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.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

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## QUESTION PRESENTED

Whether the court of appeals' ruling that petitioner lacked Article III standing should be vacated under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 878 F.3d 371. The opinion of the district court (Pet. App. 24a-66a) is reported at 266 F. Supp. 3d 297.

### JURISDICTION

The judgment of the court of appeals was entered on December 26, 2017. A petition for rehearing was denied on April 2, 2018 (Pet. App. 22a-23a). On June 26, 2018, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 30, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. a. The E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, was enacted in part to "promote use of the Internet and other information technologies" in the federal government and to enable "enhanced access to Government information and services," but "in a manner consistent with laws regarding protection of personal privacy." § 2(b)(2) and (11), 116 Stat. 2901 (44 U.S.C. 3601 note). The Act creates an Office of Electronic Government and promotes various information-technology programs in agencies and courts. § 101, 116 Stat. 2901-2910 (enacting 44 U.S.C. 3601 *et seq.*); see §§ 201-207, 116 Stat. 2910-2921; §§ 209-526, 116 Stat. 2923-2970.

Section 208 of the Act has its own "purpose": "to ensure sufficient protections for the privacy of personal information as agencies implement citizen-centered electronic Government." E-Government Act § 208(a), 116 Stat. 2921. To that end, before "initiating a new collection of information that" includes certain personally identifiable information, "each agency shall * * * conduct a privacy impact assessment" and, "if practicable," "make the privacy impact assessment publicly available." § 208(b)(1)(A)(ii), (B)(i), and (iii), 116 Stat. 2921-2922. A privacy impact assessment must include, among other things, "what information is to be collected"; "why"; "the intended use"; "with whom [it] will be shared"; any "notice or opportunities for consent"; and "how [it] will be secured." § 208(b)(2)(B)(ii), 116 Stat. 2922. The E-Government Act does not include a private right of action to enforce violations of the Act, including of Section 208.

b. In May 2017, the President by Executive Order created the Presidential Advisory Commission on Election Integrity to "study the registration and voting processes used in Federal elections." Exec. Order No. 13,799, 82 Fed. Reg. 22,389, 22,389 (May 16, 2017). The "solely advisory" Commission was to "submit a report to the President" on the "integrity of the voting processes used in Federal elections" and identify "vulnerabilities in voting systems" that "could lead to * * * improper voting, including * * * fraudulent voting," among other things. *Ibid.* The Commission would terminate 30 days after submitting its report. 82 Fed. Reg. at 22,390.

In late June 2017 the Commission sent "identical letters" to each State and the District of Columbia "request[ing] their assistance in providing" certain "publicly-available voter roll data." C.A. J.A. 51. Subject to availability and applicable state law, the requested information included "full first and last names of registrants"; "addresses"; "dates of birth"; "political party"; the "last four digits of social security numbers"; "voter history"; "prior felony convictions"; and "military status," among other things. *Ibid.*; see, *e.g.*, *id.* at 61-62.

2. a. Petitioner filed this suit 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 United States Digital Service, and the Executive Committee for Presidential Information Technology. As relevant here, the second amended complaint alleges that respondents failed to conduct and publish a privacy impact assessment be-

fore initiating collection of the requested data, as allegedly required by Section 208 of the E-Government Act. C.A. J.A. 132-147. Arguing that it was harmed by being deprived of the ability to read this assessment, petitioner moved for a preliminary injunction to prohibit the Commission from collecting further data and to require respondents to "immediately delete and disgorge any voter roll data already collected or hereafter received." D. Ct. Doc. 35-6, at 2 (July 13, 2017).

b. The district court denied preliminary injunctive relief. Pet. App. 24a-66a. Although the court found that petitioner likely had "informational standing" based on its being deprived of the privacy impact assessment, *id.* at 42a-53a, the court also found that petitioner was unlikely to succeed on its contention—necessary to establish liability—that the Commission was an "agency" within the meaning of the E-Government Act, *id.* at 55a-64a.

3. On interlocutory review under 28 U.S.C. 1292(a)(1), the court of appeals affirmed the denial of preliminary injunctive relief on an alternative ground. Pet. App. 1a-18a. The court determined that petitioner had not shown a likelihood of success on the question of whether it had Article III standing to challenge the Commission's alleged failure to conduct and publish a privacy impact assessment.

