assessments will be completed "before it distributes any 2020 Decennial Census questionnaires." *See, e.g.*, Gov. Br. at 30. Indeed, the PIA updates have been in progress as this litigation proceeded, and an updated PIA addressing the citizenship question was published for one of the six relevant IT systems (CEN08) a few days before this Court heard oral argument. Notwithstanding these assurances and evidence of progress, EPIC, a public interest research center focused on privacy and civil liberties, challenges the Government's interpretation. In EPIC's view, the decision to add the question ***was*** the initiation of information collection. If this interpretation is correct, the completed PIAs were required before the decision to add the question was announced on March 26, 2018.

Eight months after Secretary Ross's announcement, EPIC filed a complaint in the district court. It alleged three counts against the Department of Commerce and the Bureau of the Census—two under the Administrative Procedure Act and one under the Declaratory Judgment Act. Count One alleges that the Secretary committed an unlawful act under 5 U.S.C. § 706(2)(a) and (c) when he announced the decision to add the citizenship question before completing the PIAs. Similarly, Count Two alleges that the government unlawfully withheld agency action, in violation of 5 U.S.C. § 706(1), by failing to timely complete and publish the PIAs. Count Three seeks a declaration of rights under 28 U.S.C. § 2201(a). Among other requested relief, EPIC asks the court to: (1) set aside the decision to add the citizenship question; (2) order that the decision be revoked until the PIAs are completed

and published; and (3) order the completion and publication of the PIAs.

On January 18, 2019, EPIC moved for a preliminary injunction. In the text of the proposed order submitted with its motion, EPIC asked that the Census Bureau be "enjoined from ***initiating*** any collection of citizenship status information." Pl.'s Mot. Prelim. Inj. Attach. 2 at 1 (emphasis added). This is curious, since EPIC's entire argument is that such collection has already been initiated. Nevertheless, the district court denied the motion because EPIC failed to show a likelihood of success on the merits or a likelihood of irreparable harm. *EPIC v. U.S. Dep't of Commerce*, 356 F. Supp. 3d 85, 89, 95–97 (D.D.C. 2019). The district court held that EPIC was not likely to succeed on the merits because "*initiating* a new collection of information" requires more than a decision to collect information at some point in the future. *Id.* at 89–91. The court agreed with the Government that collection did not begin until the first set of census questions was mailed out. *Id.* at 90. The district court also concluded that EPIC was not likely to suffer irreparable harm since the collection of citizenship information—set to occur in 2020—was not imminent. *Id.* at 95–97. EPIC timely appealed the denial of its motion.

II. Jurisdiction

We have the statutory jurisdiction to review the denial of a preliminary injunction under 28 U.S.C. § 1292(a)(1). Before we review the merits of this appeal, however, we must consider whether federal courts have the constitutional power to decide this case in the first place. "Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under

review ...." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) (internal quotations omitted). "When the lower federal court lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (internal quotations omitted).

"The Constitution limits our 'judicial Power' to 'Cases' and 'Controversies,' U.S. Const. art. III, § 2, cl. 1." *West v. Lynch*, 845 F.3d 1228, 1230 (D.C. Cir. 2017) (citing *Steel Co.*, 523 U.S. at 102, 118 S.Ct. 1003). "[T]here is no justiciable case or controversy unless the plaintiff has standing." *Id.* "To establish standing, the plaintiff must show (1) it has suffered a concrete and particularized injury (2) that is fairly traceable to the challenged action of the defendant and (3) that is likely to be redressed by a favorable decision, i.e., a decision granting the plaintiff the relief it seeks." *EPIC v. Presidential Advisory Comm'n on Election Integrity (PACEI)*, 878 F.3d 371, 376–77 (D.C. Cir. 2017) (internal quotations omitted). EPIC is required to establish standing as to each claim, and each form of requested relief. *See id.* at 377. Since the three counts in EPIC's complaint involve a repackaging of the same underlying grievance, we need not undertake a separate standing analysis as to each claim.

As an organization, EPIC can assert standing in one of two ways. It can assert standing on its own behalf, as an organization, or on behalf of its members, as associational standing. *See Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 24 (D.C. Cir. 2011). As we will explain, EPIC's

assertion of organizational standing is plainly foreclosed by precedent. Its assertion of associational standing also fails, because it has not identified a concrete injury suffered by one of its members.

A. Organizational Standing

"[A]n organization may establish Article III standing if it can show that the defendant's actions cause a concrete and demonstrable injury to the organization's activities that is more than simply a setback to the organization's abstract social interests." *Feld Entm't*, 659 F.3d at 25 (internal quotations omitted). This Court has previously considered and rejected EPIC's assertion of organizational standing with respect to § 208 of the E-Government Act. *PACEI*, 878 F.3d 371. In *PACEI*, EPIC challenged the authority of the Presidential Advisory Commission on Election Integrity to collect voter information from each state without first publishing a PIA as required by § 208. 878 F.3d at 374. The requested relief included: (1) an order requiring the PACEI to "promptly" publish a PIA and (2) an order enjoining its collection of voter data. *Id.* at 377, 380. We held that EPIC did not have organizational standing to compel the publication of a PIA or to seek an injunction barring the collection of information. *Id.* at 378, 380. On both counts, EPIC was unable to show how the failure to publish a PIA concretely injured its organizational interest. *Id.* at 379. We held that § 208 did not confer an informational interest on EPIC as an organization, and any resources spent obtaining information that would otherwise have been in a PIA was a "self-inflicted budgetary choice that cannot qualify as an injury in fact." *Id*. The same reasoning applies to the present complaint.

Thus, any assertion of organizational standing by EPIC under § 208 is foreclosed by our prior precedent.

B. Associational Standing

With organizational standing out of the question, we turn to EPIC's assertion of associational standing. An organization can assert associational standing on behalf of its members if: "(1) at least one of their members has standing to sue in her or his own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires the participation of an individual member in the lawsuit." *Am. Library Ass'n v. FCC*, 401 F.3d 489, 492 (D.C. Cir. 2005).

We begin our analysis by observing that EPIC is a membership organization. Respondent contends that our precedent determines that EPIC is not, citing *PACEI*. It is true that when we issued our decision in *PACEI*, we noted that "as far as the record shows, [EPIC] has no traditional membership[.]" 878 F.3d at 380. Since that decision issued, however, the nature of the organization has changed. In January 2018, EPIC amended its bylaws. The new bylaws require the organization to designate "members" who must be "distinguished experts in law, technology, and public policy." Members are eligible to sit on the Board of Directors. They also provide leadership to the organization and pay dues. We implicitly recognized that these changes were enough to turn EPIC into a membership organization when we conducted an associational standing analysis in *EPIC v. FAA*, 892 F.3d 1249, 1253-55 (D.C. Cir. 2018). We expressly recognize it here.

Having established that EPIC is a membership organization, we can examine the first prong of the associational standing analysis. At this step, EPIC must show, for each of its claims, that at least one of its members has standing. *See Am. Library Ass'n*, 401 F.3d at 492. By necessity, this requires at least one of EPIC's members to have suffered a "concrete and particularized" injury. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). EPIC avers that its members have suffered, or will suffer, both informational and privacy injuries. However, they have made no such showing.

C. Privacy Injury

EPIC asserts that its members will suffer a privacy injury if their citizenship status information is "unlawfully collected." EPIC argues that the act of collecting information without a PIA, by itself, constitutes an imminent, concrete, and particularized privacy injury. But "a bare procedural violation, divorced from any concrete harm, [does not] satisfy the injury-in-fact requirement of Article III." *Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S. Ct. 1540, 1549, 194 L.Ed.2d 635 (2016). Therefore, to plausibly show a privacy injury, EPIC must allege harm that is distinct from a simple failure to comply with the procedural requirements of § 208. In the privacy context, such harm would ordinarily stem from the disclosure of private information. Since EPIC has not shown how a delayed PIA would lead to a harmful disclosure, its privacy injury theory fails.

