

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

ELECTRONIC PRIVACY INFORMATION CENTER,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF COMMERCE,
et al.,

Defendants.

Civ. Action No. 18-2711 (DLF)

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION FOR A PRELIMINARY INJUNCTION**

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SUMMARY

Unique among federal agencies, the U.S. Census Bureau is authorized by law to compel, from every person in the United States, their personal data including age, sex, race, ethnicity, family relationships, and homeownership status. The extraordinary reach of the Bureau into the private lives of Americans brings with it extraordinary risks to privacy. The data collected by the Bureau is not only subject to uses by other federal agencies inconsistent with the collection purpose, but may also be the target of foreign cyberattacks.¹ Accordingly, “Congress has provided assurances that information furnished to the [Census Bureau] by individuals is to be treated as confidential.” *Baldrige v. Shapiro*, 455 U.S. 345, 354 (1982). These legal assurances include the transparency and oversight provisions of the E-Government Act, which require the Census Bureau, a component of the Department of Commerce, to conduct and publish privacy impact assessments *before* initiating the collection of personal data.

But the Census Bureau has failed to live up to its obligations. The Bureau decided to add a citizenship question to the census yet refused to evaluate the privacy threats posed by the collection of citizenship status information, as required by the E-Government Act. As a result of the failure to complete mandatory privacy impact assessments, the Bureau has denied EPIC access to information vital to the important public debate over census changes, has undermined the agency’s own decisionmaking process, and has unduly jeopardized the privacy of EPIC’s members.

¹ See, e.g., *Census: Australian Bureau of Statistics Says Website Attacked by Overseas Hackers*, ABC News (Aug. 9, 2016), <https://www.abc.net.au/news/2016-08-10/australian-bureau-of-statistics-says-census-website-hacked/7712216> (“Australian Privacy Commissioner Timothy Pilgrim said he would launch an investigation into the ABS cyber attacks. ‘My first priority is to ensure that no personal information has been compromised as a result of these attacks,’ he said. ‘My office will continue to work with the ABS to ensure they are taking appropriate steps to protect the personal information collected through the census.’”).

EPIC has repeatedly warned the Census Bureau of the defective nature of the proposed census collection, yet the agency continues to move forward with this unlawful agency action. Key deadlines are fast approaching, and major privacy risks have not been addressed by the agency. And nowhere is the duty to assess privacy risks more important than the decennial census, a “unique” and compulsory collection of data that “reaches every population group, from America’s long-time residents to its most recent immigrants.” Presidential Proclamation No. 7,286, 65 Fed. Reg. 17,985, 17,985 (Apr. 1, 2000).

The Court should grant EPIC’s motion for a preliminary injunction and halt the Census Bureau’s implementation of the citizenship question until this Court has adjudicated EPIC’s E-Government Act claims on the merits.

BACKGROUND

I. The E-Government Act of 2002

In 2002, Congress passed the E-Government Act with the aim of “provid[ing] enhanced access to Government information” and “mak[ing] the Federal Government more transparent and accountable.” E-Government Act, Pub. L. No. 107-347, §§ 2(b)(9), (11), 116 Stat. 2899, 2901 (Dec. 17, 2002) (codified at 44 U.S.C. § 3501 note), *see also* 148 Cong. Rec. 11,227 (2002) (statement of Sen. Lieberman) (explaining that the Act is intended to “improv[e] the access of all citizens to the government services and information they rely on every day in their work and personal lives”). Among the “constituencies” accounted for in the Act are “the public access community,” “privacy advocates,” and “non-profit groups interested in good government.” 148 Cong. Rec. 11,228.

Section 208 of the Act requires federal agencies to conduct and publish a privacy impact assessment (“PIA”) before beginning the process of collecting personal data. E-Government Act § 208(b). Specifically, “before . . . initiating a new collection” of “information in an identifiable

form” from ten or more persons, the agency must “conduct a privacy impact assessment” and, “if practicable,” “make the privacy impact assessment publicly available through the website of the agency, publication in the Federal Register, or other means.” *Id.* § 208(b). Information is in an identifiable form if it “permits the identity of an individual to whom the information applies to be reasonably inferred by either direct or indirect means.” *Id.* § 208(d). To satisfy section 208 of the E-Government Act, a privacy impact assessment must specify:

- (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’).

E-Government Act § 208(b)(2)(B)(ii). A PIA must also be “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[.]” *Id.* § 208(b)(2)(B)(i).

II. The Department of Commerce order initiating the collection of personal data concerning citizenship status

In order to determine the apportionment of representatives “among the several States,” the Census Clause of the U.S. Constitution, as amended, requires that an “actual Enumeration” of persons be undertaken every ten years “in such Manner as [Congress] shall by Law direct.” U.S. Const. art. 1, § 2, cl. 3; *see also* U.S. Const. amend. XIV, § 2 (“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”). In furtherance of the Census Clause, Congress has directed the Secretary of Commerce to “take a decennial census of

population,” 13 U.S.C. § 141(a), and to “determine the inquiries, and the number, form, and subdivisions” of the questionnaires to be used in the census. 13 U.S.C. § 5. Congress has also established the Census Bureau as an agency under the Department of Commerce. 15 U.S.C. § 1501. The Bureau will administer the next Census in 2020. *See* U.S. Census Bureau, *2020 Census* (Oct. 19, 2018).² By law, any person who refuses to answer “any of the questions . . . submitted to him in connection with any census”—or who willfully gives a false answer to a census question—is subject to criminal penalties. 13 U.S.C. § 221(a)–(b).

On March 26, 2018, Secretary of Commerce Wilbur Ross stated that he “ha[d] determined that reinstatement of a citizenship question on the 2020 decennial census [wa]s necessary” and that he was “directing the Census Bureau to place the citizenship question last on the decennial census form.” Ex. 1, Letter from Wilbur Ross, Secretary of Commerce, to Karen Dunn Kelley, Under Secretary for Economic Affairs, at 8 (Mar. 26, 2018). No such question appeared on the 2010 Census, Ex. 16, U.S. Dep’t of Commerce, *United States Census 2010* (2009), nor has the Bureau posed a citizenship question to all census respondents since the 1950 Census. *See* Ex. 1 at 2. On March 28, 2018, the Bureau officially reported to Congress its intention to add a citizenship question to the 2020 Census. Ex. 2, U.S. Census Bureau, *Questions Planned for the 2020 Census and American Community Survey* 7 (March 2018). The version of the question presented to Congress asked: “Is this person a citizen of the United States?” *Id.* Five responses were listed: “Yes, born in the United States”; “Yes, born in Puerto Rico, Guam, the U.S. Virgin Islands, or Northern Marianas”; “Yes, born abroad of U.S. citizen parent or parents”; “Yes, U.S. citizen by naturalization – *Print year of naturalization*”; “No, not a U.S. Citizen[.]” *Id.*

² <https://www.census.gov/programs-surveys/decennial-census/2020-census.html>.

Secretary Ross stated that the citizenship question was added in response to a December 2017 request by the Department of Justice (“DOJ”), which he claimed sought citizenship data to enable “more effective enforcement” of the Voting Rights Act. Ex. 1 at 1. The DOJ’s request raised alarm and opposition from members of Congress, the attorneys general of at least twenty states, and mayors across the country. *See* Letter from Sen. Dianne Feinstein et al. to Wilbur Ross, Secretary of Commerce (Jan. 5, 2018);³ Letter from Attorneys General of Twenty U.S. States to Wilbur Ross, Secretary of Commerce (Feb. 12, 2018);⁴ U.S. Conference of Mayors, *Nation’s Mayors to Secretary Ross: Don’t Politicize Census. Remove the Citizenship Question* (Mar. 27, 2018).⁵ Moreover, Secretary Ross’s explanation for his decision is at odds with the extensive evidence adduced in *New York v. U.S. Dep’t of Commerce*, No. 18-CV-2921 (JMF), 2019 WL 190285 (S.D.N.Y. Jan. 15, 2019), including the Secretary’s subsequent admission that he communicated with Chief White House strategist Steve Bannon and Kansas Secretary of State Kris Kobach about the citizenship question months before the DOJ made a request. *See, e.g.*, Defs.’ Second Suppl. Resps. to Pls.’ First Set of Interrogatories 2–3, *N.Y. Immigration Coal. v. U.S. Dep’t of Commerce*, 18-5025 (Oct. 11, 2018);⁶ Email from Kris Kobach, Sec’y, Kan. Dep’t of State, to Wilbur Ross, Sec’y, Dep’t of Commerce (Jul. 21, 2017).⁷

³ https://www.feinstein.senate.gov/public/_cache/files/3/7/376f8dcd-7f35-4913-9e80-cd1e48e3b312/7E4C59B2988E2CC14866543EDD7E01A6.2018.01.05-census-citizenship-letter.pdf.

⁴ <https://www.brennancenter.org/sites/default/files/legal-work/Multi-State-Attorney-General-Letter-re-2020-Census.pdf>.

⁵ <https://www.usmayors.org/2018/03/27/nations-mayors-to-secretary-ross-dont-politicize-census-remove-the-citizenship-question/>.

