

	Document(s)/Category Description	Document Originator (if applicable)	Document Recipient(s) (if applicable)	Date Document Created and/or Shared (if applicable)	Commission Views as Subject to 10(b)?	Has Document Been Currently Disclosed?	Rational for non-disclosure (see 3d Kossack Decl. ¶ 12)
213	Emails regarding public record requests	Maine Secretary of State Communications Director	Dunlap and staff	5/18/17, 5/19/17, 5/22/17	No	No	(n)
214	Email acknowledging National Association of Secretaries of State (NASS) alert about Commission	Dunlap	NASS staffer	22-May-17	No	No	(m), (n)
215	Cover email attaching letter from Kobach to Dunlap in his official capacity as Secretary of State requesting publicly available voter roll information	Commission Staff	Dunlap	28-Jun-17	No	No	(n)
216	Email forwarding media request	Maine SoS Staff	Dunlap and staff	28-Jun-17	No	No	(j)
217	Email exchange regarding interview request and logistics	Reporter	Dunlap staff	29-Jun-17	No	No	(j)
218	Press Release regarding Commission's Request for publicly available voter roll information	Dunlap staff	Members of the Press/Public	30-Jun-17	No	No	(n)
219	E-mail coordinating response to citizen calls about the Commission	Maine Deputy Secretary of State	Dunlap and staff	30-Jun-17	No	No	(n)
220	E-mail from news organization to Dunlap's office requesting comment	Reporter	Dunlap and staff	30-Jun-17	No	No	(j)
221	E-mail exchange regarding request for Maine's voter information	Reporter	Dunlap	30-Jun-17	No	No	(n)
222	Email exchange about June 30 letter	Reporter	Dunlap	6/30/17, 7/6/17	No	No	(j)
223	Letter from Dunlap in official capacity as Secretary of State to Kobach responding to June 28 letter requesting voter information	Dunlap	Kobach	3-Jul-17	No	No	(n)
224	Email regarding data request	Dunlap	Maine SoS Communications Director	3-Jul-17	No	No	(n)
225	Press release regarding Dunlap's response to June 26 letter requesting voter information	Maine Secretary of State Communications Director	Members of the Press/Public	3-Jul-17	No	No	(n)
226	Draft letter responding to June 26 letter requesting voter information	Dunlap	Maine SoS staff	3-Jul-17	No	No	(n)
227	Email from advocacy group attaching legal memorandum	Advocacy group	Dunlap	7/4/17, 7/6/17	No	No	(o)
228	Email from from advocacy group to Dunlap	Advocacy group	Dunlap	5-Jul-17	No	No	(o)
229	Email with attachment about attempts to influence 2016 election	Third party	Kobach, Dunlap, Lawson, Gardner	5-Jul-17	No	No	(o)
230	Email exchange forwarding July 6 email from advocacy group	Dunlap staff	Dunlap	6-Jul-17	No	No	(m)
231	Email exchange	Dunlap	Reporter	6-Jul-17	No	No	(j)

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232	Email regarding press interest in July 19 meeting	Maine Secretary of State Communications Director	Dunlap	13-Jul-17	No	No	(j)
233	Press Release regarding Dunlap's participation in July 19 meeting	Maine Secretary of State Communications Director	Members of the Press/Public	20-Jul-17	No	No	(j)
234	Email inviting Dunlap to attend July 28 meeting to discuss Commission	Advocacy group	Dunlap	25-Jul-17	No	No	(j)
235	Email from advocacy group about providing voter information	Advocacy group	Dunlap	28-Jul-17	No	No	(o)
236	Letter from Dunlap in official capacity as Secretary of State to Kobach responding to July 26 letter requesting voter information	Dunlap	Kobach	31-Jul-17	No	No	(n)
237	Email requesting information	Reporter	Dunlap staff	1-Aug-17	No	No	(j)
238	Email chain confirming receipt of Dunlap's July 31, 2017 letter to Kobach regarding request for voter information	Dunlap Staff	Williams, Commission Staff and Dunlap	1-Aug-17	No	No	(n)
239	Email inquiring about status of letter responding to July 26 request for voter information	Dunlap Staff	Dunlap	1-Aug-17	No	No	(n)
240	Email forwarding Kossack's Aug 2 email about the Hatch Act to Commission Members	Dunlap	Dunlap staff	2-Aug-17	No	No	(c)
241	Email forwarding August 7 email from Kossack to Commission Members regarding Litigation Hold	Dunlap	Dunlap staff	7-Aug-17	No	No	(c)
242	Email chain re: location/date for September 12 meeting	Dunlap	Maine SoS Communications Director	24-Aug-17	No	No	(c)
243	Email exchange regarding request to attend September 12 meeting	Maine SoS Communications Director	Kossack	8/29/17 - 8/30/17	No	No	(c)
244	Email forwarding NASS handout for August 30 call	Dunlap	Kossack	1-Sep-17	No	No	(h)
245	Email forwarding link to news article	Dunlap	Kossack	7-Sep-17	No	No	(h)
246	Email exchanges regarding media coordination/inquiries	Maine Secretary of State Communications Director	Dunlap	5/11, 12, 15, 16/17; 6/19, 22, 23, 26, 27, 29, 30/17; 7/6/17	No	No	(j)
247	Handwritten notes/logs of constituent phone calls to Dunlap's office	Members of the Public	Dunlap	5/2017 - 8/2017	No	No	(n)

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1	Document(s)/Category Description						
248	Emails, postcards, and letters from constituents, advocacy groups regarding Commission	Members of the Public	Dunlap	6/2017 - 9/2017	No	No	(o)
249	Miscellaneous emails related to travel booking				No	No	(c)
250	Miscellaneous emails related to the submission of financial disclosure and government ethics forms; copies of government ethics forms				No	No	(c)
251	Miscellaneous emails forwarding procedural/logistic emails from Kossack to Maine Secretary of State staff				No	No	(c)
252	<i>Materials of Commission Member David Dunn</i>						
253	Email requesting guidance on responding to press questions	Dunn	Kossack	5-Jul-17	No	No	(j)
254	Email exchange confirming July 19 meeting	Dunn	Kossack	10-Jul-17	No	No	(c)
255	Typed Prepared Introductory Remarks for July 19 meeting	Dunn	N/A	18-Jul-17	No	No	(l)
256	Email exchange re: update on pending litigation	Dunn	Kossack	23-Jul-17	No	No	(c), (v)
257	Email exchange re: scheduling September meeting	Dunn	Kossack	11-Aug-17	No	No	(c)
258	Email exchange re: confirming Dunn's e-mail address; forwarding August 30 e-mail from Kossack to Commission Members re: letter from Vice Chair Kobach regarding submission of meeting materials for the September 12th meeting	Dunn	Kossack	30-Aug-17	No	No	(c)
259	Statement by Senator Jeanne Shaheen	Sen. Shaheen	Commission Members	12-Sep-17	Yes	Yes	N/A
260	Miscellaneous emails related to travel booking				No	No	(c)
261	Miscellaneous emails related to the submission of financial disclosure and government ethics forms; copies of government ethics forms				No	No	(c)
262	<i>Materials of Commission Member William Gardner</i>						
263	Document containing various quotes on election administration and turnout from academic articles and newspapers	Gardner	N/A	27-Jun-16	No	No	(l)
264	Email forwarding article about Gardner's participation in Commission	NH Secretary of State's Office	Gardner	22-May-17	No	No	(m)
265	Copy of June 28 letter sent to Gardner's SoS account	Kobach	Gardner	28-Jun-17	No	No	(n)
266	Copy of July 26 letter sent to Gardner's SoS account	Kobach	Gardner	28-Jun-17	No	No	(n)
267	Copy of July 10 request to hold off email sent to Gardner's SoS account	Kossack	Gardner	10-Jul-17	No	No	(n)
268	Email including names of staff members for attendance at July meeting [and associated email chain]	Gardner (via staff)	Kossack	7/14/2017, 7/18/2017	No	No	(c)
269	Email re: Gardner's potential press availability	OVP Staff member	Gardner	17-Jul-17	No	No	(j)

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270	Email forwarding July 19 meeting materials	Gardner	NH SecState office	7/17/2017, 7/18/2017	No	No	(c)
271	Handwritten notes made on July 19 handout	Gardner	N/A	19-Jul-17	No	No	(k)
272	Typed draft remarks for July 19 meeting	Gardner	N/A	19-Jul-17	No	No	(l)
273	Copy of chart on voting turnout	Gardner	N/A	19-Jul-17	No	No	(l)
274	Email attaching filings in court case	Gardner (via staff)	Kossack	7-Aug-17	No	No	(h)
275	Email attaching statistics, editorial	Gardner (via staff)	Kossack	9-Aug-17	No	No	(h)
276	Email attaching copy of press release	Gardner (via staff)	Kossack	10-Aug-17	No	No	(h)
277	News article printed for personal research	Gardner	N/A	10-Aug-17	No	No	(m)
278	Email requesting point of contact for data collection and information on study Gardner mentioned	Williams	Gardner	14-Aug-17	No	No	(f), (u)
279	Email attaching news article	Gardner (via staff)	Kossack	14-Aug-17	No	No	(h)
280	Email about potential participation in meeting	Potential panelist	Gardner	14-Aug-17	No	No	(r)
281	Article printed for personal research	Gardner	N/A	14-Aug-17	No	No	(m)
282	News article printed for personal research	Gardner	N/A	14-Aug-17	No	No	(m)
283	Article printed for personal research	Gardner	N/A	14-Aug-17	No	No	(m)
284	Email about uploading data; requesting contact information for potential panelists	Williams	NH SecState, Gardner	8/14/2017, 8/17/2017	No	No	(c)
285	Email attaching: news article, panelist bios	Gardner (via staff)	Kossack	15-Aug-17	No	No	(h)
286	Email attaching book excerpt	Gardner (via staff)	Kossack	15-Aug-17	No	No	(h)
287	Email re draft release announcing September meeting	Kossack	Gardner	17-Aug-17	No	No	(p)
288	Email forwarding press release about Sept. 12 meeting	Gardner	St. Anselm	18-Aug-17	No	No	(c)
289	Email forwarding press release about Sept. 12 meeting	Gardner	NH Deputy Secretary of State	21-Aug-17	No	No	(c)
290	Email about uploading data	Williams	NH Ssecretary of State's office, Gardner	21-Aug-17	No	No	(n)
291	Email attaching link to news article	Gardner (via staff)	Kossack	21-Aug-17	No	No	(h)
292	Email from Gardner to Kossack (via admin), attaching link to news article	Gardner (via staff)	Kossack	21-Aug-17	No	No	(h)
293	Email re: Contact information for potential September 12 meeting panelists	Williams	Gardner	22-Aug-17	No	No	(c)
294	Email forwarding press release	Gardner	NH SecState Office	23-Aug-17	No	No	(h)
295	Email chain about press release for September 12 meeting	Kossack	Gardner, Kobach	24-Aug-17	No	No	(p)
296	Email from about uploading data	Williams	NH SecState, Gardner	24-Aug-17	No	No	(n)

