SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

BLACK LIVES MATTER D.C., et al., Plaintiffs, v. MURIEL BOWSER, et al., Defendants.	2018 CA 003168 B Judge John M. Campbell Next Court Date: November 2, 2018

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Defendants' motion to dismiss mainly recycles arguments from their preliminary injunction opposition that the Court has declined to adopt. Once again, Defendants' claim that there is no cause of action for unreasonable delay ignores the inherent equitable authority of this Court and binding precedent. Once again, Defendants' standing argument (although now somewhat altered in focus) misunderstands informational standing and contravenes leading authorities from the D.C. Circuit. And once again, Defendants press a political-question argument that ignores the legal standard for that doctrine and a ripeness argument that defies common sense. The motion to dismiss should be denied.

LEGAL STANDARD

Defendants correctly state the applicable legal standard. Plaintiffs highlight one principle concerning the scope of the material germane to the Court's adjudication of subject-matter jurisdiction: "When jurisdiction over a case depends on a factual question, the court may independently review the evidence and conduct additional fact-finding to determine whether it has jurisdiction." *Equal Rights Ctr. v. Properties Int'l*, 110 A.3d 599, 606 (D.C. 2015); *see also Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992) ("[T]he District Court may in appropriate cases dispose of a motion to dismiss for lack of subject matter jurisdiction under

Fed. R. Civ. P. 12(b)(1) on the complaint standing alone. But where necessary, the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts."); *accord* Memo. of Points & Auths. in Support of Defs.' Mot. To Dismiss (hereafter "MTD") 5.

Because two of Defendants' jurisdictional arguments — those on standing and ripeness — depend at least in part on assertions about whether Plaintiffs have in fact been injured, *see* MTD 9 (referring to injury evidence outside of the complaint), and what steps Plaintiffs have taken to obtain the information they seek, *see id.* at 10 n.3 (claiming, albeit incorrectly, that "plaintiffs failed to pursue the information [they seek] through FOIA requests"), consideration of some factual information is appropriate. Plaintiffs therefore cite facts outside of the complaint in the background section and in the standing and ripeness arguments. The purely legal questions regarding the political-question doctrine and the cause of action will be analyzed based on the complaint alone.

BACKGROUND

In Section A, Plaintiffs restate the background facts for the Court's convenience, but if the Court is sufficiently familiar with the facts as stated in Plaintiffs' motion for preliminary injunction, Section A contains nothing new.

Section B recounts developments since the filing of the case, including relevant aspects of this Court's hearings in September and October.

A. The NEAR Act And This Lawsuit.

The Council of the District of Columbia unanimously passed the NEAR Act on March 1, 2016, and it became effective on June 30, 2016, following the federally-mandated congressional review period. Cmpt. ¶ 14. Title II(G) of the NEAR Act amended the D.C. Code to require that

MPD officers record the following information about all police stops made in the District of Columbia:

A. The date, location, and time of the stop;
B. The approximate duration of the stop;
C. The traffic violation or violations alleged to have been committed that led to the stop;
D. Whether a search was conducted as a result of the stop;
E. If a search was conducted:
    i. The reason for the search;
    ii. Whether the search was consensual or nonconsensual;
    iii. Whether a person was searched, and whether a person's property was searched; and
    iv. Whether any contraband or other property was seized in the course of the search;
F. Whether a warning, safety equipment repair order, or citation was issued as a result of a stop and the basis for issuing such warning, order, or citation;
G. Whether an arrest was made as a result of either the stop or the search;
H. If an arrest was made, the crime charged;
I. The gender of the person stopped;
J. The race or ethnicity of the person stopped; and
K. The date of birth of the person stopped.

D.C. Code § 5-113.01(a)(4B). Specifically, the statute requires that "[t]he Mayor of the District of Columbia . . . cause the Metropolitan Police force to keep" these records. § 5-113.01(a).

In its Committee Report on the proposed legislation, the D.C. Council's Committee on the Judiciary and Public Safety ("Judiciary Committee") quoted the Obama Administration's Task Force on 21st Century Policing, which emphasized that "data collection, supervision, and accountability are . . . part of a comprehensive systemic approach to keeping everyone safe and protecting the rights of all involved during police encounters." Declaration of Shana Knizhnik in Support of Pls.' Mot. for Prelim. Inj'n ("Knizhnik Decl."), Attach. A, at 23. The Committee Report further noted the importance of the data collection requirement by pointing out that the Task Force had "strongly encouraged local governments to allocate infrastructure and IT staff expertise to support law enforcement reporting on activities implementing their recommendations." *Id.* The Committee Report's "Section-By-Section Analysis" makes clear that the purpose of Title II(G) is "to require the Metropolitan Police Department to collect *additional* data on stops and use of force

incidents" beyond what MPD had collected previously. *Id.* at 60 (emphasis added). As MPD's recent release of the data for all "incident reports classified as 'stop and frisk' from 2010 to 2016" makes clear, the pre-NEAR Act data collection practices lack many of the critical data points required by the Act, including: the duration of the stop; the specific violation or other justification that led to the stop; whether a search occurred and if so, the reason for and result of that search; whether the stop was consensual; whether a warning, order, or citation was issued; and whether and for what charge an arrest was made. *See* Knizhnik Decl., Attach. J; *cf.* D.C. Code § 5-113.01(a)(4B)(B)-(G).

