[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 REPLY IN SUPPORT OF MOTION TO VACATE DECISION, DISMISS APPEAL AS MOOT, AND REMAND CASE

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SUMMARY

The Presidential Advisory Commission on Election Integrity ("the Commission") is no more. The collection of state voter data has ended. Plaintiff Electronic Privacy Information Center ("EPIC")'s appeal for a preliminary injunction to suspend the collection of the data is now moot. The pending motion for vacatur should be granted. Yet the Government contends that EPIC could seek appellate review of this Court's December 26, 2017 judgment and opinion by means of a petition for rehearing, a petition for rehearing en banc, and a petition for a writ of certiorari. All of this despite the fact that this was an interim appeal seeking preliminary relief against a party that no longer exists to prevent an activity that can no longer occur. Vacatur of the Court's decision is plainly warranted under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

ARGUMENT

EPIC has been clear since the outset that this appeal—and the interim relief sought by EPIC from this Court—concerned "the *collection* of state voter data by Defendant Presidential Advisory Commission on Election Integrity." Appellant's Br. 4 (emphasis added). Indeed, EPIC made this point four different times. *Id.* at 1–2, 4; Appellant's Reply Br. 24. Not once in 71 pages of briefing did EPIC ask this Court to consider ordering the disgorgement of voter data. Not once did Defendants mention or object to that issue in this appeal. Not once was data disgorgement

raised at oral argument or mentioned in the Court's opinion. The reason is simple: *that issue is not relevant to this appeal*. Like EPIC's constitutional claims, Federal Advisory Committee Act ("FACA") claims, associational standing, and entitlement to permanent relief, the issue of data disgorgement is not before this Court.

Yet Defendants ask this Court to deny vacatur so that EPIC may pursue issues on appeal that it has never previously raised before this Court and could not, at this point in the proceeding for a preliminary injunction, put before the Court. While Defendants' desire to preserve EPIC's rights on appeal would be welcome in another context, in this case before the Court, the argument is clearly disingenuous.

The Court's ruling reflects the limited scope of EPIC's appeal. Throughout its Opinion, the Court described the "halting collection of voter data" as the sole remedy at issue—which indeed it was. Op. 14; *accord* Op. 6, 13. The Court also noted that it was "not consider[ing]" EPIC's associational standing arguments on appeal and that EPIC's constitutional and FACA claims were "not before" this Court. Op. 2 n.1 (citing *N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007)); Op. 8 n.5 (citing *See Scenic Am., Inc. v. Dep't of Transp.*, 836 F.3d 42, 53 n.4 (D.C. Cir. 2016)). And the Court appropriately tailored its holding to match the preliminary posture of the case, concluding that "EPIC does not show a *substantial likelihood* of standing to press its claims that the defendants have violated the E-Government Act." Op. 14 (emphasis added).

Though the Commission has been terminated, Defendants argue that this appeal is both live *and* dispositive of EPIC's entire case in the Court below. *E.g.*, Appellees' Opp'n 2 ("No basis exists for vacating the Court's standing ruling to allow plaintiff to continue this litigation."). Defendants are emphatically wrong on both counts.

EPIC's Appeal is Moot

EPIC's appeal concerned solely a preliminary injunction to "halt the collection of state voter data by Defendant Presidential Advisory Commission on Election Integrity." Appellant's Br. 4. Both the Commission and its data collection activities are at end. Because there is "nothing left for [the Court] to do" on appeal, the Court has "no alternative but to dismiss the case and vacate" its decision as moot. *United States v. W. Elec. Co.*, 846 F.2d 1422, 1432 (D.C. Cir. 1988). "It would certainly be a strange doctrine that would permit a plaintiff to obtain a favorable judgment, take voluntary action [that] moot[s] the dispute, and then retain the [benefit of the] judgment." Petition for a Writ of Certiorari at 21, *Hargan v. Garza*, No. 17-654 (U.S. Nov. 3, 2017) (brackets in original) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997)) (petition by Government for vacatur of D.C. Circuit judgment).

