Case No. 17-20545

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ENVIRONMENT TEXAS CITIZEN LOBBY,
INCORPORATED; SIERRA CLUB,
Plaintiffs-Appellees,
v.
EXXONMOBIL CORPORATION; EXXONMOBIL CHEMICAL
COMPANY; EXXONMOBIL REFINING & SUPPLY COMPANY,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

BRIEF OF AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, BCCA APPEAL GROUP, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, TEXAS CHEMICAL COUNCIL, AND TEXAS OIL & GAS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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This brief is filed by American Fuel & Petrochemical Manufacturers, BCCA Appeal Group, Chamber of Commerce of the United States of America, National Association of Manufacturers, Texas Chemical Council, and Texas Oil & Gas Association as *amici curiae*[1] in support of Appellants.

The American Fuel & Petrochemical Manufacturers ("AFPM") is a national trade association whose members comprise most U.S. refining and petrochemical manufacturing capacity. AFPM's members supply consumers with a wide variety of products that are used daily in homes and businesses.

BCCA Appeal Group is an association of businesses whose mission includes supporting the mutual goals of clean air and a strong economy. BCCA Appeal Group members own and operate industrial facilities in Texas and elsewhere in the United States, including refineries and petrochemical plants.

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly

[1] All parties consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(e). *Amici*'s counsel Baker Botts L.L.P. served as counsel for ExxonMobil in the early stages of the district-court proceedings. On January 12, 2012, the district court granted Baker Botts' motion to withdraw as counsel and to substitute Beck Redden L.L.P. as counsel for ExxonMobil. Baker Botts has not represented ExxonMobil in this matter since that time.

represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million people, contributes roughly $2.35 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for nearly two-thirds of private-sector research and development in the Nation. NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the nation.

The Texas Chemical Council is a statewide trade association of chemical manufacturing facilities in Texas. Currently, 68 member companies produce vital products for our way of life, fulfill educational and quality-of-life needs, and provide employment and career opportunities for more than 74,000 Texans at over 200

separate facilities across the state. Their combined economic activity sustains nearly a half-million jobs for Texans.

The Texas Oil & Gas Association ("TXOGA") has more than 5,000 members and is the largest and oldest petroleum organization in Texas. Members of TXOGA produce in excess of 80 percent of Texas' crude oil and natural gas, operate over 80 percent of the state's refining capacity, and are responsible for the vast majority of the state's pipelines. The Texas oil and natural gas industry not only produces products used daily; it anchors the state's economy. In 2020, the industry paid $13.9 billion in state and local taxes and state royalties that directly funded schools, roads, and emergency services.

Amici's members include businesses that are regulated by the Environmental Protection Agency ("EPA") and its state counterpart—the Texas Commission on Environmental Quality ("TCEQ")—under the Clean Air Act. They could be targeted by Clean Air Act citizen suits like the lawsuit at issue in this appeal. *Amici* are interested in ensuring that citizen suits retain their important but limited role in enforcing the Clean Air Act and other statutes. More generally, *amici* are interested in upholding constitutional and statutory limitations on federal court litigation that might otherwise lead to perverse outcomes, inconsistent with the purposes of environmental protection and sound governance.

SUMMARY OF ARGUMENT

Under the statutory design created by Congress, the TCEQ and the EPA play the primary role in implementing and enforcing the Clean Air Act ("CAA" or "the Act") in Texas. Acting in the public interest, these regulatory agencies enjoy broad-ranging powers to enforce the Act's requirements, including the power to seek penalties and injunctive relief as authorized by the statute. The CAA also authorizes citizens to bring civil actions in federal court to seek redress for CAA violations in certain circumstances. 42 U.S.C. § 7604. Citizen suits, however, play a limited and interstitial role in enforcing the Act—a role that must supplement and not supplant the primary role of regulatory agencies. Both the Constitution and the statute place important limits on citizen suits. This case involves two of those limits.