The D.C. Council allocated $150,000 in funds for Fiscal Year 2017 specifically to implement the data collection requirement, based on a fiscal impact analysis performed by the D.C. Office of the Chief Financial Officer concluding that this amount was sufficient for that purpose. The D.C. Budget that included these allocated funds went into effect on October 1, 2016. *See* Cmpt. ¶ 19.

On February 10, 2017, Plaintiff American Civil Liberties Union of the District of Columbia (ACLU-DC) filed a FOIA request for all data collected pursuant to the data collection requirement since the implementation of the Act. *See* Knizhnik Decl., Attach. Q. MPD responded on April 5, 2017, stating that "[a]lthough the NEAR Act became law[,] it ha[d] not been implemented as of the date of the search, and existing records do not contain the NEAR data which is the subject of your request." Knizhnik Decl., Attach. R.

As of the filing of Plaintiffs' complaint in May 2018, implementation of the NEAR Act data collection requirement had still not occurred, or even begun. In the intervening two years since passage of the law, Defendants had, instead of implementing the Act, given the public and the D.C. Council evasive or downright misleading information about the status of NEAR Act implementation. In a February 27, 2017 letter to D.C. Councilmember Charles Allen in advance

of the D.C. Council Judiciary Committee's Fiscal Year 2016 Performance Oversight hearings, Defendant Chief Peter Newsham responded to the Committee's question regarding MPD's "progress and plans for implementation" of the NEAR Act data collection requirement by stating that MPD was "working to come into compliance, but must evaluate where these changes fit with mission critical objectives." Cmpt. ¶ 22. In a publication released on January 30, 2018, the Office of the Mayor stated that Defendant Bowser's administration had "fully implemented" the NEAR Act. Cmpt. ¶ 23. In February 2018, the Office of the Mayor circulated a document describing the progress made on each aspect of the NEAR Act, which stated that with respect to the data collection requirement, "[i]mplementation has begun, but will require alternative ways to analyze data." Cmpt. ¶ 24. But in March 2018, MPD Communications Director Dustin Sternbeck admitted that MPD had not expended any of the $150,000 in funding allocated by the D.C. Council back in 2016 for implementation of the data collection requirement, Cmpt. ¶ 27, and that same month, Defendant Newsham admitted at a D.C. Council budget oversight hearing that MPD was "guilty" of not prioritizing the data collection requirement and of not having "a complete understanding of the necessary infrastructure changes that would be required." Cmpt. ¶ 29.

Meanwhile, also in March 2018 (the day before Chief Newsham's admission), Plaintiffs Black Lives Matter D.C. (BLM-DC), Stop Police Terror Project D.C. (SPTP-DC), and ACLU-DC — three D.C.-based nonprofit organizations that work to oppose racism in the criminal justice system and to bring policing in the District in line with constitutional requirements, *see* Cmpt. ¶¶ 7-9 — submitted a FOIA request for data on all stops and frisks conducted after the NEAR Act implementation date, as well as for documents reflecting MPD's plan for achieving full implementation of the NEAR Act stop and frisk data requirement. Cmpt. ¶ 32.

Having received no such data and no plans for implementation, Plaintiffs filed this action on May 4, 2018. On May 7, 2018, the District provided, in response to the FOIA request, fourteen

forms documenting stops conducted in 2016 and noted that it was "still in the process of completing data quality and validation checks" on reports from 2017 and 2018. Knizhnik Decl., Attach. T. However, the samples provided reflected the same data collection practices in place prior to the passage of the NEAR Act. *See* Knizhnik Decl., at ¶ 6. Further, the Government provided no documents reflecting any plans or timetables for achieving full compliance with the data collection requirement, and did not state that any such documents existed and were being withheld. *See id.* Accordingly, and in light of the March 2018 statements of D.C. officials indicating that the NEAR Act had not yet been implemented, *see* Decls. of Monica Hopkins-Maxwell ("Hopkins Decl.") in Support of Pls.' Mot. for Prelim. Inj'n, ¶ 10, Plaintiffs withdrew their FOIA request because it was clear the data they sought did not yet exist, and they were not prepared to pay thousands of dollars for the duplication of documents that did not contain the data they wanted, *see id.* ¶ 12 (noting MPD cost estimate of $34,625 for copies of documents plus an additional $16-40 per hour of employee time spent searching and reviewing documents).

