[ORAL ARGUMENT NOT YET SCHEDULED]
No. 26-5362

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

COMMON CAUSE, *et al.*,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF JUSTICE, et al.,

Defendants-Appellants.

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

REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

The district court vacated an assortment of distinct activities by the Department of Justice (DOJ)—requests for records, information-sharing arrangements, database comparisons, and enforcement actions undertaken to investigate compliance with federal election laws—by grouping them under the label "Voter List Maintenance Policy." By treating those activities as a single agency action and vacating them wholesale, the court exceeded established limits on judicial review under the Administrative Procedure Act (APA).

Plaintiffs' opposition confirms that flaw. Their evidence shows only coordination toward a common purpose. Their merits arguments expose the same error: by treating distinct activities as one action, plaintiffs complain that individual statutes do not authorize activities governed by other statutes. For example, they assert that the Civil Rights Act (CRA) does not authorize information sharing, although DOJ relies on Section 1373 for that authority.

Plaintiffs also fail to justify the interference with DOJ's ongoing enforcement responsibilities. Those responsibilities did not end with the midterm elections, and the order continues to impede investigative

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work while this appeal proceeds. This Court should stay the district court's order pending appeal.

ARGUMENT

I. THE GOVERNMENT IS LIKELY TO PREVAIL ON THE MERITS

A. Plaintiffs Lack a Right of Action Under the APA

1. The district court's order vacated a collection of activities: requesting statewide voter-registration lists; receiving lists from cooperating States; suing noncomplying States; utilizing the Systematic Alien Verification for Entitlements (SAVE) database; and notifying States of that query. Add. 9-13. The court grouped these activities under the label "Voter List Maintenance Policy." Add. 9. But a common label does not substitute for identifying discrete, final "agency action" subject to review under the APA. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004).

2. Plaintiffs principally respond that they challenge a policy applying a "particular measure across the board." Opp'n. 7. But in amalgamating disparate activities, this case illustrates why an APA challenge is inappropriate. Even if plaintiffs were correct that DOJ cannot compel production, that does not mean DOJ cannot request information or receive it voluntarily. Likewise, exchanging citizenship

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information with the Department of Homeland Security (DHS) presents questions distinct from demanding voter-registration lists or directing voter removals. Each activity's legality must be assessed separately; their shared objective of enforcing federal voting-rights laws through lawful means is itself unobjectionable.

3. Plaintiffs' primary evidence of a "policy" is that DOJ used "near-identical requests" for voter-registration lists and sued States that refused to comply. Opp'n. 9-10. But a pattern does not create a single agency action subject to challenge. And none of that evidence concerns DOJ's use of SAVE or its communication of those results, much less identifies a discrete agency action that encompasses all of these activities.

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Even as to the records requests, plaintiffs overstate their evidence. DOJ's letters were not identical, and South Carolina negotiated specific protections governing its production. Opp'n. 9, 10 n.5; CRT-17. Nor does shared language establish a single agency action since that would be expected from attorneys preparing demands under the same statute.

Plaintiffs' reliance on an Office of Legal Counsel (OLC) opinion underscores the same deficiency. Opp'n. 10. That opinion analyzes

statutory authority for distinct activities linked by the objective of "identify[ing] those who may be voting illegally." Dkt. 45-7 at CRT-3330. Analyzing those activities in one opinion does not establish a discrete agency action directing them. Indeed, plaintiffs expressly disclaim a "generic challenge to all aspects of" DOJ's election-integrity and voter-eligibility efforts. Opp'n. 7.

Plaintiffs cite no case allowing a challenge of this kind. Opp'n. 7-8. In *Hispanic Affairs Project v. Acosta*, this Court permitted a challenge to "automatically extending H-2A visas." 901 F.3d 378, 385 (D.C. Cir. 2018). That was an across-the board policy directive that contemplated no further exercise of discretion. *Id.* at 388. Here, DOJ exercised discretion, including by allowing South Carolina to negotiate specific terms. *See* CRT-17; Opp'n. 10 n.5. Similarly, *Center for Taxpayer Rights v. IRS* involved a "final, written document . . . that prescribes the steps . . . that [agency] officials will follow." 190 F.4th 990, 1002 (D.C. Cir. 2026). The OLC opinion here analyzes legal authority; it does not prescribe a course of conduct. *Cf. Campaign for Accountability v. United States Dep't of Just.*, 155 F.4th 724, 739 (D.C.

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Cir. 2025) ("OLC opinions generally tell agencies what they can or cannot do, not what they must do.").

Those distinctions also matter to finality. Regardless of DOJ's authority to compel production, its receipt of records voluntarily supplied by a State neither determines rights or obligations nor produces legal consequences. Nor does a request for records—which many States refused—resolve a State's obligation to comply. Similarly, notifying a State that SAVE could not verify a registrant's citizenship does not itself determine eligibility or require removal from voter rolls, which requires further action by the State.

