NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ELECTRONIC PRIVACY INFORMATION CENTER,

Applicant,

v.

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

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APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

To Chief Justice John G. Roberts, Jr., Circuit Justice for the United States Court of Appeals for the District of Columbia Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, Applicant Electronic Privacy Information Center ("EPIC") respectfully requests that the time to file a Petition for a Writ of Certiorari in this case be extended by sixty days, to and including August 30, 2018. The Court of Appeals entered judgment and issued its opinion on December 26, 2017. *See* App. 1. On April 2, 2018, the Court of Appeals issued an order denying EPIC's petition for rehearing en banc or, in the alternative, for vacatur and remand. *See* App. 2. Absent an extension of time, the time to file a petition for a writ of certiorari will expire on July 1, 2018. EPIC is filing this application at least ten days before that date. *See* S. Ct. R. 13.5. This Court would have jurisdiction over the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

Background

The Presidential Advisory Commission on Election Integrity ("Commission") was created on May 11, 2017. Exec. Order No. 13,799, 82 Fed. Reg. 22,389 (May 11, 2017). On June 28, 2017, Commission Vice Chair Kris Kobach sent letters to election officials in all fifty states and the District of Columbia seeking to collect a wide array of personal voter information. Court of Appeals Joint Appendix (JA) 60. EPIC filed suit on July 3, 2017, and subsequently moved for a preliminary injunction to halt the Commission's

collection of voter data pending the publication of a privacy impact assessment pursuant to section 208 of the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899. JA 6, 11, 132–147. On July 24, 2017, the District Court denied EPIC's motion, holding that neither the Commission nor any of the other named Defendants were subject to judicial review under the Administrative Procedure Act ("APA"). JA 14–48.

EPIC filed a notice of appeal from the District Court's decision on July 25, 2017. JA 11. EPIC asked the Court of Appeals to determine, *inter alia*, "[w]hether the District Court erred in holding that APA review is unavailable for the collection of state voter data by Defendant Presidential Advisory Commission on Election Integrity." Appellant's Br. 4. EPIC also asked the Court of Appeals "to issue a preliminary injunction halting the Commission's collection of state voter data" under *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290 (D.C. Cir. 2006). Appellant's Br. 2, 18–19. On December 26, 2017, a panel of the Court of Appeals affirmed the District Court's denial of a preliminary injunction on alternate grounds, finding that EPIC "d[id] not show a substantial likelihood of standing to press its claims that the defendants have violated the E-Government Act." App. 1 at 14. The Court of Appeals rejected the District Court's nine-page analysis, JA 29–37, and concluded in three paragraphs that EPIC lacked informational standing.

On January 3, 2018, the President issued an Executive Order terminating the Commission in its entirety. Exec. Order No. 13,820, 83 Fed.

Reg. 969 (Jan. 3, 2018). In response, on January 11, 2018, EPIC moved the Court of Appeals panel to vacate its decision under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), and to remand the case to the District Court. Appellant's Mot. Vacate Decision, Dismiss Appeal as Moot, and Remand Case. On February 9, 2018, EPIC also petitioned the full Court of Appeals for rehearing en banc or, in the alternative, for vacatur and remand. Pet. of EPIC for Reh'g En Banc or, in Alternative, Vacatur & Remand. On April 2, 2018, the Court of Appeals denied both EPIC's motion for vacatur and EPIC's petition for rehearing en banc or vacatur. App. 2; App. 3.

Reasons for Granting an Extension of Time

The time to file a petition for a writ of certiorari in this case should be extended sixty days for the following reasons:

1. First, there is a substantial prospect that the Court will grant certiorari in this case and vacate or reverse the decision of the Court of Appeals. This case raises a question about Article III informational standing that is of great importance to the enforcement of open government and consumer protection statutes: where a plaintiff asserts a view of the law under which a defendant must disclose certain information to the plaintiff, does the plaintiff suffer an injury in fact by virtue of seeking and being denied access to that information?

The Court of Appeals' decision, which answers that question in the negative, is in direct conflict with *Federal Election Commission v. Akins*, 524

U.S. 11 (1998), and *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989). In *Akins*, the Court held that the plaintiffs could establish an "injury in fact" based on their "inability to obtain information." 524 U.S. at 21. In *Public Citizen*, the Court specifically determined that the violation of a statutory right to information was sufficient to establish informational standing. 491 U.S. at 449. Yet in the decision below, the Court of Appeals imposed an additional burden on plaintiffs seeking to establish informational standing: a requirement that the plaintiff prove Congress "had in mind" the particular "type of plaintiff" bringing suit and the particular "type of harm" suffered by the plaintiff as a result of nondisclosure. App. 1 at 10.

