No. 19-777

In the Supreme Court of the United States

ELECTRONIC PRIVACY INFORMATION CENTER,
PETITIONER

v.

DEPARTMENT OF COMMERCE, 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

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
MARK B. STERN
SARAH CARROLL
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.D.C.):

Electronic Privacy Information Center v. *United States Department of Commerce*, No. 18-cv-2711 (Feb. 8, 2019)

United States Court of Appeals (D.C. Cir.):

Electronic Privacy Information Center v. *United States Department of Commerce*, No. 19-5031 (June 28, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 928 F.3d 95. The opinion of the district court (Pet. App. 23a-46a) is reported at 356 F. Supp. 3d 85.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2019. A petition for rehearing was denied on September 16, 2019 (Pet. App. 21a-22a). The petition for a writ of certiorari was filed on December 16, 2019 (Monday). 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. On March 26, 2018, the Secretary of Commerce announced his decision to include a citizenship question on the 2020 decennial census questionnaire. See *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2562 (2019). Roughly eight months later, petitioner filed this suit, claiming that Section 208 of the E-

Government Act required respondents to have completed a privacy impact assessment about the citizenship question *before* the Secretary's announcement of his decision to add that question. See Compl. ¶¶ 14, 47-63. On that basis, petitioner asked the district court to "[h]old unlawful and set aside [respondents'] decision to collect citizenship data through the 2020 Census, [respondents'] placement of a citizenship question on the 2020 Census, and [respondents'] initiation of the citizenship data collection process," and to "[o]rder [respondents] to conduct, review, and publish the full and complete Privacy Impact Assessments" allegedly required by Section 208. Compl. 27. Two months after filing suit, petitioner moved for a preliminary injunction. See D. Ct. Doc. 8 (Jan. 18, 2019).

2. The district court denied petitioner's motion for a preliminary injunction. Pet. App. 23a-46a. The court held that petitioner had not demonstrated a likelihood of success on the merits, rejecting petitioner's assertion that Section 208 required the government to complete a privacy impact assessment addressing the citizenship question "before Secretary Ross announced his decision to add the citizenship question" to the 2020 decennial census questionnaire. *Id.* at 29a. The court explained that Section 208 requires a privacy impact assessment "only before '*initiating* a new collection of information.'" *Ibid.* (citation omitted). The court observed, however, that respondents "have yet to actually begin obtaining, soliciting, or requiring the disclosure of any citizenship data. Those actions will not occur until the [Census] Bureau mails its first set of questionnaires to the public in January 2020." *Id.* at 31a. The court thus concluded that respondents "did not act contrary to the E-Government Act by deciding to collect citizenship

data before conducting, reviewing, or releasing a [privacy impact assessment] addressing that decision." *Id.* at 42a. The court also determined that petitioner was unlikely to suffer irreparable harm absent a preliminary injunction. *Id.* at 43a-45a.

3. a. The court of appeals vacated the judgment and remanded with instructions to dismiss the case for lack of subject-matter jurisdiction. Pet. App. 1a-16a. The court held that petitioner lacked Article III standing as an organization because Section 208 "d[oes] not confer an informational interest on [petitioner] as an organization." *Id.* at 8a. The court of appeals also held that petitioner lacked associational standing to sue on behalf of its members for alleged privacy and informational injuries, because petitioner had not demonstrated that "at least one of [its] members" had "suffered a 'concrete and particularized' injury." *Id.* at 10a (citation omitted).

First, the court of appeals rejected petitioner's argument that its members had suffered privacy injuries. Pet. App. 10a-13a. The court observed that even if Section 208 required a privacy impact assessment *before* the actual initiation of data collection, that would constitute only "a bare procedural violation, divorced from any concrete harm." *Id.* at 10a (citation omitted). The court explained that "[petitioner] has not shown how a delayed [privacy impact assessment] would lead to a harmful disclosure" of citizenship data from the 2020 decennial census, especially given that "[d]isclosure of individual census responses to third parties is prohibited by law." *Ibid.* (citing 13 U.S.C. 9). The court also explained that "a delay in receiving" a privacy impact assessment would not "make the Census Bureau any less likely to comply with these laws." *Id.* at 11a. The court thus rejected petitioner's asserted privacy-based

injury as relying on "a 'speculative chain of possibilities' that cannot establish an [Article III] injury." *Ibid.* (citation omitted).