⁶ https://ag.ny.gov/sites/default/files/second_supp_res_to_rog_1_final_2018.10.11.pdf.

⁷ <https://epic.org/foia/censusbureau/EPIC-18-03-22-Census-Bureau-FOIA-20180611-Production-Kobach-Emails.pdf>.

III. The privacy implications of collecting citizenship status information

Although the Census Bureau’s collection of personally identifiable information carries inherent privacy risks, the addition of a citizenship question to the 2020 Census poses a unique threat to privacy, personal security, and the accuracy of the United States Census. The citizenship question would compel the release of respondents’ citizenship status (and potentially immigration status), which could in turn expose individuals and their family members to investigation, sanction, and deportation. Secretary Ross’s stated basis for adding the citizenship question was to provide the DOJ with “census block level citizen voting age population (‘CVAP’) data,” Ex. 1 at 1, 8—data that is susceptible to reidentification. Ex. 3, Latanya Sweeney, *Simple Demographics Often Identify People Uniquely 2* (Carnegie Mellon Univ., Data Privacy Working Paper No. 3, 2000). The Bureau has indicated that census response data—including individuals’ citizenship status information—may be transferred in “[b]ulk” to other federal agencies “[f]or criminal law enforcement activities.” Ex. 6, U.S. Dep’t of Commerce, *Privacy Impact Assessment for the CEN08 Decennial Information Technology Division (DITD)* at 5, 7, 9 (approved Sep. 28, 2018). And in a June 12, 2018 email exchange between DOJ officials, disclosed in the course of litigation against Secretary Ross, DOJ officials “privately discussed the possibility that in the future census information could be shared with law enforcement.” Tara Bahrapour, *Trump Administration Officials Suggested Sharing Census Responses with Law Enforcement, Court Documents Show*, Wash. Post (Nov. 19, 2018);⁸ see also Decl. of Andrew Case in Supp. of Pls.’ Opp’n to Defs.’ Mot. Summ. J. at Ex. B, *San Jose v. Ross*, 18-2279 (N.D. Cal. Filed Nov. 16, 2018).

⁸ https://www.washingtonpost.com/local/social-issues/trump-administration-officials-suggested-sharing-census-responses-with-law-enforcement-court-documents-show/2018/11/19/41679018-ec46-11e8-8679-934a2b33be52_story.html.

Historically, the misuse of census data has caused considerable harm to certain populations. For example, the 1910 census law prohibited the use of information supplied by businesses for non-statistical, non-census purposes, but there was no such prohibition regarding individual citizen data. Act of Jul. 2, 1909 (to provide for the expenses of the Thirteenth December Census, and for other purposes), ch. 2, § 25, 36 Stat. 1, 9. As a result, the Census Bureau was able to disclose census records to the Department of Justice and local draft boards during World War I. Margo Anderson & William Seltzer, *Challenges to the Confidentiality of U.S. Federal Statistics, 1910-1965*, 23 J Official Stat. 1, 6–7 (2007). Similarly, in 1920, the Department of Justice requested census data about individuals’ citizenship for use in deportation cases. *Id.* at 8–9. In 1930, Congress passed a census statute prohibiting the Bureau from publishing any data identifying individuals. Act of June 18, 1929 (to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives in Congress), ch. 28, § 11, 46 Stat. 21, 25. Yet the Second War Powers Act weakened this restriction and permitted the Bureau in 1943 to provide the U.S. Secret Service with the names, addresses, occupations, and citizenship status of every Japanese American residing in the Washington, D.C. area. Margo Anderson & William Seltzer, *Census Confidentiality Under the Second War Powers Act (1942- 1947)* at 16 (Mar. 29-31, 2007) (unpublished manuscript). The Bureau also provided the War Department with census-block level data on Japanese Americans residing in western states to facilitate their internment. Comm’n on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* 104-05 (1982).⁹

In 2004, an EPIC Freedom of Information Act (“FOIA”) request revealed that the Census Bureau had provided the Department of Homeland Security with a list of cities containing more

⁹ <https://www.archives.gov/files/research/japanese-americans/justice-denied/chapter-3.pdf>.

than 1,000 Arab-American residents and a zip-code level breakdown of Arab-American populations throughout the United States, sorted by country of origin. EPIC, *Department of Homeland Security Obtained Data on Arab Americans From Census Bureau* (2004);¹⁰ see also Lynette Clemetson, *Homeland Security Given Data on Arab-Americans*, N.Y. Times (Jul. 30, 2004).¹¹ The Census Bureau and Customs and Border Protection revised their data request policies following EPIC's FOIA case. See Lynette Clemetson, *Census Policy On Providing Sensitive Data Is Revised*, N.Y. Times, (Aug. 31, 2004);¹² U.S. Customs and Border Protection, *Policy for Requesting Information of a Sensitive Nature from the Census Bureau* (Aug. 9, 2004).¹³

Many Americans remain fearful that their census responses will be “used against them or their loved ones” by federal agencies. *New York*, No. 18-CV-2921 (JMF), 2019 WL 190285, at *9. As the Census Bureau has previously acknowledged, “[q]uestions as to citizenship are particularly sensitive in minority communities and would inevitably trigger hostility, resentment and refusal to cooperate.” *Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 568 (D.D.C. 1980). This has consequences for the accuracy of census data. Fear over the misuse of census responses can lead individuals to provide false or incomplete information, which “harms the quality of the census count, and would [result in] substantially less accurate citizenship status data than are available from administrative sources.” Ex. 4, Memorandum from John M. Abowd, Chief Scientist, U.S. Census Bureau, to Wilbur L. Ross, Sec'y of Commerce, at 1 (Jan. 19, 2018); see also *Fed'n for Am. Immigration Reform*, 486 F. Supp. at 568 (“[A]ccording to the

¹⁰ <https://epic.org/privacy/census/foia/>.

¹¹ <https://www.nytimes.com/2004/07/30/us/homeland-security-given-data-on-arab-americans.html>.

¹² <https://www.nytimes.com/2004/08/31/us/census-policy-on-providing-sensitive-data-is-revised.html>.

¹³ <https://epic.org/privacy/census/foia/policy.pdf>.

Bureau; any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count.”).

IV. The lack of privacy impact assessments analyzing the citizenship question

None of the privacy impact assessments published by the Census Bureau address the question that Secretary Ross chose to add to the 2020 Census on March 26, 2018. When the Department of Commerce and the Census Bureau produce a PIA concerning Bureau activities, the assessment is published on the Bureau’s PIA webpage. Dep’t of Commerce, Office of Privacy & Open Gov’t, *U.S. Census Bureau Privacy Impact Assessments (PIAs) and Privacy Threshold Analysis (PTA)* (Oct. 1, 2018).¹⁴ The webpage lists Census Bureau systems and divisions that collect, process, and store personally identifiable information. *See id.* The page also provides links to (1) the most recent privacy impact assessment for each system, and (2) the most recent privacy threshold analysis for each system. *See id.* At least five of the CEN systems and divisions identified on the Bureau’s PIA webpage (CEN05, CEN08, CEN11, CEN13, and CEN18) will be used to collect, process, and/or store personally identifiable information obtained through the 2020 Census, including citizenship data. *See Ex. 5*, U.S. Dep’t of Commerce, *Privacy Impact Assessment for the CEN05 Field Systems Major Application System 1* (approved June 22, 2018); *Ex. 6* at 1, 5; *Ex. 7*, U.S. Dep’t of Commerce, *Privacy Impact Assessment for the CEN11 Demographic Census, Surveys, and Special Processing 1, 4* (approved June 22, 2018); *Ex. 8*, U.S. Dep’t of Commerce, *Privacy Impact Assessment for the CEN13 Center for Economic Studies (CES) 1* (approved June 26, 2018); *Ex. 9*, U.S. Dep’t of Commerce, *Privacy Impact Assessment for the CEN18 Enterprise Applications 1* (approved June 26, 2018).

EPIC, on its behalf and on behalf of its members, sought out the most recent privacy impact assessment for each CEN system slated to collect, store, or process citizenship status

¹⁴ <http://www.osec.doc.gov/opog/privacy/Census-pias.html>.

information. *See* Ex. 10, Declaration of Christopher Wolf ¶ 13 (Nov. 29, 2018); Ex. 11, Declaration of Bruce Schneier ¶ 13 (Nov. 29, 2018); Ex. 12, Declaration of Harry R. Lewis ¶ 13 (Dec. 3, 2018). Although a recent PIA exists for each CEN, three of the five do not mention personal data concerning citizenship status at all, while the other two include no analysis of how the collection of citizenship data would affect the privacy of census respondents. *See* Ex. 5 at 4–5 (failing to list “citizenship” among the information collected); Ex. 8 at 3–4 (same); Ex. 9 at 3–4 (same); Ex. 6 (failing to analyze the privacy implications of collecting citizenship status information); Ex. 7 (same).

