No. _____

In the
Supreme Court of the United States

E.L., a minor,
by LA'SHIEKA WHITE
the mother, legal guardian,
and next friend of E.L.,
Petitioner,

v.

VOLUNTARY INTERDISTRICT
CHOICE CORPORATION,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is an injury-in-fact "fairly traceable" to the defendant when the defendant is the but-for cause of the injury or does the mere presence of other but-for causes serve as a constitutional bar to review by an Article III court?

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PETITION FOR WRIT OF CERTIORARI

Petitioner E.L. respectfully submits this petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 864 F.3d 932 and is reproduced in the Appendix (App.) at A-1-8. The opinion of the United States District Court for the Eastern District of Missouri is reproduced at App. C-1-16.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit rendered its judgment on July 27, 2017. App. B-1-2. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

Article III, Section 2, Clause 1, of the United States Constitution states:

> 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;—

> to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

A. Factual Background

Charter schools in Missouri draw their pool of eligible students from two statutes. First, a Missouri-based charter school must enroll "[a]ll pupils resident in the district in which it operates." *See* Mo. Ann. Stat. § 160.410.1(1). Second, a Missouri-based charter school must enroll "[n]onresident pupils eligible to attend a district's school under an urban voluntary transfer program." Mo. Ann. Stat. § 160.410.1(2). Charter schools in Missouri have no authority to enroll students that do not fall under one these two eligibility criteria.[1]

[1] Specialized charter schools, i.e., "workplace" charters or "dropout prevention" charters, have a slightly larger pool of applicants. *See* Mo. Ann. Stat. § 160.410.1(3)-(5). Those specialized charter schools are not at issue here.

Because of a settlement arising out of a decades-old desegregation lawsuit, St. Louis schools operate an "urban voluntary transfer program" as recognized under Mo. Ann. Stat. § 160.410(2). From 1984 until 1999, St. Louis was under a court-supervised desegregation plan. *See Liddell v. Bd. of Educ. of the City of St. Louis*, 567 F. Supp. 1037 (E.D. Mo. 1983), *aff'd*, *Liddell v. Missouri*, 731 F.2d 1294 (8th Cir. 1984). The desegregation plan included a voluntary interdistrict transfer plan, which allowed African-American students living in the City to transfer to schools in the County, and white students living in the County to transfer to schools in the City. In 1999, the district court approved a new settlement agreement, and then dismissed the case with prejudice, dissolved all prior injunctions, and dismissed all pending motions as moot. *Liddell v. Bd. of Educ. of the City of St. Louis*, No. 4:72CV100SNL, 1999 WL 33314210 (E.D. Mo. Mar. 12, 1999).

The 1999 Settlement Agreement created the Voluntary Interdistrict Choice Corporation (VICC)—transforming the transfer program from a federally supervised program into a voluntary program under the auspices of VICC. App. F-6. VICC is governed by a board comprised of superintendents of local school districts and uses state funds to administer the transfer program at issue. App. F-6. VICC's transfer program remains race-based: African-American students living in St. Louis County are prohibited from transferring to magnet schools in the City of St. Louis. App. F-6.

Because VICC's "urban voluntary transfer program" allows "non-African-American" children to transfer to St. Louis magnet schools, St. Louis-based

charter schools must also enroll all "non-African-American" children who reside in St. Louis County. Mo. Ann. Stat. § 160.410.1(2). However, charter schools in the City of St. Louis have no statutory authority to enroll African-American students who reside in St. Louis County.[2]

E.L. is a bright ten-year-old student who attended Gateway Science Academy (Gateway), a charter school in the City of St. Louis, until August 2016. App. F-1-2. He is African-American. App. F-1-2. E.L. excelled academically, as exemplified by his 3.79 GPA. App. F-9. However, because E.L.'s family members regularly heard gunshots and were repeatedly victimized by crime, the family moved to Maryland Heights in St. Louis County. App. F-8-9.

E.L.'s mother, La'Shieka White, sought to continue E.L's. education at Gateway Science Academy. She was informed that E.L. is ineligible to enroll because he is African-American. It was at this time that Ms. White became aware of VICC's race-based policy and its prohibition on African-American students transferring to magnet schools in the City of St. Louis. App. F-9. She was shocked that a policy which explicitly discriminates on the basis of race could still exist today. Jason L. Riley, *A St. Louis Desegregation Policy That Segregates*, Wall St. J., May 10, 2016.[3] She started a petition and, after

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[2] Charter schools are required to not "limit admission based on race," Mo. Ann. Stat. § 160.410.3, but this statute restricts how charters select students among those eligible; it neither restricts nor expands the pool of eligible students.

