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

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELECTRONIC PRIVACY INFORMATION CENTER, Plaintiff-Appellant, v. EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, et al.,[1] Defendants-Appellees.	No. 17-5171

OPPOSITION TO PETITION FOR REHEARING OR, IN THE ALTERNATIVE, FOR VACATUR AND REMAND

[1] The Presidential Advisory Commission on Election Integrity has been terminated. *See* Exec. Order No. 13,820, 83 Fed. Reg. 969 (Jan. 3, 2018). Accordingly, the Commission and persons sued in their capacity as members of the Commission are no longer parties.

INTRODUCTION AND SUMMARY

Plaintiff simultaneously urges that this case warrants review by the full Court and that this case is moot. These contentions cannot both be correct; in fact, neither one is.

In this suit, the Electronic Privacy Information Center challenges the Presidential Advisory Commission on Election Integrity's collection of publicly available voter data. Plaintiff sought a preliminary injunction that would prohibit the Commission from collecting any further data and require the defendants to "immediately delete and disgorge any voter roll data already collected or hereafter received." Proposed Order, Dkt. No. 35-6, at 2 (July 13, 2017).

The panel correctly concluded that plaintiff has not shown a likelihood of demonstrating standing. As the panel explained, plaintiff acknowledged that it lacked any cognizable interest in the gathering of voter data. Plaintiff instead sought to premise standing on its asserted interest in reviewing a report that, according to plaintiff, the government was required to prepare under the E-Government Act of 2002. The panel explained that the E-Government Act, which was expressly intended to protect individual privacy, does not create a cognizable legal interest in

entities whose privacy interests are not at stake. The panel's holding is correct and fully consistent with this Court's precedents, and does not warrant the full Court's review.

Nor is there any basis for en banc review of plaintiff's contention that the panel decision should be vacated on mootness grounds, an issue that is pending before the panel on plaintiff's motion to vacate. In any event, plaintiff's attempt to obtain vacatur on this ground does not bear scrutiny. Plaintiff does not argue that its case is moot; it urges instead that it should be permitted to return to district court to seek a portion of the relief that it sought in its preliminary-injunction motion that was the subject of its appeal to this Court. Plaintiff is not entitled to obtain vacatur of this Court's opinion in order to relitigate the assertions that were rejected by this Court.

The petition should be denied.

STATEMENT

1. Plaintiff instituted this action against the Commission, several of its members in their official capacities, the Executive Office of the President, the Office of the Vice President, the Director of White House Information Technology, the General Services Administration, the

Department of Defense, the U.S. Digital Service, and the Executive Committee for Presidential Information Technology.

Plaintiff moved for a preliminary injunction that would have prohibited the Commission from collecting any further data and would have required the defendants to "immediately delete and disgorge any voter roll data already collected or hereafter received." Proposed Order, Dkt. No. 35-6, at 2 (July 13, 2017). To demonstrate standing to seek this relief, plaintiff argued that the E-Government Act required the Commission to prepare a Privacy Impact Assessment before undertaking the data collection, and that plaintiff was injured because it was deprived of the ability to review this report. The district court accepted this contention, holding that plaintiff could likely demonstrate "informational standing" based on this alleged injury. Mem. Op. 16-24 [JA 29-37].

The district court denied the requested injunction, however, on the ground that neither the Commission nor any other defendant entity that had taken actions relevant here was an "agency" under the Administrative Procedure Act and that plaintiff therefore lacked a cause of action.

2. Plaintiff appealed, and on December 26, 2017, this Court affirmed on alternative grounds, concluding that plaintiff had not demonstrated that it had a likelihood of establishing standing.

The panel recognized that "'a denial of access to information can,' in certain circumstances, 'work an "injury in fact" for standing purposes.'" Op. 9 (quoting *American Soc'y for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 22 (D.C. Cir. 2011)). But the panel noted that under this Court's precedent, a plaintiff cannot assert an informational injury unless "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), *quoted at* Op. 9.