EPIC, on its behalf and on behalf of its members, sought out the privacy impact assessment for “CEN05 Field Systems Major Application” by visiting the Census Bureau PIA webpage. Ex. 5; *see, e.g.*, Ex. 10 ¶ 13. CEN05 is a “major information system” that “plans, organizes, coordinates, and carries out the Bureau’s field data collection program for sample surveys, special censuses, the Economic Census, and the Decennial census.” Ex. 5 at 1. As such, the Bureau intends to use this system to collect personal data concerning citizenship status for the 2020 Census. *Id.* Nonetheless, the most recent PIA for CEN05 does not acknowledge that the system would handle citizenship information or analyze the privacy impact of that data collection. *See generally id.*

EPIC, on its behalf and on behalf of its members, sought out the privacy impact assessment for “CEN08 Decennial Information Technology Division (DITD)” by visiting the Census Bureau PIA webpage. Ex. 6; *see, e.g.*, Ex. 10 ¶ 13. CEN08 is a Census Bureau division and information system “consist[ing] of both general support systems and major applications,” including applications that “process response data from census tests and 2020 Census operations[.]” Ex. 6 at 1. As such, the Bureau intends to use this system to collect personal data

concerning citizenship status for the 2020 Census. *See id.* Although the most recent PIA for CEN08 acknowledges the existence of the citizenship question through a single word (“Citizenship”), *id.* at 5, the PIA contains no specific analysis of the impact of collecting citizenship status information. *See generally id.*

EPIC, on its behalf and on behalf of its members, sought out the privacy impact assessment for “CEN11 Demographic Census, Surveys, and Special Processing” by visiting the Census Bureau PIA webpage. Ex. 7; *see, e.g.*, Ex. 10 ¶ 13. CEN11 is an information system “comprised of components that support the Demographic Directorate business functions” and includes “a Commercial off the Shelf (COTS) product used by Census Bureau demographic programs for data access, transformation, reporting, and statistical analysis.” Ex. 7 at 1. As such, the Bureau intends to use this system to collect personal data concerning citizenship status for the 2020 Census. *See id.* Although the most recent PIA for CEN08 acknowledges the existence of the citizenship question through a single word (“Citizenship”), *id.* at 5, the PIA contains no specific analysis of the impact of collecting citizenship status information. *See generally id.*

EPIC, on its behalf and on behalf of its members, sought out the privacy impact assessment for “CEN13 Center for Economic Studies (CES)” by visiting the Census Bureau PIA webpage. Ex. 8; *see, e.g.*, Ex. 10 ¶ 13. The “data holdings [of CEN13] include census and survey data which may contain name, gender, age, date of birth etc. from across the Census Bureau[.]” Ex. 8 at 1. As such, the Bureau intends to use this system to collect personal data concerning citizenship status for the 2020 Census. *See id.* Nonetheless, the most recent PIA for CEN13 does not acknowledge that the system would handle citizenship information or analyze the privacy impact of that data collection. *See generally id.*

EPIC, on its behalf and on behalf of its members, sought out the privacy impact assessment for “CEN 18 Enterprise Applications” by visiting the Census Bureau PIA webpage. Ex. 9; *see, e.g.*, Ex. 10 ¶ 13. CEN18 is an information system “used to deliver applications to end users of the U.S. Census Bureau network.” Ex. 9 at 1. The system maintains “survey and census information,” including “personal names, personal addresses, personal contact information (telephone numbers, email address), business information, occupation, medical information, tax information, etc.” *Id.* As such, the Bureau intends to use this system to collect personal data concerning citizenship status for the 2020 Census. *See id.* Nonetheless, the most recent PIA for CEN18 does not acknowledge that the system would handle citizenship information or analyze the privacy impact of that data collection. *See generally id.*

V. EPIC’s prior warnings to the Census Bureau of E-Government Act noncompliance

Prior to this motion, EPIC notified the Census Bureau on four occasions that the Bureau was in violation of the section 208 of the E-Government Act. On August 7, 2018, EPIC filed comments with the Bureau about the proposed questions for the 2020 Census. Ex. 13, EPIC, *Comments of EPIC to the U.S. Census Bureau* (Aug. 7, 2018); *see also Proposed Information Collection; Comment Request; 2020 Census*, 83 Fed. Reg. 26,643 (June 8, 2018). EPIC stated that the Bureau had violated its PIA obligations under section 208 and that the Bureau had “not undertaken an appropriate analysis of the privacy risks of the citizenship question.” Ex. 13 at 5. On October 2, 2018, EPIC published a statement to the Senate Committee on Homeland Security and Government Affairs concerning the nomination of Steven D. Dillingham to be Director of the Census. Ex. 14, Statement from EPIC to Ron Johnson, Chairman, Senate Comm. on Homeland Sec. & Gov’t Affairs, et al. at 4 (Oct. 2, 2018). EPIC told the Committee (and the Bureau) that the Bureau was in violation of section 208 and “should conduct a new PIA dealing specifically with the issues raised by the citizenship question.” *Id.* at 4. On Oct. 29, 2018, EPIC

filed an amicus brief in *New York*, No. 18-CV-2921 (JMF), 2019 WL 190285, a case challenging the addition of the citizenship question to the 2020 Census. EPIC explained the Bureau's PIA obligations in detail and warned that "the Bureau has not adequately justified the collection of citizenship information or shown that it has implemented the safeguards necessary to protect the data that it collects." Br. of EPIC as Amicus Curiae in Supp. Pls.' Position at Trial at 20, *New York*, No. 18-CV-2921 (JMF), 2019 WL 190285 (S.D.N.Y. Jan. 15, 2019). Finally, on Nov. 20, 2018, EPIC filed a (and subsequently served) a complaint in this case alleging that the agency had "failed to conduct any of the privacy analysis required by the E-Government Act for a major collection of personally identifiable information." Complaint ¶ 63 (Nov. 2, 2018), ECF No. 1.

To date, the Census Bureau has not updated the PIAs for CEN05, CEN08, CEN11, CEN13, or CEN18 to include an analysis of how a citizenship question would impact privacy. The Department of Commerce recently reiterated, in a filing with the Office of Management and Budget ("OMB"), that the Bureau intends to collect citizenship status information through the 2020 Census. *See* Submission for OMB Review, 83 Fed. Reg. 67,213, 67,216 (Dec. 28, 2018). The Bureau has also stated that the "printing, addressing, and mailing of Internet invitations, reminder cards or letters, and paper questionnaire packages" for the 2020 Census will begin by June 2019. U.S. Census Bureau, *2020 Census Operational Plan: A New Design for the 21st Century* at 89 (Sept. 2017).¹⁵

VI. EPIC's lawsuit under the E-Government Act

On November 20, 2018, EPIC filed the instant suit against the U.S. Census Bureau and the Department of Commerce (collectively, "the Defendants," "the Census Bureau," or "the Bureau"). *See* Complaint. EPIC alleged that the Defendants violated the E-Government Act and

¹⁵ <https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan3.pdf>.

Administrative Procedure Act (“APA”) in two respects. First, EPIC alleged that the Defendants took unlawful action in violation of 5 U.S.C. § 706(2) and E-Government Act § 208(b) by initiating a new collection of information without first producing required privacy impact assessments. Complaint ¶¶ 64–70 (Count I). Second, EPIC alleged that the Defendants unlawfully withheld production of required privacy impact assessments in violation of 5 U.S.C. § 706(1) and E-Government Act § 208(b). Complaint ¶¶ 71–76 (Count II). EPIC also brought a claim under the Declaratory Judgment Act, 28 U.S.C. § 2201(a). Complaint ¶¶ 77–78 (Count III). As relief, EPIC sought, *inter alia*, the suspension and revocation of the citizenship question pending completion and publication of the required privacy impact assessments. Complaint pp. 26–27.

VII. The ruling of the court in *New York v. U.S. Department of Commerce*

On January 15, 2019, the U.S. District Court for the Southern District of New York entered a final judgment in *New York v. U.S. Department of Commerce*, No. 18-CV-2921 (JMF), 2019 WL 190285, a separate lawsuit challenging the addition of the citizenship question under the APA, the Enumeration Clause of the U.S. Constitution, and the Fifth Amendment of the U.S. Constitution. The court, finding “no dispute” that Secretary Ross’s decision to add a citizenship question constituted “final agency action,” concluded that the Secretary “violated the APA in several respects” and “violated the public trust.” *Id.* at *4, *89. Accordingly, the court “vacat[ed] Secretary Ross’s decision to add a citizenship question to the 2020 census questionnaire” and “enjoin[ed] Defendants from implementing Secretary Ross’s March, 26, 2018 decision or from adding a question to the 2020 census questionnaire without curing the legal defects identified” by the Court. *Id.* at *125. However, the Defendants have appealed the court’s judgment to the Second Circuit, Notice of Appeal, *New York*, No. 18-CV-2921 (JMF) (filed Jan. 17, 2019), and there remains pending litigation in the Supreme Court concerning a possible deposition of

Secretary Ross in the same case. *In re Dep't of Commerce*, No. 18-557, 2018 WL 5458822, at *1 (U.S. Nov. 16, 2018) (granting Defendants' mandamus petition to review a discovery order).

