No. 17-911

In The
Supreme Court of the United States

Mark Crawford et al., *Petitioners*

v.

United States Department of the Treasury et al., *Respondents*

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

Reply Brief

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Reasons to Grant Certiorari

Central to this case is evidence of injuries to Americans abroad coerced by FATCA/IGAs.[1] *Roe v. Wade*, 410 U.S. 113 (1973), said such coercion gives persons denied service standing to challenge coercive laws, which doctrine the Government doesn't rebut. The Government glosses over the Sixth Circuit's *own statement* of its future-injury-standing rule, in conflict with *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334 (2014). The Government rejects standing unless one violates a law or recites a formulaic intent-to-violate statement, though *Driehaus* required neither. In these and other ways, the Government fails to show that Petitioners lack standing. Certiorari should be granted because *Driehaus* recognized that correct standing doctrine is vital and Sixth Circuit standing doctrines remain erroneously strict even after *Driehaus*'s correction.

I.
The Sixth Circuit's Future-Injury Standing Rule Conflicts with *Driehaus* and Creates Circuit Splits.

The Sixth Circuit continues its overly narrow approach to standing doctrine (which *Driehaus* rejected) by substituting for *Driehaus*'s credible-threat-of-prosecution test the Circuit's certainly-impending test. (Pet. 17-18.) The difference affects this case and creates circuit splits. (Pet. 17-19.)[2]

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[1] Petition abbreviations are followed here.

[2] *Driehaus* recognized standing for "alleging 'an intention to engage in a course of conduct affected with a consti-

The Government says the Sixth Circuit didn't state a different rule—it merely "paraphras[ed]" *Driehaus*'s rule—and anyway "Petitioners could not satisfy their ... test (which the Government doesn't explain, and which is erroneous). (Opp'n 18-19.)

But the Government's "paraphrase" argument *concedes* that the Sixth Circuit's statement of the rule is not *Driehaus*'s rule. As Petitioners noted, "the Sixth Circuit quoted *Driehaus*'s language" (Pet. 17) but then created a hybrid rule (App. 26a) changing crucial language from this Court's latest pronouncement on future-injury standing. So the Government's observation that the court quoted *Driehaus* (Opp'n 19) is meaningless because the hybrid rule is not the *Driehaus* rule. The "paraphrase" argument fails because the purported "paraphrase" has different standards, making it a different rule. And Petitioners showed exactly how "[t]he difference affects this case" (Pet. 18-19), which the Government failed to answer (Opp'n 18-19).

Moreover, though Petitioners established circuit splits (Pet. 18-19), the Government failed to address the fact that there are circuit splits if its mere-paraphrase argument fails (Opp'n 18-19), as it must.[3]

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tutional interest,'" for which the Sixth Circuit substituted "a *substantial probability* that the plaintiff will engage in conduct ..." (emphasis in original) (Pet. 17-18 (citations omitted)) and the requirement to violate the law or formulaically state intention to violate it (Pet. 20-21; App. 38a ("no Plaintiff has alleged an intent to violate the FBAR requirements")). *See* Part II.

[3] *See also New Hampshire Right to Life PAC v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996) (existence of non-moribund

So Question 1 is an important federal question, involving circuit splits, that this Court should review to reaffirm its own future-injury rule in *Driehaus*.

II.
The Sixth Circuit's Requirement that Plaintiffs Violate Provisions to Have Standing Conflicts with *Driehaus* and Creates Circuit Splits.

Question 2 arose because, as the Government acknowledges, the Sixth Circuit said that "'[o]ther than Zell, no [petitioner] has alleged an intent to violate the FBAR requirements.'" (Opp'n 20 (quoting App. 38a).)

The classic formulation for a preenforcement challenge requires, not an intent to *violate the law*, but "an intention *to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute*," *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (emphasis added), so the Sixth Circuit misstates the intent requirement and creates a circuit split with the First, Second, and Ninth Circuits, which state *Babbitt*'s intent-to-*engage* test, not the Sixth Circuit's intent-to-*violate* test.[4]

The Sixth Circuit said Zell met its intent-to-violate-declaration requirement because he *had not* complied with FBAR's requirement, which is erroneous because he said he was *already* in violation, not that he *in-*

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statute provides credible enforcement threat); *Wilson v. Stocker*, 819 F.2d 943, 947 (10th Cir. 1987) (same).

[4] *McCollester v. Keene*, 668 F.2d 617, 619 (1st Cir. 1982); *Mental Hygiene Legal Serv. v. Cuomo*, 785 F. Supp. 2d 205, 217 (2d Cir. 2011); *Lopez v. Candaele*, 630 F.3d 775, 785 (9th 2010).

tended to violate the challenged provision.[5] The Sixth Circuit said the others had not made the requisite intent-to-violate declaration, so they lacked standing. So the Sixth Circuit plainly requires such formulaic intent-to-violate language for standing.