[3] http://www.wsj.com/articles/a-st-louis-desegregation-policy-that-segregates-1462919325

collecting over 130,000 signatures,[4] decided to challenge the discriminatory transfer policy in federal court. App. F-1.

At the time E.L. filed this lawsuit, Gateway, VICC, and the Missouri Department of Education all agreed that VICC's "urban voluntary transfer program" was the cause of E.L.'s inability to attend Gateway. Gateway solemnly explained to the press that "its hands are tied" because of VICC's policy. Jeff Bernthal, *Student can't attend school because he's African-American*, Fox 2 St. Louis, Feb. 23, 2016.[5] VICC explained that E.L.'s inability to attend Gateway was a "straightforward application of how [VICC's] program works." Robert Patrick, *Woman Sues St. Louis Area School Transfer Program, Claiming Discrimination Against Black Son*, St. Louis Post-Dispatch, May 4, 2016.[6] And the Missouri Department of Elementary and Secondary Education explained that it was VICC's race-based policy that discriminated against E.L.; it was "not due to state law or state regulations." Dale Singer, *Student's quest to remain in charter school has long, twisting backstory*, St. Louis Public Radio, Mar. 4, 2016.[7]

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[4] *See* La'Shieka White, *Don't Let Race Determine My Son's Enrollment*, Change.org, https://www.change.org/p/dese-don-t-let-race-determine-my-son-s-enrollment.

[5] http://fox2now.com/2016/02/23/student-cant-attend-school-because-hes-african-american/

[6] http://www.stltoday.com/news/local/education/woma n-sues-st-louis-area-school-transfer-program-claiming-discrimination/article_f01bc9c5-a536-59e0-8cd9-3770ea43560c.html

[7] http://news.stlpublicradio.org/post/student-s-quest-remain-charter-school-has-long-twisting-backstory#stream/0

B. Proceedings Below

E.L. filed this civil rights lawsuit in federal court to vindicate his right to equal protection. App. F-1-55. E.L. challenges VICC's prohibition on African-Americans transferring to magnet schools in the City of St. Louis. Shortly after filing the complaint, E.L. sought a preliminary injunction, which would have allowed him to attend Gateway on the same basis as his white neighbors. App. C-2.

The district court dismissed E.L.'s complaint and denied the preliminary injunction as moot. App. D-1. It held that E.L. lacks standing to challenge VICC's race-based, county-to-city transfer policy. According to the lower court, E.L. lacked standing because VICC could not redress E.L.'s injury. App. C-15.

The Eighth Circuit affirmed the judgment of the district court on a different basis. App. B-1. That court held that E.L. lacked standing because "E.L.'s injury is not 'fairly traceable' to VICC." App. A-8. According to the lower court, VICC's race-based policy preventing African-American children from attending magnet schools in the City of St. Louis was not the proximate cause of this African-American boy's inability to attend a charter school in the City of St. Louis. App. A-7. The court held that the proximate cause of E.L's injury was either the state's race-neutral charter school enrollment statute, or Gateway's decision to follow that statute. App. A-7. This petition follows.

REASONS FOR GRANTING THE WRIT

I. THE DEFINITION OF "CAUSATION" FOR ARTICLE III STANDING PURPOSES IS A CRITICAL ISSUE THAT THIS COURT HAS LEFT UNSETTLED

A. This Court's "Fair Traceability" Standard Is Ambiguous as to the Proper Standard of Causation for Article III Standing

All plaintiffs must establish at the outset of litigation that their suit presents a "case or controversy" that may be heard by an Article III court. This Court has established a three-part test to determine if this requirement has been satisfied. First, the plaintiff must have suffered an "injury in fact." 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." And third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992) (internal quotation marks and alterations omitted).

This case is about the second prong of that test, the "causal connection." Specifically, this case turns on the question of what meaning of "cause" is appropriate for Article III standing.

