No. 20-1061

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

REPLY BRIEF FOR PETITIONERS

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' Statement pursuant to Rule 29.6 was set forth at page ii of the petition for a writ of certiorari, and there are no amendments to that Statement.

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The courts of appeals are deeply split on the legal standard a plaintiff must satisfy to establish its standing when a third party plays a role in the chain of causation. The First Circuit refused to find standing on the ground that petitioners did not plausibly allege that respondents "forced" or "coerced" ocean carriers to pass on to petitioners the Enhanced Scanning Fees ("ESFs") that respondents charged and collected for cargo that they never scanned. App. 19a. The First Circuit found it irrelevant that the ocean carriers did not and would not absorb those unlawful charges, and in fact passed on those ESFs to petitioners, in their full amount as a separately invoiced line item.

In other circuits, those facts would have been sufficient to establish standing to challenge the legality of those charges. The courts of appeals in those circuits require only a showing of "substantial likelihood of the alleged causality." *Natural Res. Def. Council v. NHTSA*, 894 F.3d 95, 104 (2d Cir. 2018). Thus, consumers challenging regulations imposed by the Federal Communications Commission ("FCC") on their cable company were able to show standing by alleging "a substantial likelihood that their bills are higher because of the [FCC's] prohibition" on the cable company imposing certain charges on other networks. *Competitive Enter. Inst. v. FCC*, 970 F.3d 372, 384 (D.C. Cir. 2020). The other courts of appeals recognize that the directly affected entity's "control" over the third party that caused the plaintiff's injury "would certainly suffice to establish causation," but is "not a requirement." *Mendia v. Garcia*, 768 F.3d 1009, 1015 (9th Cir. 2014). Instead, plaintiffs in those circuits need allege only that the challenged action was a "substantial factor motivating" the third party's action. *Id.* Here, as the district court correctly found,

petitioners' allegations readily satisfied that legal standard.

This Court should grant certiorari to resolve that clear disagreement about the applicable legal standard. And it should clarify that the majority view is correct and reject the view of those circuits that, like the First Circuit, require a showing of a legal obligation "direct[ing]" the third party's actions or stripping the third party of all "discretion." *Lane v. Holder*, 703 F.3d 668, 674 (4th Cir. 2012); *Ammex, Inc. v. United States*, 367 F.3d 530, 534 (6th Cir. 2004).

This case also presents an ideal vehicle for resolving this clear split on the legal standard governing standing when a third party is present in the chain of causation—a frequently recurring fact pattern. In light of the facts petitioner alleged, the result turns entirely on the legal standard applied: the majority's substantial-factor test or the minority's coercion test.

I. Respondents' attempts to recharacterize the cases cannot undermine the existence of a widespread conflict on the proper application of the causation requirement for standing.

A. The courts of appeals universally recognize, as they must, that standing requires "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) (internal quotation marks, ellipses, and brackets omitted). Courts differ significantly over the legal standard they use when applying that requirement. Although every case necessarily turns on its specific facts, *see Allen v. Wright*, 468 U.S. 737,

751 (1984), seven courts of appeals take a practical approach when a third party's actions provide a necessary link in the chain of causation. They require that the plaintiff allege that the challenged actions were a substantial factor in the third party's actions that transmitted the injury to the plaintiff. Pet. 10-20. But three courts of appeals take an unduly restrictive approach that requires a showing that the third party was coerced and, therefore, deny standing in third-party cases under circumstances that would satisfy the causation requirement in most circuits. Pet. 11, 20-22. This does not mean that the majority-approach circuits will always find causation when a third party is involved or that the minority-approach circuits will inevitably deny standing. But it does mean that the same facts will yield different results based solely on the identity of the court that hears the case and the legal standard it applies.

B. Respondents attempt to discount the conflict by focusing on the specific facts presented in the cases, while ignoring their use of distinct legal standards. Those efforts are unpersuasive. If the legal standard applied by the First Circuit (or in one of the other minority-approach circuits) were followed in the majority-approach cases discussed in the petition (at 11-20), those cases would have been decided differently. By the same token, if the court below had followed the majority legal standard, petitioners' standing would have been upheld. Pet. 25-26.

Respondents assert (at 20-22) that, in several D.C. and Second Circuit cases (Pet. 11-16), those plaintiffs made a better showing as to how third parties would respond to defendants' actions. For *Competitive Enterprise Institute v. FCC*, 970 F.3d 372 (D.C. Cir. 2020), respondents point (at 21) to "expert testimony

and prior case law" showing that the alleged injury was "substantially certain" to occur. For *Competitive Enterprise Institute v. NHTSA*, 901 F.2d 107 (D.C. Cir. 1990), they point (at 21) to the defendant "agency's own fact finding." For *Natural Resources Defense Council v. NHTSA*, 894 F.3d 95 (2d Cir. 2018), they again point (at 22) to the defendant "agency's own fact finding and [a] robust body of case law."

