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

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

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INTEREST OF *AMICI*

This brief is filed by American Fuel & Petrochemical Manufacturers, Business Coalition for Clean Air ("BCCA") Appeal Group, Chamber of Commerce of the United States of America, National Association of Manufacturers, American Chemistry Council, 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 is the leading trade association representing the makers of the fuels that keep us moving, the manufacturers of the petrochemicals that are the essential building blocks for modern life, and the midstream companies that get our feedstocks and products where they need to go.

BCCA Appeal Group is an association of businesses whose mission includes supporting the mutual goals of clean air and a strong economy. BCCA Appeal

[1] 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. All parties consented to the filing of this brief.

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 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 all 50 states and in every industrial sector. Manufacturing employs over 12.9 million men and women, contributes over $2.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of private-sector research and development in the Nation. The 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 United States.

The American Chemistry Council ("ACC") represents the leading companies engaged in the multibillion-dollar business of chemistry. ACC members apply the science of chemistry to make innovative products, technologies and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health, safety and security performance through Responsible Care ®; common sense advocacy addressing major public policy issues; and health and environmental research and product testing. ACC members and chemistry companies are among the largest investors in research and development, and are advancing products, processes and technologies to address climate change, enhance air and water quality, and progress toward a more sustainable, circular economy.

The Texas Chemical Council ("TCC") is a statewide trade association of chemical manufacturers in Texas. TCC represents approximately 70 member companies who own and operate over 200 manufacturing and research facilities across the state. The business of chemistry is a major economic engine in Texas and has manufactured vital products that sustain our quality of life in Texas for nearly 100 years. The business of chemistry provides employment for approximately 500,000 Texans. The products of chemistry are the state's top non-energy export with over $50 billion in state exports annually to customers around the world.

The Texas Oil & Gas Association ("TXOGA") is a statewide trade association representing every facet of the Texas oil and natural gas industry, including small

independents and major producers. Collectively, the membership of TXOGA produces in excess of 80 percent of Texas' crude oil and natural gas, operates over 80 percent of the state's refining capacity, and is responsible for the vast majority of the state's pipelines. In fiscal year 2021, the oil and natural gas industry employed more than 422,000 Texans in direct jobs and paid $15.8 billion in state and local taxes and state royalties, funding our state's schools, roads and first responders.

Like Appellants, many of *amici*'s members are regulated by the Environmental Protection Agency ("EPA") and its state counterpart—the Texas Commission on Environmental Quality ("TCEQ")—under the Clean Air Act ("CAA" or "the Act"). These members are subject to the same self-reporting requirements under state and federal law that generated the reports on which the citizen-plaintiffs in this case relied to show violations of the CAA. The panel majority's conception of injury and traceability would vastly expand the ability of plaintiffs to bring citizen suits beyond the bounds of both the CAA and the Constitution. Its irrebuttable, per se rules eliminate the need for plaintiffs to prove that they were injured by each violation, providing a roadmap for a flood of citizen-suit litigation by unharmed plaintiffs against *amici*'s members. State and federal regulators, not private plaintiffs, are charged with the primary enforcement of environmental statutes. *Amici* seek to preserve the limited and interstitial role that citizen suits play in enforcing the Act.

SUMMARY OF ARGUMENT

Under Congress's statutory design, TCEQ and the EPA play the primary role in implementing and enforcing the CAA 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 under 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 U.S. Constitution and the Act 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 may not leverage that claim to litigate myriad *other* claims for legal violations that caused that individual no concrete injury.

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). 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 case exemplifies a citizen suit that transgressed these constitutional and statutory limits. Filing a complaint that simply appended the self-reports that ExxonMobil submitted to the state regulatory agency, plaintiffs sued for thousands of violations across an almost eight-year period. Disregarding the fundamental Article III requirement that plaintiffs prove that they suffered injuries traceable to each violation, the panel majority in *Environment Texas Citizen Lobby, Inc. v. ExxonMobil Corp.* (*ETCL II*), 968 F.3d 357 (5th Cir. 2020), crafted a standing test that irrebuttably presumed traceable injuries for certain types of violations. The panel majority reiterated this standing test in *Environment Texas Citizen Lobby, Inc. v. ExxonMobil Corp.* (*ETCL III*), 47 F.4th 408 (5th Cir. 2022), affirming the district court's judgment that plaintiffs had standing as to thousands of violations although

it never determined whether plaintiffs had in fact suffered a concrete injury traceable to each violation. The vacated panel majority's approach contradicts Supreme Court precedent and would transform citizen suits from civil actions, limited to concrete controversies, into regulatory vehicles for dictating environmental policy.