Disclosure of individual census responses to third parties is prohibited by law. 13 U.S.C. § 9. A census response may not be used for "any purpose other than the statistical purposes for which it is supplied"

and only "sworn officers and employees of the Department [of Commerce] or [Census] [B]ureau" may examine individual reports. *Id.* § 9(a)(1), (3). Responses are not even admissible as evidence in court in most circumstances. *Id.* § 9(a). We agree with the Southern District of New York that "it is pure speculation to suggest that the Census Bureau will not comply with its legal obligations to ensure the privacy of respondents' data or that those legal obligations will be amended." *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 619 (S.D.N.Y. 2019). More specifically, EPIC has not convinced us that a delay in receiving a PIA will make the Census Bureau any less likely to comply with these laws. Speculation, we have said before, "is ordinarily fatal to standing." *PACEI*, 878 F.3d at 379 (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006)). Therefore, to the extent that EPIC relies on the potential disclosure of their citizenship status to third parties as the source of injury, we reject the theory as a "speculative chain of possibilities" that cannot establish an injury. *Accord Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 414, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013).

For the first time on appeal, EPIC also suggests that its members have a constitutional privacy interest in keeping their citizenship status private from the government itself. EPIC cites *Whalen v. Roe* and *Nixon v. Administrator of General Services* for the proposition that its members have an interest in "avoiding disclosure of personal matters" and that "informational privacy is 'implicit in the concept of ordered liberty.' " Appellant Reply Br. at 10 (citing *Whalen,* 429 U.S. 589, 599 n.23, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977); *Nixon*, 433 U.S. 425, 455, 97 S.Ct. 2777, 53 L.Ed.2d

867 (1977)). We have previously expressed "grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information," at least "where the information is collected by the government but not disseminated publicly." *Am. Fed'n of Gov't Employees v. HUD*, 118 F.3d 786, 791, 794 (D.C. Cir. 1997). These doubts are particularly acute where the information in question is as deeply entwined with national sovereignty and governance as citizenship status.

We need not resolve this issue today, however, because EPIC has not squarely challenged the merits or constitutionality of the citizenship question in this case. Rather, they challenge the procedural propriety of the government's collection of this information in the absence of a timely PIA. The narrow question before the Court—a question about the timing of PIAs—is completely "[dis]connected" from the broader question of whether a citizenship question on the census is constitutionally permissible. *Accord Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 94–95 (D.C. Cir. 2002). Therefore, for the purposes of this litigation, the existence or scope of a right to informational privacy with respect to citizenship status is not relevant. EPIC has not shown that the timing for publishing PIAs is plausibly connected to the government's collection of private information that it would not otherwise collect. Especially because, as previously noted (page 98–99, *supra*), the principal purpose of the impact assessment is *not* to deter collection in the first place, but instead to improve upon an agency's storage and sharing practices.

In short, EPIC has failed to show that its members have suffered, or imminently will suffer, a privacy injury as a result of a delayed PIA.

D. Informational Injury

Having concluded that EPIC's members have not suffered a privacy injury, we turn to the contention that they have suffered an informational injury. To show an informational injury, a plaintiff must show: "(1) it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it, and (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure." *Friends of Animals v. Jewell,* 828 F.3d 989, 992 (D.C. Cir. 2016). Mirroring our analysis in *PACEI*, we do not consider whether EPIC satisfies the first prong of the analysis, because EPIC's members cannot satisfy the second. *See PACEI,* 878 F.3d at 378.

Even if § 208 requires the disclosure of PIAs to EPIC's members, the organization cannot show that those members have suffered the "type of harm Congress sought to prevent by requiring disclosure." *See Jewell,* 828 F.3d at 992. In *PACEI,* this Court considered what type of harm § 208 of the E-Government Act was designed to prevent. We held that § 208 "is directed at individual *privacy*" and protects individuals "by requiring an agency to fully consider their privacy before collecting their personal information." *PACEI*, 878 F.3d at 378 (emphasis in original). We read this holding to reject the possibility that § 208 can support an informational injury theory, at least in the absence of a colorable privacy harm of the type that Congress sought to prevent through the E-Government Act.

Section 208 was not designed to vest a general right to information in the public. Rather, the statute was designed to protect individual privacy by focusing agency analysis and improving internal agency decision-making. In this respect, § 208 is fundamentally different from statutes like the Freedom of Information Act (FOIA) where the harm Congress sought to prevent was a lack of information itself. Unlike § 208, FOIA was designed to grant enforceable rights to information in the general public. The "broad mandate of the FOIA is to provide for open disclosure of public information" and to allow citizens "to be informed about what their government is up to." *Baldrige v. Shapiro*, 455 U.S. 345, 352, 102 S.Ct. 1103, 71 L.Ed.2d 199 (1982); *DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989) (internal quotations omitted). These purposes stand in contrast with the stated agency-centric purpose of § 208 to "ensure sufficient protections for the privacy of personal information ***as agencies implement*** citizen-centered electronic Government." E-Government Act § 208(a) (emphasis added).

Because the lack of information itself is not the harm that Congress sought to prevent through § 208, EPIC must show how the lack of a timely PIA caused its members to suffer the kind of harm that Congress did intend to prevent: harm to individual privacy. *See PACEI,* 878 F.3d at 378. As discussed in Part II.B.1, however, EPIC cannot allege an imminent privacy harm without assuming the independent violation of other laws by the Census Bureau. This is too speculative to support standing. For this reason, we hold that EPIC cannot satisfy the second step of the *Jewell*

analysis, and cannot show an informational injury, just as it cannot show a privacy injury.

E. Disposition

Because we conclude that EPIC has failed, as a matter of law, to show that any of its members have suffered a concrete privacy or informational injury, we lack jurisdiction to proceed and must remand the case for dismissal. Indeed, we retain jurisdiction only "for the purpose of correcting the error of the lower court in entertaining the suit." *Steel Co.*, 523 U.S. at 95, 118 S.Ct. 1003.

We take a moment to explain why we have sometimes affirmed the denial of a preliminary injunction based on a standing-related defect, but do not do so here. One showing a plaintiff must make to obtain a preliminary injunction is "a substantial likelihood of success on the merits." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015). "[T]he 'merits' on which plaintiff must show a likelihood of success encompass not only substantive theories but also establishment of jurisdiction." *Id.* (quoting *Obama v. Klayman*, 800 F.3d 559, 565 (D.C. Cir. 2015) (Williams, J., concurring)). In determining whether the plaintiff has "a substantial likelihood of success on the merits," then, we have considered whether the plaintiff has a "substantial likelihood of standing"—that is, whether the plaintiff is likely to be able to demonstrate standing at the summary judgment stage. *See id.* at 912 (standing must be evaluated "under the heightened standard for evaluating a motion for summary judgment" in "determining whether or not to grant the motion for preliminary injunction"); *see also Bennett v. Spear*, 520 U.S. 154, 167–68, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) ("[E]ach element of

Article III standing 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the same manner and degree of evidence required at the successive stages of litigation.'... [A] plaintiff must 'set forth' by affidavit or other evidence 'specific facts' to survive a motion for summary judgment." (first quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), and then quoting Fed. R. Civ. P. 56(e) (1987))). "[A]n inability to establish a substantial likelihood of standing requires denial of the motion for preliminary injunction, not dismissal of the case." *Food & Water Watch*, 808 F.3d at 913. Thus, in cases where we have found that a plaintiff had not established a "substantial likelihood of standing," we have affirmed the denial of a preliminary injunction. *See, e.g.*, *PACEI*, 878 F.3d at 377, 380.

