[ORAL ARGUMENT SCHEDULED FOR MAY 8, 2019]

No. 19-5031

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELECTRONIC PRIVACY INFORMATION CENTER,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF COMMERCE; BUREAU OF THE CENSUS,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEES

JOSEPH H. HUNT
Assistant Attorney General

MARK B. STERN
SARAH CARROLL
Attorneys, Appellate Staff
Civil Division, Room 7511
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-4027

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici. The appellant in this Court, plaintiff in the district court, is the Electronic Privacy Information Center. The appellees in this Court, defendants in the district court, are the U.S. Department of Commerce and the Bureau of the Census. No *amici* appeared before the district court, and none have entered appearances in this Court.

B. Rulings Under Review. The ruling under review is the order and accompanying memorandum opinion issued on February 8, 2019, by Judge Dabney L. Friedrich, docket numbers 16 and 17 [JA 24, 4]. The district court's opinion is published at 356 F. Supp. 3d 85.

C. Related Cases. This matter has not previously been before this Court or any other court. The Supreme Court has granted certiorari before judgment to consider a challenge by different plaintiffs to the reinstatement of a citizenship question to the 2020 Decennial Census. *See Department of Commerce v. New York*, No. 18-966, 139 S. Ct. 953 (2019) (granting certiorari). In that case, a district court enjoined reinstatement of the question on grounds that the agency's action violated the Administrative Procedure Act. *See New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019). Another district court has enjoined reinstatement of the citizenship question on grounds that it violates the Administrative Procedure Act

and the Enumeration Clause of the Constitution. *See California v. Ross*, Nos. 18-cv-1865, 18-cv-2279, 2019 WL 1052434 (N.D. Cal. Mar. 6, 2019). The Supreme Court has directed the parties in the *New York* litigation to brief the constitutional question. *See Department of Commerce v. New York*, No. 18-966 (Mar. 15, 2019) (order). *Kravitz v. U.S. Department of Commerce*, No. 18-cv-1041 (D. Md. filed Apr. 11, 2018), and *La Union Del Pueblo Entero v. Ross*, No. 18-cv-1570 (D. Md. filed Mar. 31, 2018), are other pending cases that challenge the citizenship question.

s/ Sarah Carroll
Sarah Carroll

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GLOSSARY

EPIC	Electronic Privacy Information Center
NEPA	National Environmental Policy Act of 1969
OMB	Office of Management and Budget

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction under 28 U.S.C. § 1331. The district court denied plaintiff's motion for a preliminary injunction on February 8, 2019. *See* JA 4 (Op.); JA 24 (Order). Plaintiff filed a timely notice of appeal on February 12, 2019. *See* Fed. R. App. P. 4(a)(1)(B). This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

The Electronic Privacy Information Center (EPIC) seeks to enjoin the Department of Commerce and the Census Bureau from including a question regarding citizenship on the 2020 Decennial Census. EPIC bases this request on section 208(b)(1)(A)(ii) of the E-Government Act of 2002, which requires that an agency conduct a privacy impact assessment "before . . . initiating a new collection of information." Pub. L. No. 107-347, § 208(b)(1)(A)(ii), 116 Stat. 2899, 2921, codified at 44 U.S.C. § 3501 note. EPIC urges that the government was required to have completed an assessment addressing the citizenship question prior to March 26, 2018, the date on which the Commerce Department announced that the citizenship question would be included, and that the government should be enjoined from formulating census questionnaires including that question, even though the Census Bureau regularly conducts and updates privacy impact assessments and has made clear that it will update its assessment to further reflect the citizenship question before distributing any 2020 Decennial Census questionnaires to members of the public.

The issues presented are:

1. Whether plaintiff has standing to seek an injunction prohibiting the Census Bureau from including a citizenship question on the 2020 Decennial Census based on plaintiff's assertion that the Bureau did not complete a privacy impact assessment under section 208 of the E-Government Act prior to March 26, 2018.

2. Whether plaintiff has established that it is likely to succeed on its claim that the Census Bureau "initiat[ed] a new collection of information" within the meaning of the E-Government Act when the Secretary of Commerce announced on March 26, 2018 that he had decided to include a question regarding citizenship on the 2020 Decennial Census.

3. Whether plaintiff has established that the balance of the equities would support a preliminary injunction.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Background

1. The Census Act And The 2020 Decennial Census

a. The Constitution requires that an "actual Enumeration" of the population be conducted every ten years to apportion Representatives in Congress among the States, and it vests Congress with the authority to conduct that census "in such Manner as they shall by Law direct." U.S. Const. art. I, § 2, cl. 3. The Census Act, 13

U.S.C. § 1 *et seq.*, delegates to the Secretary of Commerce the responsibility to conduct the decennial census "in such form and content as he may determine" and "authorize[s] [him] to obtain such other census information as necessary." *Id.* § 141(a). The Census Bureau, which is an agency within the Department of Commerce, performs census-related duties assigned to the Secretary and the Bureau. *See id.* §§ 2, 4, 21.

The governing statutes impose strict limitations on the use of census information. With some narrow exceptions not relevant here, "[n]either the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof," may "use the information furnished under the provisions of [Title 13] for any purpose other than the statistical purposes for which it is supplied." 13 U.S.C. § 9(a)(1). Nor may they "make any publication whereby the data furnished by any particular establishment or individual under [Title 13] can be identified" or "permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports." *Id.* § 9(a)(2), (3). The statute precludes any other "department, bureau, agency, officer, or employee of the Government" from "requir[ing], for any reason, copies of census reports which have been retained by any" establishment or individual that is required to complete a census form. *Id.* § 9(a). Government employees who disclose information in violation of section 9 are subject to criminal penalties. *See id.* § 214.

The Secretary "may furnish copies of tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent, and may make special statistical compilations and surveys" for other government agencies. 13 U.S.C. § 8(b). "In no case," however, "shall information furnished under this section be used to the detriment of any respondent or other person to whom such information relates, except in the prosecution of alleged violations" of the statutes governing the census. *Id.* § 8(c).

b. The decennial census is an event of immense national significance that requires years of planning and preparation. *See, e.g.*, JA 236 (May 2018 congressional testimony regarding preparations for the 2020 Decennial Census); U.S. Census Bureau, *2020 Census Operational Plan: A New Design for the 21st Century* 31 (Dec. 2018), https://go.usa.gov/xESEk (noting that the Census Bureau began operational design tests for the 2020 Census in 2012). The Census Act requires that the Secretary of Commerce submit to Congress "not later than 2 years before the appropriate census date, a report containing the Secretary's determination of the questions proposed to be included in" "each decennial and mid-decade census." 13 U.S.C. § 141(f)(2).

This case involves a challenge to one question on the 2020 Census. On March 26, 2018, shortly before the Census Bureau sent Congress the report required by section 141(f)(2), the Secretary of Commerce announced his decision to reinstate a question regarding citizenship to the 2020 Decennial Census questionnaire. *See* JA

248 ¶ 10.[1] In addition to the citizenship question, the 2020 Decennial Census will include questions regarding age, Hispanic origin, race, relationship between individuals in each household, sex, and housing tenure, as well as several operational questions that help administer the data-collection process. *See* U.S. Census Bureau, *Questions Planned for the 2020 Census and American Community Survey* 5-19 (Mar. 2018), https://go.usa.gov/xEJvC.

