IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMON CAUSE, *et al.*,

Plaintiffs,

v.

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

Defendants.

Case No. 1:17-cv-1398 (RCL)

Oral Argument Requested

PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

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INTRODUCTION

The Presidential Advisory Commission on Election Integrity is an advisory committee in name only. Although the Commission was established to prepare a "report" on "voting processes," its actions go far beyond that—and far beyond what an advisory committee is permitted to do.

Led by Vice Chair Kris W. Kobach, and acting in concert with the Department of Homeland Security, the Commission is pursuing an unlawful investigation of individual members of the voting public to uncover alleged voter fraud. In our system of government, advisory committees and their leaders cannot investigate the views, associations, and activities of American voters. Nor can federal agencies disclose individuals' personal information in furtherance of such an unauthorized investigation. But that is what is happening here: the Commission has aggregated the state voting data of millions of Americans—including First Amendment-protected data concerning voters' individual political associations—and has begun the process of crosschecking this data against data held by DHS and other federal agencies. The Commission's avowed goal is to identify any voters it believes are improperly registered, and to target them for removal from the voter rolls and referral for potential enforcement. This conduct is not only highly irregular. It violates both the Privacy Act and the Administrative Procedure Act and is *ultra vires*—without any legal authority.

Resolving the merits of Plaintiffs' claims is not for today. Instead, the question before this Court is whether, taking Plaintiffs' well-pleaded factual allegations as true, Plaintiffs' claims are plausible on their face and legally cognizable. The answer here is demonstrably yes. As recounted below, in the operative complaint Plaintiffs have made extensive allegations concerning Defendants' unauthorized investigation of individual voters that are more than sufficient to state a legal claim.

In response, Defendants do not dispute that the Commission is collecting information that is protected by the First Amendment or that disclosure to the Commission by DHS of individuals' information implicates the Privacy Act. More telling, Defendants do not offer *any* legal basis in support of the Commission's investigative activities. Instead, Defendants seek to recast this suit as a mere challenge to "research activities" that the Commission is undertaking to prepare a "recommendatory report." To be clear, Plaintiffs are not disputing the President's ability to convene a properly functioning advisory committee; previous presidents have convened such commissions to study electoral processes within the bounds of the law. But Defendants cannot credibly maintain that this Commission is functioning only as that. The Commission has so grossly exceeded its mandate to "research" and "report" that it is acting as a self-appointed investigator of alleged incidents of voter fraud, voter by voter. Plaintiffs spell out these facts in detail. And so in seeking dismissal of Plaintiffs' suit, Defendants are forced to dispute the veracity of Plaintiffs' allegations, or to ignore them all together. Neither is permissible at the motion to dismiss stage.

Defendants also seek to evade judicial review by claiming that Plaintiffs have failed to allege sufficient injury in fact and that this Court lacks jurisdiction. But Plaintiffs' allegations, and the fundamental nature of the privacy interests at stake here, demonstrate otherwise. The Executive Branch's inquiry into personal information detailing the views and associations of individual Americans, including the individual Plaintiffs, constitutes concrete harm. And although this invasion of Plaintiffs' fundamental privacy interests—which is ongoing—suffices for standing purposes, the tangible threat of further injury that Plaintiffs face from Defendants' continued maintenance and use of this data requires the Court to review the challenged conduct.

Indeed, it has only become more clear since Plaintiffs filed suit that the Court need not speculate at all to conclude that Defendants' conduct has injured Plaintiffs. As merely one example, even though Defendants have claimed, including at a hearing before this Court, that Plaintiffs' allegations of collaboration between the Commission and DHS are "purely speculative," Defendants have now disclosed at least 23 communications between the Commission and DHS, or among Commission and other staff concerning DHS. Plaintiffs' allegations stand on their own, but Defendants have now provided evidentiary support for them. Defendants' characterization of Plaintiffs' claims as conjectural cannot stand.

For these reasons, as further explained below, Plaintiffs have amply stated an actionable claim, and Defendants' motion to dismiss should be denied.

BACKGROUND

I. THE RIGHT OF INDIVIDUALS TO BE FREE FROM GOVERNMENTAL INTRUSION IN THEIR PRIVATE LIVES AND ASSOCIATIONS

This case implicates principles of individual privacy, freedom of association, and separation of powers—principles that are central to our system of democratic government and embedded in our laws. The Constitution guarantees protection against unwarranted governmental interference into one's personal life, associations, and viewpoints. *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). Courts have long recognized this sphere of privacy and have set aside governmental action that threatens it, including in cases where the government sought to uncover lists of individuals who associated with a particular group, where it sought to punish individuals for their association with a particular political party, and where it sought to collect personal information on individuals without their consent.[1]

[1] *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449, 462-63 (1958) (striking down court order that required membership list to be published); *Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232, 246 (1967) (striking down decision to prohibit professional licensure to members of the Communist

Recognizing the core importance of these rights, Congress has enacted laws to protect them. Congress passed one such law—the Privacy Act of 1974, 5 U.S.C. § 552a—amidst Watergate-era concerns regarding the Executive Branch's encroachment on individuals' privacy. As Senator Ervin, a sponsor of the Privacy Act, stated, the Act recognizes that

> despite our reverence for the constitutional principles of limited Government and freedom of the individual, Government is in danger of tilting the scales against those concepts by means of its information-gathering tactics and its technical capacity to store and distribute information. When this quite natural tendency of Government to acquire and keep and share information about citizens is enhanced by computer technology and when it is subjected to the unrestrained motives of countless political administrators, the resulting threat to individual privacy make it necessary for Congress to reaffirm the principle of limited, responsive Government on behalf of freedom.

S. Rep. No. 93-1183 (1974) (the "Senate Report"), *reprinted in* 1974 U.S.C.C.A.N. 6916, 1974 WL 186915, *3. The Privacy Act, thus, was designed to "promote governmental respect for the privacy of citizens by requiring all departments and agencies of the executive branch and their employees to observe certain constitutional rules in the computerization, collection, management, use, and disclosure of personal information about individuals." *Id.* at *1.

The Privacy Act prohibits the "disclos[ure of] any record which is contained in a system of records by any means of communication to any person, or to another agency," unless certain exceptions apply. 5 U.S.C. § 552a(b). The Act also provides that an agency shall "maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity." *Id.* § 552a(e)(7). Subsection (e)(7) was directed to the "planning stage of *any executive branch*

party); *Albright v. United States*, 631 F.2d 915, 919 (D.C. Cir. 1980) ("This penumbra of privacy can be invaded, under certain circumstances, by the mere inquiry of government into an individual's exercise of First Amendment rights."); *see id.* (collecting cases).

programs being designed for the principal purpose of identifying Americans who exercise their rights under the First Amendment and of taking note of how and when such activities are exercised." Senate Report, 1974 WL 186915 at *54 (emphasis added). It is "aimed particularly at preventing collection of protected information not immediately needed, about law-abiding Americans, on the off-chance that Government or the particular agency might possibly have to deal with them in the future." *Id.*

Overall, the Privacy Act is "designed to prevent . . . illegal, unwise, overbroad, investigation[s]," the likes of which the Act's authors saw in the "over-zealous investigators, and the curiosity of some government administrators," during the Watergate era. *Id.* at *1. As such, the Act "provides for various sorts of civil relief to individuals aggrieved by failures on the Government's part to comply with [its] requirements." *Doe v. Chao*, 540 U.S. 614, 618 (2004); *see* 5 U.S.C. § 552a(g). Most relevant here, the Act provides that "[w]henever any agency . . . fails to comply with any" of the Act's provisions "in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency" in federal court. 5 U.S.C. § 552a(g)(1)(D).

In addition to enacting statutory protections against government intrusions on individuals' privacy and First Amendment interests, Congress has also long recognized the right of individuals to be free from arbitrary and unauthorized government action. The Administrative Procedure Act ("APA"), which was passed in 1946 to ensure proper checks on the Executive following the New Deal, empowers courts to "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see id.* § 704.

II. PLAINTIFFS' ALLEGATIONS

A. The Commission's Establishment and Unauthorized Investigation

The Commission was established by Executive Order on May 11, 2017, following repeated vows by President Trump to launch a "major investigation into VOTER FRAUD." Am. Compl. ¶ 37 (Sept. 13, 2017), ECF No. 21; *see id.* ¶¶ 38-40; Exec. Order No. 13,799, 82 Fed. Reg. 22,389 (May 11, 2017) (the "Executive Order"). According to the Executive Order, the Commission is supposed to be a "solely advisory" body whose "[m]ission" is to study, "consistent with applicable law," the "registration and voting processes used in Federal elections." *Id.* ¶ 41. The Commission is charged with preparing a report that will identify "laws, rules, policies, activities, strategies, and practices" that speak to the "integrity of voting processes used in Federal elections" as well as "vulnerabilities in voting systems and practices used for Federal elections." Executive Order § 3. The Charter for the Commission provides for up to 15 Commission members; a dedicated, full-time staff; an annual budget of approximately $250,000 for Fiscal Years 2017 and 2018; and administrative and support services to be furnished by the General Services Administration. Am. Compl. ¶¶ 42, 44. The Commission acts by votes of its membership. *Id.* ¶ 47.

Since its establishment, the now 12-member Commission,[2] led by Kobach, has "undertaken multiple actions that . . . far outstrip [its] limited mission." *Id.* at 3. As explained in the operative complaint and further detailed below, the Commission has commenced a "sweeping, first-of-its-kind investigation into alleged voting misconduct by individual American citizens." *Id.* ¶ 106(a). To fuel this effort, Kobach requested—and the Commission is now

[2] In October 2017, Commission member David Dunn passed away unexpectedly. *See* John Wagner, *Member of Trump's Voting Commission Dies During Surgery*, Wash. Post (Oct. 17, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/10/17/member-of-trumps-voting-fraud-commission-dies-during-surgery/?utm_term=.7769986379a5.

maintaining—state voting data (including party affiliation and voting history) for millions of Americans as well as state-supplied "evidence" of "instances of voter fraud or registration fraud." *Id.* ¶¶ 61, 80. Kobach has repeatedly stated—and a Commission spokesman has confirmed—that the Commission's intention to "crosscheck" this state voter data against other personal data housed within the federal government, including by DHS, "to determine if there are alleged fraudulently registered voters on the rolls." *Id.* ¶¶ 53-54. "Repeated references" were made at a Commission meeting "to referrals of individuals suspected of voter fraud to the [Department of Justice] for possible criminal prosecution." *Id.* ¶ 72. Kobach has written that "*every investigation*" the Commission undertakes will use the voter roll data the Commission has amassed "to 'confirm' the identity of individual American voters alleged to have committed fraud." *Id.* at 4, ¶ 55 (emphasis added).

