No. 20-12960

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAVIER GARCIA-BENGOCHEA,
Plaintiff-Appellant

v.

CARNIVAL CORPORATION, a foreign corporation d/b/a
CARNIVAL CRUISE LINES,
Defendant-Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION
1:19-cv-21725-JLK
The Hon. James Lawrence King

SUR-REPLY BY APPELLEE CARNIVAL CORPORATION ON ISSUE OF STANDING

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Local Rule 26.1, the following is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of a party's stock, and other identifiable legal entities related to a party:

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Carnival Cruise Lines, a division of Defendant/Appellee.

Carnival Corporation (New York Stock Exchange ticker: CCL), Defendant/Appellee. Carnival Corporation is publicly traded, has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

Carnival PLC, traded on the New York Stock Exchange as an ADS with ticker "CUK" and on the London Stock Exchange with the ticker "CCL," an affiliate of Defendant/Appellee. Carnival PLC is publicly

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ARGUMENT

In its Appellee Brief, Carnival explained that Bengochea lacks standing because he cannot show that any of Carnival's challenged conduct made him worse off in any way. In his Reply Brief, Bengochea has not attempted to make such a showing, because he cannot: he was not affected by Carnival's use, in 2016, of a port that had been confiscated in 1960 from a corporation in which his cousin was a minority shareholder. Thus, entirely aside from the fact that he acquired his interest after the statutory date of March 12, 1996 and is ineligible to proceed with a claim under the statute, Bengochea lacks Article III standing.

Rather than demonstrating how Carnival's challenged conduct caused any injury cognizable in an Article III court, Bengochea's Reply argues that the injury suffered in 1960, when Cuba nationalized the property without compensation, is "traceable" to Carnival's conduct fifty-six years later, when Carnival sailed to Cuba. This argument defies common sense, and fails because Article III traceability analysis requires some plausible "chain of causation"—not one that works backwards through time. Failing that, Bengochea argues that his claim is analogous to a variety of arcane common-law and statutory causes of action, but as Congress proclaimed when passing the statute, this is a "unique" cause of action. H.R REP. 104-202(I), at 39 (1995). Accordingly, this case should be dismissed for lack of standing.

I. THERE IS NO TANGIBLE INJURY TRACEABLE TO CARNIVAL.

Bengochea first argues that *Spokeo* is inapplicable because he has alleged a "tangible" injury, which he characterizes as "a financial loss—$289,549.92," which Albert Parreño suffered when Cuba confiscated his ownership interest in La Maritima. (Reply Br. 3.) To be sure, *Spokeo* and its progeny apply to both tangible and intangible injuries, although "tangible injuries are perhaps easier to recognize." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). A plaintiff may rely on a tangible injury, however, only if there is some causal connection between that injury and the defendant's conduct. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) ("*If a defendant has caused* physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III." (Emphasis added.)). Otherwise, the plaintiff is left only with intangible harms, and the concerns addressed in *Spokeo* are fully relevant. *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1272 (11th Cir. 2019).

Bengochea's problem is that any "tangible" injury was complete in 1960, fifty-six years before Carnival's challenged conduct began. Indeed, Bengochea admits this "financial loss" was "calculated to the penny" by the Foreign Claims Settlement Commission (Reply Br. 4)—in a 1970 decision by the Commission. D.E. 1-1. The reason this tangible harm could be "calculated to the penny" nearly half a century *before* Carnival's challenged conduct here is because there is no

causal connection between Carnival's conduct and that injury. *Cal. Ass'n of Physically Handicapped v. FCC*, 778 F.2d 823, 827 (D.C. Cir. 1985) (rejecting standing where "alleged injury occurred before, existed at the time of, and continued unchanged after the challenged Commission action").

Nonetheless, Bengochea argues that this "tangible" injury from 1960 is somehow "traceable" to Carnival's conduct fifty-six years later. Contrary to Bengochea's statements, Carnival does not argue that traceability requires "proximate" or "sole" causation, and Carnival accepts that even "indirect" causal chains may suffice (Reply Br. 7 – 8)—but there must still be *some* "causal connection between the injury and the conduct complained of," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992), and even under an expansive definition of causation, causes must precede their effects. A Carnival cruise to Cuba in 2016 does not propagate backward through time and cause Cuba to confiscate property without compensation in 1960.

