[ARGUED MAY 8, 2019; DECIDED JUNE 28, 2019]

No. 19-5031

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

ELECTRONIC PRIVACY INFORMATION CENTER,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF COMMERCE, et al.,
Defendants-Appellees.

On Appeal from an Order of the
U.S. District Court for the District of Columbia
Case No. 18-cv-2711-DLF

PETITION FOR PANEL REHEARING, REHEARING EN BANC, OR VACATUR AND REMAND

MARC ROTENBERG
ALAN BUTLER
JOHN L. DAVISSON
Electronic Privacy Information Center
1519 New Hampshire Ave NW
Washington, DC 20036
(202) 483-1140
Counsel for Plaintiff-Appellant

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STATEMENT REQUIRED BY RULE 35(b)

Rehearing of this case is warranted for two reasons. First, the panel wrongly required plaintiff Electronic Privacy Information Center ("EPIC") to demonstrate an "imminent privacy harm" in order to establish that it suffered a cognizable informational injury. Op. 14. That holding conflicts directly with multiple decisions of the United States Supreme Court concerning informational standing. *Spokeo v. Robins*, 136 S. Ct. 1540 (2016); *FEC v. Akins*, 524 U.S. 11 (1998); *Public Citizen v. DOJ*, 491 U.S. 440 (1989).

Second, the case concerns a question of exceptional importance: whether members of the public, and membership organizations such as EPIC, have a justiciable right under section 208 of the E-Government Act to know how federal agencies are collecting and using personal data. The panel decision ignores clear Congressional intent to ensure the public's right to obtain the privacy impact assessments required by section 208.

Alternatively, because the Government's recent decision to withdraw the citizenship question from the 2020 Census renders this appeal moot, the Court should either (1) modify the judgment of the panel to reflect that the lower court's decision is vacated for mootness rather than lack of Article III standing, or (2) vacate the judgments of both the panel and the district court and remand the case to the court below.

STATEMENT OF THE CASE

In 2002, Congress enacted the E-Government Act with the aim of "provid[ing] enhanced access to Government information" and "mak[ing] the Federal Government more transparent and accountable." E-Government Act, Pub. L. No. 107-347, §§ 2(b)(9), (11), 116 Stat. 2899, 2901 (Dec. 17, 2002) (codified at 44 U.S.C. § 3501 note). In order to "ensure sufficient protections for the privacy of personal information," section 208 of the E-Government Act requires federal agencies to complete and publish a privacy impact assessment ("PIA") prior to "initiating" the process of collecting personal data. E-Government Act §§ 208(a)–(b). Specifically, "before . . . initiating a new collection of information" in an identifiable form that will "us[e] information technology," the agency must "conduct a privacy impact assessment" and, "if practicable," "make the privacy impact assessment publicly available[.]" *Id.* § 208(b).

Pursuant to the Constitution's Census Clause, Congress has directed the Secretary of Commerce to "take a decennial census of population," 13 U.S.C. § 141(a), and to "determine the inquiries, and the number, form, and subdivisions" of census questionnaires. 13 U.S.C. § 5. The Department of Commerce and the U.S. Census Bureau (collectively, "the Census Bureau") will administer the next Census in 2020. On March 26, 2018, Secretary of Commerce Wilbur Ross announced that he would "reinstate[ ] a citizenship question on the 2020 decennial census" and

"direct[ed] the Census Bureau to place the citizenship question last on the decennial census form." JA 60–61.

On November 20, 2018, EPIC filed the complaint in this case alleging that the Census Bureau had failed to conduct or publish "*any* of the privacy analysis required by the E-Government Act" prior to initiating a new collection of citizenship status information. JA 47. EPIC identified five information technology systems which the Bureau would use to collect, transfer, or maintain citizenship data obtained in the census. JA 41–48. With respect to each system, EPIC alleged that the Bureau had failed to timely conduct and publish a privacy impact assessment addressing the implications of the citizenship question. *Id.* On January 18, 2019, EPIC moved for a preliminary injunction to prevent the Bureau from taking steps to collect citizenship data.