Notwithstanding these cases, if, in reviewing the denial of a preliminary injunction, we determine that a litigant cannot establish standing *as a matter of law*, the proper course is to remand the case for dismissal. *See Crow Creek Sioux Tribe v. Brownlee*, 331 F.3d 912, 918 (D.C. Cir. 2003). Here, we find that EPIC lacks standing as a matter of law. As a result, our only remaining constitutional duty is to "correct[ ] the error of the lower court in entertaining the suit." *See Steel Co.*, 523 U.S. at 95, 118 S.Ct. 1003.

III. Conclusion

Because EPIC lacks standing, we vacate the district court's denial of the preliminary injunction and remand for the purpose of dismissal.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5031 **September Term, 2018**
FILED ON: JUNE 28, 2019

ELECTRONIC PRIVACY INFORMATION CENTER,
APPELLANT

V.

UNITED STATES DEPARTMENT OF COMMERCE AND
BUREAU OF THE CENSUS,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:18-cv-02711)

Before: HENDERSON and MILLETT, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause be vacated and the case be remanded to the District

Court with instructions to dismiss, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken R. Meadows,
Deputy Clerk

Date: June 28, 2019

Opinion for the court filed by Senior Circuit Judge Sentelle.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5031 **September Term, 2019**
1:18-cv-02711-DLF

Filed On: September 16, 2019

Electronic Privacy Information Center,
Appellant

v.

United States Department of Commerce and Bureau of the Census,
Appellees

BEFORE: Henderson and Millett, Circuit Judges; Sentelle, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for panel rehearing, or vacatur and remand filed on August 12, 2019, it is

ORDERED that the motion be denied. It is

FURTHER ORDERED that the request for vacatur and remand be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail,
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5031 **September Term, 2019**
1:18-cv-02711-DLF

Filed On: September 16, 2019

Electronic Privacy Information Center,
Appellant

v.

United States Department of Commerce and Bureau of the Census,
Appellees

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Griffith, Srinivasan, Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges; and Sentelle, Senior Circuit Judge.

ORDER

Upon consideration of appellant's petition for rehearing en banc, or vacatur and remand, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied. It is

FURTHER ORDERED that the request for vacatur and remand be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail,
Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER, *Plaintiff*, v. U.S. DEPARTMENT OF COMMERCE, *et al*., *Defendants*.	No. 18-cv-2711 (DLF)

MEMORANDUM OPINION

Plaintiff Electronic Privacy Information Center (EPIC), a non-profit organization dedicated to privacy and civil liberties issues, brings this action against the U.S. Department of Commerce and the U.S. Census Bureau under the Administrative Procedure Act (APA) and the Declaratory Judgment Act. The plaintiff claims that the E-Government Act requires the defendants to conduct and release "privacy impact assessments" addressing Secretary of Commerce Wilbur Ross's March 26, 2018 decision to include a citizenship question in the 2020 Census. The defendants agree, but insist they still have plenty of time to do so "before" actually "initiating a new collection of information" within the meaning of the E-Government Act.[1] Before the Court is the plaintiff's Motion for a Preliminary Injunction, Dkt. 8, seeking to enjoin Commerce and the

[1] E-Government Act of 2002, § 208(b)(1)(A), Pub. L. 107-347, 116 Stat. 2899 (2002), *codified at* 44 U.S.C.A. § 3501 note (hereinafter "E-Government Act").

Bureau from implementing Secretary Ross's decision to add a citizenship question to the Census, *see* Dkt. 8-2. For the following reasons, the Court will deny the motion.

I. BACKGROUND

A. Statutory Background

The E-Government Act requires federal agencies to "conduct a privacy impact assessment," "ensure the review of the privacy impact assessment," and, "if practicable, ... make the privacy impact assessment publicly available" "before" "initiating a new collection of information" that "will be collected, maintained or disseminated using information technology" and that "includes any information in an identifiable form permitting the physical or online contacting of a specific individual, if identical questions have been posed to[ ] ... 10 or more persons." E-Government Act § 208(b)(1)(A)–(B).

The term "collection of information" is defined by statute as "the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions ... regardless of form or format, calling for" "answers to identical questions posed to ... ten or more persons[.]" 44 U.S.C. § 3502(3)(A); *see also* E-Government Act § 201 (incorporating § 3502 definitions by reference). The same term is also used in OMB regulations to "refer[ ] to the act of collecting or disclosing information, to the information to be collected or disclosed, to a plan and/or an instrument calling for the collection or disclosure of information, or any of these, as appropriate." 5 C.F.R. § 1320.3(c). The term "initiating" has no statutory or regulatory definition.

A privacy impact assessment—or "PIA"—must "address" "what information is to be collected;" "why the information is being collected;" "the intended use of the agency of the information;" "with whom the information will be shared;" "what notice or opportunities for consent would be provided to individuals regarding what information is collected and how that information is shared;" "how the information will be secured;" and "whether a system of records is being created under [the Privacy Act]." E-Government Act § 208(b)(2)(B)(ii).

B. Factual Background

On March 26, 2018, Secretary of Commerce Wilbur Ross announced his decision to include a citizenship question on the 2020 Decennial Census questionnaire. *See* Bachman Decl. ¶ 12, Dkt. 12-1. That decision has been challenged elsewhere on a number of grounds.[2] For present purposes, all that matters is whether—and, more importantly, *when*—the decision to collect citizenship information had to be addressed in one or more PIAs.

The Bureau is no stranger to PIAs. When Secretary Ross announced the inclusion of the citizenship question in March 2018, the Bureau was already planning to conduct an annual PIA for the primary information technology system used for the decennial census. Bachman Decl. ¶¶ 3, 9. That system—called "CEN08"—shares Census-related information with four other systems: "CEN21," "CEN05," "CEN11," and "CEN13." *Id.* ¶ 14. And a sixth information technology system—called "CEN18"—enables the flow of

[2] *See New York v. U.S. Dep't of Commerce*, 351 F.Supp.3d 502 (S.D.N.Y. 2019).

information between CEN08 and the other four systems. *Id.*

The Bureau maintains and regularly updates PIAs for each of these systems. *See id.* ¶¶ 9, 15. The PIA for CEN08 was updated in June and September of 2018, and another update is in progress and scheduled for release in February or March of 2019. *Id.* ¶ 9. The PIAs for the remaining systems were all updated in June 2018 and will be reviewed and updated again "within the next two months" as part of the Bureau's annual PIA process. *Id.* ¶ 15. In the meantime, the current PIAs for these systems are available to the public online.[3]

The existing PIAs say little about the collection of citizenship information in particular. The PIAs for CEN05,[4] CEN13,[5] and CEN18[6] do not mention citizenship at all. And the PIAs for CEN08[7] and CEN11[8] mention citizenship only once, in a field labeled "Other

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

[4] http://www.osec.doc.gov/opog/privacy/Census%20PIAs/CEN05_PIA_SAOP_Approved.pdf.

[5] http://www.osec.doc.gov/opog/privacy/Census%20PIAs/CEN13_PIA_SAOP_Approved.pdf.

[6] http://www.osec.doc.gov/opog/privacy/Census%20PIAs/CEN18_PIA_SAOP_Approved.pdf.

[7] http://www.osec.doc.gov/opog/privacy/Census%20PIAs/CEN08_PIA_SAOP_Approved.pdf.

