No.

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

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," as this Court held in *Federal Election Commission v. Akins*, 524 U.S. 11, 21 (1998)?

2. 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 United States Department of Commerce.
2. The Bureau of the Census.

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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 928 F.3d 95. The orders of the court of appeals denying panel rehearing, rehearing en banc, and vacatur and remand (App. 19a, 21a) are unreported. The opinion of the district court (App. 23a) is reported at 356 F. Supp. 3d 85.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2019. The petition for panel rehearing, rehearing en banc, or vacatur and remand was denied on September 16, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

This case concerns section 208 of the E-Government Act, Pub. L. No. 107-347, 116 Stat. 2899 (Dec. 17, 2002); the Administrative Procedure Act; 5 U.S.C. § 551 *et seq.*; Article I, Section 2, Clause 3 of the U.S. Constitution; the Census Act, 13 U.S.C. § 1 *et seq.*; and the Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq.*, which are reproduced in relevant part in the appendix to this petition. App. 49a–62a.

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 sought disclosure of privacy impact assessments ("PIA") from the Department of Commerce ("the Department") and the Census Bureau ("the Bureau") concerning the Bureau's plan to collect citizenship status data in the United States in the 2020 Census. Under section 208 of the E-Government Act, federal agencies are required to create and

publish a privacy impact assessment before initiating any collection of personally identifiable information. When EPIC was unable to obtain the privacy impact assessments it sought, EPIC filed suit against the Department and the Bureau to enforce the disclosure obligations in section 208. Subsequently, EPIC moved for preliminary injunctive relief to halt the Bureau's collection of citizenship data pending publication of the required assessments.

On appeal from the district court's denial of a preliminary injunction, the D.C. Circuit held that EPIC had not suffered an injury sufficient to support Article III standing. Although the court of appeals recognized that Congress established the E-Government Act to "provide increased opportunities for citizen participation in Government," and "[t]o make the Federal Government more transparent and accountable," App. 2a (quoting E-Government Act §§ 2(b)(2), (9)), the court nonetheless concluded that EPIC lacked standing based partly on a previous ruling of the D.C. Circuit. App. 6a–15a (citing *EPIC v. Presidential Advisory Comm'n on Election Integrity (PACEI)*, 878 F.3d 371, 379 (D.C. Cir. 2017)). In *EPIC v. PACEI*, the court held that EPIC, as an organization, 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. *PACEI*, 878 F.3d at 379. The ruling below goes even further, holding that *individuals*—here, EPIC's members—are not cognizably injured by an agency's unlawful failure to publish required privacy impact assessments. App. 13a-15a. Instead, the court held that individuals must show an additional, secondary harm beyond the denial of information that Congress has guaranteed to them—a requirement this

Court has explicitly rejected for other public disclosure provisions. App. 14a.

The decision below warrants review because, first, it conflicts with decisions of this Court 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 imposed an additional, artificial requirement for informational injury not supported by the Constitution or any of this Court's decisions. Second, the D.C. Circuit decision deepens a circuit split over the proper test for an informational injury. And third, the decision renders section 208 of the E-Government Act, which establishes foundational accountability obligations for federal government recordkeeping systems, essentially unenforceable.

Moreover, the decision of this Court in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019)—which resulted in the removal of the citizenship question from the 2020 Census—has rendered this case moot in its entirety. Vacatur is therefore warranted 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 privacy impact assessment 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 Commerce Department's Attempt to Add a Citizenship Question to the 2020 Census

The U.S. Constitution requires that an "actual Enumeration" of persons be undertaken every ten years "in such Manner as [Congress] shall by Law direct." U.S. Const. Art. 1, § 2, cl. 3. To this end, Congress passed a series of laws directing the Secretary of Commerce to conduct the census, 13 U.S.C. § 141(a), and to determine the questions to be asked, 13 U.S.C. § 5. Congress also established the Census Bureau as an agency under the Department of Commerce to administer the census. 13 U.S.C. § 2. The next census will be in 2020. U.S. Census Bureau, *2020 Census* (Oct. 19, 2018).[1]