First, Article III of the Constitution constrains the range of claims that a citizen plaintiff may assert, even where the claim is authorized by statute. Article III restricts federal courts to adjudicating cases or controversies between parties. To that end, courts may decide only claims for which a plaintiff has suffered a concrete injury, fairly traceable to the defendant's wrongdoing, that can be redressed by judicial action. Moreover, a plaintiff who has standing as to one claim—*i.e.*, who has been injured by one of defendant's violations—may not leverage that claim to litigate myriad *other* claims for legal violations, unless the plaintiff has standing to assert each of these claims. These principles apply with full force to environmental

citizen suits, as the Supreme Court recently emphasized in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). Thus, a citizen plaintiff may seek redress under the statute only for a defendant's CAA violations that have concretely and particularly harmed him, that are traceable to the defendant's conduct, and that are redressable by the court.

Second, the CAA limits the penalties that may be assessed in citizen suits. In determining the proper penalty under the Act, the court "shall take into consideration," among other things, "the economic benefit of noncompliance." 42 U.S.C. § 7413(e)(1). The economic-benefit factor ensures that defendants disgorge any economic benefit they gained by violating the law, such as benefits obtained by delaying repairs or upgrades that were necessary to prevent the violation. Federal courts may not assess penalties based upon the costs of repairs or upgrades that were not necessary to prevent the violation from occurring—such as improvement projects that a company undertook for other reasons. Such repairs or upgrades do not bear any reliable relationship to the economic benefits *of the defendant's noncompliance*, which is the relevant factor that Congress directed courts to consider. This approach is not only required by the text of the CAA, but is essential to avoid perverse incentives, such as penalizing companies for voluntarily improving their facilities or discouraging companies from entering settlements with regulators that may go beyond what the law requires for compliance.

This case exemplifies a citizen suit that transgressed these constitutional and statutory limits. Using reports that ExxonMobil submitted to the state regulatory agency and records that ExxonMobil maintained, plaintiffs sued for thousands of violations across an almost eight-year period. When this case was previously before this panel, it acknowledged the fundamental Article III requirement that plaintiffs prove that they suffered injuries traceable to each violation. But the majority's standing test, which included per se rules that irrebuttably presumed traceable injuries for certain types of violations, compelled the district court to erroneously find standing without determining whether the plaintiffs had in fact suffered a concrete injury traceable to each violation. The majority's approach contradicts Supreme Court precedent, has been further repudiated by *TransUnion*, and threatens to transform citizen suits from civil actions designed to resolve concrete controversies into regulatory vehicles for dictating environmental policy.

Quite apart from erring in its analysis of Article III standing, the district court independently erred in determining the economic benefit that ExxonMobil allegedly gained from the violations in calculating the penalty to be imposed. In calculating the penalty to be imposed, the district court inquired only whether certain improvement projects performed by the company—as part of a negotiated settlement with the state—were related generally to the violations the court had found. This nontextual, free-floating approach led the court to impose the largest penalty in the

history of CAA citizen suits. Strikingly, although the district court found that plaintiffs had standing to seek penalties for *80% fewer* violations than it had previously found, it still determined that ExxonMobil gained *precisely the same* economic benefit of noncompliance from that greatly reduced number of violations.

The court misconstrued the statutory direction to consider the "economic benefit *of noncompliance*." 42 U.S.C. § 7413(e)(1) (emphasis added). It awarded penalties based upon the cost of ExxonMobil's projects without inquiring whether the violated permit required installation of emissions-reducing equipment and whether the defendant benefited from impermissibly delaying the installation of that equipment. The district court's approach of assessing penalties based upon any project that is "generally correlated" to pollution control has no limiting principle, and ignores Congress's direction in the text of the Act; virtually any improvement project or upgrade to an industrial facility could be generally correlated to the reduction of pollution.

Amici urge the Court to reexamine, in light of *TransUnion*, whether plaintiffs have established standing for each violation and to disapprove the district court's approach to economic-benefit penalties, lest this case become a national roadmap for a new quasi-regulatory program through citizen suits. *Amici* and their members work hard to ensure effective compliance with the complex web of regulatory provisions under the Nation's environmental laws. Citizen suits should not be

permitted to supplant this ongoing regulatory process. *Amici* respectfully ask the Court to reverse the decision below and to restore citizen suits to the important but limited role assigned by the Constitution and the Act.