But the causation evidence here is even stronger than in those cases. Petitioners need not rely on expert or agency predictions about what a shipping company is "substantially certain" to do when it is required to pay an ESF. Testimony in unrelated litigation proves that the shipping companies serving Puerto Rico in fact passed the ESFs on to their customers, including petitioners, through separate invoices, on a direct dollar-for-dollar basis.[1] Pet. 5 n.2. Although respondents may not have literally "forced" the shipping companies to collect the ESFs from petitioners, their imposition of the ESFs and the economic realities of a highly competitive market gave shipping companies no other feasible choice.

Respondents seek (at 21-25) to distinguish other cases applying the majority approach on the ground that they arose in different factual contexts. That distinction is irrelevant. Standing issues arise in every factual context; the same constitutional requirements

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[1] Respondents and the court below try to convey the impression that the shipping companies simply raised their prices because of increased costs, much as they might try to raise freight rates if crew wages or vessel-charter rates increased. The cited testimony demonstrates that this was not the case. Freight rates did not change in response to the ESFs. Instead, shipping companies separately invoiced their customers to obtain reimbursement of the full amount of the ESFs.

govern regardless of the factual context. Courts should apply those requirements in the same way regardless of the factual context or the circuit in which the case arises.

C. Respondents also seek to downplay the conflict by asserting that the minority-approach circuits have "found standing in a multitude of other cases when the causal chain depended on actions of third parties." Opp. 13; *see also* Opp. 17, 19. But the cases they cite do not support their assertion. For example, respondents rely heavily (at 13-14) on *Massachusetts v. U.S. Department of Health & Human Services*, 923 F.3d 209 (1st Cir. 2019). But in that case the "heart of the . . . standing challenge" was that Massachusetts had "not demonstrated an imminent injury." *Id.* at 222. And the defendants there did "not contest that the alleged injury would be caused by the [challenged] federal regulations." *Id.* at 227. To the extent the court discussed causation in connection with finding that Massachusetts had shown an "injury in fact," it focused on the number of steps in the causal chain, not the involvement of third parties. *See id.* at 223-27.

Respondents had to go back 38 and 44 years to find other First Circuit cases to cite (at 14), and what they found is just as irrelevant. In *Munoz-Mendoza v. Pierce*, 711 F.2d 421 (1st Cir. 1983), the defendants' primary argument against causation was that the plaintiffs' alleged harm would occur regardless of their challenged action. *See id.* at 427-28. To the extent the defendants argued that independent actions by third parties broke the causal chain, the First Circuit found—in a passage respondents did not cite—that the involvement of those third parties was "not material to the question of standing" in light of the particular harm at issue in that case. *Id.* at 429.

In *Rental Housing Association of Greater Lynn, Inc. v. Hills*, 548 F.2d 388 (1st Cir. 1977), the court did not follow the three-element analysis this Court later identified in *Defenders of Wildlife*. It instead considered two factors: "injury in fact" and whether the plaintiff's interest was within the "zone of interests" protected by the challenged statute. *Id.* at 389. The court disposed of what later became the second and third *Defenders of Wildlife* elements in two sentences with no discussion of the possible involvement of third parties. *Id.* at 390.

Respondents' efforts (at 17-18) fare no better in the Fourth Circuit. In *Maryland Shall Issue, Inc. v. Hogan*, 971 F.3d 199 (4th Cir. 2020), the court held that the causation element was satisfied because the challenged regulation directly addressed a plaintiff's conduct. *See id.* at 212-13 ("[w]here 'the plaintiff is himself an object of the action . . . there is ordinarily little question that the action . . . has caused him injury'") (quoting *Defenders of Wildlife*, 504 U.S. at 561-62) (second ellipsis added); *id.* at 213 ("Moreover, '[t]he legal duties created by the [HQL requirement] are addressed directly to vendors such as' Atlantic Guns.") (quoting *Craig v. Boren*, 429 U.S. 190, 194 (1976)) (brackets in original). Similarly, in *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751 (4th Cir. 2018), the court apparently rejected the defendants' "third party" argument because the challenged regulation directly constrained the plaintiff's ability to negotiate and directly prohibited it from billing its customers. *Id.* at 760. Finally, *Hutton v. National Board of Examiners in Optometry, Inc.*, 892 F.3d 613 (4th Cir. 2018), never mentions the role of third parties in the causal chain. The causation element turned entirely on whether the plaintiffs had plausibly alleged that

the defendant was the source of a data breach. *Id.* at 623-24.