But as Petitioners established (Pet. 20-21), a formulaic intent-to-violate recitation is not required because *Driehaus* said that Mr. Steffel's "*desire* to continue handbilling" sufficed (without him saying he *intended to violate* the law), 134 S.Ct. at 2342 (emphasis added) (citing *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). And *Driehaus* also cited *MedImmune v. Genetech*, 549 U.S. 118, 128-29 (2007), which said that where persons avoid actions because of government coercion (i.e., by a law the person wants to, but won't, violate for fear of penalties), that too suffices for standing, *id.* at 129. (Pet. 21.)

So Petitioners' verification that they believe FBAR requirements are unconstitutional and don't want to comply with them, but they don't violate the law due to penalties, suffices for standing. And the Sixth Circuit's erroneous requirement of a formulaic intent-to-violate recitation deprived Petitioners of standing they have under *Driehaus*, *Steffel*, and *MedImmune*.

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[5] As the Government notes, the Sixth Circuit said Zell lacked standing because there was no credible enforcement threat. (Opp'n 20.) That was based on an erroneous interpretation of *Driehaus*'s credible-threat test as a certainly-impending test. *See* Part I (Pet. 17-18). But *Driehaus* held that an "an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." 134 S.Ct. at 2342. Those violating a non-moribund law have a credible enforcement threat. *See id.* at 2342-43.

In sum, Question 2 is straightforward (despite the Government's professed confusion): whether plaintiffs must violate an act or formulaically allege intent to violate the law to have standing. That is an important federal question that this Court should review to reaffirm its own rule in *Driehaus*, *Steffel*, and *MedImmune* and resolve circuit splits.

III.
The Sixth Circuit's Rejection of Indirect Injury Based on Coerced Third-Party Actions Conflicts with *Roe.*

As Petitioners established, this Court held in *Roe v. Wade*, 410 U.S. 113 (1973), that where a service provider withholds services because of legal penalties applicable to the provider,[6] a targeted party denied the service has standing to challenge the law coercing the service withholding. (Pet. 21-22.)[7] That analysis gives

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[6] The Government says "reporting by FFIs is not mandated" but admits the coercion of FATCA/IGAs by agreeing that "FATCA encourages" reporting with the 30% FFI Penalty. (Opp'n 2-3.) So FFIs must either dump U.S. accounts altogether (which many do, Pet. 2-3) or bear the enormous cost and burden of compliance (Pet. 4-5) with a draconian 30% FFI Penalty for failure to properly comply (Pet. 4; *see also* Pet. 24 n.10 (million-dollar-plus penalty for failure to find and report U.S. accounts by bank intending to dump U.S. accounts but inadvertently getting some).)

[7] Such coercion-based standing is not unique to *Roe*. In *Warth v. Seldon*, 422 U.S. 490 (1975), the Supreme Court recognized that harm caused "indirectly" by a law is enough for standing, *id.* at 504-05 (citing *Roe*, 410 U.S. at 124). Even where an injury might be avoidable, and thus arguably self-inflicted, standing remains where the government

standing to Americans abroad—the targets of FATCA/IGAs—to challenge FATCA/IGAs because FFIs are declining service under FATCA/IGA coercion. (Pet. 21-22.) By saying that challenged provisions are "aimed at curbing offshore tax evasion" (Opp'n 2), the Government acknowledges that Americans abroad are the FATCA/IGA targets. (Americans abroad have tax obligations, not FFIs.) As will be further addressed in merits briefing, such targeting gives standing.[8]

Petitioners also established that the Sixth Circuit sought to evade this Court's holding on standing by employing a curious number-of-options analysis to distinguish *Roe*, which analysis Petitioners demonstrated to be erroneous. (Pet. 22-25.) The Government recites what the Sixth Circuit said, with no effort to refute Petitioners' arguments. (Opp'n 21-22.)

In particular, the Government relies on the Sixth Circuit's recitation of "a third option," i.e., comply with FATCA/IGAs and serve Americans abroad. (Opp'n 21-22.) But Petitioners proved that argument erroneous for four reasons, crucially for failing to come to grips with the coercion of FATCA/IGAs on FFIs (Pet. 22-25),

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action "remains a contributing factor." *Natural Resources Defense Counsel v. U.S. Food and Drug Admin.*, 710 F.3d 71, 84-85 (2d Cir. 2013). The Sixth Circuit recognizes that indirect harm gives standing. *See Grizell v. City of Columbia, Div. of Police*, 461 F.3d 711, 717-18 (6th Cir. 2006); *Lambert v. Hartman*, 517 F.3d 433, 438-39 (6th Cir. 2008).