ARGUMENT

I. COURTS MUST FAITHFULLY ENFORCE ARTICLE III'S STANDING REQUIREMENTS IN CAA CITIZEN SUITS.

A. Citizen Suits Supplement, Not Supplant, Agency Enforcement of the Clean Air Act.

State and federal authorities enjoy broad, primary power to enforce the Act. The Act also authorizes any person to commence a civil action for repeated or ongoing violations of an "emission standard or limitation," including a permit "term" or "condition." 42 U.S.C. § 7604(a)(1), (f). Citizen suits serve an important but limited purpose. They are "meant to supplement rather than to supplant governmental action." *Stringer v. Town of Jonesboro*, 986 F.3d 502, 506 (5th Cir. 2021). Thus, citizen suits play an "interstitial" role in enforcing environmental statutes, and courts reject applications of the citizen-suit provision that would "potentially intru[de]" on the "discretion of state [and federal] enforcement authorities." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 61 (1987).

Consistent with these principles, primary responsibility for achieving the CAA's objectives and imposing penalties for noncompliance is assigned to state regulators and the EPA—the entities empowered to determine enforcement priorities

and balance the costs and benefits that relate to the public interest. This structure affords regulated businesses a consistent approach to the interpretation and enforcement of environmental statutes. And this framework is critical to the regulated community, because compliance with environmental laws can require years of planning and millions of dollars in capital expenditures, even for a single project.

As the Supreme Court recently recognized, in the absence of an actual case or controversy, "the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys)." *TransUnion*, slip op. at 13-14. Private plaintiffs "are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law." *Id.* at 14. Consequently, courts should decline the invitation of private litigants to exercise "continuing superintendence" over a company or industry's regulatory compliance. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 193 (2000).

B. As This Panel Recognized, CAA Citizen-Suit Plaintiffs Must Demonstrate Article III Standing for Each Claim.

Standing doctrine undergirds the limited role of citizen suits. Acting as sovereigns, regulatory agencies may bring enforcement actions to pursue CAA violations without the need to prove individualized injuries. But standing doctrine

imposes strict constraints on the scope of citizen suits in federal court. "Federal courts do not exercise general legal oversight of the Legislative and Executive Branches, or of private entities." *TransUnion*, slip op. at 8.

Of central importance here, "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-48 (2016); *see TransUnion*, slip op. at 10. Accordingly, Article III means that a plaintiff may litigate only those CAA violations for which the plaintiff has standing.

To establish standing, a citizen-suit plaintiff must demonstrate the "irreducible constitutional minimum" of (1) a concrete and particularized injury in fact that (2) is fairly traceable to the violation and (3) will be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Even statutory violations that directly relate to the plaintiff are insufficient, unless the plaintiff also shows that the violation concretely injured her. For example, in *TransUnion* many plaintiffs lacked standing even though the defendant had allegedly violated the Fair Credit Reporting Act by placing an inaccurate alert on each plaintiff's credit report. Slip op. at 1-2. The Court concluded that only the plaintiffs whose credit files were provided to third parties had suffered a concrete harm and therefore had standing. *Id.* at 19, 24. Thus, potential injury or even an increased likelihood of injury is not enough for standing. *See id.* at 22-23.

Citizen-suit plaintiffs must also establish that their injury is "fairly . . . trace[able] to the challenged action of the defendant." *Lujan*, 504 U.S. at 560-61. An injured plaintiff provides only one side of the case or controversy; the other side is fulfilled by a defendant whose alleged wrong caused the injury of which the plaintiff complains.

Moreover, "standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek." *TransUnion*, slip op. at 15-16. The same requirements apply no matter how many violations are alleged. *See id.* at 1-2 (holding, in case where class of 8,185 individuals sued TransUnion, that only 1,853 class members had standing to assert reasonable-procedures claim). Traceability works in conjunction with the bar on standing in gross to prevent a plaintiff who has an injury traceable to *one* violation from suing for *another* violation for which he did not suffer a traceable injury. This panel thus correctly recognized that Article III requires plaintiffs to "prove standing for *each* violation in support of their claims." *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.* (*ETCL II*), 968 F.3d 357, 367 (5th Cir. 2020) (emphasis added).

C. The Majority's Test is Insufficient to Ensure That Plaintiffs Have Standing Under Article III.

1. Even though this panel recognized that plaintiffs must prove standing for each violation, it adopted a test and created a set of per se rules that largely nullify Article III's injury and traceability requirements. To be sure, the panel correctly

distinguished the standing inquiry here from those in other citizen suits, because plaintiffs here alleged a large number and variety of violations rather than "the same injury resulting from a series of similar discharges." *ETCL II*, 968 F.3d at 366. The panel also acknowledged that, unlike in prior cases, there is "doubt [in this case] that the pollutant emitted could cause the alleged injury." *Id.* But despite these cautionary signs that counseled a rigorous application of Article III, the majority nonetheless adopted a standing test from *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996), in a manner that falls far short of requiring proof of traceable injuries for each violation.

