| | |
|---|---|
| **From:** | (b)(6) |
| **To:** | "Mathias, Susan (b)(6) (b)(6) |
| **Subject:** | RE: urgent ask |
| **Date:** | 2018/01/08 16:53:00 |
| **Priority:** | Normal |
| **Type:** | Note |

Ok. Attached is the amended complaint from 9/13/17, against the Commission, DHS, and Kobach.

(b)(5)

(b)(5)

(b)(5)

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**From:** Mathias, Susan
**Sent:** Monday, January 8, 2018 4:07 PM
**To:** (b)(6)
**Subject:** RE: urgent ask

Okay, thanks.

Susan Mathias
Assistant General Counsel for Strategic Oversight
Legal Counsel Division
Office of the General Counsel
U.S. Department of Homeland Security
(b)(6)



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**From:** (b)(6)
**Sent:** Monday, January 8, 2018 4:06 PM
**To:** Mathias, Susan (b)(6)
**Subject:** RE: urgent ask

(b)(6) Let me review some materials and get back to you a couple.

---

**From:** Mathias, Susan
**Sent:** Monday, January 8, 2018 3:35 PM
**To:** (b)(6)
**Subject:** RE: urgent ask

Hi (b)(6) I included the information about DOJ's filing in December, but would appreciate any additional information on the status of the case. Thanks.

Susan Mathias
Assistant General Counsel for Strategic Oversight
Legal Counsel Division
Office of the General Counsel
U.S. Department of Homeland Security
(b)(6)



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**From:** Mathias, Susan
**Sent:** Monday, January 8, 2018 3:15 PM
**To:** (b)(6)
**Subject:** urgent ask

(b)(6) the following paragraph appears in a white paper being prepared for the front office:

(b)(5)

Can you give me the current status of this litigation?

Susan Mathias
Assistant General Counsel for Strategic Oversight
Legal Counsel Division
Office of the General Counsel
U.S. Department of Homeland Security
(b)(6)

This communication, along with any attachments, may contain confidential and legally privileged information. If the reader of this message is not the intended recipient, you are hererby notified that any dissemination, distribution, use or copying of this message is strictly prohibited. If you have received this in error, please reply to the sender and delete this message.

| | |
|---|---|
| **Sender:** | (b)(6) |
| **Recipient:** | "Mathias, Susan (b)(6)<br>(b)(6) |
| **Sent Date:** | 2018/01/08 16:52:58 |
| **Delivered Date:** | 2018/01/08 16:53:00 |
| **From:** | (b)(6) |
| **To:** | "'Borson, Joseph (CIV)' <Joseph.Borson@usdoj.gov>" |
| **CC:** | "'Federighi, Carol (CIV)' <Carol.Federighi@usdoj.gov>";<br>"'Wolfe, Kristina (CIV)' <Kristina.Wolfe@usdoj.gov>" |
| **Subject:** | RE: Common Cause v. PACEI - Reply Brief due today |
| **Date:** | 2017/12/15 11:56:00 |
| **Type:** | Note.EnterpriseVault.Shortcut.RestoreMe |

Thanks, (b)(6)

I have no comments or edits (b)(5)

On the draft reply, I had a couple of thoughts (b)(5)

(b)(5)

| | |
|---|---|
| **Sender:** | (b)(6) |
| **Recipient:** | "'Borson, Joseph (CIV)' <Joseph.Borson@usdoj.gov>";<br>"'Federighi, Carol (CIV)' <Carol.Federighi@usdoj.gov>";<br>"'Wolfe, Kristina (CIV)' <Kristina.Wolfe@usdoj.gov>" |
| **Sent Date:** | 2017/12/15 11:56:27 |
| **Delivered Date:** | 2017/12/15 11:56:00 |

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

COMMON CAUSE
805 15th Street, N.W.
Washington, D.C. 20005,

and

JAN CANTLER
c/o DEMOCRACY FORWARD FOUNDATION
P.O. Box 34553
Washington, D.C. 20043,

and

ANTHONY GUTIERREZ
c/o DEMOCRACY FORWARD FOUNDATION
P.O. Box 34553
Washington, D.C. 20043,

and

THOMAS KENNEDY
c/o DEMOCRACY FORWARD FOUNDATION
P.O. Box 34553
Washington, D.C. 20043,

and

ELLEN NAKHNIKIAN
c/o DEMOCRACY FORWARD FOUNDATION
P.O. Box 34553
Washington, D.C. 20043,

*Plaintiffs*,

vs.

PRESIDENTIAL ADVISORY COMMISSION ON
ELECTION INTEGRITY
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20405,

and

Case No. 1:17-cv-01398 (RCL)

U.S. DEPARTMENT OF HOMELAND SECURITY
245 Murray Lane, S.W.
Washington, D.C. 20528,

and

KRIS W. KOBACH, in his official capacity as Vice-Chair of the Presidential Advisory Commission on Election Integrity

*Defendants*.

**AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

Plaintiffs Common Cause, Anthony Gutierrez, Thomas Kennedy, Ellen Nakhnikian, and Jan Cantler, hereby sue the Presidential Advisory Commission on Election Integrity ("Commission"), the U.S. Department of Homeland Security ("DHS"), and Kris W. Kobach, in his official capacity as Vice-Chair of the Commission.

**Preliminary Statement**

Plaintiffs bring this action to enjoin the Commission and its Vice-Chair, Defendant Kris W. Kobach, from conducting an unprecedented and sweeping investigation into alleged voting misconduct by individual American citizens. Neither the Constitution nor federal law permits this investigation, for which the Commission, acting in concert with other Defendants, has already amassed the politically sensitive voting data of millions of individual American citizens. Moreover, the Commission's continued maintenance of data regarding Americans' political affiliations and voting history violates the Privacy Act of 1974, a Watergate-era law which specifically proscribes the government's collection of information that "describ[es] how any individual exercises rights guaranteed by the First Amendment." 5 U.S.C. § 552a(e)(7).

Although Executive Order No. 13,799 established the Commission as a "solely advisory" body, the Commission and Defendant Kobach have undertaken multiple actions that not only far outstrip this limited mission but also lack any legal authority. Among these actions, the Commission's investigation began on June 28, 2017, when Defendant Kobach, acting on his own, requested the voting rolls (including individuals' party affiliation and voter history) from all 50 states and the District of Columbia without permitting his fellow Commission members to vote on the data request. Defendant Kobach likewise failed to even notify his fellow Commission members before sending a second data request to the states on July 26, 2017.

In his role as Vice-Chair, Defendant Kobach has made clear his intention to "crosscheck" the data the Commission intakes from the states against other federal databases containing information on individuals (including databases maintained by Defendant DHS and other federal agencies) in order to identify individuals whom the Commission believes to be fraudulently registered to vote. At the Commission's July 19, 2017 meeting, Defendant Kobach spoke openly of modelling the Commission's investigation on the multi-state voting crosscheck program that he runs out of Kansas—known as the Interstate Voter Registration Crosscheck Program—that compares states voting data to identify potential misconduct and target individuals for removal from state voter rolls, including by criminal prosecution. To that end, Defendant Kobach, with the consent of the Commission, directed Commission staff to obtain "whatever data" there was within the federal government (including multiple sources of data on individuals held by Defendant DHS and other federal agencies subject to the Privacy Act) to assist the Commission in its investigation. These actions have driven at least one member of the

Commission, Maine Secretary of State Matthew Dunlap, to publicly question the propriety of the Commission's pursuit of individuals' voting data and to withhold the data of Maine's voters until he better understands "the Commission's goal." But multiple other states have complied with the Commission's request, and, as a result, the Commission is continuing to collect and maintain voting data on millions of American voters.

In one of his *Breitbart* columns, Defendant Kobach has stated that he contemplates that "*every* investigation" the Commission undertakes will require individuals' state voter roll data. Defendant Kobach has discussed the need to call witnesses to testify before the Commission concerning specific individuals who allegedly voted fraudulently in elections and believes the state voter data is needed to, among other things, "confirm" the identity and voting history of the individuals named. Just days before the filing of this Amended Complaint, Defendant Kobach publicly targeted and accused a group of voters in New Hampshire of voter fraud in another *Breitbart* column, citing to information presented to the Commission for its September 12 meeting. Defendant Kobach continued to make these accusations in New Hampshire at the Commission's most recent September 12 meeting. In an apparent attempt to continue their investigation unchecked and keep the public in the dark, neither Defendant Kobach nor other Commission members updated the Commission or the public at the September 12 meeting on the work that the Commission has been conducting.

Defendants may not, under the cloak of a presidential "advisory" Commission, establish a new federal agency within the White House to conduct an unauthorized investigation of the validity of millions of Americans' participation in the political

process. Doing so directly circumvents the Privacy Act's protections on the collection of information regarding citizens' First Amendment activities as well as the Act's restrictions on disclosure of individuals' information, and lacks any basis in the Constitution or federal law. Accordingly, Defendants' actions—which are *ultra vires* and violate the Privacy Act and the Administrative Procedure Act—should be enjoined.

**Parties**

1. Plaintiff, Common Cause, is a nonprofit corporation organized and existing under the laws of the District of Columbia. Common Cause is one of the nation's leading democracy reform organizations and has over one million members and supporters nationwide. 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, including its eligible members, to be registered for and vote in fair, open, and honest elections. Common Cause brings this action on behalf of itself and its members.

2. 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. Common Cause also advocates for policies, practices, and legislation—such as automatic and same-day registration—that facilitate voting for eligible voters and ensure against disenfranchisement. Common Cause opposes efforts that burden registration and/or voting, including restrictive voter identification laws, partisan gerrymandering, and any other effort that could potentially chill citizens' rights to register or stay registered. Common Cause advocates the safeguarding of personal information, in keeping with the dictates of both state and federal law.

3. Common Cause and 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. Common Cause has already expended staff time and resources to engage in non-litigation related outreach and communications efforts to oppose the impermissible collection of voter information as sought by the Commission, diverting resources from its core activities. The expenditures of resources that Common Cause has been forced to make as a result of the Commission's activities are aimed at counteracting the harm that the Commission's impermissible attempt to collect voter information will cause to Common Cause's mission of encouraging and facilitating voter participation and engagement.

4. The Commission's attempt to collect voter information will also harm Common Cause's and its members' efforts to encourage voter registration and participation. For voters and prospective voters facing political polarization, the threat that the federal government will monitor their electoral participation and even their party affiliations is deeply troubling and has deterred and will continue to deter the exercise of their First Amendment-protected rights to express their views through the ballot box. Further, the Commission's effort to collect voter information is causing registrants and voters to cancel their registration status (as has already occurred in Florida and Colorado) or forgo registering and voting altogether. Such actions would directly undo the work to which Common Cause has devoted itself over the past few decades and would limit voter engagement and participation in our democracy. To counteract these harmful effects, Common Cause has been engaged in direct counseling of individual voters seeking to de-

register from voting as a result of the fear they have for what the Commission will do with their personal First Amendment information.

5. Plaintiff Anthony Gutierrez is a United States citizen and resident of the State of Texas. Mr. Gutierrez is registered to vote in Texas and his personal information, including political party affiliation and voting history, has been sought by the Commission. Texas's Secretary of State has stated that he will be providing the Commission with voting information regarding Texas-registered voters such as Mr. Gutierrez. Mr. Gutierrez has experienced grave concern over his voting history, party, and other personal data being collected by the Commission. He is also concerned that the Commission's plans to crosscheck the data collected against other federal databases, including those maintained by Defendant DHS, will create obstacles to his future participation in the political process.

6. Plaintiff Thomas Kennedy is a United States citizen and a resident of the State of Florida, where he is registered to vote. Originally from Argentina, Mr. Kennedy became a citizen of the United States in 2016 and, upon completing his citizenship ceremony, immediately registered to vote. The Commission has obtained voter information regarding Florida-registered voters such as Mr. Kennedy. Mr. Kennedy is highly concerned and anxious about the Commission's collection of his voter information as well as its stated plans to perform a crosscheck in concert with other federal agencies, including Defendant DHS, which has and/or imminently will disclose Mr. Kennedy and other naturalized citizens' data to the Commission without consent. Such a crosscheck will disproportionately disenfranchise and/or hamper recently naturalized citizens, like Mr. Kennedy, from voting and/or participating fully in the political process. Mr.

Kennedy is especially concerned about Defendants' actions given Defendant Kobach's direct public attacks and animus towards immigrants, like himself. Mr. Kennedy's participation in the political process is, accordingly, threatened by Defendants' actions.

7. Plaintiff Ellen Nakhnikian is a United States citizen and resident of New York. She is a registered voter. The Commission has obtained voter information regarding New York-registered voters such as Ms. Nakhnikian. Ms. Nakhnikian is highly concerned about the Commission's collection of her voter information as well as its stated plans to perform a crosscheck in concert with other federal agencies. Such actions undermine her confidence and participation in the political process and also invade her privacy.

8. Plaintiff Jan Cantler is a United States citizen and resident of New York. She is a registered voter. Ms. Cantler is highly concerned about the Commission's collection of her voter information as well as its stated plans to perform a crosscheck in concert with other federal agencies. Such actions undermine her participation in the political process and also invade her privacy.

9. Ms. Cantler supported the Governor of New York's stance that voter data would not be disclosed to the Commission, but became anxious and concerned when the Commission took steps to override the Governor's decision in order to obtain her and other New York voters' data. To express her opposition and in an attempt to persuade the Commission and Defendant Kobach to change its course, Ms. Cantler called Defendant Kobach's office—the Secretary of State's office in Kansas—to reach him. Ms. Cantler was not connected to Defendant Kobach but was connected to someone in the Secretary of State's office. After making clear that she was not a Kansas constituent, Ms. Cantler expressed her concerns regarding Defendant Kobach and the Commission's

activities to this individual. The individual rebuffed Ms. Cantler's concerns, stating only that the data that was being collected by the Commission was "public data." Ms. Cantler explained that the data that the Commission was directing the states to provide was not of the type that could be accessed by the general public without going through certain steps and that the matching logic that would be used by the Commission to crosscheck individual voter data could lead to inaccurate and problematic results as well as invasions of privacy. The individual continued to rebuff her concerns.

10. Defendant Commission is a federal agency within the meaning of 5 U.S.C. § 552a(a)(1) and 5 U.S.C. § 551(1) that is headquartered in Washington, D.C.

11. Defendant U.S. Department of Homeland Security is a federal agency within the meaning of 5 U.S.C. § 552a(a)(1) and 5 U.S.C. § 551(1) that is headquartered in Washington, D.C. DHS (including its components) maintains multiple "systems of records" containing records concerning individuals' immigration status, including, for example, files of individuals' citizenship applications as well as the Systematic Alien Verification for Entitlements Program ("SAVE"), a system administered by the U.S. Citizenship and Immigration Services, a component of DHS, that tracks the legal status of non-citizens for use in administering benefit programs. Multiple states have previously attempted to use the SAVE database to verify individuals' names as part of voter list maintenance programs.

12. Defendant Kris W. Kobach is the Vice-Chair of the Commission. He is sued in his official capacity as Vice-Chair of the Commission. Defendant Kobach was appointed Vice-Chair of the Commission by President Donald J. Trump. Laws and policies

Defendant Kobach has championed have been the subject of multiple lawsuits by voters' rights and civil rights groups and have been responsible for suppressing votes.

**Jurisdiction and Venue**

13. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, because this action arises under federal law, specifically the Privacy Act, 5 U.S.C. §§ 552a(b), (e)(7), and the APA, 5 U.S.C. §§ 701-706.

14. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e), because at least one of Defendants is headquartered in Washington, D.C. and a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred here.

**Legal Framework**

15. Advisory commissions are governed by the Federal Advisory Committee Act, which sets forth various statutory requirements for commissions established by the President or other federal agencies, including requirements regarding public access to committee materials and meetings. *See* 5 U.S.C. app. 2 § 2; *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 445-47 (1989).

16. Lawfully constituted federal agencies are empowered to act by statute and may exercise only the authority prescribed by Congress. *See City of Arlington v. FCC*, 569 U.S. 290, 290 (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*."). Multiple statutes, including the Privacy Act of 1974 and the Administrative Procedure Act, govern agencies' actions and interactions with members of the public.

17. The Privacy Act of 1974 regulates the government's collection, maintenance, use, and dissemination of sensitive personal information.

18. Congress, which passed the Act following Watergate, was "concerned with curbing the illegal surveillance and investigation of individuals by federal agencies that had been exposed during the Watergate scandal." Overview of the Privacy Act of 1974, Dep't of Justice (last updated July 16, 2015), https://www.justice.gov/opcl/policy-objectives.

19. Section 552a(b) of 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.

20. Section 552a(e)(7) 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."

21. As the D.C. Circuit has explained: "The legislative history of the Act reveals Congress' own special concern for the protection of First Amendment rights, as borne out by statements regarding 'the preferred status which the Committee intends managers of information technology to accord to information touching areas protected by the First Amendment of the Constitution.'" *Albright v. United States*, 631 F.2d 915, 919 (D.C. Cir. 1980) (citing S. Rep. No. 1183 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916, 6971). Congress directed Section 552a(e)(7) at "inquiries made for research or statistical purposes which, even though they may be accompanied by sincere pledges of confidentiality are, by the very fact that government make (sic) the inquiry, infringing on

zones of personal privacy which should be exempted from unwarranted Federal inquiry." *Id.* (citing S. Rep. No. 1183). This same legislative history also "reveals a concern for unwarranted collection of information as a distinct harm in and of itself." *Id.*; *see also Bassiouni v. FBI*, 436 F.3d 712, 718 (7th Cir. 2006) ("[I]n enacting § 552a, Congress was motivated by a general concern with the potential for abuse if the Government is allowed to collect political dossiers about American citizens.").

22. Moreover, in interpreting the Privacy Act, the D.C. Circuit has "taken particular care not to undermine the Act's fundamental goals," *Pilon v. U.S. Department of Justice*, 73 F.3d 1111, 1118 (D.C. Cir. 1996), and has resisted "'neat legal maneuver[s]' attempted by the government that, while literally consistent with the Act's terms, were not in keeping with the privacy-protection responsibilities that Congress intended to assign to agencies under the Act," *id.* (alteration in original; citation omitted) (quoting *Benavides v. U.S. Bureau of Prisons*, 995 F.2d 269, 272 (D.C. Cir. 1993)); *see also Bartel v. FAA*, 725 F.2d 1403, 1409 (D.C. Cir. 1984) (declining to adopt interpretation that would have "circumvent[ed]" the Act's privacy protections); *Tijerina v. Walters*, 821 F.2d 789, 797 (D.C. Cir. 1987) (same, regarding interpretation that "would give agencies license to defang completely the strict limitations on disclosure that Congress intended to impose").

23. Accordingly, the D.C. Circuit has held that an agency "may not so much as collect information about an individual's exercise of First Amendment rights except under very circumscribed conditions," and that Section 552a(e)(7) applies regardless whether a record is maintained in an agency's system of records. *Albright*, 631 F.2d at 919.

24. The Privacy Act incorporates the definition of "agency" found in the Freedom of Information Act, 5 U.S.C. § 552a(a)(1), which in turn defines "agency" as "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." *Id.* § 552(f)(1).

