No. 20-1061

IN THE

Supreme Court of the United States

DANTZLER, INC., et al.,

Petitioners,

v.

S2 SERVICES PUERTO RICO, LLC; et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF 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). Here, petitioners allege injury from paying commercial shipping charges assessed at the sole discretion of third-party ocean freight carriers not before the court.

Yet, for this injury, petitioners sued the Puerto Rico Ports Authority (PRPA), and the companies retained by PRPA to scan cargo (S2 Services Puerto Rico, LLC and Rapiscan Systems, Inc.), over certain fees PRPA charged the ocean freight carriers. "[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish." *Id.* at 562 (internal quotations and citations omitted).

Therefore, the question presented is:

Whether the First Circuit correctly found petitioners lacked standing to sue PRPA, and the contractors PRPA hired to scan cargo, over alleged injuries related to commercial shipping charges that third-party ocean freight carriers at their sole discretion charged petitioners.

RULE 29.6 STATEMENT

S2 Services Puerto Rico, LLC is a private limited liability company. Rapiscan Systems, Inc. is a wholly owned subsidiary of OSI Systems, Inc., a publicly traded corporation.

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INTRODUCTION

This Court has established clear guidance for lower courts in determining whether a party has standing in federal court to challenge a government action when the plaintiff is not himself the object of the government action he challenges. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). In these situations, "standing is not precluded, but it is ordinarily substantially more difficult to establish." *Id.* at 562. The court must assess the facts specific to each case and determine whether the plaintiff demonstrated the injury alleged was caused by each defendant—and not the result of the independent action of a third party not before the court.

Petitioners are understandably disappointed that the First Circuit determined, based on the facts of this case, that they do not have standing to sue respondents for their alleged injuries. However, the First Circuit's decision is not an indication that the circuits are confused by this Court's precedent or split as to the substantive standards for assessing the causal requirement for constitutional standing when third parties are in the chain of causation. To be clear, the cases in the petition do not reflect courts applying different *legal standards* to this causation requirement. They merely reflect that courts have addressed third-party standing under *factually distinct* circumstances and allegations, which, not surprisingly, has led to different outcomes.

No circuit has held, as the petition asserts, "that the participation of a third party almost automatically breaks the chain of causation." Pet. 2. In an effort to manufacture a circuit split that does not

exist, the petition misconstrues the facts and decision of this case, as well as decisions from the First, Fourth, and Sixth Circuits it asserts applied a "general rule" against standing whenever a third party is in the causal chain. There are numerous cases where these circuits found standing despite a third party in the causal chain – cases the petition selectively omits. Further, several of the petition's so-called "minority" decisions expressly relied on similar decisions from the petition's purported "majority" circuits. Not only is there no indication from the circuits that they are split on the law in these cases, their rulings demonstrate that the circuits are properly using each other's guidance.

Here, the First Circuit did not apply a near automatic standard against standing. It explained that an indirect injury can suffice for standing in the right circumstances. However, it found petitioners' "bare" allegations were unsupported and contradicted by the complaint and documents incorporated therein. In short, petitioners did not plausibly allege that respondents caused third-party ocean freight carriers – which have complete discretion over their shipping fees – to pass on security fees PRPA assessed to those ocean freight carriers. This decision is correct and consistent with this Court's guidance.

The petition, therefore, does not present any compelling ground for this Court's review of the First Circuit's fact-specific decision below. Nor would this case provide an ideal vehicle for review, as there are multiple alternative grounds that require dismissal below even if petitioners could establish Article III standing. The Court should deny certiorari.

STATEMENT OF THE CASE

A. Factual Background

1. Petitioners are merchants that use shipping services of third-party ocean freight carriers to import goods into Puerto Rico through the Port of San Juan. *See* Pet. App. 4a. In 2008, the Puerto Rico legislature enacted Act No. 12 of 2008 ("Act 12"), which called for improved security procedures in Puerto Rico's ports. *See* Pet. App. 5a-6a.

To comply with Act 12, respondent Puerto Rico Ports Authority ("PRPA"), which owns and operates the Port of San Juan, implemented a non-intrusive cargo scanning program at the port. *See* Pet. App. 4a, 6a. PRPA contracted with respondent Rapiscan Systems, Inc. ("Rapiscan") to provide the technology and scanning services for the program. *See* Pet. App. 6a. With PRPA's consent, Rapiscan assigned its rights and obligations under the contract to respondent S2 Services Puerto Rico, LLC ("S2"). *Id.*

In 2011, PRPA approved Regulation 8067 to implement its cargo-scanning program. *See* Pet. App. 7a. To offset PRPA's costs, PRPA assessed and collected Enhanced Security Fees ("ESFs") from ocean freight carriers unloading cargo in the port (in addition to other fees it collects for use of the port). Pet. App. 4a, 7a.

Rapiscan and S2 are not involved in the assessment or collection of ESFs. *See* Pet. App. 22a. S2 simply provides technology and services to PRPA to scan containerized cargo arriving at the port pursuant to its assigned contract. Pet. App. 4a, 22a. PRPA pays S2 a separate and distinct contractual fee

without regard to the amount of the ESF or whether or not PRPA collects the ESF from the ocean freight carriers. *See* Pet. App. 22a; App. in 18-2087 (CA1), p. A169.

