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)

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

The President created and charged the Presidential Advisory Commission on Election Integrity (the "Commission") with investigating voting practices to promote public confidence in the election system. *See* Exec. Order No. 13,799, 82 Fed Reg. 22,389 (May 11, 2017) [hereinafter "Exec. Order No. 13,799"]. As part of its research activities that would support its final recommendatory report, the Commission requested that states voluntarily submit voter registration data that those states already make available to the public under their own laws. Some states have submitted data, some have not. Nonetheless, plaintiffs, the organization Common Cause and several individuals, contend that this request for voluntarily provided information violates the Privacy Act and constitutes *ultra vires* action. Because the Commission's activities have complied with the applicable legal requirements, the Court should reject all of these claims, and accordingly dismiss plaintiffs' Amended Complaint.

As a threshold matter, the Court lacks jurisdiction over the Amended Complaint because plaintiffs have failed to establish their standing. Common Cause has not pled facts sufficient to establish it has standing to sue on behalf of its members, since it has not established that it has members who would independently have standing to sue. Nor has it satisfied the requisites to sue on its own behalf: it claims injury from having to increase or refocus its advocacy activities, but such an injury is not sufficient in this Circuit to establish injury-in-fact for Article III purposes. The individual plaintiffs, moreover, claim that they are "anxious" or "concerned" over the Commission's collection of state data and its purported future plans to share that data with the Department of Homeland Security. These allegations are doubly inadequate – emotional concern by itself is not sufficient for Article III injury-in-fact, and allegations of speculative future injury cannot suffice to establish standing.

Even assuming the Court had jurisdiction over this action, plaintiffs lack any viable claims. First, the Commission is not an "agency" subject to either the Privacy Act or the Administrative Procedure Act ("APA"). Second, the injunctive relief that plaintiffs seek is not available: the Privacy Act precludes injunctive relief except in two limited circumstances not present here, and plaintiffs cannot subvert the Privacy Act's careful demarcations of acceptable relief by turning to the APA to seek injunctive relief for alleged violations of the Privacy Act. Third, neither the individual plaintiffs nor Common Cause can state a claim under the Privacy Act. Common Cause, an organization, cannot sue under the Privacy Act, which provides rights only to U.S. citizens or lawful permanent residents. Nor have the individual plaintiffs shown an entitlement to monetary relief, the only relief otherwise available under the Privacy Act, since they fail to plead out-of-pocket monetary loss, a requirement for relief. Moreover, plaintiffs' speculation that the Department of Homeland Security will, in the future, violate the Privacy Act or the APA is not sufficient for Article III injury or to state a claim. Finally, plaintiffs' *ultra vires* claim must be rejected. 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; indeed, the Executive Order constituting the Commission broadly sets its agenda. Accordingly, this Court should dismiss plaintiffs' Amended Complaint.

BACKGROUND

I. STATUTORY BACKGROUND

A. The Privacy Act of 1974

The Privacy Act of 1974, 5 U.S.C. § 552a ("the Act"), establishes "a comprehensive and detailed set of requirements" for federal agencies that maintain systems of records containing individuals' personal information. *FAA v. Cooper*, 566 U.S. 284, 287 (2012). Among other

things, the Privacy Act directs that an agency "that maintains a system of records 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." 5 U.S.C. § 552a(e)(7).

The Privacy Act authorizes injunctive relief in a suit brought by an "individual" in only two specific circumstances: (1) to order an agency to amend an individual's records, 5 U.S.C § 552a(g)(1)(A), (2)(A), and (2) to order an agency to allow an individual access to his records, *id*. § 552a(g)(1)(B), (3)(A). The Act defines an "individual" narrowly as "a citizen of the United States or an alien lawfully admitted for permanent residence." *Id.* § 552a(a)(2).

The Act otherwise authorizes courts to award monetary damages when the agency fails "to comply with any . . . provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual." 5 U.S.C. § 552a(g)(1)(D). In addition to establishing that he or she meets the definition of "individual," a plaintiff seeking monetary damages must also plead and prove facts showing "that the agency acted in a manner which was intentional or willful" and that, as a result, the plaintiff suffered "actual damages." *Id.* § 552a(g)(4). "Actual damages" under the Privacy Act "are limited to actual pecuniary loss, which must be specially pleaded and proved." *See Cooper*, 566 U.S. at 295. The federal government retains sovereign immunity from liability for all other kinds of injury. *Id*. at 304.

B. The Administrative Procedure Act

The APA, 5 U.S.C. §§ 701-706, establishes a waiver of sovereign immunity and a cause of action for injunctive relief for parties adversely affected either by agency action or by an agency's failure to act. *See* 5 U.S.C. § 706(1)-(2); *see also Heckler v. Chaney*, 470 U.S. 821,

828 (1985). The APA, however, has several important limitations. Section 702 declares that APA review is not available "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought" by the plaintiff. 5 U.S.C. § 702. Section 702 accordingly "prevents plaintiffs from exploiting the APA's waiver to evade limitations on suit contained in other statutes." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215 (2012).

Similarly, Section 704 requires that the person seeking APA review of final agency action have "no other adequate remedy in a court . . . ." 5 U.S.C. § 704. To preclude APA review, the alternative remedy "need not provide relief identical to relief under the APA, so long as it offers relief of the same genre." *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009) (citation omitted). The APA also explicitly excludes from judicial review those agency actions that are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Finally, while the APA allows a court to compel "agency action" that is withheld contrary to law or is unreasonably delayed, § 706(1), or to set aside "agency action" under certain circumstances, § 706(2), such claims can only proceed if a plaintiff identifies a "discrete agency action that [the agency] is required to take." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (emphasis omitted).

II. FACTUAL BACKGROUND: THE PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY

The President established the Presidential Advisory Commission on Election Integrity in Executive Order No. 13,799. Exec. Order No. 13,799; *see also* Decl. of Andrew J. Kossack ("First Kossack Decl.") ¶ 1, *Lawyers' Comm. for Civil Rights Under Law v. Presidential Advisory Comm'n on Election Integrity* ("*LCCR v. PACEI*"), 17-cv-1354 (CKK) (D.D.C.), ECF No. 15-1 [attached hereto as Exhibit A]; Mem in Opp'n to Pl.'s Emergency TRO, Declaration of Kris W. Kobach ("First Kobach Decl.") ¶ 3, *Elec. Privacy Info. Ctr. v. Presidential Advisory*

Comm'n on Election Integrity ("*EPIC v. PACEI*"), 17-cv-1320 (CKK) (D.D.C.), ECF No. 8-1 [attached hereto as Exhibit B]. The Commission is charged with "study[ing] the registration and voting processes used in Federal elections," "consistent with applicable law," in order to provide a report to the President. Exec. Order No. 13,799, § 3. Vice President Pence is the Chairman of the Commission. *Id*. § 2. Kansas Secretary of State Kris Kobach is the Vice Chair of the Commission. First Kossack Decl. ¶ 1. Members of the Commission come from federal, state, and local jurisdictions and both political parties. First Kossack Decl. ¶ 1; First Kobach Decl. ¶ 3.

In furtherance of the Commission's mandate, on June 28, 2017, Vice Chair Kobach sent letters to all fifty states and the District of Columbia requesting publicly available data from state voter rolls and feedback on how to improve election integrity. First Kobach Decl. ¶ 4. Among other things, the letters requested:

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

See, e.g., *id.*, Ex. 3 (letter to Alabama). The Vice Chair requested responses by July 14, 2017. First Kobach Decl. ¶ 5 & Ex. 3.

Shortly thereafter, the Electronic Privacy Information Center ("EPIC") filed suit in this Court seeking to enjoin the Commission's collection of voter roll data on the ground that the Commission was required to, but did not, prepare a privacy impact analysis pursuant to the E-Government Act of 2002, Public Law No. 107-347, 116 Stat. 2899. EPIC sought a temporary restraining order and/or preliminary injunction to halt the collection of data by the Commission.

On July 10, 2017, the Commission sent the states a follow-up communication requesting that the states not submit any data until the Court ruled on EPIC's motion. Defs.' Suppl. Br. Regarding Dep't of Def., Third Decl. of Kris W. Kobach ("Third Kobach Decl.") ¶ 2, *EPIC v. PACEI*, 17-cv-1320 (CKK), ECF No. 24-1 [attached hereto as Exhibit C].

As announced in the Federal Register on July 5, 2017, the Commission held its first public meeting on July 19, 2017. *See* The Presidential Commission on Election Integrity (PCEI); Upcoming Public Advisory Meeting, 82 Fed. Reg. 31,063, 31,063 (July 5, 2017); First Kossack Decl. ¶ 6. All of the meeting materials, *i.e.*, a video, a partial transcript, documents prepared in advance of the meeting, and documents circulated at the meeting, have been posted to the Commission's webpage. Second Kossack Decl. ¶¶ 2-8, *LCCR v. PACEI*, 17-cv-1354 (CKK), ECF No. 23-1 [attached hereto as Exhibit D]. During that meeting, the members introduced themselves and then briefly discussed issues within the scope of their mission and potential avenues for further investigation or study. *See* Meeting Minutes: Public Meeting of Wednesday, July 19, 2017, Presidential Advisory Comm'n on Election Integrity, https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/Minutes%20for%20July%2019%2C%202017%20Public%20Meeting.pdf. The Commission members posited, in the context of potential topics for the Commission to study, several categories of information that potentially would be useful to the Commission's work, including categories of information held by various components of the federal government. *See id.* at 2-8. Vice Chair Kobach suggested that, before the next meeting, Commission staff could start trying to collect any pertinent data that is already in the possession of the federal government. *See id.* at 8 There is no indication or allegations that such data from other parts of the federal government has been collected. *See, e.g.*, Am. Compl. ¶ 106(d), ECF No. 21.

