No. 18-267

IN THE
Supreme Court of the United States

ELECTRONIC PRIVACY INFORMATION CENTER,

Petitioner,

v.

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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Both parties agree that this case has become moot because of the Government's unilateral action and also that the Government prevailed below. EPIC's ability to seek further review has thus been frustrated, and vacatur of the panel opinion 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 unavailing. The equities unambiguously favor vacatur here where the Government, as the prevailing party below, created the mootness through its

voluntary and unilateral action. Had the government not mooted this case, the Court could have reviewed the D.C. Circuit's decision, which conflicts with decisions of this Court and other circuits about informational standing under Article III. The government's action has precluded that opportunity.

ARGUMENT

I. THE GOVERNMENT'S EQUITIES ARGUMENTS ARE MERITLESS

The Government acknowledges that *Munsingwear* vacatur is "rooted in equity," Op. 16, 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) misrepresents the procedural and factual history of this case. Op. 16–18.

1. This Court has never required that a litigant seeking vacatur show that "the prevailing party has deliberately frustrated further review." Op. 17. The Government offers no authority for that contention. Instead, as the Court stressed in *Azar v. Garza*, 138 S. Ct. 1790 (2018), 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 Government caused this case to become moot by terminating the Commission and deleting the state voter data in dispute. Op. 17. In these circumstances, "the normal rule should apply," and

the decision should be vacated. *Camreta*, 563 U.S. at 713.[1]

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. Op. 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 panel opinion. This concern is not "speculative," Op. 17, as the Government well knows: the

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[1] The Government also makes a speculative argument about what the lower court might have done "had this case been rendered moot *before* the court of appeals issued its opinion." Op. 16. The Government does not explain why any court would decline to rule on narrow, nonprecedential mootness grounds whenever possible or why the Government's guesswork should upset the normal rule of vacatur.

Government is currently the defendant in two other suits brought by EPIC under the E-Government Act. *See* Complaint, *EPIC v. Dep't of Commerce*, No. 18-2711 (D.D.C. filed Nov. 20, 2018); Complaint, *EPIC v. DHS*, No. 18-1268 (D.D.C. filed May 30, 2018).

Equity counsels against allowing these related cases to be controlled by a panel opinion that became unreviewable due to the Government's action.

3. The Government's final attempt at an equities argument is a paragraph full of vague insinuations about EPIC's "litigation strategy." But there is nothing remotely untoward about EPIC's decision to (1) seek vacatur of an appellate ruling after the Government mooted EPIC's interlocutory appeal, while (2) preserving EPIC's right to fully litigate a *different* set of issues before the district court. EPIC proceeded exactly as it should have. On July 24, 2017, the District Court denied EPIC's motion for preliminary injunction. App. 67a. EPIC promptly appealed that decision. On December 26, 2017, the D.C. Circuit affirmed the district court's denial of a preliminary injunction on alternate grounds. App. 16a. Eight days later—with a favorable precedent in hand—the Government terminated the Commission in response to "endless legal battles," thereby mooting EPIC's appeal and preventing further merits review. *See* The White House, *Statement by the Press Secretary on the Presidential Advisory Commission on Election Integrity* (Jan. 3, 2018).[2] EPIC moved the panel to vacate its own decision and petitioned the en banc court for rehearing or vacatur;

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[2] https://www.whitehouse.gov/briefings-statements/statement-press-secretary-presidential-advisory-commission-election-integrity/.

the court denied both motions without explanation. App. 21a, 22a.

EPIC's other claims against the Government were still pending in the district court, and none of those claims were resolved by the D.C. Circuit's decision.[3] There is nothing unusual about an appeal on one set of issues becoming moot even while other issues remain pending in the district court. *See, e.g.*, *Honig v. Students of California Sch. for the Blind*, 471 U.S. 148, 149–50 (1985) (granting *Munsingwear* vacatur of a Ninth Circuit preliminary injunction ruling, even as "[o]ther claims for relief . . . still remain[ed] to be resolved by the District Court").

II. THE GOVERNMENT CANNOT RECONCILE THE DECISION BELOW WITH *AKINS* AND *PUBLIC CITIZEN*

Most of the Government's Opposition is directed to the merits of EPIC's standing argument rather than the vacatur issue. But the Government has failed to rebut EPIC's showing that the decision below conflicts with the decisions of this Court in *FEC v. Akins*, 524 U.S. 11 (1998), and *Public Citizen v. DOJ*, 491 U.S. 440 (1988), as well as other circuits. The Government also

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[3] EPIC's complaint raised two constitutional claims, D. Ct. Doc. 52 at 38–43 (Oct. 26, 2017), neither of which was addressed in the preliminary injunction appeal. EPIC also sought permanent disgorgement of voter data, D. Ct. Doc. 33 at 15 (July 11, 2017), whereas EPIC's appeal sought only an interim halt to data collection. App. 7a. And EPIC had presented several different standing arguments, which the district court would have evaluated (under a different burden of proof) at the motion to dismiss stage.

misreads the decision of the court of appeals in this case.