2. Petitioners filed a complaint in the U.S. District Court of Puerto Rico alleging respondents (jointly) "forced ocean carriers … into becoming [their] [ESF] collection agents" that "collected [ESFs] from shippers like [petitioners]." Pet. App. 8a. Based on this theory, petitioners sought money damages and injunctive and declaratory relief under 42 U.S.C. § 1983 for alleged violations of the Commerce Clause (and other federal and state laws). Pet. App. 9a-10a.

Contrary to petitioners' allegation, the complaint conceded, and the documents incorporated therein showed: (a) ocean freight carriers are the only entities that were assessed and paid ESFs; and (b) the ocean freight carriers paid ESFs exclusively to PRPA; S2 and Rapiscan are not involved in either the assessment or collection of ESFs. *See* Pet App. 18a, 22a. To the extent ocean freight carriers charged petitioners certain fees for their shipping services, the ocean freight carriers independently did so in their own commercial discretion. *See* Pet. App. 18a, 20a.

Petitioners also alleged respondents violated a lower court's order enjoining PRPA from collecting ESFs from shipping operators whose cargo was not being scanned. Pet. App. 8a (citing *Cámara de Mercadeo, Industria, y Distribución de Alímentos v. Vázquez*, No. 11-1978, 2013 WL 5652076, at *12, *14 (D.P.R. Oct. 16, 2013)). Contrary to this allegation, S2 and Rapiscan were not parties to that action, nor subject to any injunction, as they do not collect ESFs.

Cf. Cámara de Mercadeo, 2013 WL 5652076, at *14-15.[1]

B. Proceedings Below

1. Respondents moved to dismiss on various grounds, including that petitioners lacked standing because their alleged injury—commercial shipping charges assessed at the sole discretion of ocean freight carriers—was caused by the ocean carriers' independent actions, not by PRPA's collection of ESFs from ocean freight carriers. *See* Pet. App. 10a-11a, 5b-6b. S2 and Rapiscan further argued the causal chain was completely broken as to them because they provided contracted scanning services to PRPA, and were not involved in the assessment or collection of ESFs. *Id*. PRPA also argued it is entitled to sovereign immunity, and S2 and Rapiscan argued they are entitled to qualified immunity. Pet. App. 10a-11a, 6b.

The district court granted in part and denied in part the motions. As pertinent here, it found petitioners had standing to pursue their Commerce Clause claim and state law claims because the amended complaint alleged "[respondents] … imposed

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[1] The petition and complaint also erroneously assert that PRPA lacked authority to collect ESFs after Regulation 8067 expired in 2014. Pet. 5-6. This is contrary to the Puerto Rico Supreme Court's subsequent determination in *Cámara de Mercadeo, Industria v. Distribución de Alimentos v. Autoridad de los Puertos*, No. CC-2018-600 (Sept. 11, 2019) that PRPA has independent authority pursuant to Act 12 and PRPA's enabling act to conduct the cargo scanning program and collect fees therefor after the regulation's expiration. *See* FRAP 28(j) letter for Respondent in 18-2089 (CA1), certified translation p. 9.

[ESFs] on ocean freight carriers, and the ocean freight carriers collected those fees from [petitioners]." Pet. App. 12b.[2] The district court also ruled that PRPA is not entitled to sovereign immunity, and S2 and Rapiscan are not entitled to qualified immunity as companies contracted by the government. Pet. App. 12a, 16b-19b, 38b.

2. Respondents timely appealed the denial based on standing, sovereign immunity, and qualified immunity. Pet. App. 13a. The First Circuit vacated the district court's order principally on standing grounds.

It correctly explained, pursuant to this Court's precedent, that an "indirect" injury that "depended on the actions" of third parties can suffice to establish standing, but a causal chain is "more difficult" to show. Pet. App. 18a (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 44-45 (1976)). It also explained this Court has cautioned against finding a plaintiff's injury to be fairly traceable to government action when the causal chain is dependent on independent actions of third parties, as the links may be "too weak," "uncertain" or "speculative." Pet. App. 17a-18a (quoting *Allen v. Wright*, 468 U.S. 737, 757-59 (1984); *Simon*, 426 U.S. at 42-45).

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[2] The district court dismissed petitioners' other claims on grounds that were not appealed.

The First Circuit then focused on the *sole* allegation in the amended complaint on which petitioners relied for standing, i.e.:

> According to Regulation 8067, the ocean carriers or their agents[] must pay PRPA the [ESFs] to recover the costs incurred by PRPA in the scanning program. Ocean carriers and their agents, in turn, collected [ESFs] from shippers like [petitioners] and putative class members who import cargo through the maritime ports of San Juan. Thus, in furtherance of their scheme, [respondents] Rapiscan, S2 Services and [] PRPA purposely forced ocean carriers and their agents into becoming [respondents'] [ESF] collection agents.

Pet. App. 18a-19a (quoting amended complaint).