25. Whether a governmental entity is an "agency" under the Privacy Act is a case-by-case determination where "the specific evidence bearing upon that question varies with the entity in question." *Armstrong v. Exec. Office of the President*, 90 F.3d 553, 558-59 (D.C. Cir. 1996). Courts in this circuit look at several factors in making this determination, including whether an entity's sole function is to advise and assist the President and whether the entity exercises substantial independent authority. *Citizens for Responsibility & Ethics in Wash.* (*"CREW"*) *v. Office of Admin.*, 566 F.3d 219, 222-23 (D.C. Cir. 2009). Thus, depending on its specific functions, a commission or other governmental body can be deemed to be an agency to which the Privacy Act applies.

26. Although it was formed as a "commission," Defendant Commission is an "agency" for the purposes of the Privacy Act.

## Factual Allegations

***Candidate Donald J. Trump's Repeated, Unsubstantiated Claims of Voter Fraud***

27. Prior to his election, then-presidential candidate Donald J. Trump repeatedly made unsubstantiated assertions of voter fraud.

28. On October 10, 2016, candidate Trump tweeted, "Of course there is large scale voter fraud happening on and before election day."[1]

29. On October 17, 2016, candidate Trump told supporters at a campaign rally in Wisconsin that "voter fraud is very, very common," including voting by "people that have died 10 years ago" and "illegal immigrants."[2]

30. On November 8, 2016, Donald J. Trump was elected as the forty-fifth president of the United States.

31. On November 27, 2016, president-elect Trump tweeted, "In addition to winning the Electoral College in a landslide, I won the popular vote if you deduct the millions of people who voted illegally."[3]

32. Three days later, Defendant Kobach echoed the president-elect's assertion, stating that, "I think the president-elect is absolutely correct when he says the number of illegal votes cast exceeds the popular vote margin between him and Hillary Clinton."[4]

33. In December 2016, addressing president-elect Trump's claim that "millions of people voted illegally," Trump senior advisor Kellyanne Conway stated that she has

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[1] @realDonaldTrump, Twitter (Oct. 17, 2016, 8:33 AM), https://twitter.com/realdonaldtrump/status/787995025527410688?lang=en.

[2] *Donald Trump Campaign Event in Green Bay, Wisconsin*, C-SPAN (Oct. 17, 2016), https://www.c-span.org/video/?417019-1/donald-trump-campaigns-green-bay-wisconsin.

[3] @realDonaldTrump, Twitter (Nov. 27, 2016, 3:30 PM), https://twitter.com/realdonaldtrump/status/802972944532209664.

[4] Hunter Woodall, *Kris Kobach Agrees with Donald Trump That 'Millions' Voted Illegally But Offers No Evidence*, Kansas City Star (Nov. 30, 2016), *available at* http://www.kansascity.com/news/politics-government/article117957143.html.

"been receiving information about the irregularities and about the illegal votes, particularly from sources, officials like Kris Kobach."[5]

34. Indeed, president-elect Trump met with Defendant Kobach in the days after the election. Defendant brought to the meeting a document entitled "Department of Homeland Security: Kobach Strategic Plan for the First 365 Days," which outlined various objectives for DHS in the first year of the Trump Presidency, and mentioned voter rolls.

35. In separate litigation challenging Kansas's non-compliance with the National Voter Registration Act ("NVRA"), Defendant Kobach has resisted releasing the photographed document, which outlines proposed amendments to the NVRA, and consequently he has been fined $1,000 by the court for "deceptive conduct and lack of candor."[6]

***Creation of the Presidential Advisory Commission on Election Integrity to Investigate Voter Fraud***

36. On January 20, 2017, Donald J. Trump was inaugurated as President of the United States.

37. Five days later, President Trump tweeted on his official Twitter account: "I will be asking for a major investigation into VOTER FRAUD, including those registered to vote in two states, those who are illegal and even, those registered to vote who are dead

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[5] Emily Shapiro, *Kellyanne Conway Dodges Question on Trump's Claim That 'Millions' Voted Illegally*, ABC News (Dec. 2, 2016), http://abcnews.go.com/Politics/kellyanne-conway-dodges-question-trumps-claim-millions-voted/story?id=43924056.

[6] Christopher Ingraham, *Federal Judge Upholds Fine Against Kris Kobach for 'Pattern' of 'Misleading the Court' in Voter-ID Cases*, Wash. Post, July 2016, https://www.washingtonpost.com/news/wonk/wp/2017/07/26/federal-judge-upholds-fine-against-kris-kobach-for-pattern-of-misleading-the-court-in-voter-id-cases/?utm_term=.1b1d8491cf31.

(and many for a long time). Depending on results, we will strengthen up voting procedures!"[7]

38. On January 25, 2017, President Trump reiterated his claims that allegedly fraudulent votes were cast for his opponent: "We're gonna launch an investigation to find out. And then the next time—and I will say this, of those votes cast, none of 'em come to me. None of 'em come to me. They would all be for the other side. None of 'em come to me. But when you look at the people that are registered: dead, illegal and two states and some cases maybe three states—we have a lot to look into." He vowed to "make sure it doesn't happen again."[8]

39. That same day, CNN reported that according to a senior administration official, "President Donald Trump could sign an executive order or presidential memorandum initiating an investigation into voter fraud as early as Thursday." The official further informed CNN that "[t]he investigation would be carried out through the Department of Justice."[9]

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[7] @realDonaldTrump, Twitter (Jan. 25, 2017, 7:10 AM and 7:13 AM), https://twitter.com/realDonaldTrump/status/824227824903090176 and https://twitter.com/realdonaldtrump/status/824228768227217408?lang=en.

[8] *TRANSCRIPT: ABC News anchor David Muir interviews President Trump,* ABC News (Jan. 25, 2017), *available at* http://abcnews.go.com/Politics/transcript-abc-news-anchor-david-muir-interviews-president/story?id=45047602.

[9] Dan Merica et al., *Trump Considers Executive Order on Voter Fraud*, CNN, Jan. 25, 2017, http://www.cnn.com/2017/01/25/politics/trump-calls-for-major-investigation-into-voter-fraud/index.html.

40. On May 11, 2017, the White House issued Executive Order No. 13,799 establishing the Commission, which President Trump has described as a "Voter Fraud Panel."[10]

41. The Executive Order states that the Commission "shall be solely advisory" and that its "[m]ission" is to study, "consistent with applicable law," the "registration and voting processes used in Federal elections."[11]

42. The Commission is chaired by Vice President Michael Pence and is to be composed of up to 15 additional members having knowledge and experience in "elections, election management, election fraud detection, and voter integrity efforts" or having "knowledge or experience that the President determines to be of value to the Commission."[12]

43. The Executive Order directs "[r]elevant" executive departments and agencies to "endeavor to cooperate with the Commission."[13]

44. The Commission's Charter provides for a dedicated, full-time staff of approximately three employees; an annual budget of approximately $250,000 for Fiscal Years 2017 and 2018; and "administrative services, funds, facilities, staff, equipment, and other support services" furnished by the General Services Administration.[14]

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[10] *See* Exec. Order No. 13,799 ("Exec. Order"), 82 Fed. Reg. 22,389 (May 11, 2017); @realDonaldTrump, Twitter (July 1, 2017, 9:07 AM) (capitalization omitted), https://twitter.com/realdonaldtrump/status/881137079958241280.
[11] Exec. Order No. 13,799.
[12] *Id.*
[13] *Id.*
[14] *Charter of the Presidential Advisory Commission of Election Integrity* ¶¶ 6-7 ("Charter"), White House, https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/commission-charter.pdf; Exec. Order § 7.

45. While the Charter of the Commission provides for three full-time staff members, Defendant Kobach has publicly stated that the Commission's staff is "substantial" and includes both full-time staff as well as individuals detailed from other federal agencies.[15]

46. Apart from the Chair and Vice-Chair, the Commission presently has ten additional members, consisting of a current member of the United States Elections Assistance Commission, present and former state election and judicial officials, the President and General Counsel of the Public Interest Legal Foundation ("PILF"), and an employee of the Heritage Foundation who also serves on the board of PILF.[16]

47. According to its bylaws, the Commission acts by votes of its membership.[17]

48. The Charter for the Commission indicates that the Commission was established in accordance with Executive Order 13,799 and the provisions of the Federal Advisory Committee Act ("FACA"), as amended (5 U.S.C. app. 2). However, the bylaws state that the Commission only "has voluntarily agreed to operate in accordance with [FACA]."[18]

***Appointment of Defendant Kris Kobach as Vice-Chair of the Commission***

49. The Charter for the Commission permits the Vice President to appoint a Vice-Chair of the Commission "who may perform the duties of the chair if so directed by the

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[15] Sam Levine, *Watchdog Groups Sue for Documents on Trump Voter Fraud Probe*, Huffington Post, Aug. 22, 2017, http://www.huffingtonpost.com/entry/trump-voter-fraud-probe_us_599c4ae9e4b04c532f448f59.

[16] Pam Fessler, *Amid Skepticism and Scrutiny, Election Integrity Commission Holds First Meeting*, NPR, July 19, 2017, http://www.npr.org/2017/07/19/537910132/amid-skepticism-and-scrutiny-election-integrity-commission-holds-first-meeting.

[17] *Presidential Advisory Commission on Election Integrity By-Laws and Operating Procedure* § 5, White House, https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/pacei-bylaws_final.PDF.

[18] *Id.* § 2.

Vice President."[19] Yet, President Donald Trump appointed the Vice-Chair of the Commission.

50. In a press release on May 11, 2017, the White House announced that President Trump had appointed Kris W. Kobach as Vice-Chair.[20] Defendant Kobach is the only Secretary of State in the nation with the power to prosecute voter fraud directly, and is known as a drafter and proponent of many policies that disenfranchise racial and ethnic minorities from the political process.

51. As Secretary of State of Kansas, Defendant Kobach has supported a multi-state crosscheck program, the Interstate Voter Registration Crosscheck Program, that compares names of individuals among several states to identify potential voter fraud. The program has been accused of vastly over-identifying cases of alleged voter fraud and has had the effect of erroneously removing eligible voters from the rolls. The press release announcing Defendant Kobach's appointment as Vice-Chair stated that the Commission "will utilize all available data, including state and federal databases."[21]

52. After being named Vice-Chair, Defendant Kobach described the Commission's mission as focused on "voter fraud more broadly, all forms of it,"[22] and has explained that the Commission's "goal is to, for the first time, have a nationwide fact-finding

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[19] Charter ¶ 11.

[20] *President Announces Formation of Bipartisan Presidential Commission on Election Integrity*, White House (May 11, 2017), https://www.whitehouse.gov/the-press-office/2017/05/11/president-announces-formation-bipartisan-presidential-commission.

[21] *Id.*

[22] Gary Moore, *Tucker Carlson: Kris Kobach - Trump Executive Order Creates Voter Fraud Commission: 5/11/2017*, YouTube (May 11, 2017), https://www.youtube.com/watch?v=Fm0MjHmYSJU.

effort" focused on assessing "evidence" of "different forms of voter fraud across the country."[23]

53. Defendant 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. Defendant Kobach has explained that the federal government has always prohibited states from doing such a crosscheck, but that with the creation of the Commission, the government is "going to be able to run [federal] database[s] against one or two states and see how many people are known aliens residing in the United States and also on the voter rolls."[24]

54. Yet, Defendant Kobach's efforts go far beyond matching a federal database with data from "one or two states." Defendant Kobach has expanded the scope of the Commission's data collection and crosscheck efforts—stating that the Commission "for the first time in our country's history . . . [will] be gathering data from all 50 states" and using the "federal government's databases" to "bounce[]" the data on individual voters against the federal databases. He specifically referenced data on individuals in the hands of Defendants DHS, indicating that such data could be checked against state voter rolls to identify fraud.[25] A spokesman for the Commission has confirmed that the Commission

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[23] *Transcript: Trump Forms Voter Fraud Commission*, CNN (May 15, 2017), http://transcripts.cnn.com/TRANSCRIPTS/1705/15/nday.06.html.
[24] Moore, *supra* note 24.
[25] *Transcript: Kobach Talks Goals of New Voter Fraud Commission*, Fox News (May 14, 2017), http://www.foxnews.com/transcript/2017/05/14/kobach-talks-goals-new-voter-fraud-commission-commerce-secretary-on-nkorea-missile-test-china-trade-deal.html.

intends to run the voting data it receives on individuals through a number of different databases to check for alleged fraudulent voter registrations.[26]

55. Defendant Kobach's written public statements as a paid columnist for *Breitbart* have discussed the Commission's need to hear witness testimony concerning voter fraud committed by specific individuals and that it will use data it collects from the states to "confirm" the identity of individual American voters alleged to have committed fraud.[27]

56. In a *Breitbart* column posted on the Commission's website, Defendant Kobach has targeted and publicly accused a group of individual voters in New Hampshire of fraud, indicating that he has found "proof" within materials provided to the Commission for its most recent meeting that these individuals committed voter fraud.[28]

57. Defendant Kobach has continually emphasized that the data comparison tactics used by the Commission have never before been used by the federal government. He bragged that as Secretary of State in Kansas, he implemented a similar program that was challenged in court by the ACLU.

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[26] Jessica Huseman, *Election Experts See Flaws in Trump Voter Commission's Plan to Smoke Out Fraud*, ProPublica (July 6, 2017), *available at* https://www.propublica.org/article/election-experts-see-flaws-trump-voter-commissions-plan-to-smoke-out-fraud.

[27] Kris W. Kobach, *Why States Need to Assist the Presidential Commission on Election Integrity*, *Breitbart* (July 3, 2017), *available at* http://www.breitbart.com/big-government/2017/07/03/kobach-why-states-need-to-assist-the-presidential-commission-on-election-integrity/.

[28] Kris W. Kobach, *It Appears That Out-of-State Voters Changed the Outcome of the New Hampshire U.S. Senate Race*, *Breitbart* (Sept. 7, 2017), *available at* http://www.breitbart.com/big-government/2017/09/07/exclusive-kobach-out-of-state-voters-changed-outcome-new-hampshire-senate-race/; Letter from Sec'y of State William Gardner and Commissioner John Barthelmes to Hon. Shawn N. Jasper (Sept. 6, 2017), *available at* https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/pacei-response-to-nh-speaker-jasper-from-depts-state-safety.pdf; *Speaker Receives Voter Registration Statistics Requested of Departments of State and Safety*, State of New Hampshire House of Representatives, (Sept. 7, 2017) *available at* https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/pacei-nh-speaker-jasper-report.pdf.

***The Commission's First Meeting and Its Unprecedented and Unauthorized Request for Personal and Voter Data***

58. Despite the Executive Order's directive and the requirements under FACA that the Commission hold public meetings with prior notice, the Commission first convened as a group on a June 28, 2017, call without any prior public notice. Following brief welcoming remarks, Vice President Pence disconnected from the call.

59. Neither the Commission nor the White House provided the public with a transcript of the teleconference. A brief "readout" of the meeting supplied by the White House stated that Defendant Kobach had informed the other Commission members that a letter would be sent to all 50 states and the District of Columbia requesting data from state voter rolls.

60. That same day, Defendant Kobach "directed" that a letter be sent under his signature to the Secretaries of State or other election officials in all 50 states and the District of Columbia. Declaration of Kris W. Kobach ¶ 4, *Elec. Privacy Info. Ctr.* (*"EPIC"*) *v. Presidential Advisory Comm'n on Election Integrity*, No. 17-1320 (D.D.C. July 5, 2017). The other Commission members neither reviewed nor vetted the actual language of the letter before it was sent. Nor did the members vote on sending out the letter.

61. Defendant Kobach's June 28 letter "invite[d]" state officials, among other things, to share "evidence or information . . . you have regarding instances of voter fraud or registration fraud in your state" and asked *how* the Commission could "support" state election officials "with regard to information technology security and vulnerabilities."[29]

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[29] *See, e.g.*, Letter from Kris W. Kobach, Vice Chair, Presidential Advisory Comm'n on Election Integrity, to Hon. Elaine Marshall, Sec'y of State, N.C. 1 (June 28, 2017),

62. The letter requested that the recipients provide by July 14, 2017, "the publicly-available voter roll data for [your state], including, if publicly available under the laws of your state, the full first and last names of all registrants, middle names or initials if available, addresses, dates of birth, political party (if recorded in your state), last four digits of social security number if available, voter history (elections voted in) from 2006 onward, active/inactive status, cancelled status, information regarding any felony convictions, information regarding voter registration in another state, information regarding military status, and overseas citizen information."[30]

63. The letter instructed recipients to "submit your responses electronically to ElectionIntegrityStaff@ovp.eop.gov or by utilizing the Safe Access File Exchange ('SAFE'), which is a secure FTP site the federal government uses for transferring large data files. You can access the SAFE site at https://safe.amrdec.army.mil/safe/Welcome.aspx."[31]

64. Shortly after Defendant Kobach sent the letter, one Commissioner, Luis Borunda, Maryland's Secretary of State, resigned from the Commission.

65. After reports indicated that certain state officials might decline to provide some or all of the data requested by Defendant Kobach, President Trump tweeted: "Numerous states are refusing to give information to the very distinguished VOTER FRAUD PANEL. What are they trying to hide?"[32]

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*available at* https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/information-requests-to-states-06282017.pdf.

[30] *Id.* at 1-2.

[31] *Id.* at 2.

[32] @realDonaldTrump, Twitter (July 1, 2017, 9:07 AM), https://twitter.com/realdonaldtrump/status/881137079958241280.

66. The same day that Defendant Kobach sent his letter, the Voting Section of the Civil Rights Division of the Department of Justice ("DOJ") sent its own letter to states requesting their procedures for complying with the statewide voter registration list maintenance provisions of the NVRA. DOJ requested that states provide their policies for removing ineligible voters and identify the officials responsible for doing so.[33]

***The Commission's Second Meeting***

67. At the Commission's second meeting on July 19, 2017, the Commission's intentions to conduct an unauthorized investigation of alleged individual voter fraud became even more clear.

68. Defendant Kobach described his operation of the Interstate Voter Registration Crosscheck Program in Kansas, under which 30 states pool their voter data to identify those who are registered in more than one state with the aim of removing duplicative names from the voter rolls, including by criminal prosecution.[34]

69. The methodology and reliability of the Interstate Voter Registration Crosscheck Program have been questioned, and concerns have been raised as to whether it is being used as a tool for voter suppression. This notwithstanding, Defendant Kobach then stated his hope that the Commission's work would be "equally successful on the national level."[35]

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[33] *See, e.g.*, Letter from T. Christian Herren, Jr., Chief, Voting Section, Civil Rights Div., U.S. Dep't of Justice, to Hon. Kim Westbrook Strach, Exec. Dir., N.C. State Bd. of Elections (June 28, 2017).

[34] White House, *Presidential Advisory Commission on Election Integrity*, YouTube (July 24, 2017), https://www.youtube.com/watch?v=oZI27wB8-po.

