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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

GILBERT P. HYATT and AMERICAN ASSOCIATION FOR EQUITABLE TREATMENT, INC.,

Plaintiffs,

v.

OFFICE OF MANAGEMENT AND BUDGET and SHAUN DONOVAN, in his official capacity as Director of the Office of Management and Budget,

Defendants.

Civil Case No: 2:16-cv-01944-JAD-GWF

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

ORAL ARGUMENT REQUESTED

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Introduction

Defendants, the Office of Management and Budget ("OMB") and its Director, take the position that OMB's actions under the Paperwork Reduction Act ("PRA" or "Act")—a cross-cutting remedial statute intended to protect the public from the "hidden tax" of government paperwork burdens—are immune from judicial review. That position not only conflicts with the strong presumption favoring judicial review of administrative action, but it also clashes with the PRA itself. Its text and structure reflect Congress's recognition that judicial review of OMB actions would be available under the Administrative Procedure Act ("APA"), and the narrow exception it carved out to such review applies in the one circumstance where judicial review of PRA compliance is already generally available through direct challenge of an agency rule imposing paperwork burdens. In other words, the "express bar on judicial review" that is the lynchpin of Defendants' argument, MTD at 12, actually confirms that Congress expected ordinary APA review to be available and restricted it only to channel disputes over a final rule's PRA compliance into proceedings challenging the lawfulness of the rule itself, rather than OMB's decision to approve or take no action on it. *See* 44 U.S.C. § 3507(d)(5).

That narrow exception to APA review of OMB actions does not apply to either of the actions challenged here. Even Defendants do not contend that OMB's denial of Plaintiff Gilbert Hyatt's citizen petition under PRA Section 3517(b) is the kind of action that falls within the plain text of the exception. And OMB's 2013 action to exempt several particularly burdensome paperwork requirements by the Patent and Trademark Office ("PTO") from PRA compliance did not concern a notice-and-comment rulemaking—OMB concedes as much—and so also does not fall within the exception. Faced with a statute inhospitable to their position on judicial review, Defendants are left to argue that the PRA's gestalt, if not any particular provision, bars claims challenging those actions. But the presumption is in favor of judicial review, not against it, and scores of decisions have rejected arguments akin to Defendants' claim that the PRA's "public protection" defense somehow provides an alternative "adequate remedy in a court," 5 U.S.C. § 704, to pre-enforcement review under the APA.

Defendants' other arguments to avoid review of their actions are equally meritless. Their

contention that OMB's denial of a petition to which the PRA mandates it respond is not a final agency action because it imposes no additional legal burdens on Plaintiffs runs into an unbroken wall of cases holding precisely the opposite with respect to agency decisions denying relief. Their claim that acting on such petitions is committed exclusively to agency discretion, and therefore unreviewable, is belied by statutory language *requiring* OMB to respond to requests "to determine, if, under [the PRA], a person shall maintain, provide, or disclose the information to or for the agency" and to take further remedial action, if necessary. 44 U.S.C. § 3517(b). And their challenge to the standing of Plaintiff American Association for Equitable Treatment ("AAET") is both irrelevant—Defendants do not dispute Mr. Hyatt's standing to pursue Plaintiffs' claims—and frivolous, given that Mr. Hyatt is a member of AAET.

In sum, Defendants' stated grounds for dismissal amount to the usual list of boilerplate objections that government agencies raise when they seek to avoid review of action that they do not wish to defend on the merits. Their motion to dismiss should be denied.

Background

A. The Paperwork Reduction Act

Congress enacted the Paperwork Reduction Act ("PRA"), 44 U.S.C. §§ 3501–3521, in 1980 to "minimize the paperwork burden for individuals, small businesses,…and other persons resulting from the collection of information by or for the Federal Government," and "ensure the greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the Federal Government," *id.* at § 3501(1), (2). "[T]o accomplish this goal, Congress set forth a comprehensive scheme designed to reduce the paperwork burden and designated the Office of Management and Budget (OMB) to oversee other federal agencies with respect to paperwork." *Gossner Foods, Inc. v. EPA*, 918 F. Supp. 359, 364 (D. Utah 1996). Among other responsibilities, OMB must "review and approve proposed agency collections of information" to guarantee that they "minimize the Federal information collection burden" and "maximize the practical utility of and public benefit from [the] information." 44 U.S.C. § 3504(c)(1), (3), (4).

That is no trivial task. Responding to the "hidden taxes" imposed by federal paperwork

burdens estimated in 1980 at "$100 billion a year," S. Rep. No. 96-930, at 3 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6241, 6243, Congress defined "collection of information" broadly. Specifically, "collection of information" includes any "obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for…answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons." 44 U.S.C. § 3502(3)(A)(i). As administered by OMB, it encompasses any agency request or demand for information that is addressed to ten or more "persons" in a 12-month period. *See* 5 C.F.R. § 1320.3(c)(4).

B. OMB Reviews Proposed Collections of Information for PRA Compliance

The PRA bars federal agencies from collecting information without a "control number" certifying that OMB has reviewed and approved the collection of information. 44 U.S.C. § 3507(a)(3). The control number must be "displayed upon the collection of information" to notify the public that the agency has complied with PRA requirements. *Id.* The PRA prescribes a three-step procedure for obtaining a control number from OMB.

1. Internal Agency Review

First, the agency seeking to sponsor the collection of information must conduct its own internal review. 44 U.S.C. § 3507(a)(1)(A). This includes "an evaluation of the need for the collection of information," "a plan for the collection of the information," and "a specific, objectively supported estimate of [the] burden." *Id.* at § 3506(c)(1)(A)(i), (iii), (iv).

2. Publication in *Federal Register*

After completing its internal review, the agency publishes notice of the proposed collection of information in the *Federal Register* and solicits public comments. In the notice, the agency must seek comment on the necessity and utility of the proposed collection, as well as methods of reducing the burden on the public. 44 U.S.C. § 3506(c)(2)(A)(i)–(iv). The notice can be included either in a proposed rule being promulgated through the notice-and-comment rulemaking process or in a stand-alone publication for collections not contained in proposed rules. *Id.* at § 3506(c)(2)(A), (B).

