No. _____

In The
Supreme Court of the United States

DANTZLER, INC., et al.,

Petitioners,

v.

S2 SERVICES PUERTO RICO, LLC;
RAPISCAN SYSTEMS, INC.; AND
PUERTO RICO PORTS AUTHORITY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

For a plaintiff to have standing to sue in federal court, "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (citations, internal quotation marks, and alterations omitted). The question presented is:

Is the causal connection required for standing satisfied when it is substantially likely that a third party in the chain of causation will respond to the defendant's conduct in a way that injures the plaintiff, as held by the D.C., Second, Third, Eighth, Ninth, Tenth, and Eleventh Circuits, or does the participation of a third party with the ability to act independently almost automatically break the chain of causation, as held by the First, Fourth, and Sixth Circuits?

LIST OF PARTIES

Petitioners Dantzler, Inc.; Northwestern Selecta, Inc.; Alberic Colón Auto Sales, Inc.; Alberic Colón Dodge Chrysler Jeep, Inc.; Alberic Colón Ford, Inc.; Alberic Colón Mitsubishi, Inc.; Sachs Chemical, Inc.; Mays Chemical Company of Puerto Rico, Inc.; Maderas Alpha, Inc.; Celta Export Corporation; Cougar Plastics Corporation; Caribbean Produce Exchange, LLC; Madearte Furniture Imports & Distributors, Inc.; Maderas 3C, Inc.; Marjor & Sons, Inc.; M.M. Fashion & Design, Inc.; Papelera Del Plata, Inc.; The Paperhouse Corp.; Plavica, Inc.; Empresas Berrios, Inc., d/b/a Muebleria Berrios; Empresas Berrios Inventory and Operations, Inc.; Jose Santiago, Inc.; Correa Tire Distributor, Inc.; and Eugenio Serafin, Inc., d/b/a Est Hardware, were plaintiffs in the district court and appellees in the court of appeals.

Respondents S2 Services Puerto Rico, LLC; Rapiscan Systems, Inc.; and Puerto Rico Ports Authority were defendants in the district court and appellants in the court of appeals.

STATEMENT PURSUANT TO RULE 29.6

Petitioners are all private corporations or limited liability companies, and none are publicly traded entities. No petitioner has a parent corporation and no publicly held company owns 10% or more of any petitioner's stock.

RELATED CASES

The following is a list of all proceedings in state and federal trial and appellate courts, including proceedings in this Court, that are directly related to the case in this Court:

- *Dantzler, Inc., et al. v. Puerto Rico Ports Authority*, *et al*., Civil No. 3:17-cv-01447-FAB, U.S. District Court for the District of Puerto Rico. Judgment was entered September 26, 2018.

- *Dantzler, Inc.*, *et al. v. Empresas Berríos Inventory & Operations, Inc.*, Nos. 18-2087 and 18-2089, U.S. Court of Appeals for the First Circuit. Judgment was entered on May 1, 2020, petition for reh'g denied, Sept. 2, 2020.

  NOTE: Although the Court of Appeals case heading is listed as set forth immediately above, in fact *Empresas* is not adverse to the Dantzler appellee parties. The actual appellants were Puerto Rico Ports Authority, S2 Services Puerto Rico, LLC and Rapiscan Systems, Inc.

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INTRODUCTION

One of the three elements that a plaintiff must prove to establish standing to sue in federal court is a causal connection between the defendant's conduct and the plaintiff's injury. Although this causal-connection requirement is relatively straightforward when the defendant's conduct is aimed directly at the plaintiff, a broad and deep inter-circuit conflict has arisen over the standard to apply when a third party plays a role in the chain of causation.

At least seven courts of appeals take a practical approach and hold that the causal-connection requirement is satisfied when it is substantially likely that the

third party in the chain of causation will respond to the defendant's conduct in a way that injures the plaintiff. But three courts of appeals hold that the participation of a third party almost automatically breaks the chain of causation.

In the present case, a port authority and its contractors (respondents here) collected unauthorized fees (at times in violation of a federal-court injunction and for work that was never performed) from the ocean carriers that brought cargo through the port. The carriers separately billed their customers, the shippers who owned the cargo, for those fees (in addition to the ocean freight and any other charges that were otherwise due).

A group of those shippers (petitioners here), having paid the fees for which ocean carriers charged them, brought the present action to recover the unauthorized fees from respondents. But the court below held that the suit failed for the lack of a causal relationship between petitioners and respondents. According to the court, the ocean carriers—a third party not before the court—broke the chain of causation.