The Commission's crosscheck is well underway. The Commission has already taken evidence and testimony "claiming that multiple specific individuals have fraudulently registered or voted," including, for example, materials urging "8,471 cases of *likely* duplicate voting be *investigated* for possible wrongdoing by the Commission." *Id.* ¶¶ 97, 106(g) (emphasis added); *see also id.* ¶¶ 56, 61, 80, 94, 96. Pursuant to Kobach's directive that Commission staff "'collect whatever data there is that's already in the possession of the federal government' that 'might be helpful' to the Commission's unauthorized voter fraud investigation," DHS has disclosed, and/or imminently will disclose, "naturalized citizens' data to the Commission without consent." *Id.* ¶ 6, 73; *see id.* ¶¶ 124-126. The Commission believes its investigation is bearing fruit: Kobach has proclaimed that he has "found 'proof'" within materials provided to the Commission" that "individual voters in New Hampshire" had "committed fraud." *Id.* ¶ 56.

The Commission's conduct has gone so far beyond its mission that Matthew Dunlap—one of several Commissioners who was not told about "the substance of the Commission's activities," *id.* ¶ 108—"has refused to provide data from citizens of his state (Maine) until there is clarity as to 'the Commission's goal,'" *id.* ¶ 78. Generally, the Commission has provided few details on its ongoing investigation, "keeping the public and certain Commission members in the dark as to the work that is ongoing." *Id.* ¶ 79.

B. The Injuries Caused to Plaintiffs by Defendants' Conduct

Defendants' conduct has injured and is continuing to injure Plaintiffs.

The Commission has collected and is maintaining personal data, including First Amendment-protected data, of Plaintiffs Cantler, Nakhnikian, and Kennedy, as well as that of Common Cause members. *See id.* ¶¶ 4, 6-9, 100-101; *see also* Nakhnikian Decl. ¶ 8 (attached as Ex. F); Cantler Decl. ¶¶ 10-12 (attached as Ex. A); Kennedy Decl. ¶ 6 (attached as Ex. D); McClenaghan Decl. ¶¶ 6-10 (attached as Ex. E); Flynn Decl. ¶ 13 (attached as Ex. B). The Commission has sought to maintain the data of Plaintiff Gutierrez and will collect it absent continued court intervention in an unrelated state proceeding. *Id.* ¶ 5; *see* Gutierrez Decl. ¶ 4 (attached as Ex. C). The inquiry into, collection, and maintenance of the data is an invasion of the individual Plaintiffs' personal privacy. Am. Compl. ¶¶ 3-9; 99-102; *see also* Flynn Decl. ¶¶ 24-26; Nakhnikian Decl. ¶¶ 10-11. Although this data is maintained by state officials for election purposes, it had not been made available to the federal government prior to the commencement of the Commission's investigation. Am. Compl. ¶ 54. Thus, Defendants' characterization of this data as "public," *see, e.g.*, Mem. in Supp. of Defs.' Mot. to Dismiss ("Defs.' Mot.") at 15 (Oct. 18, 2017), ECF No. 27-1, is a misnomer. This is personal data; it reveals, for example, Plaintiffs' birthdates, residential addresses, voting history, party affiliation, and social security information. And much of this data is not openly available to the public, but rather is accessible

only once a requester meets specified criteria. *See, e.g.*, Am. Compl. ¶¶ 9, 82; Cantler Decl. ¶¶ 7-12; McClenanghan Decl. ¶ 11. Moreover, although some of the data may be obtained in certain circumstances by members of the public who take the requisite steps—with strings attached, concerning the purposes for which it can be used—that is wholly different from the federal government collecting the data *en masse* and maintaining it for the purposes of an unauthorized investigation, without being transparent regarding data storage and security. *See* Am. Compl. ¶¶ 82-88; *see also* Cantler Decl. ¶¶ 7, 16; Nakhnikian Decl. ¶¶ 14-15; McClenanghan Decl.¶¶ 11, 13; Kennedy Decl. ¶ 14; Gutierrez Decl. ¶ 10; Flynn Decl. ¶¶ 24-26.

Defendants' collection and crosschecking of data revealing the individual Plaintiffs' views, expressions, and associations impedes their full participation in the political process. Am. Compl. ¶¶ 3-10; 99-102; *see* Cantler Decl. ¶ 11 ("I have and continue to be injured by the Commission's actions: they are an invasion of my personal privacy, they put my personal data at risk for theft, and they hinder my ability to fully participate in the political process without fear."); Nakhnikian Decl. ¶ 10 ("It undermines my confidence in our electoral system and hinders my ability to participate in the political process without fear of the federal government cataloguing data regarding my First Amendment activities."); Gutierrez Decl. ¶¶ 7, 9; Kennedy Decl. ¶ 5, 12; Flynn Decl. ¶¶ 21-26; McClenanghan Decl. ¶ 8.

As a result of the Commission's investigation, individual Plaintiffs are especially vulnerable to being falsely identified as ineligible to vote. Am. Compl. ¶¶ 3-9; 50; 57; 69; *see* Cantler Decl. ¶ 12, Nakhnikian Decl. ¶ 12; Kennedy Decl. ¶ 10 ("This risk is especially significant for naturalized citizens, like myself, whose data is already being disclosed and cross checked by the Commission . . . ."); ¶ 12 ("This is another effort to systemically suppress the voting capabilities of members of my community."); Gutierrez Decl. ¶ 8 ("This is particularly a

risk for me and other voters with minority surnames, especially Latino surnames, that are often overrepresented in cross check-lists."). The tactics the Commission is using here have disenfranchised eligible voters. Am. Compl. at 5 & ¶¶ 12, 50, 57, 69, 100; *see also, e.g.*, ¶¶ 13-16, 25-26; Kennedy Decl. ¶¶ 10-11; Gutierrez ¶ 9; Nakhnikian Decl. ¶¶ 12-14; McClenanghan Decl.¶ 12; Cantler ¶¶ 7, 15. In addition, the Commission's maintenance of the individual Plaintiffs' voter data creates security risks that present a substantial threat to them. Am. Compl. ¶¶ 87-88; *see* Cantler Decl. ¶ 16; Nakhnikian Decl. ¶ 15; Kennedy Decl. ¶ 14; Gutierrez Decl. ¶ 10; McClenanghan Decl. ¶ 13.

Plaintiff Common Cause has also been injured as a result of the Commission's actions. An organization dedicated to facilitating citizen engagement and participation in the political process, Common Cause has experienced substantial setbacks to its core programmatic activities by having to divert resources to combat the effects of Defendants' conduct. Am. Compl. ¶¶ 3-4, 101; Flynn Decl. ¶¶ 13-20; McClenanghan Decl. ¶¶ 9-12; *see also infra* at 18-23. In light of the scores of eligible voters that have deregistered in the wake of the Commission's data collection and investigation, Common Cause has diverted resources from activities such as advocating for the adoption of voter registration technology, same day voter registration, and online engagement, in order to dissuade the general public, as well as specific individuals, from deregistering. Flynn Decl. ¶¶ 13-20.

ARGUMENT

Plaintiffs' allegations concerning Defendants' unlawful invasion of their privacy and the Commission's and Kobach's unauthorized investigative actions more than adequately state a claim that is plausible on its face, which is all that is required at this stage of the case. Unable to justify their unprecedented and unlawful actions, Defendants primarily train their fire at two targets, arguing that this Court lacks jurisdiction, *see* Defs.' Mot. at 9-16, 35-37, and that the

Commission is not an agency subject to the Privacy Act and APA, *see id.* at 16-35. They miss on both counts. Defendants' standing arguments are refuted by well-settled law in this Circuit, and their claim that the Commission is not an agency belies reality. Under this Circuit's decisions, when a government body engages in actions that only federal agencies established by Congress are permitted to take, its unlawful activities are subject to review under the Privacy Act and the APA.

Finally, regardless of whether the Court finds that the Commission is an agency, Defendants have not proffered *any legal authority* in support of the novel proposition that a Commission formed by Executive Order to write a report can conduct a wide-sweeping fraud investigation of individual voters. That is because no such legal authority exists, and the Commission's actions are thus *ultra vires*.

Defendants' motion to dismiss, therefore, should be denied.

I. PLAINTIFFS HAVE ADEQUATELY PLEADED STANDING

Contrary to Defendants' assertions, both the individual Plaintiffs and Common Cause have standing. *See* Defs.' Mot. at 14-16 (individual Plaintiffs); *id.* at 10-14 (Common Cause). The individual Plaintiffs' injuries are concrete and legally cognizable. Common Cause has representational standing to seek redress for its members' injuries, and organizational standing because Defendants' actions have impeded activities that lie at the core of its mission.

To establish standing at the pleading stage, Plaintiffs must sufficiently allege "injury in fact, causation, and redressability." *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015). Defendants concede causation and redressability, challenging only whether Plaintiffs have asserted an injury in fact. "Injury in fact is the 'invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical.'" *Id.* (alteration in original) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

"'[E]ach element [of 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 manner and degree of evidence required at the successive stages of the litigation.'" *Id.* (alterations in original) (quoting *Lujan*, 504 U.S. at 561).

Defendants, therefore, err when they claim (at 9) that Plaintiffs must "affirmatively" put "[f]acts demonstrating" their injuries "in the record," and cannot rely on "averments in [their] pleadings" or reasonable "infer[ences]" taken therefrom. Rather, "because [Defendants] challenge[] the adequacy of [Plaintiffs'] complaint and declarations to support [their] standing" under Fed. R. Civ. P. 12(b)(1), this Court must "accept the well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in the [Plaintiffs'] favor," just as the Court would "do in reviewing [a Rule 12(b)(6) motion] for failure to state a claim." *Arpaio*, 797 F.3d at 19. Plaintiffs' burden is "'not onerous,'" *Peacock v. Dist. of Columbia*, 682 F.3d 77, 82 (D.C. Cir. 2012) (quoting *Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1141 n.3 (D.C. Cir. 2011)), and "'general factual allegations of injury resulting from [Defendants'] conduct may suffice,'" *id*. (quoting *Lujan*, 504 U.S. at 561). Thus, in order for Plaintiffs to establish standing at this stage, the complaint must simply "contain sufficient factual matter, accepted as true, to 'state a claim [of standing] that is plausible on its face.'" *Arpaio*, 797 F.3d at 19 (alteration in the original) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Plaintiffs easily clear this "low bar." *See Attias v. Carefirst, Inc.*, 865 F.3d 620, 622 (D.C. Cir. 2017). Yet Plaintiffs have also attached declarations, *see* exs. A-F, and additional materials of which the Court can take judicial notice, *see* Ex. G, to further demonstrate that Defendants' challenge to this Court's subject matter jurisdiction fails, which the Court may consider without converting Defendants' motion to one for summary judgment, *see Jerome*

Stevens Pharm., Inc. v. FDA, 402 F.3d 1249, 1253 (D.C. Cir. 2005); *Al-Owhali v. Ashcroft*, 279 F. Supp. 2d 13, 21 (D.D.C. 2003).