3. OMB Review

After the agency publishes notice in the *Federal Register*, it must then certify its compliance with the PRA's substantive requirements and submit the proposed collection for OMB review. 44 U.S.C. §§ 3506(c)(3), 3507(a)(1). The PRA prescribes three different procedures for OMB review: Section 3507(c), Section 3507(d), and Section 3507(h). *Id.* at § 3507(b). Subsection (c) governs review of proposed collections of information that are noticed in a standalone publication in the *Federal Register*, rather than in a proposed rule. Subsection (d) governs review of collections of information being promulgated through notice-and-comment procedures and therefore noticed in a proposed rule. And Subsection (h) governs review of requests for extensions of previous approvals of collections of information.

Subsection (c). For any "collection of information not contained in a proposed rule," Subsection (c) provides that OMB has 60 days after receipt and publication of the notice to approve or deny the collection of information. 44 U.S.C. § 3507(c)(1), (2). If OMB chooses to approve the collection of information, its decision is final and it may approve the collection for a period "not...in excess of 3 years." *Id.* at § 3507(g). If OMB does not respond within the 60-day window, approval may be inferred and the agency can obtain a control number valid "for not more than 1 year." *Id.* at § 3507(c)(3)(C).

Subsection (d). Subsection (d) governs OMB review of "any proposed collection of information contained in a proposed rule" through the notice-and-comment process to its finalization. *Id.* at § 3507(d)(1).[1] Unlike Subsection (c), Subsection (d) does not permit OMB to approve or deny the proposed collection of information immediately following publication of the proposal. *Compare id.* at § 3507(d)(1)(B) *with id.* at § 3507(c)(2). Instead, OMB must comment on the proposed rule like the rest of the public. *Id.* at § 3507(d)(1)(B). The rulemaking agency

[1] For example, *see* FERC, Data Collection for Analytics and Surveillance and Market-Based Rate Purposes, 81 Fed. Reg. 51,726, 51,737 (proposed Aug. 4, 2016) ("The collections of information contained in this proposed rule are being submitted to [OMB] for review under section 3507(d) of the [PRA]."); FinCEN, Customer Identification Programs, Anti-Money Laundering Programs, and Beneficial Ownership Requirements for Banks Lacking a Federal Functional Regulator, 81 Fed. Reg. 58,425, 58,433 (proposed Aug. 25, 2016) ("The collection of information contained in this proposed rule is being submitted to [OMB] for review in accordance with the [PRA] (44 U.S.C. 3507(d))").

then has the opportunity to consider, and even reject, OMB's comments when promulgating the final rule, which must include the agency's response. *Id.* at § 3507(d)(2)(A), (B). If OMB determines that the agency's response to its comments is "unreasonable," it may, at that point, disapprove the collection of information in the final rule within 60 days of the final rule's publication. *Id.* at § 3507(d)(4)(C). If it approves the collection, that approval is valid for a period "not...in excess of 3 years." *Id.* at § 3507(g).

Because agency rules promulgated through notice-and-comment procedures are generally subject to judicial review under agencies' organic statutes or the APA, 5 U.S.C. §§ 702, 704, 706(2)(a), Subsection (d) contains a provision to channel judicial review of an agency's PRA compliance into such suits. It provides, "The decision by [OMB] to approve or not act upon a collection of information contained in an agency rule shall not be subject to judicial review." 44 U.S.C. § 3507(d)(6). Thus, when OMB allows an agency's certification of PRA compliance to stand, a party must challenge the agency's compliance directly, not through a suit against OMB. To make clear that this provision does not cut off judicial review of PRA compliance in other circumstances, where direct review of the underlying agency action is unlikely to be available, the PRA expressly limits its scope and that of the other provisions contained in Subsection (d): "This subsection shall apply only when an agency publishes a notice of proposed rulemaking and requests public comments." *Id.* at § 3507(d)(5).

Subsection (h). Finally, Subsection (h) governs review of requests for an extension on "a currently approved collection of information" that is set to expire. *Id.* at § 3507(h)(1). The review procedure is similar to that of Subsection (c). *See id.* at § 3507(h)(1)(A). But because the agency is asking to continue a collection of information, not proposing a new one, Subsection (h) requires the agency to submit "an explanation of how the agency has used the information that it has collected." *Id.* at § 3507(h)(1)(B).

C. PTO Rules 111, 115, and 116 Impose a Substantial Paperwork Burden on Patent Applicants, Including Plaintiff Hyatt

PTO Rules 111, 115, and 116 establish the procedures that patent applicants must follow when supplementing or amending pending patent applications. 37 C.F.R. §§ 1.111, 1.115, 1.116.

Individually and collectively, the PTO's requests under Rules 111, 115, and 116, and the required responses from patent applicants, impose significant paperwork burdens on applicants. Compl. ¶¶ 14–15.

Rule 111. Rule 111 prescribes the information-collection requirements that an applicant must follow when replying to a non-final PTO action on an application. 37 C.F.R. § 1.111. It requires that the applicant supply substantial and substantive new information, including information "which distinctly and specifically points out the supposed errors in the examiner's action." *Id.* at § 1.111(b). It also requires that the applicant "reply to *every ground of objection and rejection* in the prior Office action," and "present arguments pointing out the specific distinctions believed to render the claims, including any newly presented claims, patentable over any applied references." *Id.* at § 1.111(b) (emphasis added). And, if the applicant is amending a reply to a rejection of claims, Rule 111 prescribes a host of other, particularized information-collection requirements. *Id.* at § 1.111(c).

The collections of information contained in Rule 111 are implemented by the guidance contained in the Manual of Patent Examining Procedure ("MPEP") §§ 714.02, 714.03(a), 2266, and 2666. These MPEP provisions provide PTO with "Form Paragraphs" that the agency sends to all similarly situated applicants. *See generally* MPEP Form Paragraphs.[2] As such, multiple applicants receive the same standardized rejections and the same form language requesting information, to which Rule 111 requires that the applicants respond. The PTO makes *hundreds of thousands* of submissions under Rule 111 every year. Compl. ¶ 34.

