

[ARGUED NOVEMBER 21, 2017; DECIDED DECEMBER 26, 2017]

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

ELECTRONIC PRIVACY INFORMATION
CENTER,

Plaintiff-Appellant,

v.

EXECUTIVE OFFICE OF THE PRESIDENT
OF THE UNITED STATES, et al.,¹

Defendants-Appellees.

No. 17-5171

OPPOSITION TO MOTION TO VACATE

This Court's decision of December 26, 2017, held that plaintiff lacked standing. Plaintiff does not ask the Court to rehear the case. It asks, instead, that the Court vacate its decision in light of the Executive Order that terminated the Presidential Advisory Commission on Election Integrity. *See* Exec. Order No. 13,820, 83 Fed. Reg. 969 (Jan. 3, 2018).

¹ The Presidential Advisory Commission on Election Integrity has been terminated. *See* Exec. Order No. 13,820, 83 Fed. Reg. 969 (Jan. 3, 2018). Accordingly, the Commission and persons sued in their capacity as members of the Commission are no longer parties.

Plaintiff notes that the Commission will no longer be seeking to collect voter information and urges that its request to enjoin the further collection of voter data is thus moot.

Even as it asks this Court to vacate its standing ruling, plaintiff explicitly declares its intention to continue proceedings in the district court. Plaintiff's request for injunctive relief is, in fact, not moot because plaintiff sought not only to prevent the Commission from collecting data, but also to require other government entities still before the Court to delete data that had already been collected. No basis exists for vacating the Court's standing ruling to allow plaintiff to continue this litigation.

STATEMENT

This case involves a challenge to an effort by the Presidential Advisory Commission on Election Integrity to collect publicly available voter data. Plaintiff instituted this action against the Commission, several of its members in their official capacities, the Executive Office of the President, the Office of the Vice President, the Director of White House Information Technology, the General Services Administration, the Department of Defense, the U.S. Digital Service, and the Executive Committee for Presidential Information Technology.

Plaintiff sought a preliminary injunction that would have prohibited the Commission from collecting any further data and required the defendants to “immediately delete and disgorge any voter data already collected or hereafter received.” Proposed Order, Dkt. No. 35-6 (July 13, 2017). The district court denied the requested injunction on the ground that neither the Commission nor the other entities sued by plaintiff who had taken actions relevant here was an “agency” under the Administrative Procedure Act, and plaintiff therefore lacked a cause of action.

Plaintiff appealed, and on December 26, 2017, this Court affirmed on alternative grounds, concluding that plaintiff had not demonstrated that it had a likelihood of establishing standing.

On January 3, 2018, the President terminated the Commission by Executive Order. *See* Exec. Order No. 13,820, 83 Fed. Reg. 969 (Jan. 3, 2018). As the government has indicated in filings in other cases, the voter data that had been collected by the Commission remains, in encrypted form, on a White House server; although the government intends to destroy the data without using it, resolution of outstanding litigation and input from the National Archives and Records Administration is needed before the government can take that step. *See* Third Decl. of Charles C. Herndon, Dkt.

No. 82-2, *Joyner v. Presidential Advisory Comm'n on Election Integrity*, Civ.

No. 17-22568-MGC (S.D. Fla. Jan. 16, 2018).

ARGUMENT

Plaintiff's request for vacatur fails at every level. This Court did not issue a ruling on the merits of a dispute that has become moot. Rather, this Court concluded that plaintiff lacked standing, and affirmed the denial of a preliminary injunction seeking the same relief that plaintiff now wishes to continue to pursue in district court. Plaintiff's request for a preliminary injunction is not moot; the defect in plaintiff's case was, and is, that plaintiff lacks standing for the reasons given by this Court in its opinion. The motion to vacate that opinion should be denied.

1. Plaintiff urges that the case is moot because "the party [plaintiff] urged this Court to enjoin (the Commission) has ceased to exist, while the activity [plaintiff] sought to preliminarily halt (the Commission's collection of data) has come to a permanent and irrevocable end." Mot. 4-5. This argument disregards the scope of plaintiff's requested injunction in at least two respects.

First, plaintiff did not merely seek to halt the collection of data; it also asked the district court to order the defendants to "immediately delete and

disgorge any voter data already collected or hereafter received.” Proposed Order, Dkt. No. 35-6 (July 13, 2017). Although the defendants will no longer be collecting data, the defendants have not yet deleted and disgorged the data that has been received to date. This case is thus unlike *Animal Legal Defense Fund v. Shalala*, 53 F.3d 363 (D.C. Cir. 1995), in which no relief could be awarded to the plaintiff on appeal because the only relief sought in the motion for a preliminary injunction was an order seeking access to a meeting that, by the time of this Court’s decision, had already occurred. *See id.* at 366.