A. The Individual Plaintiffs Have Adequately Pleaded Injuries in Fact

In arguing that the individual Plaintiffs have failed to plead a sufficient injury in fact, Defendants misapprehend the nature of the alleged injury and ignore well-settled law.

The injury in fact requirement "serves to ensure that the plaintiff has a personal stake in the litigation." *Attias*, 865 F.3d at 626 (citing *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014)). Here, the individual Plaintiffs allege—with more particularity than required at the complaint stage—that their privacy has been invaded, their freedom of association impinged, and that concrete and particularized threats have effected their confidence in, and ability to participate in, political processes. The individual Plaintiffs have experienced (among other things) invasions of privacy, fear and hesitancy toward participating in political processes, increased risks of being inappropriately identified as ineligible to vote, and increased risks that their data will be disclosed to third parties.

Defendants argue (at 14-15) that these injuries are not legally cognizable because they are "not concrete" but rather mere "abstract emotional concern." As an initial matter, Plaintiffs' alleged injuries are far from "abstract": Defendants are quite concretely collecting Plaintiffs' First Amendment-protected data in violation of subsection (e)(7) of the Privacy Act. Furthermore, as the Supreme Court has recently observed, "many" of its decisions stand for the proposition that "intangible injuries can . . . be concrete" for purposes of Article III standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (collecting cases). In determining whether an intangible injury is sufficient, *Spokeo* instructs courts to consider the "history and the judgment of Congress," *id.* at 1549, as well as whether "an alleged intangible harm has a close

relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts," *id.*

The D.C. Circuit has already provided answers to these questions—concerning, in turn, Congress and the courts. In *Albright*, the Circuit considered the Privacy Act's legislative history, and observed Congress's "concern for unwarranted collection of information as *a distinct harm in and of itself*." 631 F.2d at 919 (emphasis added). The Court also surveyed caselaw and found that "special and sensitive treatment" is provided for "First Amendment rights," *id.* (collecting cases), including the right to privacy, *see id.* (citing *Griswold*, 381 U.S. at 483). Crucially, the Court held that that right "can be invaded, under certain circumstances, by the *mere inquiry* of government into an individual's exercise of First Amendment rights." *Id.* (emphasis added) (collecting cases). That is precisely what Plaintiffs allege here. Accordingly, they "need not allege any additional harm." *Spokeo*, 136 S. Ct. at 1549 (emphasis omitted).[3]

Defendants further assert that Plaintiffs base their standing on "future" uses of the data by Defendants, asserting that "standing cannot lie based on the threat of future injury." Defs.' Mot. at 15; *see also id.* at 35-36 (arguing that Plaintiff Kennedy's allegations of injury in particular are speculative). Defendants are wrong for at least two reasons.

[3] The cases Defendants cite (at 14-15) do not undermine this conclusion. They are inapposite and none concerns the privacy interests at issue here. *E.g.*, *Humane Soc'y of U.S. v. Babbitt*, 46 F.3d 93, 97-98 (D.C. Cir. 1995) (dismissing organization's claim of injury based on one member's lost opportunity to study an exotic elephant at a zoo); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 19-20 (D.D.C. 2010) (in a next-of-friend case standing allegations were inadequate to establish requisite inability of the principal individual affected to access the courts); *Levine v. Nat'l R.R. Passenger Corp.*, 80 F. Supp. 3d 29, 39 (D.D.C. 2015) ("Merely observing luggage in various configurations around [plaintiff] is not enough to constitute an injury."); *Welborn v. IRS*, 218 F. Supp. 3d 64, 69 (D.D.C. 2016) (case not involving First Amendment data). Instead, these cases stand for the unremarkable proposition that, to establish standing, a plaintiff must allege injury to a legally protected interest. Plaintiffs have done so here.

First, the injuries suffered by the individual Plaintiffs are not conjectural; they have occurred and continue to occur. Plaintiffs have alleged that the Commission has collected data on millions of voters, including Plaintiffs Nakhnikian, Cantler, and Kennedy. The Commission has sought this information with respect to Mr. Gutierrez and will obtain it absent a court ruling to the contrary. That is, Defendants have already begun their investigation of individuals' voting records, *e.g.*, Am. Compl. at 3-4, ¶¶ 55-57, 70-72; obtained data from states for this purpose, *e.g.*, *id.* ¶¶ 81-83; commenced the process of crosschecking state data with other data, such as that housed at DHS, *e.g.*, *id.* ¶¶ 6, 53, 54, 71, 102, 106(d), 124-25, 131; and identified at least one group of individuals (voters in New Hampshire) as a target of the investigation, *id.* ¶¶ 91, 106(h).

Defendants assert (at 36) that Plaintiff Kennedy "offers no allegation that DHS will agree to share . . . data" with the Commission. That is simply incorrect: with ample support, Plaintiffs allege that Kobach has "instructed Commission staff to obtain information that . . . DHS maintains on individuals including Plaintiff Kennedy," and that in response, "DHS has [disclosed]—or imminently will . . . disclose[—]to the Commission and/or Commission staff information about individuals including Plaintiff Kennedy contained in DHS's systems of records." *Id.* ¶¶ 124-25; *see, e.g.*, *id.* ¶ 43 (the Executive Order directs "'[r]elevant' executive departments and agencies . . . to 'endeavor to cooperate with the Commission'" (quoting Executive Order § 7(b)); *id.* ¶ 102 (alleging "the unlawful disclosure by DHS of [Plaintiff Kennedy's] individually identifiable data").

Notably, although they could have for purposes of Rule 12(b)(1), Defendants have not submitted any evidence to support their assertion that Plaintiffs' allegations are incorrect.[4] Any

[4] Information disclosed by Defendants after Plaintiffs filed suit reveals additional reasons why Plaintiff Kennedy's allegation that DHS is cooperating with the Commission are not speculative. Pursuant to a court order in a related case, the Commission has disclosed the existence of at least

claim that the injuries Plaintiffs allege are based only on Defendants' future conduct is without merit. And even if the Court were inclined to disagree, for the reasons stated in Plaintiffs' concurrently-filed motion, in the alternative, for jurisdictional discovery, dismissal still is not proper at this early stage.

For this reason, Defendants' reliance (at 15) on *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), is misplaced. In *Clapper*, which involved a facial constitutional challenge to a surveillance statute, although "the plaintiffs feared the interception of their overseas communications by the government," the Court found "that harm could only occur through the happening of a series of contingent events, none of which was alleged to have occurred by the time of the lawsuit." *Attias*, 865 F.3d at 628 (distinguishing *Clapper* in a data security case where the third party had already obtained the data and injury was, thus, concrete). The *Clapper* Court emphasized the speculative and contingent nature of the injuries alleged because in order for the plaintiffs' fears to materialize, independent actors would need to take a series of steps. 586 U.S. at 413-14; *see also Cent. United Life, Inc. v. Burwell*, 128 F. Supp. 3d 321, 326 (D.D.C. 2015) (Lamberth, J.), *aff'd*, 827 F.3d 70 (D.C. Cir. 2016) ("When courts discuss standing, they often use 'speculative' as a pejorative shorthand for 'theories that rest on speculation about the decisions of independent actors.'" (emphasis omitted) (quoting *Clapper*, 586 U.S. at 414)). The *Clapper* plaintiffs were therefore unable to sufficiently allege that the government had captured or imminently would capture their data. 586 U.S. at 414.

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23 communications between the Commission and DHS, or among the Commission and others concerning DHS, some of which Defendants have characterized as substantive and concerning the Commission's attempt to gather information. *See* Defs.' Doc. Index at 8-9 (Sept. 29, 2017), *Lawyers' Comm. for Civil Rights Under Law v. Presidential Advisory Comm'n on Election Integrity* ("*LCCR*"), No. 17-cv-1354 (CKK) (D.D.C. filed Sept. 29, 2017), ECF No. 33-3 (attached as Ex. G-2); Third Decl. of Andrew J. Kossack ¶ 12(x), *LCCR* (D.D.C. filed Sept. 29, 2017), ECF No. 33-1 (attached as Ex. G-1).

Here, by contrast, Kobach and the Commission have already collected the personal data, including First Amendment-protected data, of at least Plaintiffs Nakhnikian, Cantler, and Kennedy. The harm has occurred. Thus, unlike in the cases Defendants cite, "[n]o long sequence of uncertain contingencies involving multiple independent actors has to occur before the plaintiffs in this case will suffer any harm." *Attias*, 865 F.3d at 629.

Second, and more fundamentally, Defendants are simply incorrect in asserting that "standing cannot lie based on the threat of future injury." Defs.' Mot. at 15. To the contrary, as the D.C. Circuit recently observed, it has "frequently upheld claims of standing based on allegations of a substantial risk of future injury." *Attias*, 865 F.3d at 627 (collecting cases). In *Attias*, for example, the plaintiffs' personal data had been obtained by a third party without consent. *Id.* at 623. Over the objections of the defendants, who claimed that the plaintiffs' allegations of injury based on future threats of identity theft were speculative, the Court found that the plaintiffs plausibly alleged "a substantial risk of identity fraud, even if their social security numbers were never exposed to the data thief." *Id.* at 628. Here, of course, the principal injury Plaintiffs have experienced is the inquiry into and collection of their First Amendment-protected data. This injury has already occurred, as have other injuries such as the imposition of fear and hesitation when it comes to participating in the political process.

But to the extent that Plaintiffs allege injuries from the activities that Defendants are undertaking and will complete in the future, Defendants' own assertions are enough to confirm the plausibility of Plaintiffs' allegations of a "substantial risk" of such injuries occurring. For example, Kobach has stated that "for the first time in the country's history . . . [the federal government] will be gathering data from all 50 states" that will be "bounced" off of "federal government" databases. Am. Compl. ¶ 54. To achieve this end, Kobach has "directed

Commission staff to obtain 'whatever data' there is within the federal government . . . to assist the Commission in its investigation," *see id*. at 3, ¶ 73, and has specifically referenced Defendant DHS as a source of the data, *id.* ¶ 54.

