No.

IN THE
Supreme Court of the United States

ELECTRONIC PRIVACY INFORMATION CENTER,

Petitioner,

v.

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a plaintiff suffer an Article III injury in fact "when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute," *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998)?

2. Does a court's constitutional authority to adjudicate a claim arising under a federal statute depend on what Congress "had in mind" when it enacted that statute?

3. Whether this Court should vacate the court of appeals' judgment pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioner, who was the plaintiff-appellant below, is the Electronic Privacy Information Center ("EPIC"). EPIC is a non-profit corporation in the District of Columbia with no parent corporation. No publicly held company owns a 10 percent or greater interest in EPIC.

The respondents, who were the defendant-appellees below, are:

1. The Presidential Advisory Commission on Election Integrity,
2. Michael Pence, in his official capacity as Chair of the Presidential Advisory Commission on Election Integrity,
3. Kris Kobach, in his official capacity as Vice Chair of the Presidential Advisory Commission on Election Integrity,
4. Charles C. Herndon, in his official capacity as Director of White House Information Technology,
5. The Executive Office of the President of the United States,
6. The Office of the Vice President of the United States,
7. The United States Digital Service, and
8. The Executive Committee for Presidential Information Technology.

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The Electronic Privacy Information Center ("EPIC") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is reported at 878 F.3d 371. The orders of the court of appeals denying both rehearing en banc and the alternative remedy of vacatur and remand (App. 21a, 22a) are unreported. The opinion of the district court (App. 24a) is reported at 266 F. Supp. 3d 297.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 2017. The petition for rehearing en banc or, in the alternative, for vacatur and remand was denied on April 2, 2018. On June 26, 2018, Chief Justice Roberts extended the time for filing a petition for certiorari to August 30, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case concerns Section 208 of the E-Government Act, Pub. L. No. 107-347, 116 Stat. 2899 (Dec. 17, 2002), and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, which are reproduced in relevant part in the appendix to this petition. App. 70a–87a.

STATEMENT

As this Court has held, a plaintiff "suffers an 'injury in fact'" sufficient to establish Article III standing "when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *FEC v. Akins*, 524 U.S. 11, 21 (1998). To establish such an injury, a plaintiff need only allege that—on its own "view of the law"—the plaintiff was denied information to which it is legally entitled. *Ibid.*

In this case, EPIC has sought the disclosure of a privacy impact assessment ("PIA") concerning the nationwide collection of state voter data by the Presidential Advisory Commission on Election Integrity (the "Commission"). Under Section 208 of the E-Government Act, federal agencies are required to create and publish a PIA before initiating any collection of personally identifiable information. When EPIC was unable to obtain the privacy impact assessment it

sought, EPIC filed suit against the Commission and related federal defendants to enforce the disclosure obligations in Section 208. At the same time, EPIC moved for preliminary injunctive relief to halt the Commission's collection of voter data pending the required publication of a PIA.

On appeal from the district court's denial of that motion, the D.C. Circuit held that EPIC had not suffered an injury sufficient to support Article III standing. Although the court of appeals did not deny that, on EPIC's view of the law, the Commission was required to publish a PIA before collecting voter data, the court nonetheless concluded that EPIC lacked standing because it was not the "type of plaintiff," and had not suffered the "type of harm," that Congress "had in mind" when it required agencies to publish PIAs. App. 11a. Based on that view of Section 208, the court concluded that it lacked the constitutional authority to adjudicate EPIC's claims. Eight days after the court of appeals issued its ruling, President Donald Trump disbanded the Commission. Exec. Order No. 13,820, 83 Fed. Reg. 969 (Jan. 3, 2018).

The decision below warrants review because it conflicts with decisions of this Court and other courts of appeals holding that an agency's failure to disclose information to which a litigant is entitled by statute is sufficient by itself to establish the injury in fact necessary for Article III standing. The court of appeals created an additional, artificial requirement for such informational injury not supported by any of this Court's decisions and wrongly grounded Article III judicial authority on the inferred intent of Congress not found anywhere in the statute.

Moreover, since the court of appeals issued its judgment, intervening actions taken unilaterally by the government have rendered this case moot in its entirety and thus warranting vacatur under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). If the Court agrees that this case is moot, it should grant certiorari and vacate the judgment of the court of appeals.

A. The E-Government Act

In 2002, Congress passed the E-Government Act with the aim of "provid[ing] enhanced access to Government information" and "mak[ing] the Federal Government more transparent and accountable." E-Government Act §§ 2(b)(9), (11); *see also* 148 Cong. Rec. 11,227 (2002) (statement of Sen. Lieberman) (explaining that the Act is intended to "improv[e] the access of all citizens to the government services and information they rely on every day in their work and personal lives"). Among the "constituencies" accounted for in the Act are "the public access community," "privacy advocates," and "non-profit groups interested in good government." *Id.* at 11,228.

Section 208 of the Act requires federal agencies to conduct and publish a privacy impact assessment before acquiring personal data. E-Government Act § 208(a)–(b). Specifically, prior to "initiating a new collection" of "information in an identifiable form" from ten or more persons, the agency must "conduct a privacy impact assessment" and, "if practicable," "make the privacy impact assessment publicly available through the website of the agency, publication in the Federal Register, or other means." *Id.* § 208(b)(1)(A)–(B). Section 208 thus promotes the Act's overarching

transparency goals and "ensure[s] sufficient protections for the privacy of personal information." § 208(a).

A privacy impact assessment must disclose, *inter alia*, "what information is to be collected"; "why the information is being collected"; "the intended use [by] the agency of the information"; "with whom the information will be shared"; "what notice or opportunities for consent would be provided"; and "how the information will be secured." *Id.* § 208(b)(2)(B)(ii). A PIA must also be "commensurate with the size of the information system being assessed, the sensitivity of information that is in an identifiable form in that system, and the risk of harm from unauthorized release of that information[.]" *Id.* § 208(b)(2)(B)(i).