A district court in the Southern District of New York has enjoined inclusion of the citizenship question on the ground that it violates the Administrative Procedure Act. *See New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019). The Census Bureau must initiate the process of printing decennial census questionnaires by the end of June 2019, and the Supreme Court has granted certiorari before judgment to review the *New York* decision this Term. *See Department of Commerce v. New York*, No. 18-966, 139 S. Ct. 953 (2019).[2]

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[1] Questions about citizenship or country of birth (or both) were asked of everyone on all but one decennial census from 1820 to 1950, and of a substantial portion of the population on every decennial census (on the so-called "long form" questionnaire) from 1960 through 2000. *See* U.S. Census Bureau, *Measuring America: The Decennial Censuses from 1790 to 2000*, at 91 (Sept. 2002), https://go.usa.gov/xESE8; U.S. Census Bureau, *Questionnaires*, https://go.usa.gov/xESEx. A citizenship question has also been on the annual American Community Survey questionnaire, sent to approximately 1 in 38 households, since that survey's inception in 2005. *See* U.S. Census Bureau, *American Community Survey Questionnaire Archive*, https://go.usa.gov/xESEN.

[2] A district court in the Northern District of California has also enjoined the citizenship question on the ground that it violates the Administrative Procedure Act and the Enumeration Clause of the U.S. Constitution. *See California v. Ross*, Nos. 18-

2. The E-Government Act

a. Section 208 of the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. at 2921-22, codified at 44 U.S.C. § 3501 note, requires that an agency take specified steps before "initiating a new collection of information that" "will be collected, maintained, or disseminated using information technology" and "includes . . . information in an identifiable form permitting the physical or online contacting of a specific individual, if identical questions have been posed to . . . 10 or more persons, other than agencies, instrumentalities, or employees of the Federal Government." *Id.* § 208(b)(1)(A)(ii).

Before "initiating a new collection of information," an agency must "conduct a privacy impact assessment"; "ensure the review of the privacy impact assessment by the Chief Information Officer, or equivalent official, as determined by the head of the agency"; and, "if practicable, after completion of the review . . . , make the privacy impact assessment publicly available through the website of the agency, publication in the Federal Register, or other means." E-Government Act § 208(b)(1). The privacy impact assessment is to address several matters, including "what information is to be collected," "why the information is being collected," "the intended use of the agency of the information," "with whom the information will be shared," "what notice or

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cv-1865, 18-cv-2279, 2019 WL 1052434 (N.D. Cal. Mar. 6, 2019). The Supreme Court has directed the *New York* parties to brief the constitutional question. *See Department of Commerce v. New York*, No. 18-966 (Mar. 15, 2019) (order).

opportunities for consent would be provided to individuals regarding what information is collected and how that information is shared," "how the information will be secured," and "whether a system of records is being created under" the Privacy Act. *Id.* § 208(b)(2)(B)(ii); *see also* Memorandum from Joshua B. Bolten, Director, Office of Mgmt. & Budget (OMB), to Heads of Executive Departments and Agencies 4 (Sept. 26, 2003), https://go.usa.gov/xESgX (Bolten Mem.) (requiring that privacy impact assessments address these matters).

The E-Government Act is designed to, among other things, "improv[e] the ability of the Government to achieve agency missions and program performance goals," "promot[e] the use of the Internet and emerging technologies within and across Government agencies," "promot[e] better informed decisionmaking by policy makers," and "utiliz[e], where appropriate, best practices from public and private sector organizations." E-Government Act § 2(b)(4), (5), (7), (10). The purpose of section 208 in particular is to "ensure sufficient protections for the privacy of personal information as agencies implement citizen-centered electronic Government," *id.* § 208(a), by "requiring an agency to fully consider [individuals'] privacy before collecting their personal information," *EPIC v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 378 (D.C. Cir. 2017), *cert. denied*, 139 S. Ct. 791 (2019).

A principal purpose of a privacy impact assessment is thus to ensure adequate security for personal data. As OMB guidance explains, a privacy impact assessment "is an analysis of how information is handled: (i) to ensure handling conforms to

applicable legal, regulatory, and policy requirements regarding privacy, (ii) to determine the risks and effects of collecting, maintaining and disseminating information in identifiable form in an electronic information system, and (iii) to examine and evaluate protections and alternative processes for handling information to mitigate potential privacy risks." Bolten Mem. 3; *see also* OMB Circular No. A-130, *Managing Information as a Strategic Resource*, app. II at 10, https://go.usa.gov/xEJbu (Circular A-130) (explaining that agencies should update their privacy impact assessments "whenever changes to . . . information technology, changes to the agency's practices, or other factors alter the privacy risks associated with the use of . . . information technology").

b. The Census Bureau routinely conducts and updates privacy impact assessments of each information technology system through which it collects, maintains, or disseminates personally identifiable information. *See* JA 246 ¶¶ 4, 7. Current versions of the Bureau's published privacy impact assessments are available online. *See* U.S. Census Bureau, *Privacy Impact Assessments (PIAs) and Privacy Threshold Analysis (PTAs)*, https://go.usa.gov/xESEE.

When the Secretary announced his decision to reinstate a citizenship question in March 2018, the Census Bureau was in the process of reviewing the existing privacy impact assessment for a primary information technology system that the Bureau uses to administer the decennial census, known as "CEN08." *See* JA 246 ¶ 3, 247 ¶ 9. CEN08 contains several categories of information, including data collected from

decennial census respondents and personnel data for individuals who apply to work for the Census Bureau. JA 246 ¶ 3. In June 2018, the Bureau updated the privacy impact assessment for CEN08 to reflect the intent to include citizenship status among the personally identifying information to be collected during the 2020 Decennial Census. JA 248 ¶ 10. The updated assessment was published on the websites of the Department of Commerce and the Census Bureau. JA 247 ¶ 9. A July 2018 update focused on the collection of fingerprints and other personal information from potential Census Bureau employees. JA 249 ¶ 13. The Bureau updated the privacy impact assessments for other relevant information technology systems in June 2018 and published the updated assessments on its website. JA 250 ¶ 15.

In accordance with its normal procedures, the Census Bureau is in the process of updating the privacy impact assessment for CEN08 as it continues to prepare for the 2020 Decennial Census, and the Bureau is reviewing the assessments for its other information technology systems to determine whether updates are warranted. JA 247 ¶ 9, 250 ¶ 15. Although the June and July 2018 assessments themselves note the citizenship question, the Bureau has stated that it will update and (if practicable) publish a revised privacy impact assessment reflecting the citizenship question before it distributes any questionnaires. *See* JA 4.

B. Prior Proceedings

EPIC filed this lawsuit in November 2018, nearly eight months after the Secretary of Commerce announced his decision to include a question regarding

citizenship on the 2020 Decennial Census. EPIC urged that section 208 of the E-Government Act required the government to complete a privacy impact assessment specifically addressing the Secretary of Commerce's decision to reinstate the citizenship question before the Secretary announced his decision in March 2018. On that basis, plaintiff's complaint asked the district court to "[h]old unlawful and set aside the Defendants' decision to collect citizenship data through the 2020 Census, Defendants' placement of a citizenship question on the 2020 Census, and Defendants' initiation of the citizenship data collection process" and to "[o]rder Defendants to conduct, review, and publish the full and complete Privacy Impact Assessments required by" section 208. JA 51.