[35] *Id.*

70. One Commission member described the objective of the Commission's investigation as "deciding . . . how accurate . . . the voter rolls" are.[36]

71. Referring to the "red tape" and other obstacles that have previously prevented state efforts to obtain information on individuals held by the federal government as part of voter list maintenance programs, Commission members discussed the following information maintained by federal agencies on individuals that could aid the Commission in its investigation:

- ***Department of Homeland Security:*** information on all non-citizens both legally and illegally within the United States as well as answers given by applicants on naturalization forms regarding voting history;
- ***U.S. Census Bureau:*** surveys on individuals who did not vote or did not register to vote;
- ***Federal district courts:*** information regarding individuals excused from jury duty for being non-citizens;
- ***Department of Justice:*** information regarding referrals for criminal prosecution based on non-citizens excused from jury duty or admissions on naturalization forms to having voted in an election as a non-citizen; and
- ***Social Security Administration:*** index of death records.[37]

72. Repeated references were made at the meeting to referrals of individuals suspected of voter fraud to the DOJ for possible criminal prosecution. For example, one

[36] *Id.*
[37] *Id.*

Commission member questioned whether agencies of the federal government and the federal judiciary were forwarding data they collect to DOJ for criminal prosecution.[38]

73. In response to these comments, Defendant Kobach instructed Commission staff between upcoming Commission meetings 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.[39]

***The Broadening Scope of the Commission's Unauthorized Investigation***

74. The scope of the Commission's investigation has broadened even further since the issuance of the initial June 28, 2017 letter and since the two prior Commission meetings.

75. Although Defendant Kobach's June 28 letter initially gave states a deadline of July 14 to transmit their voters' data, the Commission put the data collection on hold pending a decision on the temporary restraining order and preliminary injunction that was filed in a separate lawsuit.

76. After preliminary motions in that suit were resolved, Defendant Kobach renewed the data request by a letter dated July 26 to the states, citing to the NVRA's requirement that states maintain voter registration information and explaining that the Commission is interested in "gathering facts" and "going where those facts lead."[40]

77. Defendant Kobach did not discuss his plans to issue the July 26 letter request with the Commission at the July 19 meeting, nor were the plans to issue the request discussed with Commission members thereafter. The lack of transparency has concerned

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[38] *Id.*
[39] *Id.*
[40] *See, e.g.*, Letter from Kris W. Kobach, Vice Chair, Presidential Advisory Comm'n on Election Integrity, to N.Y. State Bd. of Elections 2 (July 26, 2017).

Commission members, causing at least one of them to question the validity of the Commission's work.

78. For example, after noting that the data request was not considered or discussed with the full Commission, Commission member Matthew Dunlap stated in a public statement after the July 19 meeting: "If we're going to act as a Commission, we should really be considering the entire request for data as a body, and determining what it is we're researching and how to look for it."[41] Mr. Dunlap has refused to provide data from citizens of his state (Maine) until there is clarity as to "the Commission's goal."[42] Commission member and Indiana Secretary of State Connie Lawson has stated that she does not know what the Commission intends to do with the state voter roll data.[43] West Virginia county clerk, Mark Rhodes, who is also a Commission member, stated after the July 19 meeting that he did not receive any information regarding the Commission's post-meeting activities. Rhodes was also not informed of Kobach's July 26 request letter prior to its being sent.[44] Former Arkansas state legislator, David Dunn, who is also a

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[41] *See Secretary Dunlap Reviewing Elections Commission's Second Request for Voter Data*, Dep't of the Sec'y of State of Me., http://www.maine.gov/sos/news/2017/electioncommission2.html.

[42] Scott Thistle, *Maine's Sec'y of State says he will Reject Second Request for Voter Registration data*, Portland Press Herald, http://www.pressherald.com/2017/07/31/maines-secretary-of-state-says-he-will-reject-second-request-for-voter-registration-data/ (last modified Aug. 1, 2017).

[43] Tony Cook and Kaitlin L Lange, *Indiana's secretary of state could be check on Trump voter fraud commission*, IndyStar (July 9, 2017), http://www.indystar.com/story/news/politics/2017/07/09/indianas-connie- lawson-could-check-trump- voter-fraud-commission/442250001/.

[44] Kira Lerner, *Democrats on Trump's voting commission iced out since first meeting*, ThinkProgress (Aug. 22, 2017), https://thinkprogress.org/democrats-voting-commission-ceec3ea98a33/.

Commission member, similarly stated that he has not received information on the Commission's work after the July 19 meeting.[45]

79. This notwithstanding, a spokesman for the Commission confirmed that the work of the Commission was continuing and that Commission members would be informed of that work at the next meeting.[46] As discussed below, such a discussion did not occur at the September 12 meeting, keeping the public and certain Commission members in the dark as to the work that is ongoing.

80. Numerous states have complied and/or have plans to comply with the Commission's latest request for data—including the request for party affiliation and voter history protected by the First Amendment. As of the filing of this Amended Complaint, at least 17 states indicated they would provide data and 11 more have said they would do so if the Commission fulfilled certain request requirements.

81. Although certain states have indicated that they may withhold their voters' data from the Commission, President Trump stated at the July 19 meeting that data from the rest of the states "will be forthcoming," observing that "[i]f any state does not want to share this information, one has to wonder what they're worried about."[47]

82. The Commission has already shown that it will use other methods to obtain data even in cases where state officials have declined to provide the information in response to the request letter. For example, in New York, the Commission sought voter data through a Freedom of Information Law request after state officials refused to provide their voter

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[45] *See id.*
[46] *See id.*
[47] White House, *supra* note 36.

rolls to the Commission. To obtain New York's data, the Commission had to certify that it would not use the data, or information derived from it, for any "non-election" purpose.

***The Continual Shifting of the Commission's Plans to Store Voter Information***

83. The Commission has not been transparent about where it intends to store the personal voter data that it is collecting for its investigation of individual Americans but its efforts have involved other federal agencies.

84. The initial June 28, 2017 voter data request issued by Defendant Kobach directed states to submit their data to a ".eop.gov" email address. Yet, Defendant Kobach stated in a sworn declaration in a separate lawsuit over the Commission's activities that he "intended" that only "narrative responses" provided in response to the letter be sent to the eop.gov email address in the letter and that "voter roll data" be uploaded onto the Safe Access File Exchange (SAFE), which he described as a "tested and reliable method of secure file transfer used routinely by the military for large, unclassified data sets" that "also supports encryption by individual users."[48] The SAFE website is operated by the U.S. Army Aviation and Missile Research Development and Engineering Center, a component within the U.S. Army and the Department of Defense.

85. After the court in a separate lawsuit inquired if the Department of Defense, by virtue of its role in collecting and maintaining the data on the SAFE website, should be joined as a defendant to that action, the Commission changed course on its storage plans. In a subsequent sworn declaration, Kobach stated that "[i]n order not to impact the ability of other customers to use" SAFE, the Director of White House Information Technology was "repurposing an existing system" to collect the information "within the White House

[48] Declaration of Kris W. Kobach ¶ 5, No. 17-1320.

Information Technology enterprise."[49] When asked by the same Court what other federal agencies support the White House's computer system, the Government stated that the "mechanics" of the White House's information technology program are "something that may not be appropriate to say in a public setting."[50] When asked by the court whether other agencies were cooperating with the Commission, it stated that none then were.[51]

86. A week later, another declarant, Charles Herndon, the White House's Director of Information Technology, stated that no other federal agency will have a role in this initial "data collection process" from the states, but left unaddressed the mechanics of the upcoming data crosscheck project and the process for collecting, storing or using the data maintained by the other federal agencies.[52]

87. The Commission's second data request issued on July 26 by Defendant Kobach described yet another system for collecting the voter data, stating that the "Commission is offering a new tool" to transmit the voter data to the "White House computer system" and that "detailed instructions" would be provided after states reached out to an email address provided in the letter.[53] The July 26 letter once again left unaddressed any role other federal agencies may have in the operation of this "new tool."

88. In the weeks since the Commission's second request, at least two Commission members have confirmed that they have been using their personal email to communicate

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[49] Third Declaration of Kris W. Kobach ¶ 1, *EPIC*, No. 17-1320 (D.D.C. July 10, 2017).
[50] Transcript of Temporary Restraining Order Hearing, *EPIC*, No. 17-1320 (D.D.C. July 7, 2017).
[51] *Id.* at 30:5-13.
[52] Declaration of Charles Christopher Herndon ¶ 6, *EPIC*, No. 17-1320 (D.D.C. July 17, 2017).
[53] *See* Letter from Kobach to N.Y. State Bd. of Elections, *supra* note 42, at 2.

about the Commission's business.[54] The Commission has not given any indication of what security precautions accompanied the use of personal email for Commission business and whether voter data has been transmitted in this manner.

***The Commission's Third Meeting***

89. The Commission convened for a third time on September 12, 2017.

90. The September 12 meeting was chaired by Defendant Kobach, not Vice President Pence.

91. At the September 12 meeting, Defendant Kobach defended his *Breitbart* column, in which he declared that he had "proof" that individual voters in New Hampshire committed fraud based on materials that were provided to the Commission by New Hampshire state officials.

92. Defendant Kobach's *Breitbart* column now appears on the Commission's website.

93. During the meeting, Defendant Kobach also touted his authority as Kansas Secretary of State to prosecute voter fraud, noting that he has prosecuted only 8 cases of illegal voting due to his limited resources, but that he has more cases "in the hopper."

94. Commission member and Heritage Foundation Fellow Hans von Spakovsky testified regarding a database hosted by the Heritage Foundation that purportedly "documents 1,071 proven incidents of election fraud."[55]

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[54] Zoe Tillman, *Members Of Trump's Election Integrity Commission Used Personal Email Accounts*, BuzzFeed (Sept. 6, 2017), *available at* https://www.buzzfeed.com/zoetillman/at-least-one-member-of-trumps-election-integrity-commission?utm_term=.tygxzmGG1#.krRoWnNNl].

[55] Hans Von Spakovsky, *Presidential Advisory Commission on Election Integrity*, The Heritage Foundation, https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/pacei-hans-von-spakovsky-election-presentation.pdf (last visited Sept. 11, 2017).

95. The Commission also heard testimony from Dr. John Lott Jr., President of the Crime Prevention Research Center, that every American voter should be subject to a criminal background check through the federal National Instant Criminal Background Check System and that the system should be updated to include certain immigration information.[56]

96. The Commission received a written presentation by Commission member J. Christian Adams, highlighting "real life examples" of improper voter registration and voting by named non-citizens, in part based on materials used in the citizenship process, and recommending increased reliance on the SAVE database by state election officials as well as opening "new information-sharing channels" between Defendant DHS and state officials in order to identify voter fraud more easily.[57]

97. Other presentations to the Commission recommended, among other things, that "8,471 cases of likely duplicate voting be investigated for possible wrongdoing" by the Commission[58] and that increased reliance be placed on data crosscheck methodology to identify alleged voter fraud.[59]

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[56] John R. Lott Jr., *Presentation to Presidential Advisory Commission on Election Integrity: A Suggestion and Some Evidence*, Crime Prevention Research Center, https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/pacei-dr-john-lott-presentation.pdf (last visited Sept. 13, 2017).

[57] Submission from J. Christian Adams, *Garden State Gotcha*, https://www .whitehouse.gov/sites/whitehouse.gov/files/docs/pacei-submission-J-Christian-Adams_Garden-State-Gotcha_PILF.pdf (last visited Sept. 13, 2017).

[58] Gov't Accountability Inst., America The Vulnerable: The Problem of Duplicate Voting, *available at* https://www.whitehouse.gov/sites/whitehouse.gov/ files/docs/pacei-govt-accountability-institute-problem-duplicate-voting.pdf (last visited Sept. 13, 2017).

[59] *Data Mining for Potential Voter Fraud Findings and Recommendations*, Simpatico Software Systems, https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/pacei-ken-block-presentation.pdf (last visited Sept. 13, 2017).

98. At the September 12 meeting, the Commission was not transparent about the work it had conducted since its previous meeting on July 19.

***The Harmful Consequences of the Commission's Unauthorized Voter Fraud Investigation***

99. As a result of the Commission's unauthorized 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.[60] Inhibiting public participation in this way undermines public confidence in the political process, creating direct harm to Plaintiffs.

100. As detailed above, Plaintiffs Kennedy, Gutierrez, Cantler, and Nakhnikian are all registered voters whose data is at risk, given Defendants' unauthorized actions and imminent plans. Plaintiffs are highly concerned and have experienced anxiety over the Commission and Defendant Kobach's investigation and collection of voting data as well as how the Commission and Defendant Kobach will use their voter data. Plaintiffs are also harmed by Defendants' efforts to crosscheck their individual data and face the imminent prospect that these crosscheck efforts will hamper, impede, and/or suppress their participation in the political process.

101. As detailed above, Plaintiff Common Cause and its members are and will be harmed by the unauthorized investigation and data collection by Defendants Commission

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[60] *See, e.g.*, *Thousands Unregister from Voter Rolls After Trump Panel's Data Requests*, NBC News, July 18, 2017, http://www.nbcwashington.com/news/politics/Thousands-Unregister-Voter-Rolls-Election-Integrity-435155813.html; Brian Eason, *More Than 3,000 Colorado Voters Have Canceled Their Registrations Since Trump Election Integrity Commission Request*, Denver Post, July 13, 2017, http://www.denverpost.com/2017/07/13/trump-election-integrity-commissions-colorado-voters-cancel-registration.

and Kobach and have already expended staff time and resources to counteract the Commission's unlawful activities.

102. As detailed above, Plaintiff Kennedy is and will be harmed by the unlawful disclosure by DHS of his individually identifiable data without his consent.

## Claims for Relief

### Count One
### (*Ultra Vires* Action Against Defendants Commission and Kobach)

103. Plaintiffs hereby reallege all allegations in the above paragraphs as if fully set forth herein.

104. Plaintiffs have a right of action to enjoin and declare unlawful official action that is *ultra vires*.

105. Executive Order No. 13,799 established the Commission as a "solely advisory" body charged to "study" the registration and voting processes used in federal elections "consistent with applicable law."

106. Defendant Kobach and the Commission have taken multiple actions that lack any authorization in the Constitution, federal law, or the Executive Order and related documents establishing the Commission. Among them:

a. Notwithstanding the Commission's authorization to be purely advisory, the Commission, at Defendant Kobach's direction, has undertaken a sweeping, first-of-its-kind investigation into alleged voting misconduct by individual American citizens that will affect their most fundamental rights.

b. Defendant Kobach alone "directed" the unprecedented investigative action of seeking from all 50 states and the District of Columbia on June 28, 2017, the

voting data of all American citizens without giving other members of the Commission the opportunity to approve or vet the request.

c. Defendant Kobach did not consult with the other members of the Commission—or propose for a vote at the Commission's July 19 meeting—before renewing the data request to the states on July 26, 2017.

d. Defendant Kobach and the Commission intend to crosscheck the voting data obtained from the states against other private information on individuals maintained by agencies throughout the federal government (including databases maintained by Defendants DHS) in order to identify individuals the Commission believes are fraudulently registered to vote.

e. When states have previously requested that such a crosscheck be performed with DHS databases in order to determine which of their residents may be fraudulently registered to vote, Defendant Kobach has acknowledged that the federal government has always prohibited such a check.

f. Defendant Kobach has discussed the Commission's need to hear testimony from witnesses concerning voter fraud committed by specific individuals.

g. The Commission has been presented with materials claiming that multiple specific individuals have fraudulently registered or voted.

h. Defendant Kobach has accused individual voters in New Hampshire of voter fraud based on materials presented to the Commission.

107. Commission member Luis Borunda, Maryland's Deputy Secretary of State, resigned following Defendant Kobach's June 28, 2017, data request to the states.

108. Commission members Matthew Dunlap, Mark Rhodes, and David Dunn were kept in the dark about the substance of the Commission's activities following the July 19 meeting.

109. As a result, Commission member Dunlap has stated he will not comply by sending the data of Maine's voters to the Commission until he better understands "the Commission's goal."

110. Notwithstanding statements of non-compliance by state officials, President Trump has declared that voting data on individuals will nevertheless be "forthcoming" from every state.

111. After New York officials declined to comply with the Commission's data request, the Commission obtained the data through other means, after certifying in a public information request that the Commission would be not be using the data for a "non-election" purpose.

112. The allegations set forth above demonstrate that under Defendant Kobach's leadership, and at his direction, the Commission is engaged in a lawless and unbounded investigation of individual voters for which there is no authorization in the Executive Order, the Constitution, or any act of Congress.

113. The investigative actions taken by Defendant Kobach and the Commission are completely unauthorized actions by a federal official and a governmental body that are therefore *ultra vires*.

114. Accordingly, the investigation is *ultra vires* and Plaintiffs are entitled to a declaration that the Commission is without authority to investigate and maintain the voting data of millions of American citizens, an order requiring that any and all such data

in the Commission's possession or that comes into its possession be returned to the states that furnished it, and an injunction preventing Defendant Kobach and the Commission from undertaking this unauthorized investigation.

**Count Two**
**(Violation of 5 U.S.C. § 552a(e)(7) By Defendant Commission)**

115. Plaintiffs hereby reallege all allegations in the above paragraphs as if fully set forth herein.

116. Section 552a(e)(7) of the Privacy Act 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."

117. The Privacy Act defines "maintain" to include "maintain, collect, use, or disseminate." 5 U.S.C. § 552a(a)(3).

118. Through the collection, maintenance, use, and/or dissemination of data on individuals' voter history and party affiliation—activity that is protected by the First Amendment—Defendants have violated, and will continue to violate, Section 552a(e)(7).

119. The collection, maintenance, use, and/or dissemination of these records was unauthorized and does not fall within the scope of a valid law enforcement activity.

120. As described above, Plaintiffs have been adversely affected by Defendant's maintenance, use, and/or dissemination of their First Amendment-protected data.

**Count Three**
**(Violation of 5 U.S.C. § 552a(b) by Defendant Department of Homeland Security)**

121. Plaintiff Kennedy hereby realleges all allegations in the above paragraphs as if fully set forth herein.

122. Information regarding Plaintiff Kennedy is maintained by Defendant DHS in one or more Privacy Act "systems of records."

123. Pursuant to 5 U.S.C. § 552a(b), DHS may not "disclose 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.

124. At the July 19, 2017, Commission meeting, Defendant Kobach instructed Commission staff to obtain information that Defendant DHS maintains on individuals including Plaintiff Kennedy, such as DHS's files on the immigration status and citizenship applications of individuals including Plaintiff Kennedy.

125. On information and belief, DHS has—or imminently will—disclose to the Commission and/or Commission staff information about individuals including Plaintiff Kennedy contained in DHS's "systems of records."

126. At no time did Plaintiff Kennedy provide DHS either verbal or written consent to disclose information concerning himself to the Commission and its staff.

127. Upon information and belief, this disclosure was or will be intentional and willful, and no exception in 5 U.S.C. § 552a(b) applies.

128. Plaintiff Kennedy has been adversely affected as a direct and proximate cause of Defendant DHS's disclosure as described in the paragraphs above.