B. Developments Since the Filing of the Preliminary Injunction Motion.

On May 8, 2018, Plaintiffs moved for a preliminary injunction, asking this Court to set a timetable for compliance with the NEAR Act data collection requirement. Defendants opposed principally on jurisdictional grounds, arguing that Plaintiffs lacked standing, that the Complaint was unripe, and that the case raised a political question. Defendants also asserted that Plaintiffs lacked a cause of action to enforce the NEAR Act data collection requirement, that Defendants had not unreasonably delayed, and that Plaintiffs' requested relief was inappropriate.

This Court held hearings on September 28 and October 5. Counsel for Defendants conceded that the data collection requirement remains unimplemented. The Court inquired about the status of Defendants' implementation efforts and the feasibility of and timetables for both an interim and a permanent solution for implementation; these matters are being addressed, at the

Court's direction, in a separate set of papers filed on October 19 (Defendants) and October 26 (Plaintiffs).

Meanwhile, the Court also heard from Defendants' counsel about its jurisdictional and cause-of-action arguments, and the Court indicated orally that it was unlikely to accept them. Counsel for Defendants specifically conceded that the purpose of the NEAR Act data collection requirement was to ensure the collection of information about the stop-and-frisk practices of MPD for disclosure to the public.

ARGUMENT

I. The Political Question Doctrine Is Inapplicable Here.

Defendants argue that Plaintiffs' claim is a non-justiciable "political question," based solely on the fact that the statutory language "places enforcement of the Act under the responsibility of the executive branch." MTD 7. However, the political question doctrine does not state that courts may not review the implementation of functions delegated to the executive branch; that is much of what courts do. Rather, the doctrine bars judicial review "where there is a textually demonstrable *constitutional* commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) (emphasis added; citation and internal quotation marks omitted). Defendants point to no constitutional provision committing NEAR Act data collection to the executive branch, nor any lack of standards for resolving this case. In fact, in the preliminary injunction briefing, both Plaintiffs and Defendants relied on the *TRAC* factors, *see Telecomm. Research & Action Ctr. v. F.C.C.*, 750 F.2d 70, 80 (D.C. Cir. 1984), which courts have used in this type of case for decades.

Non-discretionary legislative directives to the executive branch are frequently subject to judicial review in cases of executive inaction or delay. *See, e.g., In re Aiken County*, 725 F.3d

255, 260 (D.C. Cir. 2013) ("[W]here previously appropriated money is available for an agency to perform a statutorily mandated activity, we see no basis for a court to excuse the agency from that statutory mandate."); *Fesjian v. Jefferson*, 399 A.2d 861, 866 (D.C. 1979) (noting that if petitioners had exhausted their administrative remedies and not received a response to their firearm applications from the MPD, they could obtain a court order compelling the MPD to act on their applications); *see also In re Int'l Chem. Workers Union*, 958 F.2d 1144 (D.C. Cir. 1992) (imposing deadline after OSHA's delay in promulgating a rule to protect workers against exposure to the dangerous chemical cadmium); *Pub. Citizen Health Res. Group v. Auchte*r, 702 F.2d 1150 (D.C. Cir. 1983) (ordering issuance of notice of proposed rulemaking after delay in OSHA regulatory process regarding ethylene oxide).

Defendants' reliance on *District of Columbia v. Sierra Club*, 670 A.2d 354 (D.C. 1996), in support of their nonjusticiability argument is misplaced. *Sierra Club* doesn't mention the political question doctrine at all. Rather, the *Sierra Club* court merely stated that it wouldn't "second-guess the executive branch as to which mandated programs should be accorded priority when not all of them can be accommodated" because of a lack of funding. *Id.* at 365. Invoking separation of powers concerns, the Court of Appeals declined to "dictate the Mayor's spending priorities." *Id.* at 366. In this case, there is no similar funding issue. Rather, the problem is that MPD failed to request the funds necessary to implement the NEAR Act data collection requirement, didn't spend any of the $150,000 that was appropriated it, and failed to give the Council the information it needed in order to appropriate more money. *See* Cmpt. ¶¶ 28-30 (describing the Council's frustration with MPD's failure to implement the data collection requirement despite the Council's having provided funds to do so). To whatever extent the funds allocated thus far are insufficient (a claim Plaintiffs urge the Court not to take at face value in light of Defendants'

history of misdirection before the Council on this question), that state of affairs is of the executive branch's own making. Thus, this case is a far cry from *Sierra Club*.

Whether MPD's implementation of the NEAR Act's data collection mandate has been unreasonably delayed does not constitute a nonjusticiable political question and is subject to review by this Court.

