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

No. 17-5171

IN THE UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

ELECTRONIC PRIVACY INFORMATION CENTER,
Plaintiff-Appellant,

v.

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

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

PETITION OF THE ELECTRONIC PRIVACY INFORMATION CENTER FOR REHEARING EN BANC OR, IN THE ALTERNATIVE, FOR VACATUR AND REMAND

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STATEMENT REQUIRED BY RULE 35(b)

There is no doubt that "a plaintiff suffers an 'injury in fact' 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) (citing *Public Citizen v. DOJ*, 491 U.S. 440, 449 (1989)). This Court has repeatedly and emphatically embraced the *Akins* rule and found that Article III is satisfied so long as the plaintiff "assert[s] 'a view of the law under which the defendant (or an entity it regulates) is obligated to disclose certain information that the plaintiff has a right to obtain.'" *Waterkeeper Alliance v. EPA*, 853 F.3d 527, 533 (D.C. Cir. 2017); *see also Friends of Animals v. Jewell* (*Friends of Animals I*), 824 F.3d 1033, 1041 (D.C. Cir. 2016); *Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108, 109 (D.C. Cir. 2012) (per curiam); *Shays v. FEC*, 528 F.3d 914, 923 (D.C. Cir. 2008); *Zivotofsky v. Sec'y of State*, 444 F.3d 614, 618 (D.C. Cir. 2006).

Despite the clear rule established in *Akins* and followed by this Court, the panel held that the "Electronic Privacy Information Center" could not establish standing to seek the disclosure of privacy impact assessments required by section 208 of the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2921–22 (Dec. 17, 2002) ("E-Government Act"). This outcome is contrary to *Akins* and to the very purpose of the statute. As the District Court explained, section 208 requires that *before* "initiating a new collection of information," an agency must

"conduct a privacy impact assessment" and then "make the privacy impact assessment publicly available through the website of the agency, publication in the Federal Record, or other means." E-Government Act § 208(b).

A stated purpose of the E-Government Act is "[t]o make the Federal Government more transparent and accountable." *Id*. § 2(b)(9). This Court explained in *Friends of Animals I* that "a denial of access to information can work an 'injury in fact' for standing purposes, at least where a statute (on the claimant's reading) requires that the information 'be publicly disclosed' and there 'is no reason to doubt their claim that the information would help them.'" 824 F.3d at 1040–41 (quoting *Ethyl Corp. v. EPA*, 306 F.3d 1144, 1148 (D.C. Cir. 2002)).

The panel opinion does not even attempt to distinguish the informational injury that EPIC suffered from the informational injury recognized by this Court in *Friends of Animals I* or *Waterkeeper Alliance*. In *Friends of Animals I,* the Court found that the plaintiff organization "inform[ed] its members of its advocacy work through its magazine, website, and other published reports." *Id*. at 1040. The District Court in this case found that EPIC carries out its mission by using "information it obtains from the government . . . to educate the public regarding privacy issues." JA 30. In *Waterkeeper Alliance*, the Court did not even discuss the specific interests of the plaintiffs; instead it simply referred to them as "[t]he environmentalists." 853 F.3d at 532. For the purposes of informational standing

under *Akins*, there is no difference between EPIC and the plaintiffs in *Friends of Animals I* or *Waterkeeper Alliance*.

The panel decision not only "conflicts with a decision of the United States Supreme Court" in *FEC v. Akins*, 524 U.S. 11 (1998), but also conflicts with numerous decisions of this Court such that "consideration by the full court is . . . necessary to secure and maintain uniformity of the court's decisions." Fed. R. App. P. 35(b).

QUESTION PRESENTED

Whether a plaintiff who asserts "a view of the law under which the defendant (or an entity it regulates) is obligated to disclose certain information that the plaintiff has a right to obtain," *Waterkeeper Alliance v. EPA*, 853 F.3d 527, 533 (D.C. Cir. 2017), and is denied that information has suffered an injury in fact sufficient to establish informational standing.