**Count Four**
**(Violation of 5 U.S.C. § 706 by Defendants Commission and DHS)**

129. Plaintiffs hereby reallege all allegations in the above paragraphs as if fully set forth herein.

130. In collecting, maintaining, using, and/or disseminating data on Plaintiffs' voter history and party affiliation, activity that is protected by the First Amendment, in

violation of 5 U.S.C. § 552a(e)(7), Defendants Commission and DHS have acted arbitrarily, capriciously, in excess of statutory jurisdiction and authority, and otherwise contrary to law, in violation of the APA, 5 U.S.C. § 706.

131. In disclosing Plaintiff Kennedy's data in violation of 5 U.S.C. § 552a(b), Defendant DHS has acted arbitrarily, capriciously, in excess of statutory jurisdiction and authority, and otherwise contrary to law, in violation of the APA, 5 U.S.C. § 706.

132. The collection, maintenance, use, dissemination, and disclosure of Plaintiffs' data in violation of Sections 552a(e)(7) and 552a(b) of the Privacy Act by Defendants is a final agency action that is not in accordance with law.

133. If relief is unavailable under the Privacy Act, Plaintiffs are entitled to declaratory and injunctive relief under 5 U.S.C. § 706 enjoining the Defendants from collecting, maintaining, using and/or disseminating the voter history and party affiliation data in violation of Section 552a(e)(7); directing Defendants to expunge any such voter history and party affiliation data that is in their possession or comes into their possession; enjoining Defendant DHS from disclosing individuals' Privacy Act-protected records in violation of Section 552a(b); and directing Defendant Commission to expunge any such data received on Plaintiff Kennedy and other individuals from Defendant DHS.

## Prayer for Relief

WHEREFORE, Plaintiffs pray that this Court:

1. Declare that Defendant Kobach and the Commission are operating *ultra vires* because they are collecting and maintaining the voting data of millions of Americans as part an investigation they have no legal authority to conduct;

2. Enjoin Defendant Kobach and the Commission from undertaking the unauthorized investigation of individual American voters;
3. Declare that the collection, maintenance, use, and dissemination of voter history and party affiliation data by Defendant Commission violates Section 552a(e)(7) of the Privacy Act and, in the alternative, the APA;
4. Enjoin Defendant Commission from the collection, maintenance, use, and dissemination of voter history and party affiliation data;
5. Order Defendant Commission to 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;
6. Order Defendant Commission to return to any supplying state all voter history and party affiliation data received from that state or otherwise securely and permanently delete such data;
7. Declare that the disclosure of Plaintiff Kennedy's data by Defendant DHS to the Commission and/or Commission staff violates Section 552a(b) of the Privacy Act and, in the alternative, the APA.
8. Enjoin Defendant DHS from the disclosure of individuals' Privacy Act-protected data to the Commission in violation of Section 552a(b).
9. Order Defendant Commission to return to DHS the data of Plaintiff Kennedy and any other data received on individuals in violation of Section 552a(b).

10. Award Plaintiffs costs and reasonable attorneys' fees incurred in this action; and

11. Grant such other relief as the Court may deem just and proper.

Dated: September 13, 2017

Respectfully submitted,

/s/ *Skye L. Perryman*

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of September, 2017, the foregoing Amended Complaint was served electronically on all parties of record via the Court's CM/ECF system.

Dated: September 13, 2017 /s/ *Skye L. Perryman*

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

| | |
|---|---|
| COMMON CAUSE, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, *et al.*,<br><br>Defendants. | Civil Action No. 1:17-cv-1398 (RCL) |

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION, IN THE ALTERNATIVE, FOR JURISDICTIONAL DISCOVERY**

Defendants have moved to dismiss plaintiffs' Amended Complaint for lack of subject-matter jurisdiction (on the basis that plaintiffs lack standing), as well as for failure to state a claim (on the basis that plaintiffs fail to state a claim under the Privacy Act, the Administrative Procedure Act, or an ill-formed *ultra vires* theory). In that motion, defendants have "assume[d] the veracity" of the factual allegations in the Amended Complaint, *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), and those documents referenced in the Amended Complaint, *see Slate v. Public Def. Serv. for D.C.*, 31 F. Supp. 3d 277, 287 (D.D.C. 2014), but have nonetheless argued that those facts, if taken as true, do not establish plaintiffs' standing (or, for that matter, that they have stated a claim). In other words, defendants have raised a facial challenge to plaintiffs' standing. *See Erby v. United States*, 424 F. Supp. 2d 180, 182 (D.D.C. 2006).

Despite the nature of defendants' challenge to the Court's jurisdiction at the motion to dismiss stage, plaintiffs have filed an extraordinary motion for jurisdictional discovery. They do

not claim, and cannot claim, that defendants have made a factual challenge to the Court's subject-matter jurisdiction. Instead, they largely recast their factual allegations, yet again, and argue that if this Court concludes that it lacks subject-matter jurisdiction based solely on the allegations pled in the Amended Complaint, plaintiffs are nonetheless entitled to jurisdictional discovery, aimed against a presidential commission, so that they may attempt to identify additional facts to confirm their speculative theory of standing. There is no basis for this motion, and it should be rejected.

## STANDARD OF REVIEW

Jurisdictional discovery generally emerges in the context of challenges to personal jurisdiction. "In order to engage in jurisdictional discovery, the plaintiff must have at least a good faith belief that such discovery will enable it to show that the court has personal jurisdiction over the defendant. Such a request for jurisdictional discovery cannot be based on mere conjecture or speculation." *FC Inv. Grp. LC v. IFX Mkts., Ltd.*, 529 F.3d 1087, 1093-93 (D.C. Cir. 2008) (citation and quotation marks omitted). Jurisdictional discovery may also be appropriate if defendants make a challenge to "the factual basis of subject-matter jurisdiction." *Wyatt v. Syrian Arab Republic*, 225 F.R.D. 1, 2 (D.D.C. 2004). Where defendants raise a facial challenge to the court's subject-matter jurisdiction, as opposed to a factual challenge, jurisdictional discovery is not appropriate. *See id.* ("There is no doubt that jurisdictional discovery is permissible in cases where the defendant challenges the factual basis of the court's subject-matter jurisdiction. The question here, however, is whether, as plaintiffs allege, the defendants have brought such a challenge, or if, as the defendants argue, *the complaint is deficient on its face and discovery cannot save it*.") (emphasis added and citation omitted); *Conyers v. Westphal*, 235 F. Supp. 3d 72, 79 n.4 (D.D.C. 2017) (plaintiff not entitled to

jurisdictional discovery in response to facial jurisdictional challenge); *see also McElmurray v. Consol. Gov't of Augusta-Richmond Cty.*, 501 F.3d 1244, 1251 (11th Cir. 2007) ("Discovery was not necessary" when district court considered facial jurisdictional attack); *Lu v. Cent. Bank of Republic of China (Taiwan)*, 610 F. App'x 674, 675 (9th Cir. 2015) (same).

## ARGUMENT

## JURISDICTIONAL DISCOVERY IS IMPROPER IN RESPONSE TO A RULE 12 MOTION ALLEGING A FACIAL PLEADING DEFICIENCY

Defendants have not raised a factual challenge to the Court's subject-matter jurisdiction – and, indeed, plaintiffs never claim that they have. Accordingly, there is no basis for jurisdictional discovery.

Defendants have raised two challenges to the Court's subject-matter jurisdiction. First, they argue that the plaintiffs have not alleged facts which, if taken as true, demonstrate that either the individual plaintiffs have standing or that Common Cause has representational or organizational standing. *See* Mem. in Supp. of Defs.' Mot. to Dismiss ("MTD"), at 9-14, ECF No. 27-1. Second, defendants have argued that, as to plaintiff Kennedy, plaintiffs' allegations speculating that the Department of Homeland Security will share information in a manner that injures him do not establish a sufficiently concrete and imminent injury for Article III standing. *See* MTD at 35-36; *see also Clapper v. Amnesty Int'l USA*, 568 U.S.398, 401 (2013) ("[R]espondents' theory of *future* injury is too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending.'"). At no point in either argument do defendants say that plaintiffs' facts are not true; rather, defendants argue that even taking the facts in the Amended Complaint and the documents referenced in the Amended Complaint as true, plaintiffs have not established the Court's subject-matter jurisdiction. And plaintiffs never assert that defendants have advanced such a factual argument. That resolves this

issue: because the jurisdictional part of defendants' motion does not turn on disputed facts, but rather on whether plaintiffs' pled facts are sufficient to confer standing, there is no basis for jurisdictional discovery. *See, e.g.*, *Wyatt*, 225 F.R.D. at 2; *Westphal*, 235 F. Supp. 3d at 79 n.4.

Instead, plaintiffs' motion is largely an exercise in re-arguing their standing or the merits of their claims in a way that should have been confined to their opposition to defendants' motion to dismiss. *See* Pl.s' Mot., in the Alternative, for Jurisdictional Discovery ("Mot. Jurisdictional Discovery"), at 2-5, 6-8, ECF No. 32. Plaintiffs also try to introduce new facts into the record – facts which plaintiffs did not allege in their Amended Complaint and, thus, defendants did not address in their motion. *See id.* at 10-12.

Indeed, plaintiffs' motion makes it clear that it is not a request for jurisdictional discovery, but rather a hidden attempt for merits discovery. Plaintiffs admit that defendants have argued that "[p]laintiffs' factual allegations consist of mere 'speculat[ion] about what DHS and the Commission might do in the future,'" but then state that they "would propose to discover these facts through a minimal number of interrogatories and document requests to Defendant Commission and Defendant DHS, and short Fed. R. Civ. P. 30(b)(6) depositions of the Commission and of DHS." *Id.* at 10. But if injury is speculative on the face of the complaint, the remedy – per *Clapper*, and decades of precedent – is to dismiss plaintiffs' Amended Complaint for lack of standing. The remedy is not to engage in a freestanding attempt to resolve the speculation, in a way that would assert the Court's judicial power before plaintiffs have established that they have standing in a manner that would allow the Court to do so. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to

exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.") (quoting *Ex parte McCardles*, 7 Wall. 506, 514 (1868)).

None of the cases that plaintiffs cite calls this elementary proposition into question. *See* Mot. Jurisdictional Discovery at 12-14. *FC Investment Group LC*, 529 F.3d at 1093-94, *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 676 (D.C. Cir. 1996), and *Diamond Chemical Co., Inc. v. Atofina Chems., Inc.*, 268 F. Supp. 2d 1, 15-16 (D.D.C. 2003), concerned challenges to personal jurisdiction. *Ignatiev v. United States*, 238 F.3d 464 (D.C. Cir. 2001), involved a claim under the Federal Tort Claims Act ("FTCA"), in which there was a question regarding the existence of Secret Service guidelines, a fact necessary to establish a claim under the FTCA. The Court held that, under this circumstance, where "appellants wish to discover not facts, but applicable rules," discovery "limited perhaps to the issue of whether such guidelines exist[]" would be appropriate. *Id.* at 467. *Briscoe v. United States*, No. 16-cv-0809 (ABJ), 2017 WL 3188954, at *8-9 (D.D.C. July 25, 2017), involved a similar type of FTCA claim, and a similar type of discovery order. Here, of course, plaintiffs wish to discover *facts*, not written policies.

There is a more overriding reason why discovery is inappropriate at this stage. Plaintiffs' discovery is explicitly targeted against the Commission, a presidential advisory commission created by the President, chaired by the Vice President, and staffed by individuals employed by the Office of the Vice President. The Supreme Court has cautioned that where "discovery requests are directed to the Vice President and other senior Government officials who served on a [committee] to give advice and make recommendations to the President," "special considerations control" regarding "the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 385 (2004). In such circumstances, "[t]he high respect that is

owed to the Office of the Chief Executive . . . is a matter that should inform . . . the timing and scope of discovery . . . and . . . the Executive's constitutional responsibilities and status [are] factors counseling judicial deference and restraint[.]" *Id.* (internal citations and quotation marks omitted). Plaintiffs seek discovery into the very operations of the Commission. *See* Mot. Jurisdictional Discovery at 9-10. If *Cheney* is to have any meaning, it is that a party should not be allowed to pursue a speculative claim against a presidential advisory commission through a fishing expedition for jurisdictional discovery *before* a court has concluded that it has subject-matter jurisdiction. *See, e.g.*, *APP Dynamic ehf v. Vignisson*, 87 F. Supp. 3d 322, 330-31 (D.D.C. 2015) (jurisdictional discovery cannot be based on a "speculative fishing expedition").

## CONCLUSION

For the reasons discussed above, plaintiffs' motion in the alternative for jurisdictional discovery should be denied.

Dated: December 15, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Director

*/s/ Joseph E. Borson*
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*Counsel for Defendants*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on December 15, 2017, I have electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of electronic filing to the parties.

/s/ *Joseph E. Borson*
JOSEPH E. BORSON

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

| | |
|---|---|
| COMMON CAUSE, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, *et al.*,<br><br>Defendants. | Civil Action No. 1:17-cv-1398 (RCL) |

**[PROPOSED] ORDER**

Upon Consideration of Plaintiffs' Motion for Jurisdictional Discovery, it is ordered that the motion is DENIED.

DATE:_____ _____

THE HONORABLE ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

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

| | |
|---|---|
| COMMON CAUSE, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, *et al.*,<br><br>Defendants. | Civil Action No. 1:17-cv-1398 (RCL) |

**NOTICE OF EXECUTIVE ORDER**

Today, the President signed an Executive Order terminating the Presidential Advisory Commission on Election Integrity. *See* https://www.whitehouse.gov/presidential-actions/executive-order-termination-presidential-advisory-commission-election-integrity/ (last visited Jan. 3, 2018) (copy attached hereto). Undersigned counsel will confer with counsel for the plaintiffs about next steps for moving forward.

Dated: January 3, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Director

*/s/ Joseph E. Borson*
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Executive Orders

# Executive Order on the Termination of Presidential Advisory Commission on Election Integrity

Issued on: January 3, 2018



By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Executive Order 13799 of May 11, 2017 (Establishment of Presidential Advisory Commission on Election Integrity), is hereby revoked, and the Presidential Advisory Commission on Election Integrity is accordingly terminated.

Sec. 2. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party (other than by the United States) against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

THE WHITE HOUSE,

January 3, 2018.

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

| | |
|---|---|
| COMMON CAUSE, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, *et al.*,<br><br>Defendants. | Civil Action No. 1:17-cv-1398 (RCL) |

**REPLY MEMORANDUM IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

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## INTRODUCTION

In their Amended Complaint, plaintiffs allege that the Presidential Advisory Commission on Election Integrity (the "Commission") and the Department of Homeland Security ("DHS") have violated the Privacy Act, such that broad injunctive relief is warranted. Plaintiffs also allege that the Commission has taken *ultra vires* action by purportedly conducting an investigation into individual voters. Plaintiffs, however, fail in their opposition to show that they have established their Article III standing, or that they state a claim for which relief may be granted. The Amended Complaint should be dismissed.

To begin, plaintiffs have not established their standing. The individual plaintiffs attach new affidavits attempting to establish their injury, but they point to speculative harm that is not sufficient to establish injury-in-fact. Common Cause has also failed to show it has representational or organizational standing. While it has for the first time in its opposition identified members, it has not established that those members have been injured. Nor does its voluntary decision to reallocate its resources from one advocacy activity to another establish standing. In any event, plaintiffs fail to state a claim. The Commission is not an agency subject to the Privacy Act or Administrative Procedure Act ("APA"). Plaintiffs concede in their opposition that the Commission has not been tasked by its foundational Executive Order with exercising substantial independent authority, which is the most important consideration in determining agency status, but nonetheless claim that it has undertaken an investigation into individual Americans in a manner that constitutes the functional exercise of such power. Their opposition points to no facts, however, establishing such an investigation; rather, it twists facts in the Amended Complaint to speculate that one *might* exist in a way that is not enough to surmount a motion to dismiss. Nor have plaintiffs shown a right to relief. Plaintiffs have not rebutted defendants' arguments that broad

injunctive relief of the type they seek is not available under the Privacy Act or APA. Instead, they rely on dicta to resist these conclusions, but such dicta are not binding legal authority, and in any event have been superseded by more recent Supreme Court jurisprudence. Plaintiffs' claim against DHS also fails because it is entirely speculative that the agency will take any action involving plaintiffs' information; a conclusion plaintiffs do not seriously challenge in their opposition. Finally, there is no basis for the extraordinary remedy of *ultra vires* relief, again because plaintiffs have not pled facts showing that the Commission is at present conducting (or intending immensely to conduct) an investigation into individual Americans.

## ARGUMENT

## I. PLAINTIFFS LACK STANDING

### A. The Individual Plaintiffs Lack Standing

Despite plaintiffs' attempt to supplement their averments, the individual plaintiffs in this case still fail to allege a cognizable injury-in-fact sufficient to establish standing. Plaintiffs Cantler and Nakhnikian allege only generally that there has been an "invasion of . . . personal privacy," Cantler Decl. ¶ 14, ECF No. 30-1; Nakhnikian Decl. ¶ 11, ECF No. 30-6, a claim that collapses back on the allegation that there has been a violation of the Privacy Act. *See also* Pls.' Opp'n to Defs.' Mot. to Dismiss Am. Compl. ("Opp'n") at 8, 13, ECF No. 30. But the alleged violation alone is not sufficient to establish standing. Plaintiffs must allege some actual concrete or imminent harm to themselves, apart from the violation standing alone. These plaintiffs have failed to do so. The speculative and inflated list of *defendants'* possible activities plaintiffs posit on page 15 of their Opposition does not substitute for a description of actual or imminent harm to be suffered by *plaintiffs*.

Plaintiffs point to *Albright v. United States*, 631 F.2d 915 (D.C. Cir. 1980), to support their position that the "mere inquiry of the government into an individual's First Amendment rights" is sufficient to establish standing. *See* Opp'n at 14 (quoting *Albright*, 631 F.2d at 919). But that is not the holding of *Albright I*. The quoted phrase was addressing the congressional concerns behind enactment of the Privacy Act, not standing. Ultimately, *Albright I* decided the question of whether a record not incorporated within a "system of records" was covered by the Privacy Act; it did not address standing. Indeed, the court noted that plaintiffs "concede[d] that the district court did not rule on th[e] question" of whether the plaintiffs had adequately pled facts demonstrating "adverse effect," the statutory equivalent to standing. 631 F.2d at 921; *see also Doe v. Chao*, 540 U.S. 614, 624 (2004) (Privacy Act plaintiff must have suffered an "adverse effect," which is a "term of art identifying a potential plaintiff who suffers the injury-in-fact and causation requirements of Article III standing"); 5 U.S.C. § 552a(g)(1)(D). That latter question was addressed in *Albright v. United States*, 732 F.2d 181 (D.C. Cir. 1984) ("*Albright II*"). There, the court concluded that "emotional trauma alone is sufficient to qualify" as an injury for the purposes of "adverse effect," *id.* at 186, but then held that the plaintiffs had not established that their alleged emotional trauma was tied to the defendants' conduct, *id.* at 186-88. Accordingly, the court ruled that plaintiffs had not established that they had suffered an adverse effect, *id.*, and therefore also did not have standing. Had a statutory violation alone been enough for an "adverse effect," the case would have come out differently.