The Court ruled on EPIC's motion for injunctive relief on July 24, 2017, denying (without prejudice) the motion for a temporary restraining order and preliminary injunction. On July 26, 2017, Vice Chair Kobach sent a further letter to the states and the District of Columbia, renewing his request for voter roll data and directing the recipients of the letter to contact a Commission staff member for instructions as to how to submit the data securely. *See, e.g.*, Letter from Vice Chair Kobach to John Merrill, Alabama Secretary of State (July 26, 2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/letter-vice-chair-kris-kobach-07262017.pdf. Mr. Kobach further reiterated to the states that he was seeking only information that is already publicly available under state law, "which is information that States regularly provide to political candidates, journalists, and other interested members of the public." *Id.* Further, Mr. Kobach explained that "the Commission will not publicly release any personally identifiable information regarding any individual voter or any group of voters from the voter registration records" submitted and that "[t]he only information that will be made public are statistical conclusions drawn from the data, other general observations that may be drawn from the data, and any correspondence that you may send to the Commission in response to the narrative questions enumerated in [his] June 28 letter." *Id.* Mr. Kobach stated that "individuals' voter registration records will be kept confidential and secure throughout the duration of the Commission's existence," and that, "[o]nce the Commission's analysis is complete, the Commission will dispose of the data as permitted by federal law." *Id.*

The system that will receive the voter roll data is run by the Director of White House Information Technology ("DWHIT"). Decl. of Charles Christopher Herndon ("Herndon Decl.") ¶¶ 3-5, *EPIC v. PACEI*, No. 17-cv-1320, ECF No. 38-1 [attached hereto as Exhibit E]. The system allows the states to directly and securely upload the data to a server within the White

House domain. *Id*. ¶ 4-5. No federal agency will play a role in this data collection, and the only people involved will be the DWHIT and a limited number of technical staff from the White House Office of Administration. *Id*. ¶ 6.

STANDARDS OF REVIEW

Defendants seek dismissal of this case (1) under Federal Rule of Civil Procedure 12(b)(1), on the ground that the Court lacks subject-matter jurisdiction because plaintiffs lack standing, and (2) under Rule 12(b)(6), on the ground that plaintiff fails to state a claim upon which relief may be granted. When a defendant files a motion under Rule 12(b)(1), the plaintiff bears the burden of demonstrating the existence of subject-matter jurisdiction. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Courts should "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (citations omitted). "Although a court must accept as true all the factual allegations contained in the complaint when reviewing a motion to dismiss pursuant to Rule 12(b)(1)," the factual allegations in the complaint "will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim." *Wright v. Foreign Serv. Grievance Bd.*, 503 F. Supp. 2d 163, 170 (D.D.C. 2007) (citations omitted). The Court "may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction." *Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

In order to withstand a motion to dismiss under Rule 12(b)(6), a complaint must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. The plaintiff must, accordingly, plead facts that allow the court

"to draw the reasonable inference that the defendant is liable for the misconduct alleged" and offer "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. "In determining whether a complaint states a claim, the court may consider the facts alleged in the complaint, documents attached thereto or incorporated therein, and matters of which it may take judicial notice." *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006).

ARGUMENT

I. PLAINTIFFS LACK STANDING.

Plaintiffs have failed to establish the necessary Article III standing to bring this suit, and accordingly, the case should be dismissed for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). The doctrine of standing, an essential aspect of the Article III case-or-controversy requirement, demands that a plaintiff have "a personal stake in the outcome of the controversy [so] as to warrant his invocation of federal-court jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (citation omitted). At its "irreducible constitutional minimum," the doctrine requires a plaintiff, as the party invoking the Court's jurisdiction, to establish three elements: (1) a concrete and particularized injury-in-fact, either actual or imminent, (2) a causal connection between the injury and defendants' challenged conduct, and (3) a likelihood that the injury suffered will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560. Facts demonstrating each of these elements "must affirmatively appear in the record" and "cannot be inferred argumentatively from averments in the [plaintiff's] pleadings." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (citation omitted); *see also Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002).

A. Common Cause Lacks Representational or Organizational Standing.

The same rigorous standing requirement applies to organizational plaintiffs suing either on behalf of their members or on their own behalf. *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982)).

1. Common Cause Lacks Representational Standing.

Common Cause first purports to bring standing on behalf of its members. *See* Am. Compl. ¶¶ 3, 4. To establish representational standing (or as it is sometimes referred to, associational standing), an organization must demonstrate that "its members would otherwise have standing to sue in their own right[.]" *Ass'n of Flight Attendants—CWA v. Dep't of Transp.*, 564 F.3d 462, 464 (D.C. Cir. 2009) (citation omitted). Thus, in short, the organization has to have members, who themselves have standing. In addition, an organizational plaintiff must demonstrate that "the interests it seeks to protect are germane to the organization's purpose" and "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id*.

While Common Cause pleads generally that it has members, *see* Am. Compl. ¶ 1, it has not alleged that any of the individual plaintiffs is a member of its organization. *Id.* ¶¶ 5-9. Nor has Common Cause otherwise demonstrated that it has identifiable members who have standing. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009) ("[T]he Court has required plaintiffs claiming an organizational standing to identify members who have suffered the requisite harm[.]"). Accordingly, it has not met its burden of proving that it has members who would themselves have standing to sue, much less that the claims it asserts and the relief it

requests do not require the participation of those individual members. Accordingly, it has not established representational standing.

2. Common Cause Lacks Standing to Sue on Its Own Behalf.

Common Cause also has not demonstrated that it has standing to sue on its own behalf. An organization asserting standing on its own behalf must demonstrate that it has suffered a "concrete and demonstrable injury to [its] activities – with a consequent drain on [its] resources – constituting more than simply a setback to the organization's abstract social interests." *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 11 (D.C. Cir. 2011) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982)). Indeed, it has long been clear that "pure issue-advocacy[,]" *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1162 (D.C. Cir. 2005), provides no more basis for an organization's standing than "generalized grievances about the conduct of Government" do for individual standing, *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990) (citation omitted). Thus, "conflict between a defendant's conduct and an organization's mission is alone insufficient to establish Article III standing." *Nat'l Treasury Emps. Union*, 101 F.3d at 1429; *see also Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995) (finding that "frustrat[ion]" of an organization's objectives "is the type of abstract concern that does not impart standing").

Instead, "'the organization must allege that discrete programmatic concerns are being directly and adversely affected' by the challenged action." *Nat'l Taxpayers*, 68 F.3d at 1433 (quoting *Am. Legal Found. v. FCC*, 808 F.2d 84, 92 (D.C. Cir. 1987)). "An organization's ability to provide services has been perceptibly impaired when the defendant's conduct causes an 'inhibition of the organization's daily operations.'" *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015) (quoting *People for the Ethical Treatment of Animals v. U.S.*

Dep't of Agric. ("*PETA*"), 797 F.3d 1087, 1095 (D.C. Cir. 2015)). However, this Circuit's "precedent makes clear that an organization's use of resources for litigation, investigation in anticipation of litigation, or advocacy is not sufficient to give rise to an Article III injury." *Id.* "Furthermore, an organization does not suffer an injury in fact where it 'expends resources to educate its members and others' unless doing so subjects the organization to 'operational costs beyond those normally expended.'" *Id.* at 920 (quoting *Nat'l Taxpayers*, 68 F.3d at 1434).

Thus, an organization may have standing when the defendant's action imposes a concrete burden on the organization's ability to serve its clients. In *Havens Realty*, for example, the Supreme Court relied on the allegation that defendants' "practices have perceptibly impaired [plaintiff's] ability to provide counseling and referral services for low-and-moderate-income homeseekers." 455 U.S. at 379. And, the D.C. Circuit recently concluded that an animal advocacy organization had standing where the U.S. Department of Agriculture's ("USDA") lack of investigative information regarding bird abuse prevented the organization from bringing violations of the Animal Welfare Act to the agency's attention, a key component of its activities. *PETA*, 797 F.3d at 1095.

