

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

ELECTRONIC PRIVACY INFORMATION  
CENTER,

Plaintiff,

v.

PRESIDENTIAL ADVISORY  
COMMISSION ON ELECTION  
INTEGRITY, *et al.*,

Defendants.

Civil Action No. 1:17-cv-1320 (CKK)

**DEFENDANTS' SURREPLY IN OPPOSITION TO PLAINTIFF'S EMERGENCY  
MOTION FOR A TEMPORARY RESTRAINING ORDER**

As stated in defendants' memorandum in opposition to plaintiff's emergency motion for a temporary restraining order ("TRO") (Doc. 8, at 6), it is well settled that, in order to establish the injury-in-fact needed to establish Article III standing as a representative of its members, a plaintiff-organization such as the Electronic Privacy Information Center ("EPIC") must "make specific allegations establishing that at least one identified member had suffered or would suffer harm" by "naming the affected member[]" and showing that he or she has "suffered the requisite harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 498-99 (2009). The same holds true at the subsequent TRO stage of a case, at which an associational plaintiff seeking injunctive relief must (among other things) demonstrate with evidence an imminent injury warranting extraordinary judicial relief. For the same reasons that the association must show an injury-in-fact through a

specifically named member to establish representational standing, the association must show an imminent injury through such a member to warrant TRO relief.

As defendants previously pointed out, EPIC's complaint failed to make any "specific allegations" naming any one of its members who would be harmed. *See Earth Island*, 555 U.S. at 498. Yesterday, for the first time in its reply brief, EPIC has filed declarations from nine members of its Advisory Board who claim an injury from the release of their voter-registration information. *See* Doc. 13, Ex. 1-9. Those Board members assert that they are registered to vote in six jurisdictions: California (Ex. 1, 3, 6), the District of Columbia (Ex. 5), Maine (Ex. 9), Maryland (Ex. 2), Massachusetts (Ex. 4, 8), and Minnesota (Ex. 7). However, as set forth below, EPIC's belated evidentiary showing is insufficient to establish, on a representational basis, either its Article III standing or an imminent injury warranting a TRO. These reasons further support and bolster the reasons set forth in defendants' opposition memorandum for the Court's lack of jurisdiction in this matter.

EPIC does not cite any case supporting the proposition that an association has standing to sue on behalf of *Advisory Board* members. In fact, a closer examination sparked by the declarations submitted by the Advisory Board members indicates that EPIC may not have "members" at all in the traditional sense, on whose behalf it could establish standing. *See* About EPIC, <http://epic.org/epic/about.html> (last visited July 6, 2017) (EPIC "ha[s] no clients, no customers, and no shareholders"). Nor has EPIC shown that it is the "functional equivalent of a traditional membership organization" that might be entitled to representational standing, because it has not shown, or even alleged, that it is "a representative of a special group," that its affiliates (such as the Advisory Board members) possess the "indicia of membership," such as electing the

officers and financing its activities, and that its “fortunes [are] tied closely to those of any members.” *See Washington Legal Found. v. Leavitt*, 477 F. Supp. 2d 202, 209-12 (D.D.C. 2007); *see also Electr. Privacy Info. Ctr. v. U.S. Dep’t of Educ.*, 48 F. Supp. 3d 1, 22 (D.D.C. 2014) (noting that “defendant raises serious questions about whether EPIC is an association made up of members that may avail itself of the associational standing doctrine” but declining to reach the issue). In any event, Advisory Board “members” would not be the type of members on whose behalf an organization could sue, as such individuals’ role is to *advise* the organization -- the organization does not “represent” them. *See About EPIC*, <http://epic.org/epic/about.html> (last visited July 6, 2017) (“EPIC works closely with a distinguished advisory board”). Accordingly, EPIC cannot establish standing on a representational basis.

Even assuming EPIC could sue on behalf of its Advisory Board members, those members’ allegations of imminent injury caused by a feared “disclosure” of their personal information that will allegedly be transferred to the Commission (*see* Decls. ¶ 7) are controverted by the current facts. At present, the declarants’ information is not at risk of imminent transfer to the Commission by the states in which they are registered to vote. EPIC’s own website shows that five of the six relevant jurisdictions have rejected the Commission’s request for voter information. *See* <https://epic.org/privacy/voting/pacei/> (attached as Ex. 1). And the sixth jurisdiction – Maine – has recently rejected the Commission’s information request. *See* <http://www.maine.gov/sos/news/2017/denyvoterreginfo.html> (attached as Ex. 2); *see also* Ex. 3 (copy of letter from Maine Secretary of State denying request). Nor have plaintiff’s declarants established that the feared “disclosure” of information transferred to the Commission is anything

more than speculative. The Commission has explained that the “voter rolls themselves will not be released to the public.” Kobach Decl. (Doc. 8-1) ¶ 5.

In addition, even if EPIC could proceed in this case as a representative of its Advisory Board members, it could obtain relief only for those members for whom it has demonstrated a relevant injury. Under Article III, “[t]he remedy” sought must “be limited to the inadequacy that produced the injury in fact that the plaintiff has established.” *Lewis v. Casey*, 518 U.S. 343, 357 (1996). “The actual-injury requirement would hardly serve [its] purpose . . . of preventing courts from undertaking tasks assigned to the political branches[,] if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration.” *Id.*; see *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). Equitable principles independently require that injunctions be no broader than “necessary to provide complete relief to the plaintiffs.” *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation omitted). Thus, even if a TRO might otherwise be appropriate, the TRO could properly extend no further than a decree preventing the transfer of information concerning those Advisory Board members who would suffer an imminent injury from such a transfer.

In sum, EPIC lacks standing for the following reasons – first, EPIC does not have standing in its own right (Defs.’ Opp. 6) because its advocacy and educational efforts in furtherance of its mission (Pl.’s Reply 20-21) are not Article III injuries and defendants’ actions have not “perceptibly impaired” EPIC’s activities. *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 920 (D.C. Cir. 2015); *Electr. Privacy Info. Ctr.*, 48 F. Supp. 3d at 22-24 (no standing where defendant’s action “has not impeded EPIC’s programmatic concerns and activities, but

fueled them”). Second, EPIC is not a membership organization entitled to avail itself of representational standing, *Washington Legal Found.*, 477 F. Supp. 2d at 209-12. Third, even if it was, its Advisory Board “members” are not members on whose behalf EPIC can sue. *Id.* (discussing “indicia of membership”). Fourth, even if EPIC could sue on behalf of Advisory Board members with cognizable Article III injuries, the declarations submitted do not establish such an injury here. The declarants’ voter information is not at risk of being transferred to the Commission because their states are declining to do so and, even if it was, it is purely speculative at this point that the transfer will result in any “disclosure” that would infringe the declarants’ privacy interests. Exs. 1-3; Kobach Decl. (Doc. 8-1) ¶ 5. Finally, to the extent that the Court finds that any declarant or declarants has or have established the necessary injury (which it shouldn’t), any TRO should be limited to the state or states in which those declarants are registered to vote and should be no broader than that. *Madsen*, 512 U.S. at 765.

EPIC therefore has failed to establish its Article III standing or that it is entitled to entry of a TRO. Indeed, EPIC’s failure to name any injured member at the pleading stage should alone warrant dismissal of its complaint for want of Article III jurisdiction.

**CONCLUSION**

For the foregoing reasons and the reasons stated in defendants' opposition memorandum, the Court should deny plaintiff's emergency motion for a temporary restraining order.

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Respectfully submitted,

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