Both the complaint and the declarations of the individual Plaintiffs identify concrete harms—such as, for example, there being obstacles to their ability to vote, and suffering injuries associated with a data breach—that are at substantial risk of occurring in light of the acts Defendants have already taken to obtain data and investigate voters. In short, the individual Plaintiffs have plausibly alleged that they have already suffered harm, that the harm is ongoing, and that there is a substantial risk of future harm. These allegations more than suffice at this stage, and the Court should reject Defendants' argument to the contrary.

B. Common Cause Has Adequately Pleaded Representational Standing

Among other things, an association has standing to bring suit on behalf of its members when "'its members would otherwise have standing to sue in their own right.'" *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 596 (D.C. Cir. 2015) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). Defendants argue (at 10-11) that Common Cause lacks representational standing because it has not identified any of its members with standing to sue. Here, too, they are wrong.

A plaintiff asserting representational standing "need not identify [its] affected members by name at the pleading stage," because at this stage, "the Court presumes that general allegations encompass the specific facts necessary to support the claim." *Ass'n of Am. Physicians & Surgeons, Inc. v. Sebelius*, 901 F. Supp. 2d 19, 31 (D.D.C. 2012) (collecting cases), *aff'd*, 746 F.3d 468 (D.C. Cir. 2014); *see also Am. Ass'n of Cosmetology Sch. v. DeVos*, --- F. Supp. 3d ---, 2017 WL 2804886, at *11 (D.D.C. June 28, 2017) ("Lower courts have found that, although an association must identify members, it need not identify members by name at the

pleading stage to fulfill the first prong of the test for associational standing." (emphases omitted) (collecting cases)). Common Cause alleges that it "has over one million members and supporters nationwide," Am. Compl. ¶ 1; that its "members have been and will be injured by the Defendants' activities, including the efforts to obtain personal and private information regarding voter affiliation, vote history, and other related details," *id.* ¶ 3; and that these unlawful actions will hamper "its members' efforts to encourage voter registration and participation," *id.* ¶ 4. Common Cause has thereby plausibly alleged that it has members who have suffered injuries akin to those alleged by the individual Plaintiffs. For all the reasons described above, Common Cause's allegations establish its Article III standing.

Nevertheless, although not required, Plaintiffs have submitted declarations from three Common Cause members (two of which are individual Plaintiffs) who have been injured as a result of Defendants' activities. *See, e.g.*, Gutierrez Decl. ¶¶ 1, 7-10; Cantler Decl. ¶¶ 3, 13-16; McClenaghan ¶¶ 1, 11-14; *see also* Flynn Decl. ¶¶ 21-26. On the basis of its allegations alone, and particularly when its allegations are considered alongside the supporting declarations, Common Cause has adequately pleaded its standing to sue on members' behalves.[5]

[5] Notwithstanding Defendants' arguments to the contrary (at 31-32), Common Cause has standing to represent its members' interests under the Privacy Act. Common Cause's members are "individual[s]" under the Act. 5 U.S.C. § 552a(a)(2). Here, "Common Cause . . . stands in [their] shoes," *Common Cause v. Bolger*, 512 F. Supp. 26, 30 (D.D.C. 1980), and "it and its members are in every practical sense identical," *NAACP v. Alabama*, 357 U.S. at 459. On this basis, courts have approved representational standing under the Privacy Act. *See, e.g.*, *Nat'l Ass'n of Letter Carriers, AFL-CIO v. USPS*, 604 F. Supp. 2d 665, 672 (S.D.N.Y. 2009); *Prof'l Dog Breeders Advisory Council v. Wolff*, No. 09-cv-258, 2009 WL 2948527, at *5 (M.D. Pa. Sept. 11, 2009); *Nat'l Fed'n of Fed. Emps. v. Greenberg*, 789 F. Supp. 430, 433 (D.D.C. 1992), *rev'd on other grounds*, 983 F.2d 286 (D.C. Cir. 1993). In addition, class actions are also "a form of representative litigation," *Keepseagle v. Vilsack*, No. 99-cv-3119, 2016 WL 9455764, at *6 (D.D.C. April 20, 2016), and courts routinely certify classes under the Privacy Act, *see, e.g.*, *Rice v. United States*, 211 F.R.D. 10, 12 (D.D.C. 2002); *Baker v. Runyon*, No. 96-2619, 1997 WL 232606, at *4 (N.D. Ill. May 2, 1997). Defendants' arguments are unavailing. Some of Defendants' cases do not discuss representational standing at all. *E.g.*, *Cell Assocs., Inc. v. NIH*,

C. Common Cause Has Adequately Pleaded Organizational Standing

Common Cause also has standing to sue on its own behalf. Defendants' arguments to the contrary (at 11-14) ignore Plaintiffs' allegations and disregard binding caselaw.

Following *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982), the D.C. Circuit has recognized "organizational standing in a wide range of circumstances," *Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006). When evaluating organizational standing, courts first consider whether the "actions taken by [the defendant] have 'perceptibly impaired' the [organization's] programs," *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 8 (D.C. Cir. 2016) (alterations in original) (quoting *Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994)), asking simply whether the "defendant's conduct has made the organization's activities more difficult," *id.* (emphasis omitted) (quoting *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996)). Courts then consider whether the defendants' actions "directly conflict with the organization's mission." *Id*.

Here, Defendants do not dispute that their activities directly conflict with Common Cause's mission. And they fail in their attempt to argue that, under the first prong of the

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579 F.2d 1155 (9th Cir. 1978); *Pub. Emps. for Envt'l Responsibility v. EPA*, 926 F. Supp. 2d 48 (D.D.C. 2013). Similarly, another concerns the standing of "advocacy groups" generally, not membership organizations specifically. *In re Dep't of Veterans Affairs Data Theft Litig.*, No. 06-mc-506, 2007 WL 7621261, at *2 (D.D.C. Nov. 16, 2007). Likewise, that the Privacy Act's legislative history indicates that the Act does not cover "proprietorships, businesses and corporations," Defs.' Mot. at 32, saying nothing about whether it permits an association to sue in its members' stead. In other cases Defendants reference, the issue was whether individual participation was necessary in light of the plaintiffs' damages claims, *e.g.*, *Am. Fed'n of Gov't Emps. v. Hawley*, 543 F. Supp. 2d 44, 50 (D.D.C. 2008), an issue not presented here. Yet, in the event the Court finds that Common Cause cannot assert its members' interests under the Privacy Act, it undoubtedly can do so under the APA or, alternatively, through its *ultra vires* claim.

organizational standing test, Common Cause has not sufficiently alleged that Defendants' activities have perceptibly impaired its programs. Common Cause's declaration buttresses the complaint's factual allegations concerning its organizational standing. *See* Flynn Decl. ¶¶ 13-20; Am. Compl. ¶¶ 1-4, 37-38, 40, 52-56, 60-62, 68, 70-73, 80, 91, 93-97, 99, 101, 106; *see also* McClenaghan Decl. ¶ 10. Together, they establish that because of Defendants' actions, Common Cause has suffered concrete and specific injuries to its core activities that are more than adequate to establish standing at the motion to dismiss stage.

First, Plaintiffs' allegations concerning Defendants' injurious activities are specific and comprehensive. In sum, under Kobach's leadership, and with assistance from DHS, the Commission is undertaking a "nationwide fact-finding effort focused on assessing 'evidence' of 'different forms of voter fraud,'" Am. Compl. ¶¶ 37-38, 52, 60-62, 80 (data request to states); *id.* ¶ 73 (data request to federal agencies), with the aim of identifying individuals the Commission believes to be fraudulently registered to vote, *see id.* ¶¶ 68, 71-72. As a result of Defendants' investigation, "thousands of voters have de-registered from the rolls, while others are gravely concerned about how their data will be used by the Commission, making them hesitant to fully participate in the political process." *Id.* ¶ 99; *see id.* ¶ 99 n.60.

Second, Plaintiffs' allegations concerning how Defendants' actions have harmed Common Cause are concrete. "Since its founding in 1970, Common Cause has been dedicated to the promotion and protection of the democratic process, such as the right of all citizens . . . to be registered for and vote in fair, open, and honest elections." *Id.* ¶ 1; Flynn Decl. ¶ 3-6. In furtherance of its mission, Common Cause "conducts significant nonpartisan voter-protection, advocacy, education, and outreach activities to ensure that voters are registered to vote and have their ballots counted as cast." Am. Compl. ¶ 2; Flynn Decl. ¶¶ 3-6. The conflict between

Defendants' actions and Common Cause's activities is readily apparent. Defendants' actions have "inhibit[ed] [Common Cause's] daily operations" and have "subject[ed] [Common Cause] to 'operational costs beyond those normally expended.'" *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015) (quoting *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995)). To take but a few examples:

- Over and above its typical activities, "Common Cause has been engaged in direct counseling of individual voters seeking to deregister from voting as a result of the fear they have for what the Commission will do with their personal First Amendment information." Am. Compl. ¶ 4; Flynn Decl. ¶¶ 14-19 (discussing activities Common Cause has engaged in to dissuade individuals from deregistering from voting, including the counseling of individual voters).

- Common Cause has directed specific educational and outreach activities to counteract the Commission's effect of undermining the political process and the hesitation that many individuals are experiencing in light of Defendants' activities. Am. Compl. ¶ 4. Common Cause's declaration elaborates that it has published materials dissuading individuals from deregistering to vote as the result of the Commission's activities; and has dedicated digital and other media resources to these efforts, diverting them away from its ongoing activities. Flynn Decl. ¶¶ 15-20.

- Common Cause is also increasing spending for voter registration efforts over and above its normal levels in order to counteract the wave of voter deregistration and general lack of confidence in the political process that has resulted from the Commission's activities. Flynn Decl. ¶¶ 14, 18.

Equally significant, Common Cause's other activities—its efforts to facilitate same day voter registration, automatic voter registration, fair redistricting, and work to facilitate discussion, education, and engagement about the importance of a free press and transparent government —have suffered because Common Cause has had to divert resources from those efforts in order to try to counteract the effects of the Commission's investigation. Flynn Decl. ¶ 18-20 (providing examples of specific programs from which resources have been diverted). Accordingly, Common Cause has established "that discrete programmatic concerns are being directly and adversely affected by [Defendants'] action[s]," *Nat'l Taxpayers Union*, 68 F.3d at

1433, and that it "undertook [specified] expenditures in response to, and to counteract, the effects of [Defendants' actions]," *Equal Rights Ctr.*, 633 F.3d at 1140.