4. Plaintiffs' primary rejoinder is that the disclosure of confidential information itself produced legal consequences, relying on *Venetian Casino Resort, L.L.C. v. EEOC*, 530 F.3d 925, 931 (D.C. Cir. 2008). Opp'n. 11. But that case concerned a policy permitting disclosure of confidential information to third parties. *Id.* at 927. Here, DOJ exchanges information within the Executive Branch. And even if the disclosures qualified as final agency action, that would not establish the finality of every activity the district court vacated. An unsuccessful

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request for records from a State involves no disclosure, nor does DOJ's internal analysis of information already in its possession.

Plaintiffs also argue that DOJ's requests for information had legal consequences. Opp'n. 11-12. But many States refused to comply, and an agency's assertion that the law has been violated does not itself establish final agency action. *See FTC v. Standard Oil Co.*, 449 U.S. 232, 243 (1980) (an administrative complaint asserting the agency had "reason to believe" that the law had been violated was merely "a threshold determination that further inquiry is warranted" and had "no legal force or practical effect . . . other than the disruptions that accompany any major litigation").

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B. DOJ Is Authorized to Engage in the Challenged Conduct

1. The Civil Rights Act authorizes DOJ's requests for voter rolls.

a. Plaintiffs' challenges to individual agency actions underscore the district court's error in reviewing DOJ's activities wholesale. Plaintiffs begin by challenging the government's demands for information from states, but then pivot to arguing that even if the CRA authorizes DOJ to seek voter-registration lists, it does not authorize the

"remainder" of the policy the district court vacated. Opp'n. 16. That argument illustrates that the multiplicity of disputes here cannot be summarily resolved. DOJ does not rely on the CRA, for example, to authorize its use of SAVE to verify the citizenship of individuals on voter rolls; it relies on 8 U.S.C. § 1373.

Even as to the CRA, disputes over the legality of particular demands for voter-registration lists present individualized issues that are properly resolved in the courts adjudicating DOJ's enforcement suits. Moreover, even if some existing demands were deficient, DOJ could revise future demands to cure those deficiencies. But rather than account for that possibility, the district court improperly treated every demand as part of a single unlawful policy that it vacated in its entirety.

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b. Any wholesale challenge would necessarily fail. The CRA expressly makes certain election records available for inspection and copying upon a written demand from the Attorney General or his representative. 52 U.S.C. §§ 20701, 20703. These provisions authorize DOJ to demand statewide voter-registration lists.

c. As to their particularized challenges, plaintiffs' principal argument rests on a ground the district court did not adopt: that voter-registration lists are created by state election officials and therefore cannot "come into [the] possession" of those officials. Opp'n. 14. But there is no dispute that state election officials possess those lists and that the lists contain "externally sourced information." *United States v. Benson*, 179 F.4th 470, 484 (6th Cir. 2026) (Nalbandian, J., dissenting). At a minimum, an election official thus comes into possession of a voter roll "when her employees send it to her." *Id.* at 487.

Plaintiffs also argue that DOJ's demand letters failed to state the required "basis and purpose" for the demands. Opp'n. 15. But the letters explain that DOJ seeks to ascertain each State's compliance with statutory list-maintenance requirements, Add. 50, and to conduct an independent review of each State's list, *see* D. Ct. Doc. 33, at 51. Multiple judges have concluded that those explanations suffice. *See, e.g.*, *Benson*, 179 F.4th at 484 (Nalbandian, J., dissenting). That accords with *Kennedy v. Lynd*, which explained that "[t]here is no place for any other procedural device or maneuver . . . to ascertain the factual support for, or the sufficiency of," a statement of basis and purpose. 306

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F.2d 222, 226 (5th Cir. 1962). In any event, particular challenges to DOJ's demands are not appropriately resolved in a global challenge to a "policy."

2. DOJ complied with the Privacy Act.

a. DOJ's maintenance and sharing of voter-registration lists are authorized by 8 U.S.C. § 1373. Sections 1373(a) and (c) authorize DOJ to share that information with DHS when using SAVE to verify citizenship status. Similarly, Section 1373(b) authorizes DOJ to maintain that information. As the Supreme Court explained, Section 1373 "supersedes restrictions on disclosure elsewhere in the Code." *DHS v. League of Women Voters*, 225 L. Ed. 2d 1134, 1138 (2026).

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Plaintiffs principally contend that the government forfeited this argument. Opp'n. 20-21. But defendants expressly invoked Section 1373 below as authorizing DOJ's use of SAVE. Add. 85; *see* Dkt. 32-1 at 45-46. The government's reliance on that provision here therefore does not introduce a new issue.

On the merits, plaintiffs argue that Section 1373 does not authorize DOJ to "demand and collect" voter-registration lists. Opp'n. 21-22. But DOJ relies on the CRA, not Section 1373, for that authority.

Like plaintiffs' contention that the CRA does not authorize DOJ's use of SAVE, this argument both misses the point and illustrates the error of combining activities governed by distinct statutory authorities into a single policy.

Plaintiffs also argue that some data in voter-registration lists falls outside Section 1373. Opp'n. 22. Even assuming that is correct, it would limit what information DOJ may maintain under that provision, not foreclose maintenance altogether. Finally, plaintiffs contend that Section 1373(b) does not cover information about citizens because they "have no immigration status." Opp'n. 22-23. But even accepting that characterization, information that a person lacks an immigration status remains information regarding immigration status. There is no basis for reading Section 1373 to protect DOJ's ability to request and receive citizenship information from DHS, yet fail to protect its retention of the answer.