Nearly two months after filing suit, plaintiff moved for a preliminary injunction. Plaintiff asked the district court to enjoin defendants "from (1) implementing the Defendants' March 26, 2018 decision to" reinstate a citizenship question to the 2020 Census and from "(2) otherwise initiating any collection of citizenship status information that would be obtained through the 2020 Census." Dkt. No. 8, at 1.

The district court denied plaintiff's request for a preliminary injunction. The court held that plaintiff had not demonstrated a likelihood of success on the merits, rejecting plaintiff's assertion that the government was required to complete a privacy impact assessment addressing the citizenship question "before Secretary Ross announced his decision to add the citizenship question on March 26, 2018." JA 9.

Instead, the court explained, "the E-Government Act requires agencies to conduct (and, if practicable, release) a [privacy assessment] only before '*initiating* a new collection of information,'" "[a]nd 'initiating' the collection of information . . . means more than just announcing a decision to collect information at some point in the future." *Id.* (quoting E-Government Act § 208(b)(1)(A)(ii)). Initiating a new collection of information "requires at least one instance of obtaining, soliciting, or requiring the disclosure of information," the court held, which "will not occur until the Bureau mails its first batch of Census questionnaires to the public." JA 9-10.

The court noted that, if Congress had wished to require an agency to prepare a privacy impact assessment before the agency even *decided* to collect information, as plaintiff proposed, Congress would have "had a range of terms at its disposal." JA 12. Congress could, for example, have required that an agency conduct a privacy assessment "before 'planning' or 'providing for' a new collection of information," or "whenever an agency makes a 'determination' or 'decision' to initiate a new collection of information." *Id.* "'The fact that [Congress] did not adopt th[ese] readily available and apparent alternative[s],'" the district court reasoned, "'strongly supports rejecting' an interpretation that would substitute them for the word Congress did choose." *Id.* (quoting *Knight v. Commissioner*, 552 U.S. 181, 188 (2008)).

Although plaintiff's likely failure on the merits precluded a grant of preliminary relief, the court also "briefly address[ed]" plaintiff's "theories of irreparable harm," "none of which" it found persuasive. JA 21. The court first addressed plaintiff's

claim of informational injury—that the alleged "failure to publish adequate [privacy assessments] irreparably harms [EPIC's] members by denying them information vital to a national debate." *Id.* The court found that the relief EPIC sought would not redress that alleged harm. *Id.* As for plaintiff's allegations regarding harm to privacy interests, the district court found that any potential injury was "neither imminent nor certain." JA 22-23.

SUMMARY OF ARGUMENT

EPIC seeks to enjoin the Department of Commerce and the Census Bureau from taking any steps to include a question regarding citizenship on the 2020 Decennial Census, on the ground that the government did not complete a privacy impact assessment under section 208(b)(1)(A)(ii) of the E-Government Act specifically addressing the inclusion of a citizenship question before the Secretary of Commerce announced an intention to include the question in March 2018. The Census Bureau regularly conducts privacy impact assessments and has made clear that it will complete an updated assessment reflecting the citizenship question before distributing any 2020 Decennial Census questionnaires to the public. Plaintiff appears to argue, however, that failure to publish such a privacy impact assessment prior to March 2018 renders inclusion of the question unlawful without regard to any subsequent assessments.

1. As an initial matter, plaintiff lacks standing. The government in district court assumed for purposes of the preliminary injunction motion that plaintiff had

standing, and the district court did not address the issue *sua sponte*.[3] Because the question of standing implicates the Court's subject matter jurisdiction, it is properly considered for the first time on appeal. Doing so is particularly appropriate because this Court has already held that EPIC lacks standing to bring a claim on its own behalf under section 208 of the E-Government Act. *See EPIC v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 375 (D.C. Cir. 2017).

Plaintiff seeks to skirt that holding here by claiming associational standing on the theory that it is bringing suit on behalf of individuals on its advisory board, whom it characterizes as "members." But EPIC is not a membership organization capable of asserting associational standing under this Court's precedents. And, in any event, EPIC's board members lack standing as individuals. The New York district court decision enjoining inclusion of the citizenship question, on which plaintiff seeks to rely, rejected privacy interests as a basis for standing to challenge the citizenship question, holding that it would be "pure speculation to suggest that the Census Bureau will not comply with its legal obligations to ensure the privacy of respondents' data or that those legal obligations will be amended." *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 619 (S.D.N.Y. 2019). That holding is clearly correct, and EPIC's board members cannot predicate standing on an asserted privacy injury.

[3] The government has since moved to dismiss on standing grounds, as well as for failure to state a claim.

Equally clearly, the board members have suffered no informational injury and the requested injunction would do nothing to redress any such injury if it existed. Section 208 of the E-Government Act does not confer a broad public right to information, and members of the public do not have a cognizable interest in reviewing a privacy impact assessment regarding agency action that does not threaten their privacy. *See EPIC*, 878 F.3d at 378-79 (explaining that "section 208 . . . does not confer an[] . . . informational interest on EPIC" because "individual privacy . . . is not at stake for EPIC") (emphasis omitted). Nor would the injunction plaintiff seeks remedy the asserted informational harm. An injunction would simply prevent the census from going forward with the citizenship question. It would do nothing to provide plaintiff with additional information. *See id.* at 380 ("[H]alting collection of voter data would not 'likely' redress any informational or organizational injury, even had EPIC suffered one.").

2. Plaintiff has not demonstrated a probability of success on the merits. Plaintiff's argument turns on the assertion that agencies must complete a privacy impact assessment before making a decision to collect covered information, and that failure to do so renders the decision invalid. The statute provides, however, that the assessment should be made before an agency "initiat[es] a new collection of information." E-Government Act § 208(b)(1)(A)(ii). As the district court explained, "'initiating' the collection of information . . . requires at least one instance of obtaining, soliciting, or requiring the disclosure of information, which . . . will not

occur until the Bureau mails its first batch of Census questionnaires to the public." JA 9-10. The Census Bureau was not required to complete, internally review, and (if practicable) publish a privacy impact assessment addressing the citizenship question before the Secretary even decided to add the question. As the district court explained, section 208 "is not a general privacy law; nor is it meant to minimize the collection of personal information." JA 18-19. It simply "ensure[s] that [agencies] have sufficient protections in place before they" collect information, a purpose that is fully achieved where an agency completes a privacy impact assessment before it "actually begin[s] to gather, store, and potentially share personal information." JA 19.

3. The district court did not abuse its discretion in concluding that EPIC would not suffer irreparable harm absent a preliminary injunction, and the balance of harms and the public interest further preclude relief. As noted above, inclusion of the citizenship question does not threaten privacy interests. *See New York*, 351 F. Supp. 3d at 619. This Court has already held that EPIC's asserted informational interest in reviewing a privacy impact assessment does not even support standing, and the relief EPIC seeks here—an injunction barring inclusion of the citizenship question—would not provide plaintiff with additional information in any event.

On the other side of the ledger, issuance of a preliminary injunction would represent an extraordinary interference with the government's preparations to conduct the 2020 Decennial Census, a constitutional obligation of immense nationwide importance. The Census Bureau must begin the process of printing

census forms by the end of June, and the Supreme Court has granted certiorari before judgment to review the *New York* district court's order enjoining inclusion of the citizenship question. Plaintiff's request to enjoin inclusion of the citizenship question would prevent the Secretary of Commerce from exercising his delegated powers to "take a decennial census . . . in such form and content as he may determine," 13 U.S.C. § 141(a), on the basis of an assertion that the Census Bureau did not complete a privacy impact assessment in a timely manner. The equities strongly militate against injunctive relief.