[8] http://www.osec.doc.gov/opog/privacy/Census%20PIAs/CEN11_PIA_SAOP_Approved.pdf.

general personal data (specify)," without any analysis or further context.[9]

Unsatisfied with this level of treatment, EPIC filed this action on November 20, 2018. The complaint asserts two counts under the APA and one count under the Declaratory Judgment Act. Count I alleges that the defendants acted unlawfully by adding the citizenship question to the Census without first conducting, reviewing, and releasing PIAs to address that decision. Compl. ¶¶ 64–70 (citing 5 U.S.C. § 706(2)(a), (c)). Count II alleges that the defendants unlawfully withheld agency action by failing to conduct, review, or release PIAs as required. *Id.* ¶¶ 71–76 (citing 5 U.S.C. § 706(1)). And Count III seeks a declaration of rights and relations consistent with counts I and II. *Id.* ¶¶ 77–78 (citing 28 U.S.C. § 2201(a)).

On January 15, 2019, a federal district court in New York permanently enjoined Commerce and the Bureau from including the citizenship question on the Census. *See New York v. U.S. Dep't of Commerce,* 351 F.Supp.3d at 679–80, 2019 WL 190285, at *125. Three days later, EPIC filed this motion for a preliminary injunction, which the Court now resolves.

II. LEGAL STANDARD

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). To warrant a preliminary injunction, a plaintiff "must make a clear showing" that (1) he "is likely to succeed on the merits"; (2) he

[9] The plaintiffs do not challenge the PIA for CEN21. *See* Compl. ¶¶ 49, 51–62, Dkt.1.

"is likely to suffer irreparable harm in the absence of preliminary relief"; (3) the "balance of equities" tips in his favor; and (4) "an injunction is in the public interest." *Id.* at 20, 129 S.Ct. 365; *League of Women Voters of United States v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016). The last two factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009). The plaintiff "bear[s] the burdens of production and persuasion" when moving for a preliminary injunction. *Qualls v. Rumsfeld*, 357 F.Supp.2d 274, 281 (D.D.C. 2005) (citing *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004)).

"Before the Supreme Court's decision in *Winter*, courts weighed the preliminary injunction factors on a sliding scale, allowing a weak showing on one factor to be overcome by a strong showing on another factor." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F.Supp.3d 4, 26 (D.D.C. 2016). The D.C. Circuit, however, has "suggested, without deciding, that *Winter* should be read to abandon the sliding-scale analysis in favor of a 'more demanding burden' requiring a plaintiff to independently demonstrate both a likelihood of success on the merits and irreparable harm." *Id.* (quoting *Sherley v. Sebelius*, 644 F.3d 388, 392–93 (D.C. Cir. 2011)); *see also Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009).

"Both before and after *Winter*, however, one thing is clear: a failure to show a likelihood of success on the merits alone is sufficient to defeat the motion." *Hudson v. Am. Fed'n of Gov't Employees*, 308 F.Supp.3d 121, 127 (D.D.C. 2018) (citing *Ark. Dairy Co-op Ass'n, Inc. v. USDA*, 573 F.3d 815, 832 (D.C. Cir.

2009)). "[A]bsent a substantial indication of likely success on the merits, there would be no justification for the Court's intrusion into the ordinary processes of administration and judicial review.' " *Archdiocese of Washington v. Washing Metro. Area Transit Auth.*, 281 F.Supp.3d 88, 99 (D.D.C. 2017) (internal quotation marks omitted), *aff'd*, 897 F.3d 314 (D.C. Cir. 2018). Accordingly, "[u]pon finding that a plaintiff has failed to show a likelihood of success on the merits, the Court may deny a motion for preliminary injunction without analyzing the remaining factors." *In re Akers*, 487 B.R. 326, 331 (D.D.C. 2012); *see also Hudson*, 308 F.Supp.3d at 131–32 (same).

Likewise, "it is clear" before and after *Winter* "that failure to show a likelihood of irreparable harm remains, standing alone, sufficient to defeat the motion." *Navajo Nation v. Azar*, 292 F.Supp.3d 508, 512 (D.D.C. 2018).

III. ANALYSIS

A. Likelihood of Success on the Merits

The defendants concede that they must eventually prepare PIAs that adequately address the collection of citizenship data in the 2020 Census. *See, e.g.*, Defs.' Opp'n at 1, 12, Dkt. 12. But they disagree with the plaintiff that they were required to do so before Secretary Ross announced his decision to add the citizenship question on March 26, 2018. As the defendants point out, the E-Government Act requires agencies to conduct (and, if practicable, release) a PIA only before "*initiating* a new collection of information." E-Government Act § 208(b)(1)(A)(ii) (emphasis added). And "initiating" the collection of information, the defendants argue, means more than just announcing a

decision to collect information at some point in the future. It requires at least one instance of obtaining, soliciting, or requiring the disclosure of information, which in the defendants' view will not occur until the Bureau mails its first batch of Census questionnaires to the public. *See* Defs.' Opp'n at 11–14. The Court agrees.

"A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979); *see also New Prime Inc. v. Oliveira*, —— U.S. ——, 139 S.Ct. 532, 539, —— L.Ed.2d —— (2019) (same). Contemporary dictionaries define "initiate" as "[t]o begin, commence, enter upon; to introduce, set going, give rise to, originate, 'start' (a course of action, practice, etc.)." Oxford English Dictionary, http://www.oed.com/view/Entry/96066?rskey=wxG1jD&result=2&isAdvanced=false#eid; *see also* Merriam-Webster, https://www.merriam-webster.com/dictionary/initiate ("to cause or facilitate the beginning of: set going"). Black's Law Dictionary similarly defines "initiate" as to "[c]ommence, start; originate; introduce[.]" Black's Law Dictionary 784 (6th ed. 1990). These definitions share a focus on the *beginning, starting*, or *commencing* of a course of conduct. In the words of *Webster's Third*, they contemplate "the first actions, steps, or stages of" the activity initiated. Webster's Third New International Dictionary 1164 (3d ed. 1976)).

Combining this ordinary meaning with the statutory definition of "collection of information," an agency must conduct (and, if practicable, release) a PIA before it *begins* "obtaining, causing to be obtained,

soliciting, or requiring the disclosure to third parties or the public, of facts or opinions[.]" 44 U.S.C. § 3502(3)(A). Commerce and the Bureau have not yet gone so far. While Secretary Ross decided to collect citizenship information—and announced that decision in a letter that the parties agree constitutes final agency action, *see* Pl.'s Mot. at 24–25, Dkt. 8-1; Defs.' Opp'n at 18—the defendants have yet to actually begin obtaining, soliciting, or requiring the disclosure of any citizenship data. Those actions will not occur until the Bureau mails its first set of questionnaires to the public in January 2020. *See* Pl.'s Reply at 2, 13, Dkt. 13 (acknowledging that the questionnaires will be sent to the public in January 2020); U.S. Census Bureau, 2020 Census Operational Plan: A New Design for the 21st Century 97 (Dec. 2018), https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan4.pdf (stating that the "printing, addressing, and mailing of Internet invitations, reminder cards or letters, and paper questionnaire packages" will occur between June 2019 and April 2020).

A simple hypothetical offered by the defendants illustrates why this interpretation tracks the plain meaning of the statute. Imagine a happy couple is planning a wedding, and a friend asks if they have "initiated the collection of RSVPs." Ordinarily, they would not say yes if they had merely finalized the guest list, chosen a font for the invitations, or decided to include a dinner selection on the RSVP cards. At that point, they have not "initiated the collection" of any RSVPs. They have merely made antecedent decisions about what information to collect—and from whom—in the future. Likewise, when Secretary Ross

decided to add a citizenship question to the yet-to-be-mailed Census questionnaires—the equivalent of adding a dinner selection to an un-mailed RSVP card—he did not "initiate a new collection of information" but merely decided what new information the Bureau would collect later.