The decision below is unjustified on the merits and inconsistent with the policies that this Court has expressed, including the unanimous standing analysis in *Department of Commerce v. New York*, 139 S. Ct. 2551, 2565-66 (2019). This case provides an ideal vehicle to resolve the inter-circuit conflict and answer a question of fundamental national importance.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-24a) is reported at 958 F.3d 38. The opinion of the district court (App. 1b-46b) is reported at 335 F. Supp. 3d 226.

JURISDICTION

The court of appeals entered its judgment on May 1, 2020, App. 1a, and denied a timely petition for rehearing on September 2, 2020, App. 1c. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Petitioners asserted jurisdiction in the district court under 28 U.S.C. §§ 1331, 2201, 1343 & 1367. The First Circuit had appellate jurisdiction under 28 U.S.C. § 1291.

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2, Clause 1 of the United States Constitution provides in relevant part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . .

STATEMENT

1. Factual Background[1]

Petitioners are businesses that import goods into Puerto Rico through the maritime port of San Juan. Respondent Puerto Rico Ports Authority ("PRPA"), which owns and operates the port, contracted with respondent Rapiscan Systems, Inc. ("Rapiscan") in 2009 to conduct "non-intrusive scanning of shipping containers" entering Puerto Rico through the port. App. 2b; *see also* App. 6a. Rapiscan subsequently assigned its rights to respondent S2 Services Puerto Rico LLC ("S2 Services"), its wholly owned subsidiary. App. 6a, 2b.

In 2011, PRPA approved Regulation 8067 to implement its cargo-scanning program. App. 7a, 2b-3b. Regulation 8067 required ocean carriers or their agents to pay PRPA an Enhanced Security Fee ("ESF") for each container that was scanned. *See* App. 7a, 3b. Rapiscan or S2 Services received the lion's share of those payments. *See*, *e.g.*, *Cámara de Mercadeo, Industria y Distribución de Alimentos v. Vázquez*, 2013 WL 5652076, at *4 (D.P.R. Oct. 16, 2013), *aff'd sub nom. Industria y Distribución de Alimentos v. Trailer Bridge*, 797 F.3d 141 (1st Cir. 2015) (noting that, as of March 2013, approximately 84% of the ESF money collected "was paid to Rapiscan or S2 Services"). On the other side of the ledger, carriers passed the ESFs through to their customers—petitioners and other shippers who

[1] In the current procedural posture of the case, the facts alleged in the petitioners' complaint must be accepted as true and all reasonable inferences must be drawn in petitioners' favor.

import cargo through the port. *See* App. 3b. Carriers would accomplish this by separately billing their customers for the ESFs (in addition to the ocean freight and any other charges that were otherwise due).[2]

In 2013, the federal district court "enjoined Puerto Rico 'from collecting [ESFs] from shipping operators that are not being scanned pursuant to Regulation [] 8067.'" App. 3b (quoting *Cámara de Mercadeo*, 2013 WL 5652076, at *15) (second alteration in original); *see also* App. 8a. Notwithstanding that injunction, respondents continued to collect ESFs for all cargo, including cargo that was never scanned pursuant to Regulation 8067. That included non-containerized cargo (such as cars), cargo entering the port through marine terminals without access to scanning stations, and containers that were simply never scanned. App. 8a, 4b-5b.

Regulation 8067 expired in 2014, *see* App. 8a-9a, 3b-4b, but PRPA continued to collect ESFs despite the

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[2] Although no discovery has yet occurred in the present case, testimony in unrelated litigation illustrates how the process worked. *See Cámara de Mercadeo*, 2013 WL 5652076, at *4 (describing how one shipping company "generate[d] another invoice for the ESF to each customer" of the shipping company and noting that "[t]he company's clients are also paying the ESF as invoiced"); *id*. (reporting that another shipping company "has paid over $480,000 in ESF fees, but that its customers reimburse [the company] for the fees and any associated administrative costs"); *id*. (reporting that [a third shipping] company has paid approximately $1.5 million to PRPA in [ESFs], most of which, including administrative costs, are passed on to its customers); *id*. at *5 (reporting "that most of [a fourth shipping company's] clients are paying the ESF, except for one client that refuses to pay the fee").

lack of authority. Finally, in 2016, "the Puerto Rico Court of Appeals ordered PRPA 'to immediately cease and desist from carrying out any procedure under [Regulation 8067]' because Regulation 8067 'was not in force.'" App. 4b (quoting *Cámara de Mercadeo, Industria y Distribución de Alimentos v. Autoridad de los Puertos*, 2016 WL 7046805, at *8 (P.R. Ct. App. Oct. 28, 2016)) (alteration in original); *see also* App. 9a.