Common Cause states that it has "already expended staff time and resources to engage in non-litigation related outreach and communication[] efforts to oppose the impermissible collection of voter information as sought by the Commission, diverting resources from its core activities." Am. Compl. ¶ 3. These activities are not sufficient to establish organizational standing. First, Common Cause would have to show that these activities have subjected the organization to operational costs beyond those it would normally have expended, *Food & Water Watch*, 808 F.3d at 920., a showing it does not allege. *See* Am. Compl. ¶ 3. Indeed, while Common Clause asserts that it has been diverted from its "core activities," it also states that its

primary activities are to advocate for voter registration policies and practices, *id.* ¶ 2, the same activities it says it is engaging in because of the Commission's activities, *id.* ¶ 4. *See Elec. Privacy Info. Ctr. v. Dep't of Educ.*, 48 F. Supp. 3d 1, 23 (D.D.C. 2014) (holding that the "expenditures . . . EPIC . . . made in response to the [new regulation] have not kept it from pursing its true purpose as an organization but have contributed to its pursuit of its purpose"); *see also id.* at 5 (holding that EPIC has not alleged an injury in fact and thus did not have organizational standing to challenge the new regulation because defendant's promulgation of the regulation merely "prompted [EPIC] to engage in the very sort of advocacy that is its raison d'etre"). *Cf. Nat'l Consumers League v. Gen. Mills, Inc.*, 680 F. Supp. 2d 132, 136 (D.D.C. 2010) ("Challenging conduct like General Mills' alleged mislabeling is the very purpose of consumer advocacy organizations. As such, General Mills' alleged conduct does not hamper NCL's advocacy effort[s]; if anything it gives NCL an opportunity to carry out its mission.").

Common Cause further asserts that "[t]he Commission's attempt to collect voter information will also harm Common Cause's and its members efforts to encourage voter registration and participation," and that, accordingly, "Common Cause has been engaged in direct counseling of individual voters . . . ." Am. Compl. ¶ 4. But, even taking these allegations as true, they are not sufficiently concrete and particularized to constitute an injury-in-fact. Unlike in *PETA*, Common Cause does not point to a specific action that defendants have taken to hinder its organizational interests. In *PETA*, for example, "the USDA was not generating inspection reports that the organization used to educate its members," and the agency had "deni[ed] . . . access to an avenue for redress." *Food & Water Watch*, 808 F.3d at 920 (discussing *PETA*, 797 F.3d at 1091, 1095). Here, however, Common Cause does not articulate a comparable restriction on voter registration; instead, it merely says that individuals are less

willing to register, and thus it has to engage in voter registration efforts (which appear to be one of its programmatic activities, in any event). Were this enough for standing, almost any advocacy organization would have standing to challenge government action when it alleged that the government action forced it to work harder to advocate. The D.C. Circuit has not defined organizational standing so broadly. *See, e.g.*, *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1162 n.4 (D.C. Cir. 2005) ("[T]o hold that a lobbyist/advocacy group had standing to challenge government policy with no injury other than injury to its advocacy would eviscerate standing doctrine's actual injury requirement.").

B. The Individual Plaintiffs Lack Standing.

The four individual plaintiffs also lack standing to sue. They do not allege a concrete and particularized injury; instead, they state that they have "experienced grave concern" over their data being collected by the Commission, Am. Compl. ¶ 5; *see also id.* ¶¶ 6-8, and that they are "concerned" about its alleged future plans to work with other federal agencies to share data, *see id.* ¶¶ 5-8. These allegations of concern do not constitute a concrete harm and are insufficient to invoke this Court's jurisdiction.

As this Circuit has held, "general emotional 'harm,' no matter how deeply felt, cannot suffice for injury-in-fact for standing purposes." *Humane Soc. of U.S. v. Babbitt*, 46 F.3d 93, 98 (D.C. Cir. 1995). "Instead, a plaintiff can only establish an Article III injury in fact based on emotional harm if that alleged harm stems from the infringement of some 'legally protected' or 'judicially cognizable' interest that is either 'recognized at common law or specifically recognized as such by the Congress.'" *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 25 (D.D.C. 2010) (holding that a father did not have standing based on the emotional harm he would suffer if his son were to be killed); *see also Levine v. Nat'l R. Passenger Corp.*, 80 F. Supp. 3d 29, 40

(D.D.C. 2015) ("In order to satisfy the requirements of standing, notwithstanding allegations of emotional harm, Plaintiff must allege an injury resulting from the invasion of a legally protected interest."); *Welborn v. Internal Revenue Service*, 218 F. Supp. 3d 64, 77 (D.D.C. 2016) ("[G]eneral anxiety does not establish standing."), *dismissing appeal*, 2017 WL 2373044 (D.C. Cir. Apr. 18, 2017).

Here, the individual plaintiffs allege that they are "highly concerned" and/or "anxious" about the Commission's collection of publicly-available voter information. *E.g.*, Am. Compl. ¶ 6. Plaintiffs do not, however, show that they have a legally protected interest in preventing the collection of public state information. Accordingly, this abstract emotional concern regarding government action, without more, is not sufficient for standing purposes. Indeed, were it otherwise, virtually any "concerned" citizen could satisfy Article III's requirements.

Plaintiffs also state that they are concerned over potential *future* uses of data by the Commission and federal agencies (indeed, this is the only basis for a claim against DHS). Plaintiffs, however, speculate about what DHS and the Commission might do in the future, and standing cannot lie based on the threat of future injury. *Williams v. Lew*, 77 F. Supp. 3d 129, 132-33 (D.D.C. 2015); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) ("[W]e have repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient.") (emphasis in original) (citation omitted). Nor is the fact that the possibility of future harm may be "enough to engender some anxiety" in the plaintiffs enough to overcome Article III. *In re Sci. Apps. Int'l Corp (SAIC) Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14, 26 (D.D.C. 2014). Accordingly, the individual plaintiffs lack standing.

II. PLAINTIFFS CANNOT STATE A CLAIM UNDER THE PRIVACY ACT OR THE ADMINISTRATIVE PROCEDURE ACT.

A. The Commission Is Not An "Agency" Under The Privacy Act Or The APA.

The Privacy Act only applies to an "agency," as that term is defined in the Freedom of Information Act. *See* 5 U.S.C. § 552a(a)(1). This definition is incorporated by reference for the purposes of the Privacy Act. 5 U.S.C. § 552a(a)(1). But under well-established D.C. Circuit case law, and as Judge Koller-Kotelly recently held in a related case, the Commission is not an "agency" under that definition, or, for that matter, under the APA. *See EPIC v. PACEI,* ECF No. 40, 17-cv-1320 (CKK) (D.D.C. July 24, 2017), *appeal docketed* No. 17-5171 (D.C. Cir. 2017).

1. Entities within the Executive Office of the President are agencies only if they exercise substantial independent authority.

The Supreme Court and this Circuit have consistently recognized that while the statutory definition of "agency" may be broad, it does not encompass entities within the Executive Office of the President that do not exercise substantial independent authority. In *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), for example, the court considered the definition of "agency" under the APA which then, as now, is defined as any "authority of the Government of the United States, whether or not it is within or subject to review by another agency." *Id.* at 1073 (quoting 5 U.S.C. § 551(1)). This circuit concluded that the APA "apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions." *Id.* Following this reasoning, the court held that the Freedom of Information Act ("FOIA"), which at the time incorporated the APA's definition of "agency," applied to the Office of Science and Technology Policy ("OSTP"), which is an entity within the Executive Office of the President. *Id.* at 1073-74. It reasoned that OSTP's function was not merely to "advise and assist the President," but it also had an "independent function of evaluating federal programs," and

therefore was an agency with substantial independent authority that was subject to the APA. *Id.* at 1075.

The Supreme Court has confirmed the principle that entities that "advise and assist the President" are not "agencies." In *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980), the Supreme Court considered the scope of FOIA, whose definition of "agency" had been amended in 1974 to its current version, where "'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) (emphasis added). That definition is incorporated by reference into the Privacy Act. *See id.*. § 552(a). The Court concluded that, despite this language, "[t]he legislative history is unambiguous . . . in explaining that the 'Executive Office' does not include the Office of the President." *Kissinger*, 445 U.S. at 156. Rather, Congress did not intend "agency" to encompass "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." *Id.* (quoting H.R. Rep. No. 93-1380, at 15 (1974) (Conf. Rep.)). That Conference Report further specified that "with respect to the meaning of the term 'Executive Office of the President' the conferees intend[ed] the result reached in *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971)." *See Rushforth v. Council of Econ Advisers*, 762 F.2d 1038, 1040 (D.C. Cir. 1985) (quoting H.R. Rep. 93-1380, at 14); *see also Meyer v. Bush*, 981 F.2d 1288, 1291 n.1 (D.C. Cir. 1993) (explaining Congress had codified the D.C. Circuit's analysis of EOP entities in *Soucie* in the 1974 FOIA Amendments).

The controlling question in determining whether an entity within the Executive Office of the President is an "agency" for purposes of the APA or the Privacy Act, therefore, is whether "the entity in question 'wield[s] substantial authority independently of the President.'" *Citizens for Responsibility & Ethics in Wash.* ("*CREW*") *v. Office of Admin*., 566 F.3d 219, 222 (D.C. Cir. 2009) (quoting *Sweetland v. Walters*, 60 F.3d 852, 854 (D.C. Cir. 1995)). This principle is rooted in separation of powers concerns. The Supreme Court has expressly held that the President's actions are not subject to the APA, as such a review would infringe upon a coordinate branch. *See Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992); *see also Detroit Int'l Bridge Co. v. Gov't of Can.*, 189 F. Supp. 3d 85, 99-100 (D.D.C. 2016) (separation of powers concerns "bar review [of the President's actions] for abuse of discretion" in performance of statutory duties (citation omitted)). These concerns are equally present when exempting entities within the Executive Office of the President that have the sole function of advising and assisting the President, as such an exemption "may be constitutionally required to protect the President's executive powers." *See Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 909-10 (D.C. Cir. 1993).