The plaintiff resists this analogy because Secretary Ross's decision was final and made the collection of information all but inevitable. *See* Reply at 5. For the analogy to hold, the plaintiff argues, the couple would have had to place an order with a full-service printer who will mail the invitations on a fixed date in the future unless the couple cancels the order. *Id.* But this change would not alter the couple's response because the fact that an event is certain to occur in the future does not mean it has already begun. To build on the wedding analogy, a couple does not "initiate" their marriage by getting engaged or choosing a wedding date, even if those actions ordinarily serve as a final—and binding—decision to tie the knot. As each subsequent anniversary celebration makes clear, they will not have "initiated" their marriage until the wedding day.

A similar usage applies in the legal context. Courts routinely use the phrase "initiating an action" to refer the filing of the complaint. *See, e.g., Horne v. Dep't of Agric.*, 569 U.S. 513, 520, 133 S.Ct. 2053, 186 L.Ed.2d 69 (2013) (an agency "initiated an enforcement action" on the date the complaint was filed); *Arnold v. U.S. Secret Serv.*, 524 F.Supp.2d 65, 66 (D.D.C. 2007) (the plaintiff "initiated this action" on the date the complaint was filed). And it would be unusual—if not downright misleading—to claim to have "initiated" a lawsuit when in fact one had merely decided which

claims to allege in the complaint. That is because "initiating" normally means "beginning"—in the law as everywhere else. And there is a meaningful difference between deciding or preparing to bring a lawsuit and actually *initiating* it.

Congress must have been aware of this distinction. After all, it had a range of terms at its disposal if it wanted agencies' assessment and reporting obligations to arise earlier in the data-collection process. For instance, Congress could have required a PIA before "planning" or "providing for" a new collection of information. *See* E-Government Act (132 references to variations of the words "plan" or "provide"). Alternatively, Congress could have required a PIA whenever an agency makes a "determination" or "decision" to initiate a new collection of information. *See id.* (40 references). "The fact that [Congress] did not adopt th[ese] readily available and apparent alternative[s] strongly supports rejecting" an interpretation that would substitute them for the word Congress did choose. *Knight v. Comm'r*, 552 U.S. 181, 188, 128 S.Ct. 782, 169 L.Ed.2d 652 (2008).

Indeed, the only other use of "initiate" in the E-Government Act confirms that Congress uses that word deliberately to refer to actions beyond mere decisionmaking or planning. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 170 (2012) ("A word or phrase is presumed to bear the same meaning throughout a text[.]"). Section 214(c) requires the Administrator of the Office of Electronic Government to "initiate pilot projects or report to Congress on other activities that further the goal of maximizing the utility of information technology in disaster management." E-Government Act § 214(c).

Plainly, this obligation would not be satisfied if the Administrator merely announced a decision to initiate a pilot project at some point in the future. The natural interpretation of § 214(c) is that the Administrator must either actually commence a pilot project or else perform "other activities" that serve the same goals.

Although the plaintiff does not address § 214(c), it notes that elsewhere in Title 44 Congress apparently drew a distinction between "initiating," "carrying out," and "completing." *See* Pl.'s Mot. at 19 (quoting 44 U.S.C. § 3902(a)). The relevant provision states that the "Director of the Government Publishing Office shall have no authority to prevent or prohibit the Inspector General from *initiating*, *carrying out*, or *completing* any audit or investigation[.]" 44 U.S.C. § 3902(a) (emphasis added). In the plaintiff's view, this sentence proves that Congress uses "initiating" to mean something different and less than "carrying out"; thus, it must include the decision to carry out an activity in the future. The Court is unconvinced. To be sure, "[i]t is a cardinal principle of statutory construction that [a court] must give effect, if possible, to every clause and word of a statute." *NLRB. v. SW Gen., Inc.*, —— U.S. ——, 137 S.Ct. 929, 197 L.Ed.2d 263 (2017) (alteration adopted and internal quotation marks omitted). But it would not produce any redundancy to interpret "initiating" in § 3902(a) to refer to the actual commencement of an audit or investigation. Section 3902(a) describes the beginning, middle, and end of an audit or investigation, and it makes clear that the Director cannot prevent the Inspector General from proceeding at any point in that process. If the Inspector General has not yet begun an audit or investigation, the Director cannot prevent him from "initiating" one;

if he has already begun an audit or investigation, the Director cannot prevent him from "carrying [it] out"; and if he is nearing the end of an audit or investigation, the Director cannot prevent him from "completing" it. While the words "carrying out" might technically be used to describe the first or last step of an audit or investigation—just as it describes every step in between—it is more natural to refer to those steps as "initiating" and "completing" the audit or investigation. And there is nothing surprising about using the three terms together to emphasize the Inspector General's freedom from interference from beginning to end.

The plaintiff raises a number of additional arguments to support its interpretation, but none are persuasive. *First*, the plaintiff attempts to show that the text itself encompasses a decision to collect information at some point in the future. The plaintiff highlights the use of gerunds in the definition of "collection of information," *see* 44 U.S.C. § 3502(3)(A) ("obtaining," "causing," "soliciting," or "requiring"), and argues that this grammatical choice connotes "a process, not a one-off action," Pl.'s Reply at 4. But even so, the statute makes clear what that process consists of: the "obtaining" of information, the "causing" of information to be obtained, the "soliciting" of information, and the "requiring" of the disclosure of information. 44 U.S.C. § 3502(3)(A). Consequently, "initiating" a "collection of information"—even if viewed as a process—still requires the beginning of at least one of these actions.

The plaintiff also argues that Congress would not have used the six-word phrase "initiating a new collection of information" if it meant "collecting new information" and could have said so directly in three

fewer words. *See* Reply at 4. But this observation ignores that the noun form "collection of information" has a statutory definition that Congress may have used for clarity or consistency. Moreover, the defendants have never argued that the agency must actually "collect"—that is, obtain or receive—information to have initiated a new collection of information under § 208. They acknowledge that performing any one of the gerunds listed in 44 U.S.C. § 3502(3)(A) would qualify as "initiating" the collection of information. Thus, "soliciting" or "requiring the disclosure" of citizenship data—here, by mailing Census questionnaires—would require a PIA even if no information has been obtained in response. *See* Defs.' Opp'n at 12.

Next, the plaintiff argues that Secretary Ross literally "requir[ed] the disclosure of facts or opinions to third parties" when he issued the March 26, 2018 decision adding a citizenship question to the Census. *See* Pl.'s Reply at 7. That is simply not true. By the plaintiff's own admission, the public will not be obligated to disclose information to third-parties until the Bureau actually implements the 2020 Census. *See id.* ("[M]embers of the public will inevitably come under an obligation to disclose their citizenship status via the 2020 Census"); *id.* at 14 ("[O]nce [the Bureau] sends out the questionnaires, individuals will be legally obligated to respond.").

Second, EPIC attempts to draw various inferences from statutory structure. For instance, the plaintiff points to other provisions in Title 44 that describe the "collection of information" in contexts where an agency clearly has not begun obtaining or soliciting information. *See* Pl.'s Reply at 5–6 (citing, *e.g.*, 44 U.S.C. § 3505). But these provisions are both

unsurprising and irrelevant because none use the critical word "initiate." Of course, an agency can "propose," "review," "approve," or "reject" a collection of information without "initiating" it, just as one can propose or reject a marriage without initiating one. But that possibility says nothing about what it means to initiate a collection of information.