The court of appeals recognized that "'a denial of access to information can,' in certain circumstances, 'work an "injury in fact" for standing purposes.'" Pet. App. 10a (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 court noted (*id.* at 11a) that under D.C. Circuit 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 (2016).

The court of appeals explained that Section 208 of the E-Government Act was not designed to avoid the type of harm claimed by petitioner here. Rather, "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.'" Pet. App. 11a (citation omitted; brackets in original). The court 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." *Ibid.* Because petitioner "is not a voter," the panel concluded that petitioner is "not the type of plaintiff the Congress had in mind." *Ibid.*

The court of appeals rejected petitioner's assertion of organizational injury for "similar reasons." Pet. App. 12a. Because petitioner has no cognizable interest in the information at issue, it "cannot ground organizational injury on a non-existent interest." *Ibid.*

Judge Williams concurred, agreeing that petitioner 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.'" Pet. App. 17a.

4. a. A few days after the court of appeals' ruling, the President issued an Executive Order terminating the Commission. Exec. Order No. 13,820, 83 Fed. Reg. 969 (Jan. 8, 2018). Petitioner moved the court to vacate its panel decision and dismiss the appeal as moot. C.A. Doc. 1712678 (Jan. 11, 2018). Respondents argued that the case was not moot because petitioner still sought deletion of all data the Commission had collected, and not

all the data had yet been deleted. C.A. Doc. 1713887, at 4-5 (Jan. 19, 2018). The court denied petitioner's motion. Pet. App. 21a. Petitioner also sought rehearing en banc or, in the alternative, vacatur and remand, which the en banc court denied. *Id.* at 22a-23a.

b. Meanwhile, proceedings in the district court continued during the pendency of petitioner's interlocutory appeal. In July 2018, the court denied without prejudice respondents' motion to dismiss the complaint. D. Ct. Doc. 63 (July 19, 2018). The following month, respondents filed a declaration confirming that all of the voter data the Commission had collected had been deleted. D. Ct. Doc. 64-1 (Aug. 20, 2018). Because petitioner had sought only injunctive relief in its operative complaint, see C.A. J.A. 132, 146, the court promptly ordered the case dismissed as moot. D. Ct. Doc. 65 (Aug. 22, 2018). Petitioner did not appeal that dismissal.

**ARGUMENT**

Petitioner agrees (Pet. 4, 33-35) that its case is now moot, and so the only relief it seeks from this Court is to have the court of appeals' decision vacated under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). But "not every moot case will warrant vacatur"; rather, because vacatur on mootness grounds "is rooted in equity, the decision whether to vacate turns on 'the conditions and circumstances of the particular case.'" *Azar* v. *Garza*, 138 S. Ct. 1790, 1792-1793 (2018) (per curiam) (quoting *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 478 (1916)).

Vacatur is inappropriate here because the decision below would not otherwise have warranted this Court's review; the lower court's ruling on an Article III juris-

dictional ground does not warrant a vacatur on a different Article III jurisdictional ground; and the equities counsel against vacatur.

### A. The Decision Below Would Not Independently Have Warranted This Court's Review

Vacatur under *Munsingwear* because of intervening mootness is generally available only to "those who have been prevented from obtaining the review *to which they are entitled*." *Camreta* v. *Greene*, 563 U.S. 692, 712 (2011) (quoting *Munsingwear*, 340 U.S. at 39) (emphasis added). It follows that a petitioner who would not otherwise be "entitled" to review under the criteria set forth in this Court's Rule 10 is not entitled to vacatur under *Munsingwear* either.

It has therefore been the consistent position of the United States that the Court should ordinarily deny review of cases (or claims) that have become moot after the court of appeals entered its judgment, but before this Court has acted on the petition, when such cases (or claims) do not present any question that would independently be worthy of this Court's review. See, *e.g.*, U.S. Br. in Opp. at 5-8, *Velsicol Chem. Corp.* v. *United States,* cert. denied, 435 U.S. 942 (1978) (No. 77-900); U.S. Br. on Mootness at 8 n.6, *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18 (1994) (No. 93-714); U.S. Amicus Br. at 9-10, *McFarling* v. *Monsanto Co.*, cert. denied, 545 U.S. 1139 (2005) (No. 04-31); U.S. Pet. at 23 n.4, *Azar* v. *Garza*, 138 S. Ct. 1790 (2018) (No. 17-654).