The word "cause" has multiple meanings in the law. The most basic meaning is factual cause: "Conduct is a factual cause of harm when the harm would not have occurred absent the conduct." Restatement (Third) of Torts: Phys. & Emot. Harm § 26 (2010). Because this test can also be expressed by the statement that harm would not have occurred "but for" the conduct, this meaning of causation is commonly referred to as "but-for" causation.

Although "but-for" causation would be the most straightforward interpretation of the phrase "causal connection" in Article III standing analysis, the Eighth Circuit and other courts have interpreted the Article III standard to require something closer to proximate causation, which exists only in the absence of a "superseding" independent cause. Courts have reached this conclusion primarily because this Court's formulation of the causation test draws a distinction between an injury that is "fairly traceable to the challenged action of the defendant" and an injury that is "the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560.

The Court's formulation of these two possibilities as a dichotomy is admittedly in tension with the "but-for" interpretation of "causal connection." In many cases, both the defendant *and* another party may have taken independent voluntary acts, each of which is a but-for cause of a plaintiff's injury.[8] In such situations, lower courts seeking to

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[8] As the Restatement of Torts explains,

> [a]n actor's tortious conduct need only be *a* factual cause of the other's harm. The existence of other causes of the harm does not affect whether specified tortious conduct was a

faithfully apply this Court's precedents have had to grapple with whether to place more weight on the first half (fairly traceable) or second half (no independent action) of the Article III standing causation test.

Adding uncertainty, this Court elaborated in *Bennett v. Spear* that any action of a third party that is "produced by determinative or coercive effect" of the defendant does not qualify as an independent action. 520 U.S. 154, 169 (1997). Yet that case did not present, and the Court did not answer, the question whether a truly independent, uncoerced third-party action causing injury would destroy standing when the defendant is nonetheless also a but-for cause of a plaintiff's injury. That is the question presented in this case, and it is a question on which the circuit courts are deeply split.

B. Circuit Courts Are Split on Whether "But-For" Causation Is Sufficient for the Purposes of Article III Standing

The Eighth Circuit's decision below is in conflict with decisions in the Third, Fifth, Seventh, Eleventh, and D.C. Circuits, each of which has held that but-for causation is sufficient to establish Article III causation even when an independent party not before the court was also a cause of a plaintiff's

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> necessary condition for the harm to occur. Those other causes may be innocent or tortious, known or unknown, influenced by the tortious conduct or independent of it, but so long as the harm would not have occurred absent the tortious conduct, the tortious conduct is a factual cause.

Restatement (Third) of Torts: Phys. & Emot. Harm § 26 (2010), comment c.

injury. By contrast, the decision below is consistent with opinions from the Second, Fourth, and Ninth Circuits, which hold that but-for causation is not sufficient to establish fair traceability. However, there is considerable confusion within those circuit courts, with more recent opinions finding "but-for" causation sufficient. In sum, the nation's federal appellate courts are deeply split on this issue and this Court should grant review to resolve the conflict and confusion.

1. Five Circuit Courts of Appeals have plainly held that "but-for" causation is sufficient to establish fair traceability for Article III standing purposes

The Seventh Circuit has held that a defendant need not be the only party whose action was a but-for cause of the plaintiff's injury. *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 500 (7th Cir. 2005). In *Lac Du Flambeau*, plaintiffs sued the Secretary of the Interior, alleging that she had illegally approved a compact between an Indian tribe and the state of Wisconsin. The Secretary

> assert[ed] that plaintiff ha[d] not met [the Article III causation] standard because Wisconsin and Ho-Chunk, not the Secretary, caused any injury suffered by [the plaintiff] by negotiating the compact. Because neither Wisconsin nor Ho-Chunk are named or could be joined as defendants, [the Secretary] assert[ed] that plaintiff [could not] establish causation.

Id.

The Seventh Circuit unequivocally rejected this argument, holding that

> [w]hile the Secretary may not be the only party responsible for the injury alleged here, a plaintiff does not lack standing merely because the defendant is one of several persons who caused the harm. The Secretary's silent approval caused [the] potential [harm of a compact negotiated by third parties] to become a reality because, but for her approval, the compact would have no effect.

Id. at 500-01.