Quite apart from the errors in 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. Based on dictum from the initial panel opinion in this case, *see Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp. (ETCL I)*, 824 F.3d 507, 530 n.19 (5th Cir. 2016), the district court considered 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.

The *ETCL I* majority's guidance to the district court misconstrued the statutory direction to consider the "economic benefit *of noncompliance*." 42 U.S.C. § 7413(e)(1) (emphasis added). The district court thus awarded penalties based upon the cost of ExxonMobil's projects without considering whether any allegedly violated permit required installation of emissions-reducing equipment and whether the defendant benefited from impermissibly delaying the installation of that equipment. This nontextual, free-floating approach led the district court to impose the largest penalty in the history of CAA citizen suits. 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.

Amici urge the en banc Court to repudiate the panel majority's per se standing test, overrule the mistaken circuit precedent from which it grew, and disapprove the *ETCL I* panel'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 comply with a complex web of regulatory provisions under the Nation's environmental laws. Citizen suits should not supplant this ongoing regulatory process. *Amici* respectfully ask the Court 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, the CAA assigns primary responsibility for achieving its objectives, and for imposing penalties for noncompliance, 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 has recognized, in the absence of a 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 LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021). 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.* Consequently, courts should decline private litigants' invitation to exercise "continuing superintendence" over a company's or industry's regulatory compliance. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 193 (2000).

B. 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*, 141 S. Ct. at 2203.

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*, 141 S. Ct. at 2204-05. 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. 141 S. Ct. at 2200. 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 2208-09. Thus, potential injury or even an increased likelihood of injury is not enough for standing to sue for monetary relief. *See id.* at 2211-12.

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*, 141 S. Ct. at 2208. The same requirements apply no matter how many violations are alleged. *See id.* at 2200 (holding, in case where class of 8,185 individuals sued TransUnion, that only 1,853 class members had standing to assert a 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.

C. Per se rules are insufficient to ensure that citizen-suit plaintiffs have standing under Article III.

Amici agree with the traceability test articulated in ExxonMobil's supplemental brief. To understand why that test is correct, it is helpful to examine the ways in which the panel majority's per se rules fail to comply with Article III's requirements.

1. Even though the panel majority 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. The majority correctly recognized that plaintiffs here alleged a large number and variety of violations rather than "the same injury resulting from a series of similar discharges," and that, unlike in prior cases, there is "doubt [in this case] that the pollutant emitted could cause the alleged injury." *ETCL II*, 968 F.3d at 366. 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: (1) "each

violation in support of their claims 'causes or contributes to *the kinds* of injuries' they allege," and (2) "the existence of a 'specific geographic or other causative nexus' such that the violation *could have* affected their members." *ETCL II*, 968 F.3d at 369-70 (emphases added).

2. The per se rules the panel 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. *Amici* agree with ExxonMobil that traceability requires proof that the defendant's conduct is a cause-in-fact of the plaintiff's injury. The majority, however, 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 ExxonMobil's emissions actually reached the areas where plaintiffs' members live and recreate.

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 "eliminate[] traceability altogether," *id.* at 375 (Oldham, J. concurring in part and dissenting in part), as they dispense with the need to prove that a defendant's conduct is a cause in fact of a plaintiff's injury.

As the Supreme Court explained, "[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*, 141 S. Ct. at 2205.

To the extent *Cedar Point* or other circuit precedent require something less than a causal connection between an injury-in-fact and each violation for which penalties are sought, *amici* agree with ExxonMobil that such precedent should be overruled.

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) could have caused or contributed to flaring, smoke, or haze. *ETCL II*, 968 F.3d at 378; *see also TransUnion*, 141 S. Ct. 2205-06 (providing a similar example). This plaintiff plainly

lacks Article III standing as to those violations. Yet this scenario satisfies both the injury and geographic-nexus prongs of the majority's *Cedar Point*-derived test. Article III would at least require the plaintiff to show that he was physically present for the violations.

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 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 two 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. *See Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 66 F. Supp. 3d 875, 888-90 (S.D. Tex.