The panel explained that Section 208 of the E-Government Act of 2002, relied on by plaintiff, was not designed to avoid the type of harm claimed by plaintiff here. The panel observed that "Section 208, a 'Privacy Provision[]' by its very name, declares an express 'purpose' of 'ensur[ing] sufficient protections for the privacy of personal information as agencies implement citizen-centered electronic Government." Op. 10 (quoting E-Government Act of 2002, Pub. L. No. 107-347, § 208, 116 Stat. 2899, 2921-22, *codified at* 44 U.S.C. § 3501 note) (alterations in original). The panel

concluded that "the provision is intended to protect *individuals*—in the present context, voters—by requiring an agency to fully consider their privacy before collecting their personal information." *Id.* (emphasis in original). Because plaintiff "is not a voter," the panel concluded that plaintiff is "not the type of plaintiff the Congress had in mind." *Id.*

The panel rejected plaintiff's assertion of organizational injury for "similar reasons." Op. 10. Because plaintiff has no cognizable interest in the information at issue, it "cannot ground organizational injury on a non-existent interest." *Id.* at 11.

Judge Williams concurred, agreeing that plaintiff has not suffered an injury-in-fact for the reasons stated by the Court, but seeing "no need for any separate discussion of 'organizational injury.'" Concurring Op. 1.

3. On January 3, 2018, the President terminated the Commission by Executive Order. *See* Exec. Order No. 13,820, 83 Fed. Reg. 969 (Jan. 3, 2018). As the government has indicated in filings in other cases, the voter data that had been collected by the Commission remains, in encrypted form, on a White House server. Although the White House intends to destroy the data without using it, resolution of outstanding litigation and input from the National Archives and Records Administration is needed before that

step can be taken. *See* Third Decl. of Charles C. Herndon, Dkt. No. 82-2, *Joyner v. Presidential Advisory Comm'n on Election Integrity*, No. 17-22568-cv (S.D. Fla. Jan. 16, 2018).

On January 11, 2018, plaintiff moved to vacate the panel opinion and remand the case to the district court for further proceedings, urging that the case had become moot upon the termination of the Commission. The government opposed the motion, noting that the preliminary-injunction motion under review in this Court sought not only to prevent the Commission from taking further action to collect voter data, but also to compel other defendants to destroy information that is still in the government's possession. The motion is pending.

ARGUMENT

1. The panel applied this Court's precedents in analyzing whether plaintiff could demonstrate standing based on the asserted failure to comply with a provision of the E-Government Act of 2002 that requires agencies to conduct a Privacy Impact Assessment before undertaking certain types of data collection. The panel's conclusion was correct, and no further review is warranted.

Section 208 of the E-Government Act is not a public-disclosure statute. As the panel observed, Congress expressly stated that "[t]he purpose of this section is to ensure sufficient protections for the privacy of personal information as agencies implement citizen-centered electronic Government." E-Government Act of 2002, § 208(a), Pub. L. No. 107-347, 116 Stat. 2899, 2921, *codified at* 44 U.S.C. § 3501 note.

To this end, the statute requires agencies that collect, maintain, or disseminate personally identifiable information in electronic form to conduct a Privacy Impact Assessment before gathering data, and have that assessment reviewed by the agency's Chief Information Officer or equivalent. E-Government Act, § 208(b)(1)(B)(i)-(ii), 116 Stat. at 2922. These requirements are designed to improve the government's decisionmaking, and do not give rise to an informational interest in the general public. The requirement that, "after completion of the review" by the Chief Information Officer or equivalent, an agency must make the assessment publicly available "if practicable," *id.* § 208(b)(1)(B)(iii), 116 Stat. at 2922, does not alter the express purpose of the scheme or its intended beneficiaries. Congress required agencies to prepare and publish Privacy Impact Assessments in order to ensure that agencies will take account of

potential effects on individual privacy, not for the purpose of providing information to the general public.

Plaintiff does not dispute that, as the panel recognized, it does not represent any individual whose personal information might be collected. *See* Op. 10 ("[Plaintiff] is not a voter and is therefore not the type of plaintiff the Congress had in mind."). The panel thus properly concluded that the statute does not create a cognizable legal interest in plaintiff.