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b. In any event, plaintiffs may not use the APA to obtain relief that the Privacy Act's remedial scheme withholds. The Privacy Act expressly authorizes prospective relief only for claims not asserted here. *See* 5 U.S.C. § 552a(g)(1)-(3). For the remaining categories, Congress

authorized damages subject to specified conditions. *See* 5 U.S.C. § 552a(g)(4). Plaintiffs cannot invoke the APA's more general remedies to avoid the limitations of that remedial scheme. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215 (2012).

Plaintiffs incorrectly contend that this Court held that APA relief is available for Privacy Act violations. Opp'n. 23. The decision they cite, *Doe v. Stephens*, 851 F.2d 1457 (D.C. Cir. 1988), instead recognized that the Privacy Act's civil-remedies provision "precludes other forms of declaratory and injunctive relief." *Id.* at 1463. The APA relief in that case rested on an independent obligation imposed by a separate statute. *Id.* at 1466-1467. Plaintiffs identify no comparable, independent statutory obligation here.

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3. DOJ complied with the Paperwork Reduction Act.

DOJ's demand letters did not impose "identical" reporting requirements within the meaning of the Paperwork Reduction Act. 44 U.S.C. § 3502(3). Some requested voter rolls alone; others sought additional information tailored to the relevant State. *See* D. Ct. Doc. 33, at 48. In any event, the Act generally exempts information collected

during federal criminal investigations or prosecutions and administrative investigations involving specific individuals or entities. 44 U.S.C. § 3518(c)(1)(A), (B)(ii). DOJ's demands seek information relevant to potential violations of federal election laws by identified States, election officials, and individuals.

Plaintiffs respond that the demands shared a common request. Opp'n. 18. But overlap does not make distinct reporting requirements identical. Otherwise, disparate document requests could qualify as identical merely because each requested some common information, such as a name or current address. Plaintiffs also invoke the Act's provision covering general investigations directed at a category of individuals or entities. Opp'n. 19. But DOJ directed separate demands to identified States, tailoring its requests to the circumstances of each. Those parallel investigations do not become a general inquiry merely because their targets are numerous.

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4. DOJ did not act arbitrarily or capriciously.

Finally, DOJ did not act arbitrarily or capriciously by informing States that SAVE could not verify the citizenship of individuals on their voter-registration lists. States remain responsible for determining

whether removal is warranted and for maintaining safeguards against the erroneous removal of eligible voters. 52 U.S.C. § 21083(a)(4)(B).

Plaintiffs respond that DOJ expects "mandatory compliance and enforces it." Opp'n. 17. But the conduct they cite concerns DOJ's efforts to obtain statewide voter-registration lists, not to require the removal of particular voters. Plaintiffs identify no rule issued by DOJ requiring a State to remove a voter merely because SAVE cannot confirm citizenship. Moreover, any potential disenfranchisement concerns relate only to communication of SAVE results to States and does not extend to requesting and reviewing voter-registration lists. Here again, the district court's treatment of distinct activities as a single policy confuses the issues.

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II. THE EQUITABLE FACTORS FAVOR A STAY

The district court's vacatur has disrupted DOJ's ongoing efforts to compare voter rolls to identify potential duplicate registrations, Add. 96, and created uncertainty concerning pending enforcement litigation, Add. 97. Those harms are immediate. Congress assigned DOJ responsibilities to safeguard the electoral process, and the order impairs

DOJ's ability to discharge those responsibilities while this appeal proceeds.

Plaintiffs principally respond that any potential harm passed with the midterm elections. Opp'n. 24-25. But DOJ's enforcement responsibilities do not end on Election Day. Investigating potential violations and addressing them in time for future elections requires ongoing work, especially because investigations and related litigation can be lengthy. Plaintiffs also contend that States can address duplicate registrations. Opp'n. 25. The States' ability to conduct their own investigations, however, does not displace DOJ's independent enforcement responsibilities or eliminate the value of comparisons across state lines.

Plaintiffs further contend that the order has not impeded DOJ's other enforcement efforts. Opp'n. 26. They now acknowledge that a lawsuit against California is not covered by the district court's order, but reached that conclusion only after seeking information about DOJ's activities. Opp'n. 26 n.12. Plaintiffs' eventual assessment that one suit falls outside the order—costless to plaintiffs now that the suit has been resolved—does not resolve its application to other enforcement

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proceedings. DOJ should not have to obtain plaintiffs' approval each time it contemplates an election-related enforcement action. That uncertainty impairs DOJ's ability to discharge its statutory responsibilities, and a stay would preserve that ability pending appellate review.

CONCLUSION

The Court should stay the district court's order pending appeal.

Respectfully submitted,

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November 2026

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Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this reply complies with Federal Rule of Appellate Procedure 27(d)(1)(E) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font, and that it complies with the type-volume limitation of Rule 27(d)(2)(C) because it contains 2529 words, according to Microsoft Word.

/s/ Benjamin C. Wei
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