Applying its interpretation of *Cedar Point*, the majority reasoned that plaintiffs need only make two showings to demonstrate traceable injuries. First, plaintiffs must show "that each violation in support of their claims 'causes or contributes to *the kinds* of injuries' they allege." *ETCL II*, 968 F.3d at 369-70 (emphasis added). "Second, [p]laintiffs must demonstrate the existence of a 'specific geographic or other causative nexus' such that the violation *could have* affected their members." *Id.* at 370 (emphasis added).

2. *Amici* agree with ExxonMobil that the majority's broad application of *Cedar Point* cannot be applied to this case consistent with Article III, particularly after *TransUnion*. The per se rules that the majority derived from *Cedar Point* are incompatible with the principle that a plaintiff must establish a traceable, concrete

injury for each claim on which he seeks relief. The majority stated that a violation will *automatically* satisfy the injury prong of the *Cedar Point* test if it "(1) created flaring, smoke, or haze; (2) released pollutants with chemical odors; or (3) released pollutants that cause respiratory or allergy-like symptoms." *ETCL II*, 968 F.3d at 370. The majority further instructed the district court to find the geographic-nexus prong of the test *automatically* met if the emission "violated a nonzero emissions standard" or "had to be reported under Texas regulations." *Id.* at 371. The majority allowed factfinding by the district court regarding traceable injuries only as to emissions that violated a zero-emissions standard. *Id.* Only for that limited class of emissions were plaintiffs required to prove that ExxonMobil's emissions actually reached the areas where plaintiffs' members live and recreate. For the other specified types of emissions, the majority required the district court to irrebuttably presume that plaintiffs suffered traceable injuries based on the nature of the emissions.

Put simply, the majority's rules assume that because plaintiffs experienced *some* traceable injuries during the relevant time period, a traceable injury must *also* have arisen each time that other similar specified violations occurred. These judicially constructed assumptions dispense with but-for causation and "eliminate[] traceability altogether." *See id.* at 375 (Oldham, J. concurring in part and dissenting in part).

As explained by the Supreme Court, "[a] plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, *although similar*, to which he has not been subject." *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982) (emphasis added). Indeed, even if several claims are "seemingly identical in all material respects" and share "seemingly intertwined fates," standing must be shown for each claim separately. *Nat'l Fed'n of the Blind of Tex., Inc. v. Abbott*, 647 F.3d 202, 209 (5th Cir. 2011). Nor can a court grant standing to plaintiffs based on speculation that *someone* must have been injured by the bulk of defendants' violations. *Blum*, 457 U.S. at 999. Rather, "the judicial power conferred by Art. III may not be exercised unless *the plaintiff* shows 'that *he* personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" *Id*. (emphases added). The majority's test replaces the plaintiff's evidentiary burden with an irrebuttable judicial presumption that broadly similar violations will ineluctably lead to further traceable injuries. Under that approach, plaintiffs can automatically establish standing to litigate violations from which they may have suffered no injury. And that violates Article III, which "grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions." *TransUnion*, slip op. at 11.

3. A few examples suffice to illustrate why the majority's test violates Article III's requirement that at least one of plaintiffs' members must have suffered a concrete injury traceable to each violation.

First, take Judge Oldham's hypothetical of a plaintiff with asthma who lived in Baytown during the relevant time period, but was away from Baytown during three emission events that (1) could have reached into Baytown, (2) were of reportable quantities or in excess of non-zero emissions limits, or (3) that could have caused or contributed to flaring, smoke, or haze. *ETCL II*, 968 F.3d at 378; *see also TransUnion*, slip op. at 11-12 (providing a similar example). This plaintiff plainly lacks Article III standing as to those three violations. Yet this scenario satisfies both the injury and geographic-nexus prongs of the majority's test. Article III would at least require the plaintiff to show that he was physically present for the violations and thus in a position to invoke the majority's per se rules.

