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)

REPLY IN SUPPORT OF PLAINTIFFS' MOTION, IN THE ALTERNATIVE, FOR JURISDICTIONAL DISCOVERY

"[T]he court will not allow the defendants to escape discovery simply by claiming that a disputed fact is so disputed that it is no longer really a fact at all." *Wyatt v. Syrian Arab Republic*, 225 F.R.D. 1, 4 (D.D.C. 2004). So held Judge Urbina in granting jurisdictional discovery in a case on which Defendants rely to oppose Plaintiffs' request for the same. *See* Defs.' Opp'n to Pls.' Mot., in the Alt., for Juris. Disc. ("Defs.' Opp'n") at 2, 4 (Dec. 15, 2017), ECF No. 40 (quoting and citing *Wyatt*). Like the defendants in *Wyatt*, which argued that "the complaint's allegations" as to certain of the defendants' activities were "implausible," 225 F.R.D. at 4, Defendants here argue that the complaint's allegations as to certain of Defendants' "activities" are "too speculative" to plausibly "support [Plaintiffs'] standing," Reply Mem. in Further Supp. of Defs.' Mot. to Dismiss ("Defs.' MTD Reply") at 2, 4 (Dec. 15, 2017), ECF No. 39. Like the court in *Wyatt*, therefore, if this Court has any doubt about the plausibility of Plaintiffs' factual allegations concerning the actions by Defendants that are causing Plaintiffs' injuries, the Court must permit Plaintiffs limited jurisdictional discovery. *See Ignatiev v. United States*, 238 F.3d 464, 467 (D.C. Cir. 2001) ("We have previously required that plaintiffs be given

an opportunity for discovery of facts necessary to establish jurisdiction prior to decision of a 12(b)(1) motion." (collecting cases)).

1. Plaintiffs' request for jurisdictional discovery responds to one of Defendants' (many) attempts to avoid the merits of Plaintiffs' claims—specifically, Defendants' argument that Plaintiffs' allegations detailing Defendants' injurious activities are speculative. *See* Pls.' Mot., in the Alt., for Juris. Disc. at 6 ("Pls.' Mot.") (Nov. 28, 2017), ECF No. 32 (citing Mem. in Supp. of Defs.' Mot. to Dismiss ("Defs.' MTD") at 15, 35-37 (Oct. 18, 2017), ECF No. 27-1).

Plaintiffs allege injuries stemming from the fact that the Presidential Advisory Commission on Election Integrity and Vice Chair Kobach are conducting an investigation of purported voting misconduct by individual American citizens, without any valid authorization and in violation of the Privacy Act and the Administrative Procedure Act ("APA"). *See, e.g.*, Am. Compl. ¶¶ 5-9, 55, 60-63, 72, 76, 80, 106, 118-20, 130, 132-33 (Sept. 13, 2017), ECF No. 21. Plaintiffs further claim the Commission has commenced the process of "crosschecking" state voter data against federal data, including that maintained by the Department of Homeland Security ("DHS") about naturalized citizens like Plaintiff Kennedy, grounding Plaintiff Kennedy's claims against DHS under the Privacy Act and the APA. *See, e.g.*, *id.* ¶¶ 6, 53-54, 71, 102, 106(d), 124-25, 131. *See generally* Pls.' Mot. at 2-6 (summarizing the factual allegations in the operative complaint relevant to Plaintiffs' request for jurisdictional discovery). In response, among other things, Defendants (mis)characterize Plaintiffs as "concerned over potential *future* uses of data by the Commission and [DHS]," and argue that Plaintiffs "lack standing" because their factual allegations about Defendants' activities are "speculat[ive]." Defs.' MTD at 15. In particular, Defendants argue that Plaintiff Kennedy lacks standing to sue DHS because, they say, he only "speculates that [DHS] will share information with the

Commission" in the future. *Id.* at 35; *see id.* at 35-37; *see also* Defs.' MTD Reply at 2-5, 21-22 (repeating these arguments).

