No. 19-777

IN THE
Supreme Court of the United States

ELECTRONIC PRIVACY INFORMATION CENTER,

Petitioner,

v.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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The parties agree that this case is now moot as a result of the President's decision not to include a citizenship question on the 2020 Census. EPIC's ability to seek further review has thus been blocked, and vacatur of the decision below is the logical and equitable resolution. *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). The Court routinely grants vacatur in precisely these circumstances, and "the normal rule should apply" in this case as well. *Camreta v. Greene*, 563 U.S. 692, 713 (2011) (granting vacatur).

The Government's arguments to the contrary are without foundation. Had the Government not mooted this case, the Court could have reviewed the merits of the D.C. Circuit's decision, which conflicts with decisions of this Court and other circuits about

informational standing under Article III. Moreover, the equities favor vacatur here where the Government, as the prevailing party below, created the mootness through its voluntary and unilateral action.

ARGUMENT

I. THE DECISION BELOW CANNOT BE RECONCILED WITH *AKINS*, *PUBLIC CITIZEN*, OR THE RULINGS OF MULTIPLE COURTS OF APPEALS

The Government has failed to rebut EPIC's showing that the decision below conflicts with *Federal Election Commission v. Akins*, 524 U.S. 11 (1998), *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989), and the decisions of multiple circuit courts. This case therefore warrants the Court's review.

1. The Government argues that EPIC cannot establish an informational injury based on the allegation that it "sought and w[as] denied specific agency records." Br. in Opp. 10. That statement is contrary to both *Public Citizen*, 491 U.S. at 449, and *Akins*, 524 U.S. at 21. And the Government finds no support in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), either. The Court in *Spokeo* simply reaffirmed the decades-old principle that the "'inability to obtain information' that Congress has decided to make public is a sufficient injury to satisfy Article III." *Spokeo*, 136 S. Ct. at 1549. Rather than acknowledge this well-established rule, the Government seeks to defend the decision below by adding new requirements to the traditional informational injury test. Each of these arguments fails.

a. First, the Government attempts to fashion a novel test for concreteness based on whether a statute requiring the public disclosure of information *also*

contains an independent cause of action. Br. in Opp. 9–10 (citing Freedom of Information Act (FOIA), 5 U.S.C. § 552; Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2). Not only is this argument contrary to the decisions of this Court; it also proceeds from a false premise. The FACA—the statute at issue in *Public Citizen*—does not contain a private right of action. *See* 5 U.S.C. App. 2. The Government has conceded this fact in recent litigation. *See* Mem. P. & A. Supp. Defs.' Mot. Dismiss FACA Claims at 6, *EPIC v. Nat'l Sec. Comm'n on Artificial Intelligence*, No. 19-2906 (D.D.C. Jan. 31, 2020) ("FACA does not provide a private right of action."); *see also* Mem. Supp. Mot. Dismiss at 19, *EPIC v. Drone Advisory Comm.*, 369 F. Supp. 3d 27 (D.D.C. 2019) ("FACA lacks statutory language expressly creating a cause of action."). Courts have also confirmed that the FACA does not contain private right of action. *See EPIC v. Drone Advisory Comm.*, 369 F. Supp. 3d at 36–38; *Ctr. for Biological Diversity v. Tidwell*, 239 F. Supp. 3d 213, 221 (D.D.C. 2017); *Freedom Watch, Inc. v. Obama*, 807 F. Supp. 2d 28, 32–33 (D.D.C. 2011).

Thus, when this Court held that the plaintiff in *Public Citizen* had identified a constitutionally cognizable injury under the FACA, that holding had nothing to do with the presence or absence of a statutory cause of action. The Court in *Public Citizen* identified the only requirements for an informational injury: "those requesting information under" a public disclosure statute need simply allege "that they sought and were denied specific agency records." *Public Citizen*, 491 U.S. at 449. It is this informational injury test—not the availability of a statutory cause of action—that determines whether a party has Article III standing.