Rule 115. Rule 115 establishes information collection requirements for filing a preliminary amendment to a patent application. A "preliminary amendment" is an amendment to a patent application that is received by the PTO "on or before the mail date of the first Office action" on the application. 37 C.F.R. § 1.115(a). The Rule requires that "[a] preliminary amendment seeking cancellation of all the claims" include "any new or substitute claims," or otherwise it will be "disapproved." *Id.* at § 1.115(b)(1). Rule 115 further requires that "[a]

[2] *Available at* https://www.uspto.gov/web/offices/pac/mpep/FPs.html.

preliminary amendment" be filed "in compliance with 37 C.F.R. § 1.121" ("Rule 121"). *Id.* at § 115(b). Rule 121, in turn, instructs an applicant seeking an amendment to supply detailed information about the location of the paragraphs being amended, a full text of replacement paragraphs, and markings "show[ing] all the changes relative to the previous version." *Id.* at § 1.121(b)(1)(i)–(iv). All applicants must supply this information to make a preliminary amendment.

Rule 116. Rule 116 establishes the information collection requirements for amending an application after a final PTO action. 37 C.F.R. § 1.116. It describes the form and content of an "after final" amendment, and instructs an applicant to comply with the "requirement of form expressly set forth in a previous Office action" or "present[] rejected claims in better form for consideration on appeal." *Id.* at § 1.116(b)(1), (2). Rule 116 collections of information are implemented by the guidance MPEP § 714.12, and the PTO uses Form Paragraphs to solicit such information. For example, Form Paragraph 8.12 requires the use of particular forms to link claims.

D. In Two Actions, OMB Refuses To Subject PTO Rules 111, 115, and 116 to PRA Requirements

On March 22, 2012, PTO published notice in the *Federal Register* that it would be seeking "revision of a continuing information collection." PTO, Patent Processing (Updating), 77 Fed. Reg. 16,813, 16,813 (Mar. 22, 2012). This notice included collections of information under Rules 111, 115, and 116, which it collectively labeled "Amendments and Responses." *Id.* at 16,814. *See also* Compl., Att. 5, at 4. After the public comment period concluded, PTO sought OMB approval of the collections of information, including collections of information for "Amendments and Responses." Compl., Att. 5.

But OMB did not assign control numbers to the collections of information under Rules 111, 115, and 116. Instead, in its "2013 Notice of Action," OMB stated that the collections of information under "Amendments and Responses" are "not subject to the Paperwork Reduction Act." Compl., Att. 4, at 2. OMB provided no further explanation for its decision.

On August 1, 2013, Mr. Hyatt filed a petition pursuant to PRA Section 3517(b) asking

OMB to review the collections of information contained in Rules 111, 115, and 116. Compl., Att. 1 ("Petition"). Section 3517(b) authorizes "[a]ny person [to] request the Director to review any collection of information conducted by or for an agency to determine, if…a person shall maintain, provide, or disclose the information to or for the agency." Mr. Hyatt requested that OMB conduct a PRA review and declare the collections of information in those rules invalid because they lack valid OMB control numbers. Compl., Att. 1, at 2. In support of his Petition, Mr. Hyatt attached a 17-page memorandum, authored by a former OMB analyst, detailing why these collections of information are subject to the PRA and require control numbers. Compl., Att. 2.

In a one-page email sent on September 13, 2013, OMB denied Mr. Hyatt's Petition. Compl., Att. 3 ("Petition Denial"). The Petition Denial offered two justifications. First, OMB asserted that the issue "was recently addressed by OMB" in the 2013 Notice of Action that assigned "OMB Control Number 3060-0031," a control number for the Federal Communications Commission, not the PTO. Compl., Att. 3, at 2. Second, OMB invoked three regulatory exceptions to the definition of "information"—5 C.F.R. § 1320.3(h)(1), (6), and (9)—and asserted that they excluded the collections of information contained in Rules 111, 115, and 116. Compl., Att. 3, at 2. But the Denial did not explain which exceptions apply to which of the Rules, much less why they exclude the Rules from the definition of "information." Nor were those exceptions even mentioned in the 2013 Notice of Action.

E. Plaintiffs Challenge OMB's Actions

On August 16, 2016, Plaintiffs filed this action, bringing two claims under Section 702 of the Administrative Procedure Act.[3] 5 U.S.C. § 702. Mr. Hyatt is an inventor and patent applicant with applications pending before the PTO who has regularly been subjected to collections of information under Rules 111, 115, and 116 and risks adverse consequences for failure to respond to those collections. Compl. ¶¶ 8, 12–15. The American Association for Equitable Treatment ("AAET") is a not-for-profit social-welfare organization that promotes the fair, efficient, and effective administration of laws relating to technology, innovation, and intellectual property.

[3] Contrary to Defendants' discussion (at 9–10), Plaintiffs do not assert a private right of action under the PRA.

Compl. ¶ 9. Mr. Hyatt is an AAET Member. *Id*.

First, Plaintiffs allege that OMB abused its discretion, and acted arbitrarily, capriciously, or otherwise not in accordance with law when it denied Mr. Hyatt's Section 3517(b) Petition. Compl. ¶¶ 69–73. Second, Plaintiffs allege that OMB's 2013 Notice of Action determining that collections of information under Rules 111, 115, and 116 are not subject to the PRA is an abuse of discretion, arbitrary and capricious, and contrary to law. Compl. ¶¶ 74–80. For relief, Plaintiffs seek declarations that OMB violated the PRA and APA, that PTO Rules 111, 115, and 116 are subject to the PRA, vacatur of OMB's actions, and a declaration that no one is required to respond to collections of information under those rules unless and until the PTO obtains valid OMB control numbers for them. Compl. at 17.

Legal Standard

In a Rule 12(b)(1) motion for lack of subject matter jurisdiction, the plaintiff has the burden of establishing jurisdiction, but the court "'must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party.'" *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). "[I]t is common ground that if review is proper under the APA, the District Court ha[s] jurisdiction under 28 U.S.C. § 1331." *Bowen v. Massachusetts*, 487 U.S. 879, 891 n.16 (1988). And "[t]he default rule [under the APA] is that agency actions are reviewable…, even if no statute specifically authorizes judicial review." *ANA Int'l, Inc. v. Way*, 393 F.3d 886, 890 (9th Cir. 2004). *See also Proyecto San Pablo v. INS*, 189 F.3d 1130, 1136 n.5 (9th Cir. 1999) ("In the absence of a specific statutory provision to the contrary, district courts have jurisdiction to review agency action as part of their general federal question jurisdiction, 28 U.S.C. § 1331.").