ARGUMENT

The Court should grant EPIC's motion for a preliminary injunction to preserve the status quo and to allow a full adjudication of EPIC's claims on the merits. EPIC has shown that it is entitled to such an injunction. In making the final decision to add a citizenship question to the 2020 Census, the Census Bureau initiated a new collection of personal information and triggered its obligation under the E-Government Act to conduct and publish new privacy impact assessments. Yet the Bureau has failed to publish the required assessments. As a result, EPIC and its members face irreparable harm: EPIC cannot evaluate the privacy impact of the citizenship question or scrutinize any privacy protections that might be put in place for the collection of citizenship status information. The privacy of EPIC's members is also unduly threatened by the Bureau's actions, which violate key privacy safeguards established by Congress. Finally, EPIC has Article III standing to bring this case because its members have suffered concrete and particularized injuries redressable by the Court.

I. EPIC IS ENTITLED TO A PRELIMINARY INJUNCTION.

EPIC is entitled to a preliminary injunction because the Census Bureau's failure to publish legally required privacy impact assessments causes EPIC irreparable harm and conflicts with the public interest. A plaintiff is entitled to a preliminary injunction upon "a clear showing" that "(1) [the plaintiff] 'is likely to succeed on the merits'; (2) [the plaintiff] 'is likely to suffer irreparable harm in the absence of preliminary relief'; (3) the 'balance of equities' tips in [the plaintiff's] favor; and (4) 'an injunction is in the public interest.'" *Navajo Nation v. Azar*, 292 F. Supp. 3d 508, 512 (D.D.C. 2018) (quoting *Winter v. NRDC*, 555 U.S. 7, 22 (2008)).

EPIC readily satisfies each of these factors. Accordingly, the Court should enjoin the Defendants from taking any steps to collect citizenship information via the 2020 Census in order to “preserve the relative positions of the parties until a trial on the merits can be held.” *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018) (quoting *University of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)).

A. EPIC is likely to succeed on the merits of its claims.

EPIC is likely to prevail on its claims that the Census Bureau violated the E-Government Act and Administrative Procedure Act by failing to conduct and publish privacy impact assessments for the nationwide collection of citizenship status information. Under section 208 of the E-Government Act, federal agencies must “conduct,” “ensure the review of,” and “make publicly available” a detailed privacy impact assessment “*before . . . 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.

E-Government Act § 208(b)(1) (emphasis added). Agencies must also “update[]” existing PIAs “where a system change creates new privacy risks.” Ex. 15, Joshua B. Bolten, Dir., OMB, Executive Office of the President, M03-22, Memorandum for Heads of Executive Departments and Agencies, Attachment A § II.B.2 (Sept. 26, 2003) (“OMB Guidance”).

The Census Bureau has failed to satisfy these PIA obligations with respect to each of the five Bureau systems that would contain or be used to disseminate citizenship status information.

1. *The Census Bureau is required to publish privacy impact assessments that fully address the privacy risks of collecting citizenship status information.*

The Census Bureau's collection of citizenship status information is a "new collection" of personally identifiable information ("PII") that triggers the agencies' PIA obligations. E-Government Act § 208(b)(1). An individual's citizenship status constitutes PII because it "permit[s] the identity of [the] individual to whom the information applies to be reasonably inferred," E-Government Act § 208(d), when collected in "combination [with] gender, race, birth date, geographic indicator, and other descriptors" demanded on the census. Ex. 15, OMB Guidance § II.A.2. The Bureau concedes as much. *See, e.g.*, Ex. 6 at 5 (listing "Citizenship" data among the "General Personal Data" handled by the CEN08 system).

The Census Bureau's collection of personal data concerning citizenship status is also "new." The Bureau did not collect citizenship status information through the 2010 Census, *see* Ex. 16, which is the only other decennial census conducted since the E-Government Act was enacted in 2002. Secretary Ross himself acknowledged that the Bureau was undertaking a "reinstatement of a citizenship question" that had not been asked on "census surveys of the entire United States population" since 1950. Ex. 1 at 2, 8. Finally, in deciding to collect citizenship status information from every person in the United States, the Bureau has imposed "identical reporting requirements" on "10 or more persons." E-Government Act § 208(b)(1)(A)(ii)(II); *see also* 13 U.S.C. § 221(a)–(b) (requiring all persons over 18 to respond to census questions). The Bureau is thus required to conduct and publish a fully compliant PIA for each IT system that it will deploy to collect, maintain, or disseminate citizenship status information. *See* E-Government Act § 208(b)(1); Ex. 5 at 1; Ex. 6 at 1, 5; Ex. 7 at 1, 4; Ex. 8 at 1; Ex. 9 at 1.

Similarly, the Census Bureau's order initiating the collection of citizenship status information triggers the agencies' obligation to update and republish existing PIAs because "new

information in identifiable form [is being] added to a collection” that “raises the risks to personal privacy[.]” Ex. 15, OMB Guidance § II.B.2. On March 26, 2018—the day that the Bureau initiated a new collection of citizenship status information—each of the five IT systems slated to collect, maintain, or disseminate citizenship information was covered by a prior PIA. *See* Ex. 17, U.S. Dep’t of Commerce, *U.S. Census Bureau Privacy Impact Assessments (PIAs) and Privacy Threshold Analysis (PTA)* (Dec. 13, 2016). But none of those prior PIAs addressed the extraordinary privacy implications of collecting and processing citizenship status information from every person in the United States, as now required by the Secretary of Commerce. The Bureau was simply not engaged in such data collection prior to the March 26, 2018 order. By initiating the addition of “new information in identifiable form” to multiple Census Bureau IT systems, the Bureau therefore triggered its obligation to fully update the existing PIAs for those systems. Ex. 15, OMB Guidance §§ II.B.2.i.

Indeed, the “new privacy risks” of adding a citizenship question to the 2020 Census are profound. Ex. 15, OMB Guidance § II.B.2. Citizenship status information is every bit as sensitive as “health or financial information,” and the collection of citizenship data presents unique threats to privacy and personal security. *Id.* § II.B.2.i. Disclosure of citizenship status to law enforcement agencies or the public at large could potentially expose individuals and their family members to investigation, sanction, retaliation, and deportation. Secretary Ross has expressly stated that the Census Bureau will transfer to the Department of Justice “census block level citizenship voting age population (‘CVAP’) data,” Ex. 1 at 1, 8—data that is susceptible to reidentification. Ex. 3 at 2. The Bureau has also indicated that individuals’ citizenship status information may be transferred in “[b]ulk” to other federal agencies “[f]or criminal law enforcement activities.” Ex. 6 at 5, 7, 9. These planned transfers of personal data are “significant

new uses [and] exchanges of information in an identifiable form” and constitute a “merg[ing], centraliz[ing], [or] match[ing]” of citizenship data with PII in “other databases[.]” Ex. 15, OMB Guidance §§ II.B.2.d, g.

Given the novel privacy risks posed by the collection and dissemination of citizenship status information, *id.* § II.B.2, the Census Bureau is required to fully update and republish the PIA for each IT system that will handle personal data concerning citizenship status. *See id.*; Ex. 5 at 1; Ex. 6 at 1, 5; Ex. 7 at 1, 4; Ex. 8 at 1; Ex. 9 at 1.

2. *The Census Bureau was obligated to publish the required privacy impact assessments by March 26, 2018.*

The deadline for the Census Bureau to conduct and publish the required privacy impact assessments was March 26, 2018. That is the day Secretary Ross ordered the addition of a citizenship question to the 2020 Census, thereby initiating a new collection of citizenship status information.

An agency must conduct, review, and publish a valid privacy impact assessment before “initiating a new collection of information[.]” E-Government Act § 208(b)(1)(A). The word “initiate” means “[c]ommence, start; originate; introduce; inchoate.” *Kelso v. U.S. Dep’t of State*, 13 F. Supp. 2d 1, 9 (D.D.C. 1998) (quoting Black’s Law Dictionary 705 (Special Deluxe 5th ed. 1979)). Title 44, in which the E-Government Act is codified, specifically distinguishes between “initiating” a process (*i.e.*, commencing or introducing it) and “carrying out” or “completing” a process. 44 U.S.C. § 3902(a) (“The Director of the Government Publishing Office shall have no authority to prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation[.]”). The phrase “collection of information” 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[.]

44 U.S.C. § 3502(3)(A); *see also* E-Government Act § 201 (“Except as otherwise provided, in this title the definitions under sections 3502 and 3601 of title 44, United States Code, shall apply.”).

An agency need not actually acquire “facts or opinions” for the collection of information to exist, so long as the process of “obtaining,” “soliciting,” or “requiring . . . disclosure” is underway. 44 U.S.C. § 3502(3)(A); *see also* 44 U.S.C. § 3506(c) (requiring agencies to “review each collection of information” well before any information has been solicited or added to the collection). The OMB further defines “collection of information” to include “a *plan* and/or an instrument calling for the collection or disclosure of information[.]” 5 C.F.R. § 1320.3(c) (emphasis added); *see also EPIC v. Presidential Advisory Comm’n on Election Integrity*, 878 F.3d 371, 380 (D.C. Cir. 2017) (noting that an agency must “prepare a privacy impact assessment [if] it *plans* to collect information” (emphasis added)). Even an “algorithm” can constitute a “collection of information” under 44 U.S.C. § 3502(3)(A) if it “impose[s] a ‘reporting requirement’” on members of the public. *Benkelman Tel. Co. v. FCC*, 220 F.3d 601, 607 (D.C. Cir. 2000) (quoting *Saco River Cellular, Inc. v. FCC*, 133 F.3d 25, 33 (D.C. Cir. 1998)).