2. Legal Background

The Constitution restricts the jurisdiction of federal courts to "Cases" or "Controversies." U.S. Const. Art. III, Sec. 2, Clause 1. "If a dispute is not a proper case or controversy, the courts have no business deciding it. . . ." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). In recognition of this Constitutional limit on the courts' power, "a litigant [must] have standing to invoke the authority of a federal court." *Id*. at 342.

To establish standing, a plaintiff must satisfy the three elements that this Court recognized in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992):

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the

> court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

504 U.S. at 560-561 (citations, internal quotation marks, footnote, and alterations omitted). This case focuses on the second element—the causal connection between the plaintiff's injury and the defendant's conduct.

3. Proceedings Below

Petitioners brought the present action against respondents in federal district court in Puerto Rico seeking money damages and injunctive and declaratory relief under federal and state law. Petitioners relied primarily on 42 U.S.C. §§ 1983 & 1988 because respondents acted under color of Regulation 8067 to deprive petitioners of rights secured by the Constitution (particularly the Commerce Clause) and laws of the United States. Respondents moved to dismiss on various grounds, including an argument that petitioners "lacked standing to challenge the ESFs because it was the ocean freight carriers who paid those fees, not [petitioners]."[3] App. 10a; *see also* App. 9b.

The district court carefully analyzed respondents' standing argument, addressing each of the elements

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[3] In sharp contrast, when a group of ocean carriers and other shipping interests sued the heads of PRPA and the Puerto Rico Treasury Department to challenge the program, the "defendants argue[d] that plaintiffs [did] not have Article III standing . . . because . . . any costs incurred by the plaintiffs from the ESF are passed on to their customers. . . ." *Cámara de Mercadeo*, 2013 WL 5652076, at *7.

that this Court identified in *Defenders of Wildlife*, 504 U.S. at 560-561. The focus of respondents' argument, and thus of the district court's analysis, was the second element—the "causal connection between the injury and the conduct complained of."

The district court held that petitioners established an adequate causal connection. App. 12b. It reasoned that respondents "imposed [ESFs] on ocean freight carriers, and the ocean freight carriers collected those fees from [petitioners]." *Id.* Even if petitioners were "not the direct 'object of the government action,'" *id.* (quoting *Defenders of Wildlife*, 504 U.S. at 562), they could establish the causal-connection requirement "because 'even harms that flow indirectly from the action in question can be said to be "fairly traceable" to that action for standing purposes.'" App. 13b (quoting *Focus on the Family v. Pinellas Suncoast Transit Authority*, 344 F.3d 1263, 1273 (11th Cir. 2003)).[4]

On appeal, the First Circuit reached the opposite conclusion. The court accepted that petitioners' "allegation of economic harm satisfie[d] the injury-in-fact requirement," App. 17a, the first element in *Defenders*

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[4] The district court granted respondents' motion to dismiss some of petitioners' claims. Petitioners did not cross-appeal on those issues. The district court also analyzed the status of PRPA and concluded that it was not entitled to sovereign immunity. Puerto Rico did not clearly structure PRPA as an arm of the state (as the evidence is conflicting), App. 16b-18b, and the Puerto Rico Treasury would not be liable for any judgment against PRPA, App. 18b-19b.

of Wildlife, 504 U.S. at 560. But the court held that petitioners failed on the second and third elements.

The primary analysis centered on the second element—the causal-connection requirement. Because petitioners "did not directly pay the ESFs to PRPA, nor did PRPA assess the ESFs on [petitioners]," the causal chain depended on the acts of "third parties not before the court—*i.e.*, the ocean freight carriers." App. 17a. The court reasoned that "[t]he Supreme Court has cautioned against courts finding that a plaintiff's injury is fairly traceable to a defendant's conduct where the plaintiff alleges a causal chain dependent on actions of third parties." *Id*. There was no reason not to apply that general rule. "[N]either the regulation nor PRPA controlled the ocean freight carriers' relationships with their customers, such as [petitioners]." App. 19a. Respondents did not force or coerce the ocean carriers to pass on the fees to petitioners. *Id*. The First Circuit therefore concluded that petitioners did not satisfy the causal-connection requirement.