Once again ignoring Plaintiffs' well-pleaded injuries, Defendants assert that Common Cause's alleged harms are "abstract," *see* Defs.' Mot. at 11, and "not sufficiently concrete and particularized," *id.* at 13. But the decisions that Defendants cite (at 11-13) underscore the differences between this case and those cases where courts have denied organizational standing—"between organizations that allege that their activities have been impeded [and] those that merely allege that their mission has been compromised." *Food & Water Watch*, 808 F.3d at 919 (quoting *Eschenbach*, 469 F.3d at 133). For example, unlike the plaintiff in *National Taxpayers Union*, Common Cause has not relied on "entirely speculative" allegations concerning impairment of "future fundraising initiatives" for programs yet to be implemented. 68 F.3d at 1433. Nor has Common Cause failed to describe how Defendants' "conduct perceptibly impaired [its] ability to provide services," or rested its claim to standing on its "use of resources for litigation, investigation in anticipation of litigation, or advocacy." *Food & Water Watch*, 808 F.3d at 919. Rather, Common Cause has alleged in detail, supported by comprehensive declarations, how Defendants' activities have impaired its efforts and diverted its resources from discrete, critical programs. Because "[s]uch concrete and demonstrable injury to [Common Cause's] activities—with the consequent drain on [its] resources—constitutes far more than simply a setback to [its] abstract social interests," Common Cause has established "standing . . . in its own right." *Havens Realty*, 455 U.S. at 379.

II. PLAINTIFFS HAVE ADEQUATELY PLEADED LEGALLY COGNIZABLE CLAIMS

Defendants' arguments as to why Plaintiffs' claims should be dismissed under Rule 12(b)(6) fare no better.

A. Plaintiffs Have Adequately Pleaded that the Commission Has Violated Subsection (e)(7) of the Privacy Act by Collecting Plaintiffs' First Amendment Data

Defendants do not dispute that state voter data "describe[s] how . . . individual[s] exercise[] rights guaranteed by the First Amendment," and that the Commission is "maintain[ing]" it. 5 U.S.C. § 552a(e)(7). They argue only that the Commission is not an "agency" for purposes of the Privacy Act and that even if the Commission is violating 5 U.S.C. § 552a(e)(7), this Court is powerless to enjoin it from doing so. Defendants are incorrect on both counts.

1. The Commission Is an Agency Under the Privacy Act and the APA

Under the Privacy Act, an "agency," "as defined in [5 U.S.C. § 551(1),] includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 552(f)(1) (Freedom of Information Act); *see* 5 U.S.C. § 552a(a)(1) (Privacy Act) (incorporating the definition of "agency" from the FOIA, 5 U.S.C. § 552(f)(1)). The statute's "reference to § 551(1) is to the Administrative Procedure Act's definition of 'agency'—namely, 'each authority of the Government of the United States, whether or not it is within or subject to review by another agency,' except Congress, the judiciary and a few other select bodies" not relevant here. *Energy Research Found. v. Def. Nuclear Facilities Safety Bd.*, 917 F.2d 581, 582 (D.C. Cir. 1990) (quoting 5 U.S.C. § 551(1)); *see also id.* at 584-85 (tracing the FOIA definition's legislative history).

While the FOIA's "definition of 'agency' is not entirely clear," *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971), and while the D.C. Circuit has articulated a number of definitional tests over time, *see Citizens for Responsibility & Ethics in Wash. v. Office of Admin.* ("*CREW*"),

566 F.3d 219, 222-23 (D.C. Cir. 2009), "common to every case in which [the Circuit has] held that" a unit within the Executive Office of the President "is subject to FOIA," and therefore qualifies as an agency under the Privacy Act, "has been a finding that the entity in question 'wielded substantial authority independently of the President,'" *id.* at 222 (quoting *Sweetland v. Walters*, 60 F.3d 852, 854 (D.C. Cir. 1995)). If an "entity's *sole* function is to advise and assist the President," *id.* (emphasis added), it does not qualify as an agency, *see id.* at 223-24. On the other hand, the D.C. Circuit has repeatedly found mere "[*e*]*valuation* plus advice" sufficient to bestow agency status. *Energy Research Found.*, 917 F.2d at 584 (emphasis added); *see id.* at 584-85 (surveying caselaw); *Armstrong v. Exec. Office of the President*, 90 F.3d 553, 564-65 (D.C. Cir. 1996) ("[W]e distinguish between advising and assisting the President on the one hand and exercising independent authority on the other.").

Defendants assert (at 23) that this is a "functional test," and that the "relevant inquiry is the function exercised, not [the] title" given the entity in question. Plaintiffs agree. But Defendants then proceed to entirely ignore the Commission's actual functions. Properly considered, Plaintiffs' allegations regarding the Commission's *actual* functions—not just the Commission's *authorized* functions—establish that it exercises substantial independent authority and is an agency subject to the Privacy Act and to the APA.

a. The agency test looks beyond an entity's authorizing documents to its actual functions.

The D.C. Circuit has made clear that agency status is a facts-and-circumstances determination, and thus particularly ill-suited to resolution under Rule 12(b)(6). *See, e.g.*, *Nichols v. Club for Growth Action*, 235 F. Supp. 3d 289, 295 (D.D.C. 2017) (noting that "fact-intensive" questions, in that case under the fair use doctrine, are "not traditionally decided on a motion to dismiss"). When confronted "with one of the myriad organizational arrangements for

getting the business of the government done," the "unavoidable fact is that each new arrangement must be examined anew and in its own context." *Wash. Research Project, Inc. v. Dep't of Health, Educ. & Welfare*, 504 F.2d 238, 246 (D.C. Cir. 1974). Accordingly, "the specific evidence bearing upon [the agency] question varies with the entity in question." *Armstrong*, 90 F.3d at 558-59. Courts frequently look "beyond public documents" to depositions, document discovery, letters, memoranda, and other statements by government officials, particularly where the "language establishing the entity's power [in the public documents] is broad and lacking in firm parameters." Mem. Op. at 12 & n.4, *Elec. Privacy Info. Ctr. v. Office of Homeland Sec.* ("*Office of Homeland Sec.*"), No. 02-cv-00620 (CKK) (D.D.C. Dec. 26, 2002), ECF No. 11.

Soucie, for example, involved a FOIA request to the Office of Science and Technology Policy ("OSTP") for its report evaluating the government's development of a supersonic transport aircraft. 448 F.2d at 1069, 1076. The D.C. Circuit, in reversing a Rule 12(b) dismissal, held the OSTP to be an "agency" for FOIA purposes because it not only "advise[d] and assist[ed] the President in achieving coordinated federal policies in science and technology," *id.* at 1073-74, but also had "the function of evaluating federal programs," *id.* at 1075. As the D.C. Circuit subsequently recognized, its analysis in *Soucie* hinged on the OSTP's actual functions; for even though "the report[] under consideration in *Soucie* w[as] requested by the President precisely for advisory purposes," the Circuit held that the OSTP was an agency "because the Office had functions *in addition to* advising the President." *Ryan v. Dep't of Justice*, 617 F.2d 781, 788 (D.C. Cir. 1980) (emphasis added); *see also Rushforth v. Council of Econ. Advisers*, 762 F.2d 1038, 1041 (D.C. Cir. 1985) ("[C]ritically, it was the functional role of the agency on which *Soucie* turned.").

In *Armstrong*, by contrast, the D.C. Circuit, this time reviewing a decision on summary judgment, concluded that the National Security Council ("NSC") was not an agency because it "plays [no] substantive role apart from that of the President, as opposed to a coordinating role on behalf of the President." 90 F.3d at 565. Yet in reaching that conclusion, the Circuit did not confine itself to reviewing the NSC's authorizing documents, but rather considered, among other evidentiary sources, the actual "degree of the NSC's independence in discharging" its functions, *id.* at 559; the "organizational lines of authority and responsibility within the NSC" in practice, *id.*; a declaration from President Clinton's National Security Adviser concerning the NSC's organizational structure, *see id.* at 559-60; deposition testimony of an NSC staff member about whether the President had authorized NSC staff to take certain actions, *id.* at 561; "various presidential delegations to the NSC," *id.*; and the report of an independent commission that "examin[ed] possible involvement by NSC staff members in the Iran-Contra matter," *id.*

Likewise, and most recently, in *CREW*, the D.C. Circuit held that the Office of Administration ("OA") is not an agency because "nothing in the record indicates that OA performs or is authorized to perform tasks other than operational and administrative support for the President and his staff." 566 F.3d at 224. Importantly, that "record" included facts adduced through deposition and document discovery, *see id.* at 221, that "shed light on OA's authority *and operations*, an understanding of which [was] critical," the Circuit said, "for determining whether OA is subject to FOIA," *id.* at 225 (emphasis added); *see also Meyer v. Bush*, 981 F.2d 1288, 1297 (D.C. Cir. 1993) (looking to authority task force members "were to exercise" and authority that they "in fact" exercised); *Rushforth*, 762 F.2d at 1043 & n.7 (explaining that "at bottom, [it is] function that determines an entity's status for FOIA purposes" and no "evidence [has] been brought forward to show that some other function in fact exists").

Common to each of these cases—yet ignored by Defendants—is that in every instance the D.C. Circuit assessed both the authorized and actual functions of the entities in question. Thus, as one district court has put it, an entity's "function may be discerned from its charter documents as well as the responsibilities [it] actually undertakes, if they in fact extend beyond the responsibilities delineated in [its] charter documents." *CREW v. Office of Admin.*, 559 F. Supp. 2d 9, 24 (D.D.C. 2008), *aff'd*, 566 F.3d 219 (D.C. Cir. 2009). This inquiry goes both ways, of course, underscoring that the test is functional and case-specific. For example, in *Armstrong*, even though an executive order permitted the NSC certain authority, because the NSC had never exercised it in practice, the Circuit disregarded it as a "mere formality" and "of no consequence." 90 F.3d at 562.

b. The Commission exercises "substantial independent authority" and does not solely "advise and assist the President."

Brushing aside this precedent and their own description of the governing standard as a functional test, Defendants (at 21-23) urge the Court to declare the Commission is not an agency based only on its Charter and the Executive Order. These documents provide, for example, that the "Commission shall, consistent with applicable law, study the registration and voting processes used in Federal elections," and assert that the Commission "shall be solely advisory and shall submit a report to the President" on certain identified topics. Executive Order § 3.

But the chartering documents fail to account for what the Commission is actually doing. Plaintiffs have made specific, detailed allegations demonstrating that—far from merely studying "voting processes"—the Commission "has undertaken a sweeping, first-of-its-kind investigation into alleged voting misconduct by individual American citizens." Am. Compl. ¶¶ 105, 106(a). And "*Soucie* itself recognized that an entity in the federal government which 'investigates,

evaluates and recommends' is an 'agency.'" *Energy Research Found.*, 917 F.2d at 585 (quoting *Soucie*, 448 F.2d at 1073 n.15, 1075).