B. The Formation of the Commission

The Presidential Advisory Commission on Election Integrity was created by executive order on May 11, 2017. Exec. Order No. 13,799, 82 Fed. Reg. 22,389 (May 11, 2017). The Commission, which consisted of members appointed by the President, was charged with "study[ing] the registration and voting processes used in Federal elections" and preparing a report on specified election issues. *Id.* § 3. The Commission was chaired by Vice President Michael Pence and managed by Kansas Secretary of State Kris Kobach.

On June 28, 2017, Commission Vice Chair Kris Kobach sent letters to election officials in all fifty states and the District of Columbia seeking a wide array of personal voter information, including:

> the full first and last names of all registrants, middle names or initials if available, addresses, dates of birth, political party (if recorded in your state), last four

> digits of social security number if available, voter history (elections voted in) from 2006 onward, active/inactive status, cancelled status, information regarding any felony convictions, information regarding voter registration in another state, information regarding military status, and overseas citizen information.

C.A. App. 61–62. The Commission asked states to provide the requested voter data by July 14, 2017. *Ibid*. State officials were told they could submit state voter data to a Commission email address "or by utilizing the Safe Access File Exchange ('SAFE')," a system maintained by the Department of Defense. *Ibid*. Neither the Commission nor any of the federal entities involved in acquiring voter roll information conducted or published a privacy impact assessment concerning this new collection of personal data.

C. EPIC's Suit Seeking Completion and Publication of a Privacy Impact Assessment Prior to Collection of Personal Data

After ascertaining that the Commission had not published a privacy impact assessment, EPIC filed the instant suit on July 3, 2017. EPIC's complaint stated five claims for relief, two of which are relevant to this petition: (I) unlawful agency action under 5 U.S.C. § 706(2) based on defendants' "collection of state voter data prior to creating, reviewing, and publishing a Privacy Impact Assessment"; and (II) agency action unlawfully withheld under 5 U.S.C. § 706(1) based on defendants "fail[ure] to create, review, and/or publish a

privacy impact assessment for [the] collection of voter data." C.A. App. 143–44.

EPIC also moved for a temporary restraining order—and later a preliminary injunction—to halt the Commission's collection of voter data pending the completion and publication of a PIA. App. 24a. During the pendency of EPIC's motions for preliminary relief, the Commission ceased its collection of state voter data; abandoned the use of the SAFE system, which EPIC had shown to be an insecure method for collecting personal data; and deleted voter roll information that had already been collected from one state. C.A. App. 129–31.

D. The District Court Opinion

On July 24, 2017, the district court denied EPIC's motion for a preliminary injunction. The court held, as an initial matter, that EPIC had established Article III standing to seek the disclosure of a privacy impact assessment. Citing *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016), the court concluded that EPIC satisfied "both prongs of the [D.C. Circuit's] test for informational standing":

> First, [EPIC] has espoused a view of the law that entitles it to information. Namely, Plaintiff contends that Defendants are engaged in a new collection of information, and that a cause of action is available under the APA to force their compliance with the E–Government Act and to require the disclosure of a Privacy Impact Assessment. Second, Plaintiff contends that it has suffered the very injuries meant to be prevented by the

> disclosure of information pursuant to the E–Government Act—lack of transparency and the resulting lack of opportunity to hold the federal government to account.

App. 43a. The district court also held that EPIC had established organizational standing. App. 53a–55a.

Yet the court determined that EPIC, at that preliminary stage of the case, had failed to show a likelihood of success on the merits because it had failed to establish that the Commission's actions were reviewable under the APA. App. 55a–64a. According to the district court, "the record presently before the Court [was] insufficient to demonstrate that the Commission [was] an 'agency' for purposes of the" Administrative Procedure Act ("APA"). App. 56a. Thus, the court determined that the APA, which applies only to "agenc[ies]," 5 U.S.C. § 706, was unavailable as a basis for suit. The court also concluded that neither the E-Government Act nor the FACA contained a private right of action. App. 55a, 63a–64a. As a result, the court found that EPIC's PIA claims were unlikely to succeed and that EPIC was not entitled to preliminary relief.

Following the court's ruling, the Commission resumed its efforts to collect voter data.

E. The D.C. Circuit Opinion

EPIC appealed from the denial of a preliminary injunction. EPIC asked the court of appeals to decide, *inter alia*, "[w]hether the District Court erred in holding that APA review is unavailable for the collection of state voter data by Defendant Presidential Advisory Commission on Election Integrity." EPIC Br. 4. EPIC

also requested that the D.C. Circuit "issue a preliminary injunction halting the Commission's collection of state voter data" under *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290 (D.C. Cir. 2006). EPIC Br. 2.

On December 26, 2017, the court of appeals affirmed the ruling of the district court on alternative grounds. App. 16a. In a three-paragraph analysis, the D.C. Circuit concluded—*contra* the district court—that EPIC lacked informational standing to pursue the E-Government Act claims. *Ibid*.

The court of appeals stated that, to establish an injury in fact adequate for Article III standing, EPIC must demonstrate a "sufficiently concrete and particularized informational injury." App. 10a (quoting *Friends of Animals*, 828 F.3d at 992). But the court did not find fault with EPIC's informational standing on concreteness or particularity grounds. Nor did the court express doubt that, under EPIC's view of the E-Government Act, the Commission was required to publish a PIA before collecting voter information. Rather, the court of appeals held that EPIC's asserted injury was constitutionally deficient because EPIC was not the "type of plaintiff" and had not suffered the "type of harm" that "Congress had in mind" when it mandated disclosure of privacy impact assessments:

> As we read it, the provision is intended to protect *individuals*—in the present context, voters—by requiring an agency to fully consider their privacy before collecting their personal information. EPIC is not a voter and is therefore not the type of plaintiff the Congress had in mind. Nor is EPIC's asserted harm—an

> inability to ensure public oversight of record systems—the kind the Congress had in mind. Instead, section 208 is directed at individual *privacy*, which is not at stake for EPIC.