The First Circuit found this "allegation 'is nothing more than a bare hypothesis that [ocean freight carriers] possibly might put this aspect of [their] operational costs onto [petitioners].'" Pet. App. 19a (quoting *Katz v. Pershing, LLC*, 672 F.3d 64, 77 (1st Cir. 2012). Petitioners did not provide "'factual matter' … to support [their] theory that the ocean freight carriers were 'forced' into being [respondents'] 'collection agent,'" as "neither the regulation nor PRPA controlled the ocean freight carriers' relationships with their customers[.]" Pet. App. 19a-20a. Moreover, "[t]he complaint d[id] not describe [petitioners'] injury 'in terms specific enough to

indicate that it will result from' PRPA's imposition of ESFs on ocean freight carriers rather than from a 'multitude of other factors.'" Pet. App. 19a (quoting *Pérez-Kudzma v. United States*, 940 F.3d 142, 145 (1st Cir. 2019)). Instead, petitioners' alleged injury depends "on the conduct of the ocean freight carriers—namely, what they decide to charge (disguised as ESF-related costs or otherwise) to their customers." Pet. App. 20a.

With respect to Rapiscan and S2, the First Circuit found "the causal chain . . . is even more attenuated (if not completely broken)" because "Rapiscan and S2 are not involved in the assessment or collection of the ESFs," and instead "simply provide the scanning services for containerized cargo that arrives at the Port of San Juan pursuant to a contract with PRPA." Pet. App. 22a. Petitioners did "not plausibly allege that [their] injury resulted from Rapiscan and S2's actual scanning of cargo or from accepting payment [of a distinct contractual fee] from PRPA for its scanning services," and thus failed to allege injury "'fairly traceable' to Rapiscan and S2." *Id.*

The First Circuit also found petitioners had "not met the redressability requirement as to [their] claim for damages" or for injunctive and declaratory relief against Rapiscan and S2. Pet. App. 23a (explaining that federal courts can only redress injury caused by a defendant; citing *Simon*, 426 U.S. at 41-42). In addition, it found redressability was lacking for injunctive and declaratory relief because it "is far from certain that enjoining PRPA from collecting ESFs from the ocean freight carriers, or declaring ESFs

unconstitutional, will guarantee that those carriers lower the costs they charge" petitioners. Pet. App. 20a.

In light of these findings, the First Circuit declined to reach S2 and Rapiscan's alternative arguments that petitioners lacked prudential standing for their Commerce Clause claim, or that S2 and Rapiscan are entitled to qualified immunity. *See* Pet. App. 23a; Brief for Respondents in 18-2087 (CA1), pp. 35-53. However, the First Circuit found "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" and "view[ed] this … as an alternative ground supporting [its] ultimate conclusion vacating and remanding the district court's order and partial judgment." Pet. App. 21a n.6 (citing *Grajales v. P.R. Ports Auth.*, 831 F.3d 11, 20 n.9 (1st Cir. 2016); *Thacker v. Tenn. Valley Auth.*, 139 S. Ct. 1435 (2019)).

REASONS THE WRIT SHOULD BE DENIED

I. The First Circuit's Decision Does Not Implicate a Circuit Split.

Petitioners' primary argument for why the Court should grant the petition is that it alleges a circuit split regarding the substantive standard used for determining whether a party has standing when there is a third party not before the court in the chain of causation. No such circuit split exists.

The petition fabricates an illusory circuit-split in two ways. First, it compares cases that applied the same substantive standing requirements to very different factual allegations and incorrectly asserts their divergent outcomes suggest divergent legal

approaches. Second, it mischaracterizes the decision below and the other First, Fourth, and Sixth Circuit opinions it cites as purportedly applying "an almost-automatic bar to standing" when there is "a third party in the causal chain." Pet. 11.

On the contrary, each of these circuits has not hesitated to find standing when third parties were in the causal chain when the facts supported it. As this Court has instructed, questions of standing turn on "the allegations of the particular complaint." *Allen*, 468 U.S. at 751. The decision below does not implicate a circuit conflict regarding Article III's causation requirement—let alone "a broad and deep" one. Pet. 1.

A. The First Circuit.

1. Contrary to the petition, the First Circuit correctly explained that standing was not precluded in this case because the alleged injury "depended on the actions" of third parties. Pet. App. 18a (correctly citing *Lujan*, 504 U.S. at 562 that a "causal chain" is "more difficult" to establish in such circumstances; *Simon*, 426 U.S. at 44-45). In assessing the facts of this case in a light most favorable to petitioners, the First Circuit found causation lacking because petitioners' "bare" complaint did not "plausibly" establish a causal connection between their alleged injuries and any conduct of respondents. Pet. 19a. Specifically, they did not sufficiently show the third-party ocean freight carriers' commercial shipping charges "result[ed] from PRPA's imposition of ESFs on ocean freight carriers rather than from a multitude of other factors." *Id.* (internal quotation omitted).

Thus, the First Circuit did not automatically reject standing here; it properly assessed the facts specific to this case drawn from the amended complaint and documents incorporated therein. *See id.*; Pet. App. 5a. It found petitioners' alleged injury was caused solely by the discretionary "conduct of the ocean freight carriers—namely, what they decide to charge (disguised as ESF-related costs or otherwise) to their customers." *Id.* 20a. In an effort to create a legal issue for the Court to review, the petition ignores and misrepresents these findings.

Specifically, the petition misconstrues the court's findings that petitioners failed to plausibly allege that PRPA "forced" or "coerced" ocean freight carriers to collect any fees. It wrongly suggests this statement means the court would have found standing only if "PRPA's actions would have been aimed directly against petitioners[.]" Pet. 20. However, it was the petitioners who hung their hat on an express "theory that the ocean freight carriers were 'forced' into being [respondents'] 'collection agent,'" Pet. App. 20a, so it is no surprise that the court addressed their theory's lack of factual support.