Indeed, "observation of the Court's behavior across a broad spectrum of cases since 1978 suggests that the Court denies certiorari in arguably moot cases unless the petition presents an issue (other than mootness) worthy of review." Stephen M. Shapiro et al., *Supreme*

*Court Practice* § 19.4, at 968 n.33 (10th ed. 2013); see *id.* § 5.13, at 358; cf. *Camreta*, 563 U.S. at 713 (vacating under *Munsingwear* where the court of appeals' decision was independently "appropriate for review"). The petition here does not present an issue that is independently worthy of review because, as explained below, the court of appeals' decision is correct and does not conflict with the decisions of other courts of appeals.

***1. The court of appeals correctly held that petitioner lacked Article III standing***

a. To have Article III standing, a plaintiff must show, among other things, that it suffered a "concrete and particularized" injury. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

i. A "concrete" injury is one that is "'real,' and not 'abstract.'" *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1548 (2016) (citation omitted). Generally that means the injury must be tangible, but an "intangible" injury can be sufficiently concrete under some circumstances. *Id.* at 1549. As relevant here, "Congress may 'elevate to the status of legally cognizable injuries'" certain intangible harms "'that were previously inadequate in law.'" *Ibid.* (citation and brackets omitted).

One such intangible harm is a so-called "informational injury," in which the plaintiff is allegedly denied access to information it claims to be entitled to by law. For instance, Congress might enact statutes (such as the Freedom of Information Act (FOIA), 5 U.S.C. 552, or the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 1 *et seq.*) under which "those requesting information" need only show "that they sought and were denied specific agency records" to establish the requisite concreteness. *Public Citizen* v. *United States Dep't of*

*Justice*, 491 U.S. 440, 449 (1989). Alternatively, the violation of a statute that "seek[s] to protect individuals such as [the plaintiffs] from the kind of harm they say they have suffered" might be enough to establish concreteness as well. *FEC* v. *Akins*, 524 U.S. 11, 22 (1998). But in all events "a bare procedural violation, divorced from any concrete harm," is insufficient to establish Article III standing. *Spokeo*, 136 S. Ct. at 1549; accord *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 496 (2009); *Lujan*, 504 U.S. at 572 n.7.

ii. Separate from concreteness, Article III also requires an alleged injury to be "particularized." *Spokeo*, 136 S. Ct. at 1548. A "particularized" injury is one that "affect[s] the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1. Thus, a plaintiff alleging an informational injury lacks Article III standing if it cannot demonstrate a "'logical nexus'" between its "asserted status" and the alleged violation of law that led to the lack of information. *United States* v. *Richardson*, 418 U.S. 166, 175 (1974). And an organizational plaintiff generally must "make specific allegations establishing that at least one identified member had suffered or would suffer harm" as a result of the alleged violation. *Summers*, 555 U.S. at 498.

b. Under these principles, the court of appeals' conclusion that petitioner lacked Article III standing is correct because petitioner's alleged intangible injury is neither concrete nor particularized.

i. It is not concrete because Congress has not "elevat[ed]" it to the status of a cognizable intangible injury. *Spokeo*, 136 S. Ct. at 1549. Petitioner relies (Pet. 14-17) on *Public Citizen* and *Akins* to argue that Congress in fact has. But unlike FOIA or FACA, the statute at issue in *Public Citizen*, 491 U.S. at 449, the E-Government

Act does not contain a private right of action to enforce its procedural requirements, including the requirement in Section 208 for agencies to create and publish privacy impact assessments. Therefore, unlike in *Public Citizen* or FOIA cases, petitioner cannot simply assert that it "sought and w[as] denied specific agency records" to satisfy the concreteness requirement in Article III. *Ibid.*

