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: August 3, 2018 Initial Conference

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I. Introduction

In opposition to Plaintiffs' Motion for Preliminary Injunction, Defendants do not dispute the importance of the NEAR Act's stop-and-frisk data collection requirement or contradict Plaintiffs' substantive claim that implementation of the requirement has been significantly delayed. Nor do Defendants dispute the facts presented by Plaintiffs showing Defendants' bad faith in failing to take any substantive steps to implement the data collection requirement in the more than two years since it was enacted. Instead, Defendants present mainly jurisdictional or other arguments that do not go to the substance of Plaintiffs' claim.

These arguments fail. Defendants' claim that there is no cause of action for unreasonable delay ignores the inherent equitable authority of this Court and repeated statements by the D.C. courts. Defendants' jurisdictional defenses misunderstand informational standing and contravene leading authorities from the Supreme Court and the D.C. Circuit as to the justiciability of Plaintiffs' claim.

Finally, Defendants' factual argument regarding the "significant enhancements" required to make MPD's "Cobalt" record management system compliant with the NEAR Act is insufficient

on its face to rebut the claim of unreasonable delay in this case. Defendants provide no explanation for why it has taken them over two years to implement the data collection requirement, no explanation for various officials' confusing and contradicting statements regarding implementation, and no plans or timetables for implementation from this point forward. Defendants have defied their statutory duty and obfuscated for too long for this Court to simply trust that they will implement the data collection requirement on their own. Plaintiffs renew their request for a hearing on their Motion for a Preliminary Injunction, so that the Court can have an opportunity to explore these factual issues—after which this Court should grant Plaintiffs' Motion for Preliminary Injunction.

II. Plaintiffs Have Demonstrated Informational Standing

Contrary to Defendants' assertions, Plaintiffs have sufficiently established a "substantial likelihood" of informational standing for their unreasonable delay claim.

As the Supreme Court has explained, "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). A plaintiff seeking to establish such "informational standing" must "show 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. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 378 (D.C. Cir. 2017) [hereinafter *EPIC*] (quoting *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016)).

Defendants' primary argument on the first prong — that informational injury cannot be shown where the information at issue has not been collected by defendants, Defs. Opp. at 12 — is debunked by Supreme Court and D.C. Circuit case law. The Supreme Court has recognized

informational injury not only where plaintiff seeks information in the defendant's possession but also where defendant has not collected the records at issue. For example, in *FEC v. Akins*, a group of voters sought to require the FEC to take enforcement action to obtain information from a third-party organization, the American Israel Public Affairs Committee, which the voters claimed—contrary to the FEC's view—constituted a "political committee" under the Federal Elections Campaign Act of 1971, a statute that imposes "extensive recordkeeping and disclosure requirements" upon such groups. *See* 524 U.S. at 11. Despite the fact that the required records at issue had not been collected and the information was not in the defendant's possession, the Court found that plaintiffs had informational standing. *Id.* at 24-26. Likewise, in *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440 (1989), plaintiffs sought an injunction ordering the Justice Department to comply with the Federal Advisory Committee Act when it relied on the American Bar Association (ABA) for advice on judicial nominations; complying with the statute would require the ABA to "file a charter" and "afford notice of its [future] meetings," in addition to making its existing or future "minutes, records, and reports available for public inspection and copying." 491 U.S. at 447. The Supreme Court found informational standing without regard to the fact that the information was not in the Justice Department's possession and without distinguishing between materials that currently existed (i.e., "the names of candidates under consideration by the ABA committee") and those that did not (i.e., "advance notice of future meetings"). *Id.* at 449. And in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008), a plaintiff challenged the FEC's definition of "coordinated communication," which allowed "presidential candidates not [to] report as contributions many expenditures that [the plaintiff] believe[d] [a statute] require[d] them to report." *Id.* at 923. Even though there was no evidence candidates were collecting the information that plaintiff's view of the law would have required them to collect and report, the D.C. Circuit

found that plaintiff had sufficiently alleged an injury-in-fact, namely "the denial of information he believe[d] the law entitle[d] him to," and therefore had informational standing. *Id.*