Defendants cannot evade the mootness of EPIC's appeal by dredging up issues from below that were never raised before this Court. *See Associated Gas*

Distributors v. FERC, 899 F.2d 1250, 1264 (D.C. Cir. 1990) (vacating as moot one part of a Federal Energy Regulatory Commission order, even though the order addressed "other issues" not raised on appeal). That is not how appeals work. "To preserve an argument on appeal a party must raise it both in district court and before [the Court of Appeals]." *See Weinstein v. Islamic Republic of Iran*, 831 F.3d 470, 483 (D.C. Cir. 2016) (citing *Odhiambo v. Republic of Kenya*, 764 F.3d 31, 35 (D.C. Cir. 2014)).

Defendants protest that EPIC failed to highlight the difference between the relief requested on appeal and the relief requested in the District Court. Appellees' Br. 7. But again, EPIC clearly identified the remedy sought from this Court in both its Opening Brief and Reply Brief. Appellant's Br. at 1–2 ("We respectfully ask this Court to issue a preliminary injunction halting the Commission's collection of state voter data."); Appellant's Reply Br. 24 ("The data collection activities of the Commission must therefore be suspended pending the completion and publication of a Privacy Impact Assessment by the GSA."). EPIC's Statement of Issues for Review also defined the scope of the appeal as data *collection*, not data *retention*. Appellant's Br. at 4. Defendants' reference to a filing in the lower court is simply irrelevant to the question of whether EPIC's appeal is moot.

Curiously, Defendants also fault EPIC for not "acceding to the district court's order insofar as it denied plaintiff's request to delete existing data." Appellees' Br.

7. It is unclear what "acceding" to that aspect of the District Court's order would involve (other than declining to appeal it, as EPIC did). But the scope of an appeal is defined by the issues and arguments affirmatively raised, not the issues and arguments that the appellant failed to explicitly disclaim. *See Johnson v. Bolden*, 492 F. App'x 118, 119 (D.C. Cir. 2012) (quoting *LaShawn A. by Moore v. Barry*, 144 F.3d 847, 852 n.6 (D.C. Cir. 1998)) ("Johnson's hostile work environment claim is not preserved for our review, as it fails to satisfy 'our requirement that parties' arguments be sufficiently developed lest waived.'"). EPIC never sought—let alone "expressly requested"—an order for data disgorgement from this Court, nor did EPIC seek review of the lower court's refusal to issue such an order. Appellees' Opp'n 6.

It is true that EPIC sought to enjoin several Defendants who have outlived the Commission—but only insofar as they were engaged in conduct that is now impossible. The Executive Office of the President, the Director of White House Information Technology, and the General Services Administration can play no more role in "the collection of state voter data by [the Commission]" because neither the Commission nor its data collection survive. Appellant's Br. at 1–2. As there is no collection to enjoin, the appeal is moot regardless of which other Defendants remain.

And even if EPIC's appeal were technically *not* moot—though it is—vacatur would still be warranted because the dispute on appeal has become too attenuated. *See Ukrainian-Am. Bar Ass'n, Inc. v. Baker*, 893 F.2d 1374, 1378 (D.C. Cir. 1990). "Under the doctrine of attenuation, a court may indeed, upon prudential grounds, refuse to entertain a suit which, while not actually moot, is so attenuated that considerations of prudence and comity . . . counsel the court to stay its hand, and to withhold relief it has power to grant." *Id.* (quoting *Community for Creative Non–Violence (CCNV) v. Hess*, 745 F.2d 697, 700 (D.C. Cir. 1984)) (internal quotation marks omitted). "In determining whether it should dismiss a case which is not technically moot, but in which the defendant voluntarily has discontinued the challenged activity, the court should consider whether there remains some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *CCNV*, 745 F.2d at 700.

Here, the likelihood of Defendants resuming the challenged conduct is nil: the Commission and its data collection activities are permanently ended; Defendants have admitted that they "will no longer be collecting data," Appellees' Opp'n 5; and "the White House intends to destroy all state voter data" in its possession. Second Decl. of Charles C. Herndon ¶ 4, *Dunlap v. Presidential Advisory Comm'n on Election Integrity*, No. 17-2361 (D.D.C. filed Jan. 9, 2018).

Prudence and comity would surely warrant the dismissal of EPIC's appeal and vacatur of the Court's decision, even if mootness did not.

The District Court Case is Not at Issue in This Motion

Defendants entirely misunderstand the relationship of this appeal and this motion to the proceedings below, variously arguing (1) that EPIC is barred now from seeking relief in the District Court, and (2) that EPIC's intention to seek relief below makes vacatur of this Court's decision inappropriate. Appellees' Opp'n 7–8. Both of these arguments are wrong.