Plaintiffs allege statements by Kobach and Commission members confirming the Commission's actions and intentions as regards its investigation and crosscheck:

- Kobach has stated "the Commission's 'goal is to, for the first time, have a nationwide fact-finding effort' focused on assessing 'evidence' of 'different forms of voter fraud across the country.'" Am. Compl. ¶ 52.

- Kobach "has stated that the Commission intends to utilize databases from federal agencies in order to 'crosscheck' against the names of individual voters to determine if there are alleged fraudulently registered voters on the rolls." *Id.* ¶ 53.

- "A spokesman for the Commission has confirmed that the Commission intends to run the voting data it receives on individuals through a number of different databases to check for alleged fraudulent voter registrations." *Id.* ¶ 54.

- Kobach has written that "'every investigation' the Commission undertakes will require individuals' state voter roll data" so the Commission can "use data it collects from the states to 'confirm' the identity of individual American voters alleged to have committed fraud." *Id.* at 4, ¶ 55.

- Commission members have "described the objective of the Commission's investigation as 'deciding . . . how accurate . . . the voter rolls' are" and have discussed "referrals of individuals suspected of voter fraud to the DOJ for possible criminal prosecution." *Id.* ¶¶ 70, 72.

Plaintiffs also allege facts regarding evidence being collected by the Commission as part of the ongoing investigation and crosscheck:

- Kobach instructed Commission staff to "'start trying to collect whatever data there is that's already in the possession of the federal government' that 'might be helpful' to the Commission's unauthorized voter fraud investigation." *Id.* ¶ 73; *see id.* ¶ 124.

- The Commission has received multiple forms of evidence, including: state voting data (including political party affiliation and voting history) from millions of American voters, *id.* ¶¶ 6-9, 80; "evidence or information . . . [from states] regarding instances of voter fraud or registration fraud," *id.* ¶ 61; "a database hosted by the Heritage Foundation that purportedly 'documents 1,071 proven incidents of election fraud,'" *id.* ¶ 94; "'real life examples' of improper voter registration and voting by named non-citizens," *id.* ¶ 96; "'8,471 cases of likely duplicate voting [to] be investigated for possible wrongdoing' by the Commission," *id.*

¶ 97; and "information about individuals . . . contained in DHS's systems of records," *id.* ¶ 125.

Finally, Plaintiffs allege facts about the initial results of the Commission's investigation. *Id.* ¶ 56 (Kobach has stated there is "proof" of voter fraud by "individual voters in New Hampshire" within the evidence already "provided to the Commission"). These and other allegations confirm that this is a textbook situation where the Commission's functions "in fact extend beyond the responsibilities delineated in [its] charter documents," such that its status as an "agency" must be "discerned from . . . the responsibilities [it] actually undertakes." *CREW*, 559 F. Supp. 2d at 24.[6]

By commencing its investigation and crosscheck, the Commission has already undertaken actions that confirm its status as an agency for the purposes of the Privacy Act. In *Energy Research Foundation*, the D.C. Circuit concluded that the Defense Nuclear Facilities Safety Board is an agency because, "more than merely offer[ing] advice," the Board "conducts investigations, which 'has long been recognized as an incident of legislative power' delegated to agencies by Congress." 917 F.2d at 584 (quoting *Soucie*, 448 F.2d at 1075 n.27). The Commission is likewise conducting an investigation, and what Plaintiffs allege of its activities to date points to the Commission's attempt to exercise "the full panoply of investigative powers commonly held by other agencies of government." *Id.*[7]

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[6] If, despite taking Plaintiffs' well-pleaded allegations as true, the Court nevertheless finds these allegations insufficient to establish the Commission's agency status at this juncture, Plaintiffs note that courts have ordered discovery on this threshold question prior to dismissal, and request that this Court do the same. Discovery into an entity's authority and operations is "at the very least[] helpful, *if not required*, in determining the status of an entity positioned within the Executive Office of the President." *Office of Homeland Sec.* at 12 (emphasis added); *see CREW*, 566 F.3d at 225-26 (discovery that "shed light on OA's authority and operations" was "critical" to determining whether entity was an "agency").

[7] Defendants' contention (at 23 n.2) that the Commission lacks these powers misunderstands both the extent of the Commission's power and the scope of its investigation. For example, in at

In any event, even assuming that the Commission is not yet exercising all of the sweeping powers of an Executive Department, that is not required. In *Soucie* and *Energy Research Foundation,* among other cases, the D.C. Circuit has found that evaluation plus advice is "enough" for an entity to attain agency status. *See Energy Research Found.*, 917 F.2d at 584-85 (collecting cases). The Commission is doing even more than evaluating and advising the President. For example, it is working to find evidence of individual incidents of fraudulent voting and to refer alleged perpetrators for potential enforcement. None of the D.C. Circuit decisions that Defendants cite address these types of investigative functions.[8] At bottom, the Commission is no different than the OSTP in *Soucie* that had likewise been tasked with

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least one known instance, the Commission invoked New York's freedom of information law to legally compel disclosure of that state's voter roll data, after state officials refused to provide it to the Commission. Am. Compl. ¶ 82. At the federal level, the Executive Order directs that other federal agencies "'endeavor to cooperate with the Commission.'" Am. Compl. ¶ 43 (quoting Executive Order § 7(b)). This cooperation, moreover, extends both to the data "already in the possession of the federal government" that the Commission has obtained or is obtaining "to be helpful to the Commission's unauthorized voter fraud investigation," and to the "referrals of individuals suspected of voter fraud to the [Department of Justice] for possible criminal prosecution." *Id.* ¶¶ 72, 73. That the Commission has not compelled production of individuals' data in every instance does not change the fact that it is using the information it is collecting to investigate individuals for alleged voter fraud, which is a classic function of an agency endowed with enforcement powers. *Id.* ¶ 106.

[8] *CREW* found the OA not to be an agency due to the "operational and administrative [tasks]" it provided to support the President, *see* 566 F.3d at 224, which are different in kind from the Commission's investigative functions. *Armstrong* similarly did not involve an investigation of individuals, but rather found NSC not to be an agency because it was too indistinct from the President. 90 F.3d at 565. *Meyer* involved the application of "*Soucie* to those who help the President *supervise others* in the Executive Branch," 981 F.2d at 1293 (emphasis added), a question not implicated here. Finally, Defendants' analogy to the Council of Economic Advisers in *Rushforth* is inapt, for the D.C. Circuit later pointed out that the CEA was found not to be an agency because, unlike here, its "duties simply facilitate providing advice to the President." *Energy Research Found.*, 917 F.2d at 584. Regardless, even if the Commission has functions that differ from other entities previously found to be agencies, or shares characteristics with entities deemed not to be, this would not be dispositive, given the case-by-case nature of the analysis. *See Armstrong*, 90 F.3d at 558-59; *Wash. Research Project*, 504 F.2d at 246.

generating a report "requested by the President precisely for advisory purposes," but *also* exercised "functions in addition" that drew it across the agency line. *Ryan*, 617 F.2d at 788.

Finally, Judge Kollar-Kotelly's finding regarding the Commission's agency status in *EPIC v. Presidential Advisory Commission on Election Integrity*, No. 17-cv-1320, 2017 WL 3141907, at *1 (D.D.C. July 24, 2017), *appeal pending*, No. 17-5171 (D.C. Cir.), is of little value to Defendants. *See* Defs.' Mot. at 22. The plaintiff in that case is principally seeking an injunction to require the Commission to conduct a privacy impact assessment under the E-Government Act of 2002. In relying on *EPIC*, Defendants do not acknowledge that in denying, without prejudice, a temporary restraining order and preliminary injunction, Judge Kollar-Kotelly found that the "record presently" before the court was "insufficient to demonstrate that the Commission is an 'agency.'" *Id.* at *11. This ruling, moreover, was issued in the Commission's early days and on a much less developed record than even Plaintiffs' complaint alone presents. For example, Judge Kollar-Kotelly wrote there was "no evidence that [the Commission has] exercised any independent authority that is unrelated to its advisory mission," *id.* at *11—a finding that is plainly contradicted by Plaintiffs' detailed allegations, which were not before Judge Kollar-Kotellly, concerning the Commission's extra-legal investigation. Judge Kollar-Kotelly, moreover, acknowledged that the factual circumstances surrounding the Commission were fast moving and noted that "[t]o the extent the factual circumstances change, however—for example, if the *de jure* or *de facto* powers of the Commission expand beyond those of a purely advisory body—this determination may need to be revisited." *Id.* at *1. As set

forth above, the Commission's *de facto* powers have indeed evolved significantly, and they demonstrate that the Commission is an "agency" under the Privacy Act.[9]

In sum, under the D.C. Circuit's functional approach to the question, Plaintiffs have pleaded sufficient facts establishing that the Commission is an agency for purposes of the Privacy Act.

2. Plaintiffs May Obtain Injunctive Relief on Their Privacy Act Subsection (e)(7) Claim to Prevent the Commission from Collecting and Maintaining Their First Amendment Data

Above, Plaintiffs have demonstrated that the Commission is an agency. In their brief, Defendants do not dispute that, under the Privacy Act, the Commission is "maintain[ing] . . . record[s] describing how [Plaintiffs] exercise[] rights guaranteed by the First Amendment," 5 U.S.C. § 552a(e)(7), "in such a way as to have an adverse effect on an individual," *id.* § 552a(g)(1)(D). Contrary to Defendants' arguments (at 24-28), Plaintiffs are therefore entitled to injunctive relief to halt the Commission from violating subsection (e)(7).

Defendants (at 26) acknowledge "dicta suggesting" as much, but argue (at 25) that the "Privacy Act authorizes injunctive relief in only two specific circumstances: (1) to order an agency to amend inaccurate, incomplete, irrelevant, or untimely records, 5 U.S.C §§ 552a(g)(1)(A), (g)(2)(A), and (2) to order an agency to allow an individual access to his records, *id.* § 552a(g)(1)(B), (g)(3)(A)." Otherwise, Defendants assert, only monetary damages are available.

[9] Defendants are mistaken in suggesting (at 23) that Plaintiffs claim the Commission is an advisory committee. Rather, Plaintiffs allege that "[a]lthough it was formed as a 'commission,' [the] Commission is an 'agency' for the purposes of the Privacy Act." Am. Compl. ¶ 26. As Plaintiffs have explained, although the Commission was established as an advisory committee, it remains one in name only because it is exercising investigative functions that transcend its advisory mission. *See id*. at 3.

The Act, however, also contains a catch-all provision that authorizes jurisdiction over claims that the government has "fail[ed] to comply with" certain of its provisions, including subsection (e)(7), "in such a way as to have an adverse effect on an individual." 5 U.S.C. § 552a(g)(1)(D). And it has long been established that when Congress thus authorizes jurisdiction, courts' "inherent equitable powers . . . are available for the proper and complete exercise of that jurisdiction" and cannot "be denied or limited in the absence of a clear and valid legislative command." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).