To get around time's arrow, Bengochea wrongly conflates the concept of *injury* with the *right to compensation* flowing from that injury, arguing that his real injury is not Cuba's "<u>expropriation</u>" of property but rather "the <u>lack of compensation</u>" for that expropriation. (Reply Br. 10.) All plaintiffs seeking money damages—including the plaintiffs in *Spokeo*, *TransUnion*, *Trichell*, and others—could claim that they have suffered the "tangible" harm of "lacking compensation"

for the alleged wrong. If that sufficed for Article III analysis, *Spokeo* would be merely a guide for artfully drafting a complaint. Instead, courts look not at the alleged "right to compensation," but at the underlying injury giving rise to that right. If that injury is not concrete, or not traceable to the defendant's conduct, *Spokeo* and its progeny hold that Congress may not create standing by inventing a "right to compensation" and declaring it traceable to that conduct. *Huff v. TeleCheck Services, Inc.*, 923 F.3d 458, 465 (6th Cir. 2019) ("Congress cannot conjure standing by declaring something harmful that is not, by saying anything causes injury because the legislature says it causes injury."). Here, the harm giving rise to the "lack of compensation" is the confiscation, which is not traceable to Carnival.[1]

Bengochea's final traceability argument is that "Cuba's ongoing failure to compensate" him is traceable to Carnival's use of the property, ignoring that Cuba denied him compensation for decades prior to the change in US policy allowing cruise travel to Cuba. (Reply Br. 12.) The Supreme Court, however, has repeatedly rejected standing arguments that turn on speculation about how third parties, not

[1] Bengochea alternatively suggests that the harm is caused by Carnival's *use* of the property—but this is not a traceability argument, and it is wrong. Carnival's use of property in which Bengochea has no property interest does not harm Bengochea; that is why he consistently defines his harm in terms of the loss caused by expropriation, rather than use. *E.g.*, Reply Br. 27 (explaining that the Act "prescribes damages (the value of an expropriated property) that remedy the harm (no compensation for an expropriation)").

before the court, might react to the actions of the parties before the court. *California v. Texas*, 141 S. Ct. 2104, 2117 (2021); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 413 (2013).

To avoid this, Bengochea argues that the Court may not question Congress's determination that a chain of causation exists here, because to do so would require second-guessing Congress's foreign-policy determinations. But like its power to declare new injuries, Congress's power to define chains of causation is limited by Article III. *Cordoba*, 942 F.3d at 1272 (rejecting traceability, in statutory cause of action, even where class members suffered concrete injuries). After all, since *Marbury*, it has been the *judiciary's* role to determine its own jurisdiction, notwithstanding Congressional pronouncements. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). The *Marbury* Court, recognizing their duty "to say what the law is," *id.* at 177, found it lacked jurisdiction in the case despite a statute granting jurisdiction for such cases. *Id.* at 174; *see also Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 999 (11th Cir. 2020) ("[I]n adjudicating cases or controversies (or determining whether they exist), federal courts must decide for themselves whether applicable statutes are consistent with the Constitution.").

Indeed, it is by scrupulously adhering to Article III—and offering legal opinions only when necessary to decide "cases" or "controversies"—that the judiciary avoids entangling itself in foreign-policy determinations more

appropriately decided by the political branches. *E.g.*, *Letter to Washington from Supreme Court Justices* (Aug. 8, 1793) (refusing to provide advisory opinions on privateering during conflict between France and Britain).[2] The same is true here: Bengochea seeks to invoke Article III jurisdiction so that a federal court can wade into an inter-branch dispute, re-examining the lawfulness of cruise travel that was unquestionably licensed and permitted by the Executive but which Bengochea believes was prohibited by the Legislature. Federal courts can and sometimes must resolve such disputes, but only when necessary to remedy a concrete injury suffered by the plaintiff and traceable to the defendant—not whenever Congress declares that they should. *TransUnion*, 141 S. Ct. at 2203.