On March 26, 2018, Secretary of Commerce Wilbur Ross stated that he "ha[d] determined that reinstatement of a citizenship question on the 2020 decennial census [wa]s necessary" and that he was "directing the Census Bureau to place the citizenship question last on the decennial census form." C.A. App. 60. No such question appeared on the 2010 Census, C.A. App. 221, nor has the Bureau posed a citizenship question to all census respondents since the 1950 Census. *See* C.A. App. 53. Secretary Ross stated that the citizenship question was added in response to a December 2017 request by the Department of Justice ("DOJ"), which allegedly sought citizenship data to enable "more effective enforcement" of the Voting Rights Act. C.A. App. 53. As this Court has acknowledged, Secretary Ross's explanation for his decision was at odds

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[1] https://www.census.gov/programs-surveys/decennial-census/2020-census.html.

with the extensive evidence uncovered in litigation over the citizenship question. *Dep't of Commerce*, 139 S. Ct. at 2575 (2019).

On March 28, 2018, the Bureau officially reported to Congress its intention to add a citizenship question to the 2020 Census. C.A. App. 61. The version of the question presented to Congress asked: "Is this person a citizen of the United States?" *Ibid.* Five responses were listed: "Yes, born in the United States"; "Yes, born in Puerto Rico, Guam, the U.S. Virgin Islands, or Northern Marianas"; "Yes, born abroad of U.S. citizen parent or parents"; "Yes, U.S. citizen by naturalization – *Print year of naturalization*"; and "No, not a U.S. Citizen[.]" *Ibid.*

The addition of a citizenship question to the 2020 Census posed a unique threat to privacy, personal security, and the accuracy of the census. Any person who refuses to answer "any of the questions . . . submitted to him in connection with any census"—or who willfully gives a false answer to a census question—is subject to criminal penalties. 13 U.S.C. § 221(a)–(b). Thus, the citizenship question would have compelled respondents to reveal their citizenship status (and potentially immigration status), which could have in turn exposed individuals and their family members to investigation, sanction, and deportation.

C. The Census Bureau's Failure to Analyze the Impact of the Citizenship Question in Published Privacy Impact Assessments

Following the announcement of the decision to add the citizenship question to the 2020 Census, EPIC sought the most recent privacy impact assessments for

five Bureau computer systems that the Bureau said would be used to collect and store data from the 2020 Census. *See* C.A. App. 133, 149, 153, 165, 168, 178, and 190. Although a recent privacy impact assessment existed for each system, three of the five did not mention citizenship data at all, while the two assessments that did mention citizenship data included no analysis of how the collection, maintenance, and dissemination of the data would affect the privacy of census respondents. *See* C.A. App. 136–37 (failing to list "citizenship" among the information collected); C.A. App. 180–81 (same); C.A. App. 192–93 (same); C.A. App. 148–63 (failing to analyze the privacy implications of collecting citizenship status information); C.A. App. 164–76 (same).

D. EPIC's Suit Seeking Completion and Publication of an Updated Privacy Impact Assessment Prior to Collection of Citizenship Data

On November 20, 2018, EPIC filed the complaint in this case alleging that the Bureau had "failed to conduct *any* of the privacy analysis required by the E-Government Act for a major collection of personally identifiable information." C.A. App. 47. EPIC charged that the Defendants violated the E-Government Act and Administrative Procedure Act in two respects. First, EPIC alleged that the Defendants took unlawful action in violation of 5 U.S.C. § 706(2) and E-Government Act § 208(b) by initiating a new collection of information without first producing required privacy impact assessments. C.A. App. 48–49 (Count I). Second, EPIC alleged that the Defendants unlawfully withheld production of required privacy impact

assessments in violation of 5 U.S.C. § 706(1) and E-Government Act § 208(b). C.A. App. 49–50 (Count II). EPIC also brought a claim under the Declaratory Judgment Act, 28 U.S.C. § 2201(a). C.A. App. 50–51 (Count III). As relief, EPIC sought, *inter alia*, the suspension and revocation of the citizenship question until the Bureau's completion and publication of the required privacy impact assessments. C.A. App. 51.