The D.C. Circuit has joined the Seventh, finding standing in a case with analogous facts. *See Amador County, Cal. v. Salazar*, 640 F.3d 373, 378 (D.C. Cir. 2011) ("Because the Tribe may proceed with gaming only with secretarial approval of the compact, there is a direct causal connection between the Secretary's no-action approval and the alleged harm."). *See also Orangeburg, S.C. v. Federal Energy Regulatory Commission*, 862 F.3d 1071, 1080-83 (D.C. Cir. 2017) ("[T]he causation requirement for constitutional standing is met when a plaintiff demonstrates that the challenged agency action authorizes the conduct that allegedly caused the plaintiff's injuries, if that conduct would allegedly be illegal otherwise.") (citations and quotations omitted).

The Eleventh Circuit has also adopted this logic. *Loggerhead Turtle v. County Council of Volusia County, Fla.*, 148 F.3d 1231, 1247 (11th Cir. 1998). In that case, plaintiffs sued a county for establishing

minimum environmental standards that plaintiffs believed had led to dangerously low environmental protections. The defendant county argued that causation for Article III standing had not been met because "municipalities—not parties to this case—each possess at least some degree of regulatory authority and enforcement control over public and private artificial beachfront lighting within their borders." *Id.*

The Eleventh Circuit rejected this argument, finding that "standing is not defeated merely because the alleged injury can be fairly traced to the actions of both parties and non-parties." *Id.* If the standards were indeed set too low, the county was a but-for cause of that fact even though some municipalities within the county had "the supplemental authority to enact more onerous" standards. *Id.* at 1249. And the court held that but-for causation was the proper standard to apply, because "no authority even remotely suggests that proximate causation applies to the doctrine of standing." *Id.* at 1251 n.23.

The Third Circuit has also explicitly affirmed the "but-for" test as the proper interpretation of fair traceability. *The Pitt News v. Fisher*, 215 F.3d 354, 361 (3d Cir. 2000). In that case, the plaintiff student newspaper sued the Attorney General of Pennsylvania to enjoin enforcement of a state law that penalized alcohol companies for advertising in school newspapers, on the grounds that it had "lost revenue because its advertisers decided to stop paying to place advertisements in the newspaper." *Id.* at 360. The defendant argued causation was lacking, on the theory that "any harm to *The Pitt News* was caused by the independent action of these third-party

advertisers, and did not result from the enforcement of [the Act] itself." *Id.* The court rejected this argument, finding that causation had been established because "the enforcement of [the Act] was the cause-in-fact of the financial impact felt by *The Pitt News*. 'But for' this enforcement, its advertisers would not have canceled their contracts." *Id.* at 360-61. *See also Toll Bros., Inc. v. Town of Readington*, 555 F.3d 131, 142 (3d Cir. 2009) (noting that for Article III standing, the "causal connection need not be as close as the proximate causation needed to succeed on the merits of a tort claim").

Finally, the Fifth Circuit has accepted the same reasoning. *Ivy v. Williams*, 781 F.3d 250, 253 (5th Cir. 2015) (cert granted, vacated, and remanded as moot). In that case, each of the plaintiffs was unable to find a driving school that would accommodate deaf students, and thus was unable to obtain a required certificate. The drivers sued the Texas Education Agency to enforce the ADA against these driver education school. The agency argued that causation was not met "because it is the driver education schools, not the [agency], that refuse to accommodate the named plaintiffs." *Id.* The Fifth Circuit rejected this argument as "meritless," because "[w]hile driver education schools' actions are one cause of the injury, it is equally clear that the named plaintiffs' alleged injuries are also 'fairly traceable' to the [agency's] failure to inform private driver education schools of their ADA obligations and its failure to deny licenses to driver education schools that violate the ADA." *Id.*

In sum, the Eighth Circuit's denial of standing in this case, merely because of the existence of another but-for cause of plaintiff's injury not before the court,

directly contradicts the reasoning and precedent in at least five other circuits.