Plaintiff nevertheless argues that when the panel stated that "section 208 is directed at individual *privacy*," Op. 10 (emphasis in original), "the panel emphasized the wrong term," because the panel meant to say that plaintiff "does not have an *individual* privacy interest." Pet. 11 (plaintiff's emphasis). Plaintiff concludes that the panel mistakenly relied on the fact that plaintiff is an organization rather than an individual, which is "irrelevant." *Id.* Plaintiff offers no basis for its assertion that the panel was unable to articulate its analysis. The panel's reasoning was clear and correct: the statute was designed to protect privacy, and plaintiff has no privacy interest; hence, the statute does not create a cognizable legal interest in plaintiff. In any event, even if plaintiff had been able to identify an error in the Court's opinion, contentions involving the application of

this Court's precedent regarding informational injury in the particular context of the E-Government Act would not warrant review by the full Court.

Plaintiff is on no firmer ground in arguing that the panel should not even have analyzed whether Congress intended to afford plaintiff a legally cognizable right. *See* Pet. 6 (urging that the panel erred in "conduct[ing] an inquiry into the 'type of harm' Congress sought to prevent" (quoting Op. 9)). As plaintiff acknowledges, this Court has held that "[a] plaintiff suffers sufficiently concrete and particularized informational injury where the plaintiff alleges" that it has been deprived of information and that "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), *quoted at* Pet. 7. The panel did not err in conducting the inquiry expressly contemplated by this Court's precedent.

In *Nader v. FEC*, 725 F.3d 226 (D.C. Cir. 2013), similarly, this Court made clear that for purposes of establishing informational standing, "[i]t is not enough . . . to assert that disclosure is required by law." *Id.* at 229. Instead, "[o]nly if the statute grants a plaintiff a concrete interest in the

information sought will he be able to assert an injury in fact." *Id.* This Court held that where Congress sought to provide information to facilitate participation in a political process, plaintiffs who sought to participate in that process had standing, while plaintiffs who wanted information for other purposes did not. There is no merit to plaintiff's sweeping suggestion that *any* desire to obtain information suffices for standing purposes, such that entities with no cognizable legal interest in government action could challenge that action whenever the government is allegedly required to publish a report before taking action.

Plaintiff mistakenly suggests that *Nader* "was not about a plaintiff who sought to obtain and use information." Pet. 8. This Court made clear in that case that the plaintiff had argued "that the information sought . . . would be useful to him" in litigation. *Nader*, 725 F.3d at 230 n.*. Thus, the plaintiff did seek to obtain and use information; the defect in his argument was that his inability to obtain information was "sufficiently distant from the reasons that supported the decisions in [*FEC v. Akins*, 524 U.S. 11 (1998),] and [*Shays v. FEC*, 528 F.3d 914, 923 (D.C. Cir. 2008),] that . . . Nader lack[ed] informational standing." *Nader*, 725 F.3d at 230.

Plaintiff does not advance its argument by relying on cases that did not present the relevant issue. In *Waterkeeper Alliance v. EPA*, 853 F.3d 527 (D.C. Cir. 2017), for example, this Court considered a challenge by an environmental group to an EPA rule that would prevent the public disclosure of information that was allegedly required under the Emergency Planning and Community Right-to-Know Act. Unsurprisingly, this Court's opinion assumed (without discussion) that representatives of the community wanting to know about environmental impact were intended beneficiaries of the public-disclosure requirement in a statute called the Community Right-to-Know Act. Cases under the Freedom of Information Act and other general public-disclosure laws are similarly far afield. *See, e.g.*, *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440 (1989).

Plaintiff's reliance on out-of-circuit cases only highlights the error in its analysis. In *Center for Biological Diversity, Inc. v. BP America Production Co.*, 704 F.3d 413 (5th Cir. 2013), the Fifth Circuit engaged in precisely the same type of analysis that the panel conducted here. Applying the Emergency Planning and Community Right-to-Know Act, the Fifth Circuit observed that "[t]he purpose of the EPCRA framework is to inform the public about the presence of hazardous and toxic chemicals, and to provide

for emergency response in the event of a health-threatening release." *Id.* at 429 (quotation marks and brackets omitted). The court ultimately concluded that the plaintiffs' inability to "assess the possible health effects" of their potential exposure to toxic substances was "the kind of concrete informational injury that the statute was designed to redress." *Id.* Plaintiff's reliance on that case in support of its assertion that courts should not "conduct a 'type of harm' analysis in order to establish its Article III jurisdiction," Pet. 10, is inexplicable.