Nor do Cantler's and Nakhnikian's alleged "fears" of future consequences (such as being wrongly identified as ineligible to vote) or loss of "confidence" in the election process sufficient to establish the necessary injury. Opp'n at 13. Plaintiffs' speculations about future events are insufficient to create the necessary "certainly impending" injury to establish Article III standing.

*Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 410 (2013). Indeed, plaintiffs' fears and loss of confidence are to some extent self-inflicted injuries of the type rejected in *Clapper*. Plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Id.* at 416; *see also Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.").

One plaintiff, Kennedy, states that the Commission's maintenance of his data and DHS's alleged disclosure of other data has caused him "emotional anguish" and to be "highly concerned and suffer anxiety." Kennedy Decl. ¶¶ 12, 13, ECF No. 30-4. His anguish stems primarily from his belief that the Commission intends to crosscheck his voter registration data against data about him possessed by DHS. *Id.* ¶ 10; Opp'n at 15. But this claim is also too speculative to support standing. The Amended Complaint alleges only facts showing an "intention" to conduct such a crosscheck activity, but does not assert there are concrete plans to do so in the immediate future. Am. Compl. p. 3, ¶ 54, ECF No. 21. Nor is there any evidence that such an endeavor will produce mistakes or harm to voters. In the absence of concrete, immediate plans and of any evidence of future misuse of the data, plaintiff Kennedy lacks standing as well. The case relied upon by plaintiffs, *Attias v. Carefirst, Inc.*, 865 F.3d 620 (D.C. Cir. 2017), for the proposition that standing claims in a data-breach context can lie based on "allegations of a substantial risk of future injury," Opp'n at 17, is inapplicable here. Unlike in *Attias*, neither Kennedy nor the other plaintiffs plead facts from which a substantial risk of things going wrong could be inferred. *Cf. Attias*, 865 F.3d at 628 (finding a sufficient substantial risk of harm where "an unauthorized party has already accessed personally identifying data on CareFirst's servers"); *In re U.S. Office of Personnel Mgm't Data Sec. Breach Litig.* ("*In re OPM*"), No. 15-1394 (ABJ), 2017 WL 4129193, at *25 (D.D.C.

Sept. 19, 2017) ("Even an objectively reasonably likelihood of harm sufficient to engender some anxiety does not create standing."), *appeals docketed*, Nos. 17-5217 & 17-5232 (D.C. Cir. Sept. 27 & Oct. 12, 2017), No. 18-1182 (Fed. Cir. Nov. 15, 2017).

**B. Common Cause Lacks Representational Standing**

Common Cause lacks representational standing, *i.e.*, it lacks standing to sue on behalf of its members. *See Ass'n of Flight Attendants-CWA v. Dep't of Transp.*, 564 F.3d 462, 464 (D.C. Cir. 2009). While plaintiffs do confirm in their opposition that several of the individual plaintiffs are themselves members of Common Cause, *see* Opp'n at 19 (referring to Gutierrez, Cantler, and McClenaghan Declarations), they have not established that these members themselves have been injured by the defendants, such that they have standing. Ms. Cantler, for example, stated that she was injured by the Commission's activities because those activities invaded her personal privacy, put her personal data at risk for theft, hindered her ability to fully participate in the political process without fear, and presented a "substantial risk" that the collection of data would lead to the suppression of her vote. Cantler Decl. ¶¶ 14-15, ECF No. 30-1. Mr. Gutierrez stated that he is anxious "over how the federal government is going to use [his] personal data," that the collection of data "undermines [his] confidence in the electoral system," and that he is fearful that the collection of data will lead to suppression of his vote. Gutierrez Decl. ¶¶ 7-9, ECF No. 30-3. Ms. McClenaghan raised similar concerns. McClenaghan Decl. ¶¶ 7-8, 12-13, ECF No. 30-5.

The first allegation – that the Commission has invaded the privacy of Common Cause's members – is merely an allegation that the Commission has violated the Privacy Act, without describing the *injury* alleged to have been caused by that harm. Second, the members allege that their ability to "fully participate in the political process" has been hindered. These members do not show how their ability to participate in the political process has been frustrated, however, and

so such complaints are "conjectural." *See, e.g.*, *Woodened v. Lenape Regional High School Dist.*, 535 F. App'x 164, 167 (3d Cir. 2013) (hypothetical fear of frustration of political participation rights are not sufficient for standing). Third, the members state that there is a risk that the collection of data would lead to the suppression of their vote. Such claims, however, stack speculation on top of speculation: that the Commission will compare the public data it receives to other data sources; that it will then find a "false positive"; and that it will then take action against the member. Such claims of speculative future injury are too attenuated to constitute injury-in-fact. *See Clapper*, 568 U.S. at 410. Finally, the members claim that they are fearful of a future breach of their information. This is merely a speculative fear of a future injury absent any showing of a data breach; indeed, even had there been a breach, that would not be enough, as "plaintiffs cannot predicate standing on the basis of [a] [data] breach alone." *In re OPM*, 2017 WL 4129193, at *11.

### C. Common Cause Lacks Organizational Standing

Common Cause also lacks standing to sue on its own behalf, because it has not itself been injured. Rather, as it makes clear in its opposition, the organization has engaged in an advocacy campaign against the Commission, which is in keeping with its mission of encouraging voting. *See* Opp'n at 20-23. As Common Cause pleads, it is an organization that is focused on elections and promoting the right to vote (though not, notably, privacy). *See* Opp'n at 21; Am. Compl. ¶ 1. The activities it claims it has undertaken in response to the Commission are in keeping with its goals of promoting the right to vote, for example, conducting outreach, supporting voter registration efforts, and engaging in direct counseling of individual voters. Opp'n at 22. Common Cause also alleges that its other voter-related activities 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." *Id*. at 22.

This diversion of resources, however, represents Common Cause's voluntary decision to reallocate its resources from one advocacy activity to another, neither of which involve the protection of personal privacy – the purpose of the Privacy Act. Such a voluntary reallocation decision is not enough to establish organizational standing. In *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 920 (D.C. Cir. 2015), the plaintiffs made a similar argument: that they had to spend additional time and money in response to a new federal policy, in order to educate and advocate to the public. The D.C. Circuit concluded that this was "no more than an abstract injury to [plaintiff's] interests." *Id.*; *see also Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 12 (D.C. Cir. 2011) (an organization's decision to "redirect[]" resources "is insufficient to impart standing upon the organization"); *Elec. Privacy Info. Ctr. v. Dep't of Educ.*, 48 F. Supp. 3d 1, 23 (D.D.C. 2014) (holding that the "expenditures . . . EPIC . . . made in response to the [new regulation] have not kept it from pursuing its true purpose as an organization but have contributed to its pursuit of its purpose"). Nor is this a situation where defendants have taken a specific action that has hindered plaintiff's organizational interest. In *People for the Ethical Treatment of Animals v. U.S. Department of Agriculture*, 797 F.3d 1087, 1093 (D.C. Cir. 2015), for example, the defendant denied the plaintiff "access to an avenue for redress and denial of information," *Food & Water Watch*, 808 F.3d at 920; here, by contrast, plaintiffs make no comparable claim. Indeed, were it otherwise, an organization could create standing simply by re-allocating resources from one advocacy activity to another, a conclusion that flies in the face of the Supreme Court's admonition that plaintiffs cannot "manufacture standing merely by inflicting harm on themselves." *Clapper*, 568 U.S. at 402.

## II. PLAINTIFFS CANNOT STATE A CLAIM UNDER THE PRIVACY ACT OR THE APA

### A. The Commission Does Not Exercise Substantial Independent Authority

As plaintiffs acknowledge, the test of whether the Commission is an "agency" for purposes of the Privacy Act and the APA is whether it has "wielded substantial authority independently of the President." *Citizens for Responsibility & Ethics in Wash.* ("*CREW*") v. *Office of Admin.*, 566 F.3d 219, 223 (D.C. Cir. 2009); *see also* Mot. to Dismiss ("MTD") at 16-24, ECF No. 27-1; Opp'n at 24-32. Plaintiffs apparently concede that the Commission lacks *de jure* substantial independent authority based on its foundational documents, *see* Opp'n at 28, which "is the most important indication of the [Commission's] role," *Meyer v. Bush*, 981 F.2d 1288, 1294 (D.C. Cir. 1993); *cf. In re Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005) (en banc) (construing whether an entity is subject to FACA based on authority set out in the foundational document). But then they go on to claim that the Commission has acquired and used such authority *de facto* in a manner sufficient for it to constitute an agency. But the facts in the Amended Complaint, taken as true, do not establish such a showing.[1] Accordingly, plaintiffs' Privacy Act and APA claims should be dismissed on this threshold ground alone.

#### 1. Plaintiffs have not pled facts showing that the Commission has undertaken a purported investigation into individual American citizens

Plaintiffs claim that the facts in their Amended Complaint "demonstrate[] that . . . the Commission has 'undertaken a sweeping, first-of-its-kind investigation into alleged voting

[1] The proposed *Amicus Curiae* brief filed by former National Security and Technology Officials, ECF No. 38-1, does not address the threshold issue of whether the Commission is an agency, *see id.* at 17-20, and its speculation about potential future harms caused by a potential future data breach would not, in any event, be sufficient to establish Article III standing. *See, e.g.*, *In re OPM*, 2017 WL 4129193, at *12.

misconduct by individual American citizens.'" Opp'n at 28 (quoting Am. Compl. ¶¶ 105, 106(a)). But the actual facts plaintiffs cite in their Amended Complaint do not support the existence of any such investigation.

First, plaintiffs cite isolated statements by individual Commission or staff members about their purported intentions. But these statements do not show that the Commission actually *is* investigating individuals. Plaintiffs first allege that Vice Chair Kobach – on the day the Executive Order was issued and before the Commission had begun any work – said that the Commission's goal was to have a "nationwide fact-finding effort focusing on assessing 'evidence' of different forms of voter fraud across the country." Opp'n at 29 (quoting Am. Compl. ¶ 52). Far from declaring an intent to investigate individual allegations of voter fraud (which the statement says nothing about), this statement shows a "fact-finding effort" followed by a recommendation, which is what the Executive Order contemplates. *See* Exec. Order No. 13,799, 82 Fed. Reg. 22,389 (May 11, 2017) ("The Commission shall, consistent with applicable law, study the registration and voting processes used in Federal elections . . . and shall submit a report to the President.").

Plaintiffs next say that Vice Chair 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." Opp'n at 29 (quoting Am. Compl. ¶ 53). But Vice Chair Kobach's interview, referred to in the Amended Complaint, said nothing about investigating individual voters. Gary Moore, *Tucker Carlson: Kris Kobach – Trump Executive Order Creates Voter Fraud Comm'n* (May 11, 2017), https://www.youtube.com/watch?v=Fm0MjHmYSJU (last visited Dec. 15, 2017) (cited in Am. Compl. ¶ 53 n.24). Moreover, the plaintiffs do not allege that the Commission is actually utilizing federal government databases, much less that it is investigating or taking action against individual

voters. Plaintiffs' effort to convert speculation about what the Commission could do into facts showing what it is doing cannot surmount the plausibility standard required to defeat a motion to dismiss. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level.").

Plaintiffs' other allegations fail for similar reasons. They say 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." Opp'n at 29 (quoting Am. Compl. ¶ 54). But intent does not mean that the Commission will actually do so, nor does the Amended Complaint say anything in this section about whether the Commission even intends to look at individual registrants, as opposed to drawing population-level conclusions. Plaintiffs also allege that "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.'" Opp'n at 29 (quoted Am. Compl. ¶ 55). This claim relies on – and misquotes – an article written by Vice Chair Kobach. In that article, he said that, "[f]or example, if a witness testifies before the Commission that a certain person voted fraudulently in a given state, the Commission needs to confirm that such a person even exists on the voter rolls and actually cast a ballot in the relevant election." Kris W. Kobach, *Why States Need to Assist the Presidential Comm'n on Election Integrity*, Breitbart (July 3, 2017), http://www.breitbart.com/big-government/2017/07/03/kobach-why-states-need-to-assist-the-presidential-commission-on-election-integrity/ (last visited Dec. 13, 2017) (quoted in Am. Compl. ¶ 55 n.27). The article describes a future hypothetical, and indeed, there are no allegations that any witnesses have testified that a specific person voted fraudulently, much less that the Commission is taking steps to determine whether that person voted fraudulently.

Plaintiffs also state that Commission members have described the Commission's mandate as determining the "accura[cy] of voter rolls," Opp'n at 29 (citing Am. Compl. ¶ 70), but that has nothing to do with purported investigations of individual voters. They also say in their opposition that Commission members have "discussed 'referrals of individuals suspected of voter fraud to the DOJ for possible criminal prosecution.'" Opp'n at 29 (quoting Am. Compl. ¶ 72). What the Amended Complaint actually says is that, "one Commission member questioned whether agencies of the federal government and the federal judiciary were forwarding data they collect to DOJ for criminal prosecution." Am. Compl. ¶ 72. In other words, plaintiffs allege that Commission members discussed whether *other* entities made criminal prosecution referrals; not whether the Commission itself could (or would) make referrals.

Plaintiffs next discuss the evidence that the Commission has purportedly collected or evidence that has been presented to it. They state that Vice Chair Kobach has "instructed Commission staff to 'start trying to collect'" federal government data. Opp'n at 29 (quoting Am. Compl. ¶ 73). But the fact that the Commission staff has been instructed to "try" to collect federal government data says nothing about whether they have collected such information or whether the Commission has used such information to investigate individuals. Nor does the fact that the Commission "has received multiple forms of evidence," including evidence of individual cases of voter fraud, Opp'n at 29-30, mean that the Commission itself has actually investigated those cases, much less taken action.

Three final allegations in the opposition are worthy of special treatment. First, plaintiffs assert that there are "'8,471 cases of likely duplicate voting [to] be investigated for possible wrongdoing' by the Commission." Opp'n at 30 (quoting Am. Compl. ¶ 97). ). But as the Amended Complaint makes clear, the reference to 8,471 cases of alleged duplicate voting refers

to report presented to the Commission at its September 12, 2017, meeting; the report did not recommend that the *Commission* investigate those cases. *See* Gov't Accountability Inst., America the Vulnerable: The Problem of Duplicate Voting (2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/pacei-govt-accountability-institute-problem-duplicate-voting.pdf. Plaintiffs also contend that the Commission has received "information about individuals . . . contained in DHS's system of records." Opp'n at 29 (quoting Am. Compl. ¶ 125). But paragraph 125 of the Amended Complaint provides no facts to support the claim that DHS has transferred such information to the Commission; rather, the paragraph merely speculates that DHS "will" transfer such information to the Commission. Am. Compl. ¶ 125. This conclusory allegation does not state a claim. *See Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to rise a right to relieve above the speculative level."). Plaintiffs conclude by asserting that they "allege facts about the initial results of the Commission's investigation." Opp'n at 30 (quoting Am. Compl. ¶ 56). But paragraph 56 of the Amended Complaint refers to a *Breitbart* article written by Vice Chair Kobach, which refers to a study conducted by the New Hampshire Departments of State and Safety. *See* Am. Compl. ¶ 56; MTD at 39-40. Neither that study, nor Vice Chair Kobach's article, identified any specific individual voters, much less any action taken by the Commission against individual voters.

In short, plaintiffs have alleged facts showing that the Commission is conducting a study of voter fraud, and that it has been presented with evidence at its September 12, 2017, meeting about the existence of voter fraud. But plaintiffs have not alleged facts showing that the Commission itself is investigating individual voters, much less that it has (or could) take action against them. Research activities undertaken in conjunction with the Commission's direction to study election integrity do not constitute the exercise of substantial independent authority

sufficient to render a presidential entity an agency for purposes of the Privacy Act. *See Meyer*, 981 F.2d at 1294 (Presidential Task Force, which researched federal regulations, was not an agency because there was no evidence that it "directed anyone . . . to do anything.").

**2. Plaintiffs' claim that the Commission is conducting "evaluation plus advice" is not enough to surmount the agency bar**

As discussed above, plaintiffs have not pled facts showing that the Commission is conducting an investigation into individual voters. In an effort to surmount this weakness, plaintiffs rely on *Energy Research Foundation v. Defense Nuclear Facilities Safety Board*, 917 F.2d 581 (D.C. Cir. 1990), for the proposition that an entity that conducts "investigation[s]" or offers "evaluation plus advice" is an agency. Opp'n at 30-32. But this argument misconstrues *Energy Research Foundation* to create a test that cannot be reconciled with this Circuit's precedent. In *Energy Research Foundation*, the D.C. Circuit evaluated whether the Defense Nuclear Facilities Safety Board was an "agency." It concluded that it was an agency, in part because the Board "has at its disposal the full panoply of investigative powers commonly held by other agencies of government," 917 F.2d at 584, including the power to "conduct hearings, compel testimony, require the production of documents . . . and to require the Secretary [of Energy] to report to it classified information and other information protected from disclosure," *id.* at 582. While the Commission has the power to research topics related to voter registration and voting processes, there is no indication that it has, or has attempted to assert, any of these type of formal investigative powers, and therefore *Energy Research Foundation* is inapposite.

Further, this Circuit's precedent makes clear that "evaluation plus advice" is not the test to be applied for determining whether an entity within the Executive Office of the President, such as the Commission, is an agency. Opp'n at 30. In *Meyer v. Bush*, for example, the D.C. Circuit concluded that President Reagan's Task Force on Regulatory Relief," which was instructed to

"review pending regulations, study past regulations with an eye towards revising them and recommend appropriate legislative remedies," 981 F.2d at 1289-90, was not an agency because it lacked the power to direct others "to do anything," *id.* at 1294. But were the dispositive test "evaluation plus advice" – both of which the Task Force unquestionably did – *Meyer* would have come out differently. The Commission, which shares a similar role in researching and recommending, but not compelling action, is similarly situated.[2]

**B. The Privacy Act Precludes the Injunctive Relief Plaintiffs Seek**

As set forth in defendants' opening brief, *see* MTD at 24-28, the Privacy Act is a "comprehensive remedial scheme" to regulate, *inter alia*, the management and dissemination of private information about individuals. *Wilson v. Libby*, 535 F.3d 697, 703 (D.C. Cir. 2008) (citing *Chung v. Dep't of Justice*, 333 F.3d 273, 274 (D.C. Cir. 2003)). It authorizes injunctive relief only in two circumstances: to compel an agency to amend or alter an individual's record or to require an agency to allow an individual access to her records. 5 U.S.C. §§ 552a(g)(1), (g)(2)(A), and (g)(3)(A). "The [Privacy] Act's subsection on civil remedies authorizes entry of injunctive relief in only [those] two specific situations. In so doing, as we have held, the Act precludes other forms of declaratory and injunctive relief." *Doe v. Stephens*, 851 F.2d 1457, 1463 (D.C. Cir. 1988); *see also, e.g.*, *Cell Assocs., Inc. v. Nat'l Insts. of Health*, 579 F.2d 1155, 1161-62 (9th Cir. 1978); *Edison v. Dep't of the Army*, 672 F.2d 840, 846-47 (11th Cir. 1982).