App. 11a–12a. (emphasis in original).

Based on its appraisal of the legislative intent behind the E-Government Act, the court of appeals concluded that it lacked Article III authority to consider EPIC's informational injury claims. The court also concluded that EPIC had failed to establish organizational standing because its asserted organizational injury was based "on a non-existent [informational] interest." App. 13a. Because, according to the D.C. Circuit, "EPIC [did] not show a substantial likelihood of standing to press its claims that the defendants have violated the E-Government Act," the court affirmed the district court's denial of a preliminary injunction. App. 16a.

Judge Williams, who concurred in part and concurred in the judgment, wrote separately to express that he saw "no need for any separate discussion of 'organizational injury'" because he believed that EPIC's asserted informational and organizational harms were coextensive. App. 17a–18a (Williams, J., concurring in part and concurring in the judgment).

F. The Termination of the Commission

On January 3, 2018—eight days after the court of appeals entered judgment—the President issued an Executive Order terminating the Commission in its entirety. Exec. Order No. 13,820. After the President terminated the Commission, the remaining defendants ceased their data collection program. The sole relief EPIC had sought on appeal was an injunction

halting that data collection. App. 7a. Accordingly, on January 11, 2018, EPIC moved the panel to vacate its decision as moot and remand the case to the District Court under *Munsingwear*.

On February 9, 2018, while the Motion to Vacate was still pending, EPIC filed a parallel petition for rehearing en banc or, in the alternative, for vacatur and remand. The defendants filed an opposition in each instance. The defendants argued, *inter alia*, that EPIC's appeal remained live because the Director of White House Information Technology was still housing voter data collected by the Commission, and because EPIC had previously asked the district court to order the disgorgement of voter data already in the defendants' possession. Gov't Opp'n to Mot. to Vacate 3. EPIC countered that its appeal had been limited solely to halting *ongoing* data collection by the Commission and that the issue of disgorgement had never been raised before the D.C. Circuit. EPIC Reply in Supp. of Mot. to Vacate 3.

On April 2, 2018, the court of appeals denied both EPIC's motion to vacate and its en banc petition. App. 21a, 22a.

G. The Deletion of the State Voter Data

On July 19, 2018, the district court—responding to numerous "material factual developments" in the case—issued an order concerning the status of the state voter data collected by the Commission. D. Ct. Doc. 63 at 2 (July 19, 2018). Based on defendants' representation that "[t]he White House stands ready to destroy the state voter data," the district court ordered the defendants to file a notice "confirming whether all state voter data collected by the Commission has been

deleted, and if not, identifying when Defendants expect to complete that process." *Id.* at 1–2. The court added that "[u]pon Defendants' confirmation of deletion, the Court expects that this case can be dismissed." *Id.* at 2.

On August 20, 2018, the defendants filed in the district court a declaration by Charles C. Herndon, Director of White House Information Technology. D. Ct. Doc. 64-1 (Aug. 20, 2018). Mr. Herndon declared that his staff had deleted the voter data in the White House's possession as of August 2, 2018. *Id.* at ¶ 2. "At that point, the data was inaccessible to all users and applications." *Ibid.* Mr. Herndon stated that while "fragments of this data may have still existed" beyond August 2, those fragments "were overwritten as of August 16, 2018, and are entirely deleted and unrecoverable at this time." *Ibid.* He added that "all fragments of the data that may have existed on automated backup systems have been overwritten" and are similarly unrecoverable. *Ibid.*

On August 22, 2018, the district court dismissed EPIC's case in full, finding that "no further adjudication of this action is necessary." App. 68a–69a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision warrants review for three reasons: (1) the court's informational injury test is contrary to this Court's decisions in *FEC v. Akins*, 524 U.S. 11, 21 (1998), and *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989); (2) the decision deepens a significant circuit split over informational injury; and (3) the decision undermines Section 208 of the E-Government Act, which establishes

foundational accountability obligations for federal government recordkeeping systems that help safeguard personal data collected by government agencies. In addition, given intervening events, the decision below should be vacated because the respondents have unilaterally mooted this case. The Court should therefore grant certiorari and vacate the judgment of the court of appeals.

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THIS COURT HOLDING THAT A PARTY DENIED ACCESS TO INFORMATION TO WHICH IT IS LEGALLY ENTITLED HAS STANDING TO SUE

The court of appeals wrongly concluded that EPIC did not have standing to challenge the Government's failure to produce a privacy impact assessment as required by law. This decision directly conflicts with *FEC v. Akins*, 524 U.S. 11 (1998), and *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989). Rather than follow those decisions and find that the "denial of access to information" to which EPIC was entitled under the E-Government Act was a concrete and particularized injury, the court instead determined that EPIC was not the "type of plaintiff" that Congress "had in mind" when it enacted the E-Government Act. App. 11a. The court's mistake in conflating merits issues under the statute and jurisdictional issues under Article III is the same error that this Court had to correct in *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014) (quoting *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 642–43 (2002)).

1. This Court has held that "a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *Akins*, 524 U.S. at 21 (citing *Public Citizen*, 491 U.S. at 449); *see also Spokeo v. Robins*, 136 S. Ct. 1540, 1549 (2016) (reaffirming *Public Citizen* and *Akins*); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982) (holding that the denial of information subject to disclosure under the Fair Housing Act constitutes an injury in fact). In the decision below, the court of appeals departed from this rule and held that EPIC lacked standing to challenge the unlawful denial of information. The court's ruling was based on its view that EPIC had not established that it was the "type of plaintiff the Congress had in mind" when it enacted the E-Government Act. That requirement has no basis in Article III and directly contradicts this Court's prior rulings.