Accordingly, the Census Bureau initiated a new collection of information when—on March 26, 2018—Secretary Ross ordered the “reinstatement of a citizenship question on the 2020 decennial census.” Ex. 1 at 8. With the Secretary’s announcement “directing the Census Bureau to place the citizenship question . . . on the decennial census form,” *id.*, the Bureau both

commenced the “soliciting” and “obtaining” of citizenship status information, 44 U.S.C. § 3502(3)(A), and introduced a definite “plan . . . calling for the collection or disclosure of information,” 5 C.F.R. § 1320.3(c) (construing § 3502(3)(A)). By the same token, the Bureau introduced a new requirement that census respondents disclose “facts or opinions” to “third parties or the public.” 44 U.S.C. § 3502(3)(A). Persons over 18 must respond to a citizenship question on the census, 13 U.S.C. § 221(a)–(b), and the aggregate facts provided by census respondents are disclosed to the public and third parties. *See* U.S. Census Bureau, *Decennial Census of Population and Housing* (2014)¹⁶ (publishing aggregate responses to 2010 Census questions); Ex. 1 at 8 (stating that the citizenship question “is necessary to provide complete and accurate data in response to the DOJ request” for citizenship data); U.S. Census Bureau, *Subjects Planned for the 2020 Census and American Community Survey* 52 (Mar. 2017)¹⁷ (listing six outside agencies that would use census-collected citizenship data); Submission for OMB Review, 83 Fed. Reg. at 67,221 (promising that if state officials “indicate a need for tabulations of citizenship data . . . the Census Bureau will make a design change to include citizenship as part of that data”).

Because the Census Bureau initiated a new collection of information of citizenship status information on March 26, 2018, the Bureau was obligated to conduct and publish the required privacy impact assessments by that date.

3. *The Census Bureau has unlawfully failed to publish the required privacy impact assessments for more than nine months.*

The Census Bureau failed to produce valid privacy impact assessments by March 26, 2018, and still refuses to correct its unlawful conduct despite EPIC’s repeated warnings and the

¹⁶ <https://www.census.gov/programs-surveys/decennial-census/data/datasets.2010.html>.

¹⁷ <https://www2.census.gov/library/publications/decennial/2020/operations/planned-subjects-2020-ac.pdf>.

initiation of this lawsuit. To satisfy section 208 of the E-Government Act, an agency must publish a PIA specifying, *inter alia*, “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”; and “how the information will be secured[.]” E-Government Act § 208(b)(2)(B)(ii). A PIA also “must identify what choices the agency made regarding an IT system or collection of information as a result of performing the PIA.” Ex. 15, OMB Guidance § II.C.1.b. Moreover, a PIA must be “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[.]” E-Government Act § 208(b)(2)(B)(i); *see also* Ex. 15, OMB Guidance § II.C.1.b (“The depth and content of the PIA should be appropriate for the nature of the information to be collected and the size and complexity of the IT system.”). Where a PIA is required for a “major information system[.]”¹⁸—for example, a Census Bureau system used to collect and process hundreds of millions of census responses—the PIA “should reflect more extensive analyses of:”

1. the consequences of collection and flow of information,
2. the alternatives to collection and handling as designed,
3. the appropriate measures to mitigate risks identified for each alternative and,
4. the rationale for the final design choice or business process.

Ex. 15, OMB Guidance § II.C.2.a.ii. In such cases, a mere “checklist or template” will not satisfy an agency’s PIA obligation. *Id.* § II.C.2.a.iii.

The Census Bureau has failed to publish a valid PIA for any of the five systems that the Bureau proposes to collect, maintain, or disseminate citizenship status information. With respect

¹⁸ A “major information system” includes any “system or project that requires special management attention because of its: (i) importance to the agency mission, (ii) high development, operating and maintenance costs, (iii) high risk, (iv) high return, (v) significant role in the administration of an agency’s programs, finances, property or other resources.” Ex. 15, OMB Guidance § II.A.4.

to three systems (CEN05, CEN13, and CEN18), the Bureau's failure is total. Although these systems would be used to maintain or process response data from the 2020 Census, the most recent PIA for each system does not even acknowledge that citizenship status information is among the data "to be collected." E-Government Act § 208(b)(2)(B)(ii); *see also* Ex. 5 at 1, 4–6; Ex. 8 at 1, 3–4; Ex. 9 at 1, 3–4. Consequently, the Bureau has entirely failed to assess the privacy impact of maintaining and processing personal data concerning citizenship status with these systems. *See* Ex. 5; Ex. 8; Ex. 9.

The current PIAs for two other Census Bureau systems (CEN08 and CEN11) acknowledge, with a single word, that citizenship status information will be collected. *See* Ex. 6 at 5 ("Citizenship"); Ex. 7 at 4 ("Citizenship"). Yet neither PIA includes any analysis—let alone a "commensurate" analysis, § 208(b)(2)(B)(i)—of how the collection of this new information will impact privacy. For example, neither PIA explains "why [citizenship] information is being collected" via the census for the first time in 70 years or what "the intended use of the agency of [citizenship] information" is. § 208(b)(2)(B)(ii); *see also* Ex. 6; Ex. 7. Nor do the PIAs address the privacy "consequences of collection and flow of [citizenship] information"; "the alternatives to collection and handling [of citizenship information]"; "the rationale for the final design choice" to include citizenship information; or "what choices the agency made . . . as a result of performing the PIA." Ex. 15, OMB Guidance §§ II.C.1.b, a.ii; *see also* Ex. 6; Ex. 7. The CEN08 PIA even indicates—without explanation or analysis—that citizenship status and other census data could be transferred in "[b]ulk" to federal agencies "[f]or criminal law enforcement activities." Ex. 6 at 7, 9. Yet the privacy risks posed by this alarming (and illegal) possibility are nowhere addressed.

The Census Bureau was obligated to publish valid PIAs for its collection of citizenship status information by March 26, 2018. The Bureau failed to do so. After nine months and multiple filings by EPIC notifying the Bureau of its unlawful conduct, it has still failed to do so. The Bureau is therefore in violation of section 208 of the E-Government Act.

4. *EPIC's suit satisfies the requirements for an action under the APA.*

EPIC is entitled to bring this suit under the Administrative Procedure Act because EPIC has been “adversely affected or aggrieved” by the Census Bureau’s violations of the E-Government Act, 5 U.S.C. § 702, which this Court has the power to review. 5 U.S.C. §§ 704, 706. Because EPIC is a membership organization, Ex. 18, *Bylaws of the Electronic Privacy Information Center* §§ 2.02, 5.01–5.05 (amended Jan. 26, 2018), it is aggrieved to the same extent that EPIC’s members are. *See Pharm. Research & Mfrs. of Am. v. Thompson*, 259 F. Supp. 2d 39, 56 (D.D.C. 2003), *aff’d*, 362 F.3d 817 (D.C. Cir. 2004) (finding membership organization that “represent[ed] the interests of urban Indian Centers” therefore “ha[d] prudential standing to assert” an APA claim on behalf of those centers).

First, EPIC is aggrieved by the Census Bureau’s unlawful initiation of a new collection of information without first completing the required privacy impact assessments. *Id.*; *see also* Complaint ¶¶ 64–70. By “direct[ing] the Census Bureau to place the citizenship question . . . on the decennial census form” after “a thorough review of the legal, program, and policy considerations,” Ex. 1 at 8, Secretary Ross took “final agency action” on behalf of the Bureau. § 704. “There is no dispute the Secretary Ross’s decision constitutes ‘final agency action’ reviewable under the APA.” *New York*, No. 18-CV-2921 (JMF), 2019 WL 190285; *see also Kravitz v. Dep’t of Commerce*, No. GJH-18-1041, 2018 WL 6830226, at *1, *6 (D. Md. Dec. 28, 2018) (analyzing the “U.S. Census Bureau’s decision to include a citizenship question on the

2020 Census” as a “final agency action”). This action was final because it “mark[ed] the consummation of the agency’s decisionmaking process” and is a decision “by which rights or obligations have been determined, or from which legal consequences will flow[.]” *Ipsen Biopharmaceuticals, Inc. v. Hargan*, 334 F. Supp. 3d 274, 277 (D.D.C. 2018) (quoting *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016)); *see also* 13 U.S.C. § 221(a)–(b) (requiring all persons over 18 to respond to census questions). Moreover, the Bureau’s final agency action violated section 208 of the E-Government Act, a provision whose purpose is to “is to ensure sufficient protections for the privacy of personal information[.]” § 208(a); *see also EPIC*, 878 F.3d at 378 (explaining that section 208 of the E-Government Act “protect[s] *individuals* . . . by requiring an agency to fully consider their privacy before collecting their personal information” (emphasis in original)). EPIC is thus aggrieved by the Bureau’s action, which unlawfully imperils the privacy of EPIC’s members and has denied them information to which they are legally entitled. *See* Ex. 10 ¶¶ 11–15; Ex. 11 ¶¶ 11–15; Ex. 12 ¶¶ 11–15. Finally, this Court has the power to “hold unlawful and set aside” the Bureau’s action because it is “not in accordance with law” and was carried out “without observance of procedure required by law[.]” § 706(2); *see also* § 704.