II. Plaintiffs Have Informational Standing.

"[A] plaintiff suffers an 'injury in fact,' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *FEC v. Akins*, 524 U.S. 11, 21 (1998). To make this showing, a plaintiff must demonstrate that "(1) it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it, and (2) it suffers, by being denied access to that information, the type of harm [the legislature] sought to prevent by requiring disclosure." *Elec. Privacy Info. Ctr. v. Pres. Advisory Comm'n on Election Integrity*, 878 F.3d 371, 378 (D.C. Cir. 2017) (hereinafter *EPIC*) (citation and internal quotation marks omitted).

Central to the application of this test here is the purpose of the NEAR Act's data collection requirement. The D.C. Council enacted this provision in order to "institutionalize[] a culture of transparency and accountability" and "increase[] opportunities for community participation and collaboration in policing." Knizhnik Decl., Attach A at 23 (D.C. Council Judiciary Committee Report on the NEAR Act). Achieving those goals, the Council realized, required that MPD not only collect comprehensive records but also that it "share data with the public." *Id.* Although Defendants' filings play down these statements, MTD 12, at least one Defendant, Deputy Mayor for Public Safety Kevin Donahue, has acknowledged in public testimony to the Council that it is "the intention and spirt of the NEAR Act" for MPD to "put out" (i.e. publicly release) the "police use of force and stop and frisk information." *Comm. on the Judic. and Pub. Safety, Performance*

Oversight Hearing at 3:12:30-3:12:47 (Feb. 22, 2018), *available at* http://dc.granicus.com/MediaPlayer.php?view_id=2&clip_id=4370. Similarly, during this Court's September 28, 2018 status hearing, Defendants' counsel readily acknowledged to the Court that the goal of the NEAR Act is to collect information for the purpose of public disclosure. These concessions confirm what the NEAR Act's legislative history makes plain: the Council intended the "community" — of which Plaintiffs are members — to have access to the information at issue.

With respect to the first prong of informational standing, then, Plaintiffs clearly have a right to the stop-and-frisk data they seek. The Council passed the NEAR Act to promote such access. Although the statute's text does not expressly require publication, the Council did not need to include such a provision to ensure disclosure. Instead, the legislature could rely on the D.C. Freedom of Information Act (FOIA), which already provides comprehensive and well-settled rules governing when the government must release its records. *See* D.C. Code §§ 2-531 to -539. Thus, through the NEAR Act, Council mandated that MPD collect extensive stop-and-frisk data that, under FOIA, MPD must disclose upon request. Together, these statutes compel MPD to "use open data to build transparency." Knizhnik Decl., Attach A at 23 (D.C. Council Judiciary Committee Report on the NEAR Act). And Defendants have conceded that the NEAR Act's data-collection mandate was designed to compile information for public disclosure.

MPD has indisputably failed to disclose this information to Plaintiffs. All three Plaintiffs filed a FOIA request that MPD release the data collected pursuant to the NEAR Act (a fact that, contrary to Defendants' assertions, MTD 8–9, Plaintiffs did allege in their complaint, Cmpt. ¶¶ 20, 32). Because the data-collection mandate of the Act remains unimplemented, MPD was unable to disclose the requested data. *See* Cmpt. ¶ 33. MPD thus deprived Plaintiffs of information that, "on [their] interpretation" of the law, they have a right to obtain. *EPIC*, 878 F.3d at 378.

To the extent Defendants rely on the formalistic notion that a right to information conferred by the joint operation of two separate statutory provisions working together is somehow less entitled to legal recognition than a right created by a single statutory provision, D.C. Circuit precedent refutes their argument. In *Waterkeeper Alliance v. Environmental Protection Agency*, 853 F.3d 527 (D.C. Cir. 2017), the court held that plaintiffs had informational standing to challenge a rule that reduced farmers' duties to report information about animal pollutants under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). *Id.* at 529, 533. CERCLA did not obligate the government to publish the pollutant information the farmers reported; however, another statute, the Emergency Planning and Community Right-to-Know Act (EPCRA), did mandate disclosure of that information. *Id.* at 533. Thus, the D.C. Circuit reasoned, a plaintiff organization that wished to use EPCRA's disclosure provision to receive CERCLA-required records stated an injury when it challenged an administrative rule reducing the records kept under CERCLA — because such a modification of CERCLA would reduce plaintiffs' access to information under EPCRA. *Id.* The D.C. Circuit specifically rejected the agency's argument that the plaintiff lacked informational standing to challenge the reduction in reporting requirements under CERCLA because "CERCLA (unlike EPCRA) has no requirement of *disclosure*." *Id.* Instead, the court recognized the functional reality that a plaintiff suffers injury "when agency action *cuts him off* from information which must be publicly disclosure pursuant to a statute." *Id.* (citation and internal quotation marks omitted; emphasis added).