On January 18, 2019, EPIC moved for a preliminary injunction to prevent the Government from collecting citizenship status information pending final resolution of EPIC's claims. Pl.'s Mot. Prelim. Inj. The Bureau opposed EPIC's motion on the merits but did not dispute that EPIC had "associational standing to challenge the Defendants' alleged failure to publish a PIA consistent with the requirements of section 208 of the E-Government Act[.]" Defs.' Opp'n at 19–20.

E. The District Court Opinion

On February 8, 2019, the district court denied EPIC's motion for a preliminary injunction on the view that EPIC was unlikely to succeed on the merits. App. 24a. Although the court acknowledged that Secretary Ross's March 26, 2018 letter announcing the citizenship question "constitutes final agency action," App. 31a, the court reasoned that the Bureau's duty to conduct, review, and publish the requisite privacy impact assessments would not come due "until the Bureau mails its first set of [census] questionnaires to the public in January 2020," App. 30a. In dicta, the district court also said that EPIC was not likely to suffer irreparable harm because the collection of citizenship data was not imminent. App. 43a. The court did not consider whether EPIC had standing.

F. The D.C. Circuit Opinion

EPIC appealed the district court's denial of a preliminary injunction. On June 28, 2019, the court of appeals vacated the district court's judgment and directed the district court to dismiss EPIC's case because, "*as a matter of law*," EPIC lacked both organizational and associational standing to bring claims under the E-Government Act. App. 16a (emphasis in original).

The court rejected EPIC's assertion of organizational standing based in part on the D.C. Circuit's earlier decision in *EPIC v. PACEI*, 878 F.3d 371. In *PACEI*, EPIC had challenged the Presidential Advisory Commission's authority to collect personal voter data without first publishing the privacy impact assessment required by section 208 of the E-Government Act. *Ibid.* The court below wrote that, in *PACEI*, "EPIC did not have organizational standing to compel the publication of a PIA or to seek an injunction barring the collection of information" because "EPIC was unable to show how the failure to publish a PIA concretely injured its organizational interest." App. 8a. The court restated its holding from *PACEI* that "§ 208 did not confer an informational interest on EPIC as an organization, and any resources spent obtaining information that would otherwise have been in a PIA was a 'self-inflicted budgetary choice that cannot qualify as an injury in fact.'" *Ibid*. The court concluded the "same reasoning applies to the present complaint." *Ibid.*

The court then addressed EPIC's assertion of associational standing. The Court recognized EPIC can claim associational standing as a membership organization. App. 9a. Nevertheless, the court concluded

that EPIC's members would not suffer informational or privacy injuries from the Bureau's failure to publish the required PIAs. App. 10a.

First, the court determined that EPIC could not show a concrete privacy injury unless EPIC demonstrated "how a delayed PIA would lead to a harmful disclosure" of private information. *Ibid*. The court reasoned that because the law prohibits the Bureau from disclosing census data to third parties, and "EPIC has not convinced us that a delay in receiving a PIA will make the Census Bureau any less likely to comply with these laws," EPIC was relying on a "'speculative chain of possibilities' that cannot establish an injury." App. 11a. The court also rejected EPIC's assertion of standing based on its members' constitutional privacy interest in keeping their citizenship data private from the government. App. 11a–12a. The court determined that "EPIC has not shown that the timing for publishing PIAs is plausibly connected to the government's collection of private information that it would not otherwise collect" because "the principal purpose of the impact assessment is *not* to deter collection in the first place, but instead to improve upon an agency's storage and sharing practices." App. 12a (emphasis in original).