Second, EPIC is “aggrieved” by the Census Bureau’s unlawful failure to complete the required privacy impact assessments for the collection of citizenship status information. An agency “unlawfully with[olds]” action under § 706 the APA when it fails to take a “discrete action that the agency has a duty to perform.” *W. Org. of Res. Councils v. Zinke*, 892 F.3d 1234, 1241 (D.C. Cir. 2018) (citing *Norton v. Southern Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 62–63 (2004)). Here, the Bureau failed to take the discrete actions of conducting, reviewing, and publishing required privacy impact assessments before “initiating a new collection of

information,” as mandated by section § 208(b) of the E-Government Act. These duties are “nondiscretionary” and amount to “specific, unequivocal command[s].” *W. Org. of Res. Councils*, 892 F.3d at 1241 (quoting *SUWA*, 542 U.S. at 63–64); *see also* E-Government Act § 208(b)(1)(A) (“An agency shall take actions described under subparagraph (B)[.]”). By failing to conduct or publish PIAs for the collection of citizenship status information, the Bureau has failed to “ensure sufficient protections for the privacy of personal information,” § 208(a), and failed to “fully consider the[] privacy” of individuals whose personal data would be collected. *EPIC*, 878 F.3d at 378. EPIC is thus aggrieved by the Bureau’s inaction, which unlawfully imperils the privacy of EPIC’s members and has denied them information to which they are legally entitled. *See* Ex. 10 ¶¶ 11–15; Ex. 11 ¶¶ 11–15; Ex. 12 ¶¶ 11–15. Finally, this Court has the power to “compel agency action unlawfully withheld or unreasonably delayed” under 5 U.S.C. § 706(1). As the D.C. Circuit recently explained, “the court can undertake review [under § 706(1)] as though the agency had denied the requested relief and can order an agency to either act or provide a reasoned explanation for its failure to act.” *Friedman v. FAA*, 841 F.3d 537, 545 (D.C. Cir. 2016) (quoting *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987)).

Because EPIC is aggrieved by the Census Bureau’s violations of the E-Government Act and the APA, and because this Court has the power to review and remedy those violations, EPIC “is likely to succeed on the merits” of its claims. *Navajo Nation*, 292 F. Supp. 3d at 512 (quoting *Winter*, 555 U.S. at 22).

B. EPIC will suffer irreparable harm absent an injunction.

EPIC and its members will “suffer irreparable harm in the absence of preliminary relief” in three ways. *Navajo Nation*, 292 F. Supp. 3d at 512 (quoting *Winter*, 555 U.S. at 22). First, EPIC and its members will be irreparably harmed—and have already been harmed—by the

Census Bureau’s failure to disclose “information [that] is highly relevant to an ongoing and highly public matter.” *EPIC v. Presidential Advisory Comm'n on Election Integrity*, 266 F. Supp. 3d 297, 319 (D.D.C.), *aff'd on other grounds*, 878 F.3d 371. Second, EPIC and its members will be irreparably harmed—and have already been harmed—by “the failure of decision-makers” to take privacy “factors into account in the way that” the E-Government Act mandates. *Jones v. D.C. Redevelopment Land Agency*, 499 F.2d 502, 512 (D.C. Cir. 1974). Third, EPIC and its members will be irreparably harmed if the Bureau is permitted invade the privacy of EPIC’s members by unlawfully compelling disclosure of their citizenship status.

First, the Census Bureau’s failure to publish valid privacy impact assessments irreparably harms EPIC by denying EPIC’s members information vital to the national debate over the inclusion of the citizenship question on the 2020 Census. As the D.C. Circuit has emphasized, “stale information is of little value[.]” *Judicial Watch, Inc. v. DHS*, 895 F.3d 770, 778 (D.C. Cir. 2018) (quoting *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988)); *see also Byrd v. EPA*, 174 F.3d 239, 244 (D.C. Cir. 1999) (“Byrd’s injury, however, resulted from EPA’s failure to furnish him with the documents until long after they would have been of any use to him.”). Thus, “the non-disclosure of information to which a plaintiff is entitled, under certain circumstances itself constitutes an irreparable harm; specifically, where the information is highly relevant to an ongoing and highly public matter.” *EPIC*, 266 F. Supp. 3d at 319; *see also EPIC v. DOJ*, 416 F. Supp. 2d 30, 41 (D.D.C. 2006) (“EPIC will also be precluded, absent a preliminary injunction, from obtaining in a timely fashion information vital to the current and ongoing debate surrounding the legality of the Administration's warrantless surveillance program.”); *Washington Post v. DHS*, 459 F. Supp. 2d 61, 75 (D.D.C. 2006) (“Because the urgency with which the plaintiff makes its FOIA request is predicated on a matter of current

national debate, due to the impending election, a likelihood for irreparable harm exists if the plaintiff's FOIA request does not receive expedited treatment.”).

The collection of citizenship status information through the 2020 Census is inarguably “an ongoing and highly public matter.” *EPIC*, 266 F. Supp. 3d at 319. The Census Bureau has resolved to collect the citizenship status of hundreds of millions of persons nationwide, a controversial decision that has been the subject of tens of thousands of articles of interest to the public. See “Census” and “Citizenship”, Google News (Jan. 13, 2019)¹⁹ (identifying more than 57,000 news articles containing the words “Census” and “Citizenship”). The Bureau’s decision to initiate the collection of citizenship status information is the subject of at least six other federal lawsuits,²⁰ one of which was significant enough to warrant the Supreme Court’s granting of a mandamus petition to review an interlocutory order. *In re Dep’t of Commerce*, No. 18-557, 2018 WL 5458822, at *1. And the window for public debate is rapidly closing: the Bureau has stated that the “printing, addressing, and mailing of Internet invitations, reminder cards or letters, and paper questionnaire packages” for the 2020 Census must begin by June 2019. U.S. Census Bureau, *2020 Census Operational Plan: A New Design for the 21st Century*, *supra*, at 89; see also *New York*, No. 18-CV-2921 (JMF), 2019 WL 190285, at *88 (noting that “the Census Bureau ‘need[s] to begin printing the 2020 census questionnaire’ in June 2019”); Ex. 19, *Census Progress Report: Hearing Before the H. Comm. on Gov’t Oversight & Reform*, 115 Cong. 9

¹⁹ <https://www.google.com/search?q=%22Census%22+and+%22Citizenship%22&tbm=nws>.

²⁰ See *New York*, No. 18-CV-2921 (JMF), 2019 WL 190285; *New York Immigration Coal. v. Dep’t of Commerce*, No. 18-CV-5025 (JMF), 2019 WL 190285 (S.D.N.Y. Jan. 15, 2019); *Kravitz v. Dep’t of Commerce*, No. GJH-18-1041, 2018 WL 6830226; *La Union del Pueblo Entero v. Ross*, No. GJH-18-1570, 2018 WL 5885528 (D. Md. Nov. 9, 2018); *California v. Ross*, No. 18-1865 (N.D. Cal. filed March 26, 2018); *City of San Jose v. Ross*, No. 18-2279 (N.D. Cal. filed Apr. 17, 2018).

(2018) (statement of Ron Jarmin, Dir., U.S. Census Bureau) (“The physical printing of the majority of the paper materials for the 2020 Census will begin in June 2019.”).

The privacy impact assessments that the Census Bureau has unlawfully withheld are also “highly relevant” to the ongoing debate over the planned citizenship question. *EPIC*, 266 F. Supp. 3d at 319. In failing to publish valid assessments, the Bureau has denied EPIC and its members critical details about the methods and systems used to process personal data concerning citizenship status, leaving EPIC “little if any information about prospective [] harms and potential mitigating measures.” *Winter*, 555 U.S. at 23. The Bureau has thus irreparably harmed—and will continue to harm—the ability of EPIC’s members to learn about, analyze, and debate the privacy implications of collecting citizenship status information through the census. *See* Ex. 10 ¶¶ 14–15 (“I am unable to determine whether the Census Bureau has fully considered or addressed the risks to my privacy, even as the Bureau begins to develop a new collection of personal data that will contain my citizenship status.”); Ex. 11 ¶¶ 14–15 (same); Ex. 12 ¶¶ 14–15 (same). The requested injunction would avoid further such harm to EPIC by ensuring that the Bureau does not acquire any personal data concerning citizenship status before this Court has fully assessed the Bureau’s compliance (or non-compliance) with the E-Government Act. Absent such an injunction, EPIC will suffer harm “beyond remediation.” *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). EPIC’s ability to meaningfully debate or challenge a planned act of government—here, the acquisition of citizenship information—cannot be restored after the government has already acted.

Second, the Census Bureau’s failure to conduct and publish valid privacy impact assessments causes irreparable harm to EPIC and its members by undermining the “protections for the privacy of personal information” established by Congress. E-Government Act § 208(a).

The E-Government Act “protect[s] *individuals* . . . by requiring an agency to fully consider their privacy before collecting their personal information.” *EPIC*, 878 F.3d at 378 (emphasis in original). When an agency bypasses the privacy safeguards set out in section 208, the agency unlawfully endangers the privacy of those whose personal data will be collected. The E-Government Act is directly analogous to National Environmental Policy Act (“NEPA”) in this way. The NEPA requires federal agencies to publish an environment impact statement (“EIS”) before taking “actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). The D.C. Circuit has long held that a violation of the NEPA’s EIS requirement—like a violation of the E-Government Act’s PIA requirement—works an irreparable harm by undermining the agency’s decisionmaking process:

The harm against which NEPA's impact statement requirement was directed was not solely or even primarily adverse consequences to the environment; such consequences may ensue despite the fullest compliance. Rather NEPA was intended to ensure that decisions about federal actions would be made only after responsible decisionmakers had fully adverted to the environmental consequences of the actions, and had decided that the public benefits flowing from the actions outweighed their environmental costs. Thus, the harm with which courts must be concerned in NEPA cases is not, strictly speaking, harm to the environment, but rather the failure of decision-makers to take environmental factors into account in the way that NEPA mandates. And, for purposes of deciding whether equitable relief is appropriate, we think that this harm matures simultaneously with NEPA's requirements, *i.e.*, at the time the agency is, under NEPA, obliged to file the impact statement and fails to do so.

Jones, 499 F.2d at 512 (citing *Calvert Cliffs’ Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1115 (1971); *Lathan v. Volpe*, 455 F.2d 1111, 1116–17 (9th Cir. 1971)); accord *Illinois Commerce Comm’n v. ICC*, 848 F.2d 1246, 1259 (D.C. Cir. 1988). So too here: the failure of the Bureau to take privacy risks into account when reviewing its proposed collection, as mandated by the E-Government Act, works an irreparable harm to those whose citizenship status information will be collected (including EPIC’s members). That harm has already “mature[d],”

in that the Bureau was “obliged to file the impact statement and fail[ed] to do so.” *Jones*, 499 F.2d at 512.

Moreover, a preliminary injunction will ensure that compliance with the E-Government Act “take[s] place before there has been an ‘irretrievable commitment of resources,’” *Jones*, 499 F.2d at 512 (quoting *Lathan*, 455 F.2d at 1121), such as the “printing, addressing, and mailing of Internet invitations, reminder cards or letters, and paper questionnaire packages” in June 2019. U.S. Census Bureau, *2020 Census Operational Plan: A New Design for the 21st Century*, *supra*, at 89. As the D.C. Circuit has explained regarding environmental impact statements:

The purpose of equitable intervention in cases in which federal agencies have failed to comply with NEPA's requirements is to ensure that such compliance will take place before there has been an ‘irretrievable commitment of resources.’ It may be that preparation of the statement will, in the end, not move the agency from adherence to decisions it has already made. But it is not for the courts to prejudge. So long as the status quo is maintained, so long as the environmental impact statement is not merely a justification for a fait accompli, there is a possibility that the statement will lead the agency to change its plans in ways of benefit to the environment. It is this possibility that the courts should seek to preserve.

Jones, 499 F.2d at 512–13 (quoting *Lathan*, 455 F.2d at 1121); *cf. Pub. Employees for Env'tl. Responsibility v. United States Fish & Wildlife Serv.*, 189 F. Supp. 3d 1, 2 (D.D.C. 2016) (quoting *Realty Income Tr. v. Eckerd*, 564 F.2d 447, 456 (D.C. Cir. 1977)) (“[W]hen an action is being undertaken in violation of NEPA, there is a presumption that injunctive relief should be granted against continuation of the action until the agency brings itself into compliance.”). For the same reasons, the Court should issue a preliminary injunction here to preserve the possibility that the Census Bureau will “change its plans in ways of benefit to” privacy. *Jones*, 499 F.2d at 512–13. Without such an injunction, the Bureau’s decisionmaking process—and the privacy interests of EPIC’s members—will be further harmed “beyond remediation.” *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297.

Finally, EPIC and its members will be irreparably harmed if the Census Bureau unlawfully acquires personal data concerning citizenship status from EPIC's members. The nonconsensual or compelled disclosure of one's personal information to a party who is not legally entitled to it constitutes irreparable harm. *United States v. Hubbard*, 650 F.2d 293, 314 n.73 (D.C. Cir. 1980) (finding a "serious threat of irreparable harm to the property and the privacy interests advanced" where the government seized documents from a church containing personal information of the church's members); *see also Hirschfeld v. Stone*, 193 F.R.D. 175, 187 (S.D.N.Y. 2000) ("The harm at issue here—disclosure of confidential information—is the quintessential type of irreparable harm that cannot be compensated or undone by money damages."); *Nat'l Fed'n of Fed. Emps. v. Greenberg*, 789 F. Supp. 430, 438 (D.D.C. 1992) ("[I]rreparable injury flows not only from the employee's failure to complete the form or to complete it in a manner that the Department deems unacceptable; the intrusive nature of the compelled disclosure itself also constitutes such injury."), *vacated on other grounds*, 983 F.2d 286 (D.C. Cir. 1993).

Absent an injunction blocking the Census Bureau's acquisition of citizenship status information and printing of census forms, EPIC's members will necessarily suffer such harm. Just two weeks ago, the Bureau reiterated its earlier decision to collect citizenship status information in a filing to the OMB. Submission for OMB Review, 83 Fed. Reg. at 67,216 ("The proposed questions for the 2020 Census questionnaire include age, citizenship, Hispanic origin, race, relationship, sex, and tenure.").

The Census Bureau's collection of citizenship status information will irreparably harm EPIC by denying it information critical to an ongoing nationwide debate, by disregarding privacy safeguards established by Congress, and by unlawfully compelling disclosure of personal data

concerning citizenship status from EPIC's members. Each day that the Bureau fails to produce valid privacy impact assessments, the census printing deadline (and the census itself) approaches, and the irreparability of the harms suffered by EPIC increases. The Court should therefore enter a preliminary injunction to prevent irreparable injury to EPIC and to ensure adequate time for a final decision on the merits of EPIC's claims.

C. The equities and the public interest weigh in favor of an injunction.

The Court should enter a preliminary injunction as an equitable matter because “the ‘balance of equities’ tips in [the plaintiff’s] favor” and “‘an injunction is in the public interest.’” *Navajo Nation*, 292 F. Supp. 3d at 512 (quoting *Winter*, 555 U.S. at 22). These final two factors of the four-factor test “merge when the Government is the opposing party.” *Id.* (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

EPIC has a powerful equitable interest in avoiding the irreparable harms that will result if the Census Bureau continues its unlawful collection of citizenship status information without first conducting and publishing valid privacy impact assessments. *See* Part I.B, *supra*. For example, the equities favor enabling EPIC to review to the agency’s assessment of privacy risks *before* the citizenship question is fully implemented. *See EPIC*, 266 F. Supp. 3d at 319 (holding that a denial of “information [that] is highly relevant to an ongoing and highly public matter” works an irreparable harm). Indeed, EPIC’s informational interest in this matter is uniquely strong. EPIC is the premiere organization in the country working to enforce agencies’ E-Government Act obligations, Complaint ¶ 8 (collecting EPIC PIA cases), and EPIC has been a leading advocate of census privacy protections for nearly two decades. *Id.* ¶ 9. As an organization dedicated to both privacy and open government, EPIC is uniquely equipped to evaluate the Bureau’s PIAs and to inform EPIC’s members and the public about the Bureau’s

compliance with the E-Government Act. *See* Complaint ¶ 6; EPIC, *EPIC FOIA Cases* (Sep. 17, 2018)²¹ (collecting dozens of EPIC Freedom of Information Act cases resulting in the disclosure of thousands of privacy-related records). EPIC also has a strong equity in ensuring E-Government Act compliance “before there has been an ‘irretrievable commitment of resources’” by the Bureau, *Jones*, 499 F.2d at 512 (quoting *Lathan*, 455 F.2d at 1121), and EPIC’s members have an urgent need to avoid the unlawful collection of their citizenship status information. *See* Ex. 10 ¶ 15; Ex. 11 ¶ 15; Ex. 12 ¶ 15.

The equities also favor an injunction because the Census Bureau has ignored four prior warnings from EPIC, including the filing of the Complaint in this matter, concerning the Bureau’s noncompliance with section 208. First, on August 7, 2018, EPIC explained in comments to the Census Bureau that the Bureau had “not undertaken an appropriate analysis of the privacy risks of the citizenship question.” Ex. 13 at 5. Second, on October 2, 2018, EPIC published a statement to the Senate Committee on Homeland Security & Government Affairs urging—in advance of a hearing on the Census—that the Bureau “should conduct a new PIA dealing specifically with the issues raised by the citizenship question.” Ex. 14 at 4. Third, on Oct. 29, 2018, EPIC filed an amicus brief in *New York v. Department of Commerce* arguing that “the Bureau has not adequately justified the collection of citizenship information or shown that it has implemented the safeguards necessary to protect the data that it collects.” Br. of EPIC as Amicus Curiae in Supp. Pls.’ Position at Trial at 20, *New York*, No. 18-CV-2921 (JMF), 2019 WL 190285. Finally, on Nov. 20, 2018, EPIC filed a (and subsequently served) a Complaint in this case alerting the Defendants that they had “failed to conduct any of the privacy analysis required by the E-Government Act for a major collection of personally identifiable information.”