No such command can be found in the Privacy Act. Indeed, upon reviewing the very provisions of the Act's remedial scheme upon which Defendants rely, and in language that previews the present dispute, the D.C. Circuit concluded that "[i]t is not at all clear . . . that Congress intended to preclude broad equitable relief (injunctions) to prevent (e)(7) violations such as, for instance, a hypothetical agency's secret compiling of records on Americans' legitimate political activities." *Haase v. Sessions*, 893 F.2d 370, 374 n.6 (D.C. Cir. 1990). Accordingly, the D.C. Circuit stated that "Congress presumably intended the district court to use its inherent equitable powers—at least to remedy violations of (e)(7)." *Id.* (citing *Porter*, 328 U.S. at 398). And the D.C. Circuit distinguished the decisions of other circuits that Defendants would have this Court follow, *see* Defs.' Mot. at 25-26 & n.3, finding that none of them "deal[] squarely with a situation"—specifically, *this* situation—where "a party charging an (e)(7) violation" seeks, under § 552a(g)(1)(D), "an injunction broader in scope than amendment or expungement to address the offending activity." *Haase*, 893 F.2d at 374 n.6.

Even prior to *Haase*, the D.C. Circuit had recognized that damages are not the sole remedy for a Privacy Act (e)(7) claim. *See Smith v. Nixon*, 807 F.2d 197, 204 (D.C. Cir. 1986); *Nagel v. U.S. Dep't of Health, Educ. & Welfare*, 725 F.2d 1438, 1441 (D.C. Cir. 1984); *Albright*,

631 F.2d at 921. Notably, in *Haase*, the government agreed with that view. There, it argued that an action seeking to enforce compliance with subsection (e)(7) "should logically be construed as an action seeking the District Court's exercise of its inherent equitable power to order the amendment or expungement of records as a means of vindicating statutory or constitutional rights." Corrected Brief for Appellees at 17, *Haase*, 893 F.2d 370 (D.C. Cir. 1990) (No. 88-5303); *see also id.* at 10 ("[A]n action for injunctive relief to remedy an (e)(7) violation must be construed as one brought directly under the Constitution, inherent equitable principles, or perhaps the Administrative Procedure Act."). And following *Haase*, in a decision upon which Defendants (at 25, 27) perplexingly rely, the Circuit acknowledged its prior "suggestion that the district court retains 'inherent equitable powers' to issue injunctions in § 552a(g)(1)(D) cases predicated on violations of § 552a(e)(7)." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1122 n.10 (D.C. Cir. 2007). This Court has likewise stated "that injunctive relief for (e)(7) violations under (g)(1)(D) would be available," *Scott v. Conley*, 937 F. Supp. 2d 60, 82 (D.D.C. 2013) (Lamberth, J.), and should apply this same rule here to enjoin the Commission's violation of subsection (e)(7).

Concluding that injunctive relief is available respects Congress's intent in enacting subsection (e)(7). Congress was "well aware of the special and sensitive treatment accorded First Amendment rights under the interpretive case law" and exhibited a "concern for unwarranted collection of information as a distinct harm in and of itself." *Albright*, 631 F.2d at 919. Thus, in finding injunctive relief to be available on an (e)(7) claim in *Nagel*, the D.C. Circuit invoked the "chilling effect" that flows from the "mere compilation by the government of records describing the exercise of First Amendment freedoms." 725 F.2d at 1441. The D.C. Circuit, moreover, has "consistently turned back neat legal maneuver[s] . . . attempted by the

government that, while literally consistent with the Act's terms, [are] not in keeping with the privacy-protection responsibilities that Congress intended to assign to agencies under the Act." *Pilon v. U.S. Dep't of Justice*, 73 F.3d 1111, 1118 (D.C. Cir. 1996) (first alteration in original). This Court should likewise resist Defendants' maneuvering here: denying the injunctive relief to which Plaintiffs are entitled cannot be squared with Congress' specific and clear intent that the Privacy Act in general, and subsection (e)(7) in particular, broadly protect individuals' First Amendment interests.

Finally, as described below, even if the Court were to conclude that injunctive relief to remedy Plaintiffs' (e)(7) claim is unavailable under the Privacy Act, the Court may issue such relief under the APA. *See, e.g.*, *Doe v. Chao*, 540 U.S. at 619 n.1; *Doe v. Stephens*, 851 F.2d 1457, 1466 (D.C. Cir. 1988).

B. Plaintiff Kennedy Has Adequately Pleaded a Claim Against DHS Under Subsection (b) of the Privacy Act

Defendants do not dispute that DHS cannot, consistent with the Privacy Act, disclose Plaintiff Kennedy's personal information to the Commission. They instead (at 35-36) revert back to challenging Mr. Kennedy's standing, and then attempt to argue (at 36-37) that subsection (b) of the Privacy Act does not provide for injunctive relief. Defendants' challenge to Plaintiff Kennedy's standing fails for the reasons already discussed, and they again err concerning the availability of injunctive relief.

The Court may award Plaintiff Kennedy the relief he seeks under the APA. *See* 5 U.S.C. § 706(2)(A) (authorizing courts to hold unlawful and set aside agency actions that are, *inter alia*, not in accordance with law). The availability of injunctive relief under the APA for Privacy Act-prohibited actions was recognized by the Office of Management and Budget over 40 years ago in its Privacy Act implementation guidelines for agencies. 40 Fed. Reg. 28,948, 28,968 (July 9,

1975) (stating that plaintiffs are not limited by the specific civil remedies provisions set forth in 5 U.S.C. § 552a(g) and "may seek judicial review under other provisions of the [APA]"). As the agency charged by the Privacy Act to "develop guidelines and regulations . . . and provide continuing assistance to and oversight of . . . implementation," *id.* at 28,948, OMB's interpretation is entitled to deference. *Sussman*, 494 F.3d at 1120 ("[W]e . . . give the OMB Guidelines 'the deference usually accorded interpretation of a statute by the agency charged with its administration.'" (quoting *Albright*, 631 F.2d at 920 n.5)). And in reliance on this guidance, the Solicitor General has at least twice taken the position before the Supreme Court—contrary to the position that Defendants take here—that where a plaintiff does not have a damages claim under the Privacy Act's "independent remedial scheme," that individual "would be limited to pursuing injunctive relief under the [APA], to halt any ongoing agency violation of the Privacy Act." Brief for Respondent at 38 & n.13, *Doe v. Chao*, 540 U.S. 614 (2004) (No. 02-1377), 2003 WL 22489257; *see* Brief for Petitioners at 34-35 & n.*, *FAA v. Cooper*, 566 U.S. 284 (2012) (No. 10-1024), 2011 WL 3678806 (similar)

The Supreme Court has likewise recognized in the context of a subsection (b) claim that the APA provides an avenue to equitable relief. As the Court explained in *Doe v. Chao*, agreeing with the Solicitor General's view at the time, "[t]he Privacy Act says nothing about standards of proof governing equitable relief that may be open to victims of adverse determinations or effects, although it may be that this inattention is explained by the general provisions for equitable relief within the Administrative Procedure Act." 540 U.S. at 619 n.1 (citing 5 U.S.C. § 706); *see FAA v. Cooper*, 566 U.S. at 303 n.12 (noting the possibility of the Privacy Act "allowing for injunctive relief under" the APA). The *Doe* Court then approvingly noted that the district court

had "relied on the APA" in determining that it had jurisdiction to award injunctive relief. 540 U.S. at 619 n.1.

On remand from the Supreme Court to adjudicate attorney's fees, the Fourth Circuit in *Doe v. Chao* reaffirmed that the APA provides the predicate for seeking injunctive relief on a Privacy Act subsection (b) claim. 435 F.3d 492, 493 (4th Cir. 2006). The Fourth Circuit explained that it did not read cases limiting injunctive relief under the Privacy Act to "stand for the proposition that the Government may not be enjoined from violating the Privacy Act by disclosing personal records." *Id.* at 504 n.17. To the contrary, "[o]ften . . . and as was the case in the instant action, injunctive relief for a Government's violation of the Act will instead be appropriate and authorized by the APA." *Id.* (citing 5 U.S.C. § 706(2)(A)).

The D.C. Circuit reached the same conclusion in *Doe v. Stephens*, holding that injunctive relief for a disclosure prohibited by the Privacy Act was authorized by the APA in circumstances strikingly similar to those here. 851 F.2d at 1466. *Doe* involved a claim that the Veterans Administration improperly disclosed private data—medical records released in response to a grand jury subpoena—in violation of the Privacy Act, which had been expressly incorporated into the Veterans Records Statute. *Id.* at 1460-61; *see id.* at 1463 (Doe "premises his request for equitable relief . . . on the VA's violation of the Privacy Act."). After finding that the "Privacy Act [did] not by itself authorize the injunctive relief sought by Doe," the Court went on to hold that such relief nevertheless *was* available under the APA because Doe's "clearly [was] a case of agency action 'not in accordance with law' within the meaning of 5 U.S.C. § 706(2) . . . [where] the disclosure of Doe's psychiatric records violated the Veterans' Records Statute, as amended by the Privacy Act." *Id.* at 1463, 1466.

More recently, in *Radack v. United States Department of Justice*, a court in this district held that it had authority under the APA to award injunctive and declaratory relief to redress a Section 552a(b) prohibited disclosure. 402 F. Supp. 2d 99, 103-04 (D.D.C. 2005). Explicitly rejecting the argument made by Defendants here (at 29-30) that by authorizing specific remedies for a disclosure of records, the Privacy Act supplies the exclusive remedy for such conduct, the court reasoned that because the plaintiff "seeks declaratory and injunctive relief in addition to damages, the Privacy Act does not provide an 'adequate remedy'" under the APA. *Id.* at 104. The Court then focused on the "adequa[cy]" of the Privacy Act claim as an alternative to a suit under the APA, observing that the plaintiff's APA claim—which centered on the agency's violation of its internal policies—did not "duplicate" the Privacy Act improper disclosure claim. *Id.* Accordingly, the court permitted the plaintiff to proceed on an APA claim predicated on a disclosure alleged to have violated subsection (b) of the Privacy Act.

