IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION, *et al.* Plaintiffs,	)	
v.	)	Civil Case. No. 1:17-cv-01351
DONALD TRUMP, *et al*. Defendants.	)	

REPLY IN SUPPORT OF PLAINTIFFS'APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

Plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation (together, the "ACLU") submit the following reply memorandum in support of their application for a temporary restraining order and/or preliminary injunction.

INTRODUCTION

More than two months after the President's Executive Order establishing the Presidential Advisory Commission on Election Integrity (the "Pence-Kobach Commission"), several weeks after the Commission's telephonic meeting on June 28, and only after the ACLU filed this lawsuit and motion for emergency relief, Defendants have made a few concessions towards transparency by hastily setting up a webpage for the Pence-Kobach Commission, posting a few of the Commission's documents on that page, and inviting an unspecified number of unnamed members of the White House press corps to attend the upcoming July 19 meeting "as space permits."

These eleventh-hour efforts to ward off liability are unavailing for several reasons. Most significantly, Defendants have made available to the public only certain documents related to the Pence-Kobach Commission's meetings on June 28 and July

19—but they have *not* made available the full range of documents that they must pursuant to their obligations under the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. 2 §§ 1-16. FACA requires public access to all "documents which were made available to or prepared **for or by each advisory committee**," not merely those documents used in connection with a specific meeting. 5 U.S.C. app. 2 § 10(b) (emphasis added). The Commission has made numerous substantive decisions, including the momentous and unprecedented decision to collect and aggregate the personal data of every registered voter in the United States. The question of how that data will be transmitted and stored (issues on which the Commission has changed course at least once) and how that data will be used to search for problems related to elections integrity surely are addressed in one or more documents—but *no* Commission documents related to those decisions have been made available to the public. The only documents on the Commission's website as of 4:30 p.m. on July 14, 2017, are the Commission's Charter; the Commission's voter data request to the states; the notice for the July 19 meeting; and some of the comments that have been received from the public and state elections officials in advance of the Commission's July 19 meeting. In their filings in this litigation, Defendants have also attached a single undated email sent to the members of the Commission and an agenda from the June 28 meeting. These limited disclosures are plainly insufficient to satisfy FACA's requirement that all documents "made available to or prepared for or by" the Commission be made publicly available. *Id.* The Court should order that all such documents be made publicly available immediately.

Moreover, Defendants have not made any effort to cure their violations of FACA's requirement that meetings of advisory committees be open to the public. With

respect to the Pence-Kobach Commission's June 28 meeting, after-the-fact media reports indicate that, on or around the time of that meeting, the Commission made the various decisions described above. These are not merely "preparatory" decisions about "gather[ing] information." These are weighty decisions about whether and how to collect, transmit, store, and use the personal data of every voter in the United States, decisions that bear directly on the Commission's recommendations. And they were made during (or around) a 90-minute closed meeting outside of the public eye. Indeed, it is unclear exactly when and how these decisions were made precisely because the Commission has not operated transparently to date. In addition, Defendants' promise to webcast the Commission's July 19 in-person meeting—which they attempt to justify by pointing to a regulation that, by its terms, applies not to all committee meetings but only to those held via an "electronic medium"—is insufficient for meaningful public access.

Finally, Defendants' jurisdictional arguments are meritless, as courts in this District have routinely recognized the availability of relief in the nature of mandamus for violations of the non-discretionary transparency requirements of FACA.

ARGUMENT

I. The Court Has Jurisdiction to Review the ACLU's Claims.

A. An Action for Relief in the Nature of Mandamus Is the Proper Way To Obtain Judicial Review of FACA Violations by a Presidential Advisory Committee.

(1) This Court has jurisdiction to compel compliance with the non-discretionary duties of FACA.

The Mandamus Act authorizes district courts to order relief in the nature of mandamus compelling federal officials to perform ministerial or non-discretionary duties. 28 U.S.C. § 1361. "This relief is available if (1) the plaintiff has a clear right to relief;

(2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to the plaintiff." *Council of & for the Blind of Del. Cty. Valley, Inc. v. Regan*, 709 F.2d 1521, 1533 (D.C. Cir. 1983). While mandamus is an extraordinary remedy, "the showing necessary to obtain mandamus is not inherently preclusive." *Citizens for Responsibility & Ethics in Wash. v. Cheney*, 593 F. Supp. 2d 194, 219 (D.D.C. 2009). Indeed, courts in this District have held that claims for violations of FACA may be brought pursuant to the Mandamus Act. *See Freedom Watch, Inc. v. Obama*, 807 F. Supp. 2d 28, 33-36 (D.D.C. 2011) (allowing claim for mandamus review against advisory committee established by President Obama); *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 736 F. Supp. 2d 24, 31 (D.D.C. 2010) ("the court holds that the plaintiff may bring his claim for alleged FACA violations under the Mandamus Act"). And relief in the nature of mandamus is equally available here.