[2] *Energy Research Foundation* referred to the D.C. Circuit's holding in *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), that the Office of Science and Technology is an agency for its "evaluation plus advice" premise. *Energy Research Found.*, 917 F.2d at 584-85. But the Office of Science and Technology had an explicit, congressionally conferred "independent function of evaluating federal programs," which the Commission lacks. *See Rushforth v. Council on Econ. Advisers*, 762 F.2d 1038, 1041 (D.C. Cir. 1985).

Contrary to plaintiffs' claims, this Circuit's dicta in *Haase v. Sessions*, 893 F.2d 370 (D.C. Cir. 1990), does not compel a different result. There, the court stated that "[i]t is not at all clear to us that Congress intended to preclude broad equitable relief (injunctions) to prevent (e)(7) violations . . . . And in the absence of such an explicit intention, by creating a general cause of action (under (g)(1)(D)) for violations of the Privacy Act, Congress presumably intended the district court to use its inherent equitable powers – at least to remedy violations of (e)(7)." *Id.* at 374 n.6 (citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)) ("Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper exercise of that jurisdiction.")).[3] These dicta does not control.

*Haase* relied on language from the Supreme Court's decision in *Porter v. Warner Holding Co.* that the Supreme Court and D.C. Circuit have since cabined. In *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190 (D.C. Cir. 2005), the Court recognized the broad language in *Porter* that *Haase* cited, but held that this language was not to be broadly applied:

> As the Supreme Court has repeatedly observed: "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Reading *Porter* in light of this limited jurisdiction we must not take it as a license to arrogate to ourselves unlimited equitable power. We will not expand upon our equitable jurisdiction if, as here, we are restricted by the statutory language, but may only assume broad equitable powers when the statutory or Constitutional grant of power is equally broad.

*Id.* at 1197. Here, Congress has not granted broad equitable powers to the courts to enforce the Privacy Act. Rather, it expressly limited injunctive remedies to the amendment and access claims discussed above. Under the interpretative canon of *expressio unius*, "expressing one item of an associate group or series excludes another left unmentioned." *N.L.R.B. v. SW Gen., Inc.*, 137 S.

[3] *Scott v. Conley*, 937 F. Supp. 2d 60, 81-82 (D.D.C. 2013) quoted *Haase*'s language, but did not otherwise analyze the D.C. Circuit's dicta.

Ct. 929, 940 (2017) (brackets and citation omitted). Applying that principle here, Congress's decision to list two forms of injunctive relief as specifically available to individuals would exclude other forms of injunctive relief. *See Cell Assocs.*, 579 F.2d at 1159 ("[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.").

Second, since *Haase* was decided in 1990, the Supreme Court has further emphasized that the *expressio unius* principle applies when determining the availability of relief. "The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001) (citing *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S 11, 19-20 (1979)); *see also Hinck v. United States*, 550 U.S. 501, 506 (2007) (holding that it is a "well-established principle" that "a precisely drawn, detailed statute preempts more general remedies."); *Transamerica*, 444 U.S. at 19 ("[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."); *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 488 (1996). *Haase*, which did not consider this rule, should not be taken to control.

Plaintiffs' arguments to the contrary are unavailing. They cite to several cases for the proposition that "the D.C. Circuit has recognized that damages are not the sole remedy for a Privacy Act (e)(7) claim." Opp'n at 34. But the cases they cite all discussed, often in cursory form, the availability of *amendment and access*-type injunctive reliefs, not general injunctive relief. *See Smith v. Nixon*, 807 F.2d 197, 204 (D.C. Cir. 1986) (expungement); *Nagel v. U.S. Dep't of Health, Educ., & Welfare*, 725 F.2d 1438, 1441 (D.C. Cir. 1984) (amendment and/or expungement claim); *Albright*, 631 F.2d at 921 (destruction of record claim). Nor, in any event, do these cases engage with the clear authority from this Circuit that injunctive relief is not available

outside the limited circumstances set forth in the Privacy Act. Moreover, while *Sussman v. United States Marshals Service*, 494 F.3d 1106 (D.C. Cir. 2007), did recognize the *Haase*'s court's "subsequent 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)," *id.* at 1122 n.10, the court declined to adopt that holding. And *Sussman* reaffirmed the holding that "only monetary damages, not declaratory or injunctive relief," are available for violations, like that of section 552a(e)(7), that are "not described in § 552a(g)(1)(A)-(C). *Id.* at 1122.

Finally, while plaintiffs make a general argument with reference to the purposes of the Privacy Act, Opp'n at 35-36, they do not explain why those purposes cannot be satisfied through the Act's monetary relief provisions – if the plaintiffs could show actual injury, a showing they have not attempted to make. *See* MTD at 32-35.

**C. Plaintiffs Cannot Obtain Injunctive Relief Through the APA**

Plaintiffs cannot seek injunctive relief for alleged violations of the Privacy Act through the APA. The APA does not waive the federal government's sovereign immunity – and thus does not provide a cause of action – when another statute "expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. "That provision prevents plaintiffs from exploiting the APA's waiver to evade limitations on suit contained in other statutes." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215 (2012). Rather, "[w]hen Congress has dealt in particularity with a claim and has intended a specified remedy – including its exceptions – to be exclusive, that is the end of the matter; the APA does not undo the judgment." *Id.* at 216.

The Privacy Act is a "comprehensive remedial scheme," *Chung*, 333 F.3d at 275, which only provides for injunctive relief, and thus waives the federal government's sovereign immunity, in two specific circumstances. "Courts are more likely to hold that a statute has expressly or

impliedly foreclosed injunctive or declaratory relief, even under the APA, when that statute waives immunity only over a specific class of cases." *Diaz-Bernal v. Myers*, 758 F. Supp. 2d 106, 119 (D. Conn. 2010). And as further discussed above, under the principle of *expressio unius*, among others, "a precisely drawn, detailed statute preempts more general remedies." *Hinck*, 550 U.S. at 506 (citation omitted); *see also Lake v. Rubin*, 162 F.3d 113, 116 (D.C. Cir. 1998) (Internal Revenue Code's more specific disclosure provisions preempts Privacy Act); *Cell Assocs.*, 579 F.2d at 1159 ("[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.").

Plaintiffs' APA claim is "simply a restatement of [their] Privacy Act claims," *Mittleman v. U.S. Treasury*, 773 F. Supp. 442, 449 (D.D.C. 1991): they state that defendants have violated section (e)(7) of the Privacy Act, and therefore have violated the APA. The Privacy Act precludes injunctive relief under the APA, and as stated in defendants' motion to dismiss, a plaintiff cannot bring an APA claim to obtain injunctive relief for a Privacy Act violation. *See* MTD at 29-30 (collecting cases).[4] Their APA claim should thus be dismissed, in keeping with decades of case law from this Circuit.

Plaintiffs' opposition brief does not call this conclusion into question. First, they point to guidance from the Office of Management and Budget ("OMB") which states that subsection (g) of the Privacy Act "prescribes the circumstances under which an individual may seek court relief in the event that a Federal agency violates any requirement of the Privacy Act or any rule or regulation promulgated thereunder, the basis for judicial intervention, and the remedies which the

[4] For the reasons stated in defendants' opening brief, *Radack v. U.S. Dep't of Justice*, 402 F. Supp. 2d 99, 103-04 (D.D.C. 2005), which held that it had authority under the APA to award injunctive relief to redress a violation of the Privacy Act, is an outlier and should be rejected. MTD at 30 n.4; Opp'n at 39.

courts may prescribe." Privacy Act Guidelines, 40 Fed. Reg. 28,948, 28,968 (July 9, 1975); Opp'n at 36-37. This guidance also states that "[a]n individual may have grounds for action under other provisions of the law in addition to those provided in this section," including that "[a]n individual may seek judicial review under other provisions of the [APA]." 40 Fed. Reg. at 28,968. That guidance says nothing about whether the APA provides injunctive remedies *beyond* the Privacy Act. Moreover, the provision in section 702 of the APA that states that courts lack "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought," 5 U.S.C. § 702, was added to the APA in 1976, after the OMB guidance was issued. H.R. Rep. No 94-1656, at 1 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6121, 6122 (Sept. 22, 1976). Such OMB guidance, in this context, is of little help

Second, plaintiffs argue that the "Supreme Court has likewise recognized . . . that the APA provides an avenue to equitable relief." Opp'n at 37. But this mischaracterizes what the Supreme Court has held. The Court said that "[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 [APA]." *Chao*, 540 U.S. at 619 n.1. But *Chao* was a case about *monetary* damage; the Court did not need to reach, and thus did not reach, the issue of whether equitable relief was otherwise available. This was made clear eight years later in *FAA v. Cooper*, 566 U.S. 284, 303 n.12 (2012), where the Court noted that the Act "*possibly* . . . allow[s] for injunctive relief under the [APA],"(emphasis added), but, again, the Court did not reach the issue. Moreover, as discussed earlier, the Court's more recent jurisprudence indicates that a detailed remedial scheme preempts alternative remedies.

Third, the D.C. Circuit's decision in *Stephens* is not to the contrary. *See* Opp'n at 38. There, the court "concluded that Doe is entitled to declaratory relief against future [Department of Veteran's Affairs ("VA")] disclosure unauthorized by the *Veterans' Records Statute*, and having invalidated the VA's 'routine use' regulation insofar as it is inconsistent with the interpretation of *that statute* . . . we believe it is unnecessary to award Doe additional injunctive relief." *Stephens*, 851 F.2d at 1467 (emphasis added). The D.C. Circuit did not reach the issue of whether the Privacy Act precluded APA relief.

**D. Common Cause, an Organization, Cannot Sue Under the Privacy Act**

The Privacy Act does not provide organizations with a right of action. *See* MTD at 31-32. Only "individuals" may bring a civil action against an agency to enforce the Privacy Act, 5 U.S.C. § 552a(g)(1), and an individual is defined narrowly as "a citizen of the United States or an alien lawfully admitted for permanent residence," *id.* § 552a(a)(2). Organizations, therefore, cannot sue under the Privacy Act, either on their own behalf or on behalf of their members. *See, e.g.*, *In re Dep't of Veterans Affairs (VA) Data Theft Litig.*, No. 06-0506 (JR), 2007 WL 7621261, at *3 (D.D.C. Nov. 16, 2007) (organizations cannot sue under the Privacy Act on their own behalf or on behalf of their members); *Comm. in Solidarity with People of El Salvador (CISPES) v. Sessions*, 738 F. Supp. 544, 547 (D.D.C. 1990) ("[T]he Privacy Act does not confer standing upon organizations on their own or purporting to sue on behalf of their members.").

The cases plaintiffs cite are not to the contrary. See Opp'n at 19 n.5. The courts in *National Association of Letter Carriers, AFL-CIO v. U.S. Postal Service*, 604 F. Supp. 2d 665, 672 (S.D.N.Y. 2009), *Professional Dog Breeders Advisory Council v. Wolff*, No. 09-cv-258, 2009 WL 2948527, at *5 (M.D. Pa. Sept. 11, 2009), and *National Federation of Federal Employees v. Greenberg*, 789 F. Supp. 430, 433 (D.D.C. 1992), *rev'd on other grounds*, 983 F.2d 286 (D.C. Cir.

1993), did not consider whether an association had statutory standing to sue under 5 U.S.C. § 552a(g)(1). And while plaintiffs suggest that courts certify class actions under the Privacy Act, *see* Opp'n at 19 n.5, plaintiffs have, of course, not brought a class complaint here. Accordingly, Common Cause's Privacy Act claims must be dismissed.

## III. PLAINTIFF KENNEDY HAS NOT STATED A CLAIM AGAINST THE DEPARTMENT OF HOMELAND SECURITY

The sole basis for a claim against the Department of Homeland Security is plaintiff Kennedy's theory that DHS might share information with the Commission in violation of section 552a(b) of the Privacy Act. But, as stated in defendants' opening brief, *see* MTD at 35-37, while the Amended Complaint conclusorily asserts that "DHS has – or imminently will – disclose to the Commission and/or Commission staff information about individuals including Plaintiff Kennedy contained in DHS's 'system of records,'" Am. Compl. ¶ 125, the Amended Complaint alleges no facts that support such a claim. Instead, it alleges that the Commission *sought* or is *seeking* such information, without any allegations about whether DHS will actually disclose such information. MTD at 35-37. Such theory that an entity will violate the law in the future is not sufficient for standing under *City of Los Angeles v. Lyons*, 461 U.S. 95, 106 (1983) and *Clapper*. Moreover, the speculative allegation that a defendant has violated the law, without more, is simply a "legal conclusion" or "formulaic recitation of the elements" that is insufficient to state a claim under *Ashcroft v. Iqbal*. 556 U.S. 662, 680 (2009).

Plaintiffs do not rebut this argument. Instead, they double-down on their claim that Vice Chair Kobach has directed Commission staff to seek out information from other government agencies, and note that the Executive Order directs executive agencies to "endeavor to cooperate with the Commission." Opp'n at 15. But plaintiffs' argument amounts to a claim that DHS will intentionally violate the Privacy Act, without any facts to support such a theory. The Executive

Order does not *compel* agencies to cooperate with the Commission in violation of the law. Rather, the Executive Order specifically states that its directives "shall be implemented consistent with applicable law." Exec. Order 13,799. Further, the fact that the Commission might seek information does not mean that the DHS will provide it. That is particularly true here, as "in the absence of clear evidence to the contrary, courts presume that [public officials] have properly discharged their official duties." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926)). Plaintiffs put forward no facts that call that presumption into question.[5]

## IV. PLAINTIFFS HAVE NOT STATED AN *ULTRA VIRES* CLAIM

Plaintiffs have not stated a claim that the Commission has acted *ultra vires* by requesting data from the states that, plaintiffs speculate, will be used to "engage[] in a lawless and unbounded investigation of individual voters for which there is no authorization in the Executive Order, the Constitution, or any act of Congress." Am. Compl. ¶ 112; MTD at 37-41.

To begin, the facts pled in the Amended Complaint, taken as true, do not establish that the Commission is investigating alleged voting misconduct by individual American citizens. *See* MTD at 38-40. Plaintiffs do not show otherwise in their opposition; rather, they contort their own Amended Complaint to draw conclusions not supported by their actual averments. For example, they state that the Commission has "'undertaken an . . . investigation into alleged voting

[5] Plaintiffs rely, for the first time, on allegations that the Commission and DHS have communicated with each other. *See* Opp'n at 4. But these communications, which were disclosed in another case, only show that the Commission and DHS have communicated; they do not show (nor is there a basis to conclude) that DHS has agreed to share information. Moreover, while plaintiffs state that defendants could submit evidence to rebut their claim, Opp'n at 15-16, this flips the burden: it is plaintiffs' obligation to state facts plausibly showing a legal violation, not defendants' responsibility to factually rebut a conclusory claim. Indeed, were it otherwise, *Lyons* and *Clapper* would have come out differently.

misconduct' . . . '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.'" Opp'n at 41-42 (quoting, first, Am. Compl. ¶ 106, and second, *id.* ¶ 106(d)). But paragraph 106(d) of the Amended Complaint says that the Commission "intend[s] . . . to crosscheck" voting data against other data from the federal government. Am. Compl. ¶ 106(d). The word "intend" – which plaintiffs omit in their opposition – is critical, because it indicates that plaintiffs have not pled that defendants have *actually* carried out a purported *ultra vires* action; rather, they speculate that the Commission may do so in the future. And that allegation is not sufficient to state a present claim of *ultra vires* injury.

Second, plaintiffs note that Commission staff has been instructed to collect data that is in the possession of the federal government that "might be helpful." Opp'n at 42 (quoting Am. Compl. ¶ 42). These allegations, of course, say nothing about what that data will be used for, much less whether it will, if collected, be used to investigate *individuals* (as opposed to making broader statistical conclusions).

Third, plaintiffs state that "[t]he Commission has already compiled 'materials claiming that multiple specific individuals have fraudulently registered or voted.'" Opp'n at 42 (quoting Am. Compl. ¶ 106(g)). But as stated earlier, these averments apparently refer to a study conducted by the New Hampshire Departments of State and Safety in September 2017, *see* MTD at 39-40; Am. Compl. ¶ 56 & n.28, or a third-party study that was presented to the Commission at its September 12, 2017, meeting which referenced "8,471 cases of likely duplicate voting," Am. Compl. ¶ 97 & n.58. But neither of these studies identified individual voters. Instead, they referred to aggregate cases or cases that are already in the public record – as this Court can assure itself upon review of

the materials referenced in the Amended Complaint. *See Slate v. Public Def. Serv. for D.C.*, 31 F. Supp. 3d 277, 287 (D.D.C 2014) (court can consider documents that were referenced in a complaint when resolving a motion to dismiss). Moreover, this is not a case of defendants challenging the facts alleged in the complaints, as plaintiffs' claim. Opp'n at 43. This is a case where plaintiffs have mischaracterized the facts they rely on in their own Amended Complaint. *Iqbal*'s plausability standard does not allow plaintiffs to draw legal conclusions not supported by their own factual allegations.

In other words, plaintiffs have pled facts showing that the Commission has an interest in voter fraud, including looking at cases of alleged voter fraud. But they have not shown that the Commission is investigating an individual, much less that it is taking any action against any individual voter. It cannot be that researching public information constitutes an error that is "so extreme that one may view it as jurisdictional or nearly so." *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009). And contrary to plaintiffs' claim, *see* Opp'n at 42, this research power fits within the President's broad power to collect information and make recommendations. *See, e.g.*, U.S. Const. art II, § 3, cl. 2 ("[The President] shall recommend to [Congress's] Considerations such Measures as he shall judge necessary and expedient."); *Judicial Watch*, 219 F. Supp. 2d 20, 50 & n.15 (D.D.C. 2002) ("Article II reflect[s] an understanding that the President will have access to information and the power to acquire it.").

Plaintiffs' other objections similarly fail. They first argue that the Commission is "engaged in a voter fraud investigation without 'any authorization.'" Opp'n at 42. But as discussed above, the President has broad power to collect information and make recommendations. Nor have plaintiffs pled facts showing the existence of such an investigation. Next, plaintiffs state that "[d]efendants apparently conceded that [p]laintiffs have stated a plausible claim for *ultra vires*

conduct against Kobach," referring to the fact that the motion to dismiss' header referenced *ultra vires* action only by the Commission and the fact that the brief supposedly "makes only stray mention of allegations pertaining to Kobach." Opp'n at 43. Not so. Plaintiffs have brought suit against Mr. Kobach in his *official capacity* as Vice Chair of the Commission. Am. Compl. ¶ 12. As "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent," *Monell v. Dep't of Social Servs. of City of N.Y.*, 436 U.S. 658, 690 n.55 (1978), plaintiffs' claims are against the *Commission* (and so too must be their *ultra vires* claim). Moreover, defendants' opening brief extensively discussed allegations against Mr. Kobach in his capacity as Vice Chair of the Commission. *See* MTD at 38-40. Finally, plaintiffs claim that the Commission has taken actions without a vote by the Commission's members. *See* Opp'n at 43-44 (citing Am. Compl. ¶ 47). By the Commission's by-laws do not specify *when* a vote is required, *see* Presidential Advisory Commission on Election Integrity By-Laws § V(A), https://www.whitehouse.gov /sites/whitehouse.gov/files/docs/pacei-bylaws_final.PDF, nor do plaintiffs show how, even if a vote was required, the error would be so extreme as to amount to the Commission "act[ing] without any authority whatever." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984).