To be clear, the First Circuit did not hold that a direct injury was required for standing. The First Circuit explained that petitioners' complaint failed to show the ocean freight carriers' charges "result[ed] from PRPA's imposition of ESFs on ocean freight carriers rather than from a multitude of other factors." Pet. 19a (internal quotation omitted).

Also, for contextual purposes, the term "coerced" was drawn from this Court's holding in *Bennet v. Spear*, 520 U.S. 154, 169 (1997). The Court

stated there that "[w]hile . . . it does not suffice if the injury complained of is the result of the *independent* action of some third party not before the court, that does not exclude injury produced by *determinative or coercive effect* upon the action of someone else" (second emphasis added; internal quotation marks, brackets and citations omitted). *See* Pet. 19a (citing *Wine & Spirits Retailers, Inc.*, 418 F.3d 36, 45 (1st Cir. 2005) (citing *Bennet*, 520 U.S. at 169)).[3]

The petition also conspicuously omits that the First Circuit found "the causal chain … is even more attenuated (if not completely broken)" with respect to respondents Rapiscan and S2 because they "are not involved in the assessment or collection of the ESFs." Pet. App. 22a. "Rapiscan and S2 simply provide the scanning services for containerized cargo that arrives at the Port of San Juan pursuant to a contract with PRPA" and petitioners did "not plausibly allege that [their] injury resulted from Rapiscan and S2's actual scanning of cargo or from accepting payment [of a distinct contractual fee] from PRPA for its scanning services[.]" *Id*. This omission underscores the petition's lack of merit and why the First Circuit found petitioners do not have standing to sue respondents here.

2. The petition also incorrectly asserts that the First Circuit has a general rule defeating causation

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[3] In *Wine & Spirits*, the First Circuit also explained, contrary to the petition's representation of First Circuit case law, that the causal requirement "does not mean that the defendant's action must be the final link in the chain of events leading up to the alleged harm." *Id.*

when a third party is in the causal chain in *Katz v. Pershing, LLC*, 672 F.3d 64 (1st Cir. 2012). There, a brokerage accountholder sued the company that sold her third-party financial institution its electronic account management platform on a theory that the company falsely advertised the platform's security, which caused her financial institution to overpay for the platform and then overcharge her for financial services. *See id.* at 69-70. Again, the First Circuit reached this decision on the specific facts of the case, finding the plaintiff's "bare hypothesis" was insufficient to establish causation. It did not posit any general rule against standing when a third party is in the causal chain. On the contrary, the First Circuit explained that nothing "foreclose[s] the possibility that overpayments to a third party might in some circumstances constitute a cognizable injury caused by the party that has made the misrepresentations." *Id.* at 77.

3. The First Circuit has found standing in a multitude of other cases when the causal chain depended on actions of third parties, belying any notion that it has a general rule defeating standing in such context. Pet. 20.

For example, in *Massachusetts v. United States Dep't of Health & Human Servs.*, 923 F.3d 209 (1st Cir. 2019),[4] the Commonwealth of Massachusetts sued several federal agencies to enjoin enforcement of rules that would allow employers with religious

[4] The three judge panel in *Massachusetts* included two of the same judges as in this matter: Circuit Judges Torruella and Thompson.

objections to contraception to obtain exemptions from providing health insurance coverage for contraceptive care. *Id.* at 212-13. The First Circuit found the Commonwealth had standing because it showed it was "highly likely" that at least three third-party employers would choose to use the exemption based on their past litigation positions, and that there was a "substantial risk" that some women employed by those companies (who were also third parties) would lose contraceptive coverage and chose to obtain state-funded care. *Id.* at 224-26.

In *Munoz-Mendoza v. Pierce*, 711 F.2d 421 (1st Cir. 1983) minority residents of several Boston neighborhoods alleged a state agency's development grant would increase racial segregation in nearby neighborhoods. *Id.* at 422-24. The First Circuit found the plaintiffs demonstrated a "'substantial likelihood' that the causal link exists" because they had shown the development would increase local housing demand, which was substantially likely to cause third-party landlords to raise rents, which would displace low-income minority tenants (who were also third parties). *Id*. at 427-28.

Similarly, in *Rental Housing Assoc. of Greater Lynn, Inc. v. Hills*, 548 F.2d 388 (1st Cir. 1977), the First Circuit found an association of landlords had standing to challenge an act subsidizing the conversion of a factory building into low-income housing for the elderly. *Id.* at 388-89. The court explained that the association's allegations had established it was "likely" its members would suffer a competitive injury because some of their tenants (who were third parties) would likely be drawn away to the low-income housing development. *Id.* at 389.

The petition selectively omits these cases to portray a wrong impression as to the legal standards the First Circuit applies. There is no almost automatic bar against standing in third party cases.