Nor can petitioner show that the E-Government Act "seek[s] to protect individuals such as [petitioner] from the kind of harm [it] say[s] [it] ha[s] suffered." *Akins*, 524 U.S. at 22. Section 208 of the Act—the provision respondents allegedly violated—expressly states that its "purpose * * * is to ensure sufficient protections for the *privacy of personal information*." § 208(a), 116 Stat. 2921 (emphasis added). Petitioner is not a private individual whose "personal information" is at risk of being exposed. Nor does it allege that it has any members whose personal information is at risk of being exposed. In fact, petitioner "has no clients, no customers, and no shareholders" at all. C.A. J.A. 25 (brackets and citation omitted). So this is not a case like *Akins*, where Congress "intended to authorize this kind of suit" in order "to protect" petitioner "from suffering the kind of injury" that it alleges. 524 U.S. at 20.

Petitioner's argument (Pet. 19) that the inquiry described above is one about a statutory basis for a cause of action, not Article III standing, is misplaced. To be sure, whether a plaintiff falls within a statute's "zone of interests" is not a jurisdictional inquiry. *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 127-128 (2014). But the question here is not whether petitioner "falls within the class of plaintiffs whom Congress has authorized to sue under" the E-Government

Act. *Id.* at 128. After all, Congress did not authorize *anyone* to sue under that Act, which contains no private right of action. Rather, the question here is whether Congress has "identif[ied] and elevat[ed]" a particular intangible harm—being deprived of the Commission's publication of a privacy impact assessment under Section 208 of the E-Government Act—to the status of a cognizable intangible injury for purposes of Article III standing. *Spokeo*, 136 S. Ct. at 1549. As *Akins* explained, that jurisdictional inquiry requires analyzing the statutory language to determine whether Congress intended "to protect individuals such as" the particular plaintiffs "from the kind of harm they say they have suffered." 524 U.S. at 22.

Here, petitioner's alleged injury bears no relation to the language of Section 208 and the kind of harm Congress intended to protect against when enacting that section. As the court of appeals recognized (Pet. App. 11a-12a), Section 208 does not protect advocacy groups (such as petitioner) from a dearth of information; it protects individuals whose personal information an agency might collect—here, individual voters—from inadvertent disclosure of certain types of personal information. Petitioner neither is a voter nor has members who are voters. C.A. J.A. 25-26; Pet. App. 11a. Instead, it alleges only a "bare procedural violation" of Section 208 without any concrete injury that Section 208 was intended to protect against. *Spokeo*, 136 S. Ct. at 1549; see *id.* at 1550; *Akins*, 524 U.S. at 20, 22. That does not satisfy Article III's concreteness requirement for an intangible injury under *Spokeo*, *Akins*, and *Public Citizen*.

ii. Petitioner's alleged intangible injury is not sufficiently particularized either. As noted, petitioner is not

a voter, does not have any members who are voters, and is thus at no risk of having the privacy of its or its members' "personal information" compromised as a result of the Commission's allegedly having collected data without first conducting and publishing a privacy impact assessment. So unlike the plaintiff in *Spokeo*, who alleged an injury from "the handling of *his* credit information," 136 S. Ct. at 1548 (emphasis added), petitioner here has not alleged that *its* personal information was or even could have been collected by the Commission. Petitioner has thus failed to establish a "'logical nexus'" between its status as an advocacy organization without any individual members, on the one hand, and the E-Government Act's privacy protections for individuals' personal information, on the other. *Richardson*, 418 U.S. at 175. Instead, petitioner can allege only an injury that is "'common to all members of the public'"—namely, the inability to read a privacy impact assessment prepared by the Commission and published in the Federal Register or on the Commission's website. *Id.* at 177 (citation omitted); see E-Government Act § 208(b)(1)(B)(iii), 116 Stat. 2922 (requiring publication, "if practicable," on the agency's "website," "in the Federal Register," or by "other means"). That is not sufficiently particularized to support Article III standing.

***2. The decision below does not conflict with those of other courts of appeals***

Petitioner is mistaken to suggest (Pet. 20-25) that the court of appeals' decision in this case conflicts with the precedential decisions of other courts of appeals.

In *American Canoe Association* v. *City of Louisa Water & Sewer Commission*, 389 F.3d 536 (6th Cir. 2004), an environmental organization challenged, under the Clean Water Act's citizen-suit provision, 33 U.S.C.