The plaintiff also highlights the provision directly adjacent to § 208(b)(1)(A)(ii), which requires a PIA before "developing or procuring information technology that collects, maintains, or disseminates information[.]" E-Government Act § 208(b)(1)(A)(i). In the plaintiff's view, the choice to require a PIA before "developing" or "procuring" technology—and not merely before "activating" or "deploying" it—shows that Congress intended PIAs to be completed early on in an agency's decisionmaking process. *See* Pl.'s Reply at 6. But one could just as easily draw the opposite inference and conclude that when Congress wants to require a PIA at a preliminary stage, like development or procurement, it does so explicitly.

Third, the plaintiff invokes OMB regulations that implement a related statute, the Paperwork Reduction Act, whose definitions are incorporated into the E-Government Act. *See* Pl.'s Mot. at 20; *see also* 5 C.F.R. § 1320.3 (implementing the Paperwork Reduction Act); 44 U.S.C. § 3502 (defining terms in Paperwork Reduction Act); E-Government Act § 201 (incorporating definitions in § 3502 by reference). Those regulations explain that OMB uses the term "collection of information" to refer not only to the "act of collecting or disclosing information" but also "to the information to be collected or disclosed" or to a "*plan* and/or an instrument calling for the collection or disclosure of

information." 5 C.F.R. § 1320.3(c) (emphasis added). Applying this expansive regulatory definition, the plaintiff argues that Secretary Ross "introduced a definite plan ... calling for the collection or disclosure of information" and thereby initiated a collection of information under § 208. Pl.'s Mot. at 21 (internal quotation marks omitted). Again, the Court is unpersuaded.

The OMB regulations define "collection of information" only "[a]s used in this Part"—that is, in the Paperwork Reduction Act regulations themselves. 5 C.F.R. § 1320.3(c). They do not purport to define the terms of the E-Government Act. This limitation is not just a technicality. Unlike § 208, the regulations implementing the Paperwork Reduction Act use the phrase "collection of information" to refer both to the act of collecting information and as a noun to describe materials submitted by an agency to OMB for approval. *See, e.g., id.* § 1320.10. Given these multiple meanings, it makes sense for OMB to provide separate definitions for each. But it would be nonsensical to import these specialized, regulation-specific uses to § 208, which plainly uses "the collection of new information" to describe an event. To illustrate, it would be incoherent to speak of "initiating" "information" or "initiating" an "instrument." Yet that is the result of inserting the OMB definitions into § 208, where they were not meant to apply. And while one can "initiate" a "plan," it would be unwise to cherry-pick one component of a definition that, as a whole, was clearly designed for another purpose. Indeed, even OMB does not ordinarily invoke all three regulatory meanings of "collection of information" at once; rather, it uses the phrase to refer to "any" one of them, "as appropriate."

Id. § 1320.3(c). Since in context, § 208 clearly refers to "the act of collecting or disclosing information," it is irrelevant that OMB sometimes uses the same phrase to refer to something else, like a "plan."

In any event, even if the OMB regulations did apply, they would not change the outcome here. To "initiate" a "plan" would still mean to commence it or put it into action, not merely to announce it, as EPIC suggests, *see* Pl.'s Mot. at 20–21. Thus, a "plan ... calling for the collection or disclosure of information" would not be "initiated" until the "collection or disclosure" "call[ed] for" actually begins—in this case, with the mailing of questionnaires to the public.

Fourth, the plaintiff invokes precedent, pointing to a D.C. Circuit decision that mentioned in passing that an agency "need not prepare a privacy impact assessment unless it *plans* to collect information." *EPIC v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 380 (D.C. Cir. 2017) (emphasis added). Setting aside that this quote addresses *whether* an agency must prepare a PIA—not *when*—EPIC overlooks that the same decision elsewhere describes the E-Government Act as requiring an agency to "conduct, review and, if practicable, publish a privacy impact assessment before it *collects* information." *Id.* at 375 (emphasis added and internal quotation marks omitted); *see also id.* (describing the Act as "requiring an agency to fully consider [individuals'] privacy before *collecting* their personal information" (emphasis added)). If anything, *EPIC* supports the defendants' interpretation, although the Court declines to attach significance either way to a decision that had no occasion to interpret the statutory language.

Fifth, the plaintiff argues that allowing agencies to wait until after deciding to collect information to conduct and publish a PIA would frustrate the purpose of the E-Government Act's privacy provisions. *See* Pl.'s Reply at 9. But "[e]ven the most formidable argument concerning the statute's purposes could not overcome the clarity" of "the statute's text." *Kloeckner v. Solis*, 568 U.S. 41, 55 n.4, 133 S.Ct. 596, 184 L.Ed.2d 433 (2012). At any rate, here the statutory purpose and plain text are perfectly compatible. The E-Government Act has many purposes—eleven to be exact—and nearly all focus on improving Government efficiency, transparency, and performance through the use of the Internet and emerging technologies. *See* E-Government Act § 2(b)(1)–(11). Congress recognized, however, that this shift to "electronic Government" could create privacy concerns, and it addressed those concerns through the "Privacy Provisions" embodied in § 208. *Id.* § 208(a). Importantly, § 208 is not a general privacy law; nor is it meant to minimize the collection of personal information. Rather, its express purpose is "to ensure sufficient protections for the privacy of personal information as agencies implement citizen-centered electronic Government." *Id.* Congress's focus on ensuring "protections" when agencies "implement" electronic Government shows that § 208's provisions—including the requirement to prepare PIAs—were not meant to discourage agencies from collecting personal information but rather to ensure that they have sufficient protections in place before they do. It is no surprise, then, that Congress would require agencies to prepare PIAs only before they actually begin to gather, store, and potentially share personal information.

The plaintiff advocates a much broader conception of § 208's purpose aimed at influencing agency decisionmaking. To support that vision, it cites cases discussing the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, which requires agencies to prepare "environmental impact statements." *See* Pl.'s Reply at 9 (citing *Jones v. D.C. Redevelopment Land Agency*, 499 F.2d 502, 512 (D.C. Cir. 1974) and *Lathan v. Volpe*, 455 F.2d 1111, 1121 (9th Cir. 1971)). But the E-Government Act and NEPA are hardly analogous. Although they both require a form of "impact" assessment, the role and timing of those assessments differ sharply. Unlike the E-Government Act, NEPA explicitly requires an impact statement to be included "in every *recommendation* or *report* on *proposals* for legislation and other Federal actions" that meet certain criteria. 42 U.S.C. § 4332(C) (emphasis added). EPA regulations further specify that "[a]n agency shall commence preparation of an environmental impact statement *as close as possible* to the time the agency is *developing or is presented with a proposal*," and the statement must "be prepared *early enough* so that it can serve practically as an *important contribution to the decisionmaking process* and will not be used to rationalize or justify decisions already made." 40 C.F.R. 1502.5 (emphasis added). The regulations go on to provide specific deadlines for preparing environmental statements depending on the type of agency action proposed. *Id.* (a)–(d). This language—explicitly tying impact statements to agency decisionmaking and imposing clear and specific deadlines as early as possible in the decisionmaking process—is notably absent from the E-Government Act, which requires only that agencies conduct and, if practicable, release a privacy

impact assessment before "initiating the new collection of information" and only then for the purpose of "ensuring sufficient protections" for the information collected.

That is not to say that negative policy consequences cannot ever result if an agency drags its feet in performing its PIA obligations. *See* Pl.'s Reply at 3. But publishing a PIA shortly before commencing a new collection of information does not make the PIA "useless," as EPIC claims. *See id.* Indeed, publishing a PIA even belatedly would support one of the purposes of the E-Government Act to "make the Federal Government more transparent and accountable," E-Government Act § 2(b)(9), and would inform citizens why their data is being collected, how it is secured, and with whom it will be shared. *See id.* § 208(b)(2)(B)(ii).