The court of appeals likewise rejected petitioner's argument that its members had suffered informational injuries. Pet. App. 13a-15a. The court explained that to establish an informational injury, a plaintiff must show, among other things, that "it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure." *Id.* at 13a (citation omitted). The court explained, however, that Section 208 "'is directed at individual *privacy*,'" and "was not designed to vest a general right to information in the public." *Id.* at 13a-14a (citation omitted). Instead, the court explained, Section 208 is "designed to protect individual privacy by focusing agency analysis and improving internal agency decision-making." *Id.* at 14a. The court observed that "[i]n this respect, § 208 is fundamentally different from statutes like the Freedom of Information Act (FOIA) where the harm Congress sought to prevent was a lack of information itself." *Ibid.*

b. On June 27, 2019, this Court issued its decision in *Department of Commerce*, holding that the Secretary's explanation for his decision to add the citizenship question to the 2020 decennial census was pretextual. 139 S. Ct. at 2575-2576. Two weeks later, the President signed a July 11, 2019 executive order stating that the Court's decision "made it impossible, as a practical matter, to include a citizenship question on the 2020 decennial census questionnaire" in light of "the logistics and timing for carrying out the census." Exec. Order No. 13,880, 84 Fed. Reg. 33,821, 33,821 (July 16, 2019).

Petitioner then sought panel and en banc rehearing or, in the alternative, vacatur of the decisions of the

court of appeals and the district court on the ground that the litigation had become moot. See C.A. Doc. 1801783 (Aug. 12, 2019). The court of appeals denied both requests. Pet. App. 19a-20a, 21a-22a.

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 jurisdictional 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 generally is 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.*, Gov't Br. in Opp. at 5-8, *Velsicol Chemical Corp.* v. *United States,* 435 U.S. 942 (1978) (No. 77-900); Gov't Br. on Mootness at 8 n.6, *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18 (1994) (No. 93-714); Gov't Amicus Br. at 9-10, *McFarling* v. *Monsanto Co.*, 545 U.S. 1139 (2005) (No. 04-31); Gov't Pet. at 23 n.4, *Garza*, *supra* (No. 17-654); Gov't Br. in Opp. at 7-8, *Electronic Privacy Information Center* v. *Presidential Advisory Commission on Election Integrity*, 139 S. Ct. 791 (2019) (No. 18-267).

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. The Court recently denied petitioner's nearly identical request for vacatur in closely analogous circumstances.

See *Electronic Privacy Information Center* v. *Presidential Advisory Commission on Election Integrity*, *supra* (No. 18-267). The same result is warranted here.

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.* (brackets and citation 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 a statute (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 Department 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 Institute*, 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 those 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 so elevated it. 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. As the court

of appeals explained, Section 208 is "fundamentally different from statutes like" FOIA because it does not "vest a general right to information in the public." Pet. App. 14a. 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. *Public Citizen*, 491 U.S. at 449.

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 itself is not a private individual whose "personal information" is at risk of being exposed. And as the court of appeals explained, petitioner has not established that any of its members' personal information would have been at risk of exposure had the 2020 decennial census gone forward with a citizenship question. See Pet. App. 10a-11a. The Census Bureau and its employees are subject to strict statutory limitations on the disclosure of individual census responses to third parties, 13 U.S.C. 9; see 13 U.S.C. 214 (imposing criminal penalties for unlawful disclosure), and "it is pure speculation to suggest that the Census Bureau will not comply with its legal obligations to ensure the privacy" of individual census responses, Pet. App. 11a (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. 20-21) 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 International, 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 respondents' 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 against which Congress intended to protect when enacting that section. At most, Section 208 protects the interests of individuals whose personal information is at risk of disclosure by virtue of an agency's collection of that information. It does not protect an advocacy group or its members from a *dearth* of information, much less from a mere delay in the publishing of a privacy impact assessment. Petitioner thus alleges only a "bare proce-

dural 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 did not establish that the inclusion of a citizenship question on the 2020 decennial census would have threatened the privacy of its members. And obviously petitioner itself would suffer no injury, since it is not an individual who responds to the census questionnaire. Petitioner has thus failed to establish a "logical nexus" between its claim of harm from a delay in the publishing of a privacy impact assessment about the citizenship question, 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 temporary inability to read a privacy impact assessment prepared by respondents and published in the Federal Register or on the agency'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. 22-25) 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), two environmental organizations 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 one plaintiff organization had associational 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 542. Unlike petitioner, therefore, the organization in *American Canoe* had a member who alleged a concrete and particularized injury: his inability to make an informed decision about 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. Indeed, the Sixth Circuit has since confirmed that a failure to disclose information under a statute does not support Article III standing unless that failure harms a concrete interest of the plaintiff that the statute was intended to protect. See *Huff* v. *TeleCheck Services, Inc.*, 923 F.3d 458, 467-468 (2019).