Finally, the court concluded that EPIC lacked associational standing to sue on behalf of its members because EPIC's members would not suffer the "type of harm Congress sought to prevent by requiring disclosure." App. 13a. The court relied on its own interpretation of the E-Government Act in *PACEI*—*not* EPIC's reading of the statute—that § 208 "is directed at individual *privacy*" and protects individuals "by requiring an agency to fully consider their privacy before

collecting their personal information." *Ibid.* (emphasis in original). The court read *PACEI* "to reject the possibility that § 208 can support an informational injury theory, at least in the absence of a colorable privacy harm of the type that Congress sought to prevent through the E-Government Act." *Ibid.* Despite acknowledging that the E-Government Act "aims to 'provide increased opportunities for citizen participation in Government,' and '[t]o make the Federal Government more transparent and accountable,'" App. 2a (quoting E-Government Act §§ 2(b)(2), (9)), the court reasoned that "§ 208 is fundamentally different from statutes like the Freedom of Information Act (FOIA) where the harm Congress sought to prevent was a lack of information itself." App. 14a. The court determined instead that "Section 208 was not designed to vest a general right to information in the public" but only "to protect individual privacy by focusing agency analysis and improving internal agency decision-making." App. 14a. "Because the lack of information itself is not the harm that Congress sought to prevent through § 208," the court required EPIC to "show how the lack of a timely PIA caused its members to suffer the kind of harm that Congress did intend to prevent: harm to individual privacy." *Ibid.* As the court had already found that EPIC could not meet this burden, the court rejected EPIC's assertion of associational standing based on an informational injury. *Ibid.*

G. This Court's Decision in *Department of Commerce v. New York* and the Removal of the Citizenship Question

The day before the D.C. Circuit's decision in this case—June 27, 2019—this Court affirmed in part a

lower court decision prohibiting the Bureau from adding the citizenship question to the census. *Dep't of Commerce*, 139 S. Ct. at 2576 (2019). On July 11, 2019, President Donald Trump confirmed that the Department of Commerce had withdrawn the citizenship question, finding "no practical mechanism for including the question on the 2020 decennial census." Exec. Order No. 13,880, Fed. Reg. 33,821, 33,821 (2019).

On August 12, 2019, EPIC filed a petition with the D.C. Circuit for rehearing, rehearing en banc, or vacatur and remand. EPIC argued that the panel decision conflicted with this Court's precedents and that the decision undermined the informational right Congress established in § 208. EPIC Pet. for Rehearing, Rehearing En Banc, or Vacatur and Remand 5-15. EPIC alternatively requested that the D.C. Circuit modify or vacate the panel judgment because this Court's decision and the President's subsequent action made this case moot. *Id*. at 16-17.

The D.C. Circuit denied EPIC's petition on September 16, 2019. App. 19a, 21a. The district court dismissed the action on October 3, 2019. App. 48a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision warrants review for three reasons: (1) the lower 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 the informational injury doctrine; 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, because this Court's decision in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), led to the removal of the citizenship question from the census and the suspension of the data collection challenged by EPIC, the decision below should be vacated for mootness. The Court should 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 and its members did not have standing to challenge the Government's failure to produce legally required privacy impact assessments. 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 and its members were entitled under the E-Government Act was a concrete and particularized injury, the court instead determined that—under its own reading of the statute, and contrary to this Court's holding in *Akins*—failure to publish PIAs as required was not the "type of harm" that Congress "sought to prevent" when it enacted the E-Government Act. App. 13a. 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).

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 and its members lacked standing to challenge the unlawful denial of information. The court's ruling was based partly on its prior holding that EPIC, as an organization, was not the "type of plaintiff," and had not suffered the "type of harm," that "Congress had in mind" when it enacted the E-Government Act. *PACEI* at 378. But the court of appeals in this case strayed even further from *Public Citizen* and *Akins*, holding that an *individual* does not suffer an informational injury from an agency's failure to publish legally required privacy impact assessments unless the individual can establish an *additional*, secondary privacy harm. App. 14a. 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 Federal Advisory Committee Act ("FACA"). *Public Citizen*, 491 U.S. at 447–48. 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). The Court directed lower courts to analyze Congress's judgment only when Congress has elevated *new* intangible injuries "that were previously inadequate in law"—not when a statute protects against a well-established injury long recognized by this Court. *Id.* at 1549 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992)).