EPIC readily satisfies the *Public Citizen* test here, having sought and been denied agency records that EPIC argued the Government was required to produce under section 208 of the E-Government Act, Pub. L. No. 107-347, 116 Stat. 2899 (Dec. 17, 2002).[1]

In support of its proposed test for concreteness, the Government quotes the lower court's contention that section 208 is "fundamentally different from statutes like" the FOIA and FACA because it does not "vest a general right to information in the public." Br. in Opp. 10 (quoting App. 14a). But neither the Government nor the lower court explains why the *concreteness* of an informational injury would depend on the *scope* of the disclosure requirement that Congress has established. If Congress wishes to require the public disclosure of many types of records at once—as under the FOIA or the FACA—it may do so. If Congress wishes to require the public disclosure of a smaller subset of records—as in the privacy impact assessments mandated by section 208—it may do so as well. In either case, a party that "s[eeks] and [is] denied" those "specific agency records" suffers a concrete injury in fact. *Public Citizen*, 491 U.S. at 449.

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[1] Even if the availability of a statutory cause of action were somehow relevant to Article III standing, 5 U.S.C. § 702 and § 706 entitle EPIC to bring suit over any "agency action" by which it is aggrieved—including an agency's failure to produce a required privacy impact assessments under section 208 of the E-Government Act. The two statutes, read together, confirm Congress's intent to elevate a denial of information under section 208 to a constitutionally cognizable injury in fact.

b. Second, the Government misconstrues language from *Akins* that was not related to the Court's Article III informational injury analysis. As a result, the Government has confused the informational injury test with (1) prudential standing (which is not a jurisdictional issue), and (2) the special rule for "taxpayer standing" addressed in *United States v. Richardson*, 418 U.S. 166 (1974), and *Flast v. Cohen*, 392 U.S. 83 (1968).

For example, the Government reads *Akins* to suggest that Congress must have "intended to authorize this kind of suit" in order for a plaintiff to suffer an informational injury. Br. in Opp. 10. But the passage quoted by the Government begins: "Moreover, *prudential standing* is satisfied when the injury asserted by a plaintiff 'arguably [falls] within the zone of interests . . . ." *Akins*, 524 U.S. at 20 (emphasis added). As the Government acknowledges, "whether a plaintiff falls within a statute's 'zone of interests' is not a jurisdictional inquiry." Br. in Opp. 11.

The Government also misinterprets a passage in *Akins* distinguishing informational injury from the special "taxpayer standing" test, which requires that certain plaintiffs show "a logical nexus between the status asserted and the claim sought to be adjudicated." *Akins*, 524 U.S. at 22. As the Court explained in *Akins*, informational injury cases are fundamentally different from taxpayer standing cases brought under the Accounts Clause, a "constitutional provision [which] requir[es] the demonstration of the 'nexus.'" *Id.* All that is required of a plaintiff under *Akins* is to show an "inability to obtain information" that, under their "view of the law, the statute requires the" defendant to make public. *Id.* at 21.

2. The Government also argues—for the first time—that EPIC did not suffer a sufficiently particularized injury from the denial of information subject to disclosure under section 208. Br. in Opp. 12. This argument is both wrong and irrelevant. An injury is "particularized" if it "affect[s] the plaintiff in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 n.1 (1992)). EPIC's members, on whose behalf EPIC asserts associational standing, attest that they sought and were denied information concerning the Government's collection of their personal data. C.A. App. 202–10. That is all EPIC need allege to establish a particularized injury in this case. *Spokeo*, 136 S. Ct. at 1548. In any event, the lower court did not question (or even discuss) the particularity of EPIC's injuries, and EPIC does not seek a writ of certiorari on those grounds. The "particularized" prong of the injury-in-fact test is simply irrelevant to the Court's consideration of EPIC's petition. Review is instead warranted because the lower court applied a "concreteness" test to EPIC's informational injury that is at odds with the decisions of this Court.

3. Finally, the Government misunderstands several courts of appeals decisions interpreting *Akins* and *Public Citizen*. There is no way to read the decision below in harmony with the informational injury precedents of the Sixth, Eighth, and Eleventh Circuits.