1365, the defendant's alleged failure to monitor and report its effluent discharges into the Big Sandy River. 389 F.3d at 539-540. The Sixth Circuit held that the plaintiff organization had standing because one of its members alleged that the "lack of information" from the defendant's failure to report its pollutant discharges "deprived him of the ability to make choices about whether it was 'safe to fish, paddle, and recreate in th[e] waterway,'" and resulted in his forgoing such recreational activities on the river. *Id.* at 541-542. Unlike petitioner, therefore, the organization in *American Canoe* had a member who alleged a concrete and particularized injury: *his own* inability to decide whether to fish or swim in the river. And unlike the E-Government Act, the Clean Water Act expressly "provide[s] a broad right of action to vindicate th[e] informational right" at issue. *Id.* at 546. The Sixth Circuit therefore concluded that Congress "intended to authorize th[e] kind of suit" at issue in *American Canoe* "to protect" the organizational plaintiff's member against precisely "the kind of injury" that he alleged. *Akins*, 524 U.S. at 20. *American Canoe* is thus a straightforward application of *Akins* and does not conflict with the court of appeals' decision in this case.

The Eleventh Circuit's unpublished decision in *Church* v. *Accretive Health, Inc.*, 654 Fed. Appx. 990 (2016) (per curiam), likewise does not conflict with this case. *Church* simply applied *Spokeo* to hold that the plaintiff "sustained a concrete—*i.e.*, 'real'—injury because she did not receive" certain disclosures in a letter addressed *to her* that the defendant allegedly was required to make *to her* under the Fair Debt Collection Practices Act, 15 U.S.C. 1692a *et seq.* 654 Fed. Appx. at 994-995. The court thus concluded that Congress had "elevated" this intangible harm to be actionable by a plaintiff who

suffers it in a concrete and particularized way. *Id.* at 995 (citing *Spokeo*, 136 S. Ct. at 1549).

The Seventh Circuit's decision in *Heartwood, Inc.* v. *United States Forest Service*, 230 F.3d 947 (2000), focused its analysis of Article III standing on the plaintiffs' concrete and particularized injury: diminution of their use and enjoyment of lands that would be affected by the challenged agency action. *Id.* at 951. In a footnote, the court, citing *Akins*, found "compelling" the plaintiffs' additional argument that they also had suffered an informational injury from the agency's failure to conduct an environmental assessment, because that failure would leave "interested parties" with "no way to comment on or to appeal decisions made by an agency." *Id.* at 952 n.5. Yet the Seventh Circuit did not suggest that the plaintiffs would have had standing based on their informational injury even if they had not had a concrete and particularized interest in the ultimate agency action. And in any event *Heartwood* preceded this Court's decisions in *Spokeo* and *Summers* holding that a "bare procedural violation" is an insufficient basis for Article III standing. *Spokeo*, 136 S. Ct. at 1549; see *Summers*, 555 U.S. at 496; see also p. 9, *supra*. *Heartwood* is therefore of limited relevance here.

Of even less relevance is *Charvat* v. *Mutual First Federal Credit Union*, 725 F.3d 819 (8th Cir. 2013), cert. denied, 134 S. Ct. 1515 (2014), because it is no longer good law: as the Eighth Circuit has recognized, *Spokeo* "superseded [its] precedent in * * * *Charvat*." *Braitberg* v. *Charter Commc'ns, Inc.*, 836 F.3d 925, 930 (2016).

Finally, petitioner cites (Pet. 22-23) the D.C. Circuit's decision in *Ethyl Corp.* v. *EPA*, 306 F.3d 1144 (2002). But *Ethyl* simply applied *Akins* to find that a "manufacturer of additives for motor vehicle fuels" had

a concrete and particularized injury from EPA's use of "closed-door * * * emission test procedures" that "deprive[d] Ethyl of information that might well help it develop and improve its products with an eye to conformity to emissions needs." *Id.* at 1147. That determination is not in conflict with the decision here, which found that petitioner had no particularized stake in the procedures used to protect the private information of others, and thus had not suffered a concrete and particularized injury. Pet. App. 10a-11a. Petitioner cited *Ethyl* in its petition for rehearing en banc, see C.A. Doc. 1717399, at 2 (Feb. 9, 2018); the court of appeals' denial of that petition shows that it does not view *Ethyl* as being in conflict with the decision here. And even if it were, this Court would not grant review to resolve an asserted intra-circuit conflict; indeed the very fact that petitioner claims an intra-circuit conflict itself demonstrates that these cases represent not a split of authority, but merely factbound applications of *Akins* and *Spokeo*.