II. THERE IS NO ANALOGOUS CAUSE OF ACTION SUPPORTING STANDING.

Alternatively, Bengochea argues that his claim is analogous to a handful of obscure causes of action, including "accomplice after-the-fact" liability and a questionable state statute predating the Constitution. His proffered analogies only serve to underscore just how unique—and improper—his cause of action really is.

[2] *Available at* https://founders.archives.gov/documents/Washington/05-13-02-0263. *See generally* Casto, *The Supreme Court in the Early Republic* 75 – 82 (1995).

A. Carnival Is Not an "Accomplice" Fifty-Six Years After the Confiscation.

Bengochea argues that his claim is similar to "accomplice-after-the-fact liability" recognized at common law because, when Carnival used the dock beginning in 2016, Carnival allegedly knew "that Cuba wrongfully confiscated Albert's property" in 1960. (Reply Br. 15.) Bengochea cites no authority applying this concept to an alleged accomplice *fifty-six years* "after the fact."

This is unsurprising because, as Bengochea admits, this joint liability applies only where the defendant ratifies some tortious conduct that was done for the defendant's own benefit. Reply Br. 16 ("[A]ssenting to, ratifying, or approving of, another's original wrongdoing *for one's own benefit* … is actionable." (Emphasis added)). This is confirmed by the many sources cited in Bengochea's Reply Brief. *Id.*; *see also* 2 Hilliard, *The Law of Torts* 293 (3d edition 1866) ("All … who approve of [another's tort] after it is done, are liable, if done for their benefit …."); *Judson v. Cook*, 11 Barb. 642, 644 (N.Y. Gen. Term. 1852) (same); *Dillingham v. Anthony*, 11 S.W. 139, 142 (Tex. 1889).[3]

[3] Bengochea also cites *Licci v. Lebanese Canadian Bank, SAL*, 834 F.3d 201 (2d Cir. 2016), which did not involve after-the-fact ratification. *Licci* dealt with allegations that a bank had aided and abetted terrorist attacks by facilitating wire transfers *prior* to the attacks, and with specific intent to aid the terrorist attacks. *Id.* at 217. Bengochea has not alleged anything like that here.

The decision in *Bishop v. Viscountess Montague* (1604), 78 Eng. Rep. 1051; Cro. Eliz. 824, described by Bengochea, illustrates the principle. In that case a bailiff, incorrectly believing that the plaintiff owed five oxen to the Viscountess, took those oxen for the Viscountess's benefit. *Id*. When the Viscountess ratified the taking by taking the oxen herself, she could be held liable for the bailiff's trespass that was done for her benefit. *Id.*[4]

Bengochea's cause of action lacks this essential element: the Cuban government did not confiscate American-owned properties in 1960 in order to benefit Carnival. Moreover, when a Carnival ship docked at this port, Carnival did not "ratify" or "assent to" the expropriation of property that had occurred decades earlier. Indeed, Carnival did not derive any benefit from that earlier confiscation, even though it meant that the Cuban Government rather than La Maritima corporation controlled the dock.

Bengochea's discussion of actions for "trover or conversion" is even less applicable. Common-law actions for trover and conversion involved depriving a plaintiff of possession of goods or chattels. 3 Blackstone, *Commentaries* *150 –

[4] Bengochea cites two additional cases that had no occasion to consider this principle. In one, the court held that an attorney was liable for procuring the plaintiff's false imprisonment; there was no issue of ratification after-the-fact. *Barker v. Braham* (1773), 95 Eng. Rep. 1104, 1111; 3 Wils. K.B. 367. In the other, the court *rejected* a ratification theory, finding that a "pound-keeper" did not ratify the wrongful taking of the plaintiff's cart and horses when the original wrongdoers delivered them. *Badkin v. Powell* (1776), 98 Eng. Rep. 1195, 1197; 2 Cowp. 476.