The Government attempts to distinguish *American Canoe Association v. City of Louisa Water & Sewer Commission*, 389 F.3d 536 (6th Cir. 2004), from this case on the grounds that (1) the plaintiffs alleged an additional harm, and (2) the Clean Water Act has

a "broad right of action." Br. in Opp. 13. It is true that the plaintiffs in *American Canoe*—like EPIC's members here—identified an additional harm suffered as a result of the defendant's unlawful failure to disclose information. In *American Canoe*, one member of the American Canoe Association alleged that he was "deprived . . . of the ability to make choices about whether it was 'safe to fish, paddle, and recreate in th[e] waterway,'" *id.* at 542; in this case, EPIC's members alleged that they were prevented from "determin[ing] whether the Census Bureau ha[d] fully considered or addressed the risks to [their] privacy, even as the Bureau beg[an] to develop a new collection of personal data that [was to] contain [their] citizenship status." *E.g.*, C.A. App. 204. But the Sixth Circuit was clear that a showing of additional harm was not *necessary* to establish an informational injury; rather, it was enough to show that the defendant was "disobeying the law in failing to provide information that the plaintiffs desire[d] and allegedly need[ed]." *Am. Canoe Ass'n*, 389 F.3d at 546. The Court refused to "read into the *Akins* holding a firm requirement that to establish standing, a plaintiff must adequately allege more than the withholding of the required information from the citizenry." *Id.* at 547. And as already established, the presence or absence of a "broad right of action" is not a relevant criterion under this Court's informational injury precedents. The fact that a panel of the Sixth Circuit recently issued a ruling in tension with *American Canoe* deepens—rather than closes—the split between courts of appeals over the requirements for informational injury. *See Huff v. TeleCheck Servs., Inc.*, 923 F.3d 458 (6th Cir. 2019).

The Government also misstates the significance of *Spokeo* on the Eighth Circuit's application of the informational injury test in *Charvat v. Mutual First Federal Credit Union*, 725 F.3d 819 (8th Cir. 2013). Following *Spokeo*, the Eighth Circuit said that "the Supreme Court rejected [the] absolute view and superseded our precedent in *Hammer* and *Charvat*." *Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925, 930 (8th Cir. 2016). But the "absolute view" that was superseded by *Spokeo* was described this way by the court in the preceding paragraph: "This court's decisions in [*Hammer* and *Charvat*] . . . declared that 'the actual-injury requirement may be satisfied *solely* by the invasion of a legal right that Congress created." *Id.* (emphasis in original). Nothing in *Spokeo* or in *Braitberg* has disrupted the Eighth Circuit's view of *Akins*, which is that "a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *Charvat*, 725 F.3d at 823 (quoting *Akins*, 524 U.S. at 21). Indeed, the court continues to cite favorably to *Akins* for the same proposition that EPIC set out in its petition. *See, e.g.*, *Demarais v. Gurstel Chargo, P.A.*, 869 F.3d 685, 692 (8th Cir. 2017) (quoting *Akins*, 524 U.S. at 21) (noting that a "denial of information that would help plaintiffs evaluate candidates is a 'concrete' injury").

Rather than reconcile the Eleventh Circuit's decision in *Church v. Accretive Health, Inc.*, 654 Fed. App'x 990 (11th Cir. 2016), with the decision below, the Government simply notes that the plaintiff's injury in *Church* was also "particularized." Br. in Opp. 14. But this is irrelevant to the circuit split at issue in this case, which turns on the "concreteness" prong of

the Court's informational injury test. The Government does not bother to address the Eleventh Circuit's holding—contrary to the decision below—that a plaintiff may establish a concrete informational injury without identifying any additional harm. *Church*, 654 F. App'x at 994–95.

In seeking to downplay the disagreement between panels of the D.C. Circuit over the proper test for informational injury, the Government once again deflects attention to the "particularized" prong of injury in fact. Br. in Opp. 15–16. As part of this digression, the Government invents a holding that the court below did not reach. The court did not dispute that EPIC had a "*particularized* stake in procedures related to the attempted inclusion of a citizenship question on the 2020 decennial census[.]" Br. in Opp. 16 (emphasis added). Rather, the court's decision rested entirely on the "concreteness" prong of informational injury. *See* App. 15a ("Because we conclude that EPIC has failed, as a matter of law, to show that any of its members have suffered a concrete privacy or informational injury, we lack jurisdiction to proceed and must remand the case for dismissal."). Thus, the Government's efforts to harmonize conflicting decisions of the D.C. Circuit are beside the point.