STATEMENT OF THE CASE

The Presidential Advisory Commission on Election Integrity was created on May 11, 2017. Exec. Order No. 13,799, 82 Fed. Reg. 22,389 (May 11, 2017). On June 28, 2017, Commission Vice Chair Kris Kobach sent letters to election officials in all fifty states and the District of Columbia seeking to collect a wide array of personal voter information. *E.g.*, Letter from Kris Kobach, Vice Chair, Presidential Advisory Comm'n on Election Integrity, to John Merrill, Secretary of

State, Alabama (June 28, 2017), JA 60. EPIC filed suit on July 3, 2017, and subsequently moved for a preliminary injunction to halt the Commission's collection of voter data pending the publication of a privacy impact assessment pursuant to section 208 of the E-Government Act. Pl.'s Compl., Dkt. No. 1; Pl.'s Second Am. Compl., Dkt. No. 33; Pl's Am. Mot. Prelim. Inj., Dkt. No. 35. On July 24, 2017, the District Court denied EPIC's motion, holding that neither the Commission nor any of the other named Defendants were subject to judicial review under the Administrative Procedure Act ("APA"). JA 39–46.

EPIC filed a notice of appeal from the District Court's decision on July 25, 2017. Notice of Appeal, Dkt. No. 42. EPIC asked this Court to determine "[w]hether the District Court erred in holding that APA review is unavailable for the collection of state voter data by Defendant Presidential Advisory Commission on Election Integrity" and "[w]hether the General Services Administration [is required] to provide all the services, funds, facilities, staff, and equipment necessary to carry out the Commission's collection of state voter data." Appellant's Br. 4. EPIC also asked this Court "to issue a preliminary injunction halting the Commission's collection of state voter data" under *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290 (D.C. Cir. 2006). Appellant's Br. 2, 18–19. On December 26, 2017, the panel affirmed the District Court's denial of a preliminary injunction on other grounds, finding that EPIC "d[id] not show a

substantial likelihood of standing to press its claims that the defendants have violated the E-Government Act." Opinion ("Op.") 14. The panel rejected the District Court's nine-page analysis, JA 29–37, and concluded in three paragraphs that EPIC lacked informational standing.

On January 3, 2018, the President issued an Executive Order terminating the Commission in its entirety. Exec. Order No. 13,820, 83 Fed. Reg. 969 (Jan. 3, 2018). On January 11, 2018, EPIC moved the panel to vacate its decision and remand the case to the District Court.

ARGUMENT

Rehearing en banc of this case is required for two distinct reasons. Not only does the panel's ruling conflict with a decision of the Supreme Court; it also conflicts with numerous decisions of *this* Court and with decisions of other circuits. Consideration by the full Court is necessary to correct the panel decision's conflict with Supreme Court precedent and to maintain uniformity of this Court's decisions.

In the alternative, because the Commission was terminated, the Court should vacate the panel decision, dismiss this appeal as moot, and remand the case to the District Court. The dissolution of the Commission has, by no fault of EPIC, brought the dispute on appeal to a sudden end and foreclosed further review on the merits. Vacatur and dismissal are therefore warranted.

I. The panel's cursory informational standing analysis is in direct conflict with numerous decisions by this Court and by the Supreme Court.

The panel decision begins, as all informational standing cases should, with a reference to *FEC v. Akins*, 524 U.S. 11 (1998). Under *Akins*, it was necessary for the panel to determine only whether EPIC suffered an injury from its "inability to obtain information" that, based on EPIC's "view of the law," a statute required the Commission to make public. 524 U.S. at 21. In *Akins*, the Supreme Court emphasized that "[t]here is no reason to doubt respondents' claim that the information would help them (and others to whom they would communicate it) . . . ." *Id.* Nowhere does *Akins* suggest that a court conduct an inquiry into the "type of harm" Congress sought to prevent.

This Court has routinely followed *Akins*. In *Waterkeeper Alliance v. EPA*, 853 F.3d 527 (D.C. Cir. 2017), the Court found that the "reduct[ion] of information that must be publicly disclosed under EPCRA" allegedly caused by the agency's unlawful CERCLA exemption was sufficient to establish Article III standing to challenge the exemption. *Id*. at 533. In *Friends of Animals I*, this Court held that the alleged failure to comply with section 10(c) of the Endangered Species Act was sufficient to establish Article III standing to challenge permit notice exemptions. *Id.* at 1041.