The court of appeals "acknowledged that [petitioners] satisfie[d] the redressability requirement" (the third element) to the extent that they sought "money damages to redress [their] economic injury." App. 21a n.5. But to the extent that they sought injunctive and declaratory relief, they failed on the redressability requirement for the same reason that they failed on the causal-connection requirement. "[I]t is far from certain that enjoining PRPA from collecting ESFs from the ocean freight carriers . . . will guarantee that those

carriers lower the costs they charge [petitioners]." App. 20a.

The analysis with respect to all three of the respondents was "substantially the same," but for Rapiscan and S2 Services the causal chain was one link longer and thus "even more attenuated." App. 22a.[5]

REASONS FOR GRANTING THE PETITION

I. The courts of appeals are deeply divided on the proper application of the causation requirement for standing.

Although the courts of appeals universally recognize and apply this Court's requirement that "there must be a causal connection between the injury and the conduct complained of," *Defenders of Wildlife*, 504 U.S. at 560, they apply that requirement in very different ways when the actions of a third party provide a necessary link in the chain of causation. The majority of circuits take a practical approach,[6] holding that the

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[5] In a footnote, the court of appeals added that, although it was "unnecessary to reach PRPA's argument that it is entitled to sovereign immunity," the court "f[ou]nd it difficult to see how PRPA cannot be cloaked with sovereign immunity here in its performance of an inspection function that is governmental in nature." App. 21a n.6.

[6] In addition to the seven circuits discussed in the text, it appears that the Fifth Circuit also follows the majority approach. *See Inclusive Communities Project, Inc. v. Department of Treasury*, 946 F.3d 649, 655-660 (5th Cir. 2019). But because the *Inclusive Communities* court held that the plaintiff did not satisfy the causal-connection requirement, even under the majority approach, the case cannot fairly be included in the conflict.

causal-connection requirement is satisfied when it is substantially likely[7] that the third party will respond to a defendant's conduct in a way that injures the plaintiff. But a significant minority—including the First Circuit in the decision below—take an unduly restrictive approach in which the existence of a third party in the causal chain is an almost-automatic bar to standing.

A. The D.C., Second, Third, Eighth, Ninth, Tenth, and Eleventh Circuits take a practical approach that recognizes a causal connection when it is substantially likely that a third party will respond to the defendant's conduct in a way that injures the plaintiff.

1. The D.C. Circuit. Challenges to agency decisions often involve third-party actions, and thus the D.C. Circuit has frequently addressed the causation issue here (and its decisions have been influential in other circuits). Most recently, in *Competitive Enterprise Institute v. Federal Communications Commission*, 970 F.3d 372 (D.C. Cir. 2020), individual consumers challenged conditions that the FCC imposed on the merger of three cable companies. One condition required the merged company to provide fee-free

[7] Courts following the majority approach have phrased the standard in a variety of different ways. Some examples of the core language include "substantially likely," "substantial likelihood," "substantial factor," "substantial reason," "eminently plausible," and "plausibly." The underlying premise in all these cases is that the court should take a practical approach to decide what would be likely to happen in the real world.

internet connections to "edge providers," *i.e.*, companies such as Netflix that provide consumer content. *Id*. at 382. The consumers argued that they were injured when their cable bills were higher because of the FCC-imposed conditions.

The consumers relied on a "relatively simple" causal chain. "By requiring [the merged company] to forgo revenue from edge providers, the condition *caused* [the company] to raise prices on broadband subscribers." *Id*. at 383. Although that causal chain was more attenuated than the causal chain in the present case—in which respondents did not simply deny the ocean carriers some undetermined amount of additional revenue but instead imposed specific charges that could easily be (and predictably were) passed on to petitioners—the D.C. Circuit had no difficulty holding that the consumers had standing. *Id*. at 383-384. The FCC's conditions did not literally require the company to raise its cable rates, but through simple economics plaintiffs showed "a substantial likelihood that [the FCC condition] caused their cable bills to increase." *Id*. at 384.

The court justified its holding in part by noting that it had previously "found standing where third-party conduct has been adequately proven" in "many cases." *Id*. at 381. It gave "just a few examples," *id*., illustrating that the majority approach is well-entrenched in the D.C. Circuit. Specifically, the court cited *Competitive Enterprise Institute v. National Highway Traffic Safety Administration*, 901 F.2d 107, 117 (D.C. Cir. 1990), which held that a consumer