B. The Fourth Circuit.

1. The same is true in the Fourth Circuit. Contrary to the petition, the Fourth Circuit also does not apply a near automatic rule against standing when third parties are in the chain of causation. The petition cites to *Lane v. Holder*, 703 F.3d 668 (4th Cir. 2012) and *Frank Krasner Enters., Ltd. v. Montgomery Cnty.*, 401 F.3d 230 (4th Cir. 2005). In these cases, the Fourth Circuit correctly recognized an indirect injury can suffice to establish standing, although, as this Court has explained, the causal chain is more difficult to establish. *See Frank Krasner*, 401 F.3d at 234-35 (citing *Lujan*, 504 U.S. at 562; *Allen*, 468 U.S. at 758); *Lane*, 703 F.3d at 673. Further, in both cases, the Fourth Circuit expressly relied on decisions in the Ninth Circuit that similarly found standing lacking, contradicting the petition's allegation that these circuits apply different substantive standards to the causal requirement.

In *Lane*, prospective handgun purchasers alleged a regulation requiring handgun purchases to be made through federal firearm licensees ("FLLs") made it more costly to purchase handguns after a FLL started charging a transfer fee. *Lane*, 703 F.3d at 670-71. On these facts, the court found the plaintiffs failed to allege a causal nexus to the challenged regulation because the FFLs had complete discretion over the prices they charged their customers and "[n]othing in the challenged legislation or regulations direct[ed]

FLLs to impose such charges." *Id.* at 674. In reaching this conclusion, the court relied on the Ninth Circuit's similar determination in *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1130 (9th Cir. 1996), that consumers lacked standing to challenge a gun ban that they alleged caused third-party gun dealers and manufactures to increase prices because the third parties independently determined their prices.

In *Frank Krasner*, the court found a gun-show promoter and exhibitor lacked standing to challenge a county law denying public funding to venues that display and sell guns, after a third-party venue stopped hosting the promoter's gun shows. *Frank Kranser*, 401 F.3d at 232-33. The court noted that the plaintiffs had not cited, and it was unaware, of "a single case [from any circuit] granting standing to a plaintiff challenging a government's decision not to subsidize a third party, not before the court, with whom the plaintiff does business." *Id.* at 236. In this context, the court found causation lacking, as the third-party venue independently decided who to lease to and the court could not compel it to rent space to the promoter even if the court struck down the challenged legislation. *Id*.

The Fourth Circuit also relied on the Ninth Circuit's decision in *San Diego Cnty. Gun Rights Comm*, *supra*, in reaching this conclusion. *See id.* at 235. It further relied on the Ninth Circuit's decision in *Pritikin v. Dep't of Energy*, 254 F.3d 791, 797 (9th Cir. 2001), finding that a private citizen lacked standing to sue the Department of Energy ("DOE") to compel funding of a medical monitoring program because a third-party agency decided whether or not to

implement the program even though the DOE was liable for the program's costs.

These cross-circuit references further demonstrate the purported circuit-split the petition alleges is illusory. The Fourth and Ninth Circuits do not apply a categorically different standard.

2. The petition also omits that there are numerous cases in which the Fourth Circuit found standing where the causal chain depended on actions of third parties. For example, in *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751 (4th Cir. 2018), the Fourth Circuit found an air ambulance company had standing to challenge regulations setting reimbursement rates for West Virginia's privatized workers' compensation system even though the state did not pay any claims to the plaintiff and the state's fee schedules did not bind the third-party private insurers who did. *Id.* at 759-60. The Fourth Circuit explained that "the defendant's conduct need not be the last link in the causal chain," and found the plaintiff's lower reimbursements were attributable to the challenged regulations because they set the default reimbursement rates private insurers were likely to use and prevented the plaintiff from recovering additional amounts directly from patients. *Id.* at 760.

Maryland Shall Issue, Inc. v. Hogan, 971 F.3d 199 (4th Cir. 2020) provides another example. In that case, the Fourth Circuit found a firearms dealer had standing to challenge a regulation prohibiting the sale of handguns unless the purchaser presented a qualification license because the record "support[ed] a reasonable inference of a causal relation" between the

dealer's loss of sales and the regulation, as it deterred some consumers from buying guns and limited the plaintiff's ability to sell to them. *Id.* at 213. As above, the Fourth Circuit explained that "the defendant's conduct need not be the last link in the causal chain" and "does not have to be 'the sole or even immediate cause of th[at] injury.'" *Id.* at 212 (citations omitted).

Hutton v. Nat'l Board of Examiners in Optometry, Inc., 892 F.3d 613 (4th Cir. 2018) is a third example. In *Hutton*, optometrists sued the National Board of Examiners in Optometry, Inc. ("NBEO") for failing to adequately secure their personal data after third parties hacked the data and set up fraudulent credit lines in their names. *Id.* at 616-17. The Fourth Circuit found it was "both plausible and likely that a breach of the NBEO's database resulted in the fraudulent use of the [p]laintiffs' personal information," notwithstanding that the third-party fraudsters were in the causal chain. *Id.* at 623. Thus, the Fourth Circuit also has no near automatic bar against standing in third party cases.

C. The Sixth Circuit.

1. Likewise, the Sixth Circuit does not apply a general rule barring standing when a third party is in the causal chain. Contrary to the petition, in *Ammex, Inc. v. United States*, 367 F.3d 530 (6th Cir. 2004), the court simply found the facts alleged did not support causation. There, the government assessed motor-fuel excise taxes solely on third-party fuel suppliers. *Id.* at 532. An operator of a duty-free store who did not pay the tax sued the government for a tax refund under the Export Clause on the theory that its third parties suppliers added the amount of the tax to the wholesale

price they charged. *Id.* The Sixth Circuit found the "tax burden at issue … [was] that of [the plaintiff's] suppliers, not [the plaintiff]" and that "any alleged injury suffered by [the] [p]laintiff in the form of increased fuel costs was not occasioned by the Government" because "[i]t was in the discretion of [the plaintiff's] suppliers to charge [the plaintiff] for the challenged tax amount." *Id.* 534.