But rather than analyze EPIC's claim under *Akins* and the numerous D.C. Circuit opinions applying *Akins*, the panel misconstrued *Friends of Animals v.*

Jewell (*Friends of Animals II*), 828 F.3d 989 (D.C. Cir. 2016), and produced an outcome that is both at odds with well-established law and illogical. The panel's opinion turns on a selectively quoted passage from *Friends of Animals II*:

> [T]he plaintiff *must show* that "(1) it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it, and (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure." *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016)

Op. 9. (emphasis added).

First, the panel's excerpt is not correct. The Court in *Friends of Animals II* said that a "plaintiff suffers sufficiently concrete and particularized informational injury where the plaintiff *alleges* . . . ." 828 F.3d at 992. Second, the panel's interpretation is not correct. As the Court further stated in *Friends of Animals II*:

> In some instances, a plaintiff suffers the type of harm Congress sought to remedy when it simply "s[eeks] and [is] denied specific agency records." *Pub. Citizen,* 491 U.S. at 449-50. In others, a plaintiff may need to allege that nondisclosure has caused it to suffer the kind of harm from which Congress, in mandating disclosure, sought to protect individuals or organizations like it. Compare *Akins*, 524 U.S. at 21-23, and *Shays v. FEC*, 528 F.3d 914, 923, 381 U.S. App. D.C. 296 (D.C. Cir. 2008), with *Nader v. FEC*, 725 F.3d 226, 230, 406 U.S. App. D.C. 353 (D.C. Cir. 2013).

Id.

EPIC suffered precisely the type of harm described by the Supreme Court in *Akins*. "[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). Congress clearly sought to enable "individuals and organizations" such as EPIC to obtain privacy impact assessments when it passed the E-Government Act. And *Nader v. FEC*, 725 F.3d 226 (D.C. Cir. 2013), the case cited in *Friends of Animals II* in contrast to *Akins*, was not about a plaintiff who sought to obtain and use information. As this Court made clear in *Nader*, the plaintiff did not "seek information to facilitate his informed participation in the political process. Instead, he seeks to force the FEC to 'get the bad guys.'" 725 F.3d at 230. The panel simply misunderstood the Nader reference.

The panel cites no authority for dismissing an informational standing claim brought by an organization that has asserted a view of a public disclosure law that requires the release of certain information. There simply is none. The District Court discussed the statutory structure and EPIC's interest at length in its opinion, finding that EPIC had established informational standing. JA 29–37. The District Court's analysis included a detailed discussion of this Court's prior cases, including *Friends of Animals I*, 824 F.3d at 1041, *Friends of Animals II*, 828 F.3d at 992, *Zivotofsky*, 444 F.3d at 615–19, and *Judicial Watch v. U.S. Dep't of Commerce*, 583 F.3d 871, 873 (D.C. Cir. 2009), as well as the Supreme Court's decisions in *Akins*, 524 U.S. at 24, *Public Citizen*, 491 U.S. at 447, and *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–75 (1982). The panel opinion

dismisses EPIC's informational standing claim in three cursory paragraphs that do not discuss any of these cases and intentionally ignore text that makes clear Congress intended section 208 of the E-Government Act to promote government transparency.

En banc rehearing is warranted where, as here, "the panel decision conflicts" with earlier decisions and "consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions." Fed. R. App. P. 35(b)(1)(A). Without vacatur and en banc rehearing, courts in this Circuit will be forced to choose between two different lines of informational standing cases: those that follow the Supreme Court's rule in *Akins*, and those that misconstrue *Friends of Animals II* and import a test—"type of harm," Op. 9–10—into informational standing analysis that never previously existed.