In *EPIC v. PACEI*, the D.C. Circuit deviated from the informational injury standard established in *Public Citizen*, *Akins*, and *Spokeo*, holding that EPIC lacked standing to challenge the Government's refusal

to produce a privacy impact assessment as required under the E-Government Act. It was 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[.]" *PACEI*, 878 F.3d at 378. Rather, the court held that it lacked Article III jurisdiction because it concluded that EPIC failed to satisfy the purported second prong of the test in *Friends of Animals v. Jewell*, 828 F.3d 989 (D.C. Cir. 2016). *Ibid.* But the second prong in *Friends of Animals* was dicta and misconstrued the *prudential standing* discussion in *Akins*. The court in *Friends of Animals* did not actually address whether the plaintiffs "suffer[ed] the type of harm Congress sought to prevent by requiring disclosure[.]"828 F.3d at 992.

Applying the *Friends of Animals* test in *PACEI*, 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." *PACEI*, 878 F.3d at 378 (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.

In this case, the D.C. Circuit went further still, declaring that *individuals* do not suffer an informational injury by virtue of an agency's failure to publish a legally required privacy impact assessment. Rather, on the court's view, EPIC needed to show that its members had suffered the "type of harm Congress sought to prevent by requiring disclosure"—i.e., "harm to individual privacy." App. 13a–14a. The court read *PACEI* to "reject the possibility that § 208 can support an informational injury theory, at least in the absence of a colorable privacy harm of the type that Congress sought to prevent through the E-Government Act." *Ibid*. The court acknowledged that, in enacting the E-Government Act, Congress explicitly aimed to "provide increased opportunities for citizen participation in Government," and "[t]o make the Federal Government more transparent and accountable." App. 2a (quoting E-Government Act §§ 2(b)(2), (9)). Yet the court decided—with no basis in precedent—that "§ 208 is fundamentally different from statutes like the Freedom of Information Act (FOIA) where the harm Congress sought to prevent was a lack of information itself." App. 14a. The court focused solely on Congress's aim to "ensure sufficient protections for the privacy of personal information," ignoring the informational objectives that Congress expressly identified in the E-Government Act. App. 14a (quoting E-Government Act § 208(a)). On this basis, the court determined that "EPIC must show how the lack of a timely PIA caused its members to suffer the kind of harm that Congress did intend to prevent: harm to individual privacy." *Ibid*.

The court of appeals' analysis is directly at odds with this Court's 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 members did face an imminent privacy harm from the respondents' collection of citizenship data, 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 provision] 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). The court of appeals' reading of section 208, though 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.

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. 8a. 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; *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. *Ibid.*

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.

In *American Canoe Association, Inc. v. City of Louisa Water & Sewer Commission*, 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. 389 F.3d 536, 540–41 (6th. Cir. 2004). 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 Forest 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. at 21). The D.C. Circuit recently reaffirmed *Ethyl Corp.* in *Environmental Defense Fund v. Environmental Protection Agency*, holding that a plaintiff who challenged an EPA rule as unlawfully shielding information from public disclosure had asserted "a quintessential claim of informational standing." 922 F.3d 446, 452 (D.C. Cir. 2019); *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 requirement for informational injury onto the rule of *Akins* and *Public Citizen*. These decisions require that plaintiffs show that they suffered an additional harm. Many of these decisions cite dicta from the D.C. Circuit opinion in *Friends of Animals* that a plaintiff must "suffer[] . . . the type of harm Congress sought to prevent by requiring disclosure." 828 F. 3d at 992. Panels of the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth Circuits have relied on this flawed analysis.