2. Notably, in other cases, when the facts supported it, the Sixth Circuit has readily found standing notwithstanding third parties in the casual chain. For example, in *Parsons v. U.S. Dept. of Justice*, 801 F.3d 701 (6th Cir. 2015), fans of a musical band challenged their designation by the DOJ and FBI as a hybrid gang after suffering allegedly unconstitutional searches and detentions by state and local law enforcement officers because of the designation. *Id.* at 706-09. Although the DOJ and FBI "did not direct the third-party law enforcement entities to stop, detain and question" the plaintiffs, the Sixth Circuit found that the plaintiffs had adequately established causation because the "officers communicated the motivation behind their actions to be the DOJ's [] gang designation." *Id.* 714-15.

In *Lambert v. Hartman*, 517 F.3d 433 (6th Cir. 2008), an individual sued a county clerk for causing her credit rating to drop after the clerk disclosed her private information on the clerk's website and a third party stole her identity. *Id.* at 435. Notwithstanding "that a third party was undoubtedly the *direct* cause of [her] injuries," the Sixth Circuit found that the plaintiff's injuries were fairly traceable to the clerk because the identity thief admitted she took the

plaintiff's information from the clerk's website. *Id.* at 437-38 (emphasis in original).

In *Jet Courier Servs., Inc. v. Fed. Reserve Bank of Atlanta*, 713 F.2d 1221 (6th Cir. 1983), private air couriers who performed services for commercial clearing banks sought to enjoin Federal Reserve Banks from implementing a below-cost fee schedule for Federal Reserve check clearing operations that the couriers alleged their third-party bank customers could not compete with, which would cause the banks to stop using the courier's services. *Id.* at 1222-24. The Sixth Circuit found that the couriers established Article III standing by showing through customer affidavits that they "will suffer economic losses flowing from the actions which the private banks will take in response to the revised schedules of the Federal Reserve Banks." *Id.* 1226. Again, these cases are not the hallmarks of a circuit that has a near automatic bar against standing in such cases.

D. The D.C., Second, Third, Eighth, Ninth, Tenth, and Eleventh Circuit cases cited in the petition are inapposite and do not conflict with this case.

The findings of standing by the other circuit courts cited in the petition were also based on the factual records of those cases. They solely reflect that different factual situations produce different outcomes. They do not conflict with this case on any legal standards applied and are readily distinguishable from the facts of the present case.

1. D.C. Circuit. In *Competitive Enter. Inst. v. Fed. Commc'ns Comm'n*, 970 F.3d 373 (D.C. Cir.

2020), the record showed that the cable companies operated in a "two-sided market" with edge providers on one end and consumers at the other end. *Id.* at 383. The plaintiffs marshalled expert testimony and prior case law establishing the government's elimination of one of two revenue streams in a two-sided market (the edge providers in that case) was substantially certain to cause increased prices at the other end (the consumers). *Id.* at 383-84. The instant case does not similarly concern elimination of a revenue stream in a two-sided market, and petitioners below did not support their "bare" allegation that any respondent (let alone S2 and Rapiscan) caused ocean freight carriers to charge petitioners shipping fees with any "factual matter" or economic theories. Pet. App. 19a.

The other D.C. Circuit opinions cited in the petition are also facially inapposite. *Cf. Competitive Enters. Institute v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 115-16 (D.C.C. 1990) (agency's own fact finding determined that vehicle manufacturers could only comply with fuel-efficiency regulations by making fewer large vehicles available); *Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 308-09 (D.C.C. 2001) (addressing issue of competitive injury caused by designation of plaintiff's product ingredient as carcinogen); *Teton Historic Aviation Found. v. U.S. Dep't of Defense*, 785 F.3d 719, 725 (D.C.C. 2015) (government classification "barred public sale" of airplane parts plaintiff sought and third-party auctioneer was mere instrument of government); *Energy Future Coal. v. E.P.A.*, 793 F.3d 141, 144 (D.C.C. 2015) (regulation directly prevented plaintiffs' product from competing in marketplace).

2. Second Circuit. The two Second Circuit decisions cited in the petition do not resemble this case either. *Cf. Nat. Resources Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 104-05 (2d Cir. 2018) (agency's own fact finding and robust body of case law established causal connection between "coercive penalties intended to induce compliance" with emissions reductions and emissions reductions); *Citizens for Resp. & Ethics in Wash. v. Trump*, 953 F.3d 179, 192-93 (2d. Cir. 2019), *vacated as moot*, (addressing inapposite issue of competitive injury in hospitality market allegedly caused by President Trump's receipt and invitation of illegal emoluments, supported by expert declarations).

3. Third Circuit. The sole Third Circuit case cited in the petition, *Freeman v. Corzine*, 629 F.3d 146 (3d Cir. 2010), did not address similar circumstances. The court found the plaintiffs had standing to challenge marketplace prohibitions on direct sales by out-of-state wineries and a direct shipment ban that prevented the plaintiffs from acquiring wine directly from out-of-state wine sellers. *Id.* at 154-56.