STANDARD OF REVIEW

This Court reviews the denial of a preliminary injunction for abuse of discretion, and the Court reviews any underlying legal conclusions de novo. *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995).

ARGUMENT

I. Plaintiff Lacks Standing To Seek A Preliminary Injunction Barring Inclusion Of A Citizenship Question On The 2020 Census

A. Plaintiff Lacks Organizational Standing

An organization can sue either on a theory of organizational standing, "by showing . . . an injury to itself," or on a theory of associational standing, by showing "a cognizable injury to one or more of its members." *Kingman Park Civic Ass'n v. Bowser*, 815 F.3d 36, 39 (D.C. Cir. 2016). Circuit precedent forecloses any theory of organizational standing here: this Court has already held that "EPIC is not . . . the

type of plaintiff that can" bring suit under section 208 of the E-Government Act to remedy an alleged injury to its own asserted interests. *EPIC v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 378 (D.C. Cir. 2017), *cert. denied*, 139 S. Ct. 791 (2019). The Court held that EPIC has "no cognizable interest in a privacy impact assessment" because section 208 "does not confer any . . . informational interest on EPIC." *Id.* at 379. EPIC does not claim that it seeks to redress any other injury to the organization here. *Cf. id.* at 378 (noting that, because EPIC is an organization, "individual privacy . . . is not at stake") (emphasis omitted).

B. Plaintiff Lacks Associational Standing

Plaintiff claims in the alternative that it seeks to vindicate interests of individuals on its advisory board, whom it characterizes as "members." *See, e.g.*, JA 48-50 (alleging that defendants' actions injure both plaintiff and plaintiff's "members"). To succeed on such a theory of associational (also known as "representational") standing, a plaintiff must demonstrate that "(1) at least one of [its] members has standing to sue in her or his own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires the participation of an individual member in the lawsuit." *American Library Ass'n v. FCC*, 401 F.3d 489, 492 (D.C. Cir. 2005). Plaintiff cannot satisfy these criteria.

1. Individuals On Plaintiff's Advisory Board Would Lack Standing To Sue In Their Own Right

As discussed below, plaintiff is not a membership organization that can properly assert associational standing. *See infra* pp. 26-29. But even if individuals on plaintiff's advisory board qualified as "members" in the relevant sense, those individuals would not have standing to sue in their own right. *See American Library Ass'n*, 401 F.3d at 492 (requiring that "at least one of [an association's] members ha[ve] standing to sue in her or his own right").

a. Plaintiff urges that the inclusion of a citizenship question will harm the privacy of its "members," relying on cases addressing the allegedly wrongful disclosure of confidential information. *See* Br. 51-52. But any claim that a citizenship question threatens the privacy of plaintiff's advisory board is "pure speculation," as the District Court for the Southern District of New York held in concluding that other plaintiffs could not rely on asserted privacy interests to provide standing. *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 619 (S.D.N.Y. 2019).[4]

The threat to any privacy interest is wholly speculative because, as plaintiff recognizes (Br. 1), the Census Act severely restricts the government's use and disclosure of census-derived information. Indeed, plaintiff has conceded that "some

[4] The *New York* court found standing on alternative grounds that are not available to plaintiff here. *See* 351 F. Supp. 3d at 619 (identifying other theories of injury-in-fact); *see also California v. Ross*, Nos. 18-cv-1865, 18-cv-2279, 2019 WL 1052434, at *27-29 (N.D. Cal. Mar. 6, 2019) (similar). Whether the *New York* plaintiffs have standing is one of the issues before the Supreme Court.

of the strictest privacy laws in the U.S. apply to census data." JA 212. The Department of Commerce and the Census Bureau may not "use the information furnished under [Title 13] for any purpose other than the statistical purposes for which it is supplied," may not "make any publication whereby the data furnished by any particular establishment or individual under [Title 13] can be identified," and may not "permit anyone other than the sworn officers and employees of the Department" or the Census Bureau "to examine the individual reports." 13 U.S.C. § 9(a). Absent consent, a census report cannot "be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding." *Id.* And although the Secretary can furnish aggregate statistical information to other government agencies, those materials must "not disclose the information reported by, or on behalf of, any particular respondent," and the information "shall" "[i]n no case . . . be used to the detriment of any respondent or other person to whom such information relates." *Id.* § 8(b), (c). A government employee who discloses census-derived information in violation of 13 U.S.C. § 9 faces severe potential criminal penalties: a $250,000 fine, up to five years in prison, or both. *See id.* § 214; 18 U.S.C. § 3571(b).

In light of these protections, the *New York* court found, after an eight-day bench trial, that it would be "pure speculation to suggest that the Census Bureau will not comply with its legal obligations to ensure the privacy of respondents' data or that those legal obligations will be amended." *New York*, 351 F. Supp. 3d at 619. EPIC's brief casts no doubt on that conclusion. To the contrary, plaintiff acknowledges that

"Congress has provided assurances that information furnished to the [Census Bureau] by individuals is to be treated as confidential." Br. 1 (quoting *Baldridge v. Shapiro*, 455 U.S. 345, 354 (1982)); *see also Baldridge*, 455 U.S. at 355 (noting that the governing statutes give "[n]o discretion . . . to the Census Bureau on whether or not to disclose the information" at issue).

Plaintiff notes that the Secretary of Commerce has expressed an intent to share census-block-level data regarding voting-age populations with the Department of Justice. *See* Br. 12. EPIC fails to note, however, that such disclosure would not reveal individual data; the statute permits disclosures to other agencies only if they "do not disclose the information reported by, or on behalf of, any particular respondent." 13 U.S.C. § 8(b). Plaintiff also fails to note that the Census Bureau will apply disclosure-avoidance techniques to even the aggregate, block-level data "to ensure that information concerning particular respondents is not identifiable." *New York*, 351 F. Supp. 3d at 619. The Bureau has long used such techniques to safeguard individual respondent data when distributing block-level information on sensitive topics, such as race or marital status (or any other statistical information).

EPIC cites an academic paper contending that it might be possible in some instances to identify individuals from "person-specific" data released by hospitals, even after names and addresses are removed. *See* JA 63. But there is no indication that data released by the Census Bureau would permit this kind of identification, and any release of data that breached confidentiality would be contrary to the governing

statute. As the Supreme Court has held, "[t]he unambiguous language of the confidentiality provisions . . . indicates that Congress plainly contemplated that raw data reported by or on behalf of individuals was to be held confidential and not available for disclosure," even if individuals cannot be identified from the data. *Baldridge*, 455 U.S. at 355.[5]

Plaintiff mistakenly suggests that citizenship information will be used for law-enforcement purposes, *see* Br. 12, on the basis of snippets from a privacy impact assessment that—as the government has explained—addressed the Census Bureau's transmission of fingerprints and other information about its newly hired employees to "other federal agencies for criminal background investigations." JA 249 ¶ 13. The sharing of this information is "not linked to 2020 Decennial Census questionnaire responses." *Id.* And to the extent that plaintiff relies more broadly on "subjective[] fear[s]" that the government will misuse census data in violation of the governing statute, the *New York* court correctly rejected such subjective fears as insufficient to support standing. *New York*, 351 F. Supp. 3d at 619 (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 417 (2013)).

b. Unable to identify a cognizable threat to a privacy interest, plaintiff alleges that its advisory board members have an informational interest in reviewing the