The Court of Appeals' decision also conflicts directly with informational standing decisions by other circuits, which have refused to impose a heightened burden of proof on plaintiffs asserting informational standing. *See, e.g.*, *Charvat v. Mut. First Fed. Credit Union*, 725 F.3d 819, 823 (8th Cir. 2013) ("[A]n informational injury alone is sufficient to confer standing, even without an additional economic or other injury."); *Ctr. for Biological Diversity v. BP Am. Prod. Co.*, 704 F.3d 413, 429–30 (5th Cir. 2013) (holding environmental group had standing to sue on behalf of its members based on defendant's failure to release information as required under Clean Water Act, CERCLA, and EPCRA); *Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 546 (6th Cir. 2004) (holding plaintiffs satisfy requirements of Article III standing when they allege that defendants "are disobeying the law in failing

to provide information that the plaintiffs desire and allegedly need"); *Heartwood, Inc. v. U.S. Forest Serv.*, 230 F.3d 947, 952 n.5 (7th Cir. 2000) (holding plaintiff suffered informational injury where defendant agency failed to conduct and publish environmental assessments).

Finally, there is a particular likelihood that the Court will grant certiorari, vacate the Court of Appeals' decision under *Munsingwear*, and dismiss EPIC's appeal as moot. Although the D.C. Circuit's decision is in irreconcilable conflict with the precedents of this Court and other circuit courts on an important question of law—and is therefore worthy of the Court's review—EPIC's appeal has also been unilaterally mooted by the Government after the Court of Appeals issued its judgment.

2. Second, an extension would give EPIC a better chance of incorporating into its certiorari petition the Third Circuit's pending decision in *Long v. SEPTA*, No. 17–1889 (3d Cir. argued Dec. 12, 2017). *Long* presents almost exactly the same question as this case: whether a plaintiff suffers an injury in fact by being denied information to which the law allegedly entitles her, or whether the plaintiff must also allege an additional harm suffered from the denial of that information? The Third Circuit has yet to directly address this question. If *Long* is decided prior to the filing of EPIC's certiorari petition, the Third Circuit's ruling will inform EPIC's analysis and affect the balance of the circuit split identified in the petition.

3. Third, an extension would provide additional time for the Government to carry out its planned deletion of the state voter data still in its possession. Such a development—though mostly irrelevant to EPIC's certiorari petition—would end any conceivable dispute as to the mootness of EPIC's appeal and further reinforce the appropriateness of *Munsingwear* vacatur in this case.

EPIC maintains, as it did below, that its appeal has already been rendered moot by the unilateral actions of the Government. The sole relief EPIC sought on appeal was a preliminary injunction to "halt the collection of state voter data by Defendant Presidential Advisory Commission on Election Integrity." Appellant Br. 4. The Commission was terminated by the President in January 2018, and the Government has halted the collection of voter data. As a result, no court could grant EPIC "any effectual relief whatever" within the scope of its appeal. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992). The Government has erroneously argued that EPIC's appeal still presents a live controversy because "the voter data that had been collected by the Commission remains, in encrypted form, on a White House server." Resp. Pet. Reh'g En Banc 5. But EPIC did not ask the D.C. Circuit to order the disgorgement of any voter data, and the Government's retention or deletion of that information has no bearing on the mootness of EPIC's appeal.

Nevertheless, an extension would provide additional time for the Government to resolve its disposition of the state voter data, which in turn may

resolve the question of mootness to the satisfaction of both parties. The Government has repeatedly stated that it "intends to destroy all state voter data" in its possession. App. 4 at 2; *accord* Resp. Pet. Reh'g En Banc 5. In a letter dated June 20, 2018, the Government notified EPIC that the National Archives and Records Administration had cleared the President to "dispose of" the voter data retained by the White House. App. 4 at 2. The Government also requested the consent of EPIC and other litigants to destroy that data. *Id.* Allowing up to sixty additional days for the Government to complete this data deletion process could provide the Court with a cleaner vehicle for certiorari and better candidate for *Munsingwear* vacatur.

4. Fourth, an extension would provide EPIC with additional time to obtain outside counsel and to acquaint that counsel with the legal and factual complexities of this case. Although EPIC regularly files amicus briefs before the Court, *see, e.g.*, Br. of Amicus Curiae EPIC, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), EPIC is diligently seeking experienced Supreme Court counsel to assist in the preparation and filing of its certiorari petition.

5. Finally, no meaningful prejudice would arise from an extension, as the Court would hear oral argument and issue its opinion in October Term 2018 whether or not an extension is granted.

For the foregoing reasons, the time to file a Petition for a Writ of Certiorari in this case should be extended by sixty days, to and including August 30, 2018.

Respectfully submitted,

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June 21, 2018

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CORPORATE DISCLOSURE STATEMENT

The Electronic Privacy Information Center ("EPIC") is a 501(c)(3) non-profit corporation. EPIC has never issued shares or debt securities to the public. EPIC has no parent corporations, shareholders, subsidiaries, or affiliates, and no publicly held company owns any stock in EPIC.