**B. The Lower Court Would Have Been Free To Order Dismissal On Article III Standing Grounds Even Had The Case Become Moot Earlier**

An independent reason not to vacate the court of appeals' decision is that it was based on Article III jurisdictional grounds, and so the court would have been entitled to rule on that basis even had the issue of mootness arisen earlier. Time and again, this Court has "recognized that a federal court has leeway 'to choose among threshold grounds for denying audience to a case on the merits.'" *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (quoting *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 585 (1999)). Subject-matter jurisdiction is one of those threshold grounds. *Ibid.* And "there is no mandatory 'sequencing

of jurisdictional issues.'" *Ibid.* (quoting *Ruhrgas*, 526 U.S. at 584).

It follows that, had this case been rendered moot *before* the court of appeals issued its opinion and judgment, the court would have had "leeway to choose" to resolve the case on Article III standing grounds instead of mootness. *Sinochem*, 549 U.S. at 431 (citation and internal quotation marks omitted). It would therefore make little sense to vacate the court's decision simply because the mooting event happened to arise *after* the panel rendered its decision. To be sure, had the mootness issue arisen earlier, the panel might have exercised its discretion to resolve the case on mootness rather than standing grounds. Cf. *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 66 (1997) (resolving the case on Article III mootness grounds despite "grave doubts" about Article III standing as well). But it would not have been compelled to do so; the court still would have had "leeway to choose" to resolve the standing question instead had it thought that to be the more appropriate course. *Sinochem*, 549 U.S. at 431 (citation and internal quotation marks omitted); see *Ruhrgas*, 526 U.S. at 584-585. Under these circumstances, therefore, granting certiorari and vacating the court of appeals' Article III jurisdictional disposition in order to replace it with a *different* Article III jurisdictional disposition would be in tension with the no-mandatory-sequencing rule in *Sinochem* and *Ruhrgas*.

**C. The Equities Counsel Against Vacatur**

The court of appeals' unreported orders (Pet. App. 21a, 22a-23a) denying petitioner's motion to vacate do not in any event warrant review. Because vacatur on mootness grounds "is rooted in equity, the decision

whether to vacate turns on 'the conditions and circumstances of the particular case.'" *Garza*, 138 S. Ct. at 1792 (citation omitted). The equities here do not favor vacatur.

As an initial matter, this is not a case where the prevailing party has deliberately frustrated further review. The President, who is neither a defendant nor a respondent in this case, terminated the first-of-its-kind Commission based on a policy judgment, and all of the data the Commission collected before its termination has been destroyed. There is thus no need to preserve the "path for future relitigation" between the parties, *Arizonans for Official English*, 520 U.S. at 71 (citation omitted), since the Commission no longer exists and it is purely speculative whether it (or anything like it) will ever exist again. See *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 108 (1983); cf. *Camreta*, 563 U.S. at 713-714 (officer would likely have to "interview[] a suspected child abuse victim at school" in the future).

Also, petitioner's litigation strategy counsels against the equitable remedy of vacatur here. After the President terminated the Commission, petitioner moved to vacate the court of appeals' decision—but did not abandon its efforts to seek further relief in district court, instead expressly arguing that "there remain other issues left for the District Court to resolve, such as the final disposition of" other claims in its operative complaint. C.A. Doc. 1712678, at 11 (Jan. 11, 2018) (petitioner's motion to vacate the panel ruling); see C.A. Doc. 1714449, at 9-11 (Jan. 24, 2018) (petitioner's reply brief). As these filings indicate, petitioner sought to continue the litigation even after the court of appeals' decision. It was only many months later that petitioner abandoned its effort to obtain further relief and fully committed to

the strategy of solely seeking to eliminate the court of appeals' decision as precedent. Those tactics counsel against rewarding petitioner with an equitable windfall.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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