For all of these reasons, the Court interprets "initiating a new collection of information," E-Government Act § 208(b)(1)(A)(ii), to require at least one instance of "obtaining, causing to be obtained, soliciting, or requiring the disclosure ... of facts or opinions," 44 U.S.C. § 3502(3)(A). This interpretation is fatal to the plaintiff's APA claims. The Bureau did not act contrary to the E-Government Act by deciding to collect citizenship data before conducting, reviewing, or releasing a PIA addressing that decision. *See* 5 U.S.C. § 706(2). Nor have the defendants "unlawfully withheld" agency action by declining to conduct or release a PIA earlier than they were required to under the statute.

See id. § 706(1). EPIC is therefore unlikely to succeed on the merits.[10]

B. Likelihood of Irreparable Harm

"Having concluded that plaintiff has no likelihood of success on the merits, the Court finds it unnecessary to weight the remaining preliminary injunction factors." *Doe v. Hammond*, 502 F.Supp.2d 94, 102 (D.D.C. 2007). Nonetheless, the Court will briefly address the plaintiff's three theories of irreparable harm—none of which are persuasive.

First, the plaintiff argues that the Bureau's ongoing failure to publish adequate PIAs irreparably harms its members by denying them information vital to a national debate. Pl.'s Mot. at 27. But even assuming this harm is irreparable, it will not be redressed by the relief requested. The plaintiff does not seek an affirmative injunction directing the defendants to perform or publish a PIA. It seeks only negative injunctions preventing the Bureau from "implementing" Secretary Ross's "decision to add a citizenship question to the 2020 Census" and from "initiating any collection of citizenship status information that would be obtained through the 2020 Census." Pl.'s Proposed Order, Dkt.

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[10] The defendants argue that this interpretation of § 208 also leads to certain prudential and jurisdictional consequences—namely, a lack of ripeness or final agency action. *See* Defs.' Opp'n at 16–21. But these arguments would only be relevant if EPIC sought to challenge, prospectively, the agencies' failure to conduct or release adequate PIAs in the future. It does not. *See* Pl.'s Reply at 13. EPIC challenges only the defendants' past failure to conduct or release adequate PIAs before Secretary Ross issued his decision on March 26, 2018. *See, e.g.*, Pl.'s Reply at 10–13; Compl. ¶¶ 64–76. The Court therefore need not consider whether a different claim premised on future acts or omissions could proceed.

8-2. As the D.C. Circuit has explained, "halting" the "collection of ... data" cannot redress an informational injury under the E-Government Act because "ordering the defendants *not* to collect ... data only *negates* the need (if any) to prepare an impact assessment, making it *less* likely that EPIC will obtain the information it says is essential." *EPIC*, 878 F.3d at 380 (emphasis in original). Because the purported deprivation of information is not redressable through the relief requested, the Court cannot rely on it to establish irreparable harm.

Second, the plaintiff argues that its members suffered irreparable harm from Secretary Ross's failure to conduct a PIA and take privacy considerations into account before deciding to collect citizenship data. *See* Pl.'s Mot. at 29–31. The plaintiff acknowledges that this harm has already "mature[d]", *id.* at 30 (internal quotation marks omitted), and that the defendants will not change course absent judicial intervention, *see* Pl.'s Reply at 5, 7, but it nonetheless argues that "equitable intervention is necessary" before an "irretrievable commitment of resources" occurs that might render any future PIA a rubber stamp, *id.* at 15 (internal quotation marks omitted). The problem, however, is that the earliest "irretrievable commitment" the plaintiff identifies is the "printing, addressing, and mailing" of Census materials in June 2019. Pl.'s Mot. at 30 (internal quotation marks omitted). That event, still four months away, is not "of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm," *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (internal quotation marks omitted), particularly in an APA suit where summary judgment typically "serves

as the mechanism for deciding, as a matter of law, whether the agency action is ... consistent with the APA standard of review," *Sierra Club v. Mainella*, 459 F.Supp.2d 76, 90 (D.D.C. 2006). Given the possibility of resolving this suit on the merits through expedited summary judgment briefing, the plaintiff has not shown a present need for equitable relief to maintain the status quo. Further, another court has already permanently enjoined the Bureau from implementing the Census with a citizenship question. *See New York v. U.S. Dep't of Commerce*, 351 F.Supp.3d at 679–80, 2019 WL 190285, at *125. Thus, the prospect of printing and mailing questionnaires that include the citizenship question is far from "certain," *Wisconsin Gas Co.*, 758 F.2d at 674, and will only occur if the Bureau successfully challenges the injunction on appeal.

Finally, the plaintiff argues that its members will be irreparably harmed if and when their own citizenship data is collected. But this harm, too, is neither imminent nor certain. The parties agree that the Bureau will not mail any questionnaires until January 2020 at the earliest. Pl.'s Reply at 2, 14; Defs.' Opp'n at 26–27. And, again, even that will only happen if the permanent injunction already in effect is vacated or reversed on appeal.

In short, the plaintiff has not demonstrated a "certain" injury "of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Wisconsin Gas Co.*, 758 F.2d at 674 (emphasis and internal quotation marks omitted). That failure alone, like the failure to show a likelihood of success on the merits, provides an independent ground for denying its motion. *Navajo Nation*, 292 F.Supp.3d at 512.

IV. CONCLUSION

For the foregoing reasons, the Court will deny the plaintiff's motion for a preliminary injunction. A separate order accompanies this memorandum opinion.

/s/
DABNEY L. FRIEDRICH
United States District Judge

February 8, 2019

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER, *Plaintiff*, v. U.S. DEPARTMENT OF COMMERCE, *et al*., *Defendants*.	No. 18-cv-2711 (DLF)

ORDER

For the reasons stated in the accompanying memorandum opinion, it is

ORDERED that plaintiff's Motion for a Preliminary Injunction, Dkt. 8, is **DENIED**.

/s/
DABNEY L. FRIEDRICH
United States District Judge

February 8, 2019

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER, *Plaintiff*, v. U.S. DEPARTMENT OF COMMERCE, *et al*., *Defendants*.	No. 18-cv-2711 (DLF)

MINUTE ORDER

On June 28, 2019, the U.S. Court of Appeals for the D.C. Circuit reviewed this Court's denial of Epic's motion for a preliminary injunction. *See Elec. Privacy Info. Ctr. v. U.S. Dep't of Commerce and Bureau of the Census*, 928 F.3d 95 (D.C. Cir. 2019). The Circuit held "that EPIC lacks standing as a matter of law." *Id.* at 104. On that ground, it vacated this Court's denial of the preliminary injunction and remanded "for the purpose of dismissal." *Id.* at 105. On October 2, 2019, the mandate from the Circuit issued. As such, this case is DISMISSED for lack of jurisdiction. The Clerk of Courts is directed to close this case. So Ordered by Judge Dabney L. Friedrich on October 3, 2019.

APPENDIX H

STATUTORY PROVISIONS

1. The United States Constitution provides, in relevant part:

U.S. Const. Art. I, § 2, Cl. 3

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

* * * * *

2. The Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237, as amended and codified at 5 U.S.C. §§ 551 *et seq*., provides, in relevant part:

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title

or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

* * * * *

3. Title 13 of the United States Code provides, in relevant part:

§ 2. Bureau of the Census

The Bureau is continued as an agency within, and under the jurisdiction of, the Department of Commerce.

§ 5. Questionnaires; number, form, and scope of inquiries

The Secretary shall prepare questionnaires, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title.

§ 141. Population and other census information

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is

authorized to obtain such other census information as necessary.

