[ARGUED NOVEMBER 21, 2017; DECIDED DECEMBER 26, 2017]

No. 17-5171

IN THE UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

ELECTRONIC PRIVACY INFORMATION CENTER,
Plaintiff-Appellant,

v.

PRESIDENTIAL ADVISORY COMMISSION
ON ELECTION INTEGRITY, *et al.*,
Defendants-Appellees.

On Appeal from an Order of the
U.S. District Court for the District of Columbia
Case No. 17-cv-1320(CKK)

APPELLANT'S MOTION TO VACATE DECISION, DISMISS APPEAL AS MOOT, AND REMAND CASE

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TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

SUMMARY

Appellant Electronic Privacy Information Center ("EPIC") respectfully moves this Court to vacate the judgment and opinion of December 26, 2017; to dismiss as moot EPIC's appeal from the District Court's denial of a preliminary injunction; and to remand this case to the District Court for further proceedings.

On January 3, 2018, the President terminated the Presidential Advisory Commission on Election Integrity ("the Commission") by Executive Order, effective immediately. Exec. Order No. 13,820, 83 Fed. Reg. 969 (Jan. 3, 2018), Ex. 1. Because there is no Commission left to enjoin and no data collection undertaking to halt, EPIC's appeal—which sought "a preliminary injunction halting the Commission's collection of state voter data"—has plainly been rendered moot. Appellant's Br. 2. Moreover, the President's dissolution of the Commission denies EPIC the ability to pursue further review. By no action of EPIC, EPIC has been deprived of the opportunity to seek rehearing, rehearing en banc, and a Writ of Certiorari from the U.S. Supreme Court. As there remains no live controversy over the preliminary injunction that would permit EPIC to seek further appellate review, the Court should vacate its judgment and opinion, dismiss this appeal as moot, and remand to the District Court. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *United States v. Schaffer*, 240 F.3d 35, 38 (D.C. Cir. 2001) (en banc); *Saco River Cellular, Inc. v. FCC*, 133 F.3d 25, 34 (D.C. Cir. 1998).

EPIC has conferred with opposing counsel, who stated that Defendants oppose this motion.

BACKGROUND

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). 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. *E.g.*, Letter from Kris Kobach, Vice Chair, Presidential Advisory Comm'n on Election Integrity, to John Merrill, Secretary of State, Alabama (June 28, 2017), JA 60. EPIC filed suit on July 3, 2017 and subsequently moved for a preliminary injunction to halt the Commission's collection of voter data pending the publication of a Privacy Impact Assessment pursuant to section 208 of the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899. Pl.'s Compl., Dkt. No. 1; Pl.'s Second Am. Compl., Dkt. No. 33; Pl's Am. Mot. Prelim. Inj., Dkt. No. 35. On July 24, 2017, the District Court denied EPIC's motion, holding that neither the Commission nor any of the other named Defendants were subject to judicial review under the Administrative Procedure Act ("APA"). *EPIC v. Presidential Advisory Comm'n on Election Integrity*, 2017 WL 3141907, at *11–13 (D.D.C. July 24, 2017).

EPIC filed a notice of appeal from the District Court's decision on July 25, 2017. Notice of Appeal, Dkt. No. 42. In briefing, EPIC asked this Court to determine "[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*" and "[w]hether the General Services Administration [is required] to provide all the services, funds, facilities, staff, and equipment necessary to carry out *the Commission's collection of state voter data*." Appellant's Br. 4 (emphases added). As relief, EPIC "ask[ed] this Court to 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). Appellant's Br. 2, 18–19 (emphasis added). On December 26, 2017, this Court affirmed the District Court's denial of a preliminary injunction on the grounds that EPIC "d[id] not show a substantial likelihood of standing to press its claims that the defendants have violated the E-Government Act." Op. 14.