The D.C. Circuit has repeatedly looked to whether EOP entities "wielded substantial authority independently of the President."[1] *CREW*, 556 F.3d at 223 (quoting *Sweetland*, 60 F.3d at 854). Courts have looked to whether these EOP entities have independent regulatory or

[1] The D.C. Circuit has used various tests to formulate its inquiry: "These tests have asked, variously, 'whether the entit[ies] exercise[s] substantial independent authority,' 'whether . . . the entit[ies] sole function is to advise and assist the President,' and in an effort to harmonize these tests, how close operationally the group is to the President,' 'whether it has a self-contained structure,' and 'the nature of its delegate[ed] authority.' However the test has been stated, common to every case in which we have held that an EOP unit is [an agency] . . . has been a finding that the entity in question 'wielded substantial authority independently of the President.'" *CREW*, 566 F.3d at 222-23 (internal citations omitted).

funding powers or are otherwise imbued with significant statutory responsibilities. For example, as previously mentioned, OSTP was determined to be an agency because it had independent authority to initiate, fund, and review research programs and scholarships. *Soucie*, 448 F.2d at 1073-75. Other courts have found the Council for Environmental Quality to be an agency because it has the power to issue guidelines and regulations to other federal agencies, *Pac. Legal Found. v. Council on Envtl. Quality*, 636 F.2d 1259, 1262 (D.C. Cir. 1980), and the Office of Management and Budget to be an agency because it has a statutory duty to prepare the annual federal budget, as well as a Senate-confirmed Director and Deputy Director. *Sierra Club v. Andrus*, 581 F.2d 895, 902 (D.C. Cir. 1978) ("Congress signified the importance of OMB's power and function, over and above its role as presidential advisor, when it provided[] . . . for Senate confirmation of the Director and Deputy Director of OMB."), *rev'd on other grounds*, 442 U.S. 347 (1979).

But many other EOP entities lack such independent authority. For example, President Reagan's Task Force on Regulatory Relief, which was comprised of senior White House staffers and cabinet officials who headed agencies, was not itself an agency because, while it reviewed proposed rules and regulations, it could not *direct* others to take action. *Meyer*, 981 F.2d at 1294 ("[W]e see no indication that the Task Force, *qua* Task Force, directed anyone . . . to do anything."). The Council of Economic Advisors similarly lacks regulatory or funding power, and therefore is not an agency. *Rushforth*, 762 F.2d at 1042. Nor is the National Security Council an agency, because it only advises and assists the President in coordinating and implementing national security policy. *Armstrong v. Exec. Office of the President*, 90 F.3d 553, 560-61 (D.C. Cir. 1996). The Office of Administration, which provides "operational and administrative support of the work of the President and his EOP staff," including IT support, is

not an agency, *CREW*, 566 F.3d at 224-25, nor is the Executive Residence Staff, which supports the President's ceremonial duties, *see Sweetland*, 60 F.3d at 854. The White House Office is similarly not an agency, *see Sculimbrene v. Reno*, 158 F. Supp. 2d 26, 35-36 (D.D.C. 2001), and neither is the White House Counsel's Office, *Nat'l Sec. Archive v. Archivist of the U.S.*, 909 F.2d 541, 545 (D.C. Cir. 1990), which is within the White House Office. In short, under this Circuit's authority, EOP entities that implement binding regulations (CEQ), grant funding (OSTP), or have important statutorily defined functions (OMB) constitute agencies; those that advise the President (CEA, Task Force), coordinate policy among different entities (NSC), provide administrative support for the President's activities (OA, Executive Residence), or constitute his closest advisors (White House Office) do not.

2. The "substantial independent authority" test applies to the APA and the Privacy Act.

The "substantial independent authority" definition of agency – and its construction – applies to the APA and the Privacy Act. To begin, *Soucie* itself was a case interpreting the *APA's* definition of "agency." *See Soucie*, 448 F.2d at 1073 ("The statutory definition of 'agency' is not entirely clear, but *the APA* apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions.") (emphasis added). The D.C. Circuit has since made clear that this definition applies to the APA generally. *See Dong v. Smithsonian Inst.*, 125 F.3d 877, 881 (D.C. Cir. 1997) ("Our cases . . . requir[e] that an entity exercise substantial independent authority before it can be considered an agency for [5 U.S.C.] § 551(1) purposes."); *McKinney v. Caldera*, 141 F. Supp. 2d 25, 32 n.14 (D.D.C. 2001) ("As the D.C. Circuit explained in a later case, the 'substantial independent authority' standard derives from both the statutory language of the APA and the legislative history characterizing the type of authority required ('final and binding')."") (citing *Dong*, 125 F.3d at 881). *See also EPIC*

v. PACEI, No. 17-1320, 2017 WL 3141907, at *12 n.5 (D.D.C. July 24, 2017) ("substantial independent authority" test is used for determining whether an "entity is an agency for purposes of the APA.") *appeal docketed*, No. 17-5171 (D.D. Cir. July 27, 2017).

Furthermore, the D.C. Circuit has held explicitly "that the Privacy Act's definition of 'agency's is to be interpreted coextensively with that term as used in FOIA." *Alexander v. FBI*, 691 F. Supp. 2d 182, 189-90 (D.D.C. 2010) (citing *Dong*, 125 F.3d at 878), *aff'd* 456 F. App'x 1 (D.C. Cir. 2011); *see also Alexander*, 691 F. Supp. 2d 189-90. (recognizing that the Privacy Act does not apply to Executive Office of the President components that lack "substantial independent authority," notwithstanding the fact that the Privacy Act and the FOIA serve different purposes).

3. The Presidential Commission is not an agency.

The Commission is not an agency subject to Privacy Act or the APA because it lacks "substantial independent authority in the exercise of specific functions." *Soucie*, 448 F.2d at 1073. The Commission reports directly to the President and is "solely advisory." Exec. Order No. 13,799 § 3; *see also* Charter, Presidential Advisory Commission on Election Integrity ¶ 4 ("The Commission will function solely as an advisory body."), *available at* https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/commission-charter.pdf. It is chaired by the Vice President (Exec. Order No. 13, 799, § 2), a constitutional officer who is also not an agency. *See Wilson v. Libby*, 535 F.3d 697, 707-08 (D.C. Cir. 2008) (holding that the Office of the Vice-President was not an agency under the Privacy Act); *Dong*, 125 F.3d at 878 (Privacy Act definitions incorporates FOIA definitions); *Alexander*, 691 F. Supp. 2d at 189 (same). Its purpose is to "submit a report to the President" that identifies rules and activities that enhance and undermine the "American people's confidence in the integrity of the voting

processes used in Federal elections" and to identify "vulnerabilities in voting systems . . . that could lead to improp[rieties]." Exec. Order No. 13,799 § 3(a)-(c). The Commission has no regulatory, funding, or enforcement powers, nor does it have any independent administrative responsibilities. Instead, it exists solely to provide research and advice to the President. It is not, therefore, an "agency." *See EPIC* 2017 WL 3141907, at *11 ("First, the Executive Order indicates that the Commission is purely advisory in nature, and that it shall disband shortly after it delivers a report to the President. *No independent authority is imbued upon the Commission by the Executive Order*, and there is no evidence that it has exercised any independent authority that is unrelated to its advisory mission. Defendants' request for information is just that – a request – and there is no evidence that they have sought to turn the request into a demand, or to enforce the request by any means.") (emphasis added).

This conclusion accords with controlling D.C. Circuit case law. The Council of Economic Advisors, like the Commission, gathers information, develops reports, and makes recommendations to the President. *See* 15 U.S.C. § 1023(c). The Council is not an agency, as it, like the Commission, "has no regulatory power under the statute," "[i]t cannot fund projects based on [its] appraisal, . . . nor can it issue regulations." *Rushforth*, 762 F.2d at 1043. And in *Meyer*, the D.C. Circuit held that the President's Task Force on Regulatory Relief, which, like the Commission, was chaired by the Vice President, was not an agency, because while it reviewed federal regulations and made recommendations, it did not have the power to "direct[] anyone . . . to do anything." 981 F.2d at 1294. The Commission here is situated the same way. In their motion for a temporary restraining order and/or preliminary injunction, plaintiffs had focused their argument on the fact that the Commission will provide "evaluation plus advice."

Pl.'s Br. in Supp. Mot. for TRO or, in the Alternative, For a Prelim. Inj. at 21, ECF No. 10-1.[2] But so did the Council of Economic Advisors and the Task Force on Regulatory Reform. What those entities lacked, as the Commission lacks here, was independent authority beyond their presidential advisory roles.