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297	Email re invitation to PACEI Sept. 12 meeting	Gardner	Staffer in Schumer office	28-Aug-17	No	No	(m)
298	Invitations to Congressional delegation	Gardner	Sens. Haasan, Shaheen, Schumer, Reps. Kuster, Shear-Porter	29-Aug-17	No	No	(m)
299	Email forwarding email from King stating that he will be unable to attend Sept. 12 meeting	Kossack	Gardner	30-Aug-17	No	No	(c)
300	Email chain about draft agenda for September 12 meeting (inc. attachment)	Kossack	Gardner	31-Aug-17	No	No	(p)
301	Email from constituent requesting to attend Sept. 12 meeting	Constituent	Gardner	1-Sep-17	No	No	(c), (o)
302	Email from constituent about Commission	Constituent	Gardner	1-Sep-17	No	No	(o)
303	Email about public comment at September 12 meeting	Constituent	Gardner, Williams	2-Sep-17	No	No	(o)
304	Email chain about draft agenda for September 12 meeting	Kossack	Gardner	5-Sep-17	No	No	(p)
305	Email re: agenda for September 12 meeting	Gardner	Reporter	6-Sep-17	No	No	(j)
306	Email chain re: time to speak	Kossack	Gardner	6-Sep-17	No	No	(c)
307	Email forwarding ethics reminder	Gardner	NH Deputy Secretary of State	6-Sep-17	No	No	(c)
308	Marked up copy of panelist list for Sept. 12 meeting	Commission Staff	Gardner	12-Sep-17	No	No	(k)
309	Statement by Sen. Shaheen re: Sept 12 meeting	Sen. Shaheen	Gardner	12-Sep-17	Yes	Yes	NA
310	Handwritten notes re: remarks for Sept 12 meeting	Gardner	N/A	12-Sep-17	No	No	(k)
311	Statements for Sept 12 meeting	Gardner	N/A	12-Sep-17	No	No	(l)
312	Email chain after Sept. 12 meeting	Panelist	Gardner	14-Sep-17	No	No	(r)
313	Article printed for personal research	Gardner	N/A	undated	No	No	(m)
314	Attendee lists for September 12 meeting (with handwritten notes)	Commission Staff	Gardner	undated	No	No	(k)
315	NH State FOIA requests				No	No	(n)
316	Postcards, letters, and other correspondence from members of the public regarding Commission				No	No	(o)
317	Miscellaneous mails related to travel booking				No	No	(c)
318	Miscellaneous emails related to the submission of financial disclosure and government ethics forms; copies of government ethics forms				No	No	(c)
319	<i>Materials of Commission Member Alan King</i>						
320	Email chain where King accepts offer to join Commission	King	Kossack	30-Jun-17	No	No	(c)

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321	Email forwarding news article	Third party	King	30-Jun-17	No	No	(o)
322	Email forwarding news article	Third party	King	30-Jun-17	No	No	(o)
323	Email re: collecting research materials about Commission subject-matter	King	King's staff member	2-Jul-17	No	No	(m)
324	Email asking staff member to conduct research	King	King's staff member	3-Jul-17	No	No	(m)
325	Email exchange about King's schedule	King	Kossack	20-Jul-17	No	No	(c)
326	Email forwarding fundraising campaign	Third party	King	21-Jul-17	No	No	(o)
327	Email forwarding news article	Third party	King	5-Aug-17	No	No	(o)
328	Email exchange about King's role on Commission	Third party	King	5-Aug-17	No	No	(o)
329	Email with third party forwarding news article (and marked-up copy of article)	Third party	King	14-Aug-17	No	No	(o)
330	Copy of news article (marked-up copy)	Printed by King		14-Aug-17	No	No	(m)
331	Copy of article (marked-up copy)	Printed by King		14-Aug-17	No	No	(m)
332	Copy of news article (marked-up copy)	Printed by King		14-Aug-17	No	No	(m)
333	Email exchange about unavailability for September 12 meeting and future availability schedule	King	Kossack	15-Aug-17	No	No	(c)
334	Email about participation in Commission	King	Third party	25-Aug-17	No	No	(o)
335	Email about Interstate Crosscheck program	Third party	King	1-Sep-17	No	No	(o)
336	Copy of news article	Printed by King		1-Sep-17	No	No	(m)
337	Email forwarding copy of news article	Third party	King	5-Sep-17	No	No	(o)
338	Email forwarding news articles	Third party	King	8-Sep-17	No	No	(o)
339	Email re how to respond to press inquiries	King	Kossack	8-Sep-17	No	No	(c)
340	Email forwarding news article	Third party	King	12-Sep-17	No	No	(o)
341	Email forwarding news stories	Third party	King	9/12/2017, 9/13/2017	No	No	(o)
342	Email forwarding magazine article	Third party	King	13-Sep-17	No	No	(o)
343	Email exchange re: sending materials for litigation index	Kossack	DOJ, King	15-Sep-17	No	No	(v)
344	Third party forwarding mass email by advocacy organization	Third party	King	15-Sep-17	No	No	(o)
345	Email exchange re: reporter inquiry	King	Reporter (forwarded by personal friend of King)	17-Sep-17	No	No	(j)
346	Email forwarding mass emails	Third party	King	17-Sep-17	No	No	(o)
347	Copy of online article about elections	Printed by King			No	No	(m)
348	Copy of National Conference of State Legislatures report	Printed by King			No	No	(m)
349	Miscellaneous mails related to travel booking				No	No	(c)

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350	Miscellaneous emails related to the submission of financial disclosure and government ethics forms; copies of government ethics forms				No	No	(c)
351	<i>Materials of Commission Vice Chair Kris Kobach</i>						
352	Email forwarding news article on launch of Commission	OVP Counsel	Kobach	5/11/2017	No	No	(f)
353	Email forwarding copy of Executive Order	OVP Counsel	Kobach	5/11/2017	No	No	(f)
354	Email forwarding research on voter fraud	Third party	Kobach	12-May-17	No	No	(m)
355	Email chain re: press interviews	Kobach	OVP Counsel, OVP staff	12-May-17	No	No	(j)
356	Email forwarding article that had been forwarded by Adams	OVP Counsel	Kobach	13-May-17	No	No	(h)
357	Email exchange re: potential Commission member	von Spakovsky	Kobach, Adams, OVP Counsel, OVP staff	15-May-17	No	No	(g)
358	Email exchange re: time to talk	OVP Counsel	Kobach	5/15/2017, 5/16/2017	No	No	(c)
359	Email forwarding email exchange with reporter	von Spakovsky	Kobach	16-May-17	No	No	(j)
360	Email chain about introductory phone call	Kossack	Kobach, von Spakovsky, Adams, OVP Counsel, OVP staff	13-Jun-17	No	No	(c)
361	Email from about potential Commission member (and chain discussing that member and other potential individuals)	OVP Counsel	Kossack, Adams, von Spakovksy, and Kossack	6/14/2017, 6/15/2017	No	No	(g)
362	Email re potential commission members	Kossack	Kobach	16-Jun-17	No	No	(g)
363	Email forwarding link to news article	Adams	Kobach	16-Jun-17	No	No	(h)
364	Emails about potential candidates for Commission	Kobach	Kossack	6/17/17, 6/19/17	No	No	(g)
365	Email about setting up call with DHS	Kossack	DHS official (Kobach copied)	6/19/2017 - 6/20/2017	No	No	(q)
366	Email re potential commission members (with biographical attachments)	Kossack	Kobach	20-Jun-17	No	No	(g)
367	Email chain regarding letters to state officials re data collection (present and future) [including draft letter attachments]	Kossack	Kobach, von Spakovsky, Adams, OVP staff	6/21/2017, 6/22/2017, 6/23/2017, 6/27/2017	No	No	(p)
368	Email chain re: reporter inquiry on Commission	Reporter	Kobach	21-Jun-17	No	No	(j)
369	Email re: potential Commission Member	Kossack	Kobach	22-Jun-17	No	No	(g)

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370	Email re: mechanics of state data collection	Kossack	Kobach	23-Jun-17	No	No	(c)
371	Email re: potential Commission member	Kossack	Kobach	26-Jun-17	No	No	(g)
372	Press inquiry	OVP Press Secretary	Kobach	26-Jun-17	No	No	(j)
373	Email exchange re: information requests	Kossack	Kobach, von Spakovsky, Adams, OVP Counsel	26-Jun-17	No	No	(c)
374	Email re: potential Commission Member	Kossack	Kobach	26-Jun-17	No	No	(g)
375	Email re: news article; study author	Kobach	Kossack, OVP Counsel	27-Jun-17	No	No	(f)
376	Email chain re: draft agenda for June 28 organizational call (with attachment)	Kossack	Kobach	27-Jun-17	No	No	(p)
377	Email re: talking points for June 28 organizational call	Kossack	Kobach	27-Jun-17	No	No	(l)
378	Email chain requesting finalization of letters to public officials re: voter collection	Kossack	Kobach	27-Jun-17	No	No	(p)
379	Email chain re: potential members of the Commission	Adams	Kobach, von Spakovsky, OVP Counsel	28-Jun-17	No	No	(g)
380	Email chain re: content of public official letters	Kossack	Kobach	28-Jun-17	No	No	(p)
381	Email re: phone number	Kossack	Kobach	28-Jun-17	No	No	(c)
382	Email chain re: updated letter to state election officials (including attachments)	Kossack	Kobach	28-Jun-17	No	No	(p)
383	Email chain about potential partnership opportunities with DHS	Kossack	Kobach, OVP Staff	28-Jun-17	No	No	(f)
384	Follow-up email with DHS official	Kossack	DHS official (Kobach copied)	28-Jun-17	No	No	(q)
385	Email chain forwarding examples of letters requesting voter information	Kossack	Kobach, OVP Counsel	28-Jun-17	No	No	(p)
386	Email asking for call	OVP Counsel	Kobach	28-Jun-17	No	No	(c)
387	Email forwarding WH press release	OVP Counsel	Kobach, von Spakovsky	29-Jun-17	No	No	(c)
388	Email re: potential Commission staff	Kobach	Kossack, OVP Counsel	29-Jun-17	No	No	(i)
389	Email re: potential Commission staff	Kobach	Kossack, OVP Counsel	29-Jun-17	No	No	(i)
390	Email re: potential witness for future committee meeting	Kobach	Kossack, OVP Counsel	29-Jun-17	No	No	(f)

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391	Email re: discussing public responses to information requests	Kobach	Kossack, OVP Counsel	29-Jun-17	No	No	(i)
392	Email chain about draft statement from Kobach re: appointment of von Spakovsky	Kobach	Kossack, OVP Counsel	29-Jun-17	No	No	(c)
393	Email re: potential witness at future Commission meeting	Kobach	Kossack, OVP Counsel	29-Jun-17	No	No	(f)
394	Email re: news article about and responses to June 28 letter	Kobach	Kossack, OVP Counsel	29-Jun-17	No	No	(h)
395	Email forwarding WH press release	White House Press Office	Kobach	29-Jun-17	No	No	(c)
396	Email attaching talking points to print (one attachment)	Kobach	Kobach	30-Jun-17	No	No	(l)
397	Email chain forwarding Pew Study on Voter Registration	Kobach	OVP Counsel, Kossack	30-Jun-17	No	No	(h)
398	Email about von Spakovsky press availability	OVP Counsel	Kossack, Kobach, OVP Press	30-Jun-17	No	No	(j)
399	Email chain re: discussing potential responses to questions raised by June 28 letter	Kossack	Kobach, OVP Counsel	30-Jun-17	No	No	(j)
400	Email chain discussing press interview	Kobach	Kossack, OVP Counsel	30-Jun-17	No	No	(j)
401	Email re: talking points for media interviews	OVP Staff	Kobach	30-Jun-17	No	No	(c)
402	Email forwarding Letter to Vice President from Members of Congress	OVP Counsel	Kobach	30-Jun-17	No	No	(c)
403	Email re: media interviews	Kobach	OVP Counsel, OVP staff	30-Jun-17	No	No	(j)
404	Email forwarding Tweet	OVP Staff	Kobach (copying OVP Counsel)	30-Jun-17	No	No	(c)
405	Email forwarding talking points to print (two attachments)	Kobach	Kobach	30-Jun-17	No	No	(c)
406	Email forwarding link to news article	Kobach	Kossack, OVP Counsel, Commission staff	30-Jun-17	No	No	(h)
407	Email asking for call	OVP Counsel	Kobach	1-Jul-17	No	No	(c)
408	Email forwarding Luis Borunda's resignation email	OVP Counsel	Kobach	3-Jul-17	No	No	(c)
409	Email forwarding tweet	OVP Counsel	Kobach	3-Jul-17	No	No	(c)
410	Email chain re: article written by Kobach (incl. draft of article); follow-up email	Kobach	OVP Counsel, Kossack	7/3/2017, 7/4/2017	No	No	(j)