First, § 10 of FACA imposes clear non-discretionary duties on the government with respect to conducting open meetings, holding committee documents open to public inspection, and keeping detailed minutes of each meeting. Each of the public openness provisions mandated by § 10 uses the mandatory language "shall," therefore "indicating that the language of . . . FACA leaves no room for discretion." *Judicial Watch*, 736 F. Supp. 2d at 31 (internal alteration and quotation marks omitted).[1] By using the word "shall," "Congress could not have chosen stronger words to express its intent that [the

[1] Each of the requirements of § 10 mandates transparency and openness in the operation of advisory committees. *See* 5 U.S.C. app. 2 § 10(a)(1) ("Each advisory committee meeting **shall** be open to the public") (emphasis added); *id.* § 10(b) (requiring that "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee **shall** be available for public inspection") (emphasis added); *id*. § 10(c) (mandating that "[d]etailed minutes of each meeting of each advisory committee **shall** be kept") (emphasis added).

requirements] be mandatory in cases where the statute applied." *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, 219 F. Supp. 2d 20, 43 (D.D.C. 2002) (quoting *United States v. Monsanto*, 491 U.S. 600, 607 (1989)). Under the plain terms of FACA, Defendants have a clear duty to hold open all meetings, to allow public inspection of all documents, and to keep detailed minutes of all meetings. *See* 5 U.S.C. app. 2 § 10(a)-(c).

Second, because there is a clear duty to act, the ACLU's clear right to relief follows from that duty. *See Walpin v. Corp. for Nat'l & Cmty. Servs.*, 630 F.3d 184, 187 (D.C. Cir. 2011) (describing mandamus standard with right to relief being "based on" clear duty to act). Section 10 of FACA ensures that the public will be able to access all advisory committee meetings and inspect all documents "made available to or prepared for or by" all advisory committees, including the meeting minutes that must be prepared for each advisory committee meeting. 5 U.S.C. app. 2 § 10(a)-(c). These provisions specify that the public, which includes the ACLU and its members, has a clear right to relief under the Act. Because FACA mandates particular action from the government, specifically for the benefit of the public, the clear right to relief flows from the clear, non-discretionary duties of the government required by FACA. *In re Medicare Reimbursement Litig.*, 309 F. Supp. 2d 89, 99 (D.D.C. 2004), *aff'd*, 414 F.3d 7 (D.C. Cir. 2005) (in granting mandamus relief, recognizing "the public's substantial interest in the [Defendant agency] Secretary's following the law").

Third, mandamus relief compelling the Pence-Kobach Commission to comply with the non-discretionary duties of FACA is the only remedy available to the ACLU. Other ordinary routes to relief are foreclosed on the facts of this case. FACA itself does not contain a private right of action. *See Ctr. for Biological Diversity v. Tidwell*, No. 15-

cv-2176 (CKK), 2017 WL 943902, at *4 (D.D.C. Mar. 9, 2017). And while courts of this Circuit have found that the Administrative Procedure Act ("APA") can serve as the cause of action to enforce the requirements of FACA, *see Judicial Watch*, 736 F. Supp. 2d at 31, in order for the APA to apply, the defendant at issue must be an "agency" under the terms of that statute, *see Chamber of Commerce v. Reich*, 74 F.3d 1322, 1326 (D.C. Cir. 1996). Here, none of the Defendants named in the ACLU's complaint are agencies within the scope of the APA. *See Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992) ("President is not an agency within the meaning of the [APA]"); *Meyer v. Bush*, 981 F.2d 1288, 1295 (D.C. Cir. 1993) (Vice President's participation on a presidential task force did not render the body an independent agency subject to FOIA); *Freedom Watch*, 807 F. Supp. 2d at 33 (an advisory committee "cannot have a double identity as an agency" so the "APA does not provide a jurisdictional grant" against such a body).[2]

Defendants do not argue that, as a general matter, the three requirements for mandamus relief are not met by violations of the clear, non-discretionary transparency obligations of advisory committees under § 10 of FACA. Rather they argue only that mandamus is unavailable because the ACLU is "wrong on the merits," and, in the alternative, that the merits are "debatable enough to foreclose mandamus." Defs.' Mem.