## CONCLUSION

For the aforementioned reasons, and those stated in defendants' opening brief, this Court should grant defendants' motion to dismiss the Amended Complaint.

Dated: December 15, 2017

Respectfully submitted,

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Civil Division

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*/s/ Joseph E. Borson*
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*Counsel for Defendants*

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

| | |
|---|---|
| COMMON CAUSE, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, *et al.*,<br><br>Defendants. | Civil Action No. 1:17-cv-1398 (RCL) |

**NOTICE OF EXECUTIVE ORDER**

Today, the President signed an Executive Order terminating the Presidential Advisory Commission on Election Integrity. *See* https://www.whitehouse.gov/presidential-actions/executive-order-termination-presidential-advisory-commission-election-integrity/ (last visited Jan. 3, 2018) (copy attached hereto). Undersigned counsel will confer with counsel for the plaintiffs about next steps for moving forward.

Dated: January 3, 2018

Respectfully submitted,

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Acting Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Director

*/s/ Joseph E. Borson*
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Executive Orders

# Executive Order on the Termination of Presidential Advisory Commission on Election Integrity

Issued on: January 3, 2018



By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Executive Order 13799 of May 11, 2017 (Establishment of Presidential Advisory Commission on Election Integrity), is hereby revoked, and the Presidential Advisory Commission on Election Integrity is accordingly terminated.

Sec. 2. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party (other than by the United States) against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

THE WHITE HOUSE,

January 3, 2018.

| | |
|---|---|
| **From:** | OGC LCD Litigation (b)(6) (b)(6) |
| **To:** | "OGC LCD Litigation (b)(6) (b)(6)<br>"Palmer, David (b)(6) (b)(6)<br>"Hamilton, Gene (b)(6) (b)(6)<br>"Lapan, David (b)(6) (b)(6)<br>"Corbin, Susan (b)(6) (b)(6) |
| **CC:** | "OGC LCD Litigation (b)(6) (b)(6) |
| **Subject:** | (b)(5) |
| **Date:** | 2018/01/05 15:31:00 |
| **Priority:** | Normal |
| **Type:** | Note |

Good Afternoon,

(b)(5)

Thank you,

(b)(6)

Attorney-Advisor (Privacy)
Legal Counsel Division,
Office of the General Counsel
U.S. Department of Homeland Security

(b)(6) (Office)
(Mobile)
E-mail: (b)(6)

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**From:** OGC LCD Litigation
**Sent:** Tuesday, August 8, 2017 3:38 PM
**To:** Palmer, David (b)(6)
(b)(6) Hamilton, Gene (b)(6)
(b)(6) Lapan, David
(b)(6) Corbin, Susan
(b)(6)
**Cc:** (b)(6)
(b)(6) OGC LCD Litigation
(b)(6)
**Subject:** (b)(5)
(b)(5)

Good afternoon,

(b)(5)

Thank you,
(b)(6)
Attorney-Advisor (Privacy)
Legal Counsel Division,
Office of the General Counsel
U.S. Department of Homeland Security
(b)(6) (Office)
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E-mail: (b)(6)

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| **Delivered Date:** | 2018/01/05 15:31:00 |

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

| | |
|---|---|
| COMMON CAUSE<br>805 15th Street N.W.<br>Washington, D.C. 20005,<br><br>*Plaintiff*,<br><br>vs.<br><br>PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY<br>The White House<br>1600 Pennsylvania Avenue, N.W.<br>Washington, D.C. 20405,<br><br>and<br><br>U.S. DEPARTMENT OF HOMELAND SECURITY<br>245 Murray Lane, S.W.<br>Washington, D.C. 20528,<br><br>and<br><br>U.S. SOCIAL SECURITY ADMINISTRATION<br>6401 Security Boulevard<br>Baltimore, MD 21235,<br><br>*Defendants*. | Case No. |

**COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

Plaintiff, Common Cause, hereby sues Defendants, Presidential Advisory Commission on Election Integrity ("PACEI" or the "Commission"), the U.S. Department of Homeland Security ("DHS"), and the U.S. Social Security Administration ("SSA"), and alleges as follows.

## Introduction

1. This is an action under the Privacy Act of 1974, 5 U.S.C. § 552a(e)(7), and the Administrative Procedure Act (APA), 5 U.S.C. § 706, to halt the unlawful collection,

maintenance, use, and dissemination of the sensitive and personal voting data of millions of Americans by the Commission.

2. In the wake of the Watergate scandal and revelations that the White House had compiled information on individuals with opposing political viewpoints, Congress passed the Privacy Act to regulate the collection, maintenance, use, and dissemination of sensitive personal information by federal agencies. Among other safeguards, the Act proscribes the collection of information that "describ[es] how any individual exercises rights guaranteed by the First Amendment." 5 U.S.C. § 552a(e)(7).

3. After campaigning on unsubstantiated claims of voter fraud and rigged elections, President Donald J. Trump asserted that he "won the popular vote if you deduct the millions of people who voted illegally." Within days of his inauguration, President Trump called for "a major investigation into VOTER FRAUD."

4. The Commission was created with the aim of examining this purported voter fraud and has opened a broad and unprecedented investigation into Americans' voting habits and political affiliations. The Commission's first project is to assemble a national voter file and compare this information to data sets maintained by other federal agencies (including the Department of Homeland Security and the Social Security Administration) in order to discover the names of individuals that it believes are ineligible to vote. To carry out this review, it initially gave all 50 states and the District of Columbia a deadline of July 14, 2017 to comply with a sweeping request for their residents' voting and other personal data, including information regarding the quintessentially First Amendment-protected activities of voting history and party affiliation.

5. The Commission initially sought to have states upload the voting data to a Department of Defense website, from which the data would then be transferred to White House computers. But after the Court in a separate lawsuit filed against the Commission inquired of the Government if the Department of Defense should be joined as a defendant, the Commission abruptly shifted course to "repurpos[e]" a computer system within the White House's Information Technology "enterprise" to collect, maintain, and use the data. *See Elect. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, No. 1:17-cv-1320 (CKK) (D.D.C.) (EPIC lawsuit). And when asked by the Court to describe the involvement of other federal agencies in this enterprise, the Government stated that the "mechanics" of it were "something that may not be appropriate to say in a public setting." *See id.*

6. The Privacy Act's protections—designed to curb this very type of encroachment on citizens' First Amendment activities by an earlier White House—cannot be so circumvented. The Commission's collection, maintenance, and use of this data in cooperation with DHS and SSA, among other federal agencies either within or outside the White House,[1] violates both the Privacy Act and the APA. Plaintiff therefore seeks to enjoin Defendants from collecting, maintaining, using, or disseminating this data and to destroy or return any such data that has already been collected and is being maintained in violation of the law.

[1] Plaintiff intends to seek discovery from the federal defendants and third-parties, if necessary, to determine whether additional agencies should be added as defendants based on their activities with regard to the electronic databases described herein. *Bailey v. U.S. Marshal Serv.*, 584 F. Supp. 2d 128, 134 (D.D.C. 2008) ("[I]t is generally proper to allow discovery to determine the identity of unknown defendants.").

## Parties

7. Plaintiff, Common Cause, is a nonprofit corporation organized and existing under the laws of the District of Columbia. Common Cause is one of the nation's leading democracy reform organizations and has over 900,000 members nationwide. Common Cause also has a strong presence in 30 states, with either staff or volunteer boards. 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, including its eligible members, to be registered for and vote in fair, open, and honest elections. Common Cause brings this action on behalf of itself and its members.

8. 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. Common Cause also advocates for policies, practices, and legislation – such as automatic and same-day registration – that facilitate voting for eligible voters and ensure against disenfranchisement. Common Cause opposes efforts that burden registration and/or voting, including restrictive voter identification laws, partisan gerrymandering, and any other effort that could potentially chill citizens' rights to register or stay registered. Common Cause advocates the safeguarding of personal information, in keeping with the dictates of both state and federal law.

9. Common Cause and 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. Common Cause has already expended staff time and resources to engage in non-litigation related outreach and communications efforts to oppose the impermissible collection of voter information as

sought by the Commission, diverting resources from its core activities. These expenditures are aimed at counteracting the harm that the Commission's impermissible attempt to collect voter information will cause to Common Cause's mission of encouraging and facilitating voter participation and engagement.

10. The Commission's attempt to collect voter information will also harm Common Cause's and its members' efforts to encourage voter registration and participation. For voters and prospective voters facing political polarization, the threat that the federal government will monitor their electoral participation and even their party affiliations is deeply troubling and has deterred and will continue to deter the exercise of their First Amendment-protected rights to express their views through the ballot box. Further, the Commission's effort to collect voter information may cause registrants and voters, including Common Cause members, to cancel their registration status (as has already occurred in Florida and Colorado) or forgo registering and voting altogether. Such actions would directly undo the work to which Common Cause has devoted itself over the past few decades and would limit voter engagement and participation in our democracy.

11. Defendant PACEI is a federal agency within the meaning of 5 U.S.C. § 552a(a)(1) and 5 U.S.C. § 551(1) that is headquartered in Washington, D.C.

12. Defendant U.S. Department of Homeland Security is a federal agency within the meaning of 5 U.S.C. § 552a(a)(1) and 5 U.S.C. § 551(1) that is headquartered in Washington, D.C.

13. Defendant U.S. Social Security Administration is a federal agency within the meaning of 5 U.S.C. § 552a(a)(1) and 5 U.S.C. § 551(1) that is headquartered in Baltimore, MD.

## Jurisdiction and Venue

14. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, because this action arises under federal law, specifically the Privacy Act, 5 U.S.C. § 552a(e)(7), and the APA, 5 U.S.C. §§ 701-706.

15. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e), because at least one of Defendants is headquartered in Washington, D.C. and a substantial part of the events or omissions giving rise to Plaintiff's claims occurred here.

## Factual Allegations

*Candidate Donald J. Trump's Repeated, Unsubstantiated Claims of Voter Fraud*

16. Prior to his election, then-presidential candidate Donald J. Trump repeatedly made unsubstantiated assertions of voter fraud.

17. On October 10, 2016, Candidate Trump tweeted that, "Of course there is large scale voter fraud happening on and before election day." @realDonaldTrump, Twitter (Oct. 10, 2016, 8:33 AM), *available at* https://twitter.com/realdonaldtrump/status/787995025527410688?lang=en.

18. On October 17, 2016, candidate Trump told supporters at a campaign rally in Wisconsin that "voter fraud is very, very common," including voting by "people that have died 10 years ago" and "illegal immigrants." C-SPAN, *Donald Trump Campaign Event in Green Bay, Wisconsin* (Oct. 17, 2016), *available at* https://www.c-span.org/video/?417019-1/donald-trump-campaigns-green-bay-wisconsin.

19. On November 8, 2016, Donald J. Trump was elected as the forty-fifth president of the United States.

20. On November 27, 2016, president-elect Trump tweeted that, "In addition to winning the Electoral College in a landslide, I won the popular vote if you deduct the millions of people who voted illegally." @realDonaldTrump, Twitter (Nov. 27, 2016, 3:30 PM), *available at* https://twitter.com/realdonaldtrump/status/802972944532209664.

21. Three days later, Kansas Secretary of State Kris W. Kobach echoed the president-elect's assertion, telling reporters that, "I think the president-elect is absolutely correct when he says the number of illegal votes cast exceeds the popular vote margin between him and Hillary Clinton." Hunter Woodall, *Kris Kobach Agrees With Donald Trump That 'Millions' Voted Illegally But Offers No Evidence*, Kansas City Star (Nov. 30, 2016), *available at* http://www.kansascity.com/news/politics-government/article117957143.html.

22. Asked in a televised interview on December 2, 2016 about president-elect Trump's claim that "millions of people voted illegally," Trump senior adviser Kellyanne Conway said that she has "been receiving information about the irregularities and about the illegal votes, particularly from sources, officials like Kris Kobach." Emily Shapiro, *Kellyanne Conway Dodges Question on Trump's Claim That 'Millions' Voted Illegally*, ABC News (Dec. 2, 2016), *available at* http://abcnews.go.com/Politics/kellyanne-conway-dodges-question-trumps-claim-millions-voted/story?id=43924056.

*Creation of the Presidential Advisory Commission on Election Integrity*

23. On January 20, 2017, Donald J. Trump was inaugurated as President of the United States.

24. Five days later, President Trump tweeted on his official Twitter account: "I will be asking for a major investigation into VOTER FRAUD, including those registered to vote in two states, those who are illegal and even, those registered to vote who are dead (and many for a long time). Depending on results, we will strengthen up voting procedures!" @realDonaldTrump, Twitter (Jan. 25, 2017, 7:10 AM and 7:13 AM), *available at* https://twitter.com/realDonaldTrump/status/824227824903090176 and https://twitter.com/realdonaldtrump/status/824228768227217408?lang=en.

25. In a televised interview on January 25, 2017, President Trump reiterated his claims that allegedly fraudulent votes were cast for his opponent: "We're gonna launch an investigation to find out. And then the next time—and I will say this, of those votes cast, none of 'em come to me. None of 'em come to me. They would all be for the other side. None of 'em come to me. But when you look at the people that are registered: dead, illegal and two states and some cases maybe three states—we have a lot to look into." He vowed to "make sure it doesn't happen again." *TRANSCRIPT: ABC News anchor David Muir interviews President Trump,* ABC News (Jan. 25, 2017), *available at* http:// abcnews.go.com/Politics/transcript-abc-news-anchor-david-muir-interviews-president/story?id=45047602.

26. That same day, CNN reported that according to a senior administration official, "President Donald Trump could sign an executive order or presidential memorandum initiating an investigation into voter fraud as early as Thursday." Dan Merica, Eric Bradner, and Jim Acosta, *Trump considers executive order on voter fraud*, CNN (Jan. 25,

2017), *available at* http://www.cnn.com/2017/01/25/politics/trump-calls-for-major-investigation-into-voter-fraud/index.html. The official further informed CNN that "[t]he investigation would be carried out through the Department of Justice." *Id.*

27. On May 11, 2017, the White House issued Executive Order No. 13,799 establishing the Commission, which President Trump has described as a "Voter Fraud Panel." *See* Executive Order No. 13,799, 82 Fed. Reg. 22389 (May 11, 2017); @realDonaldTrump, Twitter (July 1, 2017, 9:07 AM) *available at* https://twitter.com/realdonaldtrump/status/881137079958241280.

28. The Commission's stated "mission" is studying, "consistent with applicable law," the "registration and voting processes used in Federal elections." *Id.*

29. The Commission is chaired by Vice President Michael Pence and is to be composed of up to 15 additional members having knowledge and experience in "elections, election management, election fraud detection and voter integrity efforts" or having "knowledge or experience that the President determines to be of value to the Commission." *Id.*

30. On the same day that the Commission was established, Kansas Secretary of State Kobach was appointed as a member and Vice Chair. Kobach is the only Secretary of State in the nation with the power to prosecute voter fraud directly. *See Interview of Kris W. Kobach on Fox News Channel* (May 11, 2017), *available at* https://www.youtube.com/watch?v=Fm0MjHmYSJU.

31. The Commission presently has ten additional members, consisting of a current member of the United States Elections Assistance Commission, present and former state

officials, and an employee of the Heritage Foundation. It will also have a staff of approximately three full-time equivalent employees.

32. The Executive Order directs "relevant" executive departments and agencies to "endeavor to cooperate with the Commission." Executive Order No. 13799, 82 Fed. Reg. 22389 (May 11, 2017).

33. The Commission's estimated annual operating costs for Fiscal Years 2017 and 2018 are approximately $250,000.

34. Consistent with President Trump's description of the Commission as a voter fraud panel, Kobach has described the Commission's focus as "voter fraud more broadly, all forms of it," *see* Gary Moore, *Tucker Carlson: Kris Kobach - Trump Executive Order Creates Voter Fraud Commission: 5/11/2017*, YouTube (May 11, 2017), *available at* https://www.youtube.com/watch?v=Fm0MjHmYSJU, and has explained that the Commission's "goal is to, for the first time, have a nationwide fact-finding effort, to see what evidence there is of different forms of voter fraud across the country." *See Transcript of Interview of Kris W. Kobach on New Day,* CNN (May 15, 2017), *available at* http://www.cnn.com/TRANSCRIPTS/1705/15/nday.06.html.

35. Asked how the Commission would prove President Trump's unsubstantiated claims of widespread voter fraud, Kobach explained that, "The federal government has a database of every known alien who has a greencard or a temporary visa. States have in the past asked, 'can we please run our voter rolls against that database, and see if any of those aliens are on our voter rolls?' The federal government has always said no. Well, now we're going to be able to run that database against one or two states and see how many people are known aliens residing in the United States and also on the voter rolls."

Gary Moore, *Tucker Carlson: Kris Kobach - Trump Executive Order Creates Voter Fraud Commission: 5/11/2017*, YouTube (May 11, 2017), *available at* https://www.youtube.com/watch?v=Fm0MjHmYSJU.

36. Describing in further detail which other agencies' data the Commission would be working with on its voter fraud investigation, Kobach explained that "what we'll be doing is for the first time in our country's history, we'll be gathering data from all 50 states and we'll be using the federal government's databases which can been very valuable. The Social Security Administration has data on people when they pass away. The Department of Homeland Security knows of the millions of aliens who are in the United States legally and that data that's never been bounced against the state's voter rolls to see whether these people are registered." *Kobach talks goals of new voter fraud commission*, Fox News, Sunday Morning Futures (May 14, 2017), *available at* http://www.foxnews.com/transcript/2017/05/14/kobach-talks-goals-new-voter-fraud-commission-commerce-secretary-on-nkorea-missile-test-china-trade-deal.html.

*The Commission's Sweeping and Unprecedented Request for Personal and Voter Data*

37. Despite the Executive Order's directive that the Commission hold public meetings, it convened as a group for the first time on June 28, 2017 without any prior public notice. A brief "readout" of the meeting supplied by the White House later that day stated Kobach had informed the other commissioners that a letter would be sent to all 50 states and the District of Columbia requesting data from state voter rolls. *See* Press Release, The White House, Readout of the Vice President's Call with the Presidential Advisory Commission on Election Integrity (June 28, 2017), *available at* https://

www.whitehouse.gov/the-press-office/2017/06/28/readout-vice-presidents-call-presidential-advisory-commission-election.