Plaintiffs' motion for jurisdictional discovery corrects the record, explaining—per the plain text of the operative complaint—that Plaintiffs have experienced and alleged injuries stemming from Defendants' ongoing activities. *See* Pls.' Mot. at 6-8. Defendants, therefore, do not advance their argument by appealing to *Clapper v. Amnesty International*, 568 U.S. 398 (2013). *See* Defs.' Opp'n at 3-4 (quoting and citing *Clapper*). Crucially, whereas the *Clapper* plaintiffs pressed a "theory of *future* injury," 568 U.S. at 401, based on a "highly speculative" and "highly attenuated chain of possibilities," *see id.* at 410-11, Plaintiffs here allege injuries stemming from Defendants' *present* activities.[1] Moreover, *Clapper* makes no mention of jurisdictional discovery—unsurprisingly, given that such discovery occurs before a court rules on a motion to dismiss, whereas *Clapper* came to the Supreme Court on summary judgment. *Id*. at 407. Thus, whereas the *Clapper* Court appropriately faulted the plaintiffs for not "offer[ing] any evidence" in support of their theory of injury, *id.* at 411, Defendants' attempts to do the same here—*see, e.g.*, Defs.' MTD at 37 (faulting Plaintiff Kennedy for presenting "no . . . evidence that [DHS] will violate the Privacy Act")—are improper at the motion to dismiss stage, *see* Pls.' Mot. at 6, 8 (citing *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015)). That is particularly so given Defendants' efforts to deny Plaintiffs the limited discovery that they seek should the Court need such evidence to assure itself of its subject-matter jurisdiction.

2. Defendants now attempt to backtrack, claiming that they "have not raised a factual challenge to the Court's subject-matter jurisdiction" and that they have not "sa[id] that

[1] In addition, unlike the plaintiffs in *Clapper*, Plaintiffs here do not assert a constitutional claim concerning "actions of the political branches in the fields of intelligence gathering and foreign affairs." *Cf.* 568 U.S. at 408-09 (prescribing an "especially rigorous" "standing inquiry" in such circumstances).

[P]laintiffs' facts are not true." Defs.' Opp'n at 3. Those characterizations *themselves* are not true. Defendants persist in claiming that Plaintiffs only point to "possible activities" by Defendants, Defs.' MTD Reply at 2, and only "speculat[e] about future events," *id.* at 3, even though Plaintiffs have alleged—with ample factual support, *see* Pls.' Mot. at 2-8—that the Commission is already conducting an "investigation of individual voters for which there is no authorization," *e.g.*, Am. Compl. ¶ 112, and that the Commission is already collecting, maintaining, using, and/or disseminating First Amendment-protected information ("data on individuals' voter history and party affiliation") in violation of the Privacy Act, *e.g.*, *id.* ¶ 118. Similarly, Defendants claim that "[P]laintiff Kennedy offers no allegation that DHS will agree to share" data with the Commission, Defs.' MTD at 36, even though Plaintiffs have alleged—again, with ample factual support, *see* Pls.' Mot. at 4-5, 7-8—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.* ¶ 131 (alleging that DHS has "disclos[ed] Plaintiff Kennedy's data" to the Commission). Contrary to Defendants' assertions, Plaintiffs have not "recast their factual allegations," Defs.' Opp'n at 2, or "twist[ed] facts in the Amended Complaint," Defs.' MTD Reply at 1. Rather, Plaintiffs have simply recited the complaint's factual allegations. *See, e.g.*, Pls.' Mot. at 2-6. And Defendants have either ignored or contested them.

Defendants nonetheless insist that theirs is a facial, not factual, challenge to this Court's subject-matter jurisdiction. Defs.' Opp'n at 3-4 (citing, *e.g.*, *Wyatt*, 225 F.R.D. at 2); *see Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) (explaining the distinction) (cited in *Wyatt*, 225 F.R.D. at 3 & n.1). Not so. Defendants do not "challenge[] only the legal sufficiency of [Plaintiffs'] jurisdictional allegations." *Phoenix Consulting*, 216 F.3d at

40. Rather, as relevant here, Defendants argue that Plaintiffs have not pleaded facts sufficient to establish that Defendants are doing the things that Plaintiffs say they are doing, such as commencing an investigation of alleged voter misconduct, individual voter by individual voter, that involves crosschecking state data against DHS data. *See* Defs.' MTD at 15, 35-37. Defendants are wrong for the reasons that Plaintiffs have already explained, *see* Pls.' Mot. at 6-8, 10-12, but in any event, *Wyatt* itself—on which Defendants inexplicably rely—confirms that Defendants raise a factual challenge, *see* 225 F.R.D. at 4 (defendants raised a factual challenge where they argued "that the plaintiffs' allegations [were] so factually deficient as to move the allegations beyond the realm of factual dispute and into implausibility"). Accordingly, jurisdictional discovery is appropriate. *See id.* (granting jurisdictional discovery). Defendants' attempt to "escape discovery . . . by claiming that a disputed fact is so disputed that it is no longer really a fact at all" must be rejected. *Id.* (citing *Phoenix Consulting*, 216 F.3d at 40).