In *Public Citizen*, two public interest organizations alleged that they had been wrongfully denied access to the meetings and records of an American Bar Association committee that advises the President and the Department of Justice (DOJ) on potential judicial nominees. *Public Citizen*, 491 U.S. at 444–45, 447–48. The organizations argued that this denial of information violated the DOJ's disclosure obligations under the FACA. *Public Citizen*, 491 U.S. at 447–448. Rejecting a challenge to the organizations' Article III standing, the Court held that the DOJ's alleged "refusal to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue." *Id.* at 449. The Court noted that this holding followed naturally from prior cases concerning the

Freedom of Information Act ("FOIA"): "Our 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. There is no reason for a different rule here." *Ibid.* (citations omitted).

In *Akins*, the Court considered whether a group of voters had Article III standing to challenge the determination of the Federal Election Commission ("FEC") that the American Israel Public Affairs Committee ("AIPAC") was not a political committee under the Federal Election Campaign Act. *See Akins*, 524 U.S. 11 at 16–18, 20–21. The voters alleged that the FEC's failure to apply this designation denied them access to "information about members, contributions, and expenditures" that AIPAC would otherwise be required to disclose. *Id.* at 16. The Court agreed with the voters that the denial of information was sufficiently "concrete and particular" to confer Article III standing. *Id.* at 21. "The 'injury in fact' that respondents have suffered consists of their inability to obtain information . . . that, on respondents' view of the law, the statute requires that AIPAC make public." *Ibid.* The Court also reiterated the rule announced in *Public Citizen* that "a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *Ibid.* (citing *Public Citizen*, 491 U.S. at 449).

Recently, in *Spokeo*, the Court reaffirmed that a plaintiff's "'inability to obtain information' that Congress ha[s] decided to make public is a sufficient injury in fact to satisfy Article III." *Spokeo*, 136 S. Ct. at 1549 (quoting *Akins*, 524 U.S. at 21). While discussing the requirement of concreteness under Article III, the

Court noted that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact." *Ibid.* As one example of such a circumstance, the Court described the scenario where a plaintiff "fail[s] to obtain information subject to disclosure" under statute. *Id.* at 1549–50 (citing *Public Citizen*, 491 U.S. at 449). The Court explained that "a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified" by mandating public disclosure. *Id* at 1549 (emphasis in original) (citing *Akins*, 524 U.S. at 20–25; *Public Citizen*, 491 U.S. at 449).

Deviating from the informational injury standard established in *Public Citizen*, *Akins*, and *Spokeo*, the court of appeals held that EPIC lacked standing to challenge the Government's refusal to produce a privacy impact assessment as required under the E-Government Act. It is not enough, the court reasoned, that a plaintiff "has been deprived of information that, on its interpretation, a statute requires the government . . . to disclose to it[.]" App. 10a (quoting *Friends of Animals*, 828 F.3d at 992). Rather, the court held that it lacks Article III jurisdiction over EPIC's case because—on *the court's* interpretation of the E-Government Act—two statutory requirements were not met. First, "Congress, in mandating disclosure, [must have] sought to protect individuals or organizations like" the plaintiff. Second, the plaintiff must have "suffer[ed] the type of harm Congress sought to prevent by requiring disclosure[.]" App. 11a.

Applying this novel test for Article III standing, the court of appeals declared that Section 208 of the E-Government Act was solely "intended to protect *individuals*—in the present context, voters—by requiring

an agency to fully consider their privacy before collecting their personal information." *Ibid* (emphasis in original). *Contra* E-Government Act § 2(b)(9) (declaring that one of the primary purposes of the Act is "[t]o make the Federal Government more transparent and accountable"). The court then reasoned that EPIC is "not the type of plaintiff the Congress had in mind" and that "EPIC's asserted harm—an inability to ensure public oversight of record systems—[is not] the kind the Congress had in mind." *Ibid* (citations omitted) (internal quotation marks omitted). On this basis, the court concluded that EPIC has not suffered a constitutionally cognizable injury in fact.

The court of appeals' analysis is directly at odds with this Court's informational injury decisions. As the Court has explained, when a plaintiff is denied information subject to public disclosure under statute, they have established an informational injury, and no further analysis is required. *Spokeo*, 136 S. Ct. at 1549–50; *Akins*, 524 U.S. at 20–21; *Public Citizen*, 491 U.S. at 447–49. Although EPIC's public oversight activities were impeded by the Commission's failure to publish a privacy impact assessment—a fact confirmed by the district court (App. 54a)—EPIC was not required to prove this additional form of harm to establish an informational injury. This Court "has never suggested that those requesting information under [a public disclosure statute] need show more than that they sought and were denied specific agency records." *Public Citizen*, 491 U.S. at 449.

2. a. The Court has also made clear that, for the purposes of determining Article III jurisdiction over statutory claims, a court must accept the plaintiff's asserted reading of a statute as long as that reading is

non-frivolous. *Akins*, 524 U.S. at 21 (holding that respondents had suffered an informational injury where disclosure was required "on respondents' view of the law" and where there was "no reason to doubt [respondents'] claim that the information would help them"). As explained in *Steel Company v. Citizens for a Better Environment*:

> [Courts have] jurisdiction if "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another," unless the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)). The court of appeals' reading of Section 208, whether or not relevant to the ultimate disposition of EPIC's claims *on the merits*, has no bearing on the court's jurisdiction to consider EPIC's case in the first place. EPIC advanced a non-frivolous reading of Section 208, and that "view of the law" controls for Article III standing purposes. *Akins*, 524 U.S. at 21; *see also* App. 11a (acknowledging EPIC's argument that the E-Government Act was intended to "ensure public oversight of record systems").

b. The court of appeals also erroneously concluded that the court's judicial power to hear EPIC's claims is a function of whom Congress "intended to protect" when it enacted Section 208. App. 11a. That

holding cannot be squared with this Court's precedents, which distinguish between Article III jurisdiction and the *statutory* basis for a plaintiff's cause of action. "Injury in fact is a constitutional requirement" of constitutional dimensions, not something that Congress may define for the courts. *Spokeo*, 136 S. Ct. at 1547. "'The absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional power to adjudicate the case.'" *Lexmark*, 572 U.S. at 128 n.4 (quoting *Verizon Md. Inc.*, 535 U.S. at 642–643); *see also Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296, 1302 (2017) (differentiating between "constitutional standing" and the "question [of] whether the statute grants the plaintiff the cause of action that he asserts").