In any event, even apart from the functional test establishing that the Commission exists to advise and assist the President, and is therefore not an "agency" under the Privacy Act, it is clear that an entity cannot be at once both an advisory committee (as plaintiff claims the Commission is) and an agency. *See Heartwood, Inc. v. U.S. Forest Serv.*, 431 F. Supp. 2d 28, 36 (D.D.C. 2006) (noting that an "advisory committee cannot have a 'double identity' as an agency") (quoting *Wolfe v. Weinberger*, 403 F. Supp. 238, 242 (D.D.C. 1975)). Nor does the involvement of federal officials or federal agencies in an advisory committee transform that committee into an "agency." In *Meyer*, the Presidential Task Force at issue included "various cabinet members . . . [who were] unquestionably officers who wielded great authority as heads of their departments." 981 F.2d at 1297. But that did not turn the Task Force into an agency; the relevant inquiry is the function exercised, not the job title. The court of appeals concluded that "there is no indication that when *acting as the Task Force* they were to exercise substantial independent authority . . . . Put another way, the whole does not appear to equal the sum of its parts." *Id.* (emphasis added).

[2] Plaintiff Common Cause drew this language from *Energy Research Found. v. Def. Nuclear Facilities Safety Bd.*, 917 F.2d 581 (D.C. Cir. 1990). But in that case, unlike here, the board "ha[d] at its disposal the full panoply of investigative powers commonly held by other agencies of government," had the power to "force[] public decisions about health and safety," and "ha[d] the additional authority to impose reporting requirements on the Secretary of Energy." *Id.* at 584-85. The Commission has no such powers.

Similarly, the mere presence of a federal agency that provides some administrative support – but does not exercise "substantial independent authority" – does not transform an otherwise non-agency "whose sole function is to advise and assist" into an agency. *Meyer*, 981 F.2d at 1297-98l; *see also EPIC*, 2017 WL 3141907, at *11 (concluding roles played by GSA and Commissioner Christy McCormick of the Election Assistance Commission did not transform the Commission into an agency). Were it otherwise, every advisory committee that received support from federal employees or agencies – *i.e.*, all of them, *see* 5 U.S.C. app. 2 § 10(e) (requiring advisory committees to have support from a designated federal officer or employee) – would be an agency, a conclusion impossible to square with this Circuit's precedent. *See, e.g.*, *Meyer*, 981 F.2d at 1296 (Presidential Task Force on Regulatory reform was not an agency); *Judicial Watch, Inc. v. Dep't of Energy*, 412 F.3d 125, 127 (D.C. Cir. 2005) (Vice President Cheney's National Energy Policy Development Group was not an agency). Consistent with these decisions, this Court should similarly conclude that the Commission is not an agency, meaning that plaintiff cannot invoke the Privacy Act.

B. The Injunctive Relief Plaintiffs Seek Is Not Available Under the Privacy Act or the APA.

1. The Privacy Act precludes the injunctive relief plaintiffs seek.

Common Cause, on behalf of itself and its members, as well as the individually named plaintiffs, seek to "enjoin Defendants from the collecting, maintenance, use, and dissemination of voter history and party affiliation data." Am. Compl., Prayer for Relief ¶ 3. Even assuming that the Commission is an "agency" subject to the Privacy Act (which it is not), plaintiffs' Privacy Act claims in Counts II, III, and IV of the Amended Complaint must fail, because the Privacy Act precludes the broad injunctive relief plaintiffs seek.

The Privacy Act provides a "comprehensive remedial scheme" for injuries arising out of the inappropriate dissemination of private information about individuals. *Wilson v. Libby*, 535 F.3d 697, 703 (D.C. Cir. 2008) (citing *Chung v. DOJ*, 333 F.3d 273, 274 (D.C. Cir. 2003)). 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). Equitable remedies for Privacy Act violations are limited only to those specifically identified in the statute. As the D.C. Circuit and other Circuits have held, a plaintiff cannot seek equitable relief for any other Privacy Act violation, including under the catchall provision set out at 5 U.S.C. § 552a(g)(1)(D), which provides for civil remedies when an agency "fails to comply with any other provision of [the Privacy Act.]" *See Doe* v. *Stephens*, 851 F.2d 1457, 1463 (D.C. Cir. 1988) ("The [Privacy] Act's subsection on civil remedies authorizes entry of injunctive relief in only two specific circumstances. In so doing, as we have held, the Act precludes other forms of declaratory and injunctive relief . . . ."); *see also Sussman v. U.S. Marshall Serv.*, 494 F.3d 1106, 1122 (D.C. Cir. 2007) ("We have held that only monetary damages, not declaratory or injunctive relief, are available to § 552a(g)(1)(D) plaintiffs . . . .") (citing *Doe*, 851 F.2d at 1463); *see also Cell. Assocs., Inc. v. Nat'l Insts. of Health*, 579 F.2d 1155, 1161-62 (9th Cir. 1978); *Edison v. Dep't of the Army*, 672 F.2d 840, 846-47 (11th Cir. 1982) (citing *Parks v. IRS*, 618 F.2d 677, 683-84 (10th Cir. 1980)); *Kelley v. FBI*, 67 F. Supp. 3d 240, 253 (D.D.C. 2014); *Houston v. U.S. Dep't of Treasury*, 494 F. Supp. 24, 29 (D.D.C. 1979).

These holdings are consistent with the principle that "[w]here [a] 'statute provides certain types of equitable relief but not others, it is not proper to imply a broad right to injunctive

relief.'" *Parks*, 618 F.2d at 684 (citing *Cell Assoc., Inc. v. Nat'l Inst. of Health, Educ., & Welfare*, 579 F.2d 1155, 1161-62 (9th Cir. 1978)). This is especially true with the Privacy Act because Congress "link[ed] particular violations of the Act to particular remedies in a specific and detailed manner[,]" which "points to a conclusion that Congress did not intend to authorize the issuance of [other] injunctions." *Cell Assoc.*, 579 F.2d at 1159. Indeed, as the Ninth Circuit concluded, were injunctive relief available for violations of the Privacy Act generally, "the detailed remedial scheme adopted by Congress would make little sense. We think it unlikely that Congress would have gone to the trouble of authorizing equitable relief for two forms of agency misconduct and monetary relief for all other forms if it had intended to make injunctions available across the board." *Id.* at 1160. Accordingly, plaintiffs' requests for injunctive relief – which venture far beyond the narrow circumstances set out in sections (g)(1) and (g)(2) of the Privacy Act – must be rejected.

This same analysis holds true for a claim brought under section (e)(7) of the Privacy Act. *See, e.g., Socialist Workers Party v. Att'y Gen. of U.S.*, 642 F. Supp. 1357, 1431 (S.D.N.Y. 1986) ("The [Privacy] Act provides for a damage remedy for (e)(7) violations and certain other violations. . . . It also provides for injunctive relief in certain circumstances, but an (e)(7) violation alone is not one of these.") (citing 5 U.S.C. § 552a(g)(4)); *see also Wabun-Inini v. Sessions*, 900 F.2d 1234, 1245 (8th Cir. 1990) ("Our examination of the record [and the relevant case law] does not cause us to conclude that the district court erred in ruling that injunctive relief was not permitted for violations of section 552a(e)(7).").[3] Despite dicta suggesting otherwise,

[3] In *Clarkson v. IRS*, 678 F.2d 1368 (11th Cir. 1982), the Eleventh Circuit concluded that "[t]he remedy for violations of all other provisions of the Act is limited to recovery of damages upon a showing that the agency acted in an intentional or willful manner." *Id.* at 1375 n.11. The Court went on to determine, however, that an agency's refusal to amend a record to remove records of First Amendment activities maintained in violation of section (e)(7) may be

this Circuit's case law is not to the contrary. To be sure, in *Haase v. Sessions*, 893 F.2d 370 (D.C. Cir. 1990) the D.C. Circuit stated – in dicta – that "[i]t is not at all clear to us that Congress intended to preclude broad equitable relief (injunctions) to prevent (e)(7) violations." *Id.* at 374 n.6 (citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)) ("Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper exercise of that jurisdiction."). And in *Scott v. Conley*, 937 F. Supp. 2d 60 (D.D.C. 2013), the court – also in dicta – cited *Hasse*, and said that "its language suggests that injunctive relief for (e)(7) violations under (g)(1)(D) *would* be available." *Id.* at 82.

