UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC., 1601 N. Tucson Blvd., Suite 9, Tucson, AZ 85716, and COALITION FOR URBAN RENEWAL & EDUCATION, 722 12th Street, NW, Fourth Floor, Washington, DC 20005, Plaintiffs, v. EXECUTIVE OFFICE OF THE PRESIDENT, 1600 Pennsylvania Avenue, NW Washington, DC 20500, WHITE HOUSE OFFICE OF HEALTH CARE REFORM, 1600 Pennsylvania Avenue, NW Washington, DC 20500, NANCY-ANN DEPARLE, DIRECTOR, WHITE HOUSE OFFICE OF HEALTH CARE REFORM, *in her official capacity,* 1600 Pennsylvania Avenue, NW Washington, DC 20500, and MACON PHILLIPS, DIRECTOR OF NEW MEDIA, *in his official capacity,* 1600 Pennsylvania Avenue, NW Washington, DC 20500, Defendants.	)	Civil Action No. 09-1621-EGS

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Association of American Physicians and Surgeons, Inc. ("AAPS") and the Coalition for Urban Renewal and Education ("CURE") seek declaratory and injunctive relief based on the following allegations.

NATURE OF THE ACTION

1. AAPS and CURE bring this action to enforce the First Amendment right to free speech and the Privacy Act's right to privacy against efforts by defendants Executive Office of the President ("EOP"), White House Office of Health Care Reform ("WHOHR"), Nancy-Ann DeParle in her official capacity as WHOHR's Director, Macon Phillips in his official capacity as White House Director of New Media, and others acting in concert (collectively, hereinafter "Defendants") unlawfully to collect information on political and other noncommercial speech by and on behalf of AAPS, CURE, and their members, officers, and employees (collectively, hereinafter "Plaintiffs") and thereby to suppress speech protected by the First Amendment.

2. As set forth more fully in Paragraph 67, AAPS and CURE seek the following injunctive and declaratory relief:

(a) Declare that the First Amendment and the Privacy Act prohibit and preempt the Defendants' efforts to collect and maintain information on protected speech;

(b) Enjoin the Defendants' continued collection of such information via the flag@whitehouse.gov email address and the linked "reality check" internet reporting form (collectively, hereinafter "flag@whitehouse.gov");

(c) Order the Defendants to expunge all prohibited information obtained via flag@whitehouse.gov from their records; and

(d) Order the Defendants to remove the solicitation for citizens to report on others' "fishy" speech from whitehouse.gov and enjoin their soliciting or collecting information (including email addresses) on third parties' political speech.

PARTIES

3. Plaintiff AAPS is a not-for-profit membership organization incorporated under

the laws of Indiana and headquartered in Tucson, Arizona. AAPS' members include thousands of physicians nationwide in all practices and specialties, but primarily in small and solo practices. AAPS was founded in 1943 to preserve the practice of private medicine, ethical medicine, and the patient-physician relationship.

4. Plaintiff CURE is a not-for-profit membership organization incorporated under the laws of California and headquartered in Washington, DC. CURE was founded upon, and dedicated to, the principles of limited government, free markets, and individual responsibility on behalf of all segments of the country. CURE serves poor and inter-city communities by developing, disseminating, and implementing church-based, individual-based, and market-based solutions to poverty, without excessive government involvement, and by providing integrated and innovative programs to tackle core social problems.

5. Defendant EOP is an agency within the Executive Branch, and Defendant WHOHR is an agency within EOP. Defendant Phillips is White House Director of New Media, and Defendant DeParle is WHOHR's Director. All Defendants reside in this judicial district.

JURISDICTION AND VENUE

6. This action arises out of Defendants' ongoing Privacy Act and First Amendment violations and, therefore, raises federal questions over which this Court has jurisdiction pursuant to 28 U.S.C. §1331, the Acts of March 3, 1863 (12 Stat. 762) and June 25, 1936 (49 Stat. 1921) as amended, D.C. Code §11-501, and this Court's equity jurisdiction.