Second, the majority itself provided a scenario in which there was "obvious[ly]" no Article III standing. *ETCL II*, 968 F.3d at 365. If a citizen moved from Florida to Baytown in 2005, the majority acknowledged he would not have standing to sue for violations that occurred in 2004. *Id.* at 366. Yet the majority's *Cedar Point*-based test contains no such limiting principle. The test contains a per se geographic-nexus component, but it contains no temporal requirements.

Moreover, the violations for which the plaintiffs sued occurred between October 2005 and September 2013. *Id.* at 363. Yet, as the majority's factual statement reflects, not all plaintiffs lived in Baytown during this entire period, and plaintiffs suffered different injuries from one another. *Id.* at 367. Nonetheless, the majority's per se rules irrebuttably presume that some plaintiff was in Baytown and suffering all of the specified injuries throughout the entire time period, even when this is plainly counterfactual. For instance, the only plaintiffs who testified to suffering injuries after September 2012 did not even live in Baytown, and one of those members stopped visiting Baytown regularly after March 2013. By irrebuttably presuming that all specified emissions gave rise to traceable injuries, the majority effectively posits that at least one of those two members must have been visiting Baytown in sufficiently close proximity to the facility during the times of *all* the relevant alleged violations in late 2012 and 2013. This goes beyond conjecture. When "common sense observation[s] become[] little more than surmise[,] . . . certainly the requirements of Article III are not met." *Ctr. for Biological Diversity v. EPA*, 937 F.3d 533, 545 (5th Cir. 2019).

4. Article III requires still more than a plaintiff who is temporally present and geographically close enough to potentially experience a violation; the plaintiff must show that he was actually injured by the violation. The majority's per se rules, however, presume injury for certain categories of violations from the mere fact of

proximity. The majority stated, for example, that plaintiffs could "undoubtedly see" flares from their homes and other areas outside the Baytown complex, so plaintiffs' testimony that they saw flares on one or more occasions was "enough evidence" to support standing for all flaring violations. *ETCL II*, 968 F.3d at 371. But even assuming that merely seeing a flare constitutes an injury in fact, no *evidence* supports the inference that seeing one flare equals seeing all flares, and there is good reason to doubt it. Weather conditions such as clouds, fog, or rain could obscure the flaring, and the Baytown plant itself is "massive." *Id.* at 362. The majority's judicial assumption cannot substitute for evidence of injury.

Similarly, the majority's test irrebuttably assumes without evidence that every emission of a reportable quantity or in violation of a non-zero limit would have reached at least one of the plaintiffs' members in an amount sufficient to cause an injury. Once again, no evidence explains why this would be so, and again, there is reason for doubt. For one thing, air emissions are affected by wind.[2] If the wind were blowing away from a member's location on given days, emissions may not reach the member in sufficient quantities to cause chemical odors or allergy

[2] *See Ala. Power Co. v. Costle*, 636 F.2d 323, 348 n.29 (D.C. Cir. 1979) (noting that "[v]ariable meteorological conditions (wind direction, wind speed, temperature, humidity, etc.) . . . combine to create different [air] pollutant concentrations at different times"); *Wisconsin v. EPA*, 938 F.3d 303, 309 (D.C. Cir. 2019) ("Air pollution, once emitted, drifts with the wind. . . .").

symptoms. In fact, one of plaintiffs' members testified that "when the wind was blowing towards the Complex away from him during flaring events, he did not smell the odors." ROA.16086. Plaintiffs must present evidence to establish *each* violation for which they can reasonably trace an injury. Factual declarations by an appellate court cannot substitute for the evidentiary showing that Article III requires.

The Supreme Court's decision in *TransUnion* strongly supports this conclusion. While the Court acknowledged the class members' "serious argument" that many of their credit reports were likely sent to third parties outside of the period covered by the stipulation, the Court held that plaintiffs "had the burden to prove at trial that their reports were *actually sent* to third-party businesses." *Id.* at 23-24 (emphasis added). The Court further noted that the plaintiffs' argument about probabilities simply did not "demonstrate that the reports of any *particular* number of the 6,332 class members were sent to third-party businesses." *Id.* at 24 (emphasis added). Likewise, in this case, the majority's test, as applied by the district court, amounts to relying on "inferences" that are "too weak to demonstrate" injury-in-fact, traceability, and redressability for any *particular* number of alleged violations. *Id.* at 23-24. By substituting per se presumptions for specific proof tied to each alleged violation, the district court failed to satisfy Article III.[3]

[3] Indeed, where the district court was able to engage in factfinding unconstrained by the majority's per se rules, it repeatedly concluded that numerous alleged violations did not cause injuries to plaintiffs. *See* ROA.75443-44, 75449-51 (weighing

It is no surprise that Article III imposes meaningful hurdles on plaintiffs who seek to litigate thousands of violations over the course of several years. But courts may not lessen Article III requirements so that plaintiffs can more effectively assume the role of regulators.