52. Typically, the plaintiff would prove a right to immediate possession of the goods, the defendant's possession of those goods, and the defendant's refusal to return them upon demand. *Id.* Thus, Bengochea's authorities hold that when a defendant has possession of the plaintiff's goods and refuses to return them, the defendant may be liable—whether or not the defendant "ratified" earlier wrongdoing by someone else. (Reply Br. 18.) But Bengochea cannot allege that Carnival is (or ever was) in possession of the port of Santiago, nor that Carnival has refused to deliver the port upon demand. Moreover, as with common-law trespass, Bengochea cannot establish the basic element of conversion because, at the time of Carnival's cruises, he had neither possession nor an immediate right to possession—and thus nothing Carnival did "deprived" him of that possession. *Glen v. Club Mediterranee, S.A.*, 450 F.3d 1251, 1255 (11th Cir. 2006).

B. Bengochea's Claim Lacks the Essential Elements of Trespass, Whether Under the Common Law or the "Trespass Act" of 1783.

Finally, Bengochea unearths and places heavy reliance on the New York Trespass Act of 1783, a unique, pre-Constitution state statute that played an early role in the development of judicial review in America—because courts *refused* to apply its most important provisions. The Trespass Act defined a cause of action for American Patriots who fled New York City when the British captured it during the Revolutionary War; the Act allowed them "to bring an Action of Trespass against any Person or Persons who may have occupied, injured, or destroyed" their

property during the British occupation. 1 Goebel, *The Law Practice of Alexander Hamilton* 201 (1964). Critically, the Act prevented Loyalist defendants from arguing that their occupation was justified by any British "military Order or Command." *Id.* The Trespass Act was one of a series of "anti-Loyalist statutes enacted by the Patriot New York Legislature," including other dubious laws like the "Confiscation Act," an attainder of "fifty-nine leading citizens of colonial New York" who were stripped of all real and personal property and "banished from New York under penalty of death," and the "Citation Act," which discharged the interest owed by any "Patriots of attested loyalty" to any "Loyalist within British territory." *Id.* 197 – 200. Needless to say, these anti-Loyalist acts are not a reliable guide for understanding the subsequent Constitution. *See* U.S. Const. Art. I, § 10 ("No State shall … pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts ….").

Bengochea relies heavily on *The Law Practice of Alexander Hamilton* for his discussion of the Trespass Act and cases thereunder. (Reply Br. 20 nn. 9 – 10.) He does not mention that Alexander Hamilton was the lawyer *for the defense* in dozens of cases under the Trespass Act, and a steadfast, outspoken critic of the law outside of court. Goebel, at 218 – 223, 524 – 25.[5] In the leading *Rutgers v. Waddington* case (N.Y. Mayor's Ct. 1784), Hamilton's strong views led him to

[5] *See also* Chernow, *Alexander Hamilton* 195 – 99 (2004).

argue that this law was void, as contrary to the law of nations and the Treaty of Peace, and thus could not be applied in court—a novel position in the early days of the American judiciary.[6] Although the *Rutgers* court found his client partially liable, the result was understood largely as a victory for Hamilton, and today the decision is understood as one step on the road to judicial review.[7] Hamilton would go on to be the only New York delegate to the Constitutional Convention who signed the final document, and author of nearly every Federalist Paper dealing with the judiciary. It is thus difficult to see the Trespass Act as a guide for understanding Article III.

Regardless, the Trespass Act cannot help Bengochea. As pointed out in Carnival's Opposition Brief, Bengochea's claim is not analogous to a trespass action because it lacks the fundamental element: possession. Plaintiffs without a right of possession cannot bring a trespass action, and even an owner who has wrongly been ousted from possession can proceed only against the *wrongful possessor* of the property—not third parties who merely enter on that property. (Carnival Appellee Br. at 18 – 20.) The Trespass Act did not alter these fundamental aspects of the common law. Goebel, at 295 – 96.

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[6] Goebel, at 304 – 05; Wood, *Creation of the American Republic* 458 – 59 (1998).
[7] Goebel, at 282, 311 – 14; Wood, at 458 – 63.