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411	Email chain sharing link to newspaper article discussing data collection	Kobach	Kossack, OVP Counsel, OVP Press	4-Jul-17	No	No	(j)
412	Email regarding logistics for a call	OVP Counsel	Kobach	4-Jul-17	No	No	(c)
413	Email chain re: discussing follow-up letter to information requests	Kobach	OVP Counsel, Kossack	5-Jul-17	No	No	(p)
414	Email chain re: responding to press inquiry	Kobach	Kossack, OVP Counsel, OVP Press	5-Jul-17	No	No	(j)
415	Email requesting confirmation of access to email	OVP Counsel	Kobach	5-Jul-17	No	No	(c)
416	Email re: draft media statement	OVP Staff	Kobach (copying OVP Counsel)	5-Jul-17	No	No	(j)
417	Email confirming wifi/email access	OVP	Kobach	5-Jul-17	No	No	(c)
418	Email exchange re: information about data availability	von Spakovsky	Kobach, Kossack, Adams	6-Jul-17	No	No	(f)
419	Email forwarding draft data collection follow-up letter for review	OVP Counsel	Kobach	6-Jul-17	No	No	(p)
420	Email forwarding draft follow up letter with comments	OVP Counsel	Kobach	6-Jul-17	No	No	(p)
421	Email about the availability of data from a third party	von Spakovsky	Kossack (copying Kobach)	6-Jul-17	No	No	(f)
422	Email re: follow-up letter to states (plus attachment)	Kossack, OVP counsel	Kobach	7/6/2017, 7/7/2017	No	No	(p)
423	Email chain re: follow-up letter to states	Kobach	Kossack, OVP Counsel	7-Jul-17	No	No	(p)
424	Email exchange with person who offered to assist the Commission	Member of the Public	Kobach	7-Jul-17	No	No	(w)
425	Email chain re: draft statements regarding potential outcome of July 7 court hearing	OVP Counsel	Kobach (copying OVP staff)	7-Jul-17	No	No	(j)
426	Email re: how to reach Kobach via telephone	Kobach	OVP Counsel, OVP staff	7-Jul-17	No	No	(c)
427	Email re: availability for call	OVP Counsel	Kobach	9-Jul-17	No	No	(c)
428	Email re: draft agenda for July 19 meeting	Kossack	Kobach	11-Jul-17	No	No	(p)
429	Email re: litigation summary	Kossack	Kobach	11-Jul-17	No	No	(v)
430	Email forwarding information about Colorado's Motor Voter law	Third party	Kobach	12-Jul-17	No	No	(m)
431	Email forwarding blank EFT form	Kossack	Kobach	13-Jul-17	No	No	(c)
432	Email re: edits to draft PACEI by-laws	Kobach	Kossack	17-Jul-17	No	No	(p)

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433	Email chain re: draft by-laws (including attachments)	Kossack	Kobach	7/17/2017 - 7/18/2017	No	No	(p)
434	Email re: draft of possible topics for Commission to address (plus attachment)	Kossack	Kobach	18-Jul-17	No	No	(p)
435	Email chain re: draft article written by Kobach	Kobach	OVP Counsel, OVP Press	18-Jul-17	No	No	(j)
436	Email forwarding link to news article	Reporter	Kobach, von Spakovsky	18-Jul-17	No	No	(j)
437	Email chain re: current status of state responses to data request	Kobach	Kossack, OVP Counsel, OVP Press	18-Jul-17	No	No	(f)
438	Email re: update on number of states providing data	Kobach	Kossack, OVP Counsel, OVP Comms	7/18/17 - 7/19/17	No	No	(c)
439	Email chain re: Kobach opening statement for July 2017 meeting	Kobach	OVP staff	7/18/17 - 7/19/17	No	No	(l)
440	Email re: Letter drafted by members of PA House of Representatives	Kobach	OVP Counsel, Press, Kossack	19-Jul-17	No	No	(o)
441	White House Press Release of Remarks by President and Vice President at July 19 meeting	White House Press Office	Kobach	19-Jul-17	No	No	(c)
442	Email commenting on media interview	OVP Counsel	Kobach	19-Jul-17	No	No	(c)
443	Email exchange about request for voter information and letter member sent to Governor regarding request	Member, Pennsylvania House of Representatives	Kobach	19-Jul-17	No	No	(w)
444	Email inquiring if Kobach is available for a possible call	Kossack	Kobach	20-Jul-17	No	No	(c)
445	Email chain re: availability for call with DHS	Kossack	Kobach	7/20/2017 - 7/24/2017	No	No	(q)
446	Email chain about press statement	OVP Counsel	Kobach, Kossack	24-Jul-17	No	No	(j)
447	Email re: draft follow up letter to states re: data collection (with attachment)	Kossack	Kobach	24-Jul-17	No	No	(p)
448	Email re: updated draft follow up letter to states re: data collection (with attachment)	Kossack	Kobach	24-Jul-17	No	No	(p)
449	Email exchange with reporter	Reporter	Kobach	7/24/17 - 7/25/17	No	No	(j)
450	Email re: communication with Plaintiff's counsel in PACEI-related litigation	Kobach	Kossack	25-Jul-17	No	No	(v)
451	Email re: updated follow-up letter to states re: data collection and litigation update	Kossack	Kobach	25-Jul-17	No	No	(p)

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452	Email chain regarding July 26th data collection follow-up letter (and draft attachments)	Kossack	Kobach, OVP Counsel, OVP staff	26-Jul-17	No	No	(p)
453	Email re: contact information	Kossack	Kobach	26-Jul-17	No	No	(c)
454	Email requesting telephone number for a scheduled telephone call	Kossack	Kobach	26-Jul-17	No	No	(c)
455	Email from Kobach's Secretary of State account to Kobach sending back attached letter from Kobach to states	Kobach	Kossack	27-Jul-17	No	No	(n)
456	Email chain re: September meeting date/location and Kansas matching program	Kobach	Kossack	27-Jul-17	No	No	(f)
457	Email re: photographs from July 19 meeting	Kossack	Kobach	27-Jul-17	No	No	personal
458	Email forwarding July 26, 2017, letter	Kossack	Kobach	27-Jul-17	No	No	(c)
459	Email chain re: possible themes/topics for future meetings (and attachment)	Kossack	Kobach	7/27/2017 - 7/28/2017	No	No	(p)
460	Email forwarding article	von Spakovsky	Kobach	28-Jul-17	No	No	(h)
461	Email re: speaker request for Kobach	Kossack	Kobach	1-Aug-17	No	No	(j)
462	Email re: letter from Dunlap about data collection	Kossack	Kobach	1-Aug-17	Yes	Yes	N/A (posted as Maine's response letter, see above)
463	Email re: press article on litigation	Kossack	Kobach	1-Aug-17	No	No	(h)
464	Email re: data collection process	Kobach	OVP Staff	2-Aug-17	No	No	(f)
465	Email re: plan for September meeting (and attachment)	Kossack	Kobach	3-Aug-17	No	No	(f)
466	Email about time to speak	OVP Counsel	Kobach, Williams	14-Aug-17	No	No	(c)
467	Email re: plan for September meeting (plus attachments related to potential speakers)	Kossack	Kobach	15-Aug-17	No	No	(f)
468	Email regarding availability for a telephone call	OVP Counsel	Kobach	16-Aug-17	No	No	(c)
469	Email re: draft announcement of September meeting	Kossack	Kobach	17-Aug-17	No	No	(p)
470	Email chain re: getting additional staff support for Commission	Kobach	OVP staff	20-Aug-17	No	No	(i)
471	Email chain re: getting additional staff support for Commission	Kobach	OVP Counsel, Kossack	22-Aug-17	No	No	(i)
472	Email chain re: phone call with Kobach, OVP, and DHS staff	Kossack	OVP/DHS staff and Kobach	22-Aug-17	No	No	(q)
473	Email chain re: data collection sources	Kobach	Kossack, OVP and EOP staff	22-Aug-17	No	No	(i)
474	Email re: press release about September meeting announcement	Kossack	Kobach & Gardner	24-Aug-17	No	No	(p)

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475	Email re: phone number for DHS call	Kossack	Kobach	24-Aug-17	No	No	(q)
476	Email chain forwarding a press release announcing Secretary of State Gardner will host September 12 meeting	Kossack	Kobach, OVP Counsel, Commission staff	24-Aug-17	No	No	(c)
477	Email forwarding draft letter re: meeting material deadline	Kossack	Kobach	29-Aug-17	No	No	(p)
478	Emails re: draft letter instructing Commissioners about meeting materials (and drafts)	Kossack	Kobach	8/29/2017 - 8/30/2017	No	No	(p)
479	Email forwarding draft statement for review	Kossack	Kobach	30-Aug-17	No	No	(p)
480	Email re: draft statement	OVP Counsel	Kobach	30-Aug-17	No	No	(p)
481	Email from OVP counsel forwarding proposed press statement re: August 30, 2017, Court order	OVP Counsel	Kobach	30-Aug-17	No	No	(j)
482	Email exchange regarding news article	Third party	Kobach	30-Aug-17	No	No	(m)
483	Email re: draft agenda for September meeting (and attachment)	Kossack	Kobach	31-Aug-17	No	No	(p)
484	Email chain re NH voting study	Kossack	Kobach	9/6/2017 - 9/7/2016	No	No	(f)
485	Email re: media availability	Kobach	OVP staff	7-Sep-17	No	No	(j)
486	Email attaching materials for the September 12 meeting	Adams	Kobach, Kossack, Commission Staff, OVP Counsel	7-Sep-17	No	No	(r)
487	Email forwarding August 16, 2017 letter from N.H. Speaker of the House to Secretary Gardner, and Secretary Gardner's September 6, 2017, response	Kossack	Kobach, OVP Counsel	7-Sep-17	No	No	(c)
488	Email forwarding news article	OVP Counsel	Kobach	7-Sep-17	No	No	(c)
489	Email forwarding 2016 NH election results	OVP Counsel	Kobach, copying Kossack	7-Sep-17	No	No	(c)
490	Email forwarding article	Kossack	Kobach (copying OVP Counsel)	7-Sep-17	No	No	(c)
491	Email re: press (and associated call scheduling emails)	Kossack	Kobach	9/7/2017 - 9/8/2017	No	No	(j)
492	Email chain re: scheduling a telephone call	Kossack	Kobach, copying OVP Counsel	8-Sep-17	No	No	(c)
493	Email chain re: response to media inquiry	OVP Staff	Kobach; Kobach staff	9/10/17 - 9/11/17	No	No	(j)