[5] Furthermore, aggregate "tabulations and other statistical materials" disclosed under 13 U.S.C. § 8(b) cannot "be used to the detriment of any respondent or other person to whom such information relates." 13 U.S.C. § 8(c).

privacy impact assessment that plaintiff contends the Census Bureau was required to prepare by March 2018. But this Court already held that section 208 does not create a broad public right to information and that members of the public lack standing in the absence of a collection of information that threatens their privacy. *See EPIC*, 878 F.3d at 378-79 (holding that section 208 "does not confer [an] informational interest on EPIC" because EPIC is not an individual whose privacy is at stake); *see also Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016) ("A plaintiff suffers sufficiently concrete and particularized informational injury where the plaintiff alleges that: (1) it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it, and (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure.").[6]

In this way, section 208 of the E-Government Act is unlike statutes that confer informational standing by creating broad public rights to information. The Federal Election Campaign Act, for example, was designed to disclose information about political contributions, and nondisclosure is the type of injury that the Act is designed to remedy. *See Federal Election Comm'n v. Akins*, 524 U.S. 11, 20 (1998). Similarly,

[6] The part of plaintiff's opening brief discussing informational injury relies on the district court decision underlying plaintiff's prior section 208 appeal to this Court. *See* Br. 45-48. This Court, however, held that plaintiff did not have informational standing, *see EPIC*, 878 F.3d at 374-75, and the district court analysis that plaintiff quotes found no irreparable informational injury, *EPIC v. Presidential Advisory Comm'n on Election Integrity*, 266 F. Supp. 3d 297, 319 (D.D.C. 2017).

Congress enacted the Freedom of Information Act so that citizens could "be informed about 'what their government is up to,'" *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989), and an agency's failure to comply with the Act's disclosure requirements constitutes an injury sufficient to confer standing, *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449-50 (1989). The Federal Advisory Committee Act was likewise designed to allow members of the public to scrutinize the activities of advisory committees. *See id.*

Section 208 of the E-Government Act, by contrast, does not create a broad public informational interest. *See EPIC*, 878 F.3d at 378 (holding that "EPIC's asserted harm—an inability to 'ensure public oversight of record systems'"—is not "the kind the Congress had in mind" when it enacted section 208). Section 208 instead requires that agencies improve their internal decisionmaking by conducting and internally reviewing privacy impact assessments. Other provisions of the E-Government Act, by contrast, make express that their purpose is to increase transparency. *See* E-Government Act § 204(a)(1) (requiring establishment of "an integrated Internet-based system of providing the public with access to Government information and services"); *id.* § 205 (requiring that courts establish websites providing public access to case information); *id.* § 207(a) (improving "the methods by which Government information . . . is organized, preserved, and made accessible to the public").

Section 208's provision that an agency make a privacy impact assessment public, "if practicable," "after completion of" its internal review does not create an informational right in members of the public whose privacy is not threatened. *See EPIC*, 878 F.3d at 378-79; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 & n.7 (1992) (explaining that plaintiffs have standing to "enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs" but that "persons who have no concrete interests affected" have no such procedural right); *supra* pp. 18-21 (explaining that inclusion of the citizenship question inflicts no cognizable harm on plaintiff's board members).[7]

c. Even assuming that plaintiff's advisory board might have informational standing to seek to compel disclosure of a privacy impact assessment once it is prepared, that is not the relief plaintiff requested in its preliminary injunction motion: plaintiff instead seeks to "halt[] the Census Bureau's implementation of the citizenship question." Br. 2.

Halting the implementation of the citizenship question would provide EPIC with no information whatsoever. In this respect also, this suit parallels this Court's prior section 208 decision, in which EPIC claimed that the Presidential Advisory Commission on Election Integrity had violated the E-Government Act by initiating

[7] That section 208 calls for disclosure of a privacy impact assessment only "if practicable" further underscores that Congress did not intend to create a broad public informational right.

the collection of voter data without conducting a privacy impact assessment. There, as here, EPIC sought a preliminary injunction prohibiting the government from engaging in the alleged collection of information—in that case, "prohibit[ing] the defendants from collecting voter data unless and until they complete a privacy impact assessment." *EPIC*, 878 F.3d at 374. This Court held that plaintiff lacked standing to pursue that claim, noting that "halting collection of voter data would not 'likely' redress any informational or organizational injury, even had EPIC suffered one." *Id.* at 380; *see also id.* (noting that "ordering the defendants *not* to collect voter data" would "only *negate[]* the need (if any) to prepare an assessment, making it *less* likely that EPIC will obtain the information it says is essential to its mission"). Where an agency has allegedly failed to publish a required report, the remedy, if any, is to order publication of the report—not to enjoin the underlying agency action. *Cf. Common Cause v. Federal Election Comm'n*, 108 F.3d 413, 418 (D.C. Cir. 1997) (holding that a theory of informational injury did not give a plaintiff standing to request that an agency "'get the bad guys,' rather than disclose information").

Plaintiff cannot rely on its asserted interest in obtaining information as a basis for standing to challenge the agency action that it seeks to enjoin. Were it otherwise, plaintiffs could routinely seek to enjoin government action by asserting that the government had failed to publish a required report, even when the government action caused them no injury at all. *Cf. Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected

by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing."); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court.").

2. Plaintiff Is Not A Membership Organization

Even assuming that individuals on plaintiff's advisory board would have standing in their own right, plaintiff cannot proceed on a theory of associational standing because plaintiff is not a membership organization or its functional equivalent. Some history is relevant here. In its lawsuit alleging that the Presidential Advisory Commission on Election Integrity had violated section 208, plaintiff claimed in district court that it had associational standing. The district court rejected that theory because plaintiff had not carried its burden of showing that it actually "has 'members' whose interests it is seeking to represent" and because, even if individuals on plaintiff's advisory board could be considered "functionally equivalent" to members, those individuals would "not have standing to sue in their own capacities." *EPIC*, 266 F. Supp. 3d at 307-08. Plaintiff abandoned its associational-standing theory on appeal, and this Court accordingly addressed only whether plaintiff had standing to bring suit on its own behalf. *See EPIC*, 878 F.3d at 377 n.5; *id.* at 380 ("[A]s far as the record shows, [EPIC] has no traditional membership . . . . "); *see also EPIC v. U.S. Dep't of Educ.*, 48 F. Supp. 3d 1, 22 (D.D.C. 2014) (noting, in a different

case, "serious questions about whether EPIC is an association made up of members").[8]

Plaintiff nonetheless again claims that it is a membership organization that can invoke associational standing. *See, e.g.*, JA 28 ¶ 10. But to be a membership organization, an entity must "actually ha[ve] . . . members," or at least be "the functional equivalent of a traditional membership organization." *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 25 (D.C. Cir. 2002). In evaluating whether an organization is the "functional equivalent of a traditional membership organization," the Court considers whether the organization "serve[s] a specialized segment of the . . . community," whether it represents individuals with "all of the indicia of membership in an organization," and whether it has "fortunes . . . closely tied to those of its constituency." *Id.* at 26 (quoting *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 344 (1977)). The "indicia of membership" include the ability to elect the entity's leadership, service in the entity, and financing the entity's activities. *Id.*

Plaintiff does not satisfy those criteria. First, plaintiff does not serve a "specialized segment of the . . . community." *Fund Democracy*, 278 F.3d at 26. In *American Legal Foundation v. FCC*, 808 F.2d 84, 90 (D.C. Cir. 1987), this Court held that an organization with a "broadly defined mission as a 'media watchdog'" could not

[8] In *EPIC v. FAA*, 892 F.3d 1249 (D.C. Cir. 2018), this Court rejected plaintiff's reliance on associational standing without questioning whether plaintiff was a membership organization. *See id.* at 1253-55.

invoke associational standing because it "serve[d] no discrete, stable group of persons with a definable set of common interests." Instead, "consistent with [its] 'institutional commitment,'" the organization could "purport to serve all who read newspapers, watch television, or listen to the radio." *Id.* Likewise here, plaintiff claims to serve the public at large by "focus[ing] public attention on emerging privacy and civil liberties issues" and "overs[eeing] . . . government activities that impact individual privacy, free expression, and democratic values." JA 202 ¶ 4. Indeed, on its website, plaintiff declares that it "ha[s] no clients, no customers, and no shareholders." EPIC, *About EPIC*, https://epic.org/epic/about.html.