On February 8, 2019, the district court (Hon. Dabney L. Friedrich) denied EPIC's motion for a preliminary injunction. JA 4–23, 24. Although the court noted the Census Bureau's "conce[ssion]" that it must "prepare PIAs that adequately address the collection of citizenship data in the 2020 Census," the court concluded that EPIC had failed to demonstrate a likelihood of success on the merits. JA 9. The court reasoned that the Bureau's duty to conduct, review, and publish the requisite privacy impact assessments would not come due "until the Bureau mails

its first set of [census] questionnaires to the public in January 2020." JA 9–10. EPIC filed a notice of appeal from the district court's order on February 12, 2019.

On June 28, 2019, a three-judge panel of this Court vacated the decision of the district court for lack of Article III jurisdiction and remanded the case with instructions to dismiss. Op. 15. Although the panel held that EPIC is a membership association capable of representing the interests of its members, Op. 9, the panel ruled that EPIC had "failed, as a matter of law, to show that any of its members have suffered a concrete privacy or informational injury" sufficient for Article III standing. Op. 14. With respect to the privacy injury asserted by EPIC, the Court reasoned that "EPIC has not shown how a delayed PIA would lead to a harmful disclosure" of its members' private information. Op. 10. With respect to the informational injury asserted by EPIC, the Court ruled that a "lack of information itself is not the harm that Congress sought to prevent through § 208," and that EPIC must instead "show how the lack of a timely PIA caused its members to suffer the kind of harm that Congress did intend to prevent: harm to individual privacy." Op 13–14. Because the panel found EPIC's asserted privacy harm "too speculative to support standing," the panel concluded that EPIC lacked informational standing. Op. 14.

On June 27, 2019, the Supreme Court affirmed in part a separate lower court decision blocking the implementation of the citizenship question. *Dep't of*

Commerce v. New York, 139 S. Ct. 2551, 2576 (2019). On July 11, 2019, President Trump confirmed that the Department of Commerce had withdrawn the citizenship question, finding "no practical mechanism for including the question on the 2020 decennial census." Exec. Order No. 13,880, Fed. Reg. 33,821, 33,821 (2019).

ARGUMENT

I. REHEARING IS WARRANTED BECAUSE THE PANEL DECISION CONFLICTS WITH MULTIPLE INFORMATIONAL STANDING DECISIONS OF THE SUPREME COURT.

Rehearing of this case is warranted because the panel's decision concerning EPIC's informational standing directly conflicts with multiple decisions of the Supreme Court.

As the Supreme Court has repeatedly explained, "a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *Akins*, 524 U.S. at 21 (citing *Public Citizen*, 491 U.S. at 449); *see also Spokeo*, 136 S. Ct. at 1549 (reaffirming *Public Citizen* and *Akins*); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982) (holding that a denial of information subject to statutory disclosure constitutes an injury in fact). Nevertheless, the panel departed from this rule and held that EPIC lacked Article III standing to challenge an unlawful denial of information on behalf of its members. Although EPIC had alleged a wrongful deprivation of "information which must be publicly disclosed pursuant to a statute," *Akins*, 524 U.S. at 21, the

panel concluded the EPIC also had to show an *additional* form of harm—"harm to individual privacy"—that "the lack of a timely PIA caused its members to suffer[.]" Op. 13–14. But this secondary harm requirement has no basis in Article III and flatly contradicts the Supreme Court's informational injury rulings.

In *Public Citizen*, two public interest organizations alleged that they had been wrongfully denied access to the meetings and records of an American Bar Association committee that advises the President and the Department of Justice ("DOJ") on potential judicial nominees. *Public Citizen*, 491 U.S. at 444–45, 447–48. The organizations argued that this denial of information violated the DOJ's disclosure obligations under the Federal Advisory Committee Act ("FACA"). *Id.* at 447–448. Rejecting a challenge to the organizations' Article III standing, the Supreme Court held that the DOJ's alleged "refusal to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue." *Id.* at 449.

In *Akins*, the Supreme Court considered whether a group of voters had Article III standing to challenge the determination of the Federal Election Commission ("FEC") that the American Israel Public Affairs Committee ("AIPAC") was not a political committee under the Federal Election Campaign Act. *Akins*, 524 U.S. at 16–18, 20–21. The voters alleged that the FEC's failure to apply this designation denied them access to "information about members,

contributions, and expenditures" that AIPAC would otherwise be required to disclose. *Id.* at 16. The Court agreed with the voters that this denial of information was sufficiently "concrete and particular" to confer Article III standing. *Id.* at 21. The Court explained that "[t]he 'injury in fact' that respondents have suffered consists of their inability to obtain information . . . that, on respondents' view of the law, the statute requires that AIPAC make public." *Id.*