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1	494						
	Email forwarding summary of presentations and member submissions for September 12 meeting	Kossack	Kobach (copying OVP Counsel)	11-Sep-17	No	No	(c)
	495						
	Email forwarding link to news article	Reporter	Kobach, von Spakovsky, Adams,	14-Sep-17	No	No	(j)
	496						
	Email forwarding information about alleged voter fraud in New Hampshire	Member of the Public	Kobach, Blackwell, Adams, von Spakovsky	14-Sep-17	No	No	(m)
	497						
	Email chain re: media inquiry	Reporter	Kobach, OVP Counsel	9/14/17 - 9/15/17	No	No	(j)
	498						
	Media inquiry	Reporter	Kobach	15-Sep-17	No	No	(j)
	499						
	Press inquiry	Reporter	Kobach, forwarded to OVP	15-Sep-17	No	No	(j)
	500						
	Press inquiry	Reporter	Kobach	15-Sep-17	No	No	(j)
	501						
	Email re: press inquiry [and chain]	Kobach	Kossack, OVP Counsel	18-Sep-17	No	No	(j)
	502						
	Media inquiry	Reporter	Kobach	18-Sep-17	No	No	(j)
	503						
	Email re: submission of litigation document collection material	Kossack	Kobach	21-Sep-17	No	No	(c)
	504						
	Litigation-related material based on Kobach's status as a defendant; covered by attorney work product doctrine and/or attorney-client privilege				No	No	(e), (v)
	505						
	Miscellaneous emails related to travel booking				No	No	(c)
	506						
	Miscellaneous emails related to the submission of financial disclosure and government ethics forms; copies of government ethics forms				No	No	(c)
	507						
	Handwritten notes made for or at Commission meetings				No	No	(k)
	508						
	Text messages re: administrative topics like scheduling				No	No	(c)
	509						
	<i>Materials of Commission Member Connie Lawson</i>						
	510						
	Letter making public records request	Advocacy group	Indiana SoS	18-May-17	No	No	(n)
	511						
	Letter acknowledging state records request	Indiana SoS	Advocacy group	19-May-17	No	No	(n)
	512						
	Letter acknowledging records request	Indiana SoS	Advocacy group	22-May-17	No	No	(n)
	513						
	June 28 Kobach letter, sent to Lawson in capacity as SoS	Kobach	Lawson	28-Jun-17	No	No	(n)
	514						
	Email to Senate intelligence committee following June 21, 2017 testimony before Senate Intelligence Committee	Deputy Indiana SoS	Kossack	29-Jun-17	No	No	(n)

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515	Legal memorandum re: propriety of data collection letter	Advocacy group	Sent to Lawson by email	4-Jul-17	No	No	(m)
516	Copy of letter from advocacy group to OMB	Advocacy group	Sent to Lawson by email	5-Jul-17	No	No	(m)
517	Copy of Kossack July 10 email requesting states hold off from sending data pending resolution of EPIC TRO	Kossack	Lawson (as SoS)	10-Jul-17	No	No	(n)
518	Opening statement by Lawson for July 19 meeting (marked up)	Lawson	N/A	19-Jul-17	No	No	(l)
519	Email correspondence re: responding to reporter question	Indiana SoS	Kossack	2-Aug-17	No	No	(j)
520	Email correspondence about Hatch Act	Indiana SoS	Lawson	3-Aug-17	No	No	(m)
521	Letter responding to June 28 Kobach letter (narrative responses)	Lawson	Kobach	4-Aug-17	No	No	(n)
522	Letter responding to June 28 Kobach letter (request for data, including IEC-3 form for requesting information)	Indiana SoS GC	Kobach	4-Aug-17	No	No	(n)
523	Email acknowledging public records request and sharing responses	Indiana SoS	Reporter	23-Aug-17	No	No	(n)
524	Lawson statement to Interim Committee on Elections	Lawson	Indiana Interim Committee on Elections	30-Aug-17	No	No	(n)
525	Letter making public records request	Advocacy group	Indiana SoS	6-Sep-17	No	No	(n)
526	Email acknowledging public records request	Indiana SoS	constituent	7-Sep-17	No	No	(n)
527	Email acknowledging public records request	Indiana SoS	Advocacy group	7-Sep-17	No	No	(n)
528	Public comments received through Indiana SoS website re: Commission	Members of the Public	Lawson	6/28/17 - late July 2017	No	No	(o)
529	Miscellaneous emails related to travel booking				No	No	(c)
530	Miscellaneous emails related to the submission of financial disclosure and government ethics forms; copies of government ethics forms				No	No	(c)
531	<i>Materials of Former Commission Member Luis Borunda</i>						
532	Follow-up emails re: appointment	Borunda	OVP Staff	5/30/2017; 6/12/2017	No	No	(c)
533	Email re: time to speak	OVP Counsel	Borunda	6/12/2017; 6/19/2017	No	No	(c)
534	Email with background information about role of Secretary of state in elections	Borunda	OVP Counsel	26-Jun-17	No	No	(h)
535	Resignation email	Borunda	OVP Counsel	3-Jul-17	No	No	(c)
536	Email re: setting up time to talk after resignation	OVP Counsel	Borunda	3-Jul-17	No	No	(c)
537	Emails with personnel forms	Borunda	OVP Staff	Misc	No	No	(c)

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538	<i>Materials of Commission Member Christy McCormick</i>						
	Email forwarding White House Press Release Announcing						
539	Commission	OVP Counsel	McCormick	11-May-17	No	No	(c)
540	Email forwarding talking points	McCormick	unknown	11-May-17	No	No	(j)
541	Email exchange re: Chicago Board of Election	DOJ official	McCormick	15-May-17	No	No	(m)
	Email providing name and contact information for possible						
542	Commission staff	McCormick	OVP Counsel	23-Jun-17	No	No	(i)
	Email exchange discussing potential sources of information and						
543	topics the Commission should consider studying	McCormick	Kossack	26-Jun-17	No	No	(f)
544	Email exchange discussing voting issue with attachment	DOJ official	McCormick	7/5/17 - 7/6/17	No	No	(m)
	NASS Resolution Reaffirming Commitment to Strengthening						
545	Elections	National Association of Secretaries of State	NASS Members	10-Jul-17	No	No	(m)
546	Email forwarding link to news article	McCormick	Kossack	13-Jul-17	No	No	(h)
547	handwritten notes taken on July 19 meeting handout	McCormick	McCormick	19-Jul-17	No	No	(k)
	Handwritten notes prepared for introductory remarks at July 19						
548	meeting	McCormick	McCormick	19-Jul-17	No	No	(l)
	Email exchange about media appearance						
549		Blackwell	McCormick and producer	7/20/17 - 7/21/17	No	No	(j)
	Email exchange discussing possible staff support for Commission						
550		McCormick	Kossack	21-Jul-17	No	No	(i)
551	Email attaching resolutions from NASS meeting	McCormick	Kossack	24-Jul-17	No	No	(h)
	Email requesting Commission's general email address and						
552	discussing invitation to speak at a meeting.	McCormick	Kossack	26-Jul-17	No	No	(c)
	Email suggesting locations for future Commission meetings.						
553		McCormick	Kossack and OVP Counsel	26-Jul-17	No	No	(c)
	Email forwarding names of a potential staff person for the						
554	Commission	McCormick	Kossack	30-Jul-17	No	No	(i)
555	Letter to Kobach from potential staff person	Potential staff	Kobach	15-Aug-17	No	No	(w)
556	Email attaching resume, letter, and sample analysis	Potential staff	McCormick	15-Aug-17	No	No	(w)
557	Sample analysis	Potential staff	McCormick	15-Aug-17	No	No	(w)
558	Potential staff resume	Potential staff	McCormick	15-Aug-17	No	No	(w)
559	Email attaching resume, letter, and sample analysis	Potential staff	McCormick	16-Aug-17	No	No	(w)
560	Email exchange regarding availability for call/meeting	Potential staff	McCormick	16-Aug-17	No	No	(w)
561	Email requesting call	McCormick	Kobach	18-Aug-17	No	No	(c)
	Email forwarding potential staff person's resume, letter, and						
562	sample analysis	McCormick	Kobach	19-Aug-17	No	No	(i)
563	Prepared Remarks to Election Center discussing Commission	McCormick	Election Center	21-Aug-17	No	No	(j)

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1							
564	E-mail forwarding link to news article	DOJ official	McCormick	5-Sep-17	No	No	(m)
565	Email exchange discussing Chicago voting issue	Third party	McCormick, DOJ official	9/6/27, 9/11/17	No	No	(m)
566	Email exchange regarding certificate left at September 12 meeting	McCormick	Kossack	12-Sep-17	No	No	personal
567	Handwritten notes taken at September 12 meeting	McCormick	McCormick	12-Sep-17	No	No	(k)
568	Email exchange discussing completion of records search	Kossack	McCormick	9/19/17 - 9/20/17	No	No	(c)
569	NASS Resolution Calling for Federal Agency Assistance in Maintaining Accurate and Comprehensive State Voter Registration Lists	NASS	Secretaries of State; McCormick	Adopted Summer 2012; Reauthorized Summer 2017	No	No	(m)
570	Correspondence sent to McCormick at EAC from members of the public	Members of the Public	McCormick	5/2017 - 9/2017	No	No	(n)
571	Handwritten notes on Election Administration & Voting Survey	McCormick	McCormick	undated	No	No	(m)
572	Prepared Remarks discussing Commission	McCormick	unknown	unknown	No	No	(j)
573	Mail from Various Senders	Members of the Public	McCormick	various dates	No	No	(o)
574	Miscellaneous emails related to travel booking				No	No	(c)
575	Miscellaneous emails related to the submission of financial disclosure and government ethics forms; copies of government ethics forms				No	No	(c)
576	<i>Materials of Commission Member Hons von Spakovsky</i>						
577	Email re: introductory call	von Spakovsky	Kossack	13-Jun-17	No	No	(c)
578	Email chain about potential Commission members	von Spakovsky	Kobach, von Spakovsky, Adams, OVP Counsel, Kossack	6/14/17 - 6/15/17; 6/28/17	No	No	(g)
579	Email exchange re: scheduling a meeting	Kossack	von Spakovsky	28-Jun-17	No	No	(c)
580	Email forwarding link to best practices booklet on accurate voter roles	von Spakovsky	Kossack	29-Jun-17	No	No	(h)
581	Email forwarding link to 2005 GAO report on voter registration lists	von Spakovsky	Kossack	29-Jun-17	No	No	(h)
582	Email forwarding news article	von Spakovsky	Kossack	29-Jun-17	No	No	(h)
583	Email exchange re: press availability	von Spakovsky	Kossack	6/30/17, 7/6/17	No	No	(j)

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584	Email exchange discussing media interviews and forwarding June 28 letter to the Iowa Secretary of State	von Spakovsky	Kossack	30-Jun-17	No	No	(j)
585	Email containing statutory citations	von Spakovsky	Kossack	30-Jun-17	No	No	(h)
586	Email forwarding email from third party offering to work with the Commission	von Spakovsky	Kossack	5-Jul-17	No	No	(i)
587	Email forwarding link to article and discussing upcoming interview	von Spakovsky	Kossack, Adams	6-Jul-17	No	No	(j)
588	Email exchange regarding call received about data availability	von Spakovsky	Kossack, Kobach	6-Jul-17	No	No	(i)
589	Email forwarding July 8, 2017 email about data availability	von Spakovsky	Commission Staff	10-Jul-17	No	No	(i)
590	Email exchange regarding von Spakovsky interview	von Spakovsky	Kossack	10-Jul-17	No	No	(j)
591	Email exchange confirming von Spakovsky's title and discussing recent interviews	Kossack	von Spakovsky	11-Jul-17	No	No	(c)
592	Email exchange regarding request for guests to attend July 19 meeting	von Spakovsky	Kossack	17-Jul-17	No	No	(c)
593	Typed remarks with handwritten notations for July 19 meeting	von Spakovsky	von Spakovsky	19-Jul-17	No	No	(l)
594	Email re update on von Spakovsky interview	von Spakovsky	Kossack	23-Jul-17	No	No	(j)
595	Email forwarding link to von Spakovsky interview	von Spakovsky	Commission Staff	25-Jul-17	No	No	(h)
596	Email exchange regarding von Spakovsky's recommendation of an expert	von Spakovsky	Kossack	28-Jul-17	No	No	(i)
597	Email forwarding op-ed	von Spakovsky	Commission Staff	3-Aug-17	No	No	(h)
598	Email forwarding media inquiry	OVP Counsel	von Spakovsky, Adams, Kossack	14-Aug-17	No	No	(j)
599	Email exchange regarding scheduling call	Commission Staff	von Spakovsky	21-Aug-17	No	No	(c)
600	Email forwarding link to news article	von Spakovsky	Kossack	27-Aug-17	No	No	(h)
601	Email exchange about forwarding the materials for Sept. 12, 2017	Kossack	von Spakovsky	8-Sep-17	No	No	(r)
602	Cover email attaching power point presentation for Sept. 12 meeting	von Spakovsky	Commission Staff	8-Sep-17	No	No	(r)
603	Email exchange regarding request for guests to attend September 12 meeting	von Spakovsky	Kossack	11-Sep-17	No	No	(c)
604	Correspondence from members of the public	Members of the Public	von Spakovsky	various dates between 7/2017-9/2017	No	No	(o)