[2] In one of the related cases, Plaintiff Lawyers' Committee for Civil Rights Under the Law has argued that FACA itself and the APA provide other avenues for relief. To the extent the Court agrees and thus forecloses relief in the nature of mandamus against Defendants here because alternative avenues of relief exist, the ACLU will amend its complaint. *Cf. Citizens for Responsibility & Ethics in Wash. v. Exec. Office of President*, 587 F. Supp. 2d 48, 63 (D.D.C. 2008) ("Certainly whether relief is available under the APA will be relevant to whether the mandamus relief requested will be necessary. It is sufficient to determine that plaintiffs have stated a claim for relief under the mandamus statute. Whether or not plaintiffs will prove that claim remains to be seen."). In any event, our review of all federal court decisions has yielded no cases in which a court determined there is not a right to judicial review for claims brought to enforce § 10 of FACA.

in Opp. at 15, ECF No. 16. Those merits-based arguments are addressed below.

(2) Defendants' constitutional arguments do not strip the Court of jurisdiction nor do they counsel against the issuance of relief in the nature of mandamus.

The jurisdictional test for granting relief in the nature of mandamus is threefold, as described *supra*. The ACLU has demonstrated a clear right to relief based upon Defendants' clear duty to act and the lack of another available avenue of relief. This showing answers the jurisdictional question. In determining whether to grant relief in the nature of mandamus on the merits, the court also considers whether "compelling equitable grounds justify[] the remedy." *Citizens for Responsibility & Ethics in Wash.*, 593 F. Supp. 2d at 219 (internal alteration and quotation marks omitted). In the instant case, the equities all counsel in favor of such a grant. The ACLU seeks only openness from a committee that intends to review matters critical to our democracy. And there is a "substantial" public interest in government officials "following the law." *In re Medicare Reimbursement Litig.*, 309 F. Supp. 2d at 99, *aff'd*, 414 F.3d 7 (granting mandamus relief).

Defendants' only argument to the contrary relies heavily upon *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 637 (2004), but that case does not stand for the broad proposition for which Defendants would have it stand. In *Cheney*, the Supreme Court was faced with "overbroad" discovery requests that "go well beyond FACA's requirements." *Id.* at 383. Additionally, the relief in the nature of mandamus at issue in *Cheney* was relief sought by the defendants against the district court's broad discovery order, not against compliance with the non-discretionary duties of FACA that were at issue in the underlying case below.

Moreover, the group of advisors at issue in *Cheney* and the attendant

constitutional concerns are starkly distinct from those surrounding the Pence-Kobach Commission. The group of advisors gathered together by President George W. Bush in *Cheney* were those in "closest operational proximity to the President," *id.* at 381, that is, the Vice President, agency heads, and assistants, *id.* at 372. Indeed, all of the members of the advisory group in *Cheney* were employees of the federal government. *Id.* In establishing a group of this kind, it is plain that President Bush did not intend to invoke the requirements of FACA, which expressly exempt committees that are "composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government." 5 U.S.C. app. 2 § 3(2)(i).

By contrast, the Pence-Kobach Commission is not composed of such a group of advisors, to be relied upon for confidential communications. Rather, President Trump chose to compose a committee that falls squarely within the definition of an advisory committee under FACA, as ten of the twelve members are not employees of the federal government.[3] And while Vice President Pence is a member of the Commission and is clearly a close advisor of the President, Defendants have conceded that Vice President Pence will likely not even be in attendance at future meetings of the Pence-Kobach Commission, Kossack Decl. ¶ 8, ECF No. 16-1, underscoring that *none* of the members of the Pence-Kobach Commission who will be fully engaged in the study and deliberative work of the Commission are of the kind at issue in *Cheney*, that is, those in "closest operational proximity to the President." "[W]here," as here, "the President formally

[3] In addition to the Vice President, the only Pence-Kobach Commission member who is an employee of the federal government is Election Assistance Commissioner Christy McCormick. Vice Chair Kobach has sworn under penalty of perjury that Ms. McCormick is not serving on the Commission in her official capacity. Second Kobach Decl. ¶ 2, *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, No. 17-cv-1320-CKK (D.D.C. July 6, 2017), ECF No. 11-1.

convenes an advisory committee pursuant to [] FACA, he cannot claim that enforcement of the Act's requirements would unconstitutionally impede his ability to perform his functions." *Nat'l Anti-Hunger Coal. v. Exec. Comm. of President's Private Sector Survey on Cost Control*, 711 F.2d 1071, 1073 n.1 (D.C. Cir. 1983). FACA was not "intended to intrude upon the day-to-day functioning of the presidency," *id.* (citing *Nader v. Baroody*, 396 F. Supp. 1231, 1234 (D.D.C. 1975)), and, under the circumstances of this case, enforcing FACA's non-discretionary transparency requirements will not do so.