2. Three Circuit Courts of Appeals have held that "but-for" causation is not sufficient to establish fair traceability for Article III standing purposes

The Second Circuit has adopted reasoning similar to the court below, in holding that proximate cause is needed to show Article III causation. *See National Council of La Raza v. Mukasey*, 283 Fed. App'x 848, 852 (2d Cir. 2008). In *La Raza*, plaintiffs sued the Department of Homeland Security and other federal agencies "to halt the entry into the National Crime Information Center (NCIC) database of certain civil immigration records pertaining to aliens who are in purported violation of orders of removal." *Id.* at 850. The Second Circuit denied standing on causation grounds, solely because "a number of state and local authorities choose not to comply with such DHS requests [and] . . . [s]ignificantly, plaintiffs do not allege that such authorities suffer any adverse consequences from this resistance." Even though entry into the database would be a but-for cause of detainment whenever a local agent chooses to comply, the Second Circuit held that a direct "coercive effect" was necessary.[9] *Id.*

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[9] More recently, however, the Second Circuit has held that plaintiffs need not show proximate causation to maintain Article III standing. *See Connecticut v. American Elec. Power Co. Inc.*, 582 F.3d 309, 345-47 (2d Cir. 2009), *rev'd on other grounds*, 564 U.S. 410 (2011).

The Fourth Circuit has likewise demanded more than but-for causation to establish Article III fair traceability. *See Frank Krasner Enterprises, Ltd. v. Montgomery County, Md.*, 401 F.3d 230, 236 (4th Cir. 2005). In *Krasner*, the Montgomery County Council had amended its county code such that the county could not "give financial or in-kind support to any organization that allows the display and sale of guns at a facility" that it "own[s] or controll[s]." *Id.* at 232. In response, a gun show operator sued the county to strike down the law, after a venue rescinded its offer to host an event. The Fourth Circuit, however, denied standing on causation grounds, holding:

> We freely acknowledge that the law makes it more expensive—perhaps prohibitively so—for the [venue] to lease space to [plaintiff]. Specifically, the [venue] would need to charge [plaintiff] or any other gun show proprietors an amount at least equal to what it estimates it would lose from Montgomery County in grants. The record leaves no doubt that this was a deal-breaker . . . . But that the County's [sic] decision may have been easy does not alter the analysis.

Id.[10]

[10] A more recent decision from the Fourth Circuit calls this decision into question. In *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 316 (4th Cir. 2013), the court held that "[i]mposition of stringent proximate cause standard" is improper for an Article III fair traceability analysis.

Finally, the Ninth Circuit has held that but-for causation is insufficient for Article III standing. In *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121, 1130 (9th Cir. 1996), plaintiff gun owners sued the federal government to enjoin enforcement of provisions of the Crime Control Act, contending that the law had "caused the price of banned devices and grandfathered arms to increase 'from 40% to 100%,' thus hindering their ability to exercise their constitutional rights." *Id.* The Ninth Circuit dismissed the case, holding that "plaintiffs' asserted financial injury here fails the second prong of the *Lujan* test; plaintiffs fail to demonstrate that their alleged economic injury is fairly traceable to the Crime Control Act." *Id.* The court did not deny but-for causation, but instead held that third party actors must be left *without choice* in order to establish Article III standing. *Id.*[11]

These decisions from the Second, Fourth, and Ninth Circuits show the circuit split that was deepened by the Eighth Circuit's opinion below. But more recent opinions from those circuits demonstrate the confusion plaguing the nation's federal courts on how to properly determine whether an injury is "fairly traceable" to the government actor. *See American Electric*, 582 F.3d at 345-47; *Libertarian Party*, 718 F.3d at 316; *Barnum Timber*, 633 F.3d at 901. Review

[11] Much like the Second and Fourth Circuits, a more recent decision by the Ninth Circuit appears to contradict this earlier holding. In *Barnum Timber Co. v. E.P.A.*, 633 F.3d 894, 901 (9th Cir. 2011), the court held that an injury may be fairly traceable to a defendant, even "though other factors may also cause" the injury.

by this Court is needed to resolve the conflicts and confusion.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE CORRECT STANDARD FOR "FAIR TRACEABILITY" IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT

A. The Decision Below Threatens to Alter the Original Purpose of Including Causation as an Element of Standing

This Court's intervention is necessary, because the Eighth Circuit's approach threatens to fundamentally alter the purpose of the causation prong of Article III standing. The development of causation as an element of standing demonstrates that its primary purpose was to aid in the analysis of redressability, *not* to present an additional obstacle to standing where an injunction against illegal conduct would fully redress a plaintiff's injuries.