The Sixth Circuit cases cited by respondents (at 19-20) demonstrate more confusion but still do not support respondents' assertions. In *Parsons v. U.S. Department of Justice*, 801 F.3d 701 (6th Cir. 2015), the defendants' actions were specifically directed against the plaintiffs. Although the district court found that the plaintiffs failed to show causation because third parties "exercised independent judgment in committing the alleged injuries," *id.* at 713, on appeal the defendants instead argued that the plaintiffs failed to meet the *Iqbal-Twombly* pleading standards, *see id.* at 715 (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). In *Lambert v. Hartman*, 517 F.3d 433 (6th Cir. 2008), the court held that the plaintiff had standing in a data-breach case—although the defendants' contentions on the point were "confusing" and the plaintiff "failed to address" the issue—but only after the convicted criminal in the chain of causation identified the defendants as the source of the breach. *Id.* at 437-38. Finally, in another 38-year-old case, *Jet Courier Services, Inc. v. Federal Reserve Bank of Atlanta*, 713 F.2d 1221 (6th Cir. 1983), the court held "that the plaintiffs lack standing" on prudential grounds, *id.* at 1224, 1227, but said in dicta that "they have satisfied the constitutional requirements for standing," *id.* at 1226. The causation discussion focused not on the role of third parties but on whether the alleged harm was too speculative. *Id.*

Even if respondents were correct that a panel in the First, Fourth, or Sixth Circuit occasionally applied the causation requirement less restrictively than normal for those courts, the conflict still would exist

and the outlier case simply would evidence the confusion under which lower courts are operating in the absence of guidance from this Court.

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

Respondents seek to convey the impression that S2 Services was simply performing a straightforward contract with PRPA to maintain port security and that petitioners object to paying their fair share of the costs associated with scanning their cargo. That misconstrues the fundamental nature of the case. Petitioners' primary objection is to paying fees on cargo that was never scanned. Pet. 4-6.

Respondents cite a non-precedential judgment of the Puerto Rico Supreme Court (issued more than two years after petitioners' complaint) holding that PRPA was authorized to inspect containers and "collect the fee appropriate to the cost of said procedure, as long as it is fair and reasonable," notwithstanding the expiration of the regulation that had authorized those fees. *Cámara de Mercadeo, Industria y Distribución de Alimentos v. Autoridad de los Puertos*, No. CC-2018-600, slip op. 9 (P.R. Sept. 12, 2019);[2] *see* Opp. 5 n.1; *cf.* Pet. 5-6. That judgment did not hold that it was "appropriate" or "fair and reasonable" to collect fees for inspections that were never performed. And respondents omit any mention of the federal-court injunction prohibiting the collection of fees for cargo that was not being scanned. *See* Pet. 5. Respondents nevertheless collected those fees, and most of the

[2] A certified translation of this opinion is reproduced in an attachment to a Rule 28(j) letter filed in the First Circuit on February 20, 2020.

money went to Rapiscan or S2 Services for work they did not perform. Pet. 4.

Other than asserting that the decision below was correct, respondents' only legal argument on the merits is an attempt (at 26) to distinguish this Court's decision in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019). They contend (at 26) that causation was more clearly established in *Department of Commerce* because "the agency's own fact finding" made it "readily evident" that at least some noncitizens would not respond to the census. Respondents have the distinction exactly backwards. As explained above (*supra* p. 4 & n.1) and in the petition (at 5 n.2), the causation evidence is stronger here. Petitioners need not rely on agency predictions. Testimony in unrelated litigation proves that the shipping companies in fact passed the inappropriate fees on to their customers, including petitioners, on separate invoices and in the exact amount of the improper fees.

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

Respondents' challenge to the fundamental national importance of the question presented simply repeats their argument that no conflict exists. A careful review of the cases cited in the petition and the brief in opposition demonstrates the error in respondents' analysis. And the sheer number of reported appellate cases addressing the issue would make any other challenge regarding its importance implausible.

Respondents' suggestion that the case would be a poor vehicle to resolve the question presented is also unpersuasive. They assert (at 27) that "there are

multiple alternative grounds that require dismissal." That argument is not only mistaken but also irrelevant and speculative.

The argument is irrelevant because this Court can still resolve the question presented even if respondents ultimately win on the merits or succeed in having the case dismissed on some other preliminary ground. Respondents concede (at 6) that the court below decided the case "on standing grounds." This Court can review that decision and remand the case for the First Circuit to decide the issues that it initially found unnecessary to address. App. 23a. Standing decisions are by their very nature preliminary; courts must address them long before enough information is available to know what ultimately will happen in a case. If this Court denied certiorari in every case in which a respondent might ultimately prevail on other grounds, it would have a much lighter docket.

The argument is also speculative.[3] Respondents may believe that they would prevail on one of their "multiple alternative grounds" if this Court reverses on standing, but petitioners have a very different view (and will fully address those issues if and when they arise). For example, a court may well deny immunity to a defendant who acted in violation of a federal-court injunction. *See supra* p. 8; Pet. 5. Such court orders clearly establish the law. The intentional flouting of those orders defeats any claim of official immunity, even assuming that the private-party respondents could qualify for such immunity.

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[3] It is ironic that respondents find it too speculative to predict what shipping companies would do in the context of this case despite unequivocal evidence of what they actually did, *see supra* p. 4 & n.1; Pet. 5 n.2, but are willing to rely on their own speculative predictions about what a future court would do on remand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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