Rather, benefits flow to the executive upon invocation of an official advisory committee, namely, "political legitimacy with respect to its policy decisions." *Cummock v. Gore*, 180 F.3d 282, 292 (D.C. Cir. 1999); *see also id.* (noting utility of advisory committees because "[p]olitically" a decision may "not be salable without some outside, 'neutral' support"). Defendants have already sought to trade on that particular expected utility of an advisory committee. From its inception, Defendants have repeatedly touted the Pence-Kobach Commission as "bipartisan."[4] Defendants would drape the Pence-Kobach Commission in the cover of bipartisanship and "outside, 'neutral' support," while at the same time have the Court declare that the group is so entwined with President Trump that it cannot be made to carry out its non-discretionary statutory duties. They cannot have it both ways.

[4] *See* Press Release, Office of the Press Secretary, President Announces Formation of Bipartisan Presidential Commission on Election Integrity (May 11, 2017), https://www.whitehouse.gov/the-press-office/2017/05/11/president-announces-formation-bipartisan-presidential-commission; Madeline Conway, *Kris Kobach Defends Elections Commission Voter Data Request*, Politico (July 5, 2017), http://www.politico.com/story/2017/07/05/kobach-states-voter-data-fraud-240241 (quoting Vice Chair Kobach defending the broad data request touting "this bipartisan commission").

B. The ACLU's Claims Regarding the Commission's Documents Are Not Moot Because Defendants Have Not Made Available All of the Documents that Are Subject to FACA's Public Access Requirements.

Defendants do not meaningfully dispute that FACA requires that the Pence-Kobach Commission's documents be made public, instead primarily arguing that the ACLU's claims in this regard are moot because Defendants have slapped up a few documents on a hastily created website on the White House "Blog,"[5] and have attached a few Commission documents to their opposition brief. That argument is incorrect for three reasons.

First, Defendants have still not made available the full range of documents subject to FACA's public access requirements. Defendants' focus in their opposition brief on documents that were made available to the Commission in relation to particular *meetings* suggests that they have not complied with the full scope of § 10(b). *See* Defs.' Mem. in Opp. at 25-26. But FACA requires disclosure of "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared **for or by each advisory committee**," not merely those documents used in connection with meetings. 5 U.S.C. app. 2 § 10(b) (emphasis added). The documents Defendants have hastily "made available," either through their website or in filings with this Court, include an undated email and agenda from the June 28 meeting, the Commission Charter, the letters sent to the states, the notice for the upcoming July 19 meeting, and comments received by the Commission from the public and state officials. But that cannot possibly be the full range

[5] The White House, Presidential Advisory Commission on Election Integrity, The White House Blog (July 13, 2017 10:15 AM) https://www.whitehouse.gov/blog/2017/07/13/presidential-advisory-commission-election-integrity.

of documents prepared for or by the Commission to date. The Commission has already decided to collect the personal data of millions of Americans and reportedly made the decision to match this state-specific voter data against federal databases.[6] And, as Vice Chair Kobach has averred in response to the EPIC suit, the Commission has shifted course at least once on how that data will be maintained. Third Kobach Decl. ¶ 1, *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, No. 17-cv-1320-CKK (D.D.C. July 10, 2017), ECF No. 24-1 (informing the Court that "the Commission has decided to use alternative means for transmitting the requested data," namely, an "encrypted computer application within the White House Information Technology enterprise"). "The Commission" also made the decision to send "the state a follow-up communication requesting the states not submit any data until this Court rules on th[e EPIC] TRO motion." *Id.* ¶ 2, Ex. A. Defendants' failure to make publicly available any documents related to these issues and matters demonstrates either that Defendants have not made all documents publicly available or that they are not making informed decisions—which would itself be a fact that the public is entitled to know.[7]

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[6] *See* Sam Levine, *Trump Voter Fraud Commission Was Cautioned About Seeking Sensitive Voter Information*, Huffington Post (July 5, 2017), http://www.huffingtonpost.com/entry/trump-voter-fraud-commission_us_595d511fe4b02e9bdb0a073d; Jessica Huseman, *Election Experts See Flaws in Trump Voter Commission's Plan to Smoke Out Fraud*, ProPublica (July 6, 2017), https://www.propublica.org/article/election-experts-see-flaws-trump-voter-commissions-plan-to-smoke-out-fraud.