[8] *Cf. G & G Fire Sprinklers v. Bradshaw*, 156 F.3d 893, 899-901 (9th Cir. 1998) (subcontractor had standing, though indirectly affected by provision targeting subcontractors by regulating contractors, because provision *targeted* subcontractors), *vacated on other grounds*, 526 U.S. 1061 (1999).

to which the Government makes no response. Instead the Government simply makes the bare allegation that coerced denials of services by FFIs to Americans abroad are the "FFI's 'own independent actions.'" (Opp'n 22 (quoting App. at 35a).) Ironically, the Government makes this conclusory allegation while claiming that Petitioners' evidences of FATCA/IGA coercion are "conclusory" (Opp'n 22), as discussed further in Part IV. And Petitioners provided further evidence that FFIs are actively dumping U.S. accounts *because of* FATCA and IGAs in the form of a DOJ Non-Prosecution Agreement (Pet. 24 n.10) which is consistent with the Democrats Abroad Study and Petitioners own verified experiences, but again the Government ignores it.

Question 3—whether this Court's standing doctrine in *Roe* is viable and should be followed—is an important federal question that this Court should review to assure that its precedents are followed.

IV.

The Sixth Circuit's Failure to Accept Allegations as True and Construe Inferences in Plaintiffs' Favor Conflicts with *Warth*.

Coupled with the Sixth Circuit's refusal to recognize the foregoing coercive-effect standing is the Sixth Circuit's failure to accept as true allegations that service providers denied service because of FATCA/IGAs and provide Petitioners the benefit of inferences.

Petitioners established that the Sixth Circuit erred by ignoring evidence in the Complaint of the coercive effect of FATCA/IGAs and injuries flowing from that coercion, because under *Warth*, 422 U.S. 490, the court was required to "accept as true all material allegations ... and construe the complaint in favor of the complain-

ing party," *id.* at 501. And reasonable inferences go to plaintiffs (Pet. 26), with pleading requirements being much more modest (Pet. 26) than what Petitioners provided. Petitioners met those requirements, as they demonstrated, but the courts below failed to accept allegations as true and credit inferences to plaintiffs. (Pet. 26-28.)

The Government isolates Petitioners' paragraph-topic sentence, i.e., "'Petitioners said denial of services by FFIs was *because* of FATCA/IGAs'" (Opp'n 22 (quoting Pet. 27) (emphasis in Petition)), and ignores the *rest* of that paragraph, which provided specific evidence on causation (or traceability) that the Sixth Circuit was required to accept as true but did not (Pet. 27). Then the Government declares that paragraph-topic sentence "not the sort of 'nonconlusory factual allegation[s]' that a court must take as true in ruling on a motion to dismiss." (Opp'n 22 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009).) Of course a topic sentence in a brief is not itself the allegation that must be accepted as true. What the court was required to accept as true was evidence of the coercive effect of FATCA/IGAs, such as the Democrats Abroad study which "show[s] the intense impact FATCA is having on overseas Americans'" (Pet. 2 (citation omitted)), Petitioner Crawford's verification that he couldn't open an account because the FFI "does not wish to assume resulting FATCA/IGA burdens" (Pet. 7-8), Petitioner Zell's verification that he was asked (inter alia) to transfer trust funds due to FATCA and the soon-in-effect IGA (Pet. 10-11), and other such evidence.

The Government then says that the Sixth Circuit "did not dispute petitioners' *factual* allegation that some FFI's have reacted to FATCA and the IGAs by

declining service to Americans," but that the appellate court held those "choices were 'voluntary,' and therefore not 'traceable to FATCA' or the IGAs as a *legal* matter, because neither FATCA nor the IGAs compelled them." (Opp'n 22 (emphasis in original).) But that legal argument, which Petitioners had noted (Pet. 27), is based on an erroneous rejection of the sort of standing recognized in *Roe. See supra* Part III. And despite that legal argument, the Sixth Circuit was required to accept as true the evidence in the proposed Amended Verified Complaint of the coercive effect of FATAC/IGAs, which coercive effect caused FFIs to deny banking services and caused other described injuries. "[N]ot disput[ing]" (Opp'n 22) is not the same as accepting as true. And what the Sixth Circuit didn't dispute with its "even if" statement (App. 35a) was that Crawford's inability to open an account might be "an injury" (App. 35a), *not* that the injury was *caused* by FATCA/IGA as Crawford claimed he was told (Pet. 7-8). Had the appellate court taken seriously its duty to accept the allegations of causation (backed by evidence), perhaps it would have been more inclined to see that this case fits precedent, such as *Roe*, that recognizes that such causation provides standing and is no mere independent, uncoerced third-party decision.