D. The Majority's Approach Converts Citizen Suits from Discrete Cases and Controversies to Sprawling Regulatory-Enforcement Actions.

By adjudicating alleged legal violations in citizen suits without evidence that such violations satisfy Article III, courts improperly convert such suits to vehicles for broad-scale regulatory enforcement and policymaking, unconstrained by the separation of powers. Without a concrete injury, plaintiffs' abstract interest in CAA enforcement does not differ from that of the public at large. Such abstract interests in ensuring legal compliance must be vindicated by the government, not private citizens. As the Supreme Court recently affirmed, "[a]n uninjured plaintiff who [brings a citizen suit] is, by definition, not seeking to remedy any harm to herself but instead is merely seeking to ensure a defendant's 'compliance with regulatory law' (and, of course, to obtain some money via the statutory damages). Those are not grounds for Article III standing." *TransUnion*, slip op. at 12 (internal citations omitted). The courts' ongoing failure to apply this constitutional filter transformed

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evidence and finding that ExxonMobil's alleged violations of zero-emissions limits did not injure plaintiffs).

what should have been a relatively narrow case into a wholesale relitigation of regulatory outcomes at a large industrial complex for a period of almost eight years.

Unless the panel revisits its holding, the standing-in-gross strategy pursued by plaintiffs will serve as a handbook for citizen-suit plaintiffs unhappy with their states' regulatory decisions. Such a result effectively converts the federal courts into "virtually continuing monitors of the wisdom and soundness of Executive action," a role the Supreme Court has always rejected. *Lujan*, 504 U.S. at 577; *TransUnion*, slip op. at 13 ("A regime where Congress could freely authorize *unharmed* plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority."). Under the panel's approach, the only limits on a citizen suit's reach are the statute of limitations and the number of alleged violations plaintiffs can identify that fall into the majority's per se rules (a task made easy by comprehensive self-reporting and recordkeeping requirements). Courts are ill-equipped to oversee such sprawling law-enforcement enterprises, and the Constitution forbids them to do so.

II. ASCRIBING "ECONOMIC BENEFIT," FOR PENALTY CALCULATION PURPOSES, TO ACTIONS THAT HAVE ONLY A GENERAL CORRELATION TO ALLEGED VIOLATIONS PENALIZES CONTINUOUS IMPROVEMENT AND DISRUPTS THE REGULATORY ENFORCEMENT REGIME.

After applying the test for standing crafted by the majority, the district court determined plaintiffs had standing as to 2,008 emission events representing 3,651

days of violations. ROA.75451. This was a significant reduction from the 16,386 violation days the district court identified after this Court's first remand. ROA.13236-68. Even so, the district court determined that the economic benefit to ExxonMobil from delaying corrective measures was *exactly the same* for both the 3,651 days of violations and the 16,386 days of violations. ROA.75451.

The penalties imposed by the district court violate the Act. The statute provides that, in determining the proper penalty, the court "shall take into consideration," among other things, "the economic benefit *of noncompliance*." 42 U.S.C. § 7413(e)(1) (emphasis added). But here, the district court based its unprecedented penalty on the cost of four projects that ExxonMobil implemented as part of a larger negotiated settlement with the State of Texas. The court did so without requiring plaintiffs to prove that the permits violated required installation of emissions-reducing equipment and that the defendant benefited from impermissibly delaying the installation of that equipment—*i.e.*, to establish that the projects actually reflected the economic benefit "of noncompliance."

This approach departs from the plain language of the Act, and, if allowed to stand, will penalize companies for proactively undertaking upgrades that would reduce pollution or otherwise improve a facility's functioning. If a company can be penalized in a citizen suit for the cost of general-improvement projects—even when the projects were not necessary to prevent the alleged CAA violation—the most

environmentally proactive companies will bear the harshest punishment. To be sure, *regulators* may negotiate with companies to implement upgrades that go beyond what is necessary to address any particular CAA violations. But *federal courts* deciding citizen suits should not penalize companies for such beneficial conduct, and the CAA does not authorize them to do so.