7. Pursuant to 5 U.S.C. §552a(g)(5) and 28 U.S.C. §1391(e), venue is proper in the District of Columbia, where the Defendants are located or hold office. Under 5 U.S.C. §703, venue is proper in any court of competent jurisdiction.

8. An actual and justiciable controversy exists between Plaintiffs and Defendants.

Justiciability

9. AAPS's members earn their livelihood from practicing medicine and seek to defend their right to practice medicine free from government and third-party intrusion and to defend the access by their patients to the care they need.

10. CURE's constituents from inner-city and poor communities have direct, relevant, and negative experience with Medicaid, the federal government's primary existing and failing attempt at managing healthcare. On behalf of those constituents and communities, CURE seeks to advocate for narrower (but more efficient and liberating) healthcare reform that expands coverage through solutions such as tax credits and health savings accounts.

11. On information and belief, Plaintiffs have been reported to flag@whitehouse.gov.

12. Plaintiffs oppose the rationing of healthcare inherent in the current administration's efforts to "reform" healthcare. In addition, the patients of AAPS's physician members oppose that rationing of healthcare.

13. Plaintiffs have participated in the public-policy debate on healthcare reform and wish to and will continue to participate in that debate. In participating in that debate, Plaintiffs have and will continue to participate by relying on email and internet communications with members, affiliates, parishioners, and third parties. Plaintiffs' communications encourage the recipients to forward the information to their colleagues, acquaintances, and (in the case of AAPS) patients.

14. In the public-policy debate, the Executive Branch of the federal government enjoys an advantage in its ability to chill speech by affected members of the public (*i.e.,* to intimidate the public), particularly in regulated professions such as medicine. Removing the Executive Branch's ability to chill speech would provide Plaintiffs a more equal footing in the

public-policy debate over healthcare reform.

15. The Defendants' solicitation of information via flag@whitehouse.gov chills speech on healthcare reform, including speech by and on behalf of Plaintiffs.

16. Participating in the public debate over healthcare reform is central to Plaintiff AAPS's mission on behalf of its members and their patients. AAPS relies on First Amendment protections to encourage its members to advocate on behalf of AAPS members and their patients to state, federal, and local governments, licensing boards, and media, as well as to participate in national debates as an organization advocating to those same audiences.

17. Participating in the public debate over healthcare reform is central to Plaintiff CURE's mission on behalf of inner-city constituents and communities, the latter of which include disproportionate shares of Medicare recipients and Medicare-eligible people. CURE relies on First Amendment protections to reach inner-city leaders and communities through its clergy awareness conferences, community townhall meetings, church lecture series, campus lectures, as well as mass media of television, radio, magazines and newspapers.

18. Protecting Plaintiffs' ability to participate freely, without unlawful government coercion or intimidation, is critical to Plaintiffs' ability to participate meaningfully in the public debate over healthcare reform specifically and public affairs generally.

19. The Defendants' blog posting (as quoted in Paragraph 48) has been re-published on the internet. Information has been submitted, and continues to be submitted to Defendants based on reading the Defendants' blog posting (as quoted in Paragraph 48) from sources other than the whitehouse.gov website.

20. The Defendants' voluntary re-direction of the flag@whitehouse.gov information-collection activities to the new "reality check" website continues the initial violations via slightly

modified technical means and does not redress the past violations.

21. Defendants' flag@whitehouse.gov information-collection activities are part of an unlawful pattern and practice to collect and maintain information (including email addresses) on third parties' exercise of political speech, which pattern and practice continues in violation of the Privacy Act and First Amendment even if the Defendants terminate a particular information-collection component due to negative publicity or otherwise.

22. Because it includes expunging the information collected, deleting the solicitation for information quoted in Paragraph 48 from the whitehouse.gov website, eliminating the flag@whitehouse.gov email address, and enjoining future information-collection activities, the relief requested in Paragraph 67 will redress the foregoing injuries by eliminating the chilling effect on speech, terminating future Privacy Act violations and expunging the record of past Privacy Act violations.

23. To the extent that they relate to third parties (as distinct from Plaintiffs), the allegations of injury (Paragraphs 9-22) are made on the basis of knowledge, information, and belief, formed after reasonable inquiry, which likely could be proved conclusively after a reasonable opportunity for discovery.