organization had standing to challenge fuel-efficiency regulations because, absent the regulations, third-party automobile manufacturers would be "substantially likely to respond to market forces" by producing the larger vehicles that the organization's members desired; *Tozzi v. U.S. Department of Health and Human Services*, 271 F.3d 301, 307-311 (D.C. Cir. 2001), which held that a manufacturer had standing to challenge an HHS decision classifying a chemical as a "known carcinogen" because, absent that classification, third parties would be more likely to buy the manufacturer's products containing that chemical; *Teton Historic Aviation Foundation v. U.S. Department of Defense*, 785 F.3d 719, 727-728 (D.C. Cir. 2015) (per curiam), which held that an organization that bought surplus aircraft parts had standing to challenge a policy limiting their sale because it was likely that, absent the policy, the Defense Department would sell through a specific contractor who would likely auction the parts to the public; and *Energy Future Coalition v. Environmental Protection Agency*, 793 F.3d 141, 144 (D.C. Cir. 2015) (Kavanaugh, J.), which held that biofuel producers had standing to challenge an EPA rule that effectively prevented third-party automobile manufacturers from using a particular biofuel in emissions testing because there was "substantial reason to think that at least some vehicle manufacturers would use" that biofuel if permitted to do so.

2. The Second Circuit. The majority approach is also well-entrenched in the Second Circuit. In *Natural Resources Defense Council v. National Highway*

Traffic Safety Administration, 894 F.3d 95 (2d Cir. 2018), for example, the court held that environmental groups had standing to challenge a regulation that postponed an increase in the civil penalties for non-compliance with fuel-economy standards. The causal chain depended on the predicted response of automobile manufacturers to the penalties. The NHTSA "argue[d] that the connection between potential industry compliance and the agency's imposition of coercive penalties intended to induce compliance is too indirect to establish causation and redressability." *Id*. at 104. Rejecting that argument, the court quoted and followed three decisions of the D.C. Circuit. *Id*. at 104-105. The Second Circuit explained:

> As the caselaw recognizes, it is well-settled that "[f]or standing purposes, petitioners need not prove a cause-and-effect relationship with absolute certainty; substantial likelihood of the alleged causality meets the test. This is true even in cases where the injury hinges on the reactions of the third parties, here the auto manufacturers, to the agency's conduct."

Id. at 104 (quoting *Competitive Enter. Inst. v. NHTSA*, 901 F.2d at 113). The environmental groups accordingly had standing despite a causal chain that was more attenuated than the causal chain in the present case.

Citizens for Responsibility & Ethics in Washington v. Trump, 953 F.3d 178 (2d Cir. 2019), *vacated as moot*, No. 20-330 (U.S. Jan. 25, 2021), illustrates the Second Circuit's willingness to find standing on

an even more-attenuated causal chain. Plaintiffs challenged then-President Trump's interests in high-end hospitality properties under the Emoluments Clauses. The court held that the plaintiffs, who competed with the Trump properties, satisfied the causal-connection requirement because foreign and domestic government officials seeking to curry favor would patronize Trump properties rather than the plaintiffs' businesses. *Id*. at 191-194 & n.8. It was "eminently plausible" that "at least some" government officials patronized the Trump establishments when they might otherwise have gone to one of the plaintiffs' establishments. *Id*. at 194.

After President Biden's inauguration, this Court vacated the Second Circuit's decision as moot under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), but that does not defeat the conflict. The Second Circuit is still in conflict with the decision below as other cases demonstrate. *See*, *e.g.*, *NRDC v. NHTSA*, 894 F.3d at 104-105. More significantly, this Court's action suggests that the standing question presented in *CREW v. Trump* merited further review but for the case's mootness. *See*, *e.g.*, *Azar v. Garza*, 138 S. Ct. 1790, 1793 (2018) (per curiam) ("not every moot case will warrant vacatur"); *Camreta v. Greene*, 563 U.S. 692, 713 (2011) (explaining why vacatur under *Munsingwear* is necessary when the decision below was "appropriate for review"). To the extent a significant aspect of that standing question was an alleged failure to satisfy the causal-connection requirement because

it was uncertain what third parties would do,[8] this case presents the same question.

3. The Third Circuit. In *Freeman v. Corzine*, 629 F.3d 146 (3d Cir. 2010), the Third Circuit similarly took a practical approach to the causal-connection requirement. A New Jersey couple challenged the state's ban on out-of-state wineries' direct sales to consumers. The court held that the couple had standing despite "the fact that the record does not clearly establish that any out-of-state wineries would, but for the statute, open retail sales rooms in New Jersey." *Id*. at 155. But "evidence that numerous out-of-state wineries have, without success, sought alternative ways to enter the New Jersey marketplace" was sufficient. *Id*.