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. 1692 *et seq.* 654 Fed. Appx. at 995. The court thus concluded that Congress had "elevated" that intangible harm to be actionable by a plaintiff who suffers it in a concrete and particularized way. *Ibid.* (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 asserted 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. Since *Spokeo*,

the Seventh Circuit has confirmed that a plaintiff lacks standing to assert an informational injury when the statute "does not seek to protect [the plaintiff] from the kind of harm he claims he has suffered." *Groshek* v. *Time Warner Cable, Inc.*, 865 F.3d 884, 888 (2017), cert. denied, 138 S. Ct. 740 (2018); see *Casillas* v. *Madison Avenue Associates, Inc.*, 926 F.3d 329, 338 (7th Cir. 2019). *Heartwood* is thus 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, 572 U.S. 1002 (2014), because it is no longer good law: as the Eighth Circuit has recognized, *Spokeo* "superseded [its] precedent in * * * *Charvat*." *Braitberg* v. *Charter Communications, Inc.*, 836 F.3d 925, 930 (2016).

Finally, petitioner cites (Pet. 25) the D.C. Circuit's decisions in *Ethyl Corp.* v. *EPA*, 306 F.3d 1144 (2002), and *Environmental Defense Fund* v. *EPA*, 922 F.3d 446 (2019). 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." 922 F.3d at 1147. And *Environmental Defense Fund* applied *Ethyl* and *Akins* to hold that an organization had standing to challenge an EPA rule that would "keep secret" certain "chemical identities" that, the organization alleged, were required to be disclosed by the Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (15 U.S.C. 2601 *et seq.*), and disclosure of which would directly aid the organization's "environmental interests, research, and educa-

tional activities." 922 F.3d at 452. Those determinations are not in conflict with the decision here, which found that petitioner had no particularized stake in procedures related to the attempted inclusion of a citizenship question on the 2020 decennial census that did not threaten any concrete privacy interest of petitioner or its members. That petitioner cited neither *Ethyl* nor *Environmental Defense Fund* in its petition for rehearing en banc below, see C.A. Doc. 1801783, undermines its contention that vacatur is required to secure conformity of D.C. Circuit precedent. In any event, 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 suggests that those cases represent not a split of authority, but merely fact-bound 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 International Co.* v. *Malaysia International 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, and "there is no mandatory 'sequencing of jurisdictional issues.'" *Ibid.* (quoting *Ruhrgas*, 526 U.S. at 584).

It follows that, had the court of appeals had sufficient time to address the impact of this Court's decision in *Department of Commerce* v. *New York*, 139 S. Ct. 2551 (2019)—which was issued less than 24 hours before the panel's opinion here—the court of appeals still 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—be it this Court's decision in *Department of Commerce* or the President's subsequent executive order—arose too late for the panel to take it into consideration. 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 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. 19a-20a, 21a-22a) denying petitioner's motion to vacate

the panel's opinion 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.

This is not a case where the prevailing party has deliberately frustrated further review. After this Court issued its decision in *Department of Commerce*, *supra*, the President, who is neither a defendant nor a respondent in this case, issued an executive order announcing that it had become "impossible, as a practical matter, to include a citizenship question on the 2020 decennial census questionnaire." Exec. Order No. 13,880, 84 Fed. Reg. at 33,821. The President made that decision not for any reason related to this suit, but because "the logistics and timing for carrying out the census, combined with delays from continuing litigation, le[ft] no practical mechanism for including the question on the 2020 decennial census." *Ibid.*

Nor is there any need to preserve the "path for future relitigation" between the parties, *Arizonans for Official English*, 520 U.S. at 71 (citation omitted), since the 2020 decennial census is going forward without the citizenship question and it is purely speculative whether the Secretary of Commerce would seek to add the question to the decennial census in 2030, 2040, or beyond. 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).

Petitioner's litigation strategy also counsels against the equitable remedy of vacatur here. After the Secretary announced his decision to include a citizenship

question in the 2020 decennial census in March 2018, petitioner waited nearly ten months before seeking preliminary injunctive relief—after which it took only five months for full briefing and decisions in both the district court and the court of appeals. Had petitioner acted with greater dispatch, it might have had an opportunity to seek this Court's review of an adverse decision before this case became moot.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
MARK B. STERN
SARAH CARROLL
Attorneys

MARCH 2020