Sovereign Immunity

24. In 5 U.S.C. §552a(g) (Privacy Act) and §702 (Administrative Procedure Act), the United States has waived its sovereign immunity for actions against the United States and its instrumentalities, agencies, and officers for non-monetary injunctive, declaratory, and other equitable relief and for the entry of judgments and decrees against the United States in such actions. The United States has waived sovereign immunity for this action and for the relief sought in Paragraph 67.

25. With Defendants Phillips and DeParle named in their official capacities for ongoing violations of federal law, sovereign immunity does not shield their *ultra vires* actions.

26. This Court possesses equity jurisdiction over federal officers derived both from the Court's enabling legislation and from the historic equity jurisdiction of Maryland courts over Maryland officers, prior to Maryland's ceding the District of Columbia as a federal enclave.

27. As a matter of historical fact, at the time that the states ratified the U.S. Constitution, the equitable, judge-made doctrine that allows use of the sovereign's courts in the name of the sovereign to order the sovereign's officers to account for their conduct (*i.e.,* the rule of law) was as least as firmly established and as much a part of the legal system as the judge-made doctrine of federal sovereign immunity. Louis L. Jaffee, *The Right to Judicial Review I,* 71 HARV. L. REV. 401, 433 (1958).

28. Congress has not enacted a statute that limits this Court's equity jurisdiction for an action against the *ultra vires* acts of Defendants Phillips and DeParle.

Irreparable Harm and Inadequacy of Alternate Remedies

29. This action is not barred by 5 U.S.C. §704 or analogous equitable doctrines because no provision of law provides an adequate alternate legal remedy for Plaintiffs' injuries.

30. Because this Court has jurisdiction as a threshold matter, the Declaratory Judgment Act, 28 U.S.C. §§2201-2202, provides this Court the power to "declare the rights and other legal relations of any interested party…, whether or not further relief is or could be sought." 28 U.S.C. §2201; *accord* FED. R. CIV. P. 57 advisory committee note ("the fact that another remedy would be equally effective affords no ground for declining declaratory relief").

31. In addition to the declaratory relief requested in Paragraph 67, Plaintiffs are entitled to injunctive relief because (a) imminent and ongoing exposure to unlawful government

conduct that chills free-speech rights constitutes irreparable injury; (b) as set forth in Paragraph 29, Plaintiffs lack an adequate alternate legal remedy against Defendants' ongoing violations of federal law.

CONSTITUTIONAL AND STATUTORY BACKGROUND

32. The First Amendment of the U.S. Constitution protects the right of free speech: "Congress shall make no law … abridging the freedom of speech." U.S. CONST. amend. I, cl. 2. The right of free speech includes the right to be free from unlawful or coercive government conduct that chills the right to speak freely.

33. The Privacy Act, 5 U.S.C. §552a, protects the public from government intrusions and disclosures on privacy and free speech, among other things.

34. Outside of "authorized law enforcement activities," the Privacy Act prohibits agencies (including EOP) from maintaining records describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the relevant individual(s). 5 U.S.C. §552a(e)(7).

35. For purposes of the Privacy Act, a "record" includes "any item, collection, or grouping of information about an individual that is maintained by an agency … that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual," which includes an email with an email address.

36. Under the Privacy Act, agency records must be limited to "only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President," 5 U.S.C. §552a(e)(1), but under the Presidential Recordings and Materials Preservation Act ("PRMPA"), the White House must preserve all records.

37. PRMPA's privacy protections are narrower than the Privacy Act's protections and protect only "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 44 U.S.C. §2204(a)(6).

38. The National Archives and Records Administration ("NARA") maintains presidential records and is an "agency" within the meaning of the Privacy Act and the Administrative Procedure Act ("APA").