The dicta in these decisions, however, does not overcome the holdings by the D.C. Circuit that injunctive relief under the Privacy Act is only available in limited circumstances not present here. Nor does this dicta overcome the Supreme Court's holdings recognizing the "well-established principle" that "a precisely drawn, detailed statute preempts more general remedies." *Hinck v. United States*, 550 U.S. 501, 506 (2007); *see also Brown v. GSA*, 425 U.S. 820, 833 (1976) ("It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading."). The Court's decision in *Hinck* is instructive. There, the petitioner challenged a statute providing that exclusive review of the decision of the Treasury Secretary to abate interest on taxes due in certain circumstances was to go to the Tax Court, pursuant to 26 U.S.C. § 6406(e), rather than to an Article III court. The Court concluded that the provision at issue was a "precisely drawn,

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enforceable under 5 U.S.C. § 552a(g)(2). *Id.* In order to bring a so-called amendment lawsuit, however, the individual plaintiff must first file and exhaust a request for administrative remedies; the failure to do so forecloses judicial relief. *See, e.g.*, *Pailes v. U.S. Peace Corps.*, 783 F. Supp. 2d 1, 7-9 (D.D.C. 2009); *Kursar v. TSA*, 581 F. Supp. 2d 7, 17 (D.D.C. 2008). Here, plaintiffs have not even attempted to bring such an administrative claim (even assuming that the Commission were an agency subject to the Privacy Act, which, as discussed *supra*, it is not).

detailed statute that, in a single sentence, provides a forum for adjudication, a limited class of potential plaintiffs, a statute of limitations, a standard of review, and authorization for judicial relief." *Hinke*, 550 U.S. at 506. The Privacy Act provides a comparably detailed statutory scheme, and accordingly, provides the exclusive remedy for violation of its provisions. Moreover, the D.C. Circuit has held that by "authoriz[ing] entry of injunctive relief in only two specific situations," the Privacy Act "precludes other forms of declaratory and injunctive relief." *Doe*, 851 F.2d at 1463; *see also Sussman*, 494 F.3d at 1122 (reaffirming *Doe* holding). That decision resolves the issue here. Injunctive relief under the Privacy Act is limited to the two specific statutory contexts set out in the Act, foreclosing the relief plaintiffs seek under section (e)(7) of the Act.

2. Plaintiffs cannot obtain injunctive relief through the APA.

Nor can plaintiffs seek injunctive relief for alleged violations of the Privacy Act through the APA. *See* Am. Compl. ¶¶ 129-33. The APA generally waives the federal government's immunity from a lawsuit "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. § 702. That waiver of immunity, however, "comes with an important carve-out[.]" *Patchak*, 567 U.S. at215. It "cannot be invoked where another statute 'expressly or impliedly forbids the relief which is sought.'" *Kelley*, 67 F. Supp. 3d at 267 (citing 5 U.S.C. § 702). As the Supreme Court has explained, "[t]hat provision prevents plaintiffs from exploiting the APA's waiver to evade limitations on suit contained in other statutes." *Patchak*, 567 U.S. at 215; *see also Block v. N.D. ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 286 & n.22 (1983); *cf.* 5 U.S.C. § 704 (permitting review of "final agency action for which there is no other adequate remedy in a court") (emphasis added). "[W]hen Congress has dealt in

particularity with a claim and [has] intended a specified remedy—including its exceptions—to be exclusive, that is the end of the matter; the APA does not undo the judgment." *Patchak*, 567 U.S. at 216 (citing *Block*, 461 U.S. at 286 & n.22).

Plaintiffs' APA claim is entirely derivative of their Privacy Act claim: they state that defendants have violated 5 U.S.C. § 552a(e)(7), and therefore have violated the APA. Am. Compl., ¶¶ 130-32. But they may not use the APA to obtain types of relief for alleged Privacy Act violations that Congress has not made part of the Privacy Act's comprehensive remedial scheme. Following these well-established principles, numerous federal courts, including those in this Circuit, have concluded that the Privacy Act precludes injunctive relief under the APA, and thus a plaintiff cannot bring an APA claim to obtain injunctive relief for an alleged Privacy Act violation. *See, e.g., Welborn*, 218 F. Supp. at, 81 n.1 ("[T]he Privacy Act would preempt Plaintiffs' APA claims because the prior statute provides the only congressionally-intended legal remedy and neither injunctive relief nor any other equitable relief is available."); *Westcott v. McHugh*, 39 F. Supp. 3d 21, 33 (D.D.C. 2014) (plaintiff "cannot bring an APA claim to obtain relief for an alleged Privacy Act violation"); *Wilson v. McHugh*, 842 F. Supp. 2d 310, 320 (D.D.C. 2012); *Doe P v. Goss*, No. 04-2122, 2007 WL 106523, at *6 n.8 (D.D.C. Jan. 12, 2007); *Reid v. Fed. Bureau of Prisons*, No. 04-1845, 2005 WL 1699425, at *2 (D.D.C. July 20, 2005); *Mittleman v. U.S. Treasury*, 773 F. Supp. 442, 449 (D.D.C. 1991); *Mittleman v. King*, No. 93-1869, 1997 WL 911801, at *4 (D.D.C. 1997)); *Arruda & Beaudoin, LLP v. Astrue*, No. 11-10254, 2013 WL 1309249, at *15 (D. Mass. March 27, 2013); *Ware v. U.S. Dep't of Interior*, No. 05-3033, 2006 WL 1005091, at *3 (D. Or. Apr. 14, 2006); *Schaeuble v. Reno*, 87 F. Supp. 2d 383, 393-94 (D.N.J. 2000) (citing *Mittleman v*, 773 F. Supp. at 449); *Diaz-Bernal v. Myers*,

758 F. Supp. 2d 106, 119 (D. Conn. 2010); *El Badrawi v. Dep't of Homeland Sec.*, 579 F. Supp. 2d 249, 280 n.35 (D. Conn. 2008).[4]

This situation differs from the circumstances the D.C. Circuit faced in *Doe v. Stephens*, 851 F.2d 1457(D.C. Cir. 1988). There, the Court concluded that a plaintiff could be awarded injunctive relief for a statutory violation under the APA; however, the alleged violation at issue in that case was of the *Veterans' Records Statute*, not the Privacy Act. *Id.* at 1467. Indeed the *Doe* Court recognized that injunctive relief was not available for a Privacy Act violation absent the specific circumstances set out in the statute. *Id.* at 1463. That holding cannot be squared with a reading where the APA provides injunctive relief for the same violations of the statute that the Court had previously held was unavailable.

In sum, plaintiffs should not be allowed to circumvent the limited equitable remedies that Congress has authorized for Privacy Act violations by improperly invoking the APA. The APA is a limited waiver of sovereign immunity that is strictly construed in favor of the Government, and it does not confer authority to grant injunctive relief for Privacy Act violations beyond the relief specifically provided in the Privacy Act.[5]

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[4] Defendants are aware of one contrary district court decision permitting a plaintiff to bring an independent APA claim based on a Privacy Act violation. *See Radack v. U.S. Dep't of Justice*, 402 F. Supp. 2d 99, 104 (D.D.C. 2005). This outlier decision is incorrect, however, as it conflicts with §§ 702 and 704 of the APA, the principles enunciated by the Supreme Court, as well as the decisions of dozens of other federal courts.

[5] Plaintiff Common Cause also cannot claim that the APA is available to it because the Privacy Act does not provide organizations a right of action. As discussed above, the Privacy Act provides a "comprehensive remedial scheme," with narrowly crafted remedies and specific requirements. Allowing entities – who have no rights under the statute – to sue under the APA merely because they are membership organizations with no rights under the Privacy Act would neuter those requirements, in contravention of Congressional intent.

C. Plaintiffs Cannot Otherwise State a Claim Under the Privacy Act.

1. Common Cause, an organization, cannot sue under the Privacy Act.

Organizations lack standing under the Privacy Act. Accordingly, Common Cause – which purports to bring this lawsuit on its own behalf and on behalf of its members – cannot sue to enforce the Privacy Act, even if the Privacy Act applied to the Commission, which it does not. Counts II and IV of the Amended Complaint should therefore be dismissed with respect to plaintiff Common Cause for this reason as well.

The Privacy Act defines an "individual" narrowly as "a citizen of the United States or an alien lawfully admitted for permanent residence." 5 U.S.C. § 552a(a)(2). Only individuals may bring a civil action against an agency to enforce the Privacy Act. *Id.* § 552a(g)(1). Corporations and organizations lack standing to bring claims under the Privacy Act, either on their own behalf or on behalf of their members. *See, e.g., Pub. Emps. for Envtl. Responsibility v. EPA*, 926 F. Supp. 2d 48, 55 (D.D.C. 2013) ("Corporations and organizations lack standing to sue under the [Privacy Act."); *SAE Prods., Inc. v. FBI*, 589 F. Supp. 2d 76, 83 (D.D.C. 2008) (dismissing Privacy Act claim brought by organization for lack of subject matter jurisdiction); *Am. Fed. of Gov. Emps. v. Hawley*, 543 F. Supp. 2d 44, 49-50, 49 n.8 (D.D.C. 2008) (holding that "only individuals have standing to bring Privacy Act claims" and further concluding that "any attempts to argue otherwise would fail, as the Privacy Act's text permits no other interpretation."); *In re Dep't of Veterans Affairs (VA) Data Theft Litig.*, No. 06-0506 (JR), 2007 WL 7621261, at *3 (D.D.C. Nov. 16, 2007) (noting that organizations cannot sue under the Privacy Act on their own behalf or on behalf of their members); *Comm. in Solidarity with People of El Salvador (CISPES) v. Sessions*, 738 F. Supp. 544, 547 (D.D.C. 1990) ("[T]he Privacy Act does not confer standing upon organizations on their own or purporting to sue on behalf of their members."); *see also Cell*

Assoc., Inc., 579 F.2d at 1157 (holding that "[i]t is clear that Cell Associates, a corporation . . . is not an 'Individual' within the meaning of the [Privacy Act]"); *Socialist Workers Party v. Att'y Gen. of the United States*, 642 F. Supp. 1357, 1431 (S.D.N.Y. 1986) ("Only an individual, not an organization, has standing to obtain a remedy under the Act.").