Second, unlike a genuine membership organization, whose "fortunes" are "closely tied to those of its constituency," *Fund Democracy*, 278 F.3d at 26, the alleged "constituency" here—individuals on EPIC's advisory board—are nominated for their positions simply because they are "experts in law, technology, and public policy." JA 232 § 5.01. That is categorically different from the "apple advertising commission" in *Hunt*, which functioned like a "traditional trade association" "protect[ing] and "promot[ing] . . . the Washington apple industry," and whose pecuniary interests depended directly on the revenue of Washington apple growers. 432 U.S. at 344-45. The members of plaintiff's advisory board simply have academic or professional interests in studying technology and privacy; their "fortunes" are not tied to plaintiff's in any concrete way.

In an apparent effort to give its advisory board "the indicia of membership in an organization," *Fund Democracy*, 278 F.3d at 26, EPIC revised its bylaws in January 2018, retitling the people on the board as "members" and requiring them to pay an unspecified sum of money each year, which plaintiff labels "membership dues." *See* JA 202 ¶ 5; JA 232-33. But it would "exalt form over substance," *Hunt*, 432 U.S. at 345, if a watchdog organization or think tank could transform itself into a membership organization simply by giving its board members an additional title and charging them a fee. There is no indication that the changes here are anything other than formal. For example, while the apple growers and dealers in *Hunt* were the sole source of funding for the apple commission's activities, strengthening the "indicia of membership" in that case, 432 U.S. at 344-45, there is no sign that the "dues" paid by plaintiff's advisory board are anything other than nominal.[9]

II. Plaintiff's Claims Are Not Likely To Succeed On The Merits Because Defendants Have Not "Initiat[ed] A New Collection Of Information" Under The E-Government Act

Even if plaintiff could establish standing, the district court properly rejected plaintiff's claims on the merits. The E-Government Act requires that an agency

[9] Plaintiff relies entirely on the recharacterization of its board members to demonstrate that it is a membership organization. Indeed, a tax form posted on plaintiff's website states that plaintiff did not "have members" in 2017 and that "governance decisions of the organization" are not "reserved to (or subject to approval by) members, stockholders, or persons other than the governing body." Form 990, Return of Organization Exempt From Income Tax, at 6 (part VI, section A, questions 6 and 7b), https://epic.org/epic/EPIC-2017-990.pdf.

conduct a privacy impact assessment before "initiating a new collection of information." E-Government Act § 208(b)(1)(A)(ii). Section 208 does not require that an agency conduct a privacy impact assessment before it decides it will collect information in the future, which is all the Department of Commerce did in March 2018. Instead, as the district court explained, "initiating a new collection of information" "require[s] at least one instance of 'obtaining, causing to be obtained, soliciting, or requiring the disclosure . . . of facts or opinions.'" JA 20 (quoting 44 U.S.C. § 3502(3)(A)). The Census Bureau continues to update its privacy impact assessments and will conduct, internally review, and publish (if practicable) an assessment reflecting the collection of citizenship information before it distributes any 2020 Decennial Census questionnaires. That is all the E-Government Act even arguably requires.

A. 1. The E-Government Act does not define the term "initiating," but the district court recognized (and plaintiff agrees, *see* Br. 35) that "to initiate" commonly means "to begin," "to commence," or "to start." JA 10. The E-Government Act incorporates the Paperwork Reduction Act's definition of "collection of information," which includes, in relevant part, "the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency." 44 U.S.C. § 3502(3)(A); *see also* E-Government Act § 201 ("[I]n this title the definitions under sections 3502 and 3601 of title 44, United States Code, shall apply"). Considering together the ordinary meaning of "initiating" and the statutory definition

of "collection of information," the district court explained that "an agency must conduct (and, if practicable, release) a [privacy impact assessment] before it *begins* 'obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions.'" JA 10 (quoting 44 U.S.C. § 3502(3)(A)).

Applying that standard, the district court correctly held that the government did not "initiat[e] a new collection of information" in March 2018, when the Secretary announced his "deci[sion] to collect citizenship information." JA 9-10. To the contrary, even assuming that conducting a census with a reinstated question constitutes a "new collection of information," the government will not "actually begin obtaining, soliciting, or requiring the disclosure of any citizenship data" "until the Bureau mails its first set of questionnaires to the public." JA 10-11; *see also EPIC*, 878 F.3d at 378 (explaining that section 208 "requir[es] an agency to fully consider [individuals'] privacy before *collecting* their personal information") (emphasis added).[10]

2. As the district court observed, if Congress had wished to require privacy impact assessments earlier in the process, as plaintiff suggests it should have done, Congress could have used language that appears elsewhere in the E-Government Act. For example, Congress could have required that an agency complete a privacy impact assessment "before 'planning' or 'providing for' a new collection of information,"

[10] Plaintiff appears at times to adopt this same reading of the statute. *See, e.g.*, Br. 24 (stating that plaintiff's motion for preliminary injunction seeks to "prevent the Government from initiating the collection of citizenship status information," which plaintiff elsewhere asserts the government has already done).

terms that Congress used dozens of times in other provisions of the statute. *See* JA 12 (noting that the E-Government Act contains "132 references to variations of the words 'plan' or 'provide'"). Congress likewise "could have required a [privacy impact assessment] whenever an agency makes a 'determination' or 'decision' to initiate a new collection of information." *See id.* (noting that the Act contains "40 references" to those terms). That Congress "did not adopt th[ese] readily available and apparent alternative[s]" is strong evidence that section 208 does not require privacy impact assessments at the preliminary stage plaintiff advocates. *Knight v. Commissioner*, 552 U.S. 181, 188 (2008).

Indeed, the only other use of the word "initiate" in the E-Government Act "confirms that Congress uses that word deliberately to refer to actions beyond mere decisionmaking or planning." JA 13. Section 214(c) of the Act requires that a particular OMB official "initiate pilot projects . . . on . . . activities that further the goal of maximizing the utility of information technology in disaster management." E-Government Act § 214(c). As the district court observed, this obligation clearly "would not be satisfied if the Administrator merely announced a decision to initiate a pilot project at some point in the future." JA 13. Instead, "[t]he natural interpretation of § 214(c) is that the Administrator must . . . actually commence a pilot project." *Id.*

B. 1. Plaintiff's arguments underscore the correctness of the district court's interpretation by highlighting differences between the relevant provision of section 208 and statutes that impose requirements earlier in an agency's decisionmaking

process. Plaintiff relies, for example, on differences between the two circumstances under which a privacy impact assessment is required: (1) before an agency "develop[s] or procur[es] information technology," E-Government Act § 208(b)(1)(A)(i), and (2) before an agency "initiat[es] a new collection of information," *id.* § 208(b)(1)(A)(ii). *See* Br. 38-39. Plaintiff notes that Congress imposed the former requirement early in the process: in plaintiff's words, before "developing or procuring" information technology, rather than "before 'using' or 'activating' or 'deploying' a new IT system." Br. 38. That observation highlights the absence of such language in the second subsection, which governs new collections of information: there, Congress required an assessment only before a new collection is actually "initiat[ed]," not before the collection is "developed" or "proposed" or subject to other preliminary action.