And Petitioner provided examples of the lower court's failure to give inferences to Petitioners (Pet. 27-28), to which the Government didn't respond.

Question 4, whether the Sixth Circuit followed its duty to accept allegations as true and award inferences to Petitioners, is an important federal question this Court should review to assure its precedents are followed.

V.
The Sixth Circuit's Failure to Recognize a Privacy Interest in Financial Records Conflicts with *Miller*.

Petitioners showed that the Sixth Circuit's reliance on *United States v. Miller*, 425 U.S. 435 (1976), to hold that "[t]here is no 'legally protected interest' in maintaining the privacy of one's bank records from government access" (App. 22a) is erroneous for three reasons, including that *Miller* required a context-specific analysis and distinguished situations like those at issue here from its no-privacy-interest holding. (Pet. 28-30.)

The Government says "Petitioners argue that modern bank records contain more personal information than such records did when *Miller* was decided." (Opp'n 23.) But while FFIs *do* report more information on Americans overseas (particularly account balances) than do American banks on Americans living here, the Government creates a straw-man argument because Petitioners' argument based on "*the conditions at issue*" (Pet. 28 (emphasis in original)) was broader, focusing on the specific situations *Miller* excluded from its no-privacy-interest holding (Pet. 28-30), as the Government then admits in limited fashion (Opp'n 23).

The Government argues that "even if the circumstances here were fundamentally different from those in *Miller*, that would not establish that the decision below *conflicts* with *Miller*, only that *Miller* is not dispositive." (Opp'n 23.) But because the circumstances *are* fundamentally different, the Government accordingly acknowledges that *Miller* is not dispositive. Therefore, the Sixth Circuit's holding that *Miller is* dispositive conflicts with *Miller*, in which this Court

said it was *not* deciding the situation at issue here.

Petitioners noted that "inherent in privacy loss are financial and security risks" and established that Americans have a reasonable expectation of privacy from disclosure of their financial information "to *third parties*, i.e., *foreign governments*, which may have less security than the IRS" (Opp'n 30), and showed that security concerns are real (Opp'n 30-32).

The Government tries to evade these arguments by the straw-man arguments that (i) Petitioners can't raise a First Amendment claim (Opp'n 24), which Petitioners didn't make, and (ii) that *Miller* didn't discuss "digital security concerns" (Opp'n 24), which Petitioners didn't say. The Government says "no factual allegations" underpin "that argument" (Opp'n 24), but Petitioners have consistently asserted a privacy interest, which "inherentl[y]" includes the *reasons* one wants privacy, which include avoiding "financial and security risks" (Pet. 30), so the Government's argument fails. The same answer eliminates the Government's arguments that "[P]etitioners did not invoke digital security concerns as a ground for standing in their filings below" (Opp'n 24) because the standing claim is that Petitioners have a privacy interest under these circumstances, and digital security concerns (which the Government doesn't contest per se) are reasons why one wants and needs privacy under the circumstances at issue here.

Question 5, whether Petitioners have a privacy interest in the circumstances at issue, is an important federal question that this Court should decide, and the Sixth Circuit's holding that *Miller* is dispositive conflicts with what *Miller* said, which should be resolved.

VI.

Whether U.S. Senator Paul Has Standing to Challenge IGAs Based on Denial of His Right to Vote Is an Important Federal Question.

Petitioners explained why neither the holding nor analysis of *Raines v. Byrd*, 521 U.S. 811 (1977), denies standing to Senator Paul, though the Sixth Circuit said it did. (Pet. 33.) And were *Raines* deemed controlling, Petitioners asked for its overruling given unconstitutional executive actions. (Pet. 34 n.15.) Moreover, Petitioners noted that *Raines* didn't overrule *Coleman v. Miller*, 307 U.S. 433 (1939), under the analysis of which Senator Paul has standing. (Pet. 32-33.)

The Government doesn't respond to Petitioners arguments about why *Raines* and *Coleman* don't deny, and affirmatively provide, standing to Senator Paul. Instead, it simply reiterates that *Raines* controls and cites some lower-court opinions that don't deal with Petitioners' arguments. (Opp'n 25-25.)

So the fact remains that under *Raines* and *Coleman* the failure to vote on IGAs affects the voting process, distinguishing this situation and providing standing for Senator Paul. (Pet. 33-34.)

Question 6 is an important federal question that this Court should accept for review.

Conclusion

Millions of Americans live abroad and are adversely affected by the challenged provisions. For example, the Democrats Abroad research "'show[s] the intense impact FATCA is having on overseas Americans.'" (Pet. 2 (citation omitted).) Under proper standing doctrines, Petitioners have standing and the opportunity to get relief in this case. This Court should grant certiorari.

Respectfully submitted,

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