A quick review of recent cases in this Court upholding plaintiffs' informational standing claims, which the lower court analyzed at length and the panel did not discuss, makes clear that the panel decision creates a severe intra-circuit conflict. In *Waterkeeper Alliance*, the Court held that plaintiffs (groups of "environmentalists") had standing to challenge a final rule promulgated by the Environmental Protection Agency that exempts certain animal waste releases by farms from the interlocking reporting requirements of two federal laws (CERCLA and EPCRA). 853 F.3d at 532–33. Notably, there is no discussion in *Waterkeeper*

Alliance of whether the plaintiffs "suffered the type of harm that" CERCLA and EPCRA "see[k] to prevent." Op. 9.

The panel's determination that a court must conduct a "type of harm" analysis in order to establish its Article III jurisdiction over a case is clearly inconsistent. EPIC's interest in promoting privacy by obtaining information about the Commission's data collection practices is indistinguishable from the interests of the environmentalist plaintiffs in *Waterkeeper Alliance* in promoting environmental protection by obtaining information about animal waste emissions. Like *Waterkeeper Alliance*, the Court's decision in *Friends of Animals I* did not discuss or analyze the whether the plaintiffs "suffered the type of harm" that the Endangered Species Act "seeks to prevent." Op. 9. Indeed, the interests of the plaintiffs in *Friends of Animals* and purposes of the Act are aligned in the same way that EPIC's interests are aligned with the purposes of the E-Government Act.

The panel decision not only conflicts with numerous prior informational standing decisions by this Court; it also conflicts with the Supreme Court's decisions in *Akins* and *Public Citizen*. In *Akins*, the Court held that the plaintiffs could establish an "injury in fact" based on their "inability to obtain information" and noted that there "was no reason to doubt their claim that the information would help them." 524 U.S. at 21. Similarly, the panel decision conflicts with the decision in *Public Citizen* where the Court specifically determined that the violation of a

statutory right to information was sufficient to establish information standing. 491 U.S. at 449. The Court noted that it has "never suggested that those requesting information under [the FOIA] need show more than that they sought and were denied specific agency records." *Id*.

The panel's attempt to carve out a new requirement for informational standing in this case is misstated, contrary to law, and illogical. The panel contends that "section 208 is directed at individual *privacy*, which is not at stake for EPIC [sic]." Op. at 10 (emphasis in original). First, the panel emphasized the wrong term in its conclusion. The point the panel is apparently trying to make is that EPIC does not have an *individual* privacy interest. But that is also irrelevant. The *Friends of Animals II* passage on which the panel relies makes clear that organizations have informational standing where Congress "sought to protect individuals or *organizations*." *Friends of Animals II*, 828 F.3d at 992 (emphasis added). The panel's reading of section 208 is also contrary to EPIC's "view of the law," *Akins*, 524 U.S. at 21, and the plain text of the statute. Most remarkably, the panel has confused the public disclosure requirements set out in section 208, which do not distinguish between individuals and organizations, with the individual redress provisions of the Privacy Act. 5 U.S.C. § 552a ("Records maintained on *individuals*" (emphasis added)). These errors of fact and law underscore the dangers of allowing the panel opinion to stand.

The panel decision threatens core principles of constitutional and administrative law upon which four decades of this Court's decisions are based. EPIC is no different than the public interest groups seeking disclosure of Committee records in *Public Citizen*, the environmental groups seeking disclosure of waste emission information in *Waterkeeper Alliance*, the animal welfare group seeking disclosure of hunting permits in *Friends of Animals I*, or the voters seeking disclosure of campaign contributions in *Akins*. There is simply no justification for the Court to insert a "type of harm" analysis into the well-established *Akins* test for informational standing. Doing so would upset the uniformity of this Court's decisions and contradict binding Supreme Court precedent.

II. The panel decision also conflicts with authoritative decisions of other United States Courts of Appeals that have applied *Akins*.

The panel decision also conflicts with decisions in other circuits. Therefore, this case involves a "question[n] of exceptional importance." Fed. R. App. P. 35(b)(1)(B). Specifically, this case raises the question of whether plaintiffs satisfy the requirements of Article III standing when they allege that the defendants "are disobeying the law in failing to provide information that the plaintiffs desire and allegedly need," *Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 546 (6th Cir. 2004), or whether courts must first consider whether a plaintiff has "suffered the type of harm Congress sought to prevent by requiring disclosure," Op. 9.