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605	Miscellaneous mails related to travel booking				No	No	(c)
606	Miscellaneous emails related to the submission of financial disclosure and government ethics forms; copies of government ethics forms				No	No	(c)
607	<i>Materials of Commission Member Mark Rhodes</i>						
608	Email follow-up from news reporter	Reporter	Rhodes	22-Jun-17	No	No	(j)
609	Email request for interview by reporter	Reporter	Rhodes	22-Jun-17	No	No	(j)
610	Email from WV SoS Office about appointment to PACEI (and drafts)	WV SoS	Rhodes	22-Jun-17	No	No	(n)
611	Email request for interview	Reporter	Rhodes	2-Jul-17	No	No	(j)
612	Email chain re request for interview	Producer	Rhodes	3-Jul-17	No	No	(j)
613	Lists of cancelled Wood County voters and related emails discussing data (in response to public records request about List Maintenance policies)	Third-party requestor	Rhodes	7/11/17 - 7/28/17	No	No	(n)
614	Email request for interview	Reporter	Rhodes	17-Jul-17	No	No	(j)
615	Email request for interview	Producer	Rhodes	19-Jul-17	No	No	(j)
616	Email request for interview (and chain)	Producer	Rhodes	19-Jul-17	No	No	(j)
617	Email request for interview	Reporter	Rhodes	19-Jul-17	No	No	(j)
618	Email request for interview	Reporter	Rhodes	19-Jul-17	No	No	(j)
619	Email from NASS to members; forwarded on to Rhodes, including election-related news and disclosures (and attachments)	WV Secretary of State	Rhodes	22-Jul-17	No	No	(n)
620	Email forwarding editorial	WV Secretary of State employee	Rhodes	22-Jul-17	No	No	(n)
621	Email request for meeting with advocacy organization (and follow-up)	Advocacy organization	Rhodes	26-Jul-17	No	No	(j)
622	Email correspondence about voting machines	Third party	Rhodes	10-Aug-17	No	No	(m)
623	Email request for interview	Reporter	Rhodes	23-Aug-17	No	No	(j)
624	Email request for interview	Reporter	Rhodes	25-Aug-17	No	No	(j)
625	Email chain responding to State FOIA request for documents (and copy of redacted documents)	Rhodes	reporter	28-Aug-17	No	No	(n)
626	Email request for interview	Reporter	Rhodes	13-Sep-17	No	No	(j)
627	Email sharing link to Sept. 12 meeting and an attached request from DOJ re document collection	Kossack	Rhodes	13-Sep-17	No	No	(c)
628	Materials from members of the public	Members of the public	Rhodes	various dates	No	No	(o)
629	Miscellaneous emails related to travel booking				No	No	(c)

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630	Miscellaneous emails related to the submission of financial disclosure and government ethics forms; copies of government ethics forms				No	No	(c)
631	<i>Materials sent to or from September 12 meeting panelists</i>						
632	Email about scheduling time to speak	Kossack	Palmer	3-Aug-17	No	No	(r)
633	Email about logistics for visit to EEOB	Kossack	Palmer	8/7/2017 - 8/8/2017; 8/10/2017	No	No	(r)
634	Email re: GAI report and request to set up time for discussion	OVP Counsel	Block	8/11/17 - 8/13/17; 8/15/17	No	No	(r)
635	Email re: recommendations for topics to present during September 12 meeting	Williams	Popper	16-Aug-17	No	No	(r)
636	Email about unpublished study (study was not shared with Commission)	Williams	Popper	8/16/17 - 8/17/17	No	No	(r)
637	Email sharing contact information of a data analysis expert	Palmer	Kossack	17-Aug-17	No	No	(i)
638	Emails re: coordinating publication of Popper's participation in panel	Judicial Watch Public Affairs	Williams, OVP Staff	8/17/17 - 8/18/17; 9/5/17 - 9/8/17	No	No	(r)
639	Email with contact information	Kossack	Lott, Kossack	22-Aug-17	No	No	(r)
640	Email about meeting participation	Kossack	Lott	22-Aug-17	No	No	(r)
641	Email re: potential participation in meeting	Kossack	Rivest	23-Aug-17	No	No	(r)
642	Introductory email chain seeking to discuss participation in Commission meeting; referral from Secretary Gardner	Kossack	Appel	23-Aug-17	No	No	(r)
643	Email about timing for panel	Lott	Kossack	30-Aug-17	No	No	(r)
644	Email about reimbursement form	Kossack	Palmer	8/30/2017 - 8/31/2017	No	No	(r)
645	Email re: time to speak about September 12 meeting	Kossack	Rivest	1-Sep-17	No	No	(r)
646	Email re: contact information	Kossack	Smith	1-Sep-17	No	No	(r)
647	Email about potential meeting participation and time for discussion	Kossack	Hursti	9/1/2017; 9/5/2017	No	No	(r)
648	Email sharing copy of public testimony (for release); requesting additional information on agenda	Appel	Kossack	9/4/2017, 9/6/2017	No	No	(r)
649	Email re: reimbursements	Kossack	Hursti	5-Sep-17	No	No	(r)
650	Email re: meeting travel bookings	Kossack	Lott	5-Sep-17	No	No	(r)
651	Email re: meeting agenda and time to submit presentation materials	Kossack	Rivest	5-Sep-17	No	No	(r)
652	Email re: panel name and participants	Kossack	Hursti	6-Sep-17	No	No	(r)

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653	Email about preferred presenter title	Palmer	Kossack	6-Sep-17	No	No	(r)
654	Email with contact information	Kossack	Block	7-Sep-17	No	No	(r)
655	Email with presentation and question re: logistics	Block	Kossack	7-Sep-17	No	No	(r)
656	Email re: posting report to webpage	Kossack	Block	7-Sep-17	No	No	(r)
657	Cover email sending rough draft of presentation (final version is posted) and copy of research paper to be discussed at meeting (paper is posted)	Lott	Kossack	7-Sep-17	No	No	(r)
658	Email re: draft meeting presentation, including link to newspaper article	Lott	Kossack	9/7/2017, 9/8/17	No	No	(r)
659	Email re: physical format of panel & presentation materials	Rivest	Kossack	9/7/2017, 9/9/2017	No	No	(r)
660	Email sharing presenter materials for Sept. 12 meeting (and follow-up with link to public website posting)	Kossack	Panelists	8-Sep-17	No	No	(r)
661	Email with Popper's attached written statement (plus additional draft with non-text changes)	Popper	Williams, Kossack	8-Sep-17	No	No	(r)
662	Emails re: event timing	Judicial Watch Public Affairs	Lotter, Kossack	8-Sep-17	No	No	(r)
663	Email re: draft slides	Hursti assistant	Kossack	8-Sep-17	No	No	(r)
664	Email re: providing copy of slides (and follow-up email)	Smith	Kossack	8-Sep-17	No	No	(r)
665	Email about logistics for September 12 meeting	Kossack	Panelists	11-Sep-17	No	No	(r)
666	Email about meeting logistics	Hursti	Kossack	11-Sep-17	No	No	(r)
667	Email with changes to presentation	Block	Kossack	11-Sep-17	No	No	(r)
668	Email re: fixing typo in presentation	Lott	Kossack	11-Sep-17	No	No	(r)
669	Email re: presentation time	Rivest	Williams/Kossack	11-Sep-17	No	No	(r)
670	Email re: bringing copy of presentation	Smith	Kossack	11-Sep-17	No	No	(r)
671	Press release about Popper participation in PACEI	Judicial Watch Public Affairs	Forwarded to Kossack, VP Press, VP Counsel	11-Sep-17	No	No	(r)
672	Emails re: meeting logistics	Kossack	Lott, Kossack	9/11/2017; 9/12/2017	No	No	(r)
673	Email re: link to September 12 video	Lott	Kossack	12-Sep-17	No	No	(r)
674	Email re: fixing a typo in slides	Rivest	Kossack	12-Sep-17	No	No	(r)
675	Email re: reimbursement	Appel	Kossack	17-Sep-17	No	No	(r)
676	Email re: lunch plans and reimbursements	Kossack	Lott	19-Sep-17	No	No	(r)
677	Email re: reimbursement	Lott	GSA (copying Kossack)	20-Sep-17	No	No	(r)

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678	Email including article about Lott	Lott	Kossack	22-Sep-17	No	No	(r)
679	Email re: posting of Sept. 12 video	Rivest	Kossack	23-Sep-17	No	No	(r)
680	<i>Communications between Commission/OVP Staff and Other Government Entities</i>						
681	Email chain from DHS requesting information about the scope of the Commission's work	DHS	OVP Counsel	12-May-17	No	No	(x)
682	Email chain re: scheduling a telephone call	DHS	OVP Counsel	05/15/2017, 05/16/2017	No	No	(q)
683	Email chain with GSA about initial steps required to establish a commission	GSA staff	OVP Counsel	30-May-17	No	No	(s)
684	Email chain about Commission by-laws	Kossack	GSA staff	6-Jun-17	No	No	(s)
685	Email chain about IT issues	Kossack	GSA staff	6/7/17, 6/8/17	No	No	(s)
686	Email exchange with GSA about personnel paperwork	Kossack	GSA staff	13-Jun-17	No	No	(s)
687	Email about setting up time to speak	Kossack	DOJ official	15-Jun-17	No	No	(q)
688	Email chain about Charter review	Kossack	GSA staff	6/15/2017, 6/19/17	No	No	(s)
689	Email about setting up time to talk about Commission	Counsel to OVP	DHS, Kossack	6/19/2017, 6/20/2017	No	No	(q)
690	Email about websites that can accept public comments	Kossack	GSA staff	20-Jun-17	No	No	(s)
691	Email about Kossack's appointment as Designated Federal Officer	GSA staff	Kossack	6/20/2017, 6/26/2017	No	No	(s)
692	Email about role of Designated Federal Officer	GSA staff	Kossack	21-Jun-17	No	No	(s)
693	Planner for a call with DHS personnel	Kossack	DHS personnel, OVP staff, Kobach	21-Jun-17	No	No	(q)
694	Email chain re: Budget	GSA staff, OMB	OVP, Kossack	6/22/2017; 6/23/2017	No	No	(s)
695	Email chain about 15-day publication requirement and ethics and FACA training	GSA staff	Kossack	26-Jun-17	No	No	(s)
696	Email re: member names and logistics (i.e., swearing in) [and chain]	Kossack	GSA staff	6/26/17 - 7/7/17	No	No	(s)
697	Email chain about draft SGE appointment letters	Kossack	GSA staff	6/26/2017, 6/27/2017	No	No	(s)
698	Email chain about FACA and ethics briefing	GSA staff	Kossack	27-Jun-17	No	No	(s)
699	Email chain re: room reservation	Kossack	GSA staff	27-Jun-17	No	No	(s)
700	Email re: meeting notices and SF 50 forms	Kossack	GSA staff	28-Jun-17	No	No	(s)
701	Follow up scheduling email with DHS personnel	Kossack	DHS staff	28-Jun-17	No	No	(q)