Recently, in *Spokeo*, the Supreme Court reaffirmed that a plaintiff's "'inability to obtain information' that Congress ha[s] decided to make public is a sufficient injury in fact to satisfy Article III." *Spokeo*, 136 S. Ct. at 1549 (quoting *Akins*, 524 U.S. at 21). While addressing the requirement of concreteness under Article III, the Court noted that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact." *Id.* As an example, the Court pointed to the scenario where a plaintiff "fail[s] to obtain information subject to disclosure" under statute. *Id.* at 1549–50 (citing *Public Citizen*, 491 U.S. at 449). The Court explained that "a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified" by mandating public disclosure. *Id.* at 1549 (emphasis in original) (citing *Akin*s, 524 U.S. at 20–25; *Public Citizen*, 491 U.S. at 449).

Deviating from the informational injury standard established in *Public Citizen*, *Akins*, and *Spokeo*, the panel nevertheless held that EPIC lacked standing

to challenge the Census Bureau's failure to timely publish privacy impact assessments mandated by the E-Government Act. It was not enough, the panel reasoned, that EPIC's members were "deprived of information that, on [EPIC's] interpretation, a statute requires the government . . . to disclose[.]" Op. 12 (quoting *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016)). Rather, the panel held that it lacked Article III jurisdiction over EPIC's case because EPIC's members had not "suffered the 'type of harm Congress sought to prevent by requiring disclosure.'" Op. 12 (quoting *Jewell*, 828 F.3d at 992). Specifically, the panel concluded that EPIC had not demonstrated the "harm to individual privacy" that section 208 is concerned with. Op. 13–14.

The panel's analysis is squarely at odds with the Supreme Court's informational injury decisions. As the Court has explained, when a plaintiff is denied information subject to disclosure under statute, they have established an informational injury, and no further inquiry is required. *Spokeo*, 136 S. Ct. at 1549–50; *Akins*, 524 U.S. at 20–21; *Public Citizen*, 491 U.S. at 447–49. Although EPIC did argue that its members would suffer an imminent privacy injury from the collection of their citizenship information, Op. 10, EPIC was not required to prove this additional form of harm to establish an *informational* injury. The Supreme Court "has never suggested that those requesting information under [a public

disclosure statute] need show more than that they sought and were denied specific agency records." *Public Citizen*, 491 U.S. at 449.

In support of its standing analysis, the panel decision attempts to distinguish section 208 from statutes such as the Freedom of Information Act ("FOIA") that "vest a general right to information in the public." Op. 13. But this alleged distinction has no bearing on the Court's constitutional power to adjudicate EPIC's E-Government Act claims. Section 208—like the FOIA, the FACA, and the Federal Election Campaign Act—requires agencies to disclose particular information to the public. And EPIC, like the plaintiffs in *Akins* and *Public Citizen*, has alleged that its members were unlawfully deprived of that information. That is all the law requires. The panel cites no authority for the view that the substantive scope of a disclosure statute—whether specific or "general," Op. 13—affects a plaintiff's Article III standing to seek information wrongfully withheld.

Because the panel's informational standing analysis cannot be reconciled with Supreme Court precedent, the Court should rehear this case.

II. REHEARING IS WARRANTED BECAUSE THE PANEL DECISION UNDERMINES THE INFORMATIONAL RIGHT THAT CONGRESS ESTABLISHED IN SECTION 208.

The Court should also rehear this case because it concerns a question of exceptional importance: whether members of the public have a justiciable right to know how federal agencies are collecting and using personal data. This issue arises

at a moment in time when the United States faces staggering levels of identity theft. The personal data stored in federal agencies is regularly targeted by foreign adversaries. The 2015 Office of Personnel Management data breach compromised the personal information of more than 21 million federal employees, friends, and family members. *In re OPM Data Sec. Breach Litig.*, 928 F.3d 42, 59 (D.C. Cir. 2019). In interpreting section 208, a provision that explicitly recognizes the privacy risks attendant to electronic government, the Court should give full consideration and effect to Congressional intent. But the panel failed to do so in this case.