First, whether or not this Court vacates its ruling, EPIC's case will continue in the lower court. There are numerous matters before the District Court which were not raised on appeal, including EPIC's constitutional claims, FACA claims, associational standing, and entitlement to permanent relief. *See* Op. 2 n.1; Op. 8 n.5; Op. 14. *Contra* Defendants, EPIC has asked for relief in its Second Amended Complaint that it did not seek as interim relief, including "costs and reasonable attorney's fees"; a declaratory ruling that Defendants lacked "authority to collect personal voter data from the states"; and "such other relief as the Court may deem just and proper." Second Am. Compl. 15, JA 146. EPIC has also moved for leave to file a Third Amended Complaint, a motion which the District Court has yet to rule on. Pl.'s Mot. Leave File Third Am. Compl., Dkt. No. 54 (Oct. 12, 2017). And

EPIC's E-Government Act claims still await final resolution below, as Defendants' Motion to Dismiss is now fully briefed.

None of these matters—indeed, nothing other than EPIC's motion for a preliminary injunction—will be settled by the instant appeal. During the pendency of this appeal, the parties have continued to brief EPIC's claims and standing in the lower court based on a more developed factual record. This Court's ruling will not bring an end to that adjudication process, even if vacatur is denied. "[A]n inability to establish a substantial likelihood of standing requires denial of the motion for preliminary injunction, not dismissal of the case." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015).

Second, the existence of live issues in the lower court has no bearing on whether vacatur is warranted as to this appeal. The Supreme Court made this clear in *Honig v. Students of California School for the Blind*, in which an appeal from a preliminary injunction order was dismissed as moot:

> [T]he only question of law actually ruled on by the Court of Appeals was whether the District Court abused its discretion in applying the complicated calculus for determining whether the preliminary injunction should have issued, an issue now moot. No order of this Court could affect the parties' rights with respect to the injunction we are called upon to review. Other claims for relief, however, still remain to be resolved by the District Court. We accordingly grant the petition for writ of certiorari, and vacate the judgment of the Court of Appeals, with instructions to remand the case to the District Court for further proceedings consistent with this opinion.

471 U.S. 148, 149–50 (1985). And in *Tennessee Gas Pipeline Company v. Federal Power Commission*, this Court squarely rejected the notion that mootness and vacatur on appeal are tied to the vitality of other claims *not* on appeal:

> Indeed, one intervenor argued that the instant case is not moot precisely because of its likely effect on "causes of action which are not before this Court." Of course, the rationale of the Munsingwear doctrine is the avoidance of just such conclusive effects, whether of a district court judgment or an agency order.

606 F.2d 1373 (D.C. Cir. 1979). The very point of *Munsingwear* vacatur is to "clear[] 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, 520 U.S. at 71). Defendants cannot avoid vacatur by protesting that it will face further proceedings below. Appellees' Opp'n 2.

Vacatur Will Avoid a Lengthy and Unnecessary Petition Process

Finally, Defendants' insinuation that EPIC filed this motion to vacate because it "does not [plan to] ask the Court to rehear the case," Appellees' Opp'n 1, is entirely wrong. Not only does EPIC intend to seek further review if this Court determines that this appeal is not moot; EPIC is compelled to do so by the sweeping implications of the Court's ruling on informational standing under the E-Government Act and its inconsistency with both D.C. Circuit and Supreme Court precedents. But rather than first initiating a petition process that will consume this

Court's valuable time and the time of all attorneys involved in this case, EPIC sought vacatur as an immediate remedy in light of the unilateral changes wrought by the President. If, however, the Court does not grant EPIC's vacatur motion before the February 9 rehearing deadline, EPIC will have no choice but to proceeding with a petition for rehearing and rehearing en banc.

CONCLUSION

For the foregoing reasons, 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,

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Dated: January 24, 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing reply 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 reply 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)(C) and D.C. Cir. R. 27(a)(2) because it contains 2,321 words.

/s/ Marc Rotenberg
MARC ROTENBERG

CERTIFICATE OF SERVICE

I, Marc Rotenberg, hereby certify that on January 24, 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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