4. Eighth Circuit. The petition omits that in *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin Cnty.*, 115 F.3d 1372 (8th Cir. 1997), the Eighth Circuit opted to dismiss the complaint on prudential standing grounds rather than under Article III, and stated that it was "aware of no Commerce Clause case in which the court has granted standing to a plaintiff who was a consumer whose alleged harm was the passed-on cost incurred by the directly regulated party." *Id.* at 1380. Specifically, the court held (i) that the third party standing doctrine barred the consumers' claims because they were "asserting the

third-party rights of the haulers to be free of regulation," and (ii) local consumers bearing passed on costs are "not within the zone of interests protected by the Commerce Clause." *Id.* at 1382. Thus, the court's cursory Article III determination was of no moment and little more than dicta. As discussed in part III below, these same prudential limitations also bar petitioners' claims here.

5. Ninth Circuit. The three Ninth Circuit cases cited in the petition that found standing are factually dissimilar to this case; they did not apply different legal standards. *Cf. Mendia v. Garcia*, 768 F.3d 1009, 1013-14 (9th Cir. 2014) (unlawful immigration detainer placed on U.S. citizen prevented him from posting bail with assistance of bail bondsman); *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) (developers directly and fraudulently inflated their development's house prices by financing substantial majority of buyers to create artificial demand that did not otherwise exist); *Cent. Ariz. Water Conservation Dist. v. United States E.P.A.*, 990 F.2d 1531, 1537-38 (9th Cir. 1993) (plaintiffs were "contractually required to repay" portion of the Bureau of Reclamation's costs of installing and maintaining emission controls).

Curiously, the petition cites *Novak v. United States*, 765 F.3d 1012 (9th Cir. 2015) as an example where the Ninth Circuit applied a correct "approach even when it conclude[d] that a plaintiff lacks standing." Pet. 18-19. However, *Novak*, like the Ninth Circuit's decisions in *San Diego Cnty. Gun Rights* and *Pritikin*, *supra*, is consistent with the First Circuit's decision below. In *Novak*, purchasers of ocean cargo shipping services challenged a statute that they

alleged created a monopoly in two shipping companies and caused them to charge higher prices. *Id.* at 1017. The Ninth Circuit found causation lacking because nothing in the challenged act required the shipping companies to charge those prices; the shipping companies' independent commercial discretion to charge whatever prices they decided broke the causal chain. *Id.* at 1019. Thus, *Novak* further demonstrates that the petition's purported circuit-split is illusory and that the decision below is correct.[5]

6. Tenth Circuit. *Renewable Fuels Assoc. v. United States E.P.A.*, 948 F.3d 1206 (10th Cir. 2020) is another inapposite competitor standing case. There, renewable fuel producers showed through expert evidence that an EPA order extending a statutory exemption for certain refineries, which relieved them from having to blend renewable fuel with conventional fuel or purchase credits from other refineries that had, reduced the demand for the plaintiffs' renewable fuels. *Id.* at 1232-35

7. Eleventh Circuit. *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263 (11th Cir. 2003) does not resemble this case. There, the plaintiff had standing to sue a local transit authority because the transit authority rejected the plaintiff's

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[5] The petition also cites *Inclusive Cmtys. Project, Inc. v. Dep't of Treasury*, 946 F.3d 649 (5th Cir. 2019) as an example of a case where the Fifth Circuit applied a correct approach when finding the plaintiff did not satisfy the causal requirement. Pet. 10 n.6. Like *Novak*, however, the Fifth Circuit explained that the causal chain was broken because the third parties "retain[ed] significant discretion" over their actions. *Id.* at 658. It too is consistent with the First Circuit's decision below.

proposed advertisements in the transit authority's bus shelters pursuant to content-based restrictions in the transit authority's contract with the company that sold the advertising space. *Id.* at 1273-74.

II. The Decision Below Is Consistent With this Court's Precedent.

It is axiomatic that to establish standing, a plaintiff's injury must "not [be] the result of the independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560 (quoting *Simon*, 426 U.S. at 41-42). The First Circuit correctly found that petitioners failed to plausibly allege their injury – shipping charges imposed at the sole discretion of third-party ocean freight carriers – was not the result of the ocean freight carriers' independent pricing decisions based on a multitude of other factors.

The First Circuit further correctly found that petitioners failed to allege S2 and Rapiscan's actual scanning of cargo or acceptance of a separate and distinct contractual fee from PRPA for their services caused ocean freight carriers to impose any shipping fees on petitioners. As indicated, the First Circuit found "the causal chain … is even more attenuated (if not completely broken)" with respect to respondents Rapiscan and S2 because they "are not involved in the assessment or collection of the ESFs." Pet. App. 22a. These findings are consistent with this Court's precedent rejecting allegations of attenuated causal chains dependent on independent decisions of third parties not before the court. *See Allen*, 468 U.S. at 757-59; *Simon*, 426 U.S. at 42-45; *cf. Bennett*, 520 U.S. at 169 (causal connection may be established only where

"injury is produced by determinative or coercive effect upon the action of someone else").