[7] Whether the Commission is making informed decisions with respect to data security and privacy is of particular public concern in light of the Commission's decision to redact the contact information of the Designated Federal Officer before disclosing his communications but not to redact personal contact information of the individuals who submitted public comments to the Commission before posting their comments online. *Compare* Ex. A to Kossack Decl., ECF No. 16-1, *with* Comments Received from June 29 through July 11, 2017, Presidential Advisory Commission on Election Integrity

Second, even if Defendants were correct that the only documents that they are required to make public are those that are related to particular meetings—and they are not—Defendants have not yet done even that: they have not made available the minutes and transcript from the June 28 meeting, which must be disclosed *regardless of whether that meeting was preparatory or substantive*. FACA requires that Defendants make available for public inspection "the records, reports, **transcripts, minutes**, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by" the Commission. 5 U.S.C. app. 2 § 10(b) (emphasis added); *see also id.* § 11(a). This requirement is subject only to the limitations in FOIA. *Id.* Thus, even if the June 28 meeting is merely "preparatory" and therefore exempt from the open meeting requirements of FACA—which it was not—FACA still requires that Defendants make the minutes and transcript of that meeting available, which they have yet to do. *See* 41 C.F.R. 102-3.160 (stating only that "preparatory work" and "administrative work" are "not subject to the notice and open meeting requirements of [FACA]"). Insofar as Defendants have not kept or prepared minutes for this meeting, that would be an additional FACA violation that further demonstrates that the ACLU's claims remain live. *See* 5 U.S.C. app. 2 § 10(c); *see also* 41 C.F.R. § 102-3.165 ("The agency head or, in the case of an independent Presidential advisory committee, the chairperson must ensure that detailed minutes of each advisory committee meeting, including one that is closed or partially closed to the public, are kept."); *Judicial Watch, Inc. v. Dep't of Commerce*, 583 F.3d 871, 874 (D.C. Cir. 2009) (FACA not limited "only to existing records").

Third, Defendants' sudden willingness to "voluntarily comply" with their FACA

Resources, https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/comments-received-june-29-through-july-11-2017.pdf (last visited July 14, 2017).

disclosure requirements by providing some documents is a classic example of the "voluntary cessation" exception to mootness. Where, as here, a defendant voluntarily ceases unlawful activity, the case will be moot only if the defendant shows that there is "'no reasonable expectation'" that the violation will recur and "'interim relief or events have completely and irrevocably eradicated the effects'" of the violation. *Larsen v. U.S. Navy*, 525 F.3d 1, 4 (D.C. Cir. 2008) (quoting *Cty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). Defendants have the "heavy burden" of showing that "subsequent events" make it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Parents Involved Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (internal quotation marks omitted). Given Defendants' position that they have provided documents as required under FACA due only to their largesse, *see* Defs.' Mem. in Opp. at 17, ECF No. 16; Kossack Decl. ¶ 2, ECF No. 16-1; Mem. in Opp. to Pl.'s Emergency Mot. for a TRO at 12, *Elec. Privacy Info. Ctr.*, No. 17-cv-1320 (CKK) (D.D.C. July 5, 2017), ECF No. 8, they simply cannot meet this burden. This is especially true given the flurry of "factual developments" that have occurred since this Court began its review of the Commission's activities. *See, e.g.*, Defs.' Suppl. Br. re. the Dep't of Def. ¶ 1, *Elec. Privacy Info. Ctr.*, No. 17-cv-1320-CKK (D.D.C. July 10 2017), ECF No. 24.

II. Defendants Have Failed To Comply With and, Absent Relief Will Continue to Violate, FACA's Open Meeting Requirements.

Aside from the fact that, as discussed *supra*, Defendants did not and still have not fully complied with their document disclosure obligations under § 10(b) of FACA, Defendants have failed and continue to fail to comply with their openness duties with respect to the conduct of their meetings.

A. The June 28 Telephonic Meeting Was a "Committee Meeting."

Despite Defendants' attempt to downplay the importance of the issues discussed, the June 28 meeting was clearly a "committee meeting" subject to the notice and public access requirements of § 10(a) FACA. As Defendants correctly note, the FACA regulations define a "committee meeting" as "any gathering of advisory committee members (whether in person or electronic means) held with the approval of any agency for the purpose of deliberating on the substantive matters upon which the advisory committee provides advice or recommendations." 41 C.F.R. § 102-3.25. Defendants would truncate this definition to include only meetings in which a committee discusses its actual "recommendations," Defs.' Mem. in Opp. at 21, but the language plainly encompasses more, namely the "*substantive matters upon which* the advisory committee provides advice or recommendations." Such "substantive matters" took up at least some portion of this 90-minute meeting, according to subsequent statements by Commission members reported by the media.