On January 3, 2018, the President issued an Executive Order terminating the Commission in its entirety. Exec. Order No. 13,820. Absent the sudden demise of the Commission, EPIC would have had 45 calendar days after the entry of the Court's judgment (until February 9, 2018) to petition the Court for rehearing or rehearing en banc and at least 90 calendar days (until March 26, 2018) to petition

the Supreme Court for a Writ of Certiorari. D.C. Cir. R. 35(a); Fed. R. App. P. 40(a)(1)(A); Sup. Ct. R. 13.1.

ARGUMENT

Because the dissolution of the Commission has mooted EPIC's appeal and precluded appellate review through no act of EPIC, the Court should vacate its judgment and opinion of December 26, 2017, dismiss EPIC's appeal, and remand the case to the District Court. "[T]he court of appeals may vacate its panel decision when a case becomes moot pending disposition of a petition for rehearing and suggestion for rehearing en banc and before issuance of the mandate." *In re U.S.*, 927 F.2d 626, 627 (D.C. Cir. 1991). The Supreme Court has emphasized that a party such as EPIC "who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994).

EPIC's appeal is assuredly 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). As a result of the President's January 3 order, this appeal presents neither a live dispute nor a legally cognizable interest. The party EPIC

urged this Court to enjoin (the Commission) has ceased to exist, while the activity EPIC sought to preliminarily halt (the Commission's collection of data) has come to a permanent and irrevocable end. Because no court could grant "any effectual relief whatever" to EPIC on the instant appeal, "it must be dismissed." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

Yet the demise of the Commission has deprived EPIC of any opportunity to lodge a viable petition for rehearing, rehearing en banc, or a Writ of Certiorari with respect to this Court's December 26, 2017 judgment. Though EPIC is well within the timeframe for filing such petitions (and had begun to prepare a petition for rehearing prior to the President's January 3, 2018 order), Article III's "case or controversy" requirement now bars this Court or the Supreme Court from further consideration of EPIC's appeal. *See Holiday CVS, L.L.C. v. Holder*, 493 F. App'x 108, 109 (D.C. Cir. 2012) (citing *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.").

Vacatur of the Court's December 26, 2017 judgment and opinion is therefore proper. This Court has repeatedly recognized that "it is appropriate for a court of appeals to vacate its own judgment" where, as here, "it is made aware of events that moot the case during the time available to seek certiorari." *In re U.S.*, 927 F.2d at

627 (quoting *Clarke v. United States*, 915 F.2d 699, 706 (D.C. Cir. 1990) (en banc)) (internal quotation marks omitted). As this Court explained in *Schaffer*:

> When a case becomes moot on appeal, whether it be during initial review or in connection with consideration of a petition for rehearing or rehearing *en banc*, this court generally vacates the District Court's judgment, vacates any outstanding panel decisions, and remands to the District Court with direction to dismiss.

240 F.3d at 38 (citing *U.S. Bancorp*, 513 U.S. at 25, 29; *Munsingwear*, 340 U.S. at 39; *Clarke*, 915 F.2d at 706–08; *Flynt v. Weinberger,* 762 F.2d 134, 135–36 (D.C. Cir. 1985)).

Vacatur under these circumstances "clears the path for future relitigation by eliminating a judgment the loser was stopped from opposing on direct review." *Humane Soc. of U.S. v. Kempthorne*, 527 F.3d 181, 185 (D.C. Cir. 2008) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997)).

Moreover, a panel of this Court is empowered to vacate its own judgments and orders when a case becomes moot. "[T]he court of appeals may vacate its panel decision when a case becomes moot . . . ." *In re U.S.*, 927 F.2d 626 (panel opinion); *see Saco River Cellular*, 133 F.3d at 34 (panel opinion) ("[W]e vacate our order of March 10, 1997 staying the Commission's order, and we dismiss as moot Saco River's challenges to the Commission's handling of its application for a cellular license."); *cf. Am. Pub. Commc'ns Council v. Allnet Commc'ns Servs., Inc.*, No. 94-7003, 1996 WL 761952, at *1 (D.C. Cir. Dec. 30, 1996) (instructing District Court

"to consider whether vacatur of its [own] order is appropriate"). Indeed, panels of this Court have repeatedly vacated earlier panel decisions in response to changed circumstances. *See, e.g.*, *Murphy v. IRS*, No. 05-5139, 2006 WL 4005276, at *1 (D.C. Cir. Dec. 22, 2006) (panel order); *Fletcher v. District of Columbia*, 391 F.3d 250, 251 (D.C. Cir. 2004) (panel opinion); *United States v. Roach*, 136 F.3d 794, 794 (D.C. Cir. 1998) (panel order).