§ 221. Refusal or neglect to answer questions; false answers

(a) Whoever, being over eighteen years of age, refuses or willfully neglects, when requested by the Secretary, or by any other authorized officer or employee of the Department of Commerce or bureau or agency thereof acting under the instructions of the Secretary or authorized officer, to answer, to the best of his knowledge, any of the questions on any schedule submitted to him in connection with any census or survey provided for by subchapters I, II, IV, and V of chapter 5 of this title, applying to himself or to the family to which he belongs or is related, or to the farm or farms of which he or his family is the occupant, shall be fined not more than $100.

(b) Whoever, when answering questions described in subsection (a) of this section, and under the conditions or circumstances described in such subsection, willfully gives any answer that is false, shall be fined not more than $500.

(c) Notwithstanding any other provision of this title, no person shall be compelled to disclose information relative to his religious beliefs or to membership in a religious body.

* * * * *

5. Title 44 of the United States Code provides, in relevant part:

§ 3501. Purposes

The purposes of this subchapter are to—

* * *

(4) improve the quality and use of Federal information to strengthen decisionmaking, accountability, and openness in Government and society;

§ 3502. Definitions

As used in this subchapter—

* * *

(3) the term "collection of information"--

(A) means the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for either--

(i) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or

(ii) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes; and

(B) shall not include a collection of information described under section 3518(c)(1);

* * * * *

6. The E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, provides, in relevant part:

An Act

To enhance the management and promotion of electronic Government services and processes by establishing a Federal Chief Information Officer within the Office of Management and Budget, and by establishing a broad framework of measures that require using Internet-based information technology to enhance citizen access to Government information and services, and for other purposes.

* * *

SEC. 2. FINDINGS AND PURPOSES.

(a) Findings.—Congress finds the following:

(1) The use of computers and the Internet is rapidly transforming societal interactions and the relationships among citizens, private businesses, and the Government.

(2) The Federal Government has had uneven success in applying advances in information technology to enhance governmental functions and services, achieve more efficient performance, increase access to Government information, and increase citizen participation in Government.

(3) Most Internet-based services of the Federal Government are developed and presented separately, according to the jurisdictional boundaries of an individual department or agency, rather than being integrated cooperatively according to function or topic.

(4) Internet-based Government services involving interagency cooperation are especially difficult to develop and promote, in part because of a lack of sufficient funding mechanisms to support such interagency cooperation.

(5) Electronic Government has its impact through improved Government performance and outcomes within and across agencies.

(6) Electronic Government is a critical element in the management of Government, to be implemented as part of a management framework that also addresses finance, procurement, human capital, and other challenges to improve the performance of Government.

(7) To take full advantage of the improved Government performance that can be achieved through the use of Internet-based technology requires strong leadership, better organization, improved interagency collaboration, and more focused oversight of agency compliance with statutes related to information resource management.

(b) Purposes.—The purposes of this Act are the following:

(1) To provide effective leadership of Federal Government efforts to develop and promote electronic Government services and processes by establishing an Administrator of a new Office of Electronic Government within the Office of Management and Budget.

(2) To promote use of the Internet and other information technologies to provide increased opportunities for citizen participation in Government.

(3) To promote interagency collaboration in providing electronic Government services, where this collaboration would improve the service to citizens by integrating related functions, and in the use of internal electronic Government processes, where this collaboration would improve the efficiency and effectiveness of the processes.

(4) To improve the ability of the Government to achieve agency missions and program performance goals.

(5) To promote the use of the Internet and emerging technologies within and across Government agencies to provide citizen-centric Government information and services.

(6) To reduce costs and burdens for businesses and other Government entities.

(7) To promote better informed decisionmaking by policy makers.

(8) To promote access to high quality Government information and services across multiple channels.

(9) To make the Federal Government more transparent and accountable.

(10) To transform agency operations by utilizing, where appropriate, best practices from public and private sector organizations.

(11) To provide enhanced access to Government information and services in a manner consistent with laws regarding protection of personal privacy, national security, records retention, access for persons with disabilities, and other relevant laws.

* * *

TITLE II—FEDERAL MANAGEMENT AND PROMOTION OF ELECTRONIC GOVERNMENT SERVICES

SEC. 201. DEFINITIONS.

Except as otherwise provided, in this title the definitions under sections 3502 and 3601 of title 44, United States Code, shall apply.

* * *

SEC. 208. PRIVACY PROVISIONS.

(a) Purpose.—The purpose of this section is to ensure sufficient protections for the privacy of personal information as agencies implement citizen-centered electronic Government.

(b) Privacy Impact Assessments.—

(1) Responsibilities of agencies.—

(A) In general.—An agency shall take actions described under subparagraph (B) before—

(i) developing or procuring information technology that collects, maintains, or disseminates information that is in an identifiable form; or

(ii) initiating a new collection of information that—

(I) will be collected, maintained, or disseminated using information technology; and

(II) includes any information in an identifiable form permitting

the physical or online contacting of a specific individual, if identical questions have been posed to, or identical reporting requirements imposed on, 10 or more persons, other than agencies, instrumentalities, or employees of the Federal Government.

(B) Agency activities.—To the extent required under subparagraph (A), each agency shall—

(i) conduct a privacy impact assessment;

(ii) ensure the review of the privacy impact assessment by the Chief Information Officer, or equivalent official, as determined by the head of the agency; and

(iii) if practicable, after completion of the review under clause (ii), make the privacy impact assessment publicly available through the website of the agency, publication in the Federal Register, or other means.

(C) Sensitive information.—Subparagraph (B)(iii) may be modified or waived for security reasons, or to protect classified, sensitive, or private information contained in an assessment.

(D) Copy to director.—Agencies shall provide the Director with a copy of the

privacy impact assessment for each system for which funding is requested.

(2) Contents of a privacy impact assessment.—

(A) In general.—The Director shall issue guidance to agencies specifying the required contents of a privacy impact assessment.

(B) Guidance.—The guidance shall—

(i) ensure that a privacy impact assessment is commensurate with the size of the information system being assessed, the sensitivity of information that is in an identifiable form in that system, and the risk of harm from unauthorized release of that information; and

(ii) require that a privacy impact assessment address—

(I) what information is to be collected;

(II) why the information is being collected;

(III) the intended use of the agency of the information;

(IV) with whom the information will be shared;

(V) what notice or opportunities for consent would be provided to individuals regarding what information is collected and how that information is shared;

(VI) how the information will be secured; and

(VII) whether a system of records is being created under section 552a of title 5, United States Code, (commonly referred to as the ``Privacy Act'').

(3) Responsibilities of the director.—The Director shall—

(A) develop policies and guidelines for agencies on the conduct of privacy impact assessments;

(B) oversee the implementation of the privacy impact assessment process throughout the Government; and

(C) require agencies to conduct privacy impact assessments of existing information systems or ongoing collections of information that is in an identifiable form as the Director determines appropriate.

(c) Privacy Protections on Agency Websites.—

(1) Privacy policies on websites.—

(A) Guidelines for notices.—The Director shall develop guidance for privacy notices on agency websites

used by the public.

(B) Contents.—The guidance shall require that a privacy notice address, consistent with section 552a of title 5, United States Code—

(i) what information is to be collected;

(ii) why the information is being collected;

(iii) the intended use of the agency of the information;

(iv) with whom the information will be shared;

(v) what notice or opportunities for consent would be provided to individuals regarding what information is collected and how that information is shared;

(vi) how the information will be secured; and

(vii) the rights of the individual under section 552a of title 5, United States Code (commonly referred to as the ``Privacy Act''), and other laws relevant to the protection of the privacy of an individual.

(2) Privacy policies in machine-readable formats.—The Director shall issue guidance requiring agencies to translate privacy policies into a standardized machine-readable format.

(d) Definition.—In this section, the term "identifiable form" means any representation of information that permits the identity of an individual to whom the information applies to be reasonably inferred by either direct or indirect means.