1. The Government argues that a plaintiff cannot establish an informational injury based on the allegation it "sought and w[as] denied specific agency records." Op. 10. That statement is contrary to both *Public Citizen*, 491 U.S. at 449, and *Akins*, 524 U.S. at 21. And the Government's references to *Spokeo v. Robins*, 136 S. Ct. 1540 (2016), do not support its point either. The Court in *Spokeo* 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." 136 S. Ct. at 1549. Rather than acknowledge this well-established precedent, the Government seeks to justify the decision below by adding new requirements to the traditional informational injury test.

a. First the Government contends that an informational injury must be based on a statute that "contain[s] a private right of action to enforce its procedural requirements." Op. 10. The Government cites no support for this proposition, and there is none. Indeed, the plaintiffs in *Public Citizen* would have failed under such a test because the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. 2, does not set out a private right of action. But the Court held that the plaintiffs in *Public Citizen* satisfied the requirements of Article III, which means the presence of a statutory cause of action cannot be a prerequisite for informational injury. The Government also fails to explain why it matters whether a statute that mandates release of information provides a stand-alone right of action—*e.g.*, the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(4)(B)—or instead is enforced through the "not

in accordance with law" provision of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A)—*e.g.*, the FACA and the E-Government Act. In either circumstance, Congress has extended a legal right to receive information and has provided a mechanism by which that right can be enforced.

b. The Government's attempt to read a gloss onto *Akins* fares no better. The Government repeatedly misconstrues language from the *Akins* opinion unrelated to the Article III informational injury test. 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" cases such as *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. Op. 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). On the very same page of the Opposition, the Government acknowledges that "whether a plaintiff falls within a statute's 'zone of interests' is not a jurisdictional inquiry." Op. 10.

The Government also misinterprets a passage in *Akins* where the Court distinguished 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's second argument in defense of the decision below—that EPIC's informational injury is "not sufficiently particularized," Op. 11—is misguided in several respects. First, it is completely divorced from the court of appeals' analysis, which focused on the *concreteness*, not on the *particularity*, of EPIC's injury. App. 10a–12a. *Cf. Spokeo*, 136 S. Ct. at 1548 (explaining the difference between the two inquiries). Second, the argument is meritless in any event. EPIC plainly has a concrete and particularized injury from the denial of information to which it is legally entitled. App. 54a. There is, quite literally, no organization other than the "Electronic Privacy Information Center" that suffers a greater concrete harm when a federal agency fails to comply with a publication requirement for privacy impact assessments. If EPIC does not satisfy the informational injury test in this case, then no organization would. Such an outcome would be contrary to the E-Government Act, which anticipated that organizations such as EPIC would have access to the reports section 208 required. *See* Pet. for Cert. 26–30.

The Government's effort to reargue the basis of the decision below is telling and reveals the need for this Court to grant vacatur. The court below focused

entirely on the informational injury and related organizational injury claims. App. 10a–15a. The court below never discussed or even cited *Richardson*, which makes sense because this is not a taxpayer standing or generalized grievance case. EPIC sought specific information to which it asserted a legal entitlement and was denied access to that information. Under *Akins* and *Public Citizen*, that is a concrete and particularized informational injury sufficient under Article III.

3. The Government also misreads the appellate decisions that interpret *Akins* and *Public Citizen*. There is simply no way to read the panel opinion from this case in harmony with the decisions in the Sixth, Seventh, 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), on the grounds that the plaintiffs had standing either (1) stemming from injuries to their members or (2) because the Clean Water Act has a "broad right of action." Op. 13. The first contention is false; the other is irrelevant. As the court explained, "[a]lthough American Canoe originally sued on its own behalf and in its representational capacity, it does not argue on appeal that it has standing to sue in its representational capacity." *American Canoe*, 389 F.3d at 540. That is why the court went on to analyze the plaintiffs' "organizational standing" claims based on their informational injury. *Id*. at 544–47. The *American Canoe* court was clear that any "plus" factor under *Akins* is "liberally construed" and "easily met" where the "claims rest upon [the] organizational interests which are negatively affected by the defendants' failure to fulfill its monitoring and reporting obligations." *Id.* at 546. This

is precisely the argument that EPIC made in this case, and the Opposition's characterization of *America Canoe* cannot be reconciled with the decision below.

The Government also misstates the impact 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 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").

The Government does not make any attempt to explain how the straightforward reading of *Akins* embraced by the Sixth, Eighth, and Eleventh Circuits can be squared with the more restrictive tests adopted by the Second, Fourth, Fifth, Seventh, and Ninth. Pet.

23–25. This is precisely the type of conflict that would ordinarily warrant this Court's review. 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); *Garza*, 138 S. Ct. at 1793; *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) .

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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