In particular, on or about June 28, the Committee made a momentous and unprecedented decision to aggregate the personal voter data of every registered voter in the United States, for the purpose of identifying potential double registrants or other ineligible registrants. A spokesperson for Vice President Pence, Marc Lotter, has stated that the Commission has already formulated plans for the voter data that it is collecting, explaining that the Commission intends to check the information contained in state voter rolls against data housed in various federal databases to identify supposedly ineligible registrants.[8] Because, as far as the public is aware, the June 28 meeting is the only time

[8] *See* Huseman, *Election Experts See Flaws in Trump Voter Commission's Plan to Smoke Out Fraud*, *supra* note 6.

that the Commission has had a meeting of any sort, the formulation of these plans presumably was discussed at that meeting. Unlike the request for "views and recommendations," the call for voter roll data—which in itself raises substantial privacy concerns—and the creation of plans for what to do with that data—which may involve highly inaccurate matching procedures, *see* Pls.' App. at 13, ECF No. 3, and which therefore raise substantial concerns about the accuracy of the Commission's future recommendations regarding elections integrity—reflect a decision, deliberated and made at the June 28 meeting, that the issue of potential double and other potentially ineligible registrants would be a part of the Commission's substantive focus and ultimate recommendations.

Defendants assert that any deliberations surrounding Vice Chair Kobach's request for voter data were simply "preparatory" because they involved information and research, but this misreads the relevant regulation. The regulation they cite defines "preparatory work" as "[m]eetings of two or more advisory committee or subcommittee members convened solely to gather information, conduct research, or analyze relevant issues and facts **in preparation for a meeting of the advisory committee**, or to draft position papers for deliberation by the advisory committee." 41 C.F.R. § 102-3.160 (emphasis added). Here, the decision to request voter data and the formulation of what to do with that data were not merely discussions "in preparation for a meeting of the advisory committee"; rather, as previously discussed, they were substantive decisions about specific election integrity-related issues and how to address them, which necessarily constitute "deliberat[ions] on substantive matters upon which the advisory committee provides advice or recommendations."

Because the June 28 meeting was a "committee meeting," Defendants' failure to provide notice and public access violated § 10(a) of FACA and underscores the need for relief in the form of an order requiring that future meetings of this nature be conducted in accordance with the public notice and access requirements of FACA, particularly given Defendants' insistence that they are not subject to the requirements of FACA.[9]

B. The Current Plans for the July 19th Meeting Do Not Satisfy FACA's Requirement that Committee Meetings Be "Open to the Public".

Section 10(a) of FACA mandates that all advisory committee meetings will "be open to the public." 5 U.S.C. app. 2 § 10(a)(1). Defendants would have the Court limit this access through a strained reading of the related administrative regulations. In their brief, Defendants read a critical phrase out of the administrative regulations governing remote meetings of advisory committees: that the meeting is "conducted" through an "electronic medium." 41 C.F.R. § 102-3.140(e). That is, this subsection requires that where the meeting itself is conducted in whole or part through electronic means it still must conform to the open meeting requirements of FACA, in order to prevent committees from using electronically-conducted meetings as an end run around statutory requirements. But that does *not* mean that where the meeting is conducted *in person* it need not be held physically open to the public. And the other sections of the regulations cited by Defendants do nothing to alter this analysis: where the meeting is held electronically, public access will necessarily be in a "manner" rather than a place.

[9] To the extent that some portions of the June 28 meeting were dedicated to truly preparatory or administrative work, those portions of the meeting could have been exempted from the procedural open meeting requirements. *See, e.g.*, Meeting of the Uniform Formulatory Beneficiary Advisory Panel, 78 Fed. Reg. 33074-01 (June 3, 2013) ("Prior to the public meeting, the Panel will conduct an Administrative Work Meeting from 7:30 a.m. to 9:00 a.m. to discuss administrative matters of the Panel. . . . Pursuant to 41 CFR 102–3.160, the Administrative Work Meeting will be closed to the public.").

Defendants' reference to President Obama's Presidential Commission on Election Administration ("PCEA") is also inapposite. There, the commission meeting was "conducted . . . by a teleconference," 41 C.F.R. § 102-3.140(e), and was held "in a manner . . . reasonably accessible to the public," *id.* at § 102-3.140(a), via a conference call phone line. The meeting was not conducted in a particular physical place, gathering the commission members in-person separate and apart from the listening public, but rather was conducted entirely via teleconference. *See* The Presidential Commission on Election Administration (PCEA); Upcoming Public Advisory Meeting, 78 Fed. Reg. 64942-01 (Oct. 30, 2013).[10] That is entirely consistent with 41 C.F.R. § 102-3.140(e); § 102-3.140(b) is aimed at making clear that the open meeting requirements of FACA apply even where a forum, other than a physical place, is chosen for the conduct of the meeting.[11] But neither the regulations, nor past practice by the PCEA, justify holding an *in-person* committee meeting and providing only electronic means of public access.[12]