The logical relationship between the NEAR Act and the D.C. FOIA is similar to the one that existed between the two statutes in *Waterkeeper*: by failing to implement the NEAR Act's reporting requirements, MPD has "automatic[ally] . . . cut[] back on [FOIA's] . . . disclosure requirements . . ., [t]hus depriv[ing] [Plaintiffs] of information, the public disclosure of which

would otherwise be required." *Id.* at 534. "For the purpose of standing, that's injury enough." *Id.* at 533.

Turning to the second prong of informational standing, Plaintiffs have suffered exactly the type of harm the Council sought to prevent by passing the NEAR Act's data collection requirements. Those provisions, as discussed, exist to promote "transparency and accountability," "increase opportunities for community participation and collaboration in policing," and further "community trust." Knizhnik Decl., Attach A at 23 (D.C. Council Judiciary Committee Report on the NEAR Act). Achieving those goals demands more than "improv[ing] internal agency practices," MTD 12. Rather, they require sharing information with organizations like Plaintiffs, which have thousands of members and whose purposes include monitoring and seeking to prevent and to sanction police misconduct. Cmpt. ¶¶ 7–9. By failing to implement the NEAR Act's data collection requirements, MPD has denied Plaintiffs the information they need to "participat[e] and collaborat[e] in policing," and thus caused Plaintiffs the precise type of harm Council passed the collection provisions to prevent.

The D.C. Circuit's decision in *EPIC*, cited by Defendants, does not counsel otherwise. The plaintiffs there sought to enforce a statutory provision "intended to protect *individuals* — in the present context, voters — by requiring an agency to fully consider their privacy before collecting their personal information." 878 F.3d at 378. EPIC, an organization, was of course not a voter and "therefore not the type of plaintiff Congress had in mind." *Id.* Here, by contrast, Plaintiffs seek information that the NEAR Act was passed with the intention of making available to them via FOIA. Unlike the statute in *EPIC*, the NEAR Act was not only meant to promote individual rights, but, as explained, also to increase transparency and accountability for *community* participation.

The close relationship between the NEAR Act's goals and Plaintiffs' injuries refutes Defendants' assertion that allowing standing here would open the floodgates to litigation over any

governmental noncompliance with any reporting requirement where the resulting report would be disclosable under FOIA. MTD 11. Plaintiffs seek to enforce a collection mandate that exists *for the purpose of* providing organizations like them access to information. Thus, the denial of Plaintiffs' FOIA request undermined the goals of the *collection requirement itself*, causing them to incur the very harm the Council sought to prevent.

The second prong of the informational standing test, which examines the legislature's purpose, effectively screens out the claims of plaintiffs seeking to enforce data-collection or reporting provisions unrelated to a legislative intent to facilitate public disclosure. In such cases, the litigants' inability to acquire the information via FOIA would not undermine the legislative purposes behind the reporting regime and, as a result, the plaintiffs would not suffer a relevant harm sufficient to confer standing. *Judicial Watch, Inc. v. Office of Director of National Intelligence*, 2018 WL 1440186 (D.D.C. Mar. 22, 2018), illustrates this point. There, plaintiffs sought to compel a federal agency to conduct a "damage assessment" of the consequences, if any, of former Secretary of State Hillary Clinton's use of a private email server. *Id.* at *1. The plaintiffs claimed standing because, if the agency conducted the assessment, then they could (or at least they alleged they could) have acquired the findings via FOIA. The court rejected this theory. *Id.* at *3. The regulation requiring the creation of the assessment existed to "strengthen the protection of classified national intelligence," Intelligence Community Directive 732, a goal that served internal administrative purposes and had nothing to do with publicizing information; indeed, as the court noted, the Directive served "the polar opposite purpose[]" of FOIA, *Judicial Watch*, 2018 WL 1440186, at *4. Like the *Judicial Watch* plaintiffs, many litigants who rely on the combination of FOIA and some other recordkeeping requirement will stumble at the legislative-purpose inquiry. Plaintiffs here, by contrast, seek to enforce a statute whose purpose was to require the collection of information so that it could be shared with the public.

Thus, the second prong of the test constrains informational standing not by requiring litigants to derive their informational rights from a single statute, *see Waterkeeper*, 853 F.3d at 533, but rather by ensuring that the plaintiffs have identified a relevant harm. Thus, in *American Society for Prevention of Cruelty to Animals v. Feld Entertainment, Inc.*, 659 F.3d 13 (D.C. Cir. 2011), cited by Defendants, the court rejected the plaintiffs' informational standing claim *not* because it relied on a combination of two different statutory provisions (a characteristic of the case that the court did not even mention) but because the plaintiffs were seeking to bootstrap their right to seek information onto a statutory requirement that had nothing to do with information. Specifically, the plaintiffs were seeking to enforce a provision of the Endangered Species Act (ESA) prohibiting the "tak[ing] of any endangered species within the United States" without a permit, *id.* at 17 — an objective that has nothing to do with information. The plaintiffs asserted informational standing on the theory that, had the defendant-corporation complied with the law, it would have applied for a permit and, had the defendant done *that*, it would have been obligated to comply with the disclosure requirements Congress imposed on applicants. *Id.* at 24. The court refused to allow the plaintiffs to enforce the substantive prohibition on the "taking" of particular animals by asserting their "secondary" right to the information that might be created if the prohibition had been obeyed. *See id.* (explaining that the ESA achieves it goal "not by imposing extensive reporting requirements on persons who 'take' endangered animals, but rather by prohibiting such 'takings'"). Moreover, the purpose of the disclosure provision was to "allow interested parties to comment on and assist the Secretary's evaluation of permit applications." *Id.* Because the defendant never filed such an application, plaintiffs never lost an opportunity to participate and therefore never suffered the harm Congress mandated disclosure to prevent.

Defendants' reliance on *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102 (D.D.C. 2009), is misplaced for the same reason. There, plaintiffs asserted informational standing to enforce a

statutory provision that allowed Secretary of the Interior "to grant exceptions" to the same ESA permit requirement "only if he finds" that three substantive criteria are met "and publishes his finding in the Federal Register." *Id.* at 106 (quoting 16 U.S.C. § 1539(d)). The court rejected plaintiffs' argument that they had informational standing based on the requirement to publish the Secretary's findings: the provision at issue "require[d] the Secretary to make certain findings" in order to grant an exception to the ESA's restrictions; publication of the findings was to occur only "at the conclusion of the [statutory] process," and accordingly revealed that plaintiff's real interest was "a more general interest in the law being followed." *Id.* at 113.

Here, by contrast, Plaintiffs are not using a feigned interest in information as a guise to achieve another objective such as the protection of endangered species; rather, they are asserting an actual interest in information based on a statute to designed to make that information available. Indeed, if Plaintiffs prevail, their sole remedy will be data. Thus, unlike the litigants in *Feld* and *Friends of Animals*, Plaintiffs here have suffered harms that the legislature intended to prevent.

Defendants' remaining standing arguments are meritless. Defendants' claim that Plaintiffs lack a concrete harm, MTD 12-13, seems to be no more than a repackaging of their arguments on the two prongs of the informational standing test. In any event, "[f]or purposes of informational standing, a plaintiff "is injured-in-fact . . . because he did not get what the statute entitled him to receive." *Feld*, 659 F.3d at 23 (quoting *Zivotofsky v. Sec'y of State*, 444 F.3d 614, 618 (D.C. Cir. 2006)). That is precisely what has happened here. Further, Defendants are wrong to suggest that Plaintiffs must additionally "point to concrete ways in which [their] programmatic activities have been harmed." MTD 13 (quoting *Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, 1213 (D.C. 2002). In invoking that requirement, Defendants have confused informational standing with the theory of standing developed in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), *see Friends of Tilden Park*, 806 A.2d at 1213 — a distinct basis for standing that plaintiffs

have not and need not invoke. *See Campaign Legal Center v. FEC*, 245 F. Supp. 3d 119, 128 (D.D.C. 2017) (noting that once an organizational plaintiff had "established their informational standing . . . [t]hey need not satisfy *Havens'* requirements for organizational standing as well"). Nor are Defendants correct to suggest that Plaintiffs have merely pled an generalized or ideological interest. This is not a case in which the plaintiffs seek to "force the [government] to 'get the bad guys'" for past violations of disclosure obligations, *Nader v. FEC*, 725 F.3d 226, 230 (D.C. Cir. 2013) (quoting *Common Cause v. FEC*, 108 F.3d 413, 418 (D.C. Cir. 1997)), and resolving this dispute will not result in an advisory opinion or simply satisfy a plaintiff's curiosity about the law. Instead, it will determine whether Plaintiffs will be able to obtain information that they have sought (in the case of Plaintiff ACLU-DC, repeatedly) and that the D.C. Council clearly intended that they be able to obtain.

III. The Ripeness Doctrine Does Not Require Dismissal.

Defendants' argument, made only in a footnote, that Plaintiffs' claim is unripe because "plaintiffs failed to pursue the information through FOIA requests" and that "they cannot state what data, if any, they are unable to obtain through FOIA" is demonstrably wrong on both counts.

First, Plaintiffs did in fact request the NEAR Act data in March 2018. See Cmpt. ¶ 32. Plaintiffs withdrew their request only upon Defendants' confirmation that it would be futile. Plaintiffs sought "records and/or data regarding stops and/or frisks *following the implementation* of the Neighborhood Engagement Achieves Results (NEAR) Act of 2016." Knizhnik Decl., Attach. S, at 1 (emphasis added). By the time the District responded, Defendant Newsham had already testified to the Council that MPD was "guilty" of not implementing the stop-and-frisk data collection provision, and Defendant Bowser had sought additional funds to implement the requirement. *See* Cmpt. ¶¶ 29, 31. Therefore, the documents Plaintiffs sought did not exist. Continuing to pursue a FOIA request for data that the government had admitted it was not

collecting would have been futile and is irrelevant to the justiciability of Plaintiffs' claims. "When [an] agency has already made it abundantly obvious that it [will] not correct [its] error and [will] not conform its actions with the strictures of [an applicable statute], it [is] meaningless to compel the hapless plaintiff to pursue further administrative remedies simply for form's sake." *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 106 (D.C. Cir. 1986) (internal citation omitted). Indeed, in this case, continuing to pursue the FOIA request for NEAR Act data would have been much worse than futile: MPD wanted to charge Plaintiffs more than thirty thousand dollars for the duplication of records containing data that did not satisfy Plaintiffs' request. *See* Hopkins Decl. ¶ 12. Plaintiffs were not required to spend thousands of dollars to obtain data that did not comply with NEAR Act standards in order to ripen their claims here.

Second, and related, Plaintiffs have stated exactly what data they are unable to obtain: "data on all stops and frisks conducted beginning on the NEAR Act implementation date," Cmpt. ¶ 32 — that is, stop-and-frisk data that includes *all* the information required pursuant to the NEAR Act. Plaintiffs made that definition clear in their FOIA request. *See* Knizhnik Decl., Attach. S (Mar. 28, 2018, FOIA request, asking for "NEAR Act Data … for all stops and frisks conducted beginning on the NEAR Act implementation date — the day on which the MPD began complying with the reporting requirements of D.C. Code § 5-113.01(4B)"). Of course, that data does not yet exist because Defendants have failed to implement the NEAR Act data collection requirement, as Defendants have conceded.

Finally, and more fundamentally, unreasonable-delay and failure-to-act claims are by their very nature are exempt from ripeness challenges. "[A]dministrative delay amounts to a refusal to act, with sufficient finality and ripeness to permit judicial review." *Envtl. Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1100 (D.C. Cir. 1970). "[W]hen delay is extremely lengthy or when exigent circumstances render [delay] equivalent to a final denial of [Plaintiffs'] request," this

Court can "order an agency to [] act." *Pub. Citizen Health Res. Group v. Comm'r, Food & Drug Admin.*, 740 F.2d 21, 32 (D.C. Cir. 1984) (internal quotations omitted) (finding unreasonable-delay claims justiciable, although other claims were unripe). Likewise, if Defendants' inaction is conceived of as an outright violation of a clear statutory provision, that too is always ripe for judicial review. "When agency recalcitrance is in the face of a clear statutory duty or is of such magnitude that it amounts to *an abdication of statutory responsibility*, the court has the power to order the agency to act to carry out its substantive statutory mandates." *Id.* (emphasis added). If Defendants' ripeness argument here were credited, Defendants (and indeed all government agencies) could indefinitely deflect accountability for their delay — simply by the very fact of continued delay.

IV. This Court Has Inherent Equitable Power To Enjoin Violations Of Law, Including Defendants' Failure To Implement The NEAR Act.

Defendants have conceded they have not implemented the NEAR Act data collection requirement, and they have failed to justify their two-and-a-half-year delay. Nevertheless, they ask this Court to abdicate its historic common law power to enjoin violations of law because judicial review of certain *other* agency action or inaction is assigned to the Court of Appeals. Defendants' argument is a non sequitur, ignores a long tradition of judicial review of executive action, and would leave most executive nonfeasance effectively unreviewable.

Whether defendants' failure to implement the NEAR Act data collection requirement is framed as an unreasonable delay or simply a failure to follow the law, plaintiffs' action falls comfortably within courts' inherent power to provide redress. The nation's courts, including the courts of this jurisdiction, have long recognized their inherent judicial power to enjoin unlawful executive action, including action unlawfully withheld. As the D.C. Court of Appeals has explained: "[T]he actions of government agencies are normally presumed to be subject to judicial review unless [the legislature] has precluded review or a court would have no law to apply to test

the legality of the agency's actions." *Sierra Club*, 670 A.2d at 358 (quoting *Simpson v. D.C. Office of Human Rights*, 597 A.2d 392, 398 (D.C. 1991)). This presumption "is not the product of enacted law, it is common law." *Id.* (quoting 5 Kenneth C. Davis, Admin. Law Treatise § 28.1, at 254 (2d ed. 1984)). As the D.C. Circuit explained (in a pre-1971 opinion binding on this Court, *see M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971)), the common law presumption of reviewability inherently allows courts to "consider whether an agency's action has been unlawfully withheld or delayed," *Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Nat'l Mediation Bd.*, 425 F.2d 527, 535 (D.C. Cir. 1970), and may only be restricted "upon a showing of 'clear and convincing evidence' of a contrary legislative intent." *Sierra Club*, 670 A.2d at 358 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967)). Defendants have not even attempted to show, and in fact cannot show, such a contrary legislative intent here.