In sum, the Government does not explain how the straightforward reading of *Akins* embraced by the Sixth, Eighth, and Eleventh Circuits (and several panels of the D.C. Circuit) can be squared with the more restrictive tests adopted by the Second, Third, Fourth, Fifth, Seventh, and Ninth Circuits (and the decision below). Pet. 23–25. This is precisely the type of conflict that would ordinarily warrant plenary review by this Court. That being the case, the Court should not deny

certiorari, but should grant the writ and vacate the judgment below. *See, e.g.*, *Niang v. Tomblinson*, 139 S. Ct. 319, 319 (2018); *Azar v. Garza*, 138 S. Ct. 1790, 1793 (2018); *Amanatullah v. Obama*, 135 S. Ct. 1545, 1546 (2015); *LG Elecs., Inc. v. InterDigital Commc'ns, LLC*, 572 U.S. 1056, 1056 (2014); *United States v. Samish Indian Nation*, 568 U.S. 936, 936 (2012); *Eisai Co. v. Teva Pharm. USA, Inc. ex rel. Gate Pharm. Div.*, 564 U.S. 1001, 1001 (2011); *Indiana State Police Pension Tr. v. Chrysler LLC*, 558 U.S. 1087, 1087 (2009).

II. THE GOVERNMENT'S EQUITIES ARGUMENTS ARE WITHOUT MERIT.

The Government acknowledges that *Munsingwear* vacatur is "rooted in equity," Br. in Opp. 18, but fails to identify any equitable considerations that weigh against EPIC's motion for vacatur. Instead, the Government (1) misstates the standard for *Munsingwear* vacatur; (2) misconstrues *Arizonans for Official English*; and (3) makes irrelevant and misleading claims about the timing of this litigation.

1. This Court has never required that a litigant seeking vacatur show that "the prevailing party has deliberately frustrated further review." Br. in Opp. 17. The Government offers no authority for that contention. Instead, as the Court stressed in *Azar v. Garza*, 138 S. Ct. 1790, vacatur is warranted when the mootness was caused by the prevailing party's "voluntary, unilateral action." *Id.* at 1793. A party's actions, not its intent, guide the Court's analysis. There is no dispute that the President—as head of the Executive Branch—caused this case to become moot by determining that the citizenship question would not be included on the 2020 Census. Br. in Opp. 18. In these

circumstances, "the normal rule should apply," and the decision should be vacated. *Camreta*, 563 U.S. at 713.[2]

2. The Government also misconstrues the reference in *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997), to vacatur "clear[ing] the path for future relitigation" after further appellate review has been frustrated. *Id*. The Court was not referring to future relitigation "*between the parties*" as the Government claims. Br. in Opp. 17 (emphasis added). Mootness in *Arizonans for Official English* was caused by the plaintiff's voluntary cessation of state employment. *Id*. at 48. The Court recognized there was no prospect of further litigation between the parties. *Id*. The Court nevertheless vacated the Ninth Circuit's opinion because the State of Arizona would have otherwise faced circuit precedent in future cases against *different* parties and had lost the opportunity to review the initial opinion. EPIC faces precisely the same problem now. The D.C. Circuit's decision on informational injury is binding in future cases brought under the E-Government Act of 2002. Because this case is now moot, EPIC's path to litigate that Article III issue is blocked by the decision below.

3. Finally, the Government contends that the timing of EPIC's complaint in the district court is somehow relevant to whether the Court should now

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[2] The Government also makes a speculative argument about what the lower court might have done if "the issue of mootness arisen earlier." Br. in Opp. 16. The Government does not explain why any court would decline to rule on narrow, nonprecedential mootness grounds or why counterfactual scenarios should upset the normal rule of vacatur.

vacate a deeply flawed decision in a case that the Government itself rendered moot. But the claim that EPIC should have "acted with greater dispatch" is at odds with what the Government argued below—namely, that EPIC's litigation was "premature" because the Census Bureau would not begin distributing census questionnaires until 2020. D. Ct. Doc. 12 at 1 (Jan. 30, 2019). And, in any event, the Government cites no authority for the view that the initial filing date of a lawsuit is relevant to this Court's equitable analysis in the context of vacatur.

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.

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