FACTUAL BACKGROUND

White House Agenda for Healthcare Reform

39. On or about April 8, 2009, Executive Order 13507 (74 Fed. Reg. 17,071) created WHOHR within EOP, with principal functions that include without limitation (a) providing leadership for and coordinating the development of the Administration's policy agenda across executive agencies; (b) working with executive agencies to ensure that Federal Government policy decisions and programs are consistent with the President's health-reform goals; (c) integrating the White House's health-reform agenda across the Federal Government; (d) coordinating public outreach activities designed to gather input from the public; and (e) developing and implementing strategic initiatives to strengthen the ability of public agencies and private organizations to advance the White House's health-reform agenda.

40. WHOHR has carried out, and continues to carry out, the foregoing functions. WHOHR exercises independent authority and discretion in carrying out the foregoing functions.

41. Under the current administration, the White House healthcare reform agenda includes the enactment of legislation with the goal or intended effect of establishing a public single-payer system of rationed healthcare, either through the initial healthcare reform legislation or through a series of enactments that implement the White House healthcare reform agenda over

time. Notwithstanding the current administration's more candid expressions of the implications of its healthcare reform agenda during the election, WHOHR and the administration seek to mask the implications and intentions of their healthcare reform agenda to enable its enactment, either through the initial healthcare reform legislation or through a series of enactments that implement the White House healthcare reform agenda over time.

42. As part of their efforts to advance the White House healthcare reform agenda, Defendants have encouraged and continue to encourage recipients of their email and internet information to forward Defendants' information to the recipients' families and acquaintances.

43. As part of their effort to advance the White House healthcare reform agenda, Defendants have accused opponents (including Plaintiffs) of spreading misinformation on issues such as whether health reform would (a) provide public funding for abortions, (b) put "death panels" in place to deny care to the elderly or infirm, (c) amount to a government takeover of healthcare, and (d) increase healthcare costs. As explained in the following four paragraphs the Defendants and the administration have spread misinformation, semantics, and disinformation on these topics.

44. The Defendants and the current administration have argued and continue to argue that pending healthcare reform legislation does not mandate federal funding of abortion, but they have not acknowledged that such legislation could mandate abortion coverage through regulatory requirements (as distinct from legislation) on required care coverage or, in the case of the "public option" by requiring plans to fund abortions with premiums (as distinct from money already held by the federal government). On August 24, 2009, TIME magazine quoted Rep. Bart Stupak (D-MI) as saying that the President either does not understand pending healthcare reform legislation or "if he is aware of it, and he is making these statements, then he is misleading

people" with respect to abortion. Michael Scherer, *How Abortion Could Imperil Health-Care Reform,* TIME (Aug. 24, 2009).

45. By denying and continuing to deny that healthcare reform legislation includes "death panels" that make *individual* life-or-death decisions on the elderly or infirm, the Defendants and the current administration have ignored and implicitly denied and continue to ignore and implicitly to deny both the fact that their healthcare reform agenda involves rationing healthcare (*i.e.,* denial of coverage and, thus, of treatment) and the fact that covered end-of-life counseling would include pressuring the elderly or infirm to decide that their lives are a burden on others. The Department of Veterans Affairs has resuscitated the 1997 end-of-life planning document "*Your Life, Your Choices*," which is written to pressure elderly and infirm patients to conclude that their lives are not worth living. *See* Jim Towey, *The Death Book for Veterans: Ex-soldiers don't need to be told they're a burden to society,* WALL STREET JOURNAL (Aug. 18, 2009).

46. The Defendants and the current administration have argued and continue to argue that people who like their current private healthcare plans will not lose those plans under the White House healthcare reform agenda, without acknowledging that full implementation of that agenda, over time, will use public funding, regulatory mandates, and regulatory prohibitions to drive private healthcare plans out of business through non-competitive public subsidies.

47. The Defendants and the current administration have argued and continue to argue that pending healthcare reform legislation will save money and lower healthcare costs. By contrast, the nonpartisan Congressional Budget Office determined (a) that the Senate Finance Committee bill would cost $1.6 trillion over 10 years, (b) that the Independent Medicare Advisory Council – a purportedly cost-saving committee of medical experts empowered to make

Medicare cuts – would trim costs by a trivial 0.2 percent, and (c) that, far from saving money in the long term after a short-term investment in the first decade, the administration's healthcare reform significantly bends the cost curve *upward* (*i.e.,* not downward) after the first decade.