This Court first analyzed causation in relation to standing in *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973). In that case, a plaintiff single mother sued to have a law punishing those delinquent in child support enforced against the father of her child, alleging injury from the child support he had not paid. *Id.* at 615. This Court found that the Article III redressability requirement was not satisfied, because the plaintiff had "made no showing that her failure to secure support payments results from the nonenforcement, as to her child's father," of the law in question. *Id.* at 618. Thus, causation and redressability "were part of a single inquiry focusing

on whether a federal court judgment would have a real-world effect." Robert J. Pushaw, Jr., *Limiting Article III Standing to "Accidental" Plaintiffs*, 45 Ga. L. Rev. 1, 38 n.165 (2010) (citing *Linda R.S.*, 410 U.S. at 617-19). *See also Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984) ("The 'fairly traceable' and 'redressability' components of the constitutional standing inquiry were initially articulated by this Court as 'two facets of a single causation requirement.'") (quoting Charles Alan Wright & Mary Kay Kane, *Law of Federal Courts* § 13, p. 68 n.43 (4th ed. 1983)).

Causation played the same role in S*imon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), the case which originated the familiar "fairly traceable" language of the Article III standing inquiry. In *Simon*, a group of indigent plaintiffs sued the Secretary of the Treasury, alleging that the IRS had illegally issued a rule "allowing favorable tax treatment to a nonprofit hospital that offered only emergency-room services to indigents," and that as a result each of the plaintiffs had been denied hospital services. *Id.* at 28. Because the complaint alleged only that the IRS rules had "encouraged" hospitals to deny service, the Court reasoned that a favorable judgment would at best "discourage" hospitals from denying their services. For that reason, the Court found that it was only "speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to respondents of such [hospital] services." *Id.* at 43. Once again, traceability served as a *logical tool* to analyze redressability. Because the IRS rule was not shown to be a but-for cause of the

denial of services, the remedy sought would not have guaranteed the receipt of those services.[12]

It was only in 1984 that this Court established that causation and redressability are distinct requirements. But the narrowness of the distinction is crucial for the question of the correct standard of causation. The Court explained:

> To the extent there is a difference, it is that [causation] examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas [redressability] examines the causal connection between the alleged injury and the judicial relief requested. Cases such as this, *in which the relief requested goes well beyond the violation of law alleged*, illustrate why it is important to keep the inquiries separate if the "redressability" component is to focus on the requested relief.

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[12] As one court recognized soon after fair traceability entered the lexicon, "there is a correlation between the two elements [of causation and redressability]. As the connection between the alleged injury and the defendant's actions becomes more direct, the likelihood that requiring the defendant to change his behavior will redress that injury increases." *Community Nutrition Institute v. Block*, 698 F.2d 1239, 1245 (D.C. Cir. 1983), *judgment rev'd on other grounds*, 467 U.S. 340 (1984); *See also* Charles Alan Wright, et al., 13A *Fed. Prac. & Proc. Juris.* § 3531.5 (3d ed. 2008) ("Causation may provide one of the useful means of addressing the question whether the plaintiff has sued the proper defendant . . . . If this defendant has not caused the injury, a remedy directed against him will not relieve the injury.").

Allen, 468 U.S. at 753 n.19 (emphasis added).

In other words, the *Allen* Court made the straightforward observation that when the claim for relief asks a defendant to go above and beyond simply a cessation of allegedly harmful conduct, then the plaintiff may be asking the defendant to fix an injury that he never caused.[13] But the Court did not suggest that redressability and causation would ever diverge when the relief requested is nothing more than cessation of the activity that caused the injury.

Causation remains most often used as a means of analyzing redressability.[14] *Lujan* itself, which gave us the modern three-prong Article III standing test, analyzed causation and redressability together. *See Lujan*, 504 U.S. at 562 (noting that plaintiffs must "adduce facts showing that [third party] choices have been or will be made in such manner as to produce causation and permit redressability of injury"). *See also Bennett*, 520 U.S. at 170-71 (finding in a single analysis that a plaintiff's "injury is 'fairly traceable' to the Service's Biological Opinion and that it will 'likely' be redressed . . . if the Biological Opinion is set aside").

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[13] Another such situation is where a plaintiff seeks only monetary damages, not an injunction to cease illegal conduct. *See, e.g.*, *City of Miami v. Bank of America Corp.*, 800 F.3d 1262, 1273, 1273 n.7 (11th Cir. 2015), *vacated & remanded*, 137 S. Ct. 1296 (2017) (discussing the causation inquiry extensively before noting that redressability was "not at issue" because the plaintiffs had "'allege[d] a monetary injury and an award of compensatory damages would redress that injury'").