In addition, Plaintiffs' request for jurisdictional discovery is not "'based on mere conjecture or speculation.'" Defs.' Opp'n at at 2 (quoting *FC Inv. Grp. LC v. IFX Mkts., Ltd.*, 529 F.3d 1087, 1094 (D.C. Cir. 2008)). The factual allegations set forth in the operative complaint are well-supported and not speculative. *See* Pls.' Mot. at 2-8. All the more so given the evidence of numerous communications between the Commission and DHS, *see id.* at 10-12, to which Defendants have offered no meaningful response, and given that Defendants have conspicuously neglected to substantiate their assertion that Plaintiffs' factual allegations are incorrect, *see id.* at 8.

Far from "extraordinary," Defs.' Opp'n at 1, Plaintiffs' request for jurisdictional discovery is consistent with settled case law in this Circuit, where "jurisdictional discovery is justified" if "a party demonstrates that" such discovery "can supplement [the party's]

jurisdictional allegations," *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1351 (D.C. Cir. 2000), by "verify[ing] allegations of specific facts," *Crist v. Republic of Turkey*, 995 F. Supp. 5, 13 (D.D.C. 1998) (Lamberth, J.) (emphasis omitted). Plaintiffs have done so here.

3. Defendants invoke *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367 (2004), to argue that "special considerations control" when "discovery requests are directed to the Vice President and other senior Government officials." Defs.' Opp'n at 5; *see id.* at 5-6. But this case is not *Cheney*; nor is the jurisdictional discovery sought here the "speculative fishing expedition" that Defendants make it out to be. *Id.* at 6. Whereas the *Cheney* plaintiffs sought "unbounded" discovery and "ask[ed] for everything under the sky," *see* 542 U.S. at 387-88, here, Plaintiffs have intentionally sought "minimal" document discovery and two "short" Rule 30(b)(6) depositions for the sole purpose of answering any question—and there should be none—whether Plaintiffs' claims about Defendants' injurious activities are speculative, *see* Pls.' Mot. at 9-10. More importantly, Plaintiffs' discovery requests are *not* "directed to the Vice President" or any "other senior Government officials." *Cf. Cheney*, 542 U.S. at 385. Plaintiffs seek no discovery of the Vice President, numerous members of the Commission lack Executive Branch positions, and, in any event, the Commission has staff. Yet *Cheney* is relevant in one respect: it underscores why this Court, if it has any doubt, should grant Plaintiffs the limited discovery they seek from DHS, given that federal "agency heads" actually "complied" with the same discovery requests to which the Vice President had objected in that case. *In re Cheney*, 406 F.3d 723, 726 n.1 (D.C. Cir. 2005).

* * *

Upon any reading of Defendants' argument, Defendants challenge the factual basis of the Court's subject-matter jurisdiction. Therefore, according to the rule that Defendants themselves

advocate, jurisdictional discovery is required before the Court considers Defendants' contention. *See, e.g.*, *Phoenix Consulting*, 216 F.3d at 40; *Wyatt*, 225 F.R.D. at 3-4. As the D.C. Circuit has repeatedly held, the Court "retains 'considerable latitude in devising the procedures it will follow to ferret out the facts pertinent to jurisdiction,' but it must give the plaintiff 'ample opportunity to secure and present evidence relevant to the existence of jurisdiction.'" *Phoenix Consulting*, 216 F.3d at 40 (quoting *Prakash v. Am. Univ.*, 727 F.2d 1174, 1179-80 (D.C. Cir. 1984)). Thus, if the Court has any question about the facts underlying its subject-matter jurisdiction, Plaintiffs seek the opportunity for limited discovery that the D.C. Circuit requires, no more and no less.

Dated: December 22, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 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*
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