4. The Eighth Circuit. In *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997), multiple plaintiffs challenged a county ordinance requiring most solid waste generated in the county to be delivered to designated facilities. Because "their alleged injury [was] the indirect result of the County's regulation of the haulers," the standing question was "more difficult" for plaintiffs that generated solid waste than for the haulers. *Id*. at 1379. Those plaintiffs were not directly subject to the ordinance but were "forced to pay higher fees for waste collection, because haulers have passed on to them [the county's] high fees." *Id*. Addressing the causal-connection

[8] The petition in *CREW v. Trump* (at 9-10, 11-12, 13, 16-18, 26-27) devoted a significant portion of its argument to the contention that the Second Circuit erred in its analysis of the causal-connection requirement.

requirement, however, the court concluded that "there is little question that these rate increases are fairly traceable to Ordinance 12's restrictions on waste haulers." *Id*. at 1380.

5. The Ninth Circuit. The Ninth Circuit has also faced the present issue frequently; three cases well illustrate its adherence to the majority approach. In *Mendia v. Garcia*, 768 F.3d 1009 (9th Cir. 2014), a U.S. citizen sought damages for time spent in pre-trial detention on state criminal charges, allegedly as a result of federal agents' wrongfully lodging an immigration detainer against him. Although he was in state rather than federal custody, the Ninth Circuit held that he had standing to pursue his action under *Bivens* and the Federal Tort Claims Act, 28 U.S.C. § 1346(b). The plaintiff "c[ould] not allege that the ICE detainer directly caused his confinement," but he still satisfied the causal-connection requirement. 768 F.3d at 1012. "Causation may be found even if there are multiple links in the chain connecting the defendant's unlawful conduct to the plaintiff's injury. . . ." *Id.* It was sufficient that the plaintiff alleged "that the [defendants' wrongful act] was at least a substantial factor motivating the" third-party action. *Id*. at 1015.

In *Maya v. Centex Corp.*, 658 F.3d 1060 (9th Cir. 2011), homeowners who had purchased houses in new developments sued the developers for allegedly unlawful marketing practices. Rejecting the developers' arguments that third-party actions broke the causal chain, the Ninth Circuit explained that "plaintiffs must establish a 'line of causation' between

defendants' action and their alleged harm that is more than 'attenuated.'" *Id*. at 1070 (quoting *Allen v. Wright*, 468 U.S. 737, 757 (1984)). The court continued, "[a] causation chain does not fail simply because it has several 'links,' provided those links are 'not hypothetical or tenuous' and remain 'plausib[le].'" *Id*. (quoting *National Audubon Society, Inc. v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002)). Because "plaintiffs c[ould] plausibly claim that the 'artificial demand' created by defendants' marketing and financing practices had an identifiable effect on the price they paid for their homes," they satisfied the causal-connection requirement. *Id*.

In *Central Arizona Water Conservation District v. U.S. Environmental Protection Agency*, 990 F.2d 1531 (9th Cir. 1993), electricity customers challenged EPA regulations that imposed higher costs on a generating station—costs that would lead to an increase in their rates. The Ninth Circuit held that "the involvement of an intermediate third-party here does not undermine the [customers'] causation argument since 'the government's action [is] substantially likely to cause the petitioners' injury despite the presence of intermediary parties.'" *Id*. at 1538 (quoting *Competitive Enter. Inst. v. NHTSA*, 901 F.2d at 114).

In addition to the cases upholding standing under the majority approach, the Ninth Circuit follows that approach even when it concludes that a plaintiff lacks standing. *See*, *e.g.*, *Novak v. United States*, 795 F.3d 1012, 1019 (9th Cir. 2015) ("'[T]he plaintiff must offer facts showing that the government's unlawful conduct

is at least a substantial factor motivating the third parties' actions.'") (quoting *Mendia*, 768 F.3d at 1013).

6. The Tenth Circuit. In *Renewable Fuels Association v. U.S. Environmental Protection Agency*, 948 F.3d 1206 (10th Cir. 2020), a group of renewable fuel producers challenged an EPA order extending a statutory exemption for three refineries, which would reduce the demand for renewable fuel. Although the harm to the producers would be caused by the refineries' decision to purchase less renewable fuel, and the impact on any one producer of any an exemption for any single refinery could not be quantified, the Tenth Circuit held that the producers satisfied the causal-connection requirement. The causal chain linking the EPA orders to the producers' potential economic damage was not too attenuated. *Id*. at 1034-35.