[14] *See, e.g.*, *Dynalantic Corp. v. Department of Defense*, 115 F.3d 1012, 1017 (D.C. Cir. 1997) ("Typically, redressability and traceability overlap as two sides of a causation coin.").

In sum, the *only* situations in which this Court has suggested that a plaintiff could prove redressability but *not* causation are when a plaintiff asks for more than an injunction to cease the action which has caused them injury. This history puts in sharp relief the extent to which the Eighth Circuit's approach diverges from Supreme Court practice. Here, E.L. has shown that the defendant's action is a but-for cause of his injury, and the only relief he seeks is an injunction preventing that action. This Court has never suggested that in such a situation, the causation and redressability prongs of standing analysis should diverge. Yet that is exactly what happened here, and it is the only reason why E.L. has been denied the opportunity to have his case heard.

B. The Correct Standard of Article III Causation Is a Crucial and Unsettled Question That Is Squarely Presented in This Case

A debate over the proper interpretation of *Lujan*'s causation prong continues to this day. As some scholars have noted, the test's "independent action" language could plausibly lead lower courts to "the notion that *Lujan*'s second prong of Article III jurisprudence precludes standing in instances where the injury can also be traced to other defendants 'not before the court.'" Mary Kathryn Nagle, *Tracing the Origins of Fairly Traceable*, 85 Tul. L. Rev. 477, 506 (2010). Thus, some have taken the Eighth Circuit's view, that causation in Article III analysis means something akin to proximate cause. *See, e.g.*, Daniel A. Farber, *A Place-Based Theory of Standing*, 55 UCLA L. Rev. 1505, 1544 (2008) ("The common law

analogue to the fairly traceable test is the proximate cause requirement in torts.").

On the other hand, a careful reading of *Lujan* suggests that even if the harmful choice of a third party is "unfettered" and based on the "exercise of broad and legitimate discretion," standing is established if the plaintiff meets his burden to show that the harmful choice "ha[s] been made . . . in such a manner as to produce causation and permit redressability of injury." For this and other reasons, some scholars have rejected any proximate cause analogies. *See, e.g.*, Bradford C. Mank, *Standing for Private Parties in Global Warming Cases*, 2012 Mich. St. L. Rev. 869, 872 ("[T]he Supreme Court has recognized that there is a lower threshold for standing causation than for proximate causation on the merits."); Wright, et al., *supra*, at n.23 ("Proximate cause is not required to establish standing. Concurrent cause is recognized.").

Because of this confusion, and the circuit split noted above, scholars have increasingly noted the need for clarity on this question. *See, e.g.*, Luke Meier, *Using Tort Law to Understand the Causation Prong of Standing*, 80 Fordham L. Rev. 1241, 1253 (2011) (noting that "fairly traceable" is an "ambivalent phrase" that "obscur[es] the two different types of analyses that are commonly associated with the term 'causation'"); *id.* at 1244-45 ("Lower federal courts routinely struggle to apply the causation prong of standing because of uncertainty as to which analysis is required."); Mank, *supra*, at 925 ("[T]he term 'fairly traceable' [in] standing causation needs to be clarified."); Nadia Aksentijevich, *An American Icon in Limbo*, 41 B.C. Envtl. Aff. L. Rev. 399, 411 (2014)

(noting that "the analysis involved in the causation inquiry remains unclear" and that the doctrine's "'fairly traceable' language provides little concrete guidance"); Wright, et al., *supra* (noting that in the realm of Article III standing "the general concept of causation is subject to uncertainty and manipulation").

This case presents an ideal vehicle for the Court to resolve this uncertainty. The Eighth Circuit's opinion denied standing solely on the basis of causality, without disputing that both injury-in-fact and redressability had been established. And the Eighth Circuit did not dispute that VICC is a but-for cause of E.L.'s injury. The court instead denied standing solely because another party (Gateway) is *also* a but-for cause of E.L.'s injury and no direct coercion was established between VICC and Gateway. Thus, the question of whether E.L. has standing to sue VICC turns entirely on the question of whether but-for causation is sufficient for the purposes of Article III standing, or whether instead a second, independent but-for cause can serve as a "superseding cause" to destroy standing.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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Respectfully submitted,

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