This core distinction between jurisdictional and statutory analysis is reflected in *Akins*, where the Court examined the two issues separately. First the Court addressed whether the plaintiff voters seeking disclosure of records had a statutory basis to bring suit. *Akins*, 524 U.S. at 19–20. The Court concluded: "Given the language of the statute and the nature of the injury, . . . Congress, intending to protect voters such as respondents from suffering the kind of injury here at issue, intended to authorize this kind of suit." *Akins*, 524 U.S. at 20. Then the Court turned to the separate question of whether the voters had "suffered a genuine 'injury in fact'" such that their claims came under the Court's Article III jurisdiction. *Akins*, 524 U.S. at 21. Based on the voters' "view of the [statute]" under which they brought suit, the *Akins* Court concluded that the case within the Court's judicial power to decide.

II. THE COURT OF APPEALS' DECISION DEEPENS AN EXISTING CONFLICT OVER THE REQUIREMENTS FOR INFORMATIONAL INJURY

Review of this case is also warranted because of a deep circuit split that has developed over the proper test for informational injury.

1. Panels of the Sixth, Seventh, Eighth, Eleventh, and D.C. Circuits (prior to the decision below) have correctly read this Court's precedents to hold that "a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *Akins*, 524 U.S. at 21; *see also Public Citizen*, 491 U.S. at 449. These decisions have refused to read into *Akins* "a firm requirement that to establish standing, a plaintiff must adequately allege more than the withholding of the required information from the citizenry." *Am. Canoe Ass'n, Inc. v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 545–46 (6th. Cir. 2004).

In *American Canoe*, for example, two environmental organizations brought suit under the Clean Water Act alleging that a water authority and treatment plant had failed to comply with reporting requirements pertaining to pollutant discharges. *Id.* at 540–41. The Sixth Circuit held that this asserted deprivation of information, standing alone, established "precisely the injury alleged in *Public Citizen* and in the Freedom of Information Act cases":

> This might be a "generalized grievance" in the sense that up to the point they request it, the plaintiffs have an interest in the information shared by every other person, but it is not an abstract grievance

> in the sense condemned in *Akins*: the injury alleged is not that the defendants are merely failing to obey the law, it is that they are disobeying the law in failing to provide information that the plaintiffs desire and allegedly need. This is all that plaintiffs should have to allege to demonstrate informational standing where Congress has provided a broad right of action to vindicate that informational right.

Id. at 545–46. The court added that "'[t]o the extent that *Akins* requires some additional 'plus'—some reason that plaintiffs need the information, in addition to a Congressionally-bestowed right to sue to acquire it—that requirement is liberally construed" and "extraordinarily general[.]" *Id.* at 546.

In *Heartwood, Inc. v. United States Forest Service*, an environmental organization alleged that the Forest Service had violated the National Environmental Policy Act by not conducting and publishing a required environmental assessment. 230 F.3d 947, 948–49 (7th Cir. 2000). The organization claimed that it suffered an informational injury as a result of the Service's failure to disclose an assessment. *Id.* at 952 n.5. The Seventh Circuit agreed with this "compelling" argument, noting that this Court "has found a cognizable injury-in-fact for plaintiffs who are deprived of this [type of] information." *Ibid.* (citing *Akins*, 524 U.S. 21–25).

In *Charvat v. Mutual First Federal Credit Union*, the plaintiff alleged that two banks had failed, in violation of the Electronic Fund Transfer Act (EFTA), to post adequate notice of transaction fees on several

ATMs. 725 F.3d 819, 821 (8th Cir. 2013). The plaintiff, who made withdrawals from the ATMs, alleged that he had suffered an informational injury as result. *Id.* at 822–23. The Eighth Circuit agreed: "Decisions by this Court and the Supreme Court indicate that an informational injury alone is sufficient to confer standing, even without an additional economic or other injury. . . . Once Charvat alleged a violation of the notice provisions of the EFTA in connection with his ATM transactions, he had standing to claim damages." *Id.* at 823.

In *Church v. Accretive Health, Inc.*, the Eleventh Circuit considered a plaintiff's claim that a hospital had failed to provide her with information subject to disclosure under the Fair Debt Collection Practices Act. 654 F. App'x 990, 991–92 (11th Cir. 2016). Even though this denial of information "may not have resulted in tangible economic or physical harm," the court held that the plaintiff had "sufficiently alleged that she has sustained a concrete—i.e., 'real'—injury because she did not receive the allegedly required disclosures." *Id.* at 994–95.

And in *Ethyl Corporation v. Environmental Protection Agency*, the D.C. Circuit previously held "that a denial of access to information can work an 'injury in fact' for standing purposes, at least where a statute (on the claimants' reading) requires that the information 'be publicly disclosed' and there 'is no reason to doubt their claim that the information would help them.'" 306 F.3d 1144, 1148 (D.C. Cir. 2002) (quoting *Akins*, 524 U.S. 21). Thus, the plaintiff in *Ethyl* suffered an informational injury when the EPA's failure to conduct an open rulemaking process allegedly denied the plaintiff information about vehicle certification. *Ibid.*;

see also Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm't, Inc., 659 F.3d 13, 22 (D.C. Cir. 2011) (reaffirming the holding of *Ethyl*).