7. The Eleventh Circuit. In *Focus on the Family v. Pinellas Suncoast Transit Authority*, 344 F.3d 1263 (11th Cir. 2003), an evangelical organization alleged that content-based advertising restrictions in a contract between the defendant public transit authority and a third-party private company in violation of the First Amendment prevented the organization from placing advertisements in transit authority bus shelters. The district court held that the organization failed the causal-connection requirement because the third-party private company, not the defendant public transit authority, had denied the plaintiff organization's request to place the advertisements. Reversing, the Eleventh Circuit explained that "even harms that flow indirectly from the action in question can be said

to be 'fairly traceable' to that action for standing purposes." *Id*. at 1273.

B. The First, Fourth, and Sixth Circuits take an unduly restrictive approach in which the existence of a third party in the chain of causation is an almost-automatic bar to standing.

1. The First Circuit. In the decision below, the court of appeals posited a general rule defeating the causal-connection requirement when "the plaintiff alleges a causal chain dependent on actions of third parties." App. 17a. The court would have permitted petitioners to overcome that rule in some circumstances: (1) if they had "directly [paid] the ESFs to PRPA [or] PRPA [had] assess[ed] the ESFs on [petitioners]," App. 18a; (2) if Regulation 8067 or PRPA "controlled the ocean freight carriers' relationships with their customers [to force them] to collect the ESFs from [petitioners]," App. 19a; or (3) if "PRPA coerced the ocean freight carriers to collect the ESFs from [petitioners]," *id*. But in all three of those situations, PRPA's actions would have been aimed directly against petitioners, thus rendering the third party irrelevant. If this is not a *per se* rule to bar standing whenever a third party is in the causal chain, it is at least a rejection of the majority approach under which a substantial likelihood that the ocean carriers would act as they did would have been sufficient.

The decision below is not unique in the First Circuit. In *Katz v. Pershing, LLC*, 672 F.3d 64 (1st Cir.

2012), for example, a customer sued a financial-services provider retained by her broker alleging that she was paying more than she should have for the defendant's services because the defendant maintained inadequate security measures. The court held that she failed the causal-connection requirement because her payments were to her broker, not the defendant. "When the injury alleged is the result of actions by some third party, not the defendant, the plaintiff cannot satisfy the causation element of the standing inquiry." *Id*. at 76.

2. The Fourth Circuit. In *Lane v. Holder*, 703 F.3d 668 (4th Cir. 2012), the Fourth Circuit denied standing to prospective handgun purchasers who challenged laws restricting interstate handgun sales and requiring transfers of firearms to take place through federal firearm licensees ("FFLs"). The court reasoned that "the costs the plaintiffs complain of are not traceable to the laws they challenge, but to the FFLs that charge transfer fees. . . . Because any harm to the plaintiffs results from the actions of third parties not before this court, the plaintiffs are unable to demonstrate traceability." *Id*. at 674.

Similarly, in *Frank Krasner Enterprises, Ltd. v. Montgomery County*, 401 F.3d 230 (4th Cir. 2005), a gun-show promoter and an exhibitor at the promoter's shows challenged a county law denying public funding to venues that display and sell guns after a privately owned venue, citing the law, stopped hosting the promoter's biannual gun shows. The Fourth Circuit held that the plaintiffs lacked standing

"because an intermediary [the venue owner] stands directly between the plaintiffs and the challenged conduct in a way that breaks the causal chain." *Id*. at 236. Although the court "acknowledge[d] that the law makes it more expensive—perhaps prohibitively so—for the [venue] to lease space to [the promoter]," that was insufficient to satisfy the causal-connection requirement.

3. The Sixth Circuit. In *Ammex, Inc. v. United States*, 367 F.3d 530 (6th Cir. 2004), the Sixth Circuit held that the operator of a duty-free store lacked standing to sue the government to recover taxes that arguably were not due. A supplier had originally paid the taxes and then passed along the cost to the plaintiff. Because "[i]t was in the discretion of [plaintiff's] suppliers to charge [plaintiff] for the challenged tax amount . . . any alleged injury . . . was not occasioned by the Government." *Id*. at 534.[9]

II. The First Circuit erred in adopting an unduly restrictive approach to the causation requirement.

The First Circuit based its general rule to defeat causation when "the plaintiff alleges a causal chain dependent on actions of third parties" on two of this

[9] Judge Merritt disagreed on this issue. In his view, "[t]he fact that [plaintiff] paid the tax to the wholesaler rather than to the Government does not mean that the higher price it paid cannot be easily traced to the Government's imposition of the tax for the purposes of standing." 367 F.3d at 536 (Merritt, J., concurring).