Argument

I. The APA Authorizes Judicial Review of OMB's 2013 Action and Action Denying Mr. Hyatt's Petition

Defendants' attempt to evade review of their decisions to exempt some of the PTO's burdensome information collections from the requirements of the PRA must fail. Those actions are subject to APA review because (1) they constitute final agency action, (2) there is no other

adequate remedy in court, and (3) Congress has not barred review or otherwise committed the actions to unreviewable agency discretion by law. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

A. OMB's Actions Constitute Final Agency Action

Defendants' contention that the Petition Denial is not "final agency action" within the meaning of APA Section 704 is deeply mistaken.[4]

The Supreme Court explained in *Bennett v. Spear* that, to be final for purposes of APA review, an agency action: (1) must "mark the 'consummation' of the agency's decisionmaking process, [i.e.,] not be of a merely tentative or interlocutory nature," and (2) "must be one by which rights or obligations have been determined, or from which legal consequences will flow." 520 U.S. 154, 177–78 (1997) (quotation marks and citations omitted). The second condition serves to preclude review of things like reports and recommendations that are "purely advisory and in no way affect[] the legal rights of the relevant actors." *Id*. at 178. Instead, to be subject to APA review, "the agency action [must] impose an obligation, deny a right or fix some legal relationship." *City of San Diego v. Whitman*, 242 F.3d 1097, 1102 (9th Cir. 2001) (citing *Bennett*, *supra*) (no finality where challenged EPA letter merely "encourage[d]" City to submit waiver application adopting agency's preferred interpretation of statute). Defendants dispute only that the Petition Denial satisfies *Bennett*'s second condition. *See* MTD at 18.

Precedent firmly rejects Defendants' argument that the Petition Denial is not final agency action because it imposed no additional legal obligations on Mr. Hyatt. The APA defines "agency action" broadly to "include[] the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or *denial thereof*, or *failure to act*." 5 U.S.C. § 551(13) (emphases added). Consistent with the APA's broad view of agency action, courts have uniformly recognized that denial of a petition to issue, amend, or repeal a rule implicates the petitioner's rights under the statute at issue and therefore constitutes final agency action. *See, e.g.*, *Massachusetts v. EPA*, 415 F.3d 50, 53–54 (D.C. Cir. 2005), *rev'd on other grounds*, 549 U.S. 497 (2007) (reviewing denial

[4] Defendants do not dispute that the 2013 Notice of Action constitutes "final agency action." *See* MTD at 18–19.

of petition for issuance of rule under Clean Air Act); *Clark v. Busey*, 959 F.2d 808, 811 (9th Cir. 1992) ("An agency's denial of a petition for rulemaking constitutes final, reviewable agency action…."); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1037 (D.C. Cir. 2002) (finding it is "clear" that "an agency's denial of a petition to initiate a rulemaking for the repeal or modification of a rule is a final agency action subject to judicial review."). Likewise, it is well established that "an agency's refusal to institute proceedings has sufficient legal consequence to meet the second criterion of the finality doctrine." *Capital Network System, Inc. v. FCC*, 3 F.3d 1526, 1530 (D.C. Cir. 1993) (quotation marks omitted). Such a denial "has legal consequence because it implicates petitioners' right to a reasonable exercise of agency discretion." *Intercity Transp. Co. v. United States*, 737 F.2d 103, 107 n.6 (D.C. Cir. 1984). These kinds of agency decisions are reviewable under the APA as final actions despite that they, being denials of requests for relief, do not impose any additional legal obligations on petitioners and simply maintain the status quo—contrary to Defendants' argumentation.

Just like other kinds of agency decisions denying relief, the Petition Denial determines Mr. Hyatt's substantive and procedural rights under the PRA. For the benefit of the public, the PRA imposes detailed substantive requirements on agencies' collections of information that are to be enforced, in the first instance, by OMB. *See, e.g.*, 44 U.S.C. § 3501(1) (purpose); *id*. at § 3506(c)(3)(C) (requirement that agency minimize burdens of each collection of information); *id.* at § 3504(c)(1) (requirement that OMB "review and approve proposed agency collections of information"); *id*. at § 3508 (requirement that OMB block collections of information that are not "necessary"). Furthermore, the Act specifically authorizes members of the public to petition OMB to review collections of information for PRA compliance, mandates that OMB respond to those petitions, and requires that OMB "take appropriate remedial action, if necessary." *Id.* at § 3517(b). Denial of Mr. Hyatt's petition thereby denies his asserted rights under the PRA (1) that he need not comply with the collections of information contained in PTO Rules 111, 115, and 116 and cannot be punished for failure to do so, (2) that OMB properly determine his rights under the PRA in its petition response, and (3) that OMB take appropriate remedial action to enforce the PRA. *See* Compl., Att. 1, at 2 (Petition).

Accordingly, the Petition Denial satisfies *Bennett*'s second condition and therefore constitutes final agency action subject to APA review.

B. The PRA Provides No Other Adequate Remedy in Court

Contrary to Defendants' argumentation (at 14–17), PRA's "public protection" provision, 44 U.S.C. § 3512, does not provide an "adequate remedy in a court," 5 U.S.C. § 704, for individuals aggrieved by OMB actions refusing to apply the PRA's requirements to agency collections of information. *See* MTD at 17.

To begin with, Section 3512 cannot provide any relief from any OMB action, only (potentially) from other actions taken by another agency, the one conducting the collection of information. "The remedy for denial of action that might be sought from one agency does not ordinarily provide an 'adequate remedy' for action already taken by another agency." *Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012). That applies here: Section 3512 provides no recourse to parties like Plaintiffs injured by OMB's actions, including its denial of Mr. Hyatt's Petition.

Section 3512 is also not an adequate remedy. It has been held not to create a private right of action, *e.g.*, *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 844 (9th Cir. 1999), and so does not provide any kind of "adequate remedy *in a court*," 5 U.S.C. § 704 (emphasis added). *See Taydus v. Cisneros*, 902 F. Supp. 278, 286 (D. Mass. 1995) (APA review available where organic statute provided "no express or implied cause of action"). In fact, that provision provides only a defense that can be raised in court after the agency accused of violating the PRA has taken final agency action. *E.g.*, *Blanca Telephone Co. v. FCC*, 743 F.3d 860, 867 (D.C. Cir. 2014); *Saco River Cellular, Inc. v. FCC*, 133 F.3d 25 (D.C. Cir. 1998). And it may not be available at all when the agency files suit against a party. *See United States v. Gross*, 626 F.3d 289, 296 (6th Cir. 2010) (Section 3512 can be raised "as a defense only during an agency administrative process or any subsequent judicial review" and so cannot be raised in "criminal proceedings in district court") (quotation marks and alterations omitted). Far from providing an adequate remedy in court for PRA violations, the Section 3512 defense will be difficult or impossible to raise in many cases where a party risks consequences for failing to comply with collections of information that violate the PRA.