First, the panel largely ignored Congress's decision to require the publication of a privacy impact assessment before an agency initiates a new collection of personal information. A privacy impact assessment conveys not only the what, why, and how of a pending collection of personal data, E-Government Act § 208(b)(2)(B)(ii), but also *whether* an agency is planning to collect data in the first place. As Congress recognized, these details are essential to keeping the public informed and holding agencies accountable as they collect and use personal data. *See* E-Government Act § 2(b)(9). Moreover, a denial of this information works precisely the harm that Congress meant to avoid by requiring disclosure, leaving individuals (such as EPIC's members) unable to assess the risks of a planned data collection.

If Congress truly had no interest in keeping the public informed through section 208—or as the panel put it, in "prevent[ing]" a "lack of information," Op. 13—it could have simply omitted the publication requirement. But Congress chose to include an affirmative publication mandate in section 208. The only credible explanation for this decision is that Congress did, in fact, mean to "prevent" the "lack of information" that individuals would suffer absent the disclosure of privacy impact assessments. Op. 13. To conclude otherwise, as the panel did, renders the publication requirement meaningless: a form of administrative busywork with no apparent purpose. But such a reading of section 208(b)(1)(B)(iii) is "at odds with one of the most basic interpretive canons, that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant[.]'" *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

Second, the panel decision cannot be reconciled with the express statutory purposes of the E-Government Act. As the panel acknowledged, Congress intended the Act to "'provide increased opportunities for citizen participation in Government,' and '[t]o make the Federal Government more transparent and accountable.'" Op. 2 (quoting E-Government Act §§ 2(b)(2), (9)). By mandating the advance publication of privacy impact assessments, section 208 serves both of these Congressional objectives. The data collection activities of federal agencies

are made transparent to the public, and individuals whose personal data may be at risk are given a chance to hold the government accountable.

By corollary, an agency that violates section 208's publication requirement frustrates the purposes of the E-Government Act. The public is left to guess about the details of an agency's data collection activities, and individuals are deprived of an opportunity to participate in the agency's decisionmaking process. By wrongly withholding this information, an agency works the harms that Congress set out to prevent by requiring disclosure: a lack of transparency and public involvement in government. *See* E-Government Act §§ 2(b)(2), (9). These are precisely the harms that EPIC's members suffered from the Census Bureau's failure to publish required assessments.

Yet the panel erroneously discounted the informational harms targeted by Congress under section 208. Instead, the panel held that section 208 was solely "designed to protect individual privacy by focusing agency analysis and improving internal agency decision-making," and that "EPIC must show how the lack of a timely PIA caused its members to suffer the kind of harm that Congress did intend to prevent: harm to individual privacy." Op. 13–14. But the panel did not explain why section 208's focus on privacy would be incompatible with Congress's broader informational objectives under the E-Government Act. Indeed, nothing in the statutory text suggests that the informational right created by section 208(b) is

limited to persons facing an "imminent privacy harm" (or, for that matter, limited to "individual[s]"). Op. 14. Congress required that impact assessments be made "publicly available"—not disclosed to a special subset of persons specially affected by a given data collection. E-Government Act § 208(b)(1)(B)(iii). In this way, Congress structured section 208 to advance *both* privacy *and* informational aims.

This Court's decision in *EPIC v. Presidential Advisory Commission on Election Integrity (PACEI)*, 878 F.3d 371 (D.C. Cir. 2017), is not to the contrary. In *PACEI*, EPIC asserted Article III standing to seek a privacy impact assessment under section 208 in order to "ensure public oversight of record systems." *Id.* at 378 (quoting Appellant's Reply Br. 9). The Court concluded that EPIC lacked standing, reasoning (1) that EPIC was not an "individual," and thus "not the type of plaintiff the Congress had in mind," and (2) that the focus of section 208, "individual *privacy*," was "not at stake for EPIC" as an organization. *PACEI*, 878 F.3d at 378 (emphasis in original). But contra the panel, nothing in *PACEI* "reject[s] the possibility that § 208 can support an informational injury theory" for *individuals* who are wrongfully denied access to information that Congress has guaranteed to them. Op. 13.