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702	Email re: publication of meeting notice	Kossack	GSA staff	6/30/2017, 7/3/2017	No	No	(s)
703	Follow-up email re: getting response	DHS Official	Kossack	1-Jul-17	No	No	(q)
704	Email re: meeting publication notices	GSA	Kossack, OVP staff, OVP counsel, EOP	6-Jul-17	No	No	(s)
705	Email about potential future coordination/overlap between entities	DHS	OVP staff, OVP counsel, Kossack	6-Jul-17	No	No	(x)
706	Email re: setting up time to talk	DHS Official	OVP Counsel, Kossack	6-Jul-17	No	No	(q)
707	Email discussion re: FACA briefing	GSA	Kossack	7/6/2017, 7/7/2017	No	No	(s)
708	Email re: travel	Kossack	GSA Staff	7-Jul-17	No	No	(s)
709	Email discussion re: travel requests	GSA	Kossack	7-Jul-17	No	No	(s)
710	Email discussion re: interagency agreement (mainly for travel)	GSA	OA	7/7/2017, 7/10/2017, 7/12/2017, 7/13/2017	No	No	(s)
711	Email discussion about time for meeting	OVP Counsel	DHS Official	8-Jul-17	No	No	(q)
712	Email discussion about data submission	Kossack	Arkansas SoS Office	10-Jul-17	No	No	(u)
713	Communication about data request	PA House State Government Staffer	Kossack, forwarded from Kobach	10-Jul-17	No	No	(u)
714	Email chain re: press guidance	Chief of Public Affairs, U.S. Army Cyber Command	OVP, DWHIT, DOD	7/10/17 - 7/11/17	No	No	(t)
715	Email re swearing in	Kossack	GSA staff	11-Jul-17	No	No	(s)
716	Email re: Electronic Funds Transfer (ETF) form	Kossack	GSA staff	11-Jul-17	No	No	(s)
717	Email re: EFT form for members	GSA	Kossack	11-Jul-17	No	No	(s)
718	Email chain starting with talking points relating to SAFE site and litigation	DOD	EOP Staff	11-Jul-17	No	No	(t)
719	Email re: draft FACA presentation and plan for July 19 meeting	GSA	Kossack	7/11/2017, 7/16/2017, 7/17/2017	No	No	(s)
720	Email re: travel	Kossack	GSA staff	12-Jul-17	No	No	(s)
721	Email re: transcriptionist	Kossack	GSA staff	12-Jul-17	No	No	(s)
722	Email chain regarding: EFT forms	Kossack	GSA staff	12-Jul-17	No	No	(s)

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723	Email re: collection of Arkansas data in SAFE site	DOD & IT	Kossack, OVP counsel	12-Jul-17	No	No	(t)
724	Email about an MOU among states participating in voter registration data comparison program	Indiana state official	Kossack	12-Jul-17	No	No	(u)
725	Email re: swearing in	Kossack	GSA staff	13-Jul-17	No	No	(s)
726	Email chain regarding: member preauthorization for travel	Kossack	GSA staff	13-Jul-17	No	No	(s)
727	Email about new FACA contact	GSA Staff	Kossack	13-Jul-17	No	No	(s)
728	Email re: membership list	Kossack	GSA staff	17-Jul-17	No	No	(s)
729	Communication about employees attending July 19 FACA training	GSA staff	Kossack	17-Jul-17	No	No	(s)
730	Communication about slide deck for July 19 FACA presentation	GSA staff	Kossack	18-Jul-17	No	No	(s)
731	Email re: presentation on FACA operations	GSA staff	Kossack, EOP	18-Jul-17	No	No	(s)
732	Follow-up regarding FACA next steps	GSA Staff	Kossack	19-Jul-17	No	No	(s)
733	Email discussion re: posting/making documents available	Kossack	GSA staff	20-Jul-17	No	No	(s)
734	Communication about uploading comments to regulations.gov	GSA staff	Kossack	25-Jul-17	No	No	(s)
735	Scheduling call	Kossack	DHS Official OVP staff, OVP counsel	25-Jul-17	No	No	(q)
736	Communication about Hatch Act	GSA	Kossack	27-Jul-17	No	No	(s)
737	Communication about panelist reimbursement	Kossack	GSA staff	1-Aug-17	No	No	(s)
738	Email chain and planner setting a time for call [related to litigation]	Kossack	DHS Official and Staff, DOJ	1-Aug-17	No	No	(q)
739	Call about litigation	Kossack	DHS	1-Aug-17	No	No	(q)
740	Communication about updating FACA database (https://www.facadatabase.gov/)	GSA staff	Kossack	2-Aug-17	No	No	(s)
741	Email chain and planner setting a time for call [related to litigation]	DHS Official	Kossack, DHS, DOJ	2-Aug-17	No	No	(q)
742	Email chain and planner setting a time for call [related to litigation]	Kossack	DHS Official	3-Aug-17	No	No	(q)
743	Email chain re: disclosability of state-provided data	AZ Secretary of State's Office	Kossack	9-Aug-17	No	No	(x)
744	Email chain and planner setting a time for call	Kossack	DHS Official, OVP	8/15/17 - 8/16/17	No	No	(q)
745	Communication about Federal Register notice for Sept. 12 meeting	GSA	Kossack	17-Aug-17	No	No	(s)

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746	Communication regarding process for procurement of third-party vendors	GSA	Kossack	17-Aug-17	No	No	(s)
747	Email contact with SSA re: SSA data	SSA Official	Kossack	17-Aug-17	No	No	(x)
748	Email re: collecting data from non-state entities (chain)	Kossack	DOJ	22-Aug-17	No	No	(v)
749	Email chain and planner about setting up a time to speak	Kossack	DHS Official, Kobach, OVP	8/22/2017, 8/24/2017	No	No	(q)
750	Email about setting-up meeting	DHS	Kobach	24-Aug-17	No	No	(q)
751	Email re: presentations for 9/12 meeting and member updates in FACA database (https://www.facadatabase.gov/)	GSA	Kossack	5-Sep-17	No	No	(s)
752	Email from NARA about PRA	NARA	OVP Counsel, NARA staff	18-Sep-17	No	No	(s)
753	Staff discussions with individual states about the mechanics of transferring data	Commission Staff	State Election Officials	7/26/2017 - date of log	No	No	(u)
754	<u>Categories of Materials ("internal" refers to communications among Commission staff, OVP staff, and/or EOP staff):</u>						
755	Internal discussions about media requests & media strategy				No	No	(e)
756	Internal communications re: data collection process				No	No	(t)
757	Internal emails re: potential staff support person				No	No	(e)
758	Internal discussions and documents re: potential Commission members				No	No	(e)
759	Internal discussion and documents re: potential panelists				No	No	(e), (r)
760	Internal research on critical infrastructure designation for election systems				No	No	(e)
761	Internal briefing memos about Commission activities				No	No	(e)
762	Internal discussions about meeting logistics				No	No	(d)
763	Internal discussions about letterhead design				No	No	(d)
764	Internal discussions about June 28 call				No	No	(e)
765	Internal discussion about OVP meetings with third-parties about Commission assistance				No	No	(e)
766	Internal discussions about disclosure forms and Hatch Act requirements				No	No	(d)
767	Email discussions with or about DFO on President's Commission on Drug Addiction and Opioid Crisis about managing a committee				No	No	(q)
768	Internal discussions re: response to June 28 letter and Borunda resignation				No	No	(e)
769	Internal discussions about responding to inquiries from public officials				No	No	(d)

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770	Internal discussions of July 19 meeting (agenda, remarks)				No	No	(e)
771	Internal discussions re vendors/consultants (emails, documents)				No	No	(e)
772	Internal discussions about posting public comments				No	No	(d)
773	Internal discussions about website and email technical issues				No	No	(t)
774	Commission staff research or suggesting ideas relating to substance of Commission's work				No	No	(e)
775	Commission staff discussion about potential topics for Commission review				No	No	(e)
776	Internal discussions over press releases after litigation events				No	No	(e)
777	Internal emails re: records management				No	No	(e)
778	Litigation documents and emails (e.g., service copies, final versions, drafts, comments on drafts, discussion of legal strategy, updates, etc.) (internal and with DOJ)				No	No	(v)
779	Internal discussions about budget and finance issues				No	No	(e)
780	Internal discussions about subjects for potential Commission report				No	No	(e)
781	Internal emails re: discussing next steps for Commission				No	No	(e)
782	Internal discussion about responding to records requests (FOIA, FACA)				No	No	(e)
783	Email discussion re: interagency agreement between OVP and GSA	OVP	OA	7/7/2017, 7/10/2017, 7/12/2017	No	No	(s)
784	Internal emails discussing draft DOD talking points re: SAFE site and suggesting changes	EOP staff	EOP Staff	11-Jul-17	No	No	(e)
785	Legal research conducted by staff/internal legal consultation (documents and emails)				No	No	(e)
786	Copies of June 28 letter; list of state election officials; list of research from states				No	No	(e)
787	Internal discussions about draft Commission documents				No	No	(e)
788	Commission member appointment documents (e.g., physical commission)				No	No	(d)
789	Copies of bylaws and Roberts Rules of Order				No	No	(d)
790	Hardcopies of GSA ethics rules and materials.				No	No	(d)
791	Miscellaneous communications with third parties						

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1	Document(s)/Category Description						
792	Email to States requesting they hold off on submitting data pending resolution of EPIC TRO	Kossack	State Election Officials	10-Jul-17	No	No	(u)
793	Unsolicited requests from third-parties to Commission staff to join the Commission				No	No	(w)
794	Emails and proposals with/from third-party data analysis entities				No	No	(w)
795	Emails from third parties to Commission staff about potential collaboration				No	No	(w)
796	Third party provided list of suggested witnesses				No	No	(w)
797	FOIA/FACA request for documents				No	No	(j)
798	Emails with potential panelist about participation (and declines)				No	No	(r)
799	Emails from third parties about data sources				No	No	(i)
800	Materials forwarded to Commission staff by NASS				No	No	(j)
801	Constituent letters to Vice President or Commission members				No	No	(o)
802	GSA/OVP Reimbursement Funding documents regarding PACEI operations (Form FMS-7600A, Department of Treasury Financial Management Service)				No	No	(d)
803	Unsolicited emails by individuals alleging voter fraud				No	No	(w)
804	Discussions with third party vendor about procuring and operating livestream of Sept. 12 meeting				No	No	(y)
805	Emails between Commission staff and states about mechanics of data sources				No	No	(u)
806	Press inquiries to Commission staff				No	No	(j)
807	Discussions with staff at September 12 meeting event site about logistics (i.e., including individuals on wait lists)				No	No	(y)

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

COMMON CAUSE, *et al.*,

Plaintiffs,

v.