Moreover, the remedy that Section 3512 does provide—a defense to noncompliance with collections of information that violate the PRA—shares the same risks and burdens that have regularly led courts to reject remedies as being adequate alternative means of obtaining relief in court. For example, in *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016), the Supreme Court held that neither (1) waiting for and challenging a potential EPA enforcement action for discharging fill without a permit nor (2) applying for and then litigating over such a permit was an adequate alternative to APA review of an agency determination that a property was subject to Clean Water Act jurisdiction. The former would force property-owners to bear the risk of guessing wrong about the jurisdictional issue and being penalized for doing so; the latter would require property-owners seeking judicial review to undertake an "arduous, expensive, and long" administrative process before ever reaching court. *Id*. at 1815–16. Each, therefore, was an inadequate substitute to ordinary APA review in court.

PRA Section 3512 combines both of the ills identified in *Hawkes*: parties asserting it as a defense to agency action must endure lengthy and burdensome administrative proceedings before they can obtain a final agency action reviewable in court, and even then they face the risk that guessing wrong about the agency's PRA compliance could subject them to severe penalties and loss of their rights. The result, as a practical matter, is to require defensive compliance even with collections of information that violate the PRA, which not only runs contrary to legislative purpose but also reflects the inadequacy of Section 3512 as an alternative to APA review of OMB actions under the PRA. *Compare Bowen v. Massachusetts*, 487 U.S. 879, 905 (1988) (money judgment not substitute for prospective relief in light of risks presented by the "rather complex ongoing relationship between the parties"); *Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 645–46 (9th Cir. 1998) (remedy that would not be realized for a substantial amount of time was not adequate).[5]

[5] Indeed, the structure of the Act reflects that Section 3512 was not viewed as a silver bullet to obtain relief under the Act. While that provision may suffice in some cases, Congress provided an additional, and different, means of obtaining relief in Section 3517(b), which requires the OMB Director to respond to petitions challenging agencies' compliance with the PRA and seeking a determination that parties need not comply with a particular collection of information. 44 U.S.C. § 3517(b). That provision was intended, among other things, "to encourage the public to identify

The relief available under Section 3512 also falls far short of that available in APA review of an OMB action under the PRA. For example, a judgment in an APA suit that OMB's approval of a collection of information, or OMB's denial of a Section 3517(b) petition challenging such a collection, violated the PRA would provide prospective relief against enforcement of that collection by the agency in any proceeding. *See* 5 U.S.C. § 706(2) (providing that a court shall "hold unlawful and set aside" unlawful agency action). By contrast, a decision crediting an assertion of a public-protection defense serves as a defense in that action only and so may not provide prospective relief in other proceedings. *See* 44 U.S.C. § 3512(b) (describing protection as a "defense"). This kind of mismatch in remedies is what led the Ninth Circuit in *Tucson Airport Authority* to hold that a claims-court action for money damages was not the same as an APA action for prospective specific performance even if that performance would be to require the payment of money by the government. 136 F.3d at 645. *See also Bowen*, 487 U.S. at 905 (holding proffered alternative remedy inadequate where it did not include power to grant prospective relief); *Halbig v. Burwell*, 758 F.3d 390, 397 (2014), *vacated*, 2014 WL 4627181 (en banc) (holding proffered alternative remedy inadequate where party "would have to repeat the cycle" of obtaining relief in case after case).

Finally, Defendants do not satisfy their burden of showing by "clear and convincing evidence" that Congress intended Section 3512 to cut off remedies that would otherwise be available under the APA. *Abbott Labs.*, 387 U.S. at 141 (quotation marks omitted). The provision itself has nothing to say about APA review, and its existence cannot be taken as an indication of congressional intent to preclude such review. "The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others." *Id.* (quotation marks omitted). Moreover, the structure of the PRA reflects that Congress anticipated that most OMB decisions would be subject to judicial review. *See* § I.C.1, *infra*. And the legislative history cited by Defendants (at 15) also says nothing about APA review of OMB actions under the PRA, only

unapproved or 'bootleg' paperwork requests and thereby encourage the better agency compliance with the Act." S. Rep. No. 104-8, at 56 (1995). Section 3512 would be, at best, a cumbersome, expensive, and potentially risky way to address unapproved paperwork burdens.

confirming Congress's objective of "empowering members of the public to defend themselves against unapproved collections of information which are subject to the Act." MTD at 15 (quoting House Report).[6] APA review plainly furthers that objective, while denying such review, as Defendants urge, undermines it.

C. The PRA Does Not Preclude Judicial Review of OMB's Actions

1. Section 3507's Text and Structure Support the Availability of Judicial Review Here

Defendants hang their hats (at 11–14) on the judicial-review bar contained in Section 3507(d)(6), but the statute expressly limits that provision to actions other than those under review here. Indeed, Defendants' view of the purpose and effect of the limited judicial-review bar is precisely backwards: it is not a blanket prohibition, but applies only in the single circumstance where an aggrieved party could already obtain judicial review under the APA of the underlying agency action, including its PRA compliance. Congress's careful tailoring of this provision undercuts any argument that Congress intended to deny APA review of OMB decisions—like those at issue here—regarding collections of information not subject to direct APA review themselves.