White House Information Collection Activity

48. On or about August 4, 2009, on the whitehouse.gov website, Defendant Phillips expressly solicited the public to report on the free speech by members of the public who dispute the positions taken by WHOHR with respect to so-called healthcare reform:

> There is a lot of disinformation about health insurance reform out there, spanning from control of personal finances to end of life care. These rumors often travel just below the surface via chain emails or through casual conversation. Since we can't keep track of all of them here at the White House, we're asking for your help. If you get an email or see something on the web about health insurance reform that seems fishy, send it to flag@whitehouse.gov.

49. On August 14, 2009, and over the weekend of August 15-16, AAPS finalized an earlier version of this Complaint, which CURE agreed to join on August 17, 2009, and which AAPS and CURE had planned to file on August 18, 2009. AAPS had scheduled a press conference on the planned lawsuit for the morning of August 18, 2009.

50. On August 17, 2009, at approximately 7:10 p.m., defendant Phillips provided the following update to Defendants' information-collection efforts on the whitehouse.gov website:

> An ironic development is that the launch of an online program meant to provide facts about health insurance reform has itself become the target of fear-mongering and online rumors that are the tactics of choice for the defenders of the status quo. [¶ … ¶] To better understand what new misinformation is bubbling up online or in other venues, we want your suggestions about topics to address through the Reality Check site. To consolidate the process, the email address set up last week for this same purpose is now closed and all feedback should be sent through: http://www.whitehouse.gov/realitycheck/contact[.]

51. Starting on or about the time of defendant Phillips' second flag@whitehouse.gov

posting, emails sent to the flag@whitehouse.gov email address report the x.2.1 error code ("Mailbox disabled, not accepting messages") and return the message "The email address you just sent a message to is no longer in service.[]We are now accepting your feedback about health insurance reform via:[]http://www.whitehouse.gov/realitycheck[.]"

52. Because of Defendants' voluntary actions on the eve of Plaintiffs' planned filing date, Plaintiffs deferred filing suit to evaluate the effect of Defendants' actions. On reviewing the matter, however, the Defendants actions do not moot Plaintiffs' injuries because the Defendants' actions (a) fail to remove the initial solicitation of protected speech, (b) fail to eliminate the flag@whitehouse.gov email address, (c) refer the reporting public to continue the reporting at the new "reality check" cite, (d) fail to safeguard adequately against continued violations via the new "reality check" site; and (e) fail to expunge information unlawfully collected and maintained prior to Defendants' voluntary actions.

53. The error code x.2.1 means that "[t]he mailbox exists, but is not accepting messages. This may be a permanent error if the mailbox will never be re-enabled or a transient error if the mailbox is only temporarily disabled." By contrast, the error code x.1.1 ("Bad destination mailbox address") means that "[t]he mailbox specified in the address does not exist. For Internet mail names, this means the address portion to the left of the '@' sign is invalid. This code is only useful for permanent failures."

54. Significant portions of the public do not read or do not follow instructions when directed to simple forms (such as http://www.whitehouse.gov/realitycheck/contact) that they easily understand how to complete.

55. On information and belief, Defendants have received and have shared among themselves (and with others) information collected from flag@whitehouse.gov.

56. All Defendants have acted and continue to act in concert with each other and with *inter alia* others within the Executive Branch to continue their efforts to chill lawful speech by and on behalf of Plaintiffs.

COUNT I
FIRST AMENDMENT

57. Plaintiffs incorporate Paragraphs 1-56 and 62-66 as if fully set forth herein.

58. The Defendants' collection and maintenance of information on speech protected by the First Amendment chills the right of free speech, Defendants know that the collection and maintenance of such information chills speech, and Defendants intend that chilling effect.

59. No law or constitutional provision authorizes the Defendants' collection and maintenance of such information, and the Privacy Act prohibits the collection and maintenance of such information for "agencies" as defined by the Privacy Act.

60. For federal entities outside the Privacy Act's definition of "agency," the First Amendment and the Privacy Act preempt the collection and maintenance of such information to the extent that they do not prohibit the collection and maintenance of such information.