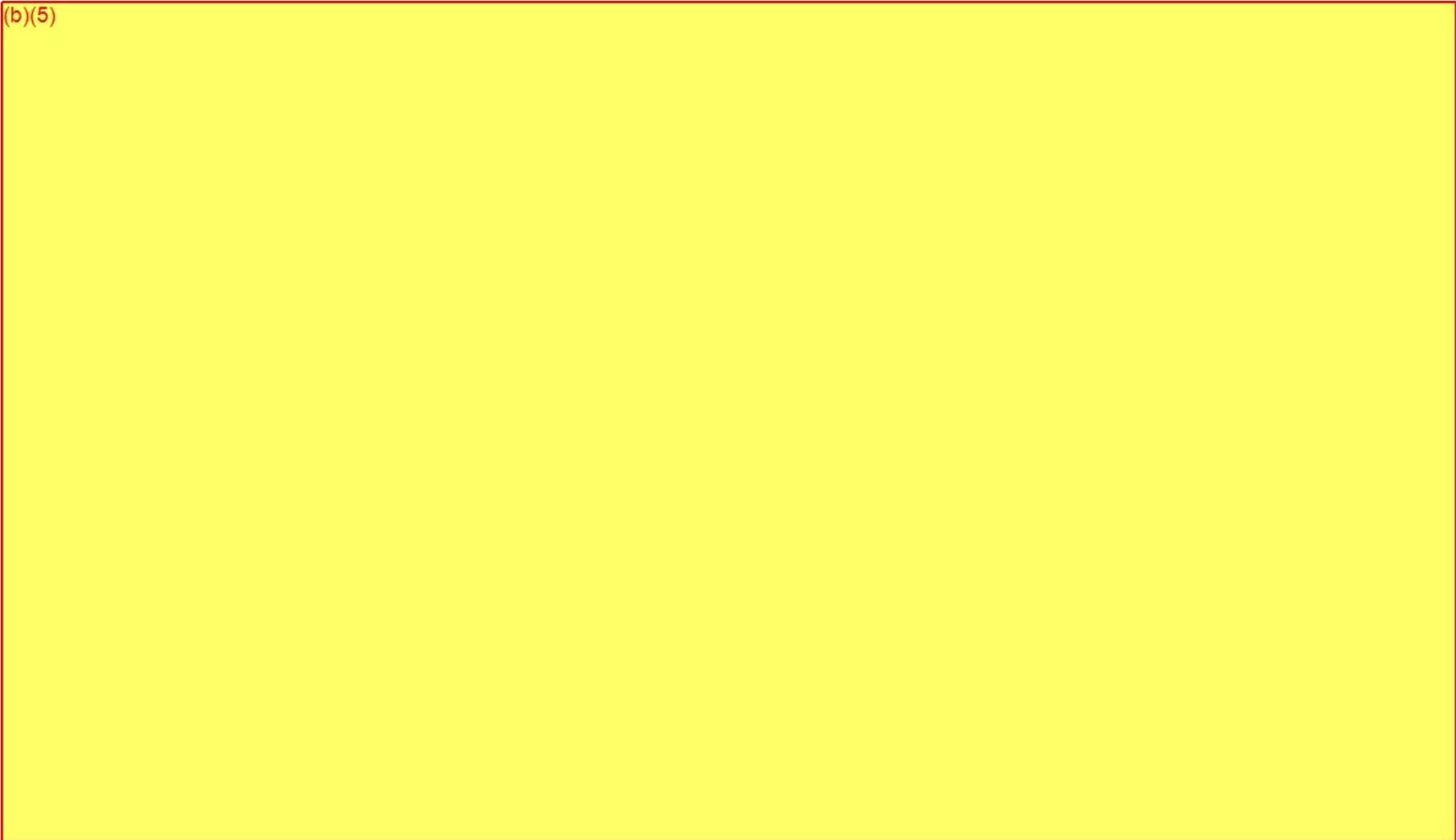
PRESIDENTIAL ADVISORY
COMMISSION ON ELECTION
INTEGRITY, *et al.*,

Defendants.

Civil Action No. 1:17-cv-1398 (RCL)

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

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of the Freedom of Information and Privacy Act

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

COMMON CAUSE, *et al.*,

Plaintiffs,

v.

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

Defendants.

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

Oral Argument Requested

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

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INTRODUCTION

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

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

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

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

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

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

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

II. PLAINTIFFS' ALLEGATIONS

A. The Commission's Establishment and Unauthorized Investigation

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

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

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

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

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

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

B. The Injuries Caused to Plaintiffs by Defendants’ Conduct

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

I. PLAINTIFFS HAVE ADEQUATELY PLEADED STANDING

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

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

“‘[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.’” *Id.* (alterations in original) (quoting *Lujan*, 504 U.S. at 561).

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

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

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

A. The Individual Plaintiffs Have Adequately Pleaded Injuries in Fact

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Common Cause Has Adequately Pleaded Representational Standing

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

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

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

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

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

C. Common Cause Has Adequately Pleaded Organizational Standing

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

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

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

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

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

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

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

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

- Over and above its typical activities, "Common Cause has been engaged in direct counseling of individual voters seeking to deregister from voting as a result of the fear they have for what the Commission will do with their personal First Amendment information." Am. Compl. ¶ 4; Flynn Decl. ¶¶ 14-19 (discussing activities Common Cause has engaged in to dissuade individuals from deregistering from voting, including the counseling of individual voters).
- Common Cause has directed specific educational and outreach activities to counteract the Commission's effect of undermining the political process and the hesitation that many individuals are experiencing in light of Defendants' activities. Am. Compl. ¶ 4. Common Cause's declaration elaborates that it has published materials dissuading individuals from deregistering to vote as the result of the Commission's activities; and has dedicated digital and other media resources to these efforts, diverting them away from its ongoing activities. Flynn Decl. ¶¶ 15-20.
- Common Cause is also increasing spending for voter registration efforts over and above its normal levels in order to counteract the wave of voter deregistration and general lack of confidence in the political process that has resulted from the Commission's activities. Flynn Decl. ¶¶ 14, 18.

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

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

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

II. PLAINTIFFS HAVE ADEQUATELY PLEADED LEGALLY COGNIZABLE CLAIMS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- Kobach has stated "the Commission's 'goal is to, for the first time, have a nationwide fact-finding effort' focused on assessing 'evidence' of 'different forms of voter fraud across the country.'" Am. Compl. ¶ 52.
- Kobach "has stated that the Commission intends to utilize databases from federal agencies in order to 'crosscheck' against the names of individual voters to determine if there are alleged fraudulently registered voters on the rolls." *Id.* ¶ 53.
- "A spokesman for the Commission has confirmed that the Commission intends to run the voting data it receives on individuals through a number of different databases to check for alleged fraudulent voter registrations." *Id.* ¶ 54.
- Kobach has written that "'every investigation' the Commission undertakes will require individuals' state voter roll data" so the Commission can "use data it collects from the states to 'confirm' the identity of individual American voters alleged to have committed fraud." *Id.* at 4, ¶ 55.
- Commission members have "described the objective of the Commission's investigation as 'deciding . . . how accurate . . . the voter rolls' are" and have discussed "referrals of individuals suspected of voter fraud to the DOJ for possible criminal prosecution." *Id.* ¶¶ 70, 72.

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

- Kobach instructed Commission staff to "'start trying to collect whatever data there is that's already in the possession of the federal government' that 'might be helpful' to the Commission's unauthorized voter fraud investigation." *Id.* ¶ 73; *see id.* ¶ 124.
- The Commission has received multiple forms of evidence, including: state voting data (including political party affiliation and voting history) from millions of American voters, *id.* ¶¶ 6-9, 80; "evidence or information . . . [from states] regarding instances of voter fraud or registration fraud," *id.* ¶ 61; "a database hosted by the Heritage Foundation that purportedly 'documents 1,071 proven incidents of election fraud,'" *id.* ¶ 94; "'real life examples' of improper voter registration and voting by named non-citizens," *id.* ¶ 96; "'8,471 cases of likely duplicate voting [to] be investigated for possible wrongdoing' by the Commission," *id.*

¶ 97; and “information about individuals . . . contained in DHS’s systems of records,” *id.* ¶ 125.

Finally, Plaintiffs allege facts about the initial results of the Commission’s investigation. *Id.* ¶ 56 (Kobach has stated there is “proof” of voter fraud by “individual voters in New Hampshire” within the evidence already “provided to the Commission”). These and other allegations confirm that this is a textbook situation where the Commission’s functions “in fact extend beyond the responsibilities delineated in [its] charter documents,” such that its status as an “agency” must be “discerned from . . . the responsibilities [it] actually undertakes.” *CREW*, 559 F. Supp. 2d at 24.⁶

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁰ *E.g.*, *Diaz-Bernal v. Myers*, 758 F. Supp. 2d 106 (D. Conn. 2010); *El Badrawi v. Dep’t of Homeland Sec.*, 579 F. Supp. 2d 249 (D. Conn. 2008).

¹¹ *E.g.*, *Reid v. Fed. Bureau of Prisons*, No. 04-cv-1845, 2005 WL 1699425 (D.D.C. July 20, 2005); *Mittleman v. King*, No. 93-1869, 1997 WL 911801 (D.D.C. 1997); *Arruda & Beaudoin, LLP v. Astrue*, No. 11-cv-10254, 2013 WL 1309249 (D. Mass. Mar. 27, 2013); *Westcott v. McHugh*, 39 F. Supp. 3d 21 (D.D.C. 2014); *Wilson v. McHugh*, 842 F. Supp. 2d 310 (D.D.C. 2012); *Doe P. v. Goss*, No. 04-cv-2122, 2007 WL 106523 (D.D.C. Jan. 12, 2007); *Ware v. U.S. Dep’t of Interior*, No. 05-3033, 2006 WL 1005091 (D. Or. Apr. 14, 2006).

¹² *E.g.*, *Mittleman v. U.S. Treasury*, 773 F. Supp. 442 (D.D.C. 1991); *Schaeuble v. Reno*, 87 F. Supp. 2d 383 (D.N.J. 2000). In *Welborn v. IRS*, the court dismissed the plaintiff’s APA claim for lack of jurisdiction and, unlike here, the plaintiff sought damages under the Privacy Act in addition to injunctive relief under the APA. 218 F. Supp. 3d 64, 81-82 (D.D.C. 2016).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated: November 28, 2017

Respectfully submitted,

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

* Admitted in New York; practicing under the supervision of members of the D.C. Bar while D.C. Bar application is pending.

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

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

/s/ Skye L. Perryman
Skye L. Perryman

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

COMMON CAUSE, *et al.*,

Plaintiffs,

v.

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

Defendants.

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

Oral Argument Requested

**PLAINTIFFS' MOTION, IN THE ALTERNATIVE,
FOR JURISDICTIONAL DISCOVERY**

In their motion to dismiss, Defendants labor to portray the Presidential Advisory Commission on Election Integrity as a run-of-the-mill advisory committee, and to trivialize Plaintiffs' allegations regarding its activities—and the injuries they have caused Plaintiffs—as speculative. In attempting these feats, Defendants are forced to ignore and recast the factual allegations in Plaintiffs' complaint. Because this is improper at the pleadings stage, Defendants' efforts fail, as Plaintiffs' opposition to Defendants' motion to dismiss explains. Plaintiffs' injuries are real and concrete, and this Court has jurisdiction to remedy them. But should this Court have any doubt, Plaintiffs move, in the alternative, for limited jurisdictional discovery to confirm their allegations regarding the Commission's and other Defendants' injurious activities. Given the specificity of Plaintiffs' factual allegations, the liberal standard for seeking jurisdictional discovery, and recent revelations about Defendants' activities, jurisdictional discovery is required before the case may be dismissed for lack of subject-matter jurisdiction.¹

¹ Pursuant to LCvR 7(m), counsel for Plaintiffs conferred with counsel for Defendants prior to filing this motion, and counsel indicated that Defendants would oppose it.

PLAINTIFFS' ALLEGATIONS ABOUT DEFENDANTS' ONGOING ACTIVITIES

The factual allegations in Plaintiffs' complaint—which must be presumed to be true at this stage—speak for themselves:

The Commission, in concert with other Defendants, has “amassed the politically sensitive voting data of millions of individual American citizens” so that it may “conduct[] an unprecedented and sweeping investigation into alleged voting misconduct by individual American citizens.” Am. Compl. at 2; *see, e.g., id.* ¶ 106(a). The President announced the Commission's mission five days after his inauguration, stating that he would “be asking for a major investigation into voter fraud.” *Id.* ¶ 37 (capitalization altered); *see id.* ¶ 38 (similar). Defendant Kris Kobach, Vice Chair of the Commission, has confirmed the Commission's aim, explaining that its “‘goal is to, for the first time, have a nationwide fact-finding effort’ focused on assessing ‘evidence’ of ‘different forms of voter fraud across the country.’” *Id.* ¶ 52; *see also id.* ¶ 70 (another “Commission member described the objective of the Commission's investigation as ‘deciding . . . how accurate . . . the voter rolls’ are”). It is unsurprising, then, that Kobach has written that “‘every investigation’ the Commission undertakes will require individuals’ state voter roll data.” *Id.* at 4.