38. On June 28, 2017, Kobach "directed" that a letter be sent under his signature to the Secretaries of State or other election officials in all 50 states and the District of Columbia. Declaration of Kris W. Kobach ¶ 4 (July 5, 2017). The other commissioners neither reviewed nor vetted the actual language of the letter before it was sent. Sam Levine, *Trump Voter Fraud Commission Was Cautioned About Seeking Sensitive Voter Information*, Huffington Post (July 5, 2017), *available at* http://www.huffingtonpost.com/entry/trump-voter-fraud-commission_us_595d511fe4b02e9bdb0a073d; Celeste Katz, *Trump election integrity commission member: "We should have predicted" the backlash*, Mic (July 5, 2017), *available at* https://mic.com/articles/181510/trump-election-integrity-commission-member-we-should-have-predicted-the-backlash#.oeqOZx3hl.

39. Kobach's letter "invite[d]" state officials, among other things, to share "evidence or information . . . you have regarding instances of voter fraud or registration fraud in your state" and asked *how* the Commission could "support" state election officials "with regard to information technology security and vulnerabilities." *See*, *e.g.*, Letter from Kris W. Kobach, Vice Chair, PACEI to the Honorable Matt Dunlap Secretary of State of Maine, at 1 (June 28, 2017).

40. The letter requested that the recipients provide by July 14, 2017 "the publicly available voter roll data for [your state], including, if publicly available under the laws of your state, the full first and last names of all registrants, middle names or initials if available, addresses, dates of birth, political party (if recorded in your state), last four digits of social security number if available, voter history (elections voted in) from 2006

onward, active/inactive status, cancelled status, information regarding any felony convictions, information regarding voter registration in another state, information regarding military status, and overseas citizen information." *Id.* at 1-2.

41. The letter instructed recipients to "submit your responses electronically to ElectionIntegrityStaff@ovp.eop.gov or by utilizing the Safe Access File Exchange ("SAFE"), which is a secure FTP site the federal government uses for transferring large data files. You can access the SAFE site at https://safe.amrdec.army.mil/safe/Welcome.aspx." *Id.* at 2.

42. The letter closed by warning that "any documents that are submitted to the full Commission will also be made available to the public." *Id.*

43. After reports indicated that certain state officials might decline to provide some or all of the personal and voter data requested by Kobach, President Trump tweeted: "Numerous states are refusing to give information to the very distinguished VOTER FRAUD PANEL. What are they trying to hide?" @realDonaldTrump, Twitter (July 1, 2017, 9:07 AM) *available at* https://twitter.com/realdonaldtrump/status/881137079958241280.

44. Kobach has stated that the purpose of his request is "to have the best data possible" to support the Commission's "purpose . . . to quantify different forms of voter fraud and registration fraud and offer solutions." Bryan Lowry, *Kris Kobach Wants Every U.S. Voter's Personal Information for Trump's Commission*, Kansas City Star (June 29, 2017), *available at* http://www.kansascity.com/news/politics-government/article158871959.html.

45. The Vice President's office has confirmed that the Commission intends to run the data it receives "through a number of different databases" to check for potential fraudulent registration. Jessica Huseman, *Election Experts See Flaws in Trump Voter Commission's Plan to Smoke Out Fraud*, ProPublica (July 6, 2017), *available at* https://www.propublica.org/article/election-experts-see-flaws-trump-voter-commissions-plan-to-smoke-out-fraud.

46. The same day that Kobach sent his letter, the Voting Section of the Civil Rights Division of the Department of Justice ("DOJ") sent its own letter to states requesting their procedures for complying with the statewide voter registration list maintenance provisions of the National Voter Registration Act. DOJ stated that under the NVRA states must make reasonable efforts to remove from voter rolls the names of voters who have become ineligible by reason of death or change of address. DOJ requested that states provide their policies for removing ineligible voters and identify the officials responsible for doing so. *See, e.g.*, Letter from DOJ to Hon. Kim Westbrook Strach, Executive Director, N.C. State Bd. of Elections (June 28, 2017).

*The Commission Shifts Its Plans to House the Personal and Voting Data*

47. In a declaration filed on July 5, 2017 in the EPIC lawsuit against the Commission for failure to comply with federal privacy laws, Kobach stated that he "intended" that only "narrative responses" provided in response to the letter be sent to the eop.gov email address in the letter and that "voter roll data" be uploaded onto the Safe Access File Exchange (SAFE), which he described as a "tested and reliable method of secure file transfer used routinely by the military for large, unclassified data sets" that "also supports encryption by individual users." Declaration of Kris W. Kobach ¶ 4.

48. The SAFE website is operated by the U.S. Army Aviation and Missile Research Development and Engineering Center, a component within the U.S. Army.

49. After the Court in the EPIC lawsuit inquired at a July 7, 2017 hearing if the Department of Defense, by virtue of its role in collecting and maintaining the data on the SAFE website, should be joined as a defendant the Commission changed course on its storage plans. In a subsequent declaration filed on July 10, 2017, Kobach stated that "[i]n order not to impact the ability of other customers to use" SAFE, the Director of White House Information Technology was "repurposing an existing system" to collect the information "within the White House Information Technology enterprise." Third Declaration of Kris W. Kobach ¶ 1.

50. Asked by the Court at the same July 7 hearing what other federal agencies support the White House's computer system, the Government stated that the "mechanics" of the White House's information technology program are "something that may not be appropriate to say in a public setting." Transcript, Temporary Restraining Order Hearing in *Elect. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 1:17-cv-1320 (CKK) (D.D.C.) (July 7, 2017).

*Several States Intend to Provide Voter History and Party Affiliation Data*

51. As of July 5, 2017, "20 states have agreed to provide the publicly available information requested by the Commission and another 16 states are reviewing which information can be released under their state laws." Press Release, The White House, Statement from Kris Kobach, Kansas Secretary of State and Vice Chair of the Presidential Advisory Commission on Election Integrity (July 5, 2017) *available at*

https://www.whitehouse.gov/the-press-office/2017/07/05/statement-kris-kobach-kansas-secretary-state-and-vice-chair-presidential.

52. The State of Arkansas had provided the Commission voter history and party affiliation through the SAFE website. In light of the pending motion for a temporary restraining order in the EPIC lawsuit, the Commission advised the Court that the Arkansas data would not be downloaded to White House computers and would be deleted from the SAFE website.

53. Several states intend to provide the Commission with voter history and party affiliation data. This group includes Arkansas, Colorado, Florida, North Carolina, and Ohio. *See*, *e.g.*, "Arkansas to give partial voter information to Voter Integrity Commission," 40/29 NEWS (July 5, 2017), *available at* http://www.4029tv.com/article/arkansas-to-give-partial-voter-information-to-voter-integrity-commission/10261303; "News Release: Secretary Williams' Response to request for public voter files," COLORADO SECRETARY OF STATE (June 29, 2017), *available at* https://content.govdelivery.com/accounts/COSOS/bulletins/1a66cee; Ltr from Ken Detzner, Florida Secretary of State to Kris W. Kobach (July 6, 2017), *available at* http://www.politico.com/states/f/?id=0000015d-19cb-d1a7-a95d-5bcf970e0001; *Request Voter Registration Data*, SUPERVISOR OF ELECTIONS, BREVARD COUNTY *available at* http://www.votebrevard.com/statistics-and-data/request-voter-registration-data; North Carolina: *Q&A: Election Integrity Commission's Data Request*, NORTH CAROLINA STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT (July 10, 2017), *available at* https://s3.amazonaws.com/dl.ncsbe.gov/Requests/QA_Election_Integrity_Commission_Request.pdf; *Statement from*

*Secretary Husted*, OHIO SECRETARY OF STATE (June 30, 2017), *available at* http://www.sos.state.oh.us/sos/mediaCenter/2017/2017-06-30-a.aspx; Dana Branham, "Ohio's Jon Husted to Trump election commission: We won't turn over confidential voter info," CINCINNATI.COM (June 30, 2017), *available at* http://www.cincinnati.com/story/news/2017/06/30/kentucky-refuses-federal-request-voter-roll-data-while-ohio-mulls-over/442492001/.

54. The Commission has directed states not to provide the requested voter data while the motion for a temporary restraining order is pending in the EPIC lawsuit.

*The Privacy Act*

55. The Privacy Act of 1974 regulates the government's collection, maintenance, use, and dissemination of sensitive personal information.

56. Congress, which passed the Act following revelations during Watergate that the White House had collected information on its political adversaries, was "concerned with curbing the illegal surveillance and investigation of individuals by federal agencies that had been exposed during the Watergate scandal." Department of Justice, Overview of the Privacy Act of 1974 (2015 edition), *available at* https://www.justice.gov/opcl/policy-objectives.

57. Section 552a(e)(7) of the Act 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."

58. As the D.C. Circuit has explained: "The legislative history of the Act reveals Congress' own special concern for the protection of First Amendment rights, as borne out

by statements regarding 'the preferred status which the Committee intends managers of information technology to accord to information touching areas protected by the First Amendment of the Constitution.'" *Albright v. United States*, 631 F.2d 915, 919 (D.C. Cir. 1980) (citing S. Rep. No. 1183, 93d Cong., 2d Sess., reprinted in (1974) U.S. Code Cong. & Admin. News, pp. 6916, 6971.)). That same legislative history also "reveals a concern for unwarranted collection of information as a distinct harm in and of itself." *Id.* In particular, Congress directed Section 552a(e)(7) at "inquiries made for research or statistical purposes which, even though they may be accompanied by sincere pledges of confidentiality are, by the very fact that government make (sic) the inquiry, infringing on zones of personal privacy which should be exempted from unwarranted Federal inquiry." *Id.* (citing S. Rep. No. 1183, (1974) U.S. Code Cong. & Admin. News at 6971-72)).

59. The initial implementation guidelines for the Act promulgated by the Office of Management and Budget (OMB) underscore the special status accorded by the Act to records concerning individuals' First Amendment-protected activities. According to OMB's guidelines, Section 552a(e)(7) established a "rigorous standard governing the maintenance of records regarding the exercise of First Amendment rights," including "political beliefs" and "freedom of assembly," and asked agencies to "apply the broadest reasonable interpretation" in determining whether a particular activity is protected by Section 552a(e)(7). OMB, Responsibilities for the Maintenance of Records About Individuals by Federal Agencies, 40 Fed. Reg. 28,948, 28,965 (July 9, 1975).

60. Accordingly, the D.C. Circuit has held that an agency "may not so much as collect information about an individual's exercise of First Amendment rights except under very circumscribed conditions" and that Section 552a(e)(7) applies regardless

whether a record is maintained in an agency's system of records. *Albright*, 631 F.2d at 919.

61. The Privacy Act incorporates the definition of "agency" found in the Freedom of Information Act, *id.* § 552a(a)(1), which in turn defines "agency" as "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." *Id.* § 552(f).

62. The Commission is an agency. In cooperation with an as-yet-unknown number of other federal agencies, the Commission will function as a federal investigative body with a dedicated staff and budget to conduct a widescale and first-of-its-kind investigation into alleged voter fraud. Presently, the Commission is amassing the personal and voting data of millions of American citizens and will cross-check this information against databases maintained by other federal agencies, including the Department of Homeland Security and the Social Security Administration, to identify and ultimately have removed individuals whom it believes have fraudulently registered to vote.

63. The Commission's functions and actions therefore go well beyond solely advising and assisting the President, and its structure shows that it is self-contained, is not operationally close to the President, and exercises substantial independent authority.

## Claims for Relief

### Count One (Violation of 5 U.S.C. § 552a(e)(7))

64. Plaintiff hereby realleges all allegations in the above paragraphs as if fully set forth herein.

65. Section 552a(e)(7) of the Privacy Act 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."

66. The Privacy Act defines "maintain" to include "maintain, collect, use, or disseminate." 5 U.S.C. § 552a(a)(3).

67. Through the collection, maintenance, use, and/or dissemination of data on individuals' voter history and party affiliation, activity that is protected by the First Amendment, Defendants have violated, and will violate, Section 552a(e)(7).

68. The collection, maintenance, use, and/or dissemination of these records was not within the scope of a valid law enforcement activity.

69. Defendants' violation has caused and continues to cause ongoing harm to Plaintiff.

**Count Two (Violation of APA – Arbitrary and Capricious Action)**

70. Plaintiff hereby realleges all allegations in the above paragraphs as if fully set forth herein.

71. In collecting, maintaining, using, and/or disseminating data on individuals' voter history and party affiliation, activity that is protected by the First Amendment, in violation of 5 U.S.C. § 552a(e)(7), Defendants have acted arbitrarily, capriciously, in excess of statutory jurisdiction and authority, and otherwise contrary to law, in violation of the APA, 5 U.S.C. § 706.

## Prayer for Relief

WHEREFORE, plaintiff pray that this Court:

1. Declare that Defendants' collection, maintenance, use, and dissemination of voter history and party affiliation data violates the Privacy Act and the APA;
2. Enjoin Defendants from the collection, maintenance, use, and dissemination of voter history and party affiliation data;
3. Order Defendants to provide an accounting of all voter history and party affiliation data in its custody, possession, or control; all copies that have been made of that data; all persons and agencies with whom Defendants have shared that data; and all uses that have been made of that data;
4. Order Defendants to return to any supplying State all voter history and party affiliation data received from that state or otherwise securely delete such data; and
5. Award Plaintiff its costs and reasonable attorneys' fees incurred in this action; and
6. Grant such other relief as the Court may deem just and proper.

Dated: July 14, 2017

Respectfully submitted,

/s/ *Javier Guzman*

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| BRENNAN CENTER FOR JUSTICE, and THE PROTECT DEMOCRACY PROJECT,<br><br>Plaintiffs,<br><br>v.<br><br>U.S. DEPARTMENT OF JUSTICE, U.S. DEPARTMENT OF HOMELAND SECURITY, U.S. GENERAL SERVICES ADMINISTRATION, and OFFICE OF MANAGEMENT AND BUDGET,<br><br>Defendants. | 17 Civ. 6335 (KBF)<br><br>**ANSWER TO THE AMENDED COMPLAINT** |

Defendants U.S. Department of Justice ("DOJ"), U.S. Department of Homeland Security ("DHS"), U.S. General Services Administration ("GSA"), and Office of Management and Budget ("OMB") (together, "Defendants"), by their attorney, Joon H. Kim, Acting United States Attorney for the Southern District of New York, hereby answer the amended complaint (Dkt. No. 12) of Plaintiffs Brennan Center for Justice and The Protect Democracy Project (together, "Plaintiffs") on information and belief as follows:

The allegations contained in the unnumbered paragraph on pages 1-2 of the amended complaint consist of Plaintiffs' characterization of this action, to which no response is required. To the extent a response is required, Defendants deny the allegations in the unnumbered

paragraph on pages 1-2 of the amended complaint, except admit that this action is putatively brought under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 et seq.

**JURISDICTION AND VENUE**[1]

1. Paragraph 1 of the amended complaint states a legal conclusion regarding jurisdiction, to which no response is required.

2. Paragraph 2 of the amended complaint states a legal conclusion regarding venue, to which no response is required.

**PARTIES**

3. Deny knowledge or information sufficient to form a belief as to the truth or falsity of the allegations set forth in Paragraph 3 of the complaint.

4. Deny knowledge or information sufficient to form a belief as to the truth or falsity of the allegations set forth in Paragraph 4 of the complaint.

5. Admit and aver that DOJ is an agency of the executive branch of the United States government, and that the Office of Information Policy ("OIP") and Office of Legal Counsel ("OLC") are components of DOJ. Admit that DOJ is headquartered at 950 Pennsylvania Avenue NW, Washington, DC 20530. Admit that DOJ is an "agency" within the meaning of 5 U.S.C. § 552(f). Deny knowledge or information sufficient to form a belief as to the truth or falsity of the remainder of the third sentence of Paragraph 5, as DOJ's searches and analyses related to Plaintiffs' FOIA requests are ongoing.

6. Admit and aver that DHS is an agency of the executive branch of the United States government. Admit that DHS is headquartered at 245 Murray Lane NW, Washington, DC 20528. Admit that DHS is an "agency" within the meaning of 5 U.S.C. § 552(f). Deny

[1] Defendants replicate the headings from Plaintiffs' complaint solely for ease of reference, without admitting the allegations set forth thereunder.

knowledge or information sufficient to form a belief as to the truth or falsity of the remainder of the third sentence of Paragraph 6, as DHS's search and analyses related to Plaintiffs' FOIA requests are ongoing.

7. Aver that GSA is an independent agency of the United States government, *see* 40 U.S.C. § 101 et seq. Admit that GSA is headquartered at 1800 F Street NW, Washington, DC 20405. Admit that GSA is an "agency" within the meaning of 5 U.S.C. § 552(f). Deny knowledge or information sufficient to form a belief as to the truth or falsity of the remainder of the third sentence of Paragraph 7, as GSA's searches and analyses related to Plaintiffs' FOIA requests are ongoing.

8. Admit that OMB is an agency of the executive branch of the United States government. Admit that OMB is headquartered at 725 17th Street NW, Washington, DC 20503. Admit that OMB is an "agency" within the meaning of 5 U.S.C. § 552(f). Deny knowledge or information sufficient to form a belief as to the truth or falsity of the remainder of the third sentence of Paragraph 8, as GSA's search and analyses related to Plaintiffs' FOIA requests are ongoing.

## STATEMENT OF FACTS

### A. President Trump's Advisory Commission on Election Integrity

9. Admit that on or about May 11, 2017, the President issued Executive Order 13799, entitled "Presidential Executive Order on the Establishment of Presidential Advisory Commission on Election Integrity," and respectfully refer the Court to that Executive Order for a complete and accurate description of its contents.

10. Admit that Vice President Mike Pence chairs the Presidential Advisory Commission on Election Integrity ("Commission"), and that Kris Kobach serves as the Commission's vice chair.

11. Admit that Hans von Spakovsky, J. Christian Adams, and Ken Blackwell are members of the Commission. The remainder of Paragraph 11 sets forth characterizations of the subject of Plaintiffs' FOIA requests, allegedly published articles, and/or allegations unrelated to Plaintiffs' legal claims under FOIA, to which no response is required. To the extent a response to the remainder of Paragraph 11 is deemed required, Defendants admit only the existence of the two articles cited in footnotes 2-4 in Paragraph 11; respectfully refer the Court to those articles for complete and accurate descriptions of their contents; and deny knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 11.

12. Paragraph 12 sets forth characterizations of the subject of Plaintiffs' FOIA requests, allegedly published articles, and/or allegations unrelated to Plaintiffs' legal claims under FOIA, to which no response is required. To the extent a response is deemed required, Defendants admit only the existence of the three articles cited in footnotes 5-7 in Paragraph 12; respectfully refer the Court to those articles for complete and accurate descriptions of their contents; and deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 12.

13. Paragraph 13 sets forth characterizations of the subject of Plaintiffs' FOIA requests, an allegedly published article, and/or allegations unrelated to Plaintiffs' legal claims under FOIA, to which no response is required. To the extent a response is deemed required, Defendants admit only the existence of the article cited in footnote 8 in Paragraph 13; respectfully refer the Court to that article for a complete and accurate description of its contents; and deny knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 13.

14. Paragraph 14 sets forth characterizations of the subject of Plaintiffs' FOIA requests and/or allegations unrelated to Plaintiffs' legal claims under FOIA, to which no