Contrary to the petition, the decision below does not conflict with this Court's ruling in *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019), which is readily distinguishable. In that case, the Census Bureau itself predicted that reinstating a citizenship question would deter noncitizens from responding to the census, *id.* at 2562-63, and the "evidence at trial established that noncitizen households have historically responded to the census at lower rates than other groups," *id.* at 2566. Thus, it was readily evident, including from the agency's own fact finding, that reinstating the citizenship question would have a coercive or determinative effect on at least some noncitizen's decisions to respond to the census. *See id.* (citing *Bennet*, 520 U.S. at 169-70). No similar circumstances exist here.

III. This Case Is Not an Ideal Vehicle for this Court's Review Because Multiple Alternative Grounds Require Dismissal Below.

Finally, this case does not present, as the petition alleges, a "question of fundamental national importance" that "could arise in practically any context." Pet. 20. Courts generally apply the law properly, reaching different outcomes based on the different facts of the cases before them.

There is no circuit split for this Court to resolve. The First Circuit, and Fourth and Sixth Circuits, apply the same substantive standards as other circuits in addressing standing, and have not

hesitated to find standing when third parties were in the causal chain where the facts supported it (including in the type of "competitor standing" cases the petition refers to (*see* Pet. 25)). *See supra*, *e.g.*, *Rental Housing Assoc.*, 548 F.2d at 388-89.

This case also does not provide an ideal vehicle for this Court's review because there are multiple alternative grounds that require dismissal. To begin, the First Circuit also found "it difficult to see how PRPA cannot be cloaked with sovereign immunity" and "view[ed] this . . . as an alternative ground supporting [its] ultimate conclusion vacating and remanding the district court's order and partial judgment." Pet. App. 21a n.6. The petition incorrectly asserts that even if PRPA were entitled to sovereign immunity, petitioners could "still obtain virtually all of the relief they seek from the remaining respondents," which are private contractors PRPA retained to scan cargo. Pet. 25 n.10. This is wrong for at least four reasons.

First, since PRPA is entitled to sovereign immunity, S2 and Rapiscan are entitled to derivative immunity as government contractors sued solely for acting as PRPA directed in their contract. *See Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20-21 (1940) (where government's "authority to carry out the project was validly conferred," "there is no liability on the part of the contractor" who performed as the government directed).

Second, the petition does not address the First Circuit's additional finding that the causal chain was "even more attenuated (if not completely broken)" against Rapiscan and S2 because they are "not

involved in the assessment or collection of the ESFs" and petitioners "did not plausibly allege that [their] injury resulted from Rapiscan and S2's actual scanning of cargo or from accepting [a distinct contractual fee] as payment from PRPA for [their] scanning services[.]" Pet. App. 22a. There is no basis in law or fact to hold Rapiscan and S2 liable in these circumstances.

Third, even if petitioners could establish Article III standing, two independent prudential limitations bar their claim. The First Circuit did not reach these prudential standing arguments since it found petitioners lacked Article III standing. *See* Pet. App. 23a; Brief for Respondents in 18-2087 (CA1), pp. 35-41. As held in *Ben Oehrleins*, *supra*, the third party standing doctrine bars claims by consumers who allegedly incurred "passed-on costs" of regulation of third parties because "[a]ny relief due [the consumers] turns on the rights of the [third parties] to be free of the [regulation]." *Ben Oehrleins*, 115 F.3d at 1381. Otherwise, "end-line consumers could always assert the Commerce Clause claims of the businesses from whom they purchase goods or services," which is not the law. *Id.* Such a ruling would open the door to claims and class actions over any number of factors that go into third-party pricing.

In addition, local consumers alleging they incurred passed-on costs of a local regulation are not within the zone of interest of the Commerce Clause because that injury is unrelated to any barrier to interstate commerce. *Id.* at 1382; *see also Freeman*, 629 F.3d at 157 ("plaintiffs whose interest is merely one in avoiding a passed-on fee or cost" are "not within the zone of interests protected by the dormant

Commerce Clause") (collecting cases). Again, if the law were otherwise, it would open the door to a wide-range of consumer challenges of government regulations. *See Ben Oehrleins*, 115 F.3d at 1382.

Fourth, Rapiscan and S2 are entitled to qualified immunity under 42 U.S. § 1983. *See Filarski v. Delia*, 566 U.S. 377, 389 (2012) ("[I]mmunity under § 1983 should not vary depending on whether [a defendant] working for the government does so as a full-time employee, or on some other basis."). As the Tenth Circuit explained in *DeVargas v. Mason & Hanger-Silas Mason Co., Inc.*, 844 F.2d 714 (10th Cir. 1988), where, as here, private companies "act in accordance with the duties imposed by a contract with a governmental body, perform a government function, and are sued solely on the basis of those acts performed pursuant to contract, qualified immunity is proper." *Id.* at 722; *see also Frazier v. Bailey*, 957 F.2d 920, 928-29, 931-32 (1st Cir. 1992); *Fabrikant v. French*, 691 F.3d 193, 211 (2d Cir. 2012); *Sherman v. Four Cnty. Counseling Ctr.*, 987 F.2d 397, 403 n.4, 405-06 (7th Cir. 1993). The First Circuit did not address this argument in light of its Article III holding either. *See* Pet. App. 13a, 23a.

For all these reasons, there are no compelling grounds for the Court to grant certiorari.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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