In contrast to the district court's original opinion in *Friends of Animals v. Jewell*, 115 F. Supp. 3d 107 (D.D.C. 2015), cited by Defendants, the D.C. Circuit's subsequent opinion in *Friends of Animals* made no distinction between documents that do and documents that do not currently exist. *Friends of Animals*, 828 F.3d 989 (D.C. Cir. 2016). The informational standing problem in *Friends of Animals* was much more basic: the plaintiff was seeking to enforce a statutory deadline in the Endangered Species Act that had nothing to do with information; it required the Secretary to make a substantive determination about whether particular animals were "threatened" or "endangered." *Id.* at 990. The plaintiff claimed informational standing because the statute required the Secretary to publish her determination after she made it, but "nothing in the [Endangered Species] Act or its legislative history indicate[d] that the deadline requirement . . . should be read to incorporate the informational purpose of [the Act]'s disclosure requirement." *Id.* at 993. Here, however, as Deputy Mayor for Public Safety, Defendant Donahue, stated himself, it is "the intention and spirit of the NEAR Act" for MPD to "put out" (i.e. publicly release) the "police use of force and stop and frisk information." Council of the District of Columbia, *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. Additionally, the "sequential procedural structure" in the Endangered Species Act was central to the *Friends of Animals* court's determination that the plaintiff lacked informational standing at the time the suit was brought. 828 F.3d at 993. By contrast, the NEAR Act requires MPD to collect the specified stop-and-frisk data *now*, and making that information available to the public (via FOIA) was an explicit purpose of the NEAR Act stop-and-frisk data collection requirement. *See* Pls.' Mot. at 3-

5 (describing the NEAR Act's legislative history); Declaration of Shana Knizhnik (Knizhnik Decl.) Attach. A, at 23 (D.C. Council Judiciary Committee Report on NEAR Act describing the purpose of the data collection requirement as "increas[ing] opportunities for community participation and collaboration in policing" and "[u]s[ing] open data to build transparency and increase community trust"); s*ee also* Council of the District of Columbia, *Comm. on the Judic. and Pub. Safety, Budget Oversight Hearing* (Mar. 29, 2018), *at* 3:04:26-3:05:18, *at* http://dc.granicus.com/MediaPlayer.php?view_id=2&clip_id=4448 (Councilmember Allen, Committee Chair: the D.C. Council "didn't sequence the law," but rather passed certain requirements that were not meant to be "slowly phased in"). The basis for Plaintiffs' informational standing goes to the heart of the requirement they seek to enforce: a requirement about gathering information.

Defendants' argument that Plaintiffs failed to allege an injury-in-fact in their Complaint, Defs' Opp. at 10-11, likewise fails. The Complaint describes Plaintiffs' March 2018 attempt via FOIA request to obtain "data on all stops and frisks conducted beginning on the NEAR Act implementation date." Cmpt. ¶ 32; *see also id.* at ¶ 20 (describing Plaintiff ACLU-DC's 2017 FOIA request for "all data collected pursuant to the [NEAR Act] data collection requirement since the implementation of the Act"); Declaration of Monica Hopkins-Maxwell (Hopkins Decl.) at ¶¶ 6-8. The Complaint also describes the government's failure to provide the requested information, to which Plaintiffs have a right under D.C.'s Freedom of Information Act, because the data collection requirement "ha[d] not been implemented" as of April 2017, Cmpt. ¶ 21, and remained unimplemented as of April 2018. *See id.* at ¶¶ 28-31 (describing Defendant Newsham's and Defendant Bowser's admissions in March and April 2018, respectively, that the data collection requirement was still not fully implemented). MPD's May 7, 2018 response to Plaintiffs' FOIA