There is a "strong presumption that Congress intends judicial review of administrative action." *Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 718 (9th Cir. 2011) (quoting *Helgeson v. Bureau of Indian Affairs*, 153 F.3d 1000, 1003 (9th Cir. 1998)). *See also Abbott Labs. v. Gardner*, 387 U.S. 136, 140–41 (1967) ("[T]he Administrative Procedure Act…embodies the basic presumption of judicial review…. [O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."). "This presumption is overcome only in two narrow circumstances. The first…is when Congress

[6] The quoted statements (at 15) by Senator Danforth concern the availability of a private right of action under the PRA, which would allow parties to bring suit at potentially any time against agencies undertaking collections of information. By contrast, Plaintiffs' claims are for ordinary APA review of OMB final actions under the PRA. While Defendants' discussion of the legislative history and structure of the PRA may support the conclusion that Congress sought to avoid the disruption that might follow if parties subject to collections of information could simply haul the responsible agencies into court at any time, it does not even suggest that Congress sought to preclude APA review of OMB's final actions under the statute.

expressly bars review by statute." *Pinnacle Armor*, 648 F.3d at 718–19 (citing 5 U.S.C. § 701(a)(1)). "The second applies in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply, thereby leaving the court with no meaningful standard against which to judge the agency's exercise of discretion." *Id*. at 719 (quotation marks and citations omitted).

Review here is not barred by statute. The judicial-review bar is contained in Subsection (d), which governs OMB review of collections of information contained in rules being promulgated through notice-and-comment rulemaking. Subsection (d)'s procedures for OMB review and approval of collections key off of the notice-and-comment process. They require the rulemaking agency to submit any proposed collections of information and supporting materials to OMB at the rule-proposal stage and limit OMB's disapproval authority, in general, to instances where OMB has filed comments on the proposed rule and then rendered a disapproval decision within 60 days after publication of the final rule. 44 U.S.C. § 3507(d)(1)(A), (d)(3), (d)(4)(C). A separate provision states that "subsection [(d)] shall apply only *when* an agency publishes a notice of proposed rulemaking and requests public comments." *Id.* at § 3507(d)(5) (emphasis added).[7] In that context, "[t]he decision by the [OMB] to approve or not act upon a collection of information contained in an agency rule shall not be subject to judicial review." *Id.* at § 3507(d)(6).

Thus, when an agency engages in notice-and-comment rulemaking, and OMB approves or takes no action on any collections of information contained in the final rule immediately following its promulgation, a party may not directly challenge that OMB action. Instead, the party may obtain judicial review of the final rule, including its compliance with PRA requirements, by directly challenging the final rule itself. *See* 44 U.S.C. § 3506(c)(3) (requiring the rulemaking agency to certify PRA compliance); 5 U.S.C. § 702 (providing a right of judicial review to any person "adversely affected or aggrieved" by agency action); 5 U.S.C. § 706(2)(A) (authorizing a court to "set aside" agency action found to be "arbitrary, capricious, an abuse of discretion, or

[7] *See also* 5 C.F.R. § 1320.11(a) (implementing Subsection (d) by requiring agency to include "in the preamble to the Notice of Proposed Rulemaking a statement that the collections of information contained in the proposed rule, and identified as such, have been submitted to OMB for review under section 3507(d) of the Act").

otherwise not in accordance with law").[8]

Neither of the OMB actions under review in this suit is subject to Subsection (d) or its judicial-review bar. The first action under review, OMB's 2013 Notice of Action, was not undertaken in response to a PTO notice-and-comment rulemaking, as confirmed by the *Federal Register* notice that PTO was required to publish in advance of obtaining OMB approval. 44 U.S.C. § 3506(c)(2)(A). That notice explains that OMB's action concerns "the revision of a continuing information collection" by PTO, not any collection of information then contained in a proposed rule. *See* 77 Fed. Reg. 16,813, 16,813 (Mar. 22, 2012). Indeed, the notice requests comments "as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A))," *id*., citing a provision that expressly *excludes* actions "contained in a proposed rule (to be reviewed by the [OMB] under section 3507(d) [i.e., Subsection (d)]." 44 U.S.C. § 3506(c)(2)(B). In this way, PTO correctly recognized that it was not seeking OMB approval pursuant to Subsection (d). After all, there was no notice-and-comment rulemaking ongoing for the PTO rules at issue at that time, as Subsection (d) requires—they were promulgated years earlier. *See* MTD at 6 (citing *Federal Register* notices).

Instead, OMB's 2013 Notice of Action was taken pursuant to one of Section 3507's two other pathways for OMB review of other collections of information. Subsection (c) applies to "any proposed collection of information not contained in a proposed rule," and Subsection (h) applies to extensions of a previous approval. *See* 44 U.S.C. § 3507(b) (identifying the three subsections, "(c), (d), or (h)," under which OMB may "mak[e] a decision"); *id.* at § 3507(g) ("The [OMB] may not approve a collection of information for a period in excess of 3 years.").

[8] By contrast, APA review of the underlying agency action is unlikely to be available for the other three kinds of actions that OMB can take under Section 3507. First, when OMB *disapproves* (as opposed to approves or takes no action on) a collection contained in a final rule, its disapproval decision may render the rule inoperative or deprive parties of standing to challenge it; in either instance, an aggrieved party's only avenue to obtain review is to challenge OMB's action under the APA. Second, when OMB extends or refuses to extend a previous approval, the agency conducting the collection of information has not undertaken any final action itself that might be challenged in court; again, review is possible only in an APA suit challenging OMB's action. And, third, when OMB approves a collection of information outside of a rulemaking (e.g., where an agency simply adopts a new form), the agency conducting the collection is unlikely to have taken final agency action subject to judicial review; once again, an aggrieved party can obtain review only by challenging OMB's action under the PRA.

Which of those two subsections applies is not important for purposes of this case; what matters is that OMB's 2013 Notice of Action was not and could not have been taken pursuant to Subsection (d) and therefore is not subject to the judicial-review bar.

Defendants' argument to the contrary (at 11–12)—that once a rule containing collections of information is promulgated in notice-and-comment rulemaking, those collections are forever after subject to Subsection (d)—is an attempt to rewrite Section 3507 to include a judicial review bar in Subsections (c) and (h) that Congress chose not to legislate. As to the text, Subsection (d) is expressly limited to collections that, at the outset of the OMB review process, are "contained in a proposed rule," not an existing rule, 44 U.S.C. § 3507(d)(1), and its other provisions key off of the notice-and-comment process, as described above. Defendants' interpretation impermissibly extends the reach of Subsection (d) to intrude on the scope of other provisions specifically addressing extensions (Subsection (h)) and other collections (Subsection (c)), as well as petitions (Section 3517(b)). Where Congress set out statutory categories with "particularization and detail," an interpretation that would extend one category's terms into another is an impermissible "enlargement" of the statute rather than a permissible "construction" of it. *Iselin v. United States*, 270 U.S. 245, 251 (1926). *Cf. Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957) ("However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment.") (quotation marks omitted). That canon applies with special force here, where Congress expressly limited the reach of Subsection (d)'s provisions to actions taken under Subsection (d). 44 U.S.C. § 3507(d)(5). Likewise, Congress's decision to carve out a single exception to judicial review of OMB actions indicates that it did not intend further exceptions. *See, e.g.*, *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) (en banc) (applying doctrine of *expressio unius est exclusio alterius*).