61. For the foregoing reasons, Defendants' actions are arbitrary, capricious, an abuse of discretion, not otherwise in accordance with the law, in excess of authority granted by law, *ultra vires,* and in violation of the First Amendment.

COUNT II
PRIVACY ACT

62. Plaintiffs incorporate Paragraphs 1-61 as if fully set forth herein.

63. Defendants' efforts to monitor speech by the public via flag@whitehouse.gov violates the letter and spirit of the Privacy Act because email addresses constitute an "identifying particular" within the meaning of the Privacy Act and because (a) the goal of the monitoring

campaign is to "maintain [a] record describing how [an] individual exercises rights guaranteed by the First Amendment" in violation of 5 U.S.C. §552a(e)(7), and (b) the monitoring campaign maintains information not required by any statute or executive order in violation of 5 U.S.C. §552a(e)(1).

64. To the extent that any of Defendants are not an "agency" or do not work for an "agency" as defined in the Privacy Act, their actions nevertheless violate the Privacy Act both because the Privacy Act preempts executive action inconsistent with the Privacy Act by executive entities outside the Privacy Act's definition of "agency" and because NARA (which maintains all such communications) is an agency under the Privacy Act.

65. For entities outside the Privacy Act's definition of "agency," the First Amendment and the Privacy Act preempt federal collection and maintenance of such information to the extent that they do not prohibit the collection and maintenance of such information.

66. For the foregoing reasons, Defendants' actions are arbitrary, capricious, an abuse of discretion, not otherwise in accordance with the law, in excess of authority granted by law, *ultra vires,* and in violation of the Privacy Act.

PRAYER FOR RELIEF

67. WHEREFORE, Plaintiffs respectfully asks this Court to grant the following relief:

A. Pursuant to 5 U.S.C. §706, 28 U.S.C. §§1331, 2201-2202, the Acts of March 3, 1863 (12 Stat. 762) and June 25, 1936 (49 Stat. 1921) as amended, D.C. Code §11-501, Fed. R. Civ. Proc. 57, and this Court's equitable powers, a Declaratory Judgment that:

(i) The Privacy Act and the First Amendment prohibit Defendants' efforts to solicit or collect information about individuals or entities derived from their speech on healthcare-related issues; and

(ii) To the extent not directly covered by the Privacy Act, Defendants' efforts to collect information on speech related to healthcare reform are preempted by the Privacy Act and the First Amendment.

B. Pursuant to 5 U.S.C. §706, 28 U.S.C. §§1331, 2202, the Acts of March 3, 1863 (12 Stat. 762) and June 25, 1936 (49 Stat. 1921) as amended, D.C. Code §11-501, and this Court's equitable powers, an Order providing that

(i) Defendants are enjoined from collecting additional information via the flag@whitehouse.gov email address;

(ii) Defendants are ordered to remove the flag@whitehouse.gov email address as a known email address under whitehouse.gov such that email sent to that address result in an "unknown user" error in standard email protocols;

(iii) Defendants are ordered to expunge all names and other identifying information collected via flag@whitehouse.gov (*i.e.,* via either the email address or the "reality check" internet form);

(iv) Defendants are ordered to delete the solicitation (quoted in Paragraph 48) of "fishy" information from whitehouse.gov;

(v) Defendants are enjoined from soliciting or collecting information (including email addresses) on third parties' political speech; and

(vi) Defendants are enjoined from collecting personal information (including email addresses) on political speech unless authorized by the speaking person or entity.

C. Pursuant to 5 U.S.C. §552a, 28 U.S.C. §2412, and any other applicable provisions of law or equity, award Plaintiffs' costs and reasonable attorneys fees.

D. Such other relief as may be just and proper.

Dated: August 26, 2009

Respectfully submitted,

/s Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar No. 464777

1250 Connecticut Avenue, NW, Suite 200
Washington, DC 20036
Telephone: (202) 669-5135
Telecopier: (202) 318-2254

Counsel for Plaintiffs Association of American Physicians & Surgeons, Inc. and Coalition for Urban Renewal & Education