2014). By irrebuttably presuming that all specified emissions gave rise to traceable injuries, the majority effectively posited 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 and reasoned that plaintiffs' testimony that they saw flares on one or more occasions was "evidence . . . enough" 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. Additionally, plaintiffs would need to be in view of the portion of the "massive" Baytown facility, *id.* at 362, from which the flare emanated

when the flaring occurred. Judicial assumptions 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 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 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 a reviewing 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"

[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 . . . .").

that many of their credit reports were likely sent to third parties outside of the period covered by a relevant stipulation, the Court held that plaintiffs "had the burden to prove at trial that their reports were *actually sent* to third-party businesses." 141 S. Ct. at 2212 (emphasis added). The Court further noted that 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.* (emphasis added). Likewise here, the majority's test 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.* By substituting per se presumptions for specific proof tied to each alleged violation, the majority undermined Article III.

D. Per se standing rules convert 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 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*, 141 S. Ct. at 2206 (internal citations omitted). The courts' failure to apply this constitutional filter transformed 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 plaintiffs are required to prove that a defendant's conduct was a cause-in-fact of a concrete injury to establish standing, the standing-in-gross strategy pursued by plaintiffs will serve as a handbook for citizen-suit plaintiffs unhappy with their states' regulatory decisions.[3] 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*, 141 S. Ct. at 2207 ("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 majority's approach, the only limits on a citizen suit's reach are the

[3] Citizen-plaintiffs must also establish redressability to satisfy Article III. *Amici*'s members, like ExxonMobil, proactively work to prevent and remedy emissions events. *Amici* agree with ExxonMobil that penalties cannot redress emissions events when the events are not ongoing and when there is no evidence that the penalties will likely prevent recurrence of those events.

statute of limitations and the number of alleged violations plaintiffs can identify that fall into the majority's per se rules.

The task of identifying alleged violations is eased by the comprehensive self-reporting and recordkeeping requirements that govern regulated businesses. Businesses with CAA permits are required to self-report events involving a "reportable quantity" of "unauthorized emission[s]" to TCEQ through the State of Texas Environmental Electronic Reporting System. 30 Tex. Admin. Code §§ 101.1(88), (89), 101.201(a); 27 Tex. Reg. 8514. Under the Clean Water Act—a statute that, like the CAA, authorizes citizen suits—businesses that hold Texas Pollution Discharge Elimination System permits are required to periodically submit discharge monitoring reports that report their compliance with the conditions of their permits and relevant statutes. *See* 30 Tex. Admin. Code § 319.1. Any discharge exceeding a permit limit is a violation of the Clean Water Act and Texas Water Code. 33 U.S.C. §§ 1311(a), 1342; Tex. Water Code § 26.121(c).

Under a system of per se standing rules, any time a report reveals an emission exceeding a permit limit that falls within the court-designated categories, citizen suit plaintiffs could use the report to establish standing without the need to prove they were in fact injured by the alleged permit violation. Equally troubling, if there are per se standing rules for the CAA, the Court will presumably need to devise per se traceability rules for the Clean Water Act and other contexts that are analogous to

those developed here under the CAA. While courts are well-equipped to evaluate whether a plaintiff has been injured by a violation, they are not suited to devise per se rules about what *kinds* of violations are likely to cause injuries. And courts are surely ill-equipped to oversee the sprawling citizen suits that will result from such an approach. Indeed, the Constitution forbids them to do so.

II. Calculating penalties based on the "economic benefit" of actions that have only a general correlation to alleged violations is not permitted by the CAA and creates perverse incentives.

Applying the now-vacated panel majority's standing test, the district court determined plaintiffs had standing as to nearly 80% fewer violation days than it identified after the first remand. *ETCL III*, 47 F.4th at 414. Even so, the district court implausibly concluded that the economic benefit to ExxonMobil from delaying corrective measures was *exactly the same*. *Id.* at 421. This conclusion was a direct result of the *ETCL I* panel's instruction in dictum that the economic benefit inquiry "should center on whether the projects will ameliorate the *kinds of general problems* that have resulted in *at least some* of the permit violations upon which Plaintiffs have sued." *ETCL I*, 824 F.3d at 530 n.19 (emphases added).

The penalties imposed on ExxonMobil pursuant to that instruction violate the Act. The Act 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 avoiding the alleged permit violations 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]

Because Section 113(e) of the CAA mandates disgorgement of the "economic benefit *of noncompliance*," 42 U.S.C. § 7413(e)(1) (emphasis added), the *ETCL I* panel rightly recognized 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." *ETCL I*, 824 F.3d at 530. 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

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

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), 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 avoiding an alleged violation of a particular permit required installing emissions-reducing equipment and that the defendant benefited from impermissibly delaying the installation of that equipment.

B. The "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. For example, *amici*'s members may pursue 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. At the *ETