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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Common Cause,)
) Civil Action
Plaintiff,) No. 17-CV-1398
)
vs.) MOTIONS HEARING
)
Presidential Advisory) Washington, DC
Commission on Election) August 1, 2017
Integrity, et al.,) Time: 10:30 A.M.
)
Defendants.)

TRANSCRIPT OF MOTIONS HEARING
HELD BEFORE
THE HONORABLE JUDGE ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

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1 THE COURTROOM DEPUTY: Your Honor, we're on the
2 record for civil case 17-1398, Common Cause versus
3 Presidential Advisory Commission on Election Integrity, et al.
4 Counsel, please approach the lectern, identify
5 yourself for the record.

6 MR. GUZMAN: Your Honor, good morning. Javier
7 Guzman on behalf of plaintiff Common Cause. I'm joined at
8 counsel table by Miss Josephine Morse and Miss Skye
9 Perryman, who intend to present argument today on behalf of
10 plaintiff. Miss Morse has a pending pro hac vice.

11 THE COURT: I have that motion here and I'll sign
12 the proposed order for Miss Morse and Miss Jones both.

13 MR. GUZMAN: And with respect to Miss Perryman,
14 Your Honor, she is a member of the District Court's bar.
15 She's awaiting her ECF registration, so she has not been
16 able to enter her appearance yet in the case.

17 And I'm also joined at the table by representatives
18 of Common Cause, Stephen Spaulding and Allegra Chapman.

19 THE COURT: Okay.

20 MR. GUZMAN: Thank you.

21 MS. SHAPIRO: Good morning, Your Honor. Elizabeth
22 Shapiro from the Department of Justice. And I'm joined
23 today by Joseph Borson, Carol Federighi, and Kristina Wolfe,
24 all from the Department of Justice.

25 (Pause.)

1 THE COURT: All right. I'll hand these two orders
2 to the clerk.

3 THE COURTROOM DEPUTY: Thank you.

4 THE COURT: We're here today solely on the motion
5 for temporary restraining order. The motion for preliminary
6 injunction will be separately determined.

7 It is not clear to me from reviewing the papers
8 whether this case could be determined to be one that should
9 be assigned to Judge Kotelly. Initially it was, apparently,
10 assigned to her and then randomly assigned to me upon
11 reassignment with some other cases that were not thought to
12 be related.

13 There is an opinion issued by Judge Kotelly in a
14 prior case that looks like a lot of issues are overlapping,
15 obviously. And so there will have to be some coordination
16 internally with the calendar committee, the Court and Judge
17 Kotelly as to how this case ultimately will proceed.

18 But there being a request for temporary
19 restraining order, it needs to be heard and determined. And
20 then under our local rules, an opposition to the motion for
21 preliminary injunction is due seven days from the time of
22 the filing of the motion and it needs to be heard within 21
23 days. If the case is not reassigned, that will be by me.
24 But, it may or may not be by me; it will be by some judge.

25 In any event, today I will determine the motion

1 for a temporary restraining order. So it's the plaintiff's
2 motion. You may proceed.

3 MS. MORSE: Thank you, Your Honor. Josephine
4 Morse on behalf of Common Cause.

5 With the Court's indulgence, I will address our
6 client's likelihood of success on the merits, and my
7 colleague, Miss Perryman, will address irreparable injury
8 and the other TRO factors.

9 This case arises under section (e)(7) of the
10 Privacy Act, which is a post Watergate statute that, as the
11 D.C. Circuit held in its *Albright* decision, broadly
12 prohibits federal agencies from even so much as collecting
13 information about individuals' exercise of their First
14 Amendment rights.

15 THE COURT: Okay. I agree. That's the first
16 question. Judge Kotelly thinks it's not a federal agency.
17 Why do you think it is?

18 MS. MORSE: For several reasons. First, I draw
19 your attention to, in Judge Kollar-Kotelly's opinion, the
20 very preliminary nature of the finding that she made where
21 she said that on the facts, you know, currently before her,
22 she did not, you know, think that the agency was -- that the
23 Commission was currently operating as an agency.

24 We have a different set of defendants here and a
25 different, you know, claim. And I'll address your question

1 about, you know, it functioning as an agency. As we sort of
2 set forth in our papers, there's --

3 THE COURT: But it was established as an advisory
4 commission by the executive order, right?

5 MS. MORSE: It was established -- the Commission
6 has said that it is voluntarily complying with the new
7 advisory -- with FACA, but it uses the words --

8 THE COURT: No, it is established by executive
9 order.

10 MS. MORSE: It was established by an executive
11 order, Your Honor.

12 THE COURT: That's the whole creation of it.

13 MS. MORSE: There's the executive order and a
14 couple of other charter documents.

15 THE COURT: There's no statute.

16 MS. MORSE: There's no statute, that's correct.

17 THE COURT: So it's established by executive order
18 and it calls it a commission.

19 MS. MORSE: That is correct.

20 THE COURT: Members are appointed by the president.

21 MS. MORSE: (Nods head.)

22 THE COURT: They're not confirmed by anybody.

23 MS. MORSE: Correct.

24 THE COURT: Traditionally, an agency is -- or,
25 nominees by the president, confirmed by the Senate. That

1 didn't happen here. So how do we get it to be an agency?

2 MS. MORSE: Okay. So by the -- under the -- I
3 want to first start with the -- what the D.C. Circuit has
4 said in its decisions here, which is that, you know, whether
5 an entity is an agency for purposes of the Privacy Act and
6 related statutes is a case-by-case determination.

7 If you look at the entity, you know, and all the
8 characteristics of that entity -- and here, you know, under
9 the D.C. Circuit's precedence, there's probably two main
10 factors this boils down to, which is what the agency says it
11 is doing and also what the agency is doing and how it is
12 functioning under the seminal *Soucie* case.

13 Here, you know, under the statements that -- you
14 know, multiple statements by commission members, and
15 including Vice-Chair Kobach, what the Commission is doing,
16 in cooperation with multiple other federal agencies, is
17 undertaken an unprecedented investigation into purported
18 voter fraud for which it has solicited and now it has
19 collected data on millions of American voters, including
20 First Amendment data of those voters. This is not a
21 situation where --

22 THE COURT: Contrary to what you said in your
23 papers. You said in your papers they demanded, or something
24 like that. And all they've done is solicited information.
25 The states are voluntarily providing it, right? No state

1 has been compelled to give anything?

2 MS. MORSE: No state has been compelled. They
3 don't have statutory authority to compel.

4 THE COURT: Okay. So the states are only giving
5 them things that they volunteer to give them.

6 MS. MORSE: That is correct. But I would add that
7 it is the, you know, federal body that's asking for this
8 information. And at the July 19th Commission meeting,
9 President Trump did say that notwithstanding that certain
10 states were withholding their data, the rest of it would be
11 forthcoming from all the remaining states.

12 So I think that that -- you know, whether or not
13 that's compulsion by statute, it's exertion of authority to,
14 you know, get data to be -- come forthwith to the Commission.

15 THE COURT: That's hard to keep a straight face
16 and say that, isn't it?

17 MS. MORSE: I'm sorry, I thought I did.

18 THE COURT: If there's no compulsion in the law, I
19 don't know -- the precatory statement by the president that
20 you ought to hand it over, I mean, I don't know what that
21 means.

22 MS. MORSE: I don't think there needs -- I mean, I
23 think there's sort of -- I don't think there needs to be
24 actually statutory compulsion by the statements of the
25 Commissions members. This is a first-of-it's-kind,

1 unprecedented endeavor. There is no, sort of, analog in the
2 prior agency cases and there is even no analog, you know,
3 under prior entities that have existed. This isn't a case
4 where, you know, a group of, you know, advisors to the
5 president are generating a report or, you know, giving best
6 practices.

7 What they are doing is collecting data on every
8 single American voter. They are doing a massive -- what
9 they call a data crosschecking exercise against data held by
10 numerous other federal agencies, including the other
11 defendants here, the outcome of which is to generate, you
12 know, a list of individuals who the Commission believes are
13 fraudulently registered to vote.

14 So while, you know, it's -- it is behaving like an
15 agency with investigative powers --

16 THE COURT: I don't know if that can be the
17 outcome. I thought I read last night -- I thought it was in
18 Judge Kotelly's opinion, maybe it wasn't. The Commission
19 has three staff members?

20 MS. MORSE: Well, there are -- they've --

21 THE COURT: How could they possibly do what you
22 just said with three staff?

23 MS. MORSE: Well, I think that goes to one of the
24 main questions in this case, which is what is the other role
25 that the other cooperating agencies are going to play? In

1 the executive order that you mentioned, it talks about that
2 the Commission should endeavor to cooperate with other
3 agencies. There have been a lot of shifting facts here, as
4 Judge Kollar-Kotelly's opinion notes, of the role that other
5 agencies are going to play.

6 And, you know, I think it's at least an open
7 question. And there's three staff members, also Commission
8 members. And also in some of the information that's come
9 out of the other cases, there are, sort of, IT support
10 people, I don't know how they play in the count. But, you
11 know, the role that all these other Commission -- these
12 other agencies are playing, that could be many more, you
13 know, staff and resources fueling what's going on in this
14 sweeping investigative operation.

15 You know, back to the question about whether or
16 not it's an agency. This is sort of -- as I mentioned, it's
17 a case-by-case determination, which boils down to sort of
18 what the entity is empowered to do in its founding documents
19 and how it actually functions in practice. And I think one
20 of the reasons --

21 THE COURT: The founding document allows it to
22 make advice to the president, right, and a report?

23 MS. MORSE: It says that, but it also talks about
24 this cooperating with other agencies. And I think it's
25 important, you know, and Judge Kollar-Kotelly in one of her

1 prior opinions in this area has specifically noted, you
2 know, looking both at the founding documents as well as how
3 the agency functions in practice, especially in a situation
4 where the founding documents have sort of broad language and
5 don't go into specifics, which is really what we have here.

6 Here we have, you know, a limited set of founding
7 documents and many, many public statements by Commission
8 members about what they are endeavoring to do and, in fact,
9 what they have started to do. At the July 19th meeting
10 Vice-Chair Kobach very clearly directed the Commission staff
11 to obtain whatever data there is, is how he put it, in the
12 hands of the government. And that was, you know -- data had
13 been talked about from defendants here, Department of
14 Homeland Security, Social Security Admission, the Department
15 of Justice, Census Bureau, and even the federal judiciary,
16 which I realize is not an agency with obligations under
17 Privacy Act.

18 But, you know, that is the sweeping scope of what
19 they are, you know, endeavoring to do here. And it's those
20 statements, sort of, overlaid on the, you know, the few
21 founding documents that we have.

22 And I think another reason I would urge the Court
23 to focus on all of the public statements and actions that
24 the Commission has taken is that, as we spell out in our
25 briefs, there already are -- the factual circumstances have

1 changed from these -- many of these founding documents. For
2 example, you know, we noted that the Department of Defense
3 was originally going to collect this data, and that has
4 shifted, you know -- you know, in filings the Commission has
5 said that that was shifted into the White House. However,
6 in the newest communication with the states, the Commission
7 has said that it's unveiling a new tool for the collection
8 of this data.

9 So we really don't know the, sort of, extent to
10 which -- which and what other agencies are cooperating in
11 that tool. And one of the reasons, again, I would urge you
12 to focus on the statements that are being made is because
13 the facts, in reality, have not matched up.

14 THE COURT: You want to focus on the statement of
15 each individual commissioner?

16 MS. MORSE: Well, I think the statements and the
17 actions that Vice-Chair Kobach has made -- he has, you know,
18 directed this wide-sweeping data collection effort. He, you
19 know, directed the -- you know, letters to go to the states
20 with the request for data from the states. He's also, you
21 know, at the meeting directed, whatever, to obtain whatever
22 data there is in the hands of the federal government. And
23 he has spoken repeatedly about the unprecedented,
24 first-of-its-kind nature of what's being undertaken here, as
25 well as the data crosscheck.

1 THE COURT: What's the evidence of that?

2 MS. MORSE: The evidence of --

3 THE COURT: Of what he's done? Are there minutes?

4 Are there statements that he's written? Or how do you know --
5 how does the Court know that?

6 MS. MORSE: As we cite in our brief, there are
7 transcripts from -- there are television appearances with
8 him on video that we've linked to. There are --

9 THE COURT: Well, I don't have that before me. I
10 don't use internet, videos, and stuff like that for court
11 evidence. What do I have?

12 MS. MORSE: There are -- well, some of them are
13 written transcripts from appearances that he's made.

14 THE COURT: Well, courts don't use that for evidence.

15 MS. MORSE: Well, on a preliminary injunction,
16 Your Honor --

17 THE COURT: I understand, for this. But, I mean,
18 for a real case, what -- how are you going to prove your
19 case? I don't understand.

20 MS. MORSE: Well, I think, you know, as the Courts
21 have -- you know, Courts looking at this have said, you
22 know, this is often an inquiry, the agency inquiry that is
23 aided by discovery.

24 THE COURT: That's after 45 days or something;
25 that's not today.

1 MS. MORSE: Well, I would point you to --

2 THE COURT: Cases like this don't start with
3 discovery.

4 MS. MORSE: In the usual course, Your Honor.
5 Although what we have here is sort of a fundamental right
6 that's at stake, you know, protected by --

7 THE COURT: If you make an adequate showing of
8 irreparable injury, all those things have a standstill order.

9 MS. MORSE: I would urge you -- there is, on the
10 White House, an official government video. And bearing in
11 mind what you said about video. But it is the record that
12 the Commission itself has supplied of the July 19th meeting
13 that is on the White House blog website for the Commission.
14 There are, you know, the letters from the Commission,
15 including the letter talking about the new tool that it's
16 unveiling. Those are on the government website.

17 So there is evidence, you know, that I think the
18 Court could take judicial notice of about the, sort of,
19 sweeping nature of this investigation at the Commission
20 meeting of which there is the video --

21 THE COURT: I don't take judicial notice of TV
22 things. You might be able to provide evidence in support of
23 your application, but I don't take judicial notice of -- I
24 don't take judicial notice of news articles and all that
25 kind of junk. That's not what courts do.

1 MS. MORSE: I understand, Your Honor.

2 THE COURT: Go ahead. I mean, I understand you
3 have to put together a TRO, but that's not going to get you
4 anything on the PI.

5 MS. MORSE: Okay. If I could address the comments
6 that you made at the beginning regarding Judge Kollar-Kotelly's
7 opinion.

8 THE COURT: Did you say she has another opinion?

9 MS. MORSE: She has -- well, there's a couple of
10 cases against the Commission. So there's --

11 THE COURT: I just read the one last night where
12 she denied the PI.

13 MS. MORSE: With the *EPIC* plaintiff. There are a
14 couple of other cases that raise claims under FACA.

15 THE COURT: And she's also written opinions in
16 those.

17 MS. MORSE: Yes. And one of those is on appeal to
18 the Circuit.

19 THE COURT: Okay. I haven't seen those. Okay.
20 Why do I have this one?

21 MS. MORSE: We -- we designated it as a related
22 case. It went to her and then maybe, you know, roughly a
23 week later it came to you. So, it's a mystery to us as well.

24 THE COURT: Okay.

25 MS. MORSE: But if I could address, since you're --

1 since we at least have you for the purposes of the TRO, you
2 know, the -- you've read her opinion, and what we think are,
3 sort of, real differences between that case and this one.

4 You know, in sum -- and I was going into a little
5 more detail. You know, that case involved different claims.
6 We have a violation here of section (e)(7) of the Privacy
7 Act. Different defendants. That was not the Social Security
8 Administration, the Department of Homeland Security. And
9 the record that was compiled for Judge Kollar-Kotelly of the
10 agency's, you know, activities was not the same as the
11 record that we're -- we've amassed for you here, which means
12 that the record that's on appeal there is much narrower
13 than, you know, what we're bringing before the Court today.
14 And besides, there aren't --

15 THE COURT: What's the status of the appeal?
16 There are two appeals?

17 MS. MORSE: There's an appeal that's been docketed
18 in the *EPIC* decision, which I think is the case you referred
19 to. And then one of the plaintiffs in the FACA suits has
20 docketed an appeal as well.

21 THE COURT: What's happening in those?

22 MS. MORSE: In the *EPIC* case I believe there's a
23 briefing schedule that ends with a reply due in late
24 September and then the Court will set it for argument. I'm
25 not familiar with the FACA case, exactly what's happened

1 with the Circuit in that one.

2 THE COURT: Okay.

3 MS. MORSE: So, there's different defendants here,
4 and I think that's important because part of, you know, our
5 claim here relates to the investigation that the Commission
6 is undertaking and, in particular, the data crosscheck
7 project, which is how these other defendants come into play
8 that aren't in the other case. Which primarily there were a
9 number of claims there, was seeking a Privacy Act impact
10 assessment be conducted under the E-Government Act.

11 I would also urge you, again, you know, to --
12 which you have read, to note the preliminary nature of Judge
13 Kollar-Kotelly's opinion and, you know, her discussion that
14 it may need to be revisited. Also, the new evidence that I
15 pointed to that's come out at the July 19th meeting. Again,
16 the -- summoning the data from all these other agencies.
17 There was a lot of talk at that meeting also of criminal
18 prosecution by both Vice-Chair Kobach -- again, not that
19 this entity was going to do that, but that is the kind of
20 thing they're looking for evidence of, or referrals made to
21 the Department of Justice for criminal prosecution and other
22 things like that.

23 Again, this is the kind of activity we would
24 submit that, you know, an agency conducts. And that was not
25 in the record. That meeting was after briefing closed in

1 the *EPIC* case. Also, this new tool that's been surfaced
2 was, again, after -- it was just a few days ago when the
3 renewed data requests went out.

4 THE COURT: The new tool being the crosscheck?

5 MS. MORSE: No, the new tool is after the
6 Commission re-requested the data from the states on July
7 26th. In its letter it talked about the states providing
8 their data through a new tool, and that it didn't give out
9 the specifics of that. It just directed the states --

10 THE COURT: Of how they're going to --

11 MS. MORSE: Yeah. And again, as we talked about
12 in our papers, there's been some back and forth about who
13 was going to collect the data, which is, of course,
14 incredibly --

15 THE COURT: Where are the states told to send it
16 now?

17 MS. MORSE: What? Sorry.

18 THE COURT: Where are the states told to send it
19 now?

20 MS. MORSE: Where are they? They're told to
21 contact a White House staffer, or there's a White House
22 e-mail, an EOP e-mailed provided, and then further
23 instructions will be provided. So we don't actually know
24 how it's being sent. And of course that's relevant because
25 depending on -- if and what the federal agency involvement

1 is, that agency would be collecting First Amendment
2 protected records in violation of section (e)(7) of the
3 Privacy Act.

4 The other relevant thing to focus on is that, you
5 know, this case that's on appeal, the *EPIC* case that Judge
6 Kollar-Kotelly had that made this very preliminary finding
7 on the agency question, you know, could be decided on appeal
8 on a threshold issue. So while this data is still in the
9 hands of, you know, the Commission and the other defendants,
10 you know, that could come back down without even a ruling,
11 even on the preliminary question of whether it's an agency.

12 And, you know, I -- you know, would turn it over
13 to my colleague to discuss the irreparable harm, which is,
14 of course, the other big difference between this case and
15 Judge Kollar-Kotelly's opinion, is that our client and its
16 members are suffering, you know, very different harms in
17 kind from what were discussed in that case.

18 THE COURT: And who's going to talk about standing?

19 MS. MORSE: My colleague, Miss Perryman.

20 THE COURT: Okay. Thank you, Miss Morse.

21 MS. MORSE: Thank you.

22 MS. PERRYMAN: Good morning.

23 THE COURT: Good morning.

24 MS. PERRYMAN: I'll proceed with the irreparable
25 injury discussion and the discussion of the other factors,

1 and then I'm happy to talk about standing, if that's the
2 order you would prefer.

3 THE COURT: That's fine.

4 MS. PERRYMAN: Temporary restraining orders aren't
5 things that litigants move for lightly. And the reason that
6 we're here today --

7 THE COURT: And courts don't grant them lightly,
8 as you know.

9 MS. PERRYMAN: And we understand that. We
10 understand that, Your Honor. And the reason we're here
11 today is because of the irreparable injury and the
12 fundamental and intrinsic injury that is at issue in this
13 case that members of Common Cause are suffering, the public
14 is suffering, and that Common Cause itself is suffering.

15 We bring this case, the privacy and the First
16 Amendment interests that are injured and threatened by the
17 government's actions in collecting and maintaining this data
18 are inherent and intrinsic injuries. That has been
19 recognized by the D.C. Circuit in the *Albright* opinion, it
20 has been recognized in Supreme Court precedence. It has
21 also been recognized in many other opinions by the district
22 courts in this circuit, as well as other district court
23 circuits opinions. And we believe that the precedence
24 supports a finding of irreparable injury here and a granting
25 of the temporary restraining order.

1 Turning to the irreparable injury for the
2 individual members of Common Cause, as you know, we brought
3 this case on behalf of our client Common Cause and on behalf
4 of its members. The individual members, again, under the
5 *Albright* decision, the D.C. Circuit said that the
6 unwarranted collection -- I'm reading from the case -- of
7 information is a distinct harm in and of itself. It is, by
8 nature, irreparable. This is not something that dollars and
9 cents can compensate for somewhere down the line. This is a
10 fundamental Constitutional injury of a Constitutional nature
11 that individuals are suffering.

12 In addition to that sort of inherent injury, which
13 we believe the case law recognizes plainly, Your Honor, we
14 submitted with our temporary restraining order two exhibits
15 from Common Cause members where they describe the personal
16 injury that they are suffering. One individual in Florida
17 whose data, I believe, is likely already in the Commission's
18 hands, Florida says that it was going to provide its data,
19 another individual from Texas.

20 THE COURT: Well, Mr. Gutierrez caught my eye,
21 since he's from Texas, and I grew up in San Antonio, myself.
22 And he says he's a voter in Texas and that will affect his --
23 because Texas you register by party, and so --

24 MS. PERRYMAN: I'm a native Texan as well, Your
25 Honor.

1 THE COURT: And that does give out, then, your
2 party affiliation and all that, if Texas provides that. And
3 he would just as soon everybody in the world not know how
4 he's registered to vote, which I understand.

5 MS. PERRYMAN: Yes. Yes.

6 THE COURT: So he says that gives him standing.

7 MS. PERRYMAN: So whether it's under the
8 irreparable injury prong or we go later to the standing
9 prong, which obviously is a bit less, even, sort of, less of
10 a standard, it does give him standing, I would argue, and it
11 demonstrates the irreparable injury. These are, sort of,
12 people putting the words -- what the cases have said when
13 they say this is an intrinsic injury in and of itself.

14 In addition to that, and to the individual and
15 intrinsic First Amendment and privacy interest, we cite many
16 cases in our papers. And, you know, I could give you more
17 but I know you don't need that because you've been the judge
18 some of those cases.

19 Common Cause itself as an organization is also
20 facing irreparable injury. The D.C. Circuit looks to
21 whether the government's actions have impaired an
22 organization's programs, it also looks to whether such
23 actions conflict with the organization's mission.

24 The materials we put with the TRO submission, and
25 in particular the declaration of Miss Flynn, who's the

1 president of Common Cause, demonstrate both in concrete
2 nature and with particularity the various -- the various
3 activities that Common Cause has not been able to engage in
4 because they have been trying to manage the fallout from the
5 Commission's collection and maintenance of this data.

6 And just to be -- you know, on that point, there
7 have been reports that many voters, and I think it's in the
8 thousands now, have deregistered from the voting rolls.
9 That is something that Common Cause has been working to try
10 to counteract and it has caused a diversion of resources.
11 That, under the D.C. Circuit precedent, most recently, I
12 think, in the *League of Women Voters versus Newby* case, that
13 is irreparable injury for an organization. And that also
14 dates back to the *Havens* precedent that is longstanding, in
15 terms of how organizations can show irreparable injury.

16 There are two other factors, as you know, and one
17 is harm to others. I think that's important, the, sort of,
18 balancing of the equities and the harm to others, to note
19 that this temporary restraining order that we're seeking --

20 THE COURT: I don't really understand. I
21 understand what you're saying, but I don't understand why
22 people would deregister and why people would be affected by
23 this perceived injury. Why is that --

24 MS. PERRYMAN: So, again, I don't -- you know,
25 perceived injury is one way to frame it, but I believe the

1 way the D.C. Circuit would frame it, in the context of the
2 very Privacy Act, the very data, First Amendment data that
3 this statute -- that Congress enacted the statute to
4 protect, they would frame that as an injury -- inherent
5 injury in and of itself. And that's Congress defining that
6 injury.

7 In terms of questions of deregistration, I think
8 that's just one fact among many as to how and why these are
9 such intrinsic injuries. Individuals don't like the federal
10 government collecting --

11 THE COURT: Snooping.

12 MS. PERRYMAN: Don't like the federal government
13 collecting data about who they associate with, whether
14 that's a political party or whether that's somebody else.
15 And in this case that's what the federal government is doing
16 in, as Miss Morse presented, in a fashion that is operating
17 as an agency, and we believe the Privacy Act applies.

18 So that's the irreparable harm piece. I'm happy
19 to answer more questions on that, if you have it, or I could
20 move on to the harm to others piece.

21 THE COURT: Go ahead.

22 MS. PERRYMAN: On that other, on harm to others,
23 and we used to call it the balance of the equities and now
24 that's being phrased as harm to others. But I think it's
25 important to note --

1 THE COURT: I will say, as a District Judge, I
2 still think the district judge has to look at all factors.
3 It may mean be some day the Supreme Court will not say
4 that's the law, but today I'm still weighing all four
5 factors, that's my job.

6 MS. PERRYMAN: Absolutely. And that is why we
7 have prepared and presented to you all four factors as we
8 have.

9 The harm to others, I think here is a clear case
10 that favors issuing the temporary restraining order. What
11 we're seeking here, while a temporary restraining order, we
12 understand that that's an exceptional remedy; it's actually
13 a really narrow one that we're seeking. We're not trying to
14 shut the Commission down from everything it's doing. If it
15 wants to write a report or go study voter issues, as other
16 commissions have done in the past, that is not what the
17 subject of this motion is.

18 It is simply aimed to stop the collection of First
19 Amendment data by the federal government and by, you know,
20 by a Commission that's acting as an agency and potential --
21 and the maintenance and sharing of that data among other
22 agencies. That is the narrow thing we're seeking here.

23 And I believe that the public, you know, that
24 there is no -- there is no significant harm to the
25 government in putting a temporary pause on that while the

1 Court reaches the merits of these very important, and as I
2 said, sort of intrinsic issues that the Circuit and Supreme
3 Court have recognized, and Congress, that are intrinsic and
4 fundamental to our Constitutional order.

5 The public interest is, of course, the final
6 factor. I mention the reports, and we cite them in our
7 papers, of voters deregistering from the rolls. You have
8 seen, in the documents that we submitted, just some examples
9 of how individual voters in states that will likely -- one
10 state that has complied, and the other one that I think
11 intends to comply, the sort of public interest that is at
12 stake here. And it's really the fundamental of our
13 Constitutional order and of what the government can do and
14 collect and what it can't do, particularly when you're
15 dealing with an executive branch agency, as we submit and as
16 Miss Morse presented, that we are here.

17 So that is the -- those are the TRO factors. If
18 you have questions about those factors, I would welcome them
19 and am happy to answer them. I could also talk briefly
20 about standing, if you wanted that.

21 THE COURT: I think I understand it. Thank you
22 very much.

23 MS. PERRYMAN: Yes.

24 THE COURT: Okay. Miss Shapiro.

25 MS. SHAPIRO: Thank you, Your Honor.

1 THE COURT: How does the government explain what
2 the Commission is doing? What do I have in the record? And
3 maybe in your opposition to the PI, I guess you're going to
4 set forth what the Commission is doing.

5 MS. SHAPIRO: The Commission is at its very early
6 stages. It had its initial meeting on July 19th and that
7 meeting consisted of talk and introductory remarks, all of
8 which is posted on the Commission's web page. So the next
9 meeting is --

10 THE COURT: Were there votes taken?

11 MS. SHAPIRO: The only votes taken were on
12 proposed bylaws. That was the only piece of business in the
13 meeting. Otherwise, it was very much introductions.

14 THE COURT: So the remarks of the vice-chair were
15 not adopted or ordered or anything?

16 MS. SHAPIRO: No.

17 I wanted to address, there are at least five
18 reasons why this temporary restraining order should be denied.

19 THE COURT: Okay.

20 MS. SHAPIRO: Several go to the likelihood that
21 they cannot succeed on the merits. And there are several
22 fundamental threshold issues, even before we get to the
23 question of the Commission being an agency. And first and
24 foremost, the Privacy Act only permits suits by individuals,
25 and individuals are defined as a citizen of the United

1 States or an alien lawfully admitted for permanent
2 residence. And the case law is very clear that the use of
3 "individual," as opposed to the use of "person," means that
4 corporations, businesses, and membership organizations like
5 Common Cause cannot bring Privacy Act claims. So as an
6 initial matter, we have no viable plaintiff to bring a claim
7 here.

8 Also, even if Common Cause could sue here, which
9 it can't, but even if it could, the Privacy Act itself
10 precludes injunctive relief for (e)(7) claims; (e)(7) is the
11 gathering of First Amendment provision that this claim is
12 predicated on. And the Privacy Act only permits injunctive
13 relief in two specified circumstances. The first is for the
14 amendment of records and the second is for individual access
15 requests, for information about a person. Otherwise, the
16 relief available under the Privacy Act is for money damages
17 and it requires that the individual plead actual damages,
18 which the Supreme Court has said is out-of-pocket pecuniary
19 harm.

20 So for the type of claim that the plaintiff is
21 bringing, there's no provision for injunctive relief and it
22 can only be brought by an individual. So those are two
23 dispositive threshold issues.

24 A third issue is that the plaintiff, even if this
25 plaintiff could sue, cannot circumvent the Privacy Act's

1 restrictions by suing under the APA. The case law is also
2 clear that the APA can't be used to bypass a comprehensive
3 remedial scheme and to basically thwart the intent of
4 Congress. The APA applies when there's no other remedy
5 available at law. And here Congress as enacted a
6 comprehensive scheme under the Privacy Act, so there's no
7 APA relief available.

8 So those are three threshold reasons why the
9 plaintiff is not likely to prevail on the merits here.

10 Similarly, with respect to the -- well, I guess I
11 should say even -- that's three reasons. The next reason
12 is, of course, the Commission is not an agency, as Judge
13 Kollar-Kotelly found. We would dispute that the public
14 statements of Commission members can make what is
15 essentially an advisory committee or commission into an
16 agency. And in fact, there are cases that say that an
17 entity that is an advisory committee cannot also be an
18 agency. You can't have both at the same time.

19 As Judge Kollar-Kotelly found, the executive order
20 is quite clear in establishing that this is a committee that
21 is meant to advise and assist the president. The president
22 can accept or reject whatever is given to him from the
23 Commission, and it has only a limited life span. It will
24 sunset and will not exist, separate and apart from the
25 advice and recommendations offered to the president.

1 THE COURT: When does it sunset?

2 MS. SHAPIRO: I don't remember. I don't have the
3 executive order in front of me and I don't remember the
4 timeframe. I think Judge Kollar-Kotelly mentioned in her
5 opinion the specific life span.

6 And so we don't have an agency as a defendant,
7 another dispositive reason why they're unlikely to succeed
8 on the merits. And with respect to the agencies that are
9 sued, the Social Security Administration and the Department
10 of Homeland Security, the claim there is purely speculative
11 because they are not receiving -- the Commission is not
12 receiving data from those agencies and those agencies have
13 not committed to any kind of data exchange.

14 So while the Commission may, in the future,
15 explore the feasibility of exchanging data with agencies,
16 they haven't done so and there's no reason to expect that
17 those agencies would violate their own Privacy Act
18 obligations in sharing information. So there's absolutely
19 no reason to believe that there would be anything improper
20 that the agencies would do in handling their own information.

21 With respect to -- those are all reasons why the
22 plaintiff is unlikely to succeed on the merits.

23 With respect to irreparable harm, I wanted to
24 stress that the information that is being requested -- and
25 there is no ability to enforce that request -- but, is being

1 requested, is information that is otherwise publicly
2 available from the states. So, the states have been -- have
3 been told that of course they should only provide information
4 that their own state laws permit.

5 THE COURT: So, in Texas, for example, could
6 anyone go down and find out that I'm a registered Democrat
7 or Republican, if it is publicly available?

8 MS. SHAPIRO: I don't know what the Texas state
9 laws provide. I do know that many states have very liberal
10 open government laws and normally you can get much more
11 information under a state FOI statute than you could under
12 the federal FOIA, for example.

13 But each state has differences and, in fact, the
14 communication that the vice-chair -- the letter wrote to the
15 states noted specifically that states will have different
16 pieces of information that it can or cannot provide under
17 its own state laws. And of course they're only asking for
18 them to do what they're legally authorized to do.

19 So, we don't think there can be irreparable harm
20 from collecting information that can already be collected
21 under either open government laws or that's otherwise
22 publicly available.

23 And with respect to the plaintiff's argument that --

24 THE COURT: Is the Commission requesting only
25 publicly available information or is it just requesting the

1 information?

2 MS. SHAPIRO: It's just requesting only publicly
3 available information.

4 THE COURT: Its requesting it if it's publicly
5 available?

6 MS. SHAPIRO: Yes.

7 THE COURT: That makes a difference.

8 MS. SHAPIRO: I brought a copy of the request, the
9 July 26th request to the states, if Your Honor is
10 interested. Again, these are posted on the -- the request
11 of all 50 states are posted.

12 THE COURT: To request publicly available voter
13 registration records. Okay. I think that makes a difference.
14 All right.

15 MS. SHAPIRO: With respect to the plaintiff's
16 argument that the harm is coming from the aggregation, that
17 harm, in terms of -- that that makes it more susceptible to
18 a data breach or something of that nature is highly
19 speculative and the case law with respect to it, data breach
20 cases, recognizes that speculation that there may be some
21 future breach of a database is insufficient to constitute
22 Article III standing. So, we think the irreparable harm
23 also fails.

24 And just to respond briefly to the argument that
25 this is collection of First Amendment information that

1 automatically constitutes irreparable harm, this is not, in
2 fact, a Constitutional claim that they are bringing. That
3 might hold true for a Constitutional claim, but here this is
4 a statutory claim, under a statute that they have no ability
5 to bring in the present posture because they don't qualify
6 under the statute as an individual.

7 So, I don't think we can presume automatically
8 that there's harm. And again, because of the information
9 being public already, we don't think it's irreparable harm.

10 I think that covers the main -- the, sort of, five
11 major reasons why we think that the TRO fails. And in terms
12 of the balancing of the interests, the Commission certainly
13 should be able to proceed with doing its work. It has a
14 mandate, via the executive order from the president, and,
15 you know, a TRO would delay the, you know, information
16 gathering that is necessary to begin the work of the Commission.

17 So we think the balance of harms is, at worst, an
18 equipoise, as Judge Kotelly said, and should lean on the
19 side of completing the mission that the president has set.

20 THE COURT: Would you look again at the sunset
21 date and see if you can tell me what it is?

22 MS. SHAPIRO: Yes, I'll look to see if it
23 specifies a precise date. It might just specify that it
24 sunsets, but I'll provide that answer.

25 THE COURT: Okay. I'll give you a moment.

1 MS. SHAPIRO: Excuse me.

2 (Pause.)

3 MS. SHAPIRO: Okay. Without having the order in
4 front of me, I'm advised that it expires one month after the
5 submission of the report, or within two years.

6 THE COURT: All right. Okay. Thank you.

7 MS. SHAPIRO: Thanks.

8 THE COURT: All right. The plaintiffs get the
9 last word.

10 MS. MORSE: Thank you. I'm going to address some
11 of the issues that the government raised.

12 As to the injunctive relief being precluded on an
13 (e) (7) claim, I would point you to one of your own decisions,
14 which is a 2013 case, *Scott v. Conley*, where you -- relying
15 on a Second Circuit case, *Haase v. Sessions*, a 1990 Second
16 Circuit case, you held that injunctive relief, you know, is
17 available for violations of (e) (7) under the, you know,
18 Court's inherent equitable powers.

19 And that's -- you know, the Circuit has made a
20 couple of comments about this it has not squarely held. But
21 in this *Haase v. Sessions* case, you know, the Circuit said --
22 which is the case that Your Honor relied on in 2013, and the
23 cite for that is 937 F.Supp.2d 60 of your case.

24 The Circuit said it is not at all clear to us that
25 Congress intended --

1 THE COURT: 937 260?

2 MS. MORSE: 937 F.Supp.2d 60. F.Supp.2d, page 60.

3 Sorry for speaking over.

4 Now this is the Circuit in the *Haase v. Sessions*
5 case, 893 F.2d 370. "It is not at all clear to us that
6 Congress intended to preclude broad equitable relief to
7 prevent (e) (7) violations such as, for instance, a
8 hypothetical agency's secret compiling of records on
9 Americans' legitimate political activities. In the absence
10 of such an explicit intention, by creating a general cause
11 of action under (g) (1) (D), Congress presumably intended the
12 District Court to use its inherent equitable powers, at
13 least --"

14 THE COURT: Obviously I'm writing too much.

15 MS. MORSE: And I would note in that Second
16 Circuit case, the Circuit notes that the government
17 suggested that such an injunctive relief could potentially
18 be broad, even if, as -- or, as the government suggests,
19 under the Constitution common law or the APA.

20 And addressing one of the government's other
21 comments about Common Cause not being able to bring a claim,
22 we also have our APA claim that's arising next to the
23 Privacy Act claim. And, you know, there are other
24 suggestions that in certain circumstances I would point you
25 to the *Doe v. Stephens* case, 851 F.2d 1457, you know, an APA

1 case can arise next to a Privacy Act claim.

2 I also want to address the comments about this
3 entity not being able to be both an advisory committee and
4 an agency. I think that's really important. The government
5 has not conceded that this is an advisory committee in
6 litigation on this. It has said, you know -- actually, some
7 of the initial papers said that it was, you know, acting in
8 accordance with FACA and then later it has only said it's
9 voluntarily complying with FACA and that it's not conceding
10 that it is a FACA.

11 So it is not that; you know, it is something. And
12 by virtue of this sweeping investigation into, you know,
13 Americans' political activities and their associations, you
14 know, we would submit that that is classic agency --
15 textbook, classic agency behavior affecting individual's
16 rights.

17 As to another comment that the government made
18 regarding that nothing had actually happened at the July
19 19th meeting with Vice-Chair Kobach's statements, I don't
20 have the full transcript of what he said, but what I have,
21 you know, down is that he instructed if there were no, you
22 know -- if no one on the Commission said otherwise, he
23 instructed staff to obtain whatever data there is, you know,
24 from all of these other federal agencies in the interim,
25 between the next meeting. Any data that would be helpful to

1 the Commission. I interpreted that as an act that was, you
2 know, actually came into being at that meeting. I don't
3 know if there's a further step that would need -- that would
4 have to take place.

5 THE COURT: Is there a next meeting set?

6 MS. MORSE: The government may know more
7 information on that. I don't know if the next meeting has
8 been set.

9 MS. SHAPIRO: It hasn't been set, but they talked
10 about in September, or sometime in September.

11 MS. MORSE: And as to the comments about, you
12 know, the harm from DHS and Social Security Administration
13 being speculative, again, we would rely on that order at the
14 meeting that, you know, in the interim between, you know,
15 upcoming meetings, this data be obtained. And as you know,
16 they -- as the government referenced, there are Privacy Act
17 obligations either way, whether the First Amendment
18 information is incoming to DHS and SSA, they cannot hold
19 that in violation of (e)(7).

20 But as to all the other data that the Commission
21 is trying to obtain -- for example, as it was talked about
22 at the July 19th meeting, information on naturalization
23 forms of new citizens, you know, other kinds of information
24 like that. Outgoing there are privacy obligations, as you
25 well know, you know, system records, Privacy Act, those

1 sorts of things. So I would say that is not speculative
2 because the information has now been ordered at that meeting
3 and is -- for all we know, they already have it. It's been,
4 you know, weeks since that meeting.

5 And finally, my colleague is going to address some
6 of the other questions that the government had raised that
7 relate to harm --

8 THE COURT: All right.

9 MS. MORSE: -- and such.

10 MS. PERRYMAN: Very briefly, Your Honor. The
11 government talked about how the data that is being collected
12 is publicly available. The case law squarely -- I mean, the
13 *Albright* decision squarely is -- makes clear that it is not
14 just the -- I mean, it is the nature of the data, that's
15 it's First Amendment data. It's not that it's an individual's
16 private data that maybe no one else knows in the world, it
17 is the act of a federal executive agency collecting that
18 data, maintaining that data, in this circumstance
19 cross-referencing that data, doing all of those things; that
20 is the injury here. Whether the data that is being
21 collected, whether states complying only provide publicly
22 available data or other data, I think that's, sort of,
23 somewhat of a side question, given the fundamental interests
24 that the Privacy Act stands to vindicate.

25 In addition, the Privacy Act also prohibits the

1 collection of data without an individual's consent. And I
2 don't -- I'm not aware of the federal government seeking
3 individual consent in this case. So that's a -- it's
4 another, sort of, issue with the harm comment about the
5 publicly available data. And I would urge the Court to look
6 back at the *Albright* decision and the other decisions on the
7 Privacy Act about the inherent nature of this harm.

8 I believe there was also a comment made about how
9 when I was discussing injury, I said many things about
10 Constitutional injury, but that we did not bring a
11 Constitutional claim here. Congress made it easy for -- or,
12 relatively easy, because of the fundamental Constitutional
13 interests in privacy and in the First Amendment interest
14 that you've written about in your opinions, interests that
15 are discussed in the *Albright* opinion, Congress expedited a
16 way that individuals and parties representing individuals,
17 as well as organizations, could bring these claims. And
18 that is what the interest of the Privacy Act seeks to
19 vindicate.

20 We believe our client here, as you know and as the
21 papers make clear, has demonstrated the inherent sort of
22 injury and irreparable harm, and we would urge the Court to,
23 again, temporarily restrain the collection and maintenance.
24 We're not trying to shut down everything that the Commission
25 is doing, but these things that are very, very central to

1 our Constitutional order.

2 THE COURT: All right. Well, on the record before
3 me today, I have to say the temporary restraining order will
4 be denied.

5 I would think that it would be to plaintiff's
6 advantage, if I want to give a little advice to the
7 plaintiffs, that you amend your motion for preliminary
8 injunction and add a few things to the record. Under our
9 local rule the defendants can file their opposition in seven
10 days from when it was filed and then nothing further can be
11 filed, absent leave of the Court; so that you would not be
12 able to file additional records or supplements.

13 I think you should get the full transcript of the
14 July 19th meeting and then whatever -- if any directives
15 came from that or whatever, the Court should have that
16 record available, if some direction was given. I think it
17 would be to plaintiff's advantage to have that. You can go
18 on the current record and they can file their opposition
19 with whatever they file and whatever affidavits they file,
20 but under our local rules, the Court will hear the
21 preliminary injunction on that record.

22 So, you should let the defendants know if their
23 time is running for the seven days from when you filed your
24 original motion, or if you want to run it from when you file
25 your amended motion. But, you may have other things that

1 would be to your advantage to have in your amended motion
2 and let their seven days run from then. And the Court will
3 set the hearing within 21 days under our local rule for the
4 preliminary injunction motion, from when your amended motion
5 is filed. It's up to the plaintiff, though.

6 But, I take it with what's happened in the other
7 cases, we're just going to tee this up for the Court of
8 Appeals anyway. I'm just a way station, or whoever the
9 judge is that's going to hear this, is a way station on the
10 way. So I think we ought to get an adequate record for
11 whoever is going to ultimately decide these issues, to make
12 sure this gets decided on the proper record.

13 Anything else you all want to raise today? I'll
14 consult promptly with the calendar committee and Judge
15 Kotelly about who's going to do what next. But that's my
16 advice in the meantime. I'll issue a written order, just
17 saying the motion for temporary restraining order is denied.

18 Thanks very much for an interesting argument,
19 Counsel.

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, JANICE DICKMAN, do hereby certify that the above and foregoing constitutes a true and accurate transcript of my stenograph notes and is a full, true and complete transcript of the proceedings to the best of my ability.

Dated this 2nd day of August, 2017.

/s/ _____

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