Plaintiff's analogy to the National Environmental Policy Act (NEPA), *see* Br. 42-43, is similarly misplaced: NEPA expressly requires that agencies prepare environmental impact statements at early stages of their decisionmaking, in "recommendation[s] or report[s] on proposals for legislation and other major Federal actions." 42 U.S.C. § 4332(C). As this Court has observed, NEPA's "requirement that a detailed environmental impact statement be made for a 'proposed' action makes clear that agencies must take the required hard look *before* taking that action." *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 896 F.3d 520, 532 (D.C. Cir. 2018); *see also* 40 C.F.R. § 1502.5 (Environmental Protection Agency regulation requiring that an agency "commence preparation of an environmental impact statement as close as

possible to the time the agency is developing or is presented with a proposal"). The E-Government Act contains no such requirement.

Plaintiff's reliance on the Paperwork Reduction Act, which requires agencies to take various steps regarding a "collection of information" before they begin actually soliciting or obtaining information, is likewise wide of the mark. *See* Br. 40-41. Under the Paperwork Reduction Act, agencies must establish procedures to "evaluate fairly whether *proposed* collections of information should be approved," including by "review[ing] each collection of information" before submitting it to OMB for review. 44 U.S.C. § 3506(c)(1) (emphasis added). Agencies must likewise conduct notice-and-comment proceedings "concerning each *proposed* collection of information." *Id.* § 3506(c)(2)(A) (emphasis added). And agencies must certify various facts to OMB's Director regarding "each collection of information submitted . . . for review." *Id.* § 3506(c)(3). Congress made clear that these steps should take place before a collection of information actually begins. *See id.* § 3507(a). That Congress used the word "initiate" in section 208, rather than an easily available alternative like "propose," further confirms that the government's reading is correct. *See* JA 15-16 (noting that an agency can "'propose,' 'review,' 'approve,' or 'reject' a collection of information without 'initiating' it, just as one can propose or reject a marriage without initiating one").

Plaintiff further notes that section 208 requires a privacy impact assessment when an agency "initiat[es] a new collection of information that" "will be collected,

maintained, or disseminated" using information technology. Br. 37-38 (quoting E-Government Act § 208(b)(1)(A)(ii)) (emphasis omitted). Plaintiff declares that these are "two independent events"—"the moment when an agency 'initiat[es] a new collection of information' and the later point in time at which the information '*will* be collected, maintained, or disseminated.'" Br. 38. That characterization does not aid plaintiff's argument. An agency can "initiat[e] a new collection of information" by beginning to distribute census questionnaires (assuming that the census does, in fact, constitute a "new collection of information") and then "collect[]" or "maintain[]" the information it subsequently receives (that is, the completed questionnaires) "using information technology." E-Government Act § 208(b)(1)(A)(ii).

2. EPIC's argument also fundamentally misunderstands the nature of privacy impact assessments, which are concerned in large measure with maintaining the security of private information. For example, plaintiff cites OMB guidance stating that a privacy impact assessment should be "draft[ed] . . . with sufficient clarity and specificity to demonstrate that the agency fully considered privacy and incorporated appropriate privacy protections from the earliest stages of the agency activity and throughout the information life cycle." Br. 43 (quoting Circular A-130, app. II at 10) (emphases omitted). The privacy protections to which the guidance refers are measures to protect the security of personal data. *See* Circular A-130, at 34 (explaining that a privacy impact assessment is "an analysis of how information is handled to ensure handling conforms to applicable . . . requirements regarding privacy; to

determine the risks and effects of creating, collecting, using, processing, storing, maintaining, disseminating, disclosing, and disposing of information in identifiable form in an electronic information system; and to examine and evaluate protections and alternate processes for handling information to mitigate potential privacy concerns"). As the district court explained, section 208 "is not a general privacy law; nor is it meant to minimize the collection of personal information." JA 18-19. It simply "ensure[s] that [agencies] have sufficient protections in place before they" collect information. JA 19. There is no reason Congress would have required agencies to settle on particular measures to protect the security of information before they even decide to collect it.

Moreover, as the guidance stresses, a privacy impact assessment "is not a time-restricted activity that is limited to a particular milestone or stage of the information system or [personally identifiable information] life cycles. Rather, the privacy analysis shall continue throughout" those "life cycles." Circular A-130, app. II at 10. Contrary to plaintiff's assertion, OMB's statement that an agency should begin considering privacy at early stages, and that its ultimate privacy impact assessment should demonstrate it did so, does not imply that an agency must complete a formal privacy impact assessment as soon as it is merely "*considering* whether to collect personal data." Br. 43.

III. The Other Preliminary Injunction Factors Likewise Counsel Against Relief

The district court properly concluded that plaintiff's likely failure on the merits precluded a preliminary injunction. *See, e.g.*, *Arkansas Dairy Coop. Ass'n v. USDA*, 573 F.3d 815, 832 (D.C. Cir. 2009) (explaining that, where plaintiffs were not likely to succeed on the merits, it was unnecessary to "proceed to review the other three preliminary injunction factors"). The court also correctly found, however, that plaintiff had not demonstrated a likelihood of irreparable harm, and the other preliminary injunction requirements likewise support the court's decision to deny relief.

As explained above, inclusion of the citizenship question threatens no injury-in-fact to plaintiff or its advisory board, much less irreparable harm that would warrant a preliminary injunction. *See supra* pp. 16-26. For the reasons discussed, plaintiff's privacy is not threatened. And, although plaintiff claims that it has a "uniquely strong" "informational interest" in reviewing privacy impact assessments, Br. 52, this Court held in its prior *EPIC* decision that that asserted interest did not support injury-in-fact. *See* 878 F.3d at 378-79. Furthermore, as in that case, the injunction requested here would not redress the asserted informational injury. *See id.* at 380; *supra* pp. 24-26. Nor is a preliminary injunction necessary for EPIC to obtain an updated privacy impact assessment: the Census Bureau has made clear that it will revise any necessary privacy impact assessments before it collects information from

census respondents. *See, e.g.*, JA 4. Plaintiff has never explained why it will suffer informational injury if the Census Bureau updates its privacy assessments on its anticipated schedule.

Plaintiff's claim of injury is particularly anomalous because plaintiff already has access to a great deal of information regarding both the citizenship question and the manner in which the Census Bureau protects private data. Section 208 indicates that a privacy impact assessment should address "what information is to be collected," "why the information is being collected," "the intended use of the agency of the information," "with whom the information will be shared," "what notice or opportunities for consent would be provided to individuals regarding what information is collected and how that information is shared," "how the information will be secured," and "whether a system of records is being created under" the Privacy Act. E-Government Act § 208(b)(2)(B)(ii). The agency record underlying the March 2018 decision to reinstate a citizenship question addresses many of these matters. The Census Bureau's publicly available privacy impact assessments provide additional information about the Bureau's robust data-security measures, the exceptionally narrow circumstances in which census information can be shared, and the applicability of the Privacy Act. *See, e.g.*, JA 148 (recent privacy impact assessment of CEN08).