2. Other circuit panels, like the D.C. Circuit in this case, have grafted an additional prerequisite for informational injury onto the rule of *Akins* and *Public Citizen*. These decisions require not only that plaintiffs allege a denial of information subject to disclosure by statute, but also that the plaintiff suffer—on the court's interpretation of the statute—the particular type of secondary harm that Congress sought to prevent by mandating disclosure. Panels of the Second, Fourth, Fifth, Seventh, Ninth Circuits have reached this flawed conclusion.

In *Strubel v. Comenity Bank*, the Second Circuit held that a denial of information subject to disclosure under statute—which the court characterized as a "procedural violation"—"manifest[s] concrete injury [only] where Congress conferred the procedural right to protect a plaintiff's concrete interests and where the procedural violation presents a 'risk of real harm' to that concrete interest." 842 F.3d 181, 190 (2d Cir. 2016). Based on this reading of *Spokeo*, *Akins*, and *Public Citizen*, the court concluded that an alleged violation of FCRA's notice requirements did not give rise to a cognizable informational injury. *Id.* at 194.

In *Dreher v. Experian Information Solutions, Inc.*, the Fourth Circuit held that a plaintiff alleging an informational injury under statute must also "suffer[], by being denied access to that information, the type of harm *Congress sought to prevent* by requiring disclosure." 856 F.3d 337, 345–46 (4th Cir. 2017) (emphasis in original) (quoting *Friends of Animals*, 828

F.3d at 992). Applying this test, the court held that a FCRA disclosure violation alleged by the plaintiff was insufficient to confer Article III standing because the plaintiff had not suffered "the type of harm Congress sought to prevent when it enacted the FCRA." *Id.* at 346.

In *Center for Biological Diversity v. BP America Production Company*, the Fifth Circuit considered a claim by an environmental organization that several offshore drilling companies had violated the reporting requirements of the Emergency Planning and Community Right-to-Know Act. 704 F.3d 413, 428–31 (5th Cir. 2013). Although the court held that the organization had suffered a cognizable informational injury, it only reached that conclusion because the plaintiff had suffered the "kind of concrete informational injury that the statute was designed to redress." *Id.* at 429.

In *Groshek v. Time Warner Cable, Inc.*, the Seventh Circuit held that a plaintiff alleging a violation of the FCRA's disclosure requirements had failed to establish an Article III informational injury. 865 F.3d 884, 888 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 740 (2018). The court justified its holding on the grounds that "unlike the statutes at issue in *Akins* and *Public Citizen*, the statute here does not seek to protect [the plaintiff] from the kind of harm he claims he has suffered." *Ibid.*

And in *Wilderness Society, Inc. v. Rey*, the Ninth Circuit considered a claim by three environmental organizations that the Forest Service had violated the notice requirements of the Forest Service Decisionmaking and Appeals Reform Act. 622 F.3d 1251, 1255 (9th Cir. 2010). The court concluded that the

organizations did not suffer a cognizable informational injury because Congress's "purpose in mandating notice in the context of the [statute] was not to disclose information, but rather to allow the public opportunity to comment on the proposals." *Id.* at 1259.

3. The ruling below—which joins decisions by Second, Fourth, Fifth, Seventh, and Ninth circuits in departing from the *Akins* test—further muddies the waters of a doctrine that the Court went out of its way to clarify just two years ago. *See Spokeo*, 136 S. Ct. at 1549–50. Indeed, the D.C. Circuit's holding has already spawned other decisions that apply an erroneous standard for informational injury.

In *Owner-Operator Independent Drivers Association, Inc. v. United States Department of Transportation*, the D.C. Circuit, citing the court of appeals' decision in this case, held that the plaintiffs lacked Article III standing to sue for many of their statutory claims. 879 F.3d 339, 345 (D.C. Cir. 2018). The court based its jurisdictional analysis on the legislative purpose of the federal statutes under which the plaintiffs brought suit. *Ibid.* Because "the harm Congress was concerned about" was different from the one alleged by the plaintiffs, the court determined that it lacked the constitutional power to adjudicate most of the plaintiffs' claims. *Ibid.*

And in *United to Protect Democracy v. Presidential Advisory Commission on Election Integrity*, the district court—distinguishing the D.C. Circuit's decision in the instant case—explained that the plaintiffs had Article III standing to bring their Paperwork Reduction Act ("PRA") claims because "the purpose of the

PRA" is different from that of the E-Government Act. 288 F. Supp. 3d 99, 108 n.4 (D.D.C. 2017).

Review of the decision below is required to resolve the deepening circuit split over the test for informational injury, which runs between (and in some cases, within) nine different courts of appeals. This Court should take the opportunity to reaffirm *Spokeo*, *Akins*, and *Public Citizen* and to restore order to the fractured landscape of informational injury law.

III. THE COURT OF APPEALS' DECISION IS CONTRARY TO THE TEXT AND PURPOSE OF SECTION 208 AND DIMINISHES PRIVACY PROTECTION FOR PERSONAL DATA COLLECTED BY FEDERAL AGENCIES

The decision of the court of appeals also warrants review because it undermines Section 208 of the E-Government Act. That provision imposes an obligation on federal agencies to conduct privacy impact assessments prior to the collection of personally identifiable information. The obligation is enforced through a provision that requires "publication" of the assessments. Under the court of appeals' mistaken view of informational standing, Section 208 would become largely unenforceable.

Section 208 establishes critical safeguards for government recordkeeping systems, setting out a series of obligations that federal agencies must satisfy prior to initiating any collection and use of personal data. Section 208 also promotes accountability by imposing a publication requirement so that the public—and particularly organizations such as EPIC with expertise in privacy and recordkeeping systems—can assess the adequacy of a privacy impact assessment for

any proposed system. By requiring federal agencies to "create" and "make . . . publicly available" a privacy impact assessment before initiating a new collection of personally identifiable information, Section 208 serves Congress's dual objectives to "make the Federal Government more transparent and accountable," and to "ensure sufficient protections for the privacy of personal information as agencies implement citizen-centered electronic Government." E-Government Act §§ 2(b)(9), 208(a).