Instead of grappling with this authority (which Plaintiffs cited in their preliminary injunction briefing), Defendants play word games, claiming that because none of these authorities speak of a common law cause of action for "unreasonable delay of a statutory mandate" in those precise words, MTD 14, no such authority exists. The Court should reject this appeal to stilted formalism. There is no question that courts' power to review alleged violations of law by the executive exists irrespective of specific statutory authorization; instead, it is a "creation of courts of equity" and "reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015). And, in exercising this power of review, both *Sierra Club* and *Machinists* considered circumstances in which agencies were alleged to have wrongfully withheld (or proposed to withhold) action statutorily required. *See Sierra Club*, 670 A.2d at 357 (suit to enjoin D.C. government from ceasing compliance with statutory mandate to provide curbside collection of recyclables); *Machinists*, 425 F.2d at 529 ("action to compel the [National Mediation] Board to proffer arbitration"). Thus, the

legal question is not whether Plaintiffs have properly invoked a set of magic words that appear in other cases; rather, it is whether courts possess the common-law equitable authority to review executive inaction. These authorities make clear that they do.

Defendants' remaining argument, that Plaintiff's cause of action cannot exist because the District of Columbia Administrative Procedure Act (DCAPA) does not apply to this action, is a non sequitur. Just because the Council assigned judicial review of a specific subset of agency action or inaction (the subset involving "contested cases") to the Court of Appeals does not mean that no cause of action exists to review agency action or inaction that does not involve a contested case. Were that proposition in question, the Court of Appeals has put the question to rest: "The authority of courts to grant relief from unlawful agency action existed at common law, and it was merely reinforced (and not created)" by the APA. *Sierra Club*, 670 A.2d at 358.[1]

Moreover, if Defendants were correct about the lacuna in judicial authority to address agency inaction (whether delayed or withheld entirely) — i.e., that agency inaction could be reviewed only in a "contested case" — the resulting legal regime would represent a startling transfer of power to the executive branch, in derogation of the powers of both the legislature and the courts. Except in "contested cases" (as defined in the DCAPA to mean "a proceeding before the Mayor or any agency in which the legal rights, duties, or privileges of specific parties are required by any law (other than this subchapter), or by constitutional right, to be determined after a hearing before the Mayor or before an agency," D.C. Code § 2-502(8)), the executive would have unreviewable discretion to ignore laws passed by the legislature. If the Council tasked the Mayor

[1] The function of DCAPA jurisprudence in Plaintiff's argument is not to establish the cause of action but to provide guidance about the appropriate *standard* to be used in adjudicating Plaintiffs' claim on the merits. *See Kegley v. District of Columbia*, 440 A.2d 1013, 1018 (D.C. 1982) (in non-contested case raising administrative-procedure issues, "the scope of review in the Superior Court … is the same as [the Court of Appeals'] scope of review of a contested case under the DCAPA"); *accord Barry v. Holderbaum*, 454 A.2d 1328, 1332 (D.C. 1982); *District of Columbia v. King*, 766 A.2d 38, 44 (D.C. 2001). But the source of judicial *authority* is distinct from the DCAPA.

with ensuring the clean-up of a toxic waste site, with building a new school, with hiring more police, or with regulating ride-sharing services and scooters, the Mayor could, on Defendants' view, simply ignore that directive for however long she pleases — or forever. As a result, both the legislature's power to make laws and the judiciary's power to hear cases involving those laws would be subordinated to the whim of the executive. Or, as the Court of Appeals has put it: "Unreviewability gives the executive a standing invitation to disregard statutory requirements." *Sierra Club*, 670 A.2d at 358 (citation and source's alteration marks omitted). That cannot be the law — and, as *Machinists* and *Sierra Club* make clear, it is not.

None of this is to say that the executive receives no consideration in its attempt to balance competing or multitudinous legislative directives. But that consideration exists within the framework of a legal standard — the *TRAC* factors — not a regime of blanket deference and judicial impotence.

CONCLUSION

The Court should deny the motion to dismiss.

October 25, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of October 2018, a copy of PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS was served on counsel for Defendants through CaseFileXpress.

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