request, received after the filing of the Complaint, *see* Mot. for Prelim. Inj. at 9 n.1; Knizhnik Decl. at ¶ 6, did not contain the universe of data on stops and frisks required by the NEAR Act's stop-and-frisk data collection requirement, because that requirement remained unimplemented as of the date of the response. *See* Knizhnik Decl. at Attach. T; Hopkins Decl. at ¶ 8. Nor was there any indication that the requirement had suddenly been implemented in the interim period between Defendant Bowser's and Defendant Newsham's March and April admissions and the May FOIA response. *See* Declaration of April Goggans (Goggans Decl.) at ¶ 8; Declaration of Eugene Puryear (Puryear Decl.) at ¶ 8; Hopkins Decl. at ¶ 11. By failing to implement the NEAR Act's stop-and-frisk data collection requirement, Defendants have plainly "deprived" Plaintiffs of "information that, on [Plaintiffs'] interpretation," the D.C. FOIA "requires the government . . . to disclose to [them]." *EPIC*, 878 F.3d at 378. Plaintiffs therefore have satisfied the first prong of the informational standing test.

"The scope of the second part of the inquiry"—whether Plaintiffs suffer the type of harm the legislature sought to prevent by requiring disclosure—"may depend on the nature of the statutory disclosure provision at issue. In some instances, a plaintiff suffers the type of harm Congress sought to remedy when it simply 's[eeks] and [is] denied specific agency records.'" *Friends of Animals*, 828 F.3d at 992 (quoting *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449-50 (1989)). "In others, a plaintiff may need to allege that nondisclosure has caused it to suffer the kind of harm from which [the legislature], in mandating disclosure, sought to protect individuals or organizations like it." *Id.* (citing *Akins*, 524 U.S. at 21-23; *Shays*, 528 F.3d at 923; and *Nader v. FEC*, 725 F.3d 226, 230 (D.C. Cir. 2013)). Plaintiffs satisfy the second prong under either version of the test.

Under the first version of the type-of-harm standard, Plaintiffs have plainly satisfied the requirement. The Supreme Court's "decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records." *Pub. Citizen*, 491 U.S. at 449.

Even under the broader version of the type-of-harm prong, Plaintiffs have suffered the kind of harm from which the D.C. Council "sought to protect individuals or organizations like [them]." *Friends of Animals*, 828 F.3d at 992. Although Defendants are correct that "institutionaliz[ing] a culture of transparency and accountability" and protecting both public safety and individual rights were goals in passing the stop-and-frisk data collection requirement, Defs' Opp. at 11, so too were "increas[ing] opportunities for *community participation* and collaboration in policing" and "[u]s[ing] open data to build transparency and increase *community trust*." Knizhnik Decl. Attach. A (D.C. Council Judiciary Committee Report on NEAR Act) at 23 (emphasis added). Plaintiffs are organizations that represent thousands of community members and seek to hold D.C. police accountable to ensure fair police practices. *See* Goggans Decl. at ¶ 2; Puryear Decl. at ¶ 2; Hopkins Decl. at ¶ 2. "[T]ransparency and accountability" are not goals that derive value from the mere "improve[ment] [of] internal agency practices." Defs. Opp. at 12. Rather, they depend on the public and organizations like Plaintiffs having access to the information at issue. Indeed, it is not coincidence that the Committee Report on the NEAR Act quoted the former Criminal Justice Director of Plaintiff ACLU-DC for the point that "accountability and transparency," as demonstrated through "[r]obust police data collection," is "a nationwide best practice." Knizhnik Decl. Attach. A, at 25. By failing to implement the data collection requirements of the NEAR Act, thereby depriving Plaintiffs of the information required to be disclosed to them under D.C. FOIA,

Defendants have caused the exact kind of harm to Plaintiffs that the D.C. Council sought to prevent.

The D.C. Circuit's decisions in *EPIC* and *Nader* do not counsel otherwise. The plaintiffs in *EPIC* asserted an interest in "ensur[ing] public oversight of record systems," while the statutory provision in question was "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 the Congress had in mind." *Id.* In *Nader*, the plaintiff did not seek, as required to have standing to bring a claim under the Federal Elections Campaign Act, a "disclosure . . . related to [his] informed participation in the political process." 725 F.3d at 230. Here, by contrast, Plaintiffs seek information that would be available to them under the D.C. FOIA and which the NEAR Act was passed with the intention of making available to them. As explained, the NEAR Act was not only meant to promote individual rights, but to increase transparency and accountability for *community* participation.

Plaintiffs do not assert standing based on their views of the likelihood of police misconduct; that possibility relates to the importance of the requirement at issue, a consideration relevant to the merits of an unreasonable-delay claim under the *TRAC* factors, *see* Pls.' Mot. at 12-24. Instead, Plaintiffs have informational standing because they (1) have sought and been denied information they have a right to receive under D.C. law and (2) are the type of organizations the D.C. Council intended to have access to such information in passing the NEAR Act.

In sum, under the standards applied by the Supreme Court and D.C. Circuit, Plaintiffs have demonstrated informational standing to challenge the unreasonably delayed implementation of the NEAR Act's stop-and-frisk data requirement.

III. Plaintiffs' Claim is a Ripe and Justiciable "Case or Controversy" Properly Reviewable By This Court

a. The Political Question Doctrine Does Not Preclude Review

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." Defs.' Opp. at 7. However, the political question doctrine does not state that courts may not review functions delegated to the executive branch; that is much of what courts do. Rather, the doctrine, motivated by separation of powers concerns, 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) (quoting *Nixon v. United States,* 506 U.S. 224, 228 (1993), in turn quoting *Baker v. Carr,* 369 U.S. 186, 217 (1962)). Defendants point to no *constitutional* provision committing the enforcement of the NEAR Act data collection provision to the executive branch, nor any lack of standards for resolving this case. In fact, both Plaintiffs and Defendants rely on the *TRAC* factors, which have been 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. *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).

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 (citing *Baker*, 369 U.S. at 217). 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 having provided financial resources 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*.

MPD's refusal to obey the NEAR Act's data collection mandate does not constitute a nonjusticiable political question and is subject to review by this Court.

b. The Ripeness Doctrine Does Not Preclude Review

Next, Defendants claim that Plaintiffs' claim is unripe because "plaintiffs Black Lives Matter D.C. and Stop Police Terror Project D.C. do not allege they have ever requested the [NEAR Act] data, . . . and plaintiff ACLU withdrew its FOIA request." Defs.' Opp. at 8. That is incorrect on both counts.

First, Plaintiffs BLM-DC and SPTP-DC did in fact request the NEAR Act data, along with ACLU-DC, in March 2018. *See* Cmpt. ¶ 32; Knizhnik Decl. Attach. S (FOIA request filed on

behalf of ACLU-DC, Black Lives Matter D.C., and Stop Police Terror Project D.C.); *see also* Goggans Decl. at ¶ 4; Puryear Decl. at ¶ 4.).

Second, withdrawing the FOIA request did not render this case nonjusticiable. 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). Plaintiff ACLU-DC had earlier sought the same data in February 2017. *See* Knizhnik Decl. Attach. Q, at 1. In response, MPD stated that, as of April 2017, the NEAR Act "ha[d] not been implemented" and "existing records d[id] not contain the NEAR data which is the subject of [the] request." Knizhnik Decl. Attach. R, at 1. Responding to the second request in 2018, made by all three plaintiffs, MPD did not assert that the NEAR Act requirements had been implemented; indeed, by the time of the FOIA response, 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. After having reviewed the sample documents provided by MPD in May 2018, Plaintiffs did not seek the production of thousands of additional similar documents (at an estimated cost of $34,625 for copying plus an additional $16-$40 per hour for personnel's search and review of such documents) because those documents, like the samples, were not responsive to Plaintiffs' FOIA request for data collected in accordance with the requirements of the NEAR Act—which has still not been implemented. *See* Hopkins Decl. ¶12.

Continuing to pursue a FOIA request for data that the government has admitted it is not collecting is futile and irrelevant to the justiciability of Plaintiffs' claims under these circumstances. The availability of incomplete data does not affect Plaintiffs' right to obtain the data that is, by the Defendants' own admission, not being collected. "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).

By their very nature, unreasonable-delay claims 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 Research 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). If Defendants' claim of nonjusticiability in this case were granted, Defendants could indefinitely deflect accountability for their delay—simply by the very fact of continued delay.

Moreover, an agency's outright violation of a clear statutory provision 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." *Pub. Citizen Health Research Group*, 740 F.2d at 32. Unlike a discretionary agency action under a broad statutory mandate—which would not sustain failure-to-act or unreasonable-delay claims—the NEAR Act is a "specific statutory command" "requiring" and "prescrib[ing]" actions for which "funds have [already] been appropriated." *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64, 71 (2004) (noting that unreasonable delay claims require plaintiff to "assert[] that an agency failed to take a *discrete* agency action that it is *required to take* (emphasis in original)). Defendants' abdication

of their duty to collect data under the NEAR Act is thus reviewable by this Court. *See, e.g.*, *Meina Xie v. Kerry*, 780 F.3d 405, 408 (D.C. Cir. 2015) (finding unreasonable-delay claims justiciable when based on a "discrete" and "specific statutory requirement").

IV. Plaintiffs Have Established the Four Factors Warranting Preliminary Injunctive Relief

a. Success on the Merits

Notably, Defendants do not challenge most of Plaintiffs' affirmative case: that the NEAR Act data-collection requirement is a critical measure promoting human health and welfare; that Defendants have delayed for more than two years in implementing the requirement; and that Defendants have given conflicting and at times inaccurate information about implementation, which shows bad faith.

Instead, the thrust of Defendants' argument on the merits concerns the "viability" of Plaintiffs' equitable unreasonable delay claim. Defendants first argue that such a claim does not exist because the D.C. APA does not provide this Court "the power to hear to hear a claim that an agency has 'unreasonably delayed'" its mandated statutory duties. Defs.' Opp. at 19. Underlying that position is the implicit premise that judicial authority in this area must be statutory. But the D.C. Court of Appeals has explained otherwise: "[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)). 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.

Defendants' second argument is that because prior cases involved challenges to "an agency *decision or order*," the Court lacks "the power to review *any action or inaction* by an agency." Defs.' Opp. at 21 (emphasis in original). But, as already shown, the case law has characterized courts' equitable jurisdiction as including the power to redress unreasonable agency delay. *See Int'l Ass'n of Machinists*, *supra*. Accordingly, Defendants are incorrect that this Court lacks authority to review their unreasonable delay.

Turning at last to the substance of Plaintiffs' unreasonable-delay claim, Defendants argue that they have not unreasonably delayed implementation of the NEAR Act data collection requirements because Plaintiffs "oversimplif[y]" the "significant enhancements" needed to make MPD's "Cobalt" record management system compliant with the NEAR Act's requirements, or at least in order "to ensure ready access to the . . . . individual-level data." Defs.' Opp. at 24. Specifically, Defendants appear to argue that because "Cobalt data is collected on an incident rather than individual basis," the categories of data required by the NEAR Act cannot be added to the current digital form without "enhancements that integrate into the existing workflow of the system, which contains menus that lead users to sub-menus based on the data recorded." *Id.* Defendants do not explain why it is not possible—at least as an interim measure—to use the current system to record the data required by the NEAR Act, such as by creating a separate incident report for each individual involved in a stop. Further, the current system does include individual-level data—namely, fields for each "subject" involved in the incident. *See* Hopkins Decl. Ex. A.

Defendants do not explain why adding the necessary fields to each of the "subject" portions of the existing digital form would require "significant enhancements."

Even if more significant changes to the system are necessary, however, Defendants do not explain what those are; how long they will take or how much they will cost to make; whether such changes would fit within the scope of the "necessary changes" that the vendor, Mark43, has already contracted to make (including changes "to code, interface, database and/or configuration" and "new system releases and new functionality development," Declaration of Scott Stewart at ¶ 12; Ex. B); or whether or not Defendants have even communicated with Mark43 regarding these fundamental questions. Instead, Defendants appear to implicitly ask Plaintiffs, the public, and this Court to trust that Defendants will eventually implement the law, despite not having taken any steps to do so since the NEAR Act was passed more than two years ago. Thus far, trust alone has not sufficed to ensure compliance with the law.

Defendants point out that the NEAR Act does not require stop-and-frisk data to be collected in any particular manner or form, and argue that Plaintiffs' requested relief is therefore not appropriate. Defs. Opp. at 25. But they do not suggest any alternative manner of complying with the statute. Moreover, Defendants do not respond to Plaintiffs' assertion that existing practices allow for systematic underreporting of stops by police. This assertion is based not on "pure speculation," Defs. Opp. at 26, but on the fact that MPD's release of data for all "incident reports classified as 'stop and frisk' from 2010 to 2016," reflects only 23,326 stops over a period of seven years, while MPD reports 33,383 *arrests* in 2016 alone. *See* Pls.' Mot. at 4. Defendants protest Plaintiffs' request for this Court to "oversee . . . *how* the agency implements the requirements of the NEAR Act," Defs. Opp. at 26, but again, they fail to explain how any alternative will ensure

compliance. If Defendants wish to propose an alternative form of preliminary injunction that will address Plaintiffs' claims, Plaintiffs may be willing to consent to such an order.

The parties' disagreement regarding the steps necessary to comply with the NEAR Act's requirements further supports Plaintiffs' request for an oral hearing on the preliminary injunction motion. Such a hearing would allow for a more robust examination of the technological and procedural hurdles allegedly barring Defendants from complying with the law. Although Plaintiffs' proposed injunctive relief is designed to ensure compliance by individual officers through revised protocols and training, and to prevent an unnecessarily convoluted implementation scheme (such as one that unnecessarily involves other agencies or relies on non-systematic collection mechanisms), Plaintiffs are willing to work with Defendants to determine the appropriate form of a preliminary injunction.

Whatever form relief takes, though, the Court's supervision of implementation is urgently necessary. Defendants fail to rebut, or even contest, Plaintiffs' characterizations that Defendants' inadequate and inconsistent justifications for the over-two-year delay constitute "bad faith" mandating a finding of unreasonable delay. *See Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987); *In re Monroe Communications Corp.*, 840 F.2d 942, 946-47 (D.C. Cir. 1988). Defendants provide no explanation for why even "significant enhancements" to a computer system should take a government agency with an over five-hundred-million-dollar annual budget longer than two years to *explain*, let alone achieve. *Cf.* Cmpt. ¶¶ 25-30 (detailing Defendant Donahue and Defendant Newsham's asserted inability, as of March 2018, to describe what changes to the "I.T. system" or "police protocol[s]" would be necessary to achieve compliance). Moreover, Defendants fail to proffer evidence of *any* existing plans for achieving compliance that might serve to rebut Plaintiffs' evidence that "they have not taken any concrete steps, either with respect to the

necessary technology or training of officers, to *increase* the information collected during stops and frisks in order to comply with the NEAR Act." Pls.' Mot. at 18. The stark lack of such evidence does suggest that "officials [a]re not working on the matter[]." Defs.' Opp. at 24 (citing *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100–01 (D.C. Cir. 2003)); *cf. In re Am. Fed'n of Gov't Employees, AFL-CIO*, 790 F.2d 116, 117 (D.C. Cir. 1986) (finding that Federal Labor Relations Authority's delays of "33 to 47 months" and "28 to 49 months" were "indeed intolerable" but that the agency's submissions in response to the petitioners "satisfied [the court] that the agency ha[d] determined to end its history of unjustifiable delay"). Defendants note that courts have refused to intervene in delays of longer duration than two years, Defs. Opp. at 23-24, but ultimately, whether a certain delay is reasonable is based not merely on the amount of time elapsed, but on the entire context of an agency's failure to act upon a statutory mandate. *See, e.g.*, *Mashpee*, 336 F.3d at 1100 ("Resolution of a claim of unreasonable delay is ordinarily a complicated and nuanced task requiring consideration of the particular facts and circumstances before the court.") Here, Defendants have not pointed to any reason why it was reasonable for the statutory mandate to collect additional data to remain unimplemented two years after its enactment.

Defendants do not and cannot justify the more-than-two-year delay in fully implementing the NEAR Act data collection requirement. Based on the evidence of bad faith, and the equitable *TRAC* factors described in Plaintiffs' Motion for Preliminary Injunction, Plaintiffs have demonstrated a substantial likelihood of success on the merits.

b. Irreparable Harm

In claiming that Plaintiffs have failed to demonstrate irreparable harm in the absence of the requested relief, Defendants again misunderstand the nature of Plaintiffs' March 2018 FOIA request. As described above, all three plaintiffs submitted the March 2018 FOIA request for "data on all stops and frisks conducted beginning on the NEAR Act implementation date." Cmpt. ¶ 32.

The FOIA request carefully defined exactly what that phrase meant: "the day on which the MPD began complying with the reporting requirements of D.C. Code § 5-113.01(4B)." Knizhnik Decl. Attach. S at 2. The May 2018 FOIA response therefore did not provide *any* responsive data, as the "NEAR Act implementation date," as defined in Plaintiffs' FOIA request, had not yet occurred (and has still not occurred). *See* Hopkins Decl. at ¶ 8-11; Goggans Decl. at ¶ 6-8, Puryear Decl. at ¶ 6-8. The sample forms that MPD provided in response to the March 2018 FOIA request reflected only the old, pre-NEAR Act data collection procedures, which provide for collection of "only about half of the NEAR Act's data collection requirements." Pls.' Mot. at 14. The remaining half of the required categories of data continues not to be collected in any systematic or useful way, leaving it entirely up to individual officers' discretion whether to include these categories of data in the "narrative" section of their reports. Defendants have not claimed otherwise, aside from hypothesizing that some of the data may be found in "possible sources of data beyond digital records" such as body-worn camera footage. Defs.' Opp. at 27. For every stop that has been conducted since the NEAR Act was enacted, until it is fully implemented, data for those missing categories has not been collected in a manner that complies with the statute. Pls.' Mot. at 26. By failing properly to collect that data, to which Plaintiffs are entitled, Defendants continue to irreparably harm Plaintiffs.

c. Balance of Harms

Defendants do not address the third factor of the preliminary injunction standard, which compares the harm faced by plaintiffs in the absence of injunctive relief to the potential harm faced by defendants from its grant. Thus, Defendants effectively concede that they would not be harmed at all by an injunction ordering them to comply with the NEAR Act data collection requirement.

d. Public Interest

Defendants also fail to substantively challenge Plaintiffs' contention that the public interest would be served through the requested injunctive relief. Rather, they rely on their belief that Plaintiffs have not demonstrated "a likelihood of success on the merits or irreparable harm." Defs. Opp. at 28. However, the cost of the agency delay in implementing a statutory provision intended to help "keep[] everyone safe and protect[] the rights of all involved during police encounters" and "to build transparency and increase community trust" is significant. "[E]xcessive delay saps the public confidence in an agency's ability to discharge its responsibilities." *Potomac Elec. Power Co. v. I.C.C.*, 702 F.2d 1026, 1034 (D.C. Cir. 1983). This effect is true for any agency, but it is particularly troubling when the agency in question is charged with serving and protecting all residents and fairly enforcing the law. Plaintiffs' requested injunctive relief, ordering Defendants to comply with the NEAR Act, would undoubtedly serve the public interest.

V. Conclusion

For the reasons stated above, and in Plaintiffs' Memorandum in support of their Motion for Preliminary Injunction, the Court should grant Plaintiffs' Motion for Preliminary Injunction.

Dated: June 15, 2018

Respectfully submitted,

/s/ *Shana Knizhnik*

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of June 2018, a copy of Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction was served on counsel for Defendants through CaseFileXpress.

/s/ *Shana Knizhnik*
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