The court of appeals misconstrued Section 208 in a way that will seriously undermine the provision. Contrary to the D.C. Circuit's confused view, privacy interests are protected by Section 208 through "publication," *id.* § 208(b)(1)(B)(iii)—which means literally to make information available to the general public, including EPIC. The court of appeals appears to have applied a Privacy Act gloss to Section 208. The Privacy Act creates specific rights for individuals regarding their personal information held by federal agencies. *See* 5 U.S.C. § 552a. The rights in the Privacy Act attach to the "individual." *Ibid.* But Section 208 of the E-Government Act contemplates an entirely different approach to privacy protection. It relies upon *publication* to enable EPIC and others to assess the adequacy of the privacy safeguards for government recordkeeping systems.

Nowhere does the Act suggest that organizations such as EPIC should be excluded from the public right of access established in Section 208(b)(1)(B)(iii). Indeed, when Senator Lieberman, the primary sponsor of the E-Government Act, presented the Act on the Senate floor, he specifically listed "the public access community," "privacy advocates," and "non-profit

groups interested in good government" as being among the "constituencies who support electronic government." 148 Cong. Rec. at 11,228 (statement of Sen. Lieberman). EPIC is a prominent member of all three constituencies identified by Senator Liberman. The E-Government Act was literally written with groups such as EPIC in mind.

The Office of Management and Budget guidance implementing the E-Government Act makes clear that Section 208 was intended to "strengthen protections for privacy and other civil liberties" to "ensure that information is handled in a manner that maximizes both privacy and security." Joshua B. Bolten, Director, Office of Mgmt. & Budget, Executive Office of the President, M-03-22, Memorandum for Heads of Executive Departments and Agencies (Sept. 26, 2003), C.A. App. 148. The OMB guidance outlines the detailed steps that agencies must take to complete a privacy impact assessment *before* a new system is developed or collection initiated, and the guidance stresses that agencies "must ensure that" the assessments are "made publicly available." C.A. App. 152.

EPIC, in its role as an open government and privacy organization, routinely monitors Section 208 privacy impact assessments, reviews agency record-keeping practices, and publicly disseminates information about the federal government's collection of personal data. In *EPIC v. DHS*, No. 11-2261 (D.D.C. filed Dec. 20, 2011), EPIC obtained a PIA and related documents concerning an effort by the Department of Homeland Security ("DHS") to track social media users and journalists. EPIC made the previously undisclosed records available to the public on its website. EPIC, *EPIC v. Department of Homeland Security: Media Monitoring*

(2015).[1] In *EPIC v. FBI*, No. 14-1311 (D.D.C. filed Aug. 1, 2014), EPIC obtained unpublished PIAs from the Federal Bureau of Investigation concerning facial recognition technology, which EPIC also made available to the public on its website. EPIC, *EPIC v. FBI – Privacy Assessments* (2016).[2] In *EPIC v. DEA*, No. 15-667 (D.D.C. filed May 1, 2015), EPIC learned that the Drug Enforcement Administration had failed to produce PIAs for the agency's license plate reader program, a telecommunications records database, and other systems of public surveillance. EPIC reported the agency's failure to produce a PIA on its website. EPIC, *EPIC v. DEA – Privacy Impact Assessments* (2016).[3] And in *EPIC v. DHS*, No. 18-1268 (D.D.C. filed May 30, 2018), EPIC is currently seeking the publication of a privacy impact assessment for a new DHS platform to monitor journalists and media organizations.

The court of appeals simply misunderstood how Section 208 achieves its objective: the requirement to make the privacy impact assessment "publicly available" is the key. E-Government Act § 208(b)(1)(B)(iii). An agency simply does not make something "publicly available" to an individual. The D.C. Circuit's conclusion is nonsensical.

Moreover, a literal application of the D.C. Circuit's rule raises doubt that anyone would have standing to obtain the records required under Section 208. According to the statute, the privacy impact assessment obligation arises *prior* to the collection of

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[1] https://www.epic.org/foia/epic-v-dhs-media-monitoring/.
[2] https://epic.org/foia/fbi/pia/.
[3] https://epic.org/foia/dea/pia/.

personal data. However, no individual could know with certainty whether their personal data would in fact be obtained by the federal agency. Such an assertion would rely on "a speculative chain of possibilities," and thus would not establish that the injury is "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013). For example, in the case below, many states objected to the collection of the voter data by the Commission. As a consequence, individuals in those states, under the D.C. Circuit's view, may not have standing to obtain the Privacy Impact Assessment under Section 208. Of course, their ability to obtain the assessments could change if their state subsequently chose to release the state's voter data, though even then it may be necessary to establish that the voter data of the specific person seeking the Section 208 report was released in order to establish standing.

Such an absurd procedure was never anticipated by Congress, nor would it be practical or sensible to administer. The Section 208 obligation is not triggered based on the request of a particular individual. The entire purpose of the provision is to ensure that the agency undertakes the necessary work prior to the collection of personal data. Publication to all is the means to ensure this outcome. The D.C. Circuit's decision—limiting enforcement of the publication obligation—defeats the purpose of Section 208.

IV. THIS CASE RAISES JURISDICTIONAL ISSUES OF NATIONAL IMPORTANCE THAT WARRANT THE COURT'S REVIEW

The issues presented by this case are of exceptional importance. The court of appeals' errant ruling implicates the authority of the courts under Article III

and the doctrine of informational injury as applied to numerous federal statutes requiring the disclosure of information.