The *Rutgers* case is a perfect example. Ms. Rutgers had fled New York and left behind her "brewhouse," which was occupied by the Defendant, first on orders from a British civilian and later the British Commander-in-Chief. Goebel, at 289 – 90. When she fled, Ms. Rutgers did not forfeit her ownership and possessory rights in the property, and thus even the British recognized her right to possess the property when the occupation ended. Goebel, at 290 (noting that British Commandant ordered defendant to start paying rent to Rutger's agent in 1783).[8] Having been ousted from possession, however, the Trespass Act gave her a cause of action against only the party *who possessed* her property—not third parties who may have entered the brewhouse for a drink.[9]

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[8] The court held that the occupying military was temporarily entitled to possession for the duration of the occupation. *Id.* at 411. Thus, the Defendant was not liable while possessing the property under authority from the British military. Goebel, at 309 – 10, 397 – 99, 411, 417 – 19. He was liable only while occupying the property, rent-free, on authority from a *civilian* official, which the court found unlawful. Goebel, at 289 & n.20, 310, 411.

Thus, Bengochea is wrong to argue that the Trespass Act allowed suits for "use of the Americans' expropriated properties" that "benefitted the foreign sovereign." (Reply Br. 22 & n.12). *Rutgers* holds the opposite: the defendant *could not* be liable while paying the British military; he was liable only for the period when he occupied the property rent-free.

[9] Bengochea also wrongly argues that the Trespass Act provided "damages equal to the value of the [confiscated] goods." (Reply Br. 22 & n.13 (quoting Goebel, at 423).) This was the remedy for "destruction or injury or taking away of property," in "contrast to … litigations concerning the mere use and occupation of Patriot property." Goebel, at 422. In *Rutgers*, it appears that the relief sought was *rent* for

Unlike *Rutgers* and other Trespass Act plaintiffs, Bengochea has neither possession of, nor a right to possess, the property at issue here: his ownership interests in the property have been entirely extinguished. *Club Mediterranee*, 450 F.3d at 1255. And unlike *Rutgers* and other Trespass Act plaintiffs, Bengochea is not proceeding against the entity currently in possession of this property (here, the Cuban government); instead, he is bringing actions against third parties who merely used the property to dock a ship.[10] As described in Carnival's Opposition, this is no mere technicality: possession is the very essence of a trespass action, and it is entirely lacking here. Neither common-law trespass nor the dubious authority of the Trespass Act provide any analogous support for Bengochea's cause of action.

CONCLUSION

As discussed above and in Carnival's opposition brief, Bengochea has not suffered any concrete injury traceable to Carnival's conduct: indeed, he has not

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the occupation. *E.g.*, Goebel, at 291 (characterizing *Rutgers* as "the suit for £8000 house rent").

[10] Even less analogous are the debt-confiscation cases briefly cited by Bengochea. (Reply Br. 22 – 23 (citing *Russek v. Angulo*, 236 S.W. 131 (Tex. Civ. App. 1922); *Keppel v. Petersburg R. Co.*, 14 F. Cas. 357 (C.C.D. Va. 1868); *Ware v. Hylton*, 3 U.S. (Dall.) 199 (1796).) None of these involved a unique cause of action; they were simple suits to recover acknowledged debts owed. The only issue was the availability of a *defense*, asserted by the *defendants*, that the debt had been cancelled (or "confiscated") by a revolutionary government in wartime. These cases are inapplicable here, which is not an action on a debt.

been affected by any Carnival cruise to Cuba. Accordingly, this case should be dismissed for lack of standing.

Dated: July 28, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY under Federal Rule of Appellate Procedure 32(g)(1) that this document complies with the word limit set forth in this Court's July 14, 2021 Order because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4, it contains 3,247 words.

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By: /s/ *Stuart Singer*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 28, 2021, a true and correct copy of the foregoing was served on all counsel of record via the court's CM/ECF System.

By: /s/ *Stuart Singer*
Stuart Singer