The impact of an injunction on the government and the public interest, by contrast, would be far-reaching. The Constitution requires that an "actual

Enumeration" of the population be conducted every ten years, U.S. Const. art. I, § 2, cl. 3, and Congress has delegated to the Secretary of Commerce the responsibility and authority to conduct the decennial census "in such form and content as he may determine," 13 U.S.C. § 141(a). It would be an extraordinary exercise of a court's equitable authority to enjoin the conduct of the decennial census in the form the Secretary of Commerce has chosen. It would be particularly extraordinary to do so where the Supreme Court has granted certiorari before judgment to review the Secretary's decision this Term, and on the basis of an assertion that EPIC's board members suffer informational injury because the Census Bureau did not revise its privacy impact assessment under the E-Government Act before determining whether to include a citizenship question.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General
MARK B. STERN

s/ Sarah Carroll
SARAH CARROLL
Attorneys, Appellate Staff
Civil Division, Room 7511
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-4027
sarah.w.carroll@usdoj.gov

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9669 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ Sarah Carroll
Sarah Carroll

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Sarah Carroll
Sarah Carroll

ADDENDUM

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§ 8. Authenticated transcripts or copies of certain returns; other data; restriction on use; disposition of fees received.

. . . .

(b) Subject to the limitations contained in sections 6(c) and 9 of this title, the Secretary may furnish copies of tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent, and may make special statistical compilations and surveys, for departments, agencies, and establishments of the Federal Government, the government of the District of Columbia, the government of any possession or area (including political subdivisions thereof) referred to in section 191(a) of this title, State or local agencies, or other public and private persons and agencies, upon payment of the actual or estimated cost of such work. In the case of nonprofit agencies or organizations, the Secretary may engage in joint statistical projects, the purpose of which are otherwise authorized by law, but only if the cost of such projects are shared equitably, as determined by the Secretary.

(c) In no case shall information furnished under this section be used to the detriment of any respondent or other person to whom such information relates, except in the prosecution of alleged violations of this title.

. . . .

13 U.S.C. § 9

§ 9. Information as confidential; exception.

(a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, or local government census liaison, may, except as provided in section 8 or 16 or chapter 10 of this title or section 210 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 or section 2(f) of the Census of Agriculture Act of 1997—

(1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.

. . . .

E-Government Act of 2002 (44 U.S.C. § 3501 note)

§ 2. Findings and purposes.

(a) Findings.—Congress finds the following:

(1) The use of computers and the Internet is rapidly transforming societal interactions and the relationships among citizens, private businesses, and the Government.

(2) The Federal Government has had uneven success in applying advances in information technology to enhance governmental functions and services, achieve more efficient performance, increase access to Government information, and increase citizen participation in Government.

(3) Most Internet-based services of the Federal Government are developed and presented separately, according to the jurisdictional boundaries of an individual department or agency, rather than being integrated cooperatively according to function or topic.

(4) Internet-based Government services involving interagency cooperation are especially difficult to develop and promote, in part because of a lack of sufficient funding mechanisms to support such interagency cooperation.

(5) Electronic Government has its impact through improved Government performance and outcomes within and across agencies.

(6) Electronic Government is a critical element in the management of Government, to be implemented as part of a management framework that also addresses finance, procurement, human capital, and other challenges to improve the performance of Government.

(7) To take full advantage of the improved Government performance that can be achieved through the use of Internet-based technology requires strong leadership, better organization, improved interagency collaboration, and more focused

oversight of agency compliance with statutes related to information resource management.

(b) Purposes.—The purposes of this Act are the following:

(1) To provide effective leadership of Federal Government efforts to develop and promote electronic Government services and processes by establishing an Administrator of a new Office of Electronic Government within the Office of Management and Budget.

(2) To promote use of the Internet and other information technologies to provide increased opportunities for citizen participation in Government.

(3) To promote interagency collaboration in providing electronic Government services, where this collaboration would improve the service to citizens by integrating related functions, and in the use of internal electronic Government processes, where this collaboration would improve the efficiency and effectiveness of the processes.

(4) To improve the ability of the Government to achieve agency missions and program performance goals.

(5) To promote the use of the Internet and emerging technologies within and across Government agencies to provide citizen-centric Government information and services.

(6) To reduce costs and burdens for businesses and other Government entities.

(7) To promote better informed decisionmaking by policy makers.

(8) To promote access to high quality Government information and services across multiple channels.

(9) To make the Federal Government more transparent and accountable.

(10) To transform agency operations by utilizing, where appropriate, best practices from public and private sector organizations.

(11) To provide enhanced access to Government information and services in a manner consistent with laws regarding protection of personal privacy, national security, records retention, access for persons with disabilities, and other relevant laws.

§ 208. Privacy provisions.

(a) Purpose.—The purpose of this section is to ensure sufficient protections for the privacy of personal information as agencies implement citizen-centered electronic Government.

(b) Privacy impact assessments.—

(1) Responsibilities of agencies.—

(A) In general.—An agency shall take actions described under subparagraph (B) before—

(i) developing or procuring information technology that collects, maintains, or disseminates information that is in an identifiable form; or

(ii) initiating a new collection of information that—

(I) will be collected, maintained, or disseminated using information technology; and

(II) includes any information in an identifiable form permitting the physical or online contacting of a specific individual, if identical questions have been posed to, or identical reporting requirements imposed on, 10 or more persons, other than agencies, instrumentalities, or employees of the Federal Government.

(B) Agency activities.—To the extent required under subparagraph (A), each agency shall—

(i) conduct a privacy impact assessment;

(ii) ensure the review of the privacy impact assessment by the Chief Information Officer, or equivalent official, as determined by the head of the agency; and

(iii) if practicable, after completion of the review under clause (ii), make the privacy impact assessment publicly available through the website of the agency, publication in the Federal Register, or other means.

(C) Sensitive information.—Subparagraph (B)(iii) may be modified or waived for security reasons, or to protect classified, sensitive, or private information contained in an assessment.

(D) Copy to director.—Agencies shall provide the Director with a copy of the privacy impact assessment for each system for which funding is requested.

(2) Contents of a privacy impact assessment.—

(A) In general.—The Director shall issue guidance to agencies specifying the required contents of a privacy impact assessment.

(B) Guidance.—The guidance shall—

(i) ensure that a privacy impact assessment is commensurate with the size of the information system being assessed, the sensitivity of information that is in an identifiable form in that system, and the risk of harm from unauthorized release of that information; and

(ii) require that a privacy impact assessment address—

(I) what information is to be collected;

(II) why the information is being collected;

(III) the intended use of the agency of the information;

(IV) with whom the information will be shared;

(V) what notice or opportunities for consent would be provided to individuals regarding what information is collected and how that information is shared;

(VI) how the information will be secured; and

(VII) whether a system of records is being created under section 552a of title 5, United States Code, (commonly referred to as the "Privacy Act").

. . . .

44 U.S.C. § 3502

§ 3502. Definitions.

As used in this subchapter—

. . .

(3) the term "collection of information"—

(A) means the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for either—

(i) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or

(ii) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes; and

(B) shall not include a collection of information described under section 3518(c)(1);

. . . .