A. To Justify Economic-Benefit Penalties Based on the Cost of Delayed Projects, a Citizen-Suit Plaintiff Must Prove the Project Was "Necessary to Correct" a Violation That Is Properly Before the Court.

Section 113(e) of the CAA provides that a court "shall take into consideration" a specific list of "factors" in determining the amount of any penalty to be assessed in a CAA citizen suit. One listed factor is "the economic benefit of noncompliance." 42 U.S.C. § 7413(e)(1). This penalty factor aims to deter violations by removing any economic benefit that the defendant may have enjoyed by forgoing necessary expenditures that would have prevented the violation. *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542, 1558 (E.D. Va. 1985); *see also* EPA, "Guidance on Calculating the Economic Benefit of Noncompliance by Federal Agencies," at 3 (Sept. 30, 1999)[4] ("EPA recaptures cost savings . . . to ensure that a noncompliant company, state, local, or Federal agency enjoys no advantage over

[4] https://www.epa.gov/sites/production/files/2015-01/documents/econben20.pdf.

compliant facilities due to its delay in committing resources to comply with requirements.”).

Because Section 113(e) of the CAA mandates disgorgement of the “economic benefit *of noncompliance*,” 42 U.S.C. § 7413(e)(1) (emphasis added), this Court has acknowledged that the calculation of economic benefit “requires[s] some showing that delayed expenditures would be ‘necessary to correct’ the violations at issue in the suit.” *Env’t Tex. Citizen Lobby, Inc. v. ExxonMobil Corp* (*ETCL I*), 824 F.3d 507, 530 (5th Cir. 2016). Indeed, as this Court has put it, the “critical factor” in setting a penalty is identifying the “economic benefit to [the defendant] *that resulted from the violation*.” *United States v. CITGO Petrol. Corp*., 723 F.3d 547, 551 (5th Cir. 2013) (emphasis added). The text of the CAA also indicates that the penalty must be determined with respect to a *specific* violation, as the other penalty factors are framed in terms of a single violation. *See* 42 U.S.C. § 7413(e)(1) (listing the factors to consider in assessing the amount of the penalty, including “the duration of *the violation* . . . , payment by the violator of penalties previously assessed for *the same violation*, the economic benefit of noncompliance, and the seriousness of *the violation*”) (emphases added).

Because citizen suits are considered a “civil action,” 42 U.S.C. § 7604(a), the plaintiffs bear the burden of proving each aspect of their claim, including any asserted economic benefit. *Schaffer v. Weast*, 546 U.S. 49, 57 (2005). Accordingly,

a citizen-suit plaintiff must present evidence establishing more than mere correlation between the delayed project and the alleged violation for which the plaintiff has standing. Instead, a plaintiff must show with specificity that the violated permit required installation of emissions-reducing equipment and that the defendant benefited from impermissibly delaying the installation of that equipment.

B. Citizen-Suit Plaintiffs Must Do More Than Show a "General Correlation" Between the Delayed Project and Pollution Control.

The district court adopted a "general correlation standard" to determine whether ExxonMobil's four improvement projects undertaken as part of an agreed order with TCEQ were "necessary to correct" the alleged violations. ROA.75469. Considered at this "high level of generality," the district court found that plaintiffs carried their burden of proof. ROA.75470. Specifically, the Court explained that the projects, "when considered together, had the effect of reducing emission events and unauthorized emission events overall." ROA.75471. Because they "addressed the types of violations found traceable" by the district court, the district court determined that the economic-benefit analysis was not altered by its traceability findings on remand. ROA.75471. In sum, the district court determined that each of the projects in question was designed to generally improve overall operations at ExxonMobil's facility, not that the project was necessary to correct or prevent a specific emissions event that violated a permit limit, resulted in specific injury to the plaintiff, and economically benefitted ExxonMobil.