Even were the Privacy Act's text unclear, and it is not, *see Am. Fed. Gov. Emps.*, 543 F. Supp. 2d at 49 n.8, "[t]he legislative history leaves no room for debate on this subject." *Dresser Indus., Inc. v. United States*, 596 F.2d 1231, 1237-38 (5th Cir. 1979). As the Senate Report makes clear:

> The term "individual" means a citizen of the United States or an alien lawfully admitted through permanent residence. This terms is used instead of the term "person" throughout the bill in order to distinguish between the rights which are given to the citizen as an individual under this Act[,] and the rights of proprietorships, businesses and corporations, which are not intended to be covered by this Act.

S. Rep. No. 93-1183, 93d Cong., 2d Sess. 79, *reprinted in* 1974 U.S.C.C.A.N. 6916, 6993. Such language, as courts have repeatedly concluded, makes clear that organizations and institutions, like plaintiff Common Cause, cannot sue under the Privacy Act. *Dresser Indus.*, 569 U.S. at 1237-38; *see also Am. Fed. Gov. Emps.*, 543 F. Supp. 2d at 49 n.8.

Accordingly, Common Cause's Privacy Act claims should be dismissed.

2. The Individual Plaintiffs Fail to State a Claim Because They Have Not Plead That They Have Suffered Out-Of-Pocket Monetary Loss.

The only available relief the individual plaintiffs could seek under the Privacy Act would be monetary damages. However, the plaintiffs have not sought such relief, and even if they did, they have not plead that they have suffered an out-of-pocket monetary loss, a necessary requirement in order to bring a Privacy Act claim (except in the specific circumstances set out in 5 U.S.C. §§ 552a(g)(2)(A) and (g)(3)(A)). The Privacy Act does not create a cause of action

against the government that is the equivalent to a general negligence claim for tortious conduct under the common law. It also does not authorize recovery where a plaintiff can only show that he or she has suffered general (as opposed to specific) damages. Instead, as the Supreme Court has explained in *Cooper*, 566 U.S. at 298-99, particular standards govern any claim for money damages brought under the Privacy Act.

First, the Privacy Act requires an individual to plead and prove that he or she has suffered out-of-pocket monetary loss. The Privacy Act provides that, for any "intentional or willful" refusal or failure to comply with the Act, the United States shall be liable for "*actual damages sustained by the individual* as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000." 5 U.S.C. § 552a(g)(4)(A) (emphasis added). As a result, to recover money damages under the Act, including the $1,000 statutory award, the plaintiff must first plead and prove that he or she has individually sustained "actual damages." *Cooper*, 566 U.S. at 295-96; *Doe v. Chao*, 540 U.S. 614, 620, 627 (2004). The term "actual damages" is "limited to proven pecuniary or economic harm." *Cooper*, 566 U.S. at 299. The United States retains sovereign immunity for all non-economic harms, including "loss of reputation, shame, mortification, injury to the feelings and the like." *Id.* at 296, 299, 305. The failure to establish monetary damage is fatal to Privacy Act claims under 5 U.S.C. § 552a(g)(1)(D) and (g)(4). *Id.* at 295; *Earle v. Holder*, No. 11-5280, 2012 WL 1450574, at *1 (D.C. Cir. Apr. 20, 2012).

Second, actual damages under the Privacy Act must be pled with specificity as required by Federal Rule of Civil Procedure 9(g). Rule 9(g) requires that, "[i]f an item of special damage is claimed, it must be *specifically stated*." Fed. R. Civ. P. 9(g) (emphasis added). In *Cooper*, the Supreme Court explained that the remedial scheme in the Privacy Act parallels the remedial

scheme of certain defamation torts at common law—namely, libel per quod and slander—that require the pleading and proof of special damages. 566 U.S. at 295; *id.* at 298 ("[W]e think it likely that Congress intended 'actual damages' in the Privacy Act to mean special damages for proven pecuniary loss."). Accordingly, as with defamation claims, the actual damages used to support a Privacy Act claim must be "*specially pleaded* and proved." *Id.* at 295 (emphasis added).

Third, the concept of sovereign immunity requires the Court to construe any ambiguity regarding the scope of available damages in the Privacy Act in favor of the United States. *Cooper*, 566 U.S. at 290; *see also Tomasello v. Rubin*, 167 F.3d 612, 618 (D.C. Cir. 1999). As the Supreme Court emphasized in *Cooper* when discussing the limitations imposed by the Privacy Act:

> We have said on many occasions that a waiver of sovereign immunity must be "unequivocally expressed" in statutory text. . . . Any ambiguities in the statutory language are to be construed in favor of immunity, so that the government's consent to be sued is never enlarged beyond what a fair reading of the text requires. Ambiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government.

Cooper, 566 U.S. at 290-91 (citations omitted). Accordingly, to the extent there is any ambiguity in whether a particular category of damages alleged by plaintiffs is compensable under the Privacy Act, that doubt must be resolved in the government's favor.

None of the plaintiffs claim pecuniary injury. *See* Am. Compl. ¶¶ 1-9. Indeed, the individual plaintiffs claim only that they have "grave concern" over the purported actions of the Commission, *id.* ¶ 5, *see also id.* ¶ 6, 7, 8 or that they are "anxious" over those activities, *id.* ¶ 6. But the Supreme Court has specifically rejected the claim that mental or emotional distress can be a basis for a Privacy Act Claim. *See Cooper*, 566 U.S. at 287; *see also id.* at 304 (holding that

because the Privacy Act "does not unequivocally authorize an award of damages for mental or emotional distress," it "does not waive the Federal Government's sovereign immunity from liability for such harms."). Accordingly, plaintiffs' Privacy Act claims must be rejected for this reason as well.

III. PLAINTIFF KENNEDY'S SPECULATION THAT THE DEPARTMENT OF HOMELAND SECURITYWILL SHARE INFORMATION WITH THE COMMISSION IN VIOLATION OF THE PRIVACY ACT OR THE APA DOES NOT CREATE AN ARTICLE III INJURY OR STATE A CLAIM.

In Count III of the plaintiffs' Amended Complaint, plaintiff Kennedy speculates that the Department of Homeland Security will share information with the Commission in violation of the section 552a(b) of the Privacy Act, which limits an agency's ability to "disclose any record which is contained in a system of records." This is a high bar, which plaintiff Kennedy makes no attempt to surmount. Accordingly, this speculative assertion is insufficient to create standing or to state a claim to proceed against DHS.

Plaintiff Kennedy posits – based on remarks from individual members – that the Commission will collect information from DHS. *See e.g.*, Am. Compl. ¶ 54 (stating that Vice Chair Kobach "specifically referenced data on individuals in the hands of Defendants DHS, indicating that such data could be checked against state voter rolls to identify fraud."); *id.* ¶ 96 (Commission member Adams recommends "opening 'new information-sharing channels' between Defendants DHS and state officials in order to identify voter fraud more easily"); *id.* ¶ 106(d) (alleging that "Defendant Kobach and the Commission intend to crosscheck the voting data obtained from the states against other private information on individuals maintained by agencies throughout the federal government (including databases maintained by Defendants DHS) in order to identify individuals the Commission believes are fraudulently registered to vote.").

But plaintiff Kennedy offers no allegation that DHS will agree to share such data, much less that it would do so in a way that would violate section 552a(b) of the Privacy Act. Indeed, plaintiff Kennedy suggests the opposite. *Id.* ¶ 106(e) (While "states have previously requested that such a crosscheck be performed with DHS databases in order to determine which of their residents may be fraudulently registered to vote, Defendant Kobach has acknowledged that the federal government has always prohibited such a check."). Mere speculation about potential future violations of the law is not sufficient for Article III standing or to state a claim. *See Clapper*, 568 U.S. at 401 ("[R]espondents' theory of *future* injury is too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending.'"). That is particularly true here, as "in the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926)).

Finally, even if plaintiff Kennedy sought monetary relief – which he does not – he still would not state a claim against the Department of Homeland Security. To assert a Privacy Act claim for money damages, the only type of relief available, against an Executive Branch agency for violation of 5 U.S.C. § 552(a)(b) under 5 U.S.C. § 552a(g)(1)(D) and (g)(4), an individual must plead and prove that "the agency acted in a manner which was intentional or willful." 5 U.S.C. § 552a(g)(4); *see also Kelley v. FBI*, 67 F. Supp. 3d 240, 253-54 (D.D.C. 2014). The words "intentional" and "willful" in § 552a(g)(4) "do not have their vernacular meanings; instead, they are terms of art." *Kelley*, 67 F. Supp. 3d at 253-54 (internal citation omitted). To meet the "intentional" and "willful" standard under section 552a(g)(4), as applied in this Circuit, an agency must either commit an act "without grounds for believing it to be lawful" or act in a manner that "flagrantly disregard[s] others' rights under the Act." *Albright v. United States*, 732

F.2d 181, 189 (D.C. Cir. 1984). As discussed above, plaintiff Kennedy has offered no allegations or evidence that the Department of Homeland Security will violate the Privacy Act, much less that it would do so intentionally or willfully as would be required for money damages. Accordingly, Count III against the Department of Homeland Security should be dismissed.