Vacatur is particularly fitting where, as here, "mootness results from unilateral action of the party who prevailed or from circumstances beyond the control of the parties." *Senate Permanent Subcomm. on Investigations v. Ferrer*, 856 F.3d 1080, 1089 (D.C. Cir. 2017) (quoting *Sands v. NLRB*, 825 F.3d 778, 785 (D.C. Cir. 2016)) (internal quotation marks omitted). The mootness of EPIC's appeal is attributable solely to the President's January 3, 2018 order terminating the Commission. EPIC had no say in the events that foreclosed further appellate review and no power to prevent them.

The present circumstances are closely analogous to *Animal Legal Def. Fund (ALDF) v. Shalala*, 53 F.3d 363 (D.C. Cir. 1995). There the plaintiffs appealed from the District Court's denial of a preliminary injunction which would have granted the plaintiffs access to the meetings of a federal advisory committee. *Id.* at 366. When the committee rendered the appeal moot by holding its final meeting, the plaintiffs

moved to vacate the prior decision and to dismiss the appeal as moot. *Id.* at 365–66. This Court granted the plaintiffs' motion on both counts:

> Because the [committee] has had its final meeting and no further meetings are contemplated, this appeal is now moot, for there are no more meetings for appellants to attend. The parties no longer have a legally cognizable interest in the determination of whether the preliminary injunction was properly denied.
>
> This appeal presents another instance in which one issue in a case has become moot, but the case as a whole remains alive because other issues have not become moot. In this case, in their pursuit of a preliminary injunction, appellants sought only to gain entry to the meetings of the [committee]. The meetings have concluded, so an injunction cannot afford the relief that was sought. However, the underlying dispute, whether the [committee] is an "advisory committee" under FACA and whether it violated FACA's mandates, remains alive. Therefore, in dismissing this appeal on grounds of mootness, we vacate the [Court's] order denying a preliminary injunction, and remand the case for consideration of the merits.

ALDF, 53 F.3d at 366 (internal citations and quotation marks omitted).

Here, as in *ALDF*, there remain other issues left for the District Court to resolve, such as the final disposition of EPIC's Federal Advisory Committee Act and Fifth Amendment claims. Pl.'s Second Am. Compl. ¶¶ 72–84, Dkt. No. 33. But those claims "are not before [this Court]." Op. 2. EPIC's appeal—and the interim relief EPIC sought from this Court—were limited to "a preliminary injunction halting the Commission's collection of state voter data" pending the creation and publication of a Privacy Impact Assessment. Appellant's Br. 2. There being no Commission left to preliminarily enjoin and no "collection of state voter data" left

to temporarily arrest, EPIC's appeal is now moot. *Id.* Vacatur is therefore warranted, just as it was in *ALDF*.

CONCLUSION

The Presidential Advisory Commission on Election Integrity no longer exists. The Commission's collection of voter data has permanently ended. Therefore, the controversy on appeal is moot, and EPIC's ability to pursue further appellate review is precluded through no fault of EPIC. Under the circumstances, the Court should vacate its December 26 judgment and opinion, dismiss this appeal as moot, and remand the case to the District Court.

Respectfully Submitted,

/s/ Marc Rotenberg

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Dated: January 11, 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). The motion is composed in a 14-point proportional typeface, Times New Roman, and complies with the word limit of Fed. R. App. P. 27(d)(2)(A) and D.C. Cir. R. 27(a)(2) because it contains 2,806 words.

/s/ Marc Rotenberg
MARC ROTENBERG

CERTIFICATE OF SERVICE

I, Marc Rotenberg, hereby certify that on January 11, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the CM/ECF system:

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