The district court thus made no findings as to how these projects would address or prevent the alleged violations. An analysis conducted at such a "high level of generality" is inadequate, for it eviscerates the statutory direction that the "economic benefit of noncompliance" serves as the relevant factor in the penalty calculus. Indeed, because every capital investment in a process improvement or pollution-control upgrade could be "generally correlated" to the reduction of pollution, the district court's approach has no limiting principle. Virtually any improvement project could become the basis for a civil penalty under the economic-benefit factor.

C. The District Court's "General Correlation" Standard Punishes Companies That Make Capital Investments in Environmental Improvements.

Amici's members undertake environmental-improvement projects for a wide variety of reasons. Many of these projects are not necessary to comply with the CAA, much less to prevent a subset of violations alleged in a particular suit. The district court's "general correlation" standard would effectively penalize companies for pursuing projects to improve their facilities.

For example, *amici*'s members may undertake upgrades as part of a larger commitment to continuous environmental improvement; to be responsive to a community stakeholder advisory committee; to take advantage of new sources of lower-emitting fuels or raw materials; or simply to improve operations. Although

environmental benefits could be "generally correlated" to the following projects, it is unlikely that any of these would be considered necessary to comply with the Act, much less to correct particular violations:

- Re-tooling process equipment to accommodate production of a new product;
- Upgrading process equipment to achieve a Food and Drug Administration certification;
- Investing capital to address a process safety improvement identified through an internal review;
- Switching to lower-emitting or safer raw materials to reduce waste, risk, and product cost while increasing production.

If citizen-suit plaintiffs were able to ascribe economic-benefit penalties to these initiatives through a "general correlation" standard, regulated entities would be penalized for undertaking them. Perversely, under the district court's approach, the most environmentally proactive companies would suffer the greatest economic-benefit penalties. This case is illustrative. The district court repeatedly praised ExxonMobil's environmental commitment, and the evidence shows that ExxonMobil spent hundreds of millions of dollars annually on maintenance and upgrades at the Baytown facility. *E.g.*, ROA.16078-79, 16122. The district court rejected testimony that a delay of those larger recurring costs should be part of a

penalty and decided instead to focus the penalty analysis on the most proactive improvements. But under the district court's general-correlation test, nothing will prevent future citizen-suit plaintiffs (and courts) from building on this approach to integrate recurring maintenance and capital expenditures into an even larger economic-benefit penalty.

Amici's members also may undertake repairs or upgrades pursuant to a negotiated settlement or an agreed order with a state or federal regulatory authority. Many of these improvement projects are undertaken not because they are necessary to bring the regulated entity into compliance with the CAA. Instead, the regulatory authority may have determined that it would better serve the public interest to encourage environmental investment—above and beyond that required by the CAA—rather than seek additional penalties. Accordingly, it would be inappropriate to assume by default that an environmental project agreed to in connection with a negotiated settlement was "necessary to correct" the violation and, therefore, subject to economic-benefit penalties.

Beyond intruding upon the regulator's enforcement discretion, attributing economic-benefit penalties to the cost of such improvements could also discourage businesses from entering into settlements with regulators. This is exactly the wrong incentive. Indeed, this court has repeatedly emphasized "the overriding public

interest in favor of settlement." *See, e.g.*, *In re Deepwater Horizon*, 739 F.3d 790, 807 (5th Cir. 2014).

In considering a similar hypothetical scenario, the Supreme Court observed that "the [EPA] Administrator's discretion to enforce the Act in the public interest would be curtailed considerably" were citizen-suit plaintiffs permitted "to seek the civil penalties that the Administrator chose to forgo" in exchange for the violator's commitment to "install particularly effective but expensive machinery, that it otherwise would not be obliged to take." *Gwaltney*, 484 U.S. at 61. By the same token, the approach taken by the district court here, if permitted to stand, will "disincline[] [businesses] to resolve disputes by . . . relatively informal agreements" with regulators "if additional civil penalties may then be imposed in pending citizen suits." *Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 357 (8th Cir. 1998). Only by enforcing the statutory text and requiring plaintiffs to prove that delayed projects were necessary to correct violations can this Court avoid "chang[ing] the nature of the citizens' role from interstitial to potentially intrusive." *Gwaltney*, 484 U.S. at 61.

CONCLUSION

Amici join Appellants in requesting that this Court vacate or reverse the decision below.

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CERTIFICATE OF SERVICE

This will certify that a true and correct copy of the above document was served on this the 14th day of July, 2021, via the Court's CM/ECF system on all counsel of record.

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 6490 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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