Second, plaintiff did not merely seek to enjoin the Commission, but also sought to enjoin other entities that remain in existence and remain parties to this case. Plaintiff urged at considerable length that the Executive Office of the President and its components, the Director of White House Information Technology, and the General Services Administration were proper defendants in an APA action and that an injunction could be issued against them. *See, e.g.*, Appellant’s Br. 35-36 (discussing Director of White House Information Technology); *id.* at 39-42 (section captioned “The Defendant [Executive Office of the President] and its subcomponents are also agencies under the *Soucie* test.”); *id.* at 42-43 (section captioned “The

Defendant [General Services Administration], which is an agency, has a mandatory, nondiscretionary duty to participate in the Commission's collection activities."). Those entities still exist, and plaintiff's request for an injunction requiring them to delete and disgorge voter data that has been collected is not moot.

Plaintiff's reliance on the Supreme Court's decision in *Church of Scientology v. United States*, 506 U.S. 9 (1992), underscores the errors in its analysis. That case concerned recordings of conversations that had already been disclosed to the Internal Revenue Service. *Church of Scientology*, 506 U.S. at 10-11. The Supreme Court held that the case was not moot, because even though a court could no longer prohibit the federal government from receiving the information, "a court does have power to effectuate a partial remedy by ordering the Government to destroy or return any and all copies it may have in its possession." *Id.* at 13. Here, similarly, if plaintiff had standing and a likelihood of success on the merits, a court could still issue a similar order – an order that plaintiff has expressly requested.

2. Although plaintiff asked the district court to require the defendants to "immediately delete and disgorge any voter data already collected or hereafter received," Proposed Order, Dkt. No. 35-6, plaintiff

appears to suggest that its appeal was limited to the denial of relief prohibiting additional collection of voter data. *See* Mot. 8. Plaintiff never stated that it sought relief from this Court narrower than the relief it sought in the district court, and certainly never committed to acceding to the district court's order insofar as it denied plaintiff's request to delete existing data.

This Court reviewed a district-court order denying a requested injunction, and its analysis applies equally to all aspects of the relief sought from the district court. It is this Court's opinion, and not the termination of the Commission, that prevents plaintiff from seeking the deletion of voter data. Plaintiff is thus mistaken to suggest that it is precluded from seeking further review. Plaintiff has not sought rehearing, and could not satisfy the standard for rehearing or certiorari, but plaintiff is not precluded from doing so by the termination of the Commission.

3. Plaintiff also errs in suggesting that it is seeking relief in district court other than that sought in its preliminary-injunction appeal and that it may have standing to seek such relief. *See* Mot. 8 ("[T]here remain other issues left for the District Court to resolve, such as the final disposition of [plaintiff's] Federal Advisory Committee Act and Fifth Amendment

claims”) (citing Second Am. Compl ¶¶ 72-84 [JA 144-46]). The only relief sought in the complaint was the relief sought in the motion for a preliminary injunction: plaintiff asked the court to prohibit collection of voter data, to “securely delete and properly disgorge any personal voter data collected or subsequently received,” and “to promptly conduct a privacy impact assessment prior to the collection of personal voter data.” Second Am. Compl. Requested Relief [JA 146]. As explained in this Court’s opinion, plaintiff lacks standing to pursue this relief. Plaintiff does not explain why the grounds on which this relief is sought should affect whether plaintiff is entitled to pursue it.

In sum, plaintiff offers no basis for vacating this Court’s standing ruling to permit it to continue to seek relief that it unsuccessfully sought in its request for a preliminary injunction.

CONCLUSION

The motion to vacate should be denied.

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

JESSIE K. LIU
United States Attorney

MARK B. STERN

s/ Daniel Tenny

DANIEL TENNY

(202) 514-1838

Attorneys, Appellate Staff

Civil Division

U.S. Department of Justice

950 Pennsylvania Ave., N.W.

Room 7215

Washington, D.C. 20530

JANUARY 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that this opposition satisfies the type-volume requirements set out in Rule 27(d)(2)(A) because it contains 1,485 words. This motion was prepared using Microsoft Word 2013 in Book Antiqua, 14-point font, a proportionally spaced typeface.

s/ Daniel Tenny

Daniel Tenny

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2018, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ Daniel Tenny

Daniel Tenny