Specifically, Kobach has stated that the Commission needs state voter data “to, among other things, ‘confirm’ the identity and voting history of the individuals named.” *Id.* He has announced that the Commission will “‘crosscheck’” this data “against other federal databases containing information on individuals (including databases maintained by Defendant [the Department of Homeland Security or DHS] and other federal agencies) in order to identify individuals whom the Commission believes to be fraudulently registered to vote.” *Id.* at 3; *see id.* ¶ 53 (“Kobach has explained . . . 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.’” (alterations in the original)); *id.* ¶ 54 (“Kobach has . . . stat[ed] 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. . . . [And a] spokesman for the Commission has confirmed that the Commission intends to run the voting data it receives on individuals through a number of different databases to check for alleged fraudulent voter registrations.” (certain alterations in the original)); *id.* ¶ 106(d) (“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 . . . DHS) in order to identify individuals the Commission believes are fraudulently registered to vote.”).²

The Commission’s work is well underway. First, the Commission began gathering individual voter data when Kobach, on June 28, 2017, “requested the voting rolls (including individuals’ party affiliation and voter history) from all 50 states and the District of Columbia.” *Id.* at 3; *see id.* ¶¶ 60-63, 106(b). Then, on July 26, 2017, Kobach “sen[t] a second data request to the states.” *Id.* at 3; *see id.* ¶¶ 76, 106(c). “Numerous states have complied and/or have plans to comply with the Commission’s . . . request for data—including the request for party affiliation and voter history protected by the First Amendment.” *Id.* ¶ 80; *see id.* ¶ 81 (President Trump has

² Precedent for the Commission’s crosscheck can be found in Defendant Kobach’s service as Kansas Secretary of State. “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 . . . that compares states['] voting data to identify potential misconduct and target individuals for removal from state voter rolls, including by criminal prosecution.” Am. Compl. at 3; *see id.* ¶¶ 51, 68-69.

stated that data from all “states ‘will be forthcoming’”); Defendants’ Document Index (“Defs.’ Doc. Index”) at 8-9 (Sept. 29, 2017), *Lawyers’ Comm. for Civil Rights Under Law v. Presidential Advisory Comm’n on Election Integrity* (“LCCR”), No. 17-cv-1354 (CKK) (D.D.C. filed Sept. 29, 2017), ECF No. 33-3 (listing state data received).³ For example, “[t]he Commission has obtained voter information regarding Florida-registered voters such as [Plaintiff Thomas] Kennedy,” Am. Compl. ¶ 6; *see* Defs.’ Doc. Index at 8 (entry 100, listing data received from Florida); and “regarding New York-registered voters such as [Plaintiff Ellen] Nakhnikian,” Am. Compl. ¶ 7, and Plaintiff Jan Cantler, *id.* ¶¶ 8-9; *see* Defs.’ Doc. Index at 8 (entry 105, listing data received from New York); *see also* Am. Compl. ¶ 5 (“Texas’s Secretary of State has stated that he will be providing the Commission with voting information regarding Texas-registered voters such as [Plaintiff Anthony Gutierrez]”).

Second, the Commission has commenced its crosscheck of state voter data with federal data. At the Commission’s July 19, 2017 meeting, “Kobach instructed Commission staff . . . to ‘start trying to collect whatever data there is that’s already in the possession of the federal government’ that ‘might be helpful’ to the Commission’s . . . investigation.” Am. Compl. ¶ 73. In his Executive Order establishing the Commission, the President directed “[r]elevant executive departments and agencies” across his administration “to ‘endeavor to cooperate with the Commission.’” *Id.* ¶ 43 (alteration in the original) (quoting Exec. Order No. 13,799, 82 Fed. Reg. 22,389 (May 11, 2017)). Kobach and the Commission have identified data from DHS as key to the Commission’s endeavor. *See id.* ¶¶ 54, 71. Accordingly, plaintiffs have alleged that DHS “has [disclosed] and/or imminently will disclose . . . data” concerning Plaintiff Thomas

³ *See also* Ex. G to Pls.’ Opp’n to Defs.’ Mot. to Dismiss (Nov. 28, 2017), ECF Nos. 30, 31 (requesting judicial notice and attaching Defs.’ Doc. Index as an exhibit).

Kennedy and “other naturalized citizens[] . . . to the Commission.” *Id.* ¶ 6; *see id.* ¶ 11 (describing DHS’s “Systematic Alien Verification for Entitlements Program”); *id.* ¶ 102 (alleging “the unlawful disclosure by DHS of [Plaintiff Kennedy’s] individually identifiable data”); *id.* ¶¶ 124-25 (“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,” and in response, “DHS has [disclosed]—or imminently will . . . disclose[—]to the Commission and/or Commission staff information about individuals including Plaintiff Kennedy contained in DHS’s systems of records.”); *id.* ¶ 131 (alleging that DHS has “disclos[ed] Plaintiff Kennedy’s data” to the Commission).

In light of the Commission’s documented activities, Defendants cannot credibly maintain that it is confining its efforts to “*study[ing]* the registration and voting *processes* used in Federal elections,” which is all that the Executive Order creating the Commission authorizes. Exec. Order No. 13,799 § 3, 82 Fed. Reg. 22,389, 22,389 (May 11, 2017) (emphasis added). Rather, the Commission is seeking evidence of voter fraud, individual voter by individual voter, and is planning to refer any specific alleged incidents of fraud to enforcement authorities. Kobach “has discussed the need to call witnesses to testify before the Commission *concerning specific individuals* who allegedly voted fraudulently in elections.” *Id.* at 4 (emphasis added); *see id.* ¶ 55. At the Commission’s July 19, 2017 meeting, there were “[r]epeated references . . . to referrals of individuals suspected of voter fraud to the [Department of Justice] for possible criminal prosecution.” *Id.* ¶ 72. Indeed, Kobach has publicized certain results of the Commission’s investigation so far. For example, on the basis of “information presented to the

Commission for its September 12 meeting,” “Kobach publicly targeted and accused a group of voters in New Hampshire of voter fraud.” *Id.* at 4; *see id.* ¶¶ 56, 91, 106(h).

ARGUMENT

As Plaintiffs have explained in their opposition to Defendants’ motion to dismiss, and as is apparent from the above recitation, Plaintiffs’ factual allegations about Defendants’ activities are detailed, concrete, well-supported, and well-pleaded. As such, at this stage of this litigation, these allegations must be taken as true, including for purposes of establishing Plaintiffs’ standing to sue. *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015). Defendants nonetheless claim that the Court lacks subject matter jurisdiction, arguing that certain of Plaintiffs’ alleged injuries—those purportedly concerning “potential *future* uses of data by the Commission and federal agencies”—are speculative. *See* Mem. in Supp. of Defs.’ Mot. to Dismiss (“Defs.’ Mot.”) at 15 (Oct. 18, 2017), ECF No. 27-1. Defendants go so far as to argue that “concern[] over potential *future* uses of data . . . is the only basis for [Plaintiff Kennedy’s] claim against DHS.” *Id.*; *see id.* at 35-37 (arguing that Plaintiff Kennedy has not sufficiently alleged that he has standing to sue DHS). In so arguing, Defendants mischaracterize Plaintiffs’ allegations. But regardless, dismissal for lack of subject matter jurisdiction would not be appropriate until Plaintiffs are permitted limited jurisdictional discovery to confirm their allegations.

1. Contrary to Defendants’ characterization, Plaintiffs have experienced and alleged injuries stemming from Defendants’ past, present, and ongoing efforts. Specifically, as detailed above, Plaintiffs have alleged that the Commission is presently undertaking a voter fraud investigation, *see, e.g.*, Am. Compl. at 4; *id.* ¶¶ 55, 60-63, 72, 76, 106(a)-(c); that in order to do so, the Commission is in receipt of First Amendment-protected data from numerous states, *see, e.g., id.* at 4; *id.* ¶ 80, including (already) from two of the individual Plaintiffs’ states, *see id.*

¶¶ 5-9; and that the Commission has begun the process of crosschecking this state data against data from DHS, *see, e.g., id.* at 3; *id.* ¶¶ 6, 53, 54, 71, 102, 106(d), 124-25, 131. In attempting to argue that all of “the individual [P]laintiffs lack standing,” Defendants ignore these allegations, and they fail to specify which of Plaintiffs’ alleged injuries, in their view, “concern[] . . . potential future uses of data by the Commission.” *See* Defs.’ Mot. at 15. That does not suffice.

Defendants’ efforts to downplay Plaintiff Kennedy’s allegations against DHS are particularly puzzling. *See id.* at 35-37. Defendants say that Plaintiff Kennedy only “speculates that [DHS] will share information with the Commission,” *id.* at 35; that he merely “posits—based on remarks from individual members—that the Commission will collect information from DHS,” *id.*; that he “offers *no allegation* that DHS will agree to share such data,” *id.* at 36 (emphasis added); and that he “has offered *no allegations* or evidence that [DHS] will violate the Privacy Act,” *id.* at 37 (emphasis added). To the contrary, Plaintiffs have plainly alleged that DHS “has [disclosed] and/or imminently will disclose . . . data” concerning Plaintiff Kennedy and “other naturalized citizens[] . . . to the Commission.” Am. Compl. ¶ 6; *see id.* ¶¶ 125, 131. In support of this allegation, Plaintiffs have described how Kobach and the Commission have singled out data that DHS maintains for use in the Commission’s crosscheck, *see id.* ¶¶ 54, 71, and how Kobach has “instructed Commission staff to obtain information that Defendant DHS maintains on individuals including Plaintiff Kennedy,” *id.* ¶ 124. Defendants imply that DHS has not complied or will not comply with the Commission’s request, Defs.’ Mot. at 36, even as they cite the “presum[ption] that [public officers] have properly discharged their official duties,” *id.* (second alteration in the original) (quoting *United States v. Armstrong*, 517 U.S. 456, 464 (1996)), and even though the President has directed his administration—including

DHS—to investigate alleged voter fraud, *see* Am. Compl. ¶¶ 37-38, and “to cooperate with the Commission” in such efforts, *id.* ¶ 43 (quoting Exec. Order No. 13,799 § 7(b)).

More to the point: at this stage of the litigation, given Plaintiffs’ well-pleaded allegation that DHS “has [disclosed] and/or imminently will disclose . . . data” concerning Plaintiff Kennedy and “other naturalized citizens[] . . . to the Commission,” *id.* ¶ 6, it is not enough—and indeed it is improper—for Defendants to ignore these allegations or to merely *assert* contrary facts in arguing that Plaintiffs lack standing and that this Court lacks jurisdiction. *See Arpaio*, 797 F.3d at 19. In challenging Plaintiff Kennedy’s standing, Defendants could, of course, have submitted *evidence* demonstrating that DHS has not complied and will not comply with any data requests by the Commission—an agency declaration, for example. *See, e.g., Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005) (a court “may consider materials outside the pleadings” in determining whether it has jurisdiction). That Defendants chose not to do so is telling.

2. For all of the above reasons, and those stated in Plaintiffs’ opposition to Defendants’ motion to dismiss, Defendants’ attempts to cast doubt on the well-pleaded factual allegations underpinning Plaintiffs’ standing are unavailing. Yet if the Court has any doubt, dismissal is not the proper course. Rather, the Court should order limited jurisdictional discovery to permit Plaintiffs the opportunity to gather evidence, uniquely in Defendants’ possession, concerning Plaintiffs’ allegations about Defendants’ activities.

“There is no doubt that jurisdictional discovery is permissible in cases,” like this one, “where the defendant[s] challenge[] the factual basis of the court’s subject-matter jurisdiction.” *Wyatt v. Syrian Arab Republic*, 225 F.R.D. 1, 2 (D.D.C. 2004) (citing *Phx. Consulting v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000)). In fact, “[t]he D.C. Circuit has stated that