The Seventh Circuit's decision in *Heartwood, Inc. v. U.S. Forest Service*, 230 F.3d 947 (7th Cir. 2000), focused on the plaintiffs' effort to challenge a concrete injury: diminution of the use and enjoyment of lands that would be affected by agency action. *Id.* at 951. In a footnote, the court held that the plaintiffs had also suffered an informational injury because the agency's failure to provide information prevented the plaintiffs from participating in an agency process in which Congress had contemplated a role for them. *Id.* at 952 n.5. The Seventh Circuit did not suggest that the plaintiffs would have had standing even if they had no cognizable interest in the ultimate agency action. *See id.* at 952 (recognizing that "a procedural

right, unconnected to a plaintiff's concrete harm, is not enough to convey standing" (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571-72 (1992)).

In *American Canoe Ass'n v. City of Louisa Water & Sewer Commission*, 389 F.3d 536 (6th Cir. 2004), the Sixth Circuit concluded that an organization had informational standing based on its determination that one of its members had suffered a "lack of information" that "deprived him of the ability to make choices about whether it was 'safe to fish, paddle, and recreate in [a] waterway.'" *Id.* at 542. In holding that the organizational plaintiff had informational standing in its own right, the court stated that in the Clean Water Act's citizen-suit provision, "Congress has provided a broad right of action to vindicate [the plaintiffs'] informational right." *Id.* at 546. The E-Government Act of 2002 does not have a citizen-suit provision, and the Sixth Circuit did not suggest that every statute compelling public disclosure gives standing to every entity.

Charvat v. Mutual First Federal Credit Union, 725 F.3d 819 (8th Cir. 2013), also relied on by plaintiff, is no longer good law even in the Eighth Circuit. As the Eighth Circuit has recognized, in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), "the Supreme Court . . . superseded [the Eighth Circuit's]

precedent in . . . *Charvat*." *Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925, 930 (8th Cir. 2016).

2. Plaintiff argues, in the alternative, that the panel decision should be vacated as moot. Plaintiff makes no attempt to explain why the mootness issue warrants the full Court's review. A motion to vacate the opinion as moot is currently pending before the panel, and there is no basis for en banc treatment of this case-specific question.

In any event, plaintiff's mootness argument is meritless. Plaintiff's request for a preliminary injunction did not merely seek to halt the Commission's collection of data; it also asked the district court to order all of the defendants to "immediately delete and disgorge any voter roll data already collected or hereafter received." Proposed Order, Dkt. No. 35-6, at 2 (July 13, 2017). To date, the defendants have not deleted and disgorged the data. And plaintiff not only requested relief against the Commission (which has been terminated), but also sought to enjoin other entities that remain in existence and remain parties to this case. Plaintiff urged at considerable length that the Executive Office of the President and its components, the Director of White House Information Technology, and the General Services Administration were proper defendants in an APA action

and that an injunction could be issued against them. *See, e.g.*, Appellant's Br. 35-36 (discussing Director of White House Information Technology); *id.* at 39-42 (section captioned "The Defendant [Executive Office of the President] and its subcomponents are also agencies under the *Soucie* test"); *id.* at 42-43 (section captioned "The Defendant [General Services Administration], which is an agency, has a mandatory, nondiscretionary duty to participate in the Commission's collection activities"). Those entities still exist, and plaintiff's request for an injunction requiring them to delete and disgorge collected voter data is not rendered moot by the termination of the Commission.

Plaintiff itself does not appear to believe that the controversy has ended. It does not urge that the case should be dismissed, but rather asks this Court to "remand the case to the District Court." Pet. 16. There is no basis for plaintiff's apparent view that its appeal is moot but it remains entitled to continue to seek relief in district court. This Court's opinion precludes plaintiff from obtaining any relief from the district court, and plaintiff is not entitled to vacatur of this Court's opinion in order to relitigate the issues that have been decided against it.

Plaintiff's mootness argument underscores that review by the full Court is unwarranted. Although the termination of the Commission did not moot the case, any uncertainty regarding mootness could complicate further review by this Court.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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MARCH 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that this opposition satisfies the type-volume requirements set out in this Court's order of February 22, 2018, because it contains 3,139 words. This opposition was prepared using Microsoft Word 2013 in Book Antiqua, 14-point font, a proportionally spaced typeface.

s/ Daniel Tenny
Daniel Tenny

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2018, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ Daniel Tenny
Daniel Tenny