The district court cases cited by Defendants (at 29-30) are inapposite. They either did not involve Privacy Act claims at all,[10] considered claims arising under different sections of the Act,[11] or held that a plaintiff may not seek the *same* relief under the Privacy Act and the APA.[12] Here, however, the relief Plaintiff Kennedy seeks under the APA—enjoining DHS from

[10] *E.g.*, *Diaz-Bernal v. Myers*, 758 F. Supp. 2d 106 (D. Conn. 2010); *El Badrawi v. Dep't of Homeland Sec.*, 579 F. Supp. 2d 249 (D. Conn. 2008).
[11] *E.g.*, *Reid v. Fed. Bureau of Prisons*, No. 04-cv-1845, 2005 WL 1699425 (D.D.C. July 20, 2005); *Mittleman v. King*, No. 93-1869, 1997 WL 911801 (D.D.C. 1997); *Arruda & Beaudoin, LLP v. Astrue*, No. 11-cv-10254, 2013 WL 1309249 (D. Mass. Mar. 27, 2013); *Westcott v. McHugh*, 39 F. Supp. 3d 21 (D.D.C. 2014); *Wilson v. McHugh*, 842 F. Supp. 2d 310 (D.D.C. 2012); *Doe P. v. Goss*, No. 04-cv-2122, 2007 WL 106523 (D.D.C. Jan. 12, 2007); *Ware v. U.S. Dep't of Interior*, No. 05-3033, 2006 WL 1005091 (D. Or. Apr. 14, 2006).
[12] *E.g.*, *Mittleman v. U.S. Treasury*, 773 F. Supp. 442 (D.D.C. 1991); *Schaeuble v. Reno*, 87 F. Supp. 2d 383 (D.N.J. 2000). In *Welborn v. IRS*, the court dismissed the plaintiff's APA claim for lack of jurisdiction and, unlike here, the plaintiff sought damages under the Privacy Act in addition to injunctive relief under the APA. 218 F. Supp. 3d 64, 81-82 (D.D.C. 2016).

disclosing to the Commission all Privacy Act-protected DHS data (including Plaintiff Kennedy's data), and directing the Commission to expunge any such data it has received from DHS, *see* Am. Compl. ¶ 133—is far broader in scope than the relief any one Privacy Act plaintiff could obtain. *See* 5 U.S.C. § 552a(g).[13] It is "hard to imagine Congress envisioned such a roundabout resolution" as that advocated by Defendants, whereby individual victims of unlawful disclosures are required to bring damages suits until "the costs of being held liable on enough occasions would convince the violating agency" to choose to halt its practices. *Doe v. Herman*, No. 97-cv-43, 1998 WL 34194937, at *6 (W.D. Va. Mar. 18, 1998). Rather, where the Privacy Act's review mechanism is clearly inadequate, that void is filled by the APA.

In sum, the government's historic interpretation of the APA, both in agency guidelines and prior litigation, and Supreme Court and D.C. Circuit decisions, allow a plaintiff to seek injunctive relief under the APA for a violation of subsection (b) of the Privacy Act. Plaintiff Kennedy therefore has pleaded a legally cognizable claim against DHS.

III. PLAINTIFFS HAVE ADEQUATELY PLEADED AN *ULTRA VIRES* CLAIM AGAINST THE COMMISSION AND KOBACH

If the Court finds that Plaintiffs may not proceed to litigate their claims under either the Privacy Act or the APA, Plaintiffs' allegations concerning the Commission's extraordinary

[13] Likewise, with respect to their subsection (e)(7) claim, Plaintiffs seek broadly to enjoin the Commission from (a) maintaining, using and/or disseminating the voter history and party affiliation data in violation of subsection (e)(7) and (b) directing the Commission to expunge any such voter history and party affiliation data in their possession or that comes into their possession. Am. Compl. ¶ 133; *id.* at 40 (Prayer for Relief ¶¶ 4, 6). They also seek a court order that the Commission "provide an accounting of all voter history and party affiliation data in their custody, possession, or control; all copies that have been made of that data; all persons and agencies with whom the Commission has shared that data; and all uses that have been made of that data." *Id.* at 40 (Prayer for Relief ¶ 5). Should the Court find Plaintiffs ineligible for injunctive relief on their subsection (e)(7) claim based on its inherent equitable powers under subsection (g)(1)(D), the scope of the relief requested provides further support for Plaintiffs' reliance on the APA as an alternative path to injunctive relief, as previously discussed.

conduct nevertheless compel the conclusion that its investigative actions—and the actions of Kobach in leading its investigative charge—are *ultra vires,* and may properly be enjoined on that basis.

As Defendants recognize, a plaintiff may maintain a non-statutory cause of action against *ultra vires* government action where no suit can be "predicated on either a specific or a general statutory review provision." *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996); *cf. City of Chicago v. Sessions*, No. 17-cv-5720, 2017 WL 4081821, at *7 (N.D. Ill. Sept. 15, 2017) (enjoining Attorney General from imposing conditions on annually awarded federal grant based, in part, on *ultra vires* theory). And it is no "matter . . . whether traditional APA review is foreclosed, because '[j]udicial review is favored when a[] [government body] is charged with acting beyond its authority.'" *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1172 (D.C. Cir. 2003) (second alteration in original) (quoting *Dart v. United States,* 848 F.2d 217, 221 (D.C. Cir. 1988)). While apparently not contesting the allegations of *ultra vires* conduct by Kobach, Defendants misconstrue Plaintiffs' allegations against the Commission and—impermissibly, on a motion to dismiss—quarrel with the underlying facts. Nor do they even attempt to identify any legal authority for the unprecedented investigation being conducted by the Commission and Kobach. For these reasons, the Court should decline Defendants' invitation to dismiss Plaintiffs' *ultra vires* claim.

Plaintiffs' allegations are more than sufficient to state a plausible claim of *ultra vires* conduct by the Commission: The Commission has "undertaken a sweeping, first-of-its-kind investigation into alleged voting misconduct by individual American citizens," Am. Compl. ¶ 106—for which it has acquired First Amendment-protected and other state data of millions of Americans, *id.* ¶¶ 61-62, 80—in order to "crosscheck the voting data obtained from the states

against other private information on individuals maintained by agencies throughout the federal government . . . in order to identify individuals the Commission believes are fraudulently registered to vote," *id.* ¶ 106(d). Although previously "always prohibited" by the federal government, *id.* ¶ 106(e), this conduct is well underway, with Commission staff instructed to "collect whatever data there is that's already in the possession of the federal government" that "might be helpful" to the Commission, *id.* ¶ 73. The Commission has already compiled "materials claiming that multiple specific individuals have fraudulently registered or voted." *Id.* ¶ 106(g). Plaintiffs claim that all of this has transpired without "any authorization in the Constitution, federal law, or the Executive Order and related documents establishing the Commission." *Id.* ¶ 106.

Defendants present no substantial argument to the contrary. Rather, they misunderstand Plaintiffs' *ultra vires* claim, contending (at 2) that Plaintiffs have "not alleged that the Commission lacks any authority to request the voluntary submission of publicly available information as part of its Presidential research charge." But Plaintiffs are not disputing the President's ability to convene a properly functioning advisory committee. Nor are Plaintiffs alleging merely a "[g]arden-variety error[] of law or fact." *Griffith v. Fed. Labor Relations Auth.*, 842 F.2d 487, 493 (D.C. Cir. 1988). Rather, Plaintiffs allege that, "[n]otwithstanding the Commission's authorization to be purely advisory," Am. Compl. ¶ 106(a), it is engaged in a voter fraud investigation without "any authorization," *id.* ¶ 106, acting in a role reserved for agencies endowed by Congress with enforcement authority, *id.* ¶ 16; *see City of Arlington v. FCC*, 569 U.S. 290, 297 (2013) ("Both [agencies'] power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is *ultra vires*."). Plaintiffs have thus adequately

alleged that the Commission's investigation is "clearly and completely outside of [its] authority." *Cause of Action Inst. v. Eggleston*, 224 F. Supp. 3d 63, 76 (D.D.C. 2016).

When Defendants do engage with Plaintiffs' allegations of *ultra vires* conduct, they do not proffer any legal authority under which the Commission and Kobach are proceeding, but rather question the veracity of Plaintiffs' allegations, offering competing interpretations of documents and disputing whether Plaintiffs "establish that the Commission has *actually* investigated alleged voting misconduct." Defs.' Mot. at 38 (emphasis added). But these arguments represent nothing more than Defendants' view that *the merits* of Plaintiffs' claim will not be borne out by the evidence, an impermissible argument on a motion to dismiss. *See Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164-68 (1993). Asking the Court to weigh the evidence in this manner is impermissible even at later stages of the litigation, such as summary judgment, *see, e.g.*, *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994), let alone now.

Finally, Defendants apparently concede that Plaintiffs have stated a plausible claim for *ultra vires* conduct against Kobach. The header to Defendants' response to Plaintiffs' *ultra vires* claim refers only to "*ultra vires* action on the part of the Commission," Defs.' Mot. at 37 (capitalization altered), and this section of Defendants' brief makes only stray mention of allegations pertaining to Kobach, *see, e.g.*, *id.* at 38. Left unchallenged by Defendants are Plaintiffs' specific and detailed allegations that, on multiple occasions, Kobach acted "alone" and without "consult[ing] with the other members of the Commission," many of whom have been "kept in the dark about the substance of the Commission's activities following the July 19 meeting," Am. Compl. ¶¶ 77, 106(b), 106(c), 108, so much so that Commission member Matthew Dunlap "has refused to provide data from citizens of his state (Maine) until there is

clarity as to 'the Commission's goal,'" *id.* ¶ 78. As Plaintiffs have further alleged, these actions are contrary to the Commission's bylaws requiring that the Commission act by vote of its membership, *id.* ¶ 47, and have no other legal basis, *id.* ¶ 106. Accordingly, Plaintiffs have adequately alleged that Kobach is acting *ultra vires*.[14]

Try as they may, Defendants cannot recast what is happening here. Under the cloak of the charter of an ordinary advisory committee, the Commission and Kobach are exercising the kind of investigative powers that can only properly be delegated to federal enforcement agencies by Congress. There has been no such delegation here. Nor is there any other basis in the law for inquiring into the validity of millions of Americans' participation in the political process. Should the Court find that Plaintiffs may not proceed under the Privacy Act or the APA, this is that appropriate circumstance where judicial intervention is necessary to rein in *ultra vires* government action. The allegations in the complaint are more than sufficient to afford Plaintiffs their right to litigate these claims.

CONCLUSION

Plaintiffs respectfully request that the Court deny Defendants' motion to dismiss.

Dated: November 28, 2017

Respectfully submitted,

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[14] Plaintiffs are not alone in arguing that Kobach and the Commission are not proceeding according to regular order. *See, e.g., Dunlap v. Presidential Advisory Commission on Election Integrity*, No. 17-cv-2361 (CKK) (D.D.C. filed Nov. 9, 2017).

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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2017, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM-ECF system.

/s/ *Skye L. Perryman*
Skye L. Perryman