[10] Each of the public notices cited by Defendants does nothing to support their position and instead supports the plain meaning of 41 C.F.R. § 102-3.140(e) advocated here. *See* Good Neighbor Environmental Board; Notification of Public Advisory Committee Teleconferences, 79 Fed. Reg. 46801-01 (Aug. 11, 2014) (providing notice of two teleconferences, not merely teleconference access to an in-person meeting); Commercial Space Transportation Advisory Committee – Public Teleconference, 78 Fed. Reg. 1917-01 (Jan. 9, 2013); Science Advisory Board; Notification of Public Teleconference Meeting, 62 Fed. Reg. 33408-01 (June 19, 1997) (committee "will conduct a public meeting by teleconference"). The meetings were themselves "conducted . . . by teleconference" and still held in compliance with the open meeting requirements of FACA.

[11] That the government has apparently also violated the open meeting requirements of FACA for the Commission on Combating Drug Addiction and the Opioid Crisis does nothing to alter the analysis with respect to the Pence-Kobach Commission.

[12] With respect to Defendants' contention that the "security protocols with the Vice President's attendance" somehow bars members of the general public from being in attendance at the July 19 meeting, the ACLU notes that Vice President Pence has made numerous appearances in which members of the general public were in attendance. *See, e.g.*, Abigail Elise, *Vice President Pence Promises to End Taxpayer-Funded Abortions at*

III. The ACLU Will Suffer Irreparable Harm Absent Preliminary Relief.

Because Defendants still have not provided all documents, the ACLU, its members, and other members of the public will lose any meaningful opportunity for public oversight or comment unless relief is ordered ensuring timely access to the minutes, transcript and any other documents prepared for or by the Commission prior to the planned July 19 meeting in order to be in a position to submit informed written comments that could be considered during the meeting. *See Food Chem. News v. Dep't Health & Human Servs.*, 980 F.2d 1468, 1472 (D.D.C. 1992) ("interested parties" must have timely "access to relevant materials" in order "to present their views" and "be informed with respect to the subject matter" at the meeting "at which the materials are used and discussed").

As discussed above, Defendants maintain that they are not bound by FACA and are complying with the Act as they see fit only because of their magnanimity. In addition, their decision to provide documents and some public access to meetings now—despite their self-serving claims that they were always planning to do so—suggests that their generosity is only a product of duress. As a result, whether future meetings will be noticed and open to the public and all Commission documents disclosed is subject to Defendants' whims. Under such circumstances, the threat of future harm is not, as Defendants claim, merely speculative. *Cf. Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 411-12 (D.C. Cir. 2009) (in mootness context, a live claim exist where the unlawful action is "capable of repetition yet evading review"). The terrain is

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March for Life, KCRA (Jan 27, 2017), http://www.kcra.com/article/vice-president-mike-pence-addresses-crowds-at-washington-dc-march-for-life/8646790; Media Advisory, NASA, *Vice President Pence to Visit NASA's Kennedy Space Center* (June 30, 2017), *available at* https://www.nasa.gov/press-release/vice-president-pence-to-visit-nasa-s-kennedy-space-center.

constantly shifting, and without an order from this Court ensuring compliance with FACA's openness requirements, there is a very real possibility that the Commission will shut its doors to public scrutiny. In that event, as with the June 28 meeting, the ACLU, its members, and other members of the public will never be in a position to obtain meaningful relief because by the time the public finds out that a meeting has taken place, it will already be too late to take advantage of the opportunity to monitor the Commission and hold it accountable in the manner contemplated by FACA. Given Defendants' position and previous actions, an order compelling compliance going forward is necessary in order to prevent irreparable harm.

Finally, without the requested relief, the ability of some members of the public, not hand selected by Defendants to attend the July 19 meeting in person, *see* Kossack Decl. ¶ 8, will be forever lost. There are concrete reasons why public attendance through the same means as the conduct of the meeting follows from the requirements and purpose of FACA. Seeing interested members of the public, as opposed to some remote faceless, numberless audience, would make clear to the Commission—as well as members of the press who amplify public oversight through reportage—that the matters at issue are of critical public concern. *Cf. Veasey v. Perry*, 71 F. Supp. 3d 627, 690 (S.D. Tex. 2014) (finding that "'voting by mail is not actually a viable 'alternative means of access to the ballot' for many of the Plaintiffs" and agreeing with other courts that "voting by mail is fundamentally different from voting in person") (citation omitted), *aff'd in relevant part by Veasey v. Abbott*, 830 F.3d 216 (5th Cir 2016); *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1365 (N.D. Ga. 2005) (finding that absentee voting by mail "simply is not a realistic alternative to voting in person that is reasonable available for

most" of the relevant voters).