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 logic, 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 *Long v. Southeastern Pennsylvania Transportation Authority*, the Third Circuit held that a group of plaintiffs had been injured by SEPTA's failure to provide copies of their consumer reports, but not by SEPTA's failure to notify them of their FCRA rights. 903 F.3d 312, 325 (3d Cir. 2018). The court reasoned that the former violation worked "'the very harm that Congress sought to prevent'" under the FCRA, *id.* at 324, whereas the latter violation was simply a "bare procedural violation" of the statute. *Id.* at 325.

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). 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 *Huff v. TeleCheck Services, Inc.*, the Sixth Circuit held that a plaintiff could not establish that a check verification company's failure to disclose all information required under FCRA was a concrete injury. 923 F.3d 458 (6th Cir. 2019). The court reasoned that the "alleged statutory violation did not harm [plaintiff's] interests" under FCRA because "it had no adverse consequences." *Id.* at 465.

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.* More recently, in *Casillas v. Madison Avenue Associates, Inc.*, the Seventh Circuit rejected a plaintiff's argument that she suffered an informational injury due to the defendant's failure to disclose how to dispute or verify her debt under the Fair Debt Collection Practices Act ("FDCPA"). 926 F.3d 329, 337–38 (7th Cir. 2019). The court distinguished the FDCPA from the disclosure statutes at issue in *Akins* and *Public Citizen*, reasoning that that the FDCPA "protects an entirely different interest" and that

plaintiff "alleged no material risk of harm to that interest." *Id.* at 338.

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 the 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. 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. Not only does the D.C. Circuit decision prevent organizations such as EPIC from suing when an agency fails to publish a privacy impact assessment, it also bars individuals—even those who are the subjects of a data collection—from seeking publication of the required assessment. Under the court of appeals' view of informational standing, section 208 would be unenforceable.

Section 208 establishes critical safeguards for government recordkeeping systems, setting out obligations that federal agencies must satisfy prior to initiating any collection and use of personal data. Section 208 also imposes a publication requirement for privacy impact assessments so that the public can assess the adequacy of privacy safeguards for a proposed collection of personal data. 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 undermine both objectives. Contrary to the D.C. Circuit's postulation, 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 and its members. Nowhere does the Act suggest that the right is limited to individuals who can demonstrate an additional privacy harm. 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 those who would benefit from passage of the Act. 148 Cong. Rec. at 11,228 (statement of Sen. Lieberman). EPIC and its members are part 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 on 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).[2] The OMB guidance outlines the 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." *Ibid.*

The court of appeals simply misunderstood how section 208 achieves its objective: the requirement to make the privacy impact assessment "publicly

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[2] https://georgewbush-whitehouse.archives.gov/omb/memoranda/m03-22.html.

available" is the key. E-Government Act § 208(b)(1)(B)(iii). Members of the public—both organizations and individuals—have a right to the information and must be able to enforce that right in court. 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—which fatally limits individuals' ability to enforce the statute and bars organizations from doing the same—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 D.C. Circuit replaced the straightforward informational injury test affirmed in *Akins* with its own inquiry about what "type of harm" Congress "sought to prevent" when it enacted the E-Government Act. App. 13a. 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).

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 a Congressionally-envisaged harm separate from the denial of information. App. 14a. *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, or 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 decision of this Court in *New York v. Department of Commerce*—which prompted the removal of the citizenship question from the 2020 Census—has rendered this case moot 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); *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). 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) (internal quotation marks omitted). The day before the D.C. Circuit's decision in this case, on June 27, 2019, this Court affirmed in part a lower court decision prohibiting the Bureau from adding the citizenship question to the census. *Dep't of Commerce*, 139 S. Ct. at 2576. On July 11, 2019, President Donald Trump confirmed that—as a result of the Court's decision—the Department of Commerce had withdrawn the citizenship question. Exec. Order No. 13,880, Fed. Reg. 33,821, 33,821 (2019). There being no more citizenship question on the 2020 Census, this case is moot in its entirety. *See Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992).

Moreover, the mootness of this case is entirely attributable to events beyond EPIC's control. EPIC

has thus been unfairly deprived 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."). 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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