Defendants' interpretation also unaccountably clashes with the "strong presumption that Congress intends judicial review of administrative action." *Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 718 (9th Cir. 2011) (quotation marks omitted). It must be rejected on that basis, too. *See McNary v. Haitian Refugee Ctr.*, 498 U.S. 479, 496 (1991) (applying the "well-settled

presumption favoring interpretations of statutes that allow judicial review of administrative action").

And it makes a hash of the statute. If accepted, Defendants' statutory interpretation—that collections of information contained in rules promulgated in notice-and-comment rulemaking are forever after subject to Subsection (d)—would mean that OMB could never disapprove collections of information contained in rules previously promulgated through notice-and-comment procedures, because it would have already missed Subsection (d)'s deadline for disapprovals. 44 U.S.C. § 3507(d)(4)(C) (in general, OMB may disapprove collections only "within 60 days after the publication of the final rule"). *See also id.* at § 3507(d)(3) (OMB may disapprove collections under Subsection (d) only when it timely filed comments on the proposed rule). Thus, OMB's hands would be tied when considering extensions of approvals (which are limited to three years, at most) or collections that were never put up for PRA approval at the time of promulgation. This would turn the OMB into a rubberstamp for those kinds of proposed collections of information, leaving it powerless to enforce the PRA's requirements—a nonsensical result at odds with the PRA's purpose and the importance it places on OMB review.

Finally, Defendants' interpretation is not supported by the D.C. District Court's decision in *Tozzi v. EPA*, 148 F. Supp. 2d 35 (D.D.C. 2001), which challenged an OMB action taken under Subsection (d). The court in that case merely held that the judicial review bar means what it says and therefore barred a claim challenging "OMB's approval of the EPA's request for a control number under the PRA" for a collection of information pursuant to Subsection (d). *Id*. at 42. *See also id*. at 38 (explaining that Subsection (d) applies when "a federal agency is proceeding through rulemaking"). In particular, the plaintiffs alleged that EPA's failure to comply with the PRA's procedural requirements rendered *OMB's decision* arbitrary and capricious in violation of the APA, without disputing the final rule's compliance with the PRA's substantive requirements for collections of information.[9] Nothing in *Tozzi* so much as suggests that the judicial review bar

[9] *See id*. at 42 ("[T]he plaintiffs maintain that the [OMB's] approval is not valid because the EPA failed to comply with the procedures of the PRA" and "that the OMB's approval of the EPA's request for a control number under the PRA is not in accordance with law").

reaches anything other than OMB decisions pursuant to Subsection (d) to approve or take no action on proposed collections of information being promulgated through notice-and-comment rulemaking.

The second action under review, the Petition Denial, also was not undertaken pursuant to Subsection (d). Defendants acknowledge as much. *See* MTD at 13 (recognizing that OMB acted pursuant to Section 3517(b)). The Petition Denial is also not a decision "to approve or not act upon a collection of information," the only kind of decision to which the bar applies. 44 U.S.C. § 3507(d)(6). Therefore, it too is not subject to the Subsection (d) judicial-review bar. Defendants' only argument to avoid that result is their assertion (at 13) that cabining the Subsection (d) judicial-review bar according to the text of Subsection (d), which does not even conceivably reach actions on Section 3517(b) petitions, "would make little sense." But that argument again reflects Defendants' meritless attempt to rewrite the statute and contravenes the strong presumption in favor of judicial review of administrative action. In particular it would deny parties any opportunity to obtain preenforcement review regarding PRA compliance—as is otherwise available when OMB acts pursuant to Section 3507 on an agency submission of a proposed collection of information—when an agency imposes new collections of information on the public without ever submitting them to OMB for review and approval, an absurd consequence.

Contrary to Defendants' attempt to rewrite the statute, the careful tailoring of the Subsection (d) judicial review bar confirms that Congress intended that parties be able to seek judicial review of agency action for compliance with the PRA's requirements. It also demonstrates that Congress knew how to cut off judicial review when that was its intent. With respect to the actions under review here, it did not.

2. Action on Section 3517(b) Petitions Is Not Committed to Agency Discretion by Law

Defendants' argument that action on Section 3517(b) petitions is committed to agency discretion by law, such that their denial is not subject to judicial review, is meritless. Notably, Defendants do not contend that compliance with PRA requirements, as is at issue in Plaintiffs'

challenge to the 2013 Notice of Action, is committed exclusively to agency discretion,[10] only that decisions on Section 3517(b) petitions to review PRA compliance are. But nothing in that provision supports the distinction.

Section 701(a)(2) of the APA creates "a very narrow exception" to judicial review for agency actions committed to agency discretion by law. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (quotation marks omitted). This exception "'is applicable in those rare instances where statutes are drawn in such broad terms that in a given case there is *no law to apply*.'" *Int'l Longshoremen's and Warehousemen's Union v. Meese*, 891 F.2d 1374, 1378 (9th Cir. 1989) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971).

This is not one of those rare instances. Section 3517(b) imposes clear obligations on OMB that can be readily assessed and applied by a court sitting in review of an OMB action under that provision. First, it mandates that OMB "shall…respond" to petitions asking it to review collections of information for PRA compliance to determine whether a party need "maintain, provide, or disclose the information to or for the agency." 44 U.S.C. § 3517(b), (b)(1). That duty is mandatory, not discretionary. *See, e.g.*, *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) ("The word 'shall' is ordinarily 'the language of command.'"); *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (similar). Defendants do not even argue that this statutory mandate—to respond to petitions asking OMB to determine whether a party must comply with collections of information under the PRA—actually serves to commit the matter entirely to OMB discretion, such that there is nothing for a court to review. The legislative history cited by Defendants (at 20) reflects the opposite view, that Section 3517(b) establishes a "*requirement*[]…for OMB to review the status of any collection upon public request." H.R. Rep. No. 104-37, at 3 (1995), *reprinted in* 1995 U.S.C.C.A.N. 164, 166 (emphasis added).