Retrospective relief will be inadequate; absent the requested relief, the rights of the ACLU, its members, and other members of the public to effectively monitor and hold accountable the Commission in real-time as it develops recommendations and policies at the upcoming July 19 meeting will be "permanently lost." *Gates v. Schlesinger*, 366 F. Supp. 797, 800-01 (D.D.C. 1973). As the FACA regulations recognize, "Timely access to advisory committee records is an important element of the public access requirements of the Act. Section 10(b) of the Act provides for the contemporaneous availability of advisory committee records that, when taken in conjunction with the ability to attend committee meetings, provide a meaningful opportunity to comprehend fully the work undertaken by the advisory committee." 41 C.F.R. § 102-3.170; *see also Ala.-Tombigbee Rivers Coal. v. Dep't of Interior*, 26 F.3d 1103, 1106 (11th Cir. 1994); *Food Chem. News*, 980 F.2d at 1472.

IV. The Balance of Harm and the Public Interest Weigh Strongly in Favor of Preliminary Relief.

No one disputes that voting is the "bedrock" of our democracy, *Reynolds v. Sims*, 377 U.S. 533, 562 (1964), but Defendants would have the Court conflate this fact with their activities. Defendants have made no showing of the public interest weighing in their favor and merely echoed the tasks of the Pence-Kobach Commission as laid out in the Executive Order, ignoring that the public interest is disserved by an unsupervised committee operating out of public view giving advice and recommendations on issues of critical concern to our democracy. *See Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 453 (1989) ("FACA was enacted to cure specific ills, above all . . . biased proposals"); *see also* H.R. Rep. No. 92-1017, at 3496 (1972) ("One of the great dangers

in this unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns.") As Justice Brandeis long ago advised, "[s]unlight is said to be the best of disinfectants," *Buckley v. Valeo*, 424 U.S. 1, 67 (1976), and it is this sort of oversight with which FACA is concerned.

Here, the public interest weighs heavily in favor of "providing the public its right to know how its government is conducting the public's business." *Pub. Citizen v. Nat'l Econ. Comm'n*, 703 F. Supp. 113, 129 (D.D.C. 1989). Certainly, the Commission's discussions and decisions are of considerable public importance and concern—a fact reflected in the intense media attention and public backlash to the Commission's request for voter information, including individuals seeking to cancel their registration for fear of how the Commission will handle personal data.[13]

The Pence-Kobach Commission is collecting and aggregating an unprecedented amount of data on every voter in the United States, without providing any information to assure voters that their privacy will be maintained. The Commission is also poised to make findings and recommendations that touch upon the fundamental right to vote.

[13] *See, e.g.*, E-mail from David Huff, to Presidential Advisory Committee on Election Integrity (June 29, 2017, 2:02 PM) (expressing concern over release of last four digits of Social Security Number), https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/comments-received-june-29-through-july-11-2017.pdf; Corey Hutchins, *In Colorado, 'Confusion,' 'Hysteria,' and Voters Unregistering at Some Local Election Offices*, Colo. Indep. (July 7, 2017), http://www.coloradoindependent.com/166227/colorado-voting-trump-unregister-confidential; *see also* Editorial Board, *Happy Fourth of July! Show Us Your Papers*, N.Y. Times (July 3, 2017), https://www.nytimes.com/2017/07/03/opinion/voter-fraud-data-kris-kobach.html; Editorial Board, *Trump Launches His Opening Voter Suppression Salvo*, Wash. Post (July 2, 2017), https://www.washingtonpost.com/opinions/trump-launches-his-opening-voter-suppression-salvo/2017/07/02/a525561a-5dd3-11e7-9b7d-14576dc0f39d_story.html?utm_term=.7d1cc26d04b6.

Ensuring that Defendants comply with the full extent of their openness obligations under FACA on such a matter of public importance clearly outweighs the need to modify the travel plans of a handful of individuals[14]—which would only be necessary if Defendants are unable to comply with their obligations prior to July 19.

CONCLUSION

For the foregoing reasons, this Court should grant the ACLU's application for a temporary restraining order and/or preliminary injunction.

Respectfully submitted,

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Dated: July 14, 2017

[14] It is worth noting that "[a]ppointment to an advisory body is often coveted and highly esteemed" with the appointees gaining "recognition and even prestige," *Cummock*, 180 F.3d at 291-92, so even as the Pence-Kobach Commission members are not salaried, theirs is not merely a selfless exercise.