Other circuits have embraced the *Akins* analysis and rejected more restrictive views of informational standing requirements. *See, e.g.*, *Am. Canoe Ass'n*, 389 F.3d at 546 ("To 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 we believe it is easily met in this case."); *Ctr. for Biological Diversity v. BP America Production Co.*, 704 F.3d 413, 429–30 (5th Cir. 2013) (finding that an environmental group had standing to sue on behalf of its members based on the defendant's failure to release information as required under the Clean Water Act, CERCLA, and EPCRA); *Charvat v. Mutual First Federal Credit Union*, 725 F.3d 819 (8th Cir. 2013) (holding that "an informational injury alone is sufficient to confer standing, even without an additional economic or other injury" and finding that failure to receive notice, in violation of the Electronic Fund Transfer Act, was an injury in fact); *Heartwood, Inc. v. U.S. Forest Serv.*, 230 F.3d 947 (7th Cir. 2000) (finding an informational injury where the defendant agency failed to conduct environmental assessments to provide stakeholders with information necessary to monitor agency activity under the National Environmental Protection Act).

III. The panel decision should be vacated as moot under *Munsingwear*.

The Court, in the alternative, should vacate the panel decision, dismiss EPIC's appeal, and remand the case to the District Court because the President has unilaterally mooted the case and foreclosed further appellate review. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *United States v. Schaffer*, 240 F.3d 35, 38 (D.C. Cir. 2001) (en banc); *Clarke v. United States*, 915 F.2d 699, 706 (D.C. Cir. 1990) (en banc). EPIC has moved the panel to grant vacatur and remand, but the panel has not yet ruled on that motion.

On January 3, 2018, the President terminated the Commission by Executive Order, effective immediately. Exec. Order No. 13,820. With no Commission left to enjoin and no data collection left to halt, EPIC's appeal—which sought "a preliminary injunction halting the Commission's collection of state voter data"—has plainly been rendered moot. Appellant's Br. 2. There is "no case or controversy, and a suit becomes moot, when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)) (internal quotation marks omitted). As a result of the President's order, this appeal presents neither a live dispute nor a legally cognizable interest. Because no court could grant "any effectual relief whatever" to EPIC on the instant appeal, "it

must be dismissed." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

Moreover, the demise of the Commission has unfairly deprived EPIC of any opportunity to seek appellate review of the panel opinion and judgment. Article III's "case or controversy" requirement now bars this Court and the Supreme Court from further consideration of the merits of EPIC's appeal. *See Holiday CVS, L.L.C. v. Holder*, 493 F. App'x 108, 109 (D.C. Cir. 2012) (citing *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983)) ("Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies."). Vacatur of the panel decision is therefore proper.

This Court has repeatedly recognized that it is "appropriate for a court of appeals to vacate its own judgment" where, as here, "it is made aware of events that moot the case during the time available to seek certiorari." *Clarke*, 915 F.2d at 706 (quoting Charles Alan Wright et al., *Federal Practice and Procedure* § 3533.10 at 435 (1984)). As the Court explained in *Schaffer*:

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

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

Cir. 1985)). The Supreme Court has emphasized that a party such as EPIC "who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994).

If the Court does not grant rehearing en banc, it should vacate the panel judgment and opinion, dismiss this appeal as moot, and remand the case to the District Court.

CONCLUSION

For the foregoing reasons, the petition should be granted and the panel decision should be vacated.

Respectfully submitted,

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Dated: February 9, 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). The petition is composed in a 14-point proportional typeface, Times New Roman, and complies with the word limit of Fed. R. App. P. 35(b)(2)(A) and D.C. Cir. R. 35(b) because it contains 3,779 words.

/s/ Marc Rotenberg
MARC ROTENBERG

CERTIFICATE OF SERVICE

I, Marc Rotenberg, hereby certify that on February 9, 2018, I electronically filed the foregoing petition with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the CM/ECF system:

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