Defendants' agency-discretion argument is limited to the second subsection of Section 3517(b), which imposes a separate obligation on OMB. It mandates that OMB, in addition to undertaking the mandatory review and responding to the petition, "shall…take appropriate

[10] Nor could they make such an argument. *See, e.g.*, *Dole v. United Steelworkers of Am.*, 494 U.S. 26 (1990) (reviewing OMB disapproval for compliance with PRA).

remedial action, if necessary." 44 U.S.C. § 3517(b)(2). Defendants assert (at 19) that "Congress supplied no standard against which to determine necessity or appropriateness" and so committed the matter to agency discretion by law. But the PRA itself sets the relevant standard for when remedial action is necessary: when a collection of information is being conducted by an agency in violation of the PRA's substantive requirements and bar on undertaking such collections. 44 U.S.C. §§ 3507(a), 3517(b). And it sets the standard for what remedial action is appropriate: remedying the violation by directing the agency that it "shall not conduct or sponsor the collection of information" or enforce such collections unless and until it acts to satisfy the PRA's requirements. *Id.* at § 3507(a). This is apparent from the context and command of Section 3517(b), which is not phrased in discretionary terms and reflects Congress's intention that, when OMB has already identified an illegal collection of information, it ensures that the violation is remedied. *Cf. Spencer Enterprises, Inc. v. United States*, 345 F.3d 683, 688 (9th Cir. 2003) (holding that the "determination" instruction in Section 1154 of the Immigration and Naturalization Act "is guided by the statutory requirements of the [] program set out in § 1153(b)(5)"); *Yates v. United States*, 135 S. Ct. 1074, 1081–83 (2015) (reading term "tangible object" in 18 U.S.C. § 1519 in light of 18 U.S.C. §§ 1512 and 1520). The use of the words "appropriate" and "necessary" simply reflects that OMB must act in "coordination with the agency responsible for the collection of information," 44 U.S.C. § 3517(b), such that OMB may not need to take action in every case: agency self-correction may be "appropriate," and no other remedy may be "necessary" when the responsible agency, informed of a PRA violation, simply desists in its unlawful conduct.

At bottom, Defendants' argument amounts to little more than the assertion that, notwithstanding the mandatory language of the subsection, its use of the words "appropriate" and "necessary" is standardless and thus leaves OMB's compliance with that mandate entirely to agency discretion. Yet courts have had no trouble interpreting and applying those very same words to reject agency claims of unbridled discretion. *See, e.g.*, *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (holding that EPA "strayed far beyond [the] bounds" of its authority when it read the words "appropriate and necessary" "to mean that it could ignore cost when deciding whether to

regulate power plants"); *Gonzales v. Oregon*, 546 U.S. 243, 259 (2006) (finding that authorization to adopt rules and procedures "deem[ed] necessary and appropriate" did not grant unlimited discretion). By contrast, language found to commit matters to agency discretion typically reflects that. *See, e.g.*, *Paulsen v. CNF Inc.*, 559 F.3d 1061, 1086 (9th Cir. 2009) (finding language granting "power...to commence, prosecute, or defend on behalf of the plan any suit or proceeding involving the plan" committed exercise of power to agency discretion); *Madison-Hughes v. Shalala*, 80 F.3d 1121, 1128 (6th Cir. 1996) (finding language "at such times, and in such form and containing such information as responsible Department official may determine to be necessary" committed matter to agency discretion) (alterations omitted). Congress's use here of mandatory and far more definite language rebuts any suggestion that it intended to leave OMB's compliance with Section 3517(b)(2) entirely to OMB's own discretion.

II. Plaintiffs Have Standing To Challenge OMB's Actions

Defendants argue (at 20–21) that AAET lacks standing because "AAET asserts no cognizable injury" to itself.[11] The Court need not reach this issue. The 2013 Notice of Action and Denial of Petition substantially affect Mr. Hyatt's ability to prosecute his patent applications, *see supra* § I.A, thus giving him standing. And "if one party has standing in an action, a court need not reach the issue of the standing of other parties when it makes no difference to the merits of the case." *Comcast Corp. v. FCC*, 579 F.3d 1, 6 (D.C. Cir. 2009) (quotation marks omitted).

In any event, AAET has organizational standing. "An association has [constitutional] standing to bring suit on behalf of its members when [1] its members would otherwise have standing to sue in their own right, [2] the interests at stake are germane to the organization's purpose, and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1154 (9th Cir. 2015) (quotation marks omitted). Such an organization has "standing to assert the claims of its members even where it has suffered no direct injury from a challenged activity." *Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791, 798 (9th Cir. 2001).

[11] Defendants do not dispute Mr. Hyatt's standing. *See* MTD at 20–21.

AAET satisfies all three criteria for constitutional standing. First, one of AAET's members, Mr. Hyatt, has standing to sue in his own right. Second, OMB's approval of inefficient and overly burdensome collections of information during the patent review process directly implicates AAET's commitment to the fair, efficient, and effective administration of laws related to intellectual property. *See WildEarth Guardians*, 795 F.3d at 1154–55 (finding that aesthetic enjoyment of predators in the Nevada wilderness is related to WildEarth's purposes of "protecting and restoring wildlife" and "carnivore protection"). And third, because this case turns on issues of statutory interpretation and the scope of agency discretion, the "claims proffered and relief requested [do] not demand individualized proof on the part of [AAET's] members." *Columbia Basin*, 268 F.3d at 798 (quotation marks omitted). *See also Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 861 (9th Cir. 2005) ("We cannot see how the participation of any individual member of OA would aid the determination of liability, an appropriate remedy, or both, let alone how such involvement would prove necessary.").

AAET also satisfies the two criteria for statutory standing: final agency action and the zone-of-interests test. There is a final agency action—two of them, in fact. *See supra* § I.A. And AAET satisfies the zone-of-interests test because the interest it seeks to vindicate—the minimization of paperwork burdens on inventors—is an interest expressly protected by the PRA. 44 U.S.C. § 3501; *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 976 (9th Cir. 2003) (Zone-of-interest test requires that "interest sought to be protected …[be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.") (quotation marks omitted).

Conclusion

For the foregoing reasons, Defendants' motion should be denied.

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Respectfully submitted,

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