1. The court of appeals' decision threatens to significantly limit judicial authority based on a vague notion of what Congress "had in mind" in a particular statute. The D.C. Circuit replaced the straightforward informational injury test affirmed in *Akins* with its own inquiry about what "type of harm" Congress "had in mind" when it enacted the E-Government Act. App. 11a. The court of appeals has thus conflated Congress's power to determine the scope of a particular statute with the courts' power to "say what [Article III] is" in cases arising from federal statutes. *Marbury v. Madison*, 1 Cranch 137, 178 (1803). The Court should not abide this error. *See Spokeo*, 136 S. Ct. at 1549. "Article III constitutes 'an inseparable element of the constitutional system of checks and balances'—a structural safeguard that must 'be jealously guarded.'" *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1950 (2015) (Roberts, J., dissenting) (quoting *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 58, 60 (1982) (plurality opinion)).

2. The court of appeals' decision is also likely to generate substantial confusion and flawed rulings concerning the constitutional status of informational injury, an area of law over which the D.C. Circuit exercises special influence. *See* 13A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3531.4 (3d ed.) (collecting twelve noteworthy informational injury cases from federal circuit courts, seven of which were decided by the D.C. Circuit). The holding improperly discounts the injury inherent in

being denied access to information that must be published by law.

If the lower court ruling is left undisturbed, it could lead courts to reject the Article III standing of plaintiffs to sue under other open government statutes for which federal court jurisdiction has long been available. Before a court could even *consider* their claims on the merits, plaintiffs challenging the withholding of records under the Freedom of Information Act could be forced to demonstrate that Congress "had in mind" parties just like them or that nondisclosure of the requested records had caused them a specific, Congressionally-envisaged harm separate from the denial of information. App. 11a. *Contra Public Citizen*, 491 U.S. at 449 ("Our 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."). So too with parties seeking records or information under the Federal Advisory Committee Act, the Sunshine Act, the Federal Election Campaign Act, the Endangered Species Act, the Paperwork Reduction Act, the Emergency Planning and Community Right-to-Know Act, the Clean Water Act, and any other statute under which Congress has guaranteed members of the public access to information. As this Court has made clear, "[t]here is no reason for a different rule" concerning the constitutional sufficiency of informational injuries alleged under different statutes. *Public Citizen*, 491 U.S. at 449.

V. THE JUDGMENT BELOW SHOULD BE VACATED BECAUSE THE GOVERNMENT HAS RENDERED THIS CASE MOOT

Not only is the D.C. Circuit's decision wrong as a matter of law; it is also subject to vacatur under *United States v. Munsingwear*, 340 U.S. 36 (1950), because the government has unilaterally mooted this case in its entirety. Where, as here, "a civil case from a court in the federal system . . . has become moot while on its way" to this Court, the Court's "established practice" is to "reverse or vacate the judgment below and remand with a direction to dismiss." *Id.* at 39. "Where it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss." *Great W. Sugar Co. v. Nelson*, 442 U.S. 92, 93 (1979) (quoting *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936)); *see also Azar v. Garza*, 138 S. Ct. 1790, 1793 (2018) (per curiam); *Trump v. Hawaii*, 138 S. Ct. 377 (2017); *Amanatullah v. Obama*, 135 S. Ct. 1545, 1546 (2015).

Vacatur under *Munsingwear* is warranted "where mootness results from the unilateral action of the party who prevailed in the lower court" or where the "controversy presented for review has 'become moot due to circumstances unattributable to any of the parties.'" *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 23 (1994) (quoting *Karcher v. May*, 484 U.S. 72, 83 (1987)). This reflects the principle that "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance" or the "unilateral action of the party who prevailed below," should "not in fairness be forced to

acquiesce in the judgment." *U.S. Bancorp*, 513 U.S. at 25. Vacatur prevents a decision "unreviewable because of mootness" from "spawning any legal consequences," *Munsingwear*, 340 U.S. at 41, and "clears the path for future relitigation by eliminating a judgment the loser was stopped from opposing on direct review." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) (internal quotation marks omitted).

This case is moot. There is "no case or controversy, and a suit becomes moot, when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)) (internal quotation marks omitted). On January 3, 2018—eight days after the court of appeals entered its judgment—the President terminated the Commission by Executive Order. Exec. Order No. 13,820. The remaining defendants in this suit have represented that they will "no longer be collecting data." Opp'n to Mot. to Vacate at 5. The defendants also confirmed in a recent filing before the district court that the voter data previously collected by the Commission has been "entirely deleted" and is "unrecoverable at this time." D. Ct. Doc. 64-1 at ¶ 2. As a result of that deletion, the district court has now dismissed EPIC's case in full, finding that "no further adjudication of this action is necessary." App. 68a–69a. There being no more Commission, no ongoing or imminent collection of personal information, and no remaining voter data left in the defendants' possession, this case is moot in its entirety. *See Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

Moreover, the mootness of this case is entirely attributable to the unilateral conduct of the government. It is the President that terminated the Commission and the defendants that voluntarily decided to delete the voter data already collected. By rendering this case moot, the government has deprived EPIC of any opportunity to seek review of the D.C. Circuit's adverse standing decision. *See Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983) ("Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies."). "It would certainly be a strange doctrine that would permit a [party] to obtain a favorable judgment, take voluntary action that moots the dispute, and then retain the benefit of the judgment." *Garza*, 138 S. Ct. at 1792 (quoting *Arizonans for Official English*, 520 U.S. at 75).

The court's ruling is also likely to "spawn[]" significant negative consequences for Article III judicial power, informational injury doctrine, and the effective operation of the E-Government Act. *Munsingwear*, 340 U.S. at 41. Because EPIC "ought not in fairness be forced to acquiesce in the judgment" that it can no longer properly appeal, *U.S. Bancorp*, 513 U.S. at 25, the Court should vacate the judgment of the D.C. Circuit and remand with instructions to the dismiss the case in full.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment should be vacated, and the case should be remanded to the district court for final disposition.

Respectfully submitted,

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