Finally, even if Congress had not expressly identified transparency as one of the objectives of the E-Government Act, § 2(b)(9), it is clear from the text and

structure of section 208 that Congress meant to "prevent" individuals from suffering a "lack of information" about the government's collection of personal data. Op. 13. Over and over, section 208 requires the disclosure of information concerning agency activities that implicate privacy. Agencies must, of course, publish privacy impact assessments, § 208(b)(1)(B)(iii). Those assessments must give the public advance notice of "what information is to be collected"; "why the information is being collected"; "the intended use of the agency of the information"; "with whom the information will be shared"; "what notice or opportunities for consent would be provided to individuals regarding what information is collected and how that information is shared"; "how the information will be secured"; and "whether a system of records is being created under [the Privacy Act.]" § 208(b)(2)(B)(ii). A parallel provision of section 208 requires agencies to publish privacy notices on agency containing substantially the same information. E-Government Act § 208(c). Congress requires that all of this information be publicly disclosed, regardless of whether an agency has taken adequate steps to protect the privacy of persons whose data will be collected. E-Government Act § 208(b)(1)(B)(iii). And all of this information is inherently valuable to an individual seeking to understand how (and if) their personal data will be collected—whether or not that individual faces an imminent privacy invasion.

Nevertheless, the panel concluded that a denial of a privacy impact assessment would only become a cognizable injury if "the lack of a timely PIA" *also* caused "harm to individual privacy." Op. 13–14. But this reading turns section 208 on its head. In the panel's view, the information subject to disclosure under section 208 is only meaningful—and its nondisclosure only justiciable in a federal court—if the information concerns agency conduct that imminently threatens individuals' privacy. Or put another way: Congress only guaranteed individuals a right to privacy impact assessments that would reveal agency *mismanagement* of personal data. Yet one of the core purposes of section 208 is to "ensure sufficient protections for the privacy of personal information," E-Government Act § 208(a)—which the statute accomplishes, in part, by forcing agencies to publicly demonstrate that privacy is *not* imperiled by new collections of data. E-Government Act §§ 208(b)(1)(B)(iii), (2)(B)(ii).

Because the panel's interpretation of section 208 undercuts the public's right to know how and when federal agencies are handling personal data, at a moment when the data breaches are of widespread public concern, the Court should rehear this case.

III. ALTERNATIVELY, THE COURT SHOULD MODIFY OR VACATE THE PANEL'S JUDGMENT BECAUSE THIS APPEAL IS NOW MOOT.

Alternatively, the Court should modify or vacate the panel's judgment because the Government's withdrawal of the citizenship question from the 2020 Census renders this appeal moot and forecloses 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).

On July 11, 2019, the President confirmed in an Executive Order that the Department of Commerce would not collect citizenship information via the 2020 Census. Exec. Order No. 13,880. With no citizenship question left to enjoin, EPIC's appeal—which sought "an injunction halting the Census Bureau's implementation of the citizenship question pending the adjudication of EPIC's claims"—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 Government's withdrawal of the citizenship question, 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).

Moreover, because this appeal is moot, EPIC is deprived of any opportunity to obtain 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). And 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.

Accordingly, this Court should either (1) modify the judgment of the panel to reflect that the lower court's decision is vacated for mootness rather than lack of Article III standing, or (2) vacate the judgments of both the panel and the district court and remand with instructions.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for rehearing or, in the alternative, modify or vacate the judgment of the panel on the grounds of mootness.

Respectfully Submitted,

Dated: August 12, 2019

MARC ROTENBERG
EPIC President

ALAN BUTLER
EPIC Senior Counsel

/s/ John L. Davisson
JOHN L. DAVISSON
EPIC Counsel

Electronic Privacy Information Center
1519 New Hampshire Ave NW
Washington, DC 20036
(202) 483-1140

davisson@epic.org

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing petition complies with the type-volume limits of Fed. R. App. P. 35(b)(2)(A) and Fed. R. App. P. 40(b)(1) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), it contains 3,898 words. I also 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) because it has been prepared in a proportionally spaced typeface using 14-point Times New Roman.

/s/ John L. Davisson
JOHN L. DAVISSON

CERTIFICATE OF SERVICE

I, John L. Davisson, hereby certify that on August 12, 2019, 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 will be served by email and the CM/ECF system:

Mark B. Stern, Attorney
Email: mark.stern@usdoj.gov
U.S. Department of Justice
(DOJ) Civil Division, Appellate Staff
Firm: 202-514-2000
950 Pennsylvania Avenue, NW
Washington, DC 20530

Sarah Carroll
Email: sarah.w.carroll@usdoj.gov
U.S. Department of Justice
(DOJ) Civil Division, Appellate Staff
Firm: 202-514-2000
950 Pennsylvania Avenue, NW
Washington, DC 20530

/s/ John L. Davisson
JOHN L. DAVISSON