Court's decisions in which there was little reason to think that government tax policies had persuaded third parties to cause the plaintiffs' injuries. *See* App. 17a (citing *Allen v. Wright*, 468 U.S. at 757-759; *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 42-45 (1976)). But both those cases are fully consistent with the majority approach since in neither case was it "substantially likely" (or even very "plausible," *see supra* note 7) that the challenged tax policies had caused the plaintiffs' injuries to any significant degree. As the courts of appeals have demonstrated, the majority approach is fully capable of defeating standing when the causal connection is insufficient. *See*, *e.g.*, *Inclusive Communities*, 946 F.3d at 655-660; *Novak*, 795 F.3d at 1019. Decisions denying standing on the basis of unwarranted speculation about the actions of third parties do not justify an almost-automatic rule that the causal-relationship requirement is not satisfied when third parties are in the causal chain.

The majority approach is more consistent with the policies that this Court has expressed. This Court's recent decision in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), is particularly instructive. When various plaintiffs challenged the Commerce Department's decision to include a citizenship question on the 2020 census, the government contended that they failed to satisfy the causal-relationship requirement because the harm that would result from an undercounting of noncitizens "depends on the independent action of third parties choosing to violate their legal duty to respond to the census." *Id*. at 2565.

This Court did not expressly define the standard that it applied in rejecting the government's argument and unanimously holding that at least some of the plaintiffs had standing to challenge the Commerce Department's decision, but it was undoubtedly not the standard that the First Circuit applied. This Court explained that the plaintiffs "theory of standing . . . does not rest on mere speculation about the decisions of third parties; it relies instead on the predictable effect of Government action on the decisions of third parties." *Id*. at 2566.

On the facts of the present case, the effect of respondents' actions on the ocean carriers serving San Juan could be predicted with even greater confidence. Not only have ocean carriers worldwide routinely passed on expenses such as the ESFs to their customers for decades, not only do basic economic principles predict that carriers would pass on those costs, but the very carriers at issue in the present case had been passing on the ESFs since the beginning of the program. The government officials running the program knew it. *See supra* note 3. And the First Circuit (at App. 8a) even cited a district court opinion that quotes the testimony of four officials from four different shipping lines explaining how they pass on the ESFs to their customers. *See supra* at 5 & note 2.

III. This case provides an ideal vehicle to resolve a question of fundamental national importance.

The question presented here arises in a wide variety of cases. Cases such as *Competitive Enterprise Institute v. Federal Communications Commission* and the D.C. Circuit cases that it cited, *see supra* at 11-13, illustrate how the issue arises in challenges to government regulations. Cases such as *Citizens for Responsibility & Ethics in Washington v. Trump*, *see supra* at 14-16, and other "competitor standing" cases illustrate how the issue arises when a business challenges a competing business that has gained an unfair advantage in the marketplace. Indeed, the question presented here could arise in practically any context. The sheer number of reported appellate decisions demonstrates that it arises frequently.

The result in the present case turns entirely on the answer to the question presented.[10] If the court of appeals had followed the majority approach, there can be little doubt that petitioners would have satisfied the causal-relationship requirement. Indeed, the district court—relying, as it did, on *Focus on the Family*, 344 F.3d at 1273—effectively did follow the majority approach, and it held that petitioners satisfied the

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[10] The First Circuit's footnote finding "it difficult to see how PRPA cannot be cloaked with sovereign immunity," *see supra* note 5 (quoting App. 21a n.6) is no bar to this Court's review. Even if PRPA were entitled to sovereign immunity, petitioners could still obtain virtually all of the relief they seek from the remaining respondents.

causal-relationship requirement. Comparing the facts here with the facts that have been found sufficient in circuits following the majority approach, the case for a causal relationship is if anything stronger than it was in most of those cases.[11]

Petitioners have identified cases in almost every circuit addressing the question presented. Seven have followed the majority approach; three other courts of appeals have followed a restrictive approach that borders on a *per se* rule rejecting any possibility of a causal relationship when a third party is in the chain of causation. Dozens of reported appellate decisions address the issue. There is no need for further percolation. This Court should grant certiorari and resolve the conflict now.

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[11] Resolving the causal-relationship issue in petitioners' favor would also fully resolve the redressability issue in petitioners' favor since the First Circuit's concerns with redressability followed directly from the causal-relationship analysis. *See supra* at 9. In any event, the court of appeals acknowledged that the redressability requirement was satisfied to the extent that petitioners seek money damages, App. 21a n.5, which is the principal issue in the case at this point.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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January 29, 2021