IV. PLAINTIFFS CANNOT STATE A CLAIM FOR *ULTRA VIRES* ACTION ON THE PART OF THE COMMISSION.

Plaintiffs allege in Count I of the First Amended Complaint that the Commission has acted *ultra vires* by requesting data from the states as part of its research activities, which, they speculate, will be used to "engage[] in a lawless and unbounded investigation of individual voters for which there is no authorization in the Executive Order, the Constitution, or any act of Congress." Am. Compl. ¶ 112. This claim is without merit.

Plaintiffs do not clearly define the nature of their *ultra vires* claim, and "[i]n the administrative law context, ultra vires claims come in both a statutory and a non-statutory variety." *Adamski v. McHugh*, No. 14-cv-0094, 2015 WL 4624007, at *6 (D.D.C. July 31, 2015). The former generally refers to "claims that have been brought under provisions of the APA," *id.*, and since plaintiffs have already brought an explicit APA challenge, defendants presume that they bring a non-statutory claim.

The non-statutory *ultra vires* doctrine is a limited principle that may apply if "a plaintiff is unable to bring his case predicated on either a specific or a general statutory review provision." *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996). "[I]t is well-settled that this doctrine is narrow: '[t]here certainly is no question that nonstatutory review is intended to be of extremely limited scope.'" *Cause of Action Inst. v. Eggleston*, 224 F. Supp. 3d 63, 76 (D.D.C. 2016) (quoting *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 190 (D.C. Cir. 2006)); *see also Schroer v. Billington*, 525 F. Supp. 2d 58, 65 (D.D.C. 2007) ("Non-

statutory review is a doctrine of last resort."). It applies, if at all, only when a government official "acts without any authority whatever." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984) (quoting *Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 697 (1982)). Accordingly, the "agency error . . . [must] be 'so extreme that one may view it as jurisdictional or nearly so.'" *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009) (quoting *Griffith v. FLRA*, 842 F.2d 487, 493 (D.C. Cir. 1988)). "Given that very stringent standard, a[n] [*ultra vires*] claim is essentially a Hail Mary pass – and in court as in football, the attempt rarely succeeds." *Id.*

Plaintiffs do not allege facts showing that the Commission or Vice Chair Kobach "have no authority" to take the limited actions they have taken to date. *Cause of Action Inst.*, 224 F. Supp. 3d at 63. Plaintiffs assert that the Commission "has undertaken a sweeping, first-of-its-kind investigation into alleged voting misconduct by individual American citizens that will affect their most fundamental rights." Am. Compl. ¶ 106(a). But the actual facts referenced in the Amended Complaint do not support this allegation. Instead, they show that the Commission "requested" publicly available information from the states as part of its charge to study issues related to election integrity so that it may provide advice to the President—a charge contemplated by the Federal Advisory Committee Act, 5 U.S.C. app. 2 § 1 *et seq.*, and required by the Executive Order itself, Exec. Order No. 13,799. *See also EPIC*, 2017 WL 3141907, at *11 ("Defendants' request for information is just that – a request – and there is no evidence that they have sought to turn the request into a demand, or to enforce the request by any means.").

The facts alleged, even taken as true, do not establish that the Commission has actually investigated alleged voting misconduct by individual American citizens; instead, plaintiffs speculate that the Commission might do so in the future. *See, e.g.*, Am. Compl. ¶ 106(d).

Similarly, while plaintiffs allege that Vice Chair "Kobach has discussed the Commission's need to hear testimony from witnesses concerning voter fraud committed by specific individuals," *id.* ¶ 106(f), the allegations in the complaint only reference an opinion piece written by Mr. Kobach in his personal capacity. *See id.* ¶¶ 55, 56 & n.28 (alleging that "Defendant Kobach's written public statements as a paid columnist for *Breitbart* have discussed the Commission's need to hear witness testimony concerning voter fraud committed by specific individuals and that it will use data it collects from the states to "confirm" the identity of individual American voters alleged to have committed fraud.") That article, however, merely posed a future, hypothetical circumstance, stating that "[f]or example, if a witness testifies before the Commission that a certain person voted fraudulently in a given state, the Commission needs to confirm that such a person even exists on the voter rolls and actually cast a ballot in the relevant election." Kris W. Kobach, *Why States Need to Assist the Presidential Commission on Election Integrity*, Breitbart (July 3, 2017), http://www.breitbart.com/big-government/2017/07/03/kobach-why-states-need-to-assist-the-presidential-commission-on-election-integrity/ (last visited Oct. 16, 2017). The article did not say that the Commission *would* take such an investigation, and it certainly did not say that it had done so.

Plaintiffs further state that "[t]he Commission has been presented with materials claiming that multiple specific individuals have fraudulently registered or voted," Am Compl. ¶ 106(g) and that "[Vice Chair] Kobach has accused individual voters in New Hampshire of voter fraud based on materials presented to the Commission," *id.* ¶ 106(h). These assertions, however, refer to a study conducted by the New Hampshire Departments of State and Safety in September 2017. *See id.* ¶ 56 & n.28 (referencing Letter from Sec'y of State William Gardner & Commissioner John Barthelmes to Hon. Shawn N. Jasper (Sept 6, 2017), *available at*

https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/pacei-response-to-nh-speaker-jasper-from-depts-state-safety.pdf. Neither that study, nor Mr. Kobach's *Breitbart* article, which the Amended Complaint cited, identified any specific individual voters. *See id.*; *see also* Kris W. Kobach, *Kobach, It Appears That Out-of-State Voters Changed the Outcome of the New Hampshire U.S. Senate Race*, Breitbart (Sept. 7, 2017), http://www.breitbart.com/big-government/2017/09/07/exclusive-kobach-out-of-state-voters-changed-outcome-new-hampshire-senate-race/ (last visited Oct. 16, 2017). More to the point, plaintiffs do not claim that the *Commission* itself has taken any action against individual voters.

Plaintiffs' remaining allegations of *ultra vires* action apparently target perceived procedural violations on the part of the Commission. They assert that "other members of the Commission [were not given] the opportunity to approve or vet the request" to the states for data, Am. Compl. ¶ 106(b), and that Vice Chair Kobach "did not consult with the other members of the Commission" before sending a follow-up request, *id.* ¶ 106(c); *see also id.* ¶ 108 (asserting that three Commissioners "were kept in the dark about the substance of the Commission's activities following the July 19 meeting"). Plaintiffs do not, however, explain how such actions would violate the Federal Advisory Committee Act, much less establish how, even if true, such an action would constitute error that is "so extreme that one may view it as jurisdictional." *Nyunt*, 589 F.3d at 449 (citation omitted). Plaintiff also raises a hodgepodge of other factual allegations, such as the allegation that Commission member Luis Borunda resigned after the June 28, 2017, letter was sent, Am. Compl. ¶ 107, that Commission member (and Maine Secretary of State) Dunlap "stated [that] he will not comply by sending the data of Maine's voters to the Commission until he better understands 'the Commission's goal,'" *id.* ¶ 109, and that President Trump stated that "voting data on individuals will nevertheless be 'forthcoming' from every

state," *id.* ¶ 110. But the first and third allegations are irrelevant to any claim that the *Commission* has acted *ultra vires*, and the second allegation merely underscores the voluntary nature of the Commission's request.

Finally, plaintiffs assert that to obtain New York's election data pursuant to a state Freedom of Information Law request, "the Commission had to certify that it would not use the data, or information derived from it, for any 'non-election' purpose.'" Am. Compl. ¶¶ 82, 111. But, even assuming these facts are true, plaintiffs have not shown that the Commission has, in fact, used the data for a "non-election purpose," and even if it had, plaintiffs have not explained how such an action would constitute an *ultra vires* error under federal law.

Accordingly, plaintiffs have not shown that the Commission "acts without any authority whatever," *Pennhurst State Sch. & Hosp.*, 456 U.S. at 101 n.11, when it voluntarily gathers publicly available state data in connection with information gathering efforts authorized by Executive Order. *See, e.g., Int'l Ass'n of Machinists & Aerospace Workers, Dist. Lodge 166, AFL-CIO v. Griffin*, 590 F. Supp. 2d 171, 178-79 (D.D.C. 2008) (ultra vires review applies only when there is "extreme error"). This Court, therefore, should dismiss this claim.

CONCLUSION

For the aforementioned reasons, this Court should grant defendants' motion to dismiss.

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Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Director

/s/ Joseph E. Borson
CAROL FEDERIGHI
Senior Trial Counsel
KRISTINA A. WOLFE
JOSEPH E. BORSON
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044
Phone: (202) 514-1944
Email: joseph.borson@usdoj.gov

Counsel for Defendants