²¹ <https://www.epic.org/foia/>.

Complaint ¶ 63. Despite these repeated warnings from EPIC over the past five months, the Bureau has taken no apparent measures to remedy its noncompliance with section 208. Instead, the Bureau has doubled down on its collection of citizenship status information. *See* Submission for OMB Review, 83 Fed. Reg. at 67,216.

There are few, if any, equities “to overcome the much more substantial countervailing harms” to EPIC. *League of Women Voters of United States v. Newby*, 838 F.3d 1, 13 (D.C. Cir. 2016)” Although federal agencies and the public have an interest in the sound administration of federal law, “there is generally no public interest in the perpetuation of unlawful agency action.” *Id.* at 12 (citing *Pursuing America’s Greatness v. FEC*, 831 F.3d 500, 511-12 (D.C. Cir. 2016); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013)). To the contrary: “there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations.” *Id.*

Neither the Census Bureau nor the public at large has a cognizable interest in the collection of citizenship status information absent the required assessments of privacy risks. Congress has already balanced the competing interests of privacy and data collection by enacting E-Government § 208(b), which prohibits collection without assessment. The Court should not hesitate to equitably enforce that Congressionally-struck balance. *Cf. Realty Income Tr.*, 564 F.2d at 456 (“[W]hen an action is being undertaken in violation of NEPA, there is a presumption that injunctive relief should be granted against continuation of the action until the agency brings itself into compliance.”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609–10 (1952) (Frankfurter, J., concurring). (“When Congress itself has struck the balance, has defined the weight to be given the competing interests, a court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable discretion.”).

Even if the Census Bureau were legally permitted to collect citizenship status information without first evaluating the attendant privacy risks, the public interest would strongly disfavor such a collection. Permitting federal agencies to collect personal data without first conducting a privacy impact assessment endangers privacy and curtails public understanding of government decisionmaking. That is why Congress imposed a government-wide PIA requirement in the first place: “[t]o make the Federal Government more transparent and accountable” and “to ensure sufficient protections for the privacy of personal information[.]” E-Government Act §§ 2(b)(9), 208(a). Nowhere is the duty to assess privacy risks more important than the decennial census, a “unique” and compulsory collection of data that “reaches every population group, from America’s long-time residents to its most recent immigrants.” Presidential Proclamation No. 7,286, 65 Fed. Reg. at 17,985. Moreover, the public interest leans heavily against the implementation of the citizenship question because—as the Census Bureau’s chief scientist recently noted—adding the question would be “very costly, harms the quality of the census count, and would [result in] substantially less accurate citizenship status data than are available from administrative sources.” *See* Ex. 4 at 1.

The public interest also favors injunctive relief at this stage because there is likely to be an “irretrievable”—and potentially wasteful—“commitment of resources” by the Census Bureau absent a preliminary order halting the citizenship question. *Jones*, 499 F.2d at 512 (quoting *Lathan*, 455 F.2d at 1121). As the Bureau has argued, “finalizing the decennial census questionnaire is time-sensitive,” and it is “important to resolve as soon as possible” the key legal issues concerning the 2020 Census. Petition for a Writ of Mandamus at 15, *In re Dep’t of Commerce*, No. 18-557, 2018 WL 5458822 (U.S. Nov. 16, 2018). If no injunction issues prior to final judgment in this case, the Bureau will likely expend significant resources in the meantime

implementing the citizenship question—a question that this Court may later deem unlawful. *See, e.g.,* U.S. Census Bureau, *2020 Census Operational Plan: A New Design for the 21st Century*, *supra*, at 89 (noting that the “printing, addressing, and mailing of Internet invitations, reminder cards or letters, and paper questionnaire packages” for the 2020 Census will begin by June 2019).

Because the balance of the equities and the public interest strongly favor a halt to the Census Bureau’s implementation of the citizenship question, the Court should grant EPIC’s motion for a preliminary injunction. The requested injunction is carefully tailored to address the privacy implications of the citizenship question and poses no impediment to other census operations or questions.

II. EPIC HAS ARTICLE III STANDING IN THIS MATTER.

EPIC has Article III standing to bring this suit because EPIC’s members have suffered “concrete injur[ies]-in-fact that [are] fairly traceable to the defendant[s’] action[s] and capable of being redressed by a favorable judicial decision.” *Conference of State Bank Supervisors v. Office of Comptroller of Currency*, 313 F. Supp. 3d 285, 294 (D.D.C. 2018) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). For the purposes of determining Article III jurisdiction, courts must accept the plaintiff’s “view of the law” on which the plaintiff’s claims are based, *FEC v. Akins*, 524 U.S. 11, 21 (1998), so long as it is nonfrivolous. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998) (“It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts’ statutory or constitutional power to adjudicate the case.”).

EPIC is a membership association. Ex. 18 §§ 2.02, 5.01–5.05. As such, EPIC has standing to sue on behalf of its members whenever “(1) [EPIC’s] members would otherwise have standing to sue in their own right; (2) the interests [EPIC] seeks to protect are germane to the

organization’s purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Sorenson Commc’ns, LLC v. FCC*, 897 F.3d 214, 224 (D.C. Cir. 2018) (quoting *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 596 (D.C. Cir. 2015)) (internal quotation marks omitted). EPIC readily satisfies these criteria here.

First, EPIC’s members would have standing to bring this suit on their own because they have suffered judicially redressable injuries caused by the Census Bureau that are “concrete, particularized, and actual or imminent.” *Conference of State Bank Supervisors*, 313 F. Supp. 3d at 295 (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013)). EPIC’s members sought and were denied information which the Government is required to disclose under section 208 of the E-Government Act: namely, “comprehensive and meaningful” assessments of how the collection, processing, and storage of their personal citizenship information will affect their privacy. Ex. 15, OMB Guidance § II.C.2.a.b; *see also* Ex. 10 ¶¶ 11–15; Ex. 11 ¶¶ 11–15; Ex. 12 ¶¶ 11–15. These injuries are concrete: “a plaintiff suffers an ‘injury in fact’ when”—as here—“the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.” *Akins*, 524 U.S. at 21 (quoting *Public Citizen v. DOJ*, 491 U.S. 440, 449 (1989)); *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549–50 (2016) (reiterating the *Akins–Public Citizen* rule that a denial of information that Congress has ordered disclosed “constitute[s] injury in fact”). These injuries are particularized: EPIC’s members each have an individual interest in obtaining the information unlawfully denied to them. *See Public Citizen*, 491 U.S. at 449–50 (“The fact that other citizens or groups of citizens might make the same complaint after unsuccessfully demanding disclosure . . . does not lessen appellants’ asserted injury[.]”); *EPIC*, 878 F.3d at 378 (emphasizing that section 208 of the E-Government Act “protect[s] individuals”). These injuries are actual: the Government was required—and failed—to disclose

the information sought by EPIC's members *before* initiating a collection of personal data concerning citizenship status. E-Government Act § 208(b)(1)(A). And these injuries would be redressed by favorable decision of this Court ordering the Census Bureau (1) to conduct and publish legally sufficient privacy impact assessments and (2) to halt the process of collecting personal citizenship information unless and until such PIAs have been completed. *See* Compl. p. 27 ("Requested Relief").

Second, the interests EPIC seeks to protect through this suit—the right to privacy and access to information about government data collection activities—are the very core of EPIC's organizational mission. *E.g.*, Ex. 18 § 1.02 ("The Corporation is organized for the charitable and educational purposes of promoting personal privacy and constitutional rights."); Ex. 10 ¶ 4 ("Central to EPIC's mission is oversight of government activities that impact individual privacy, free expression, and democratic values."); EPIC, *EPIC FOIA Cases*, *supra*. EPIC therefore satisfies the requirement of "pertinence between litigation subject and organizational purpose." *Ctr. for Sustainable Econ.*, 779 F.3d at 597.

Finally, neither the claims nor the relief at issue in this case require the direct participation of EPIC's members. "Member participation is not required where a 'suit raises a pure question of law' and neither the claims pursued nor the relief sought require the consideration of the individual circumstances of any aggrieved member of the organization." *Id.* at 597 (quoting *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 287–88 (1986)). The Government's unlawful initiation of a collection of information and failure to publish valid PIAs present pure questions of law. This suit does not implicate the specific factual circumstances of individual EPIC members beyond what those

members have already declared. *See* Ex. 10; Ex. 11; Ex. 12. EPIC therefore has associational standing to bring this suit on behalf of EPIC's members.

CONCLUSION

For the foregoing reasons, the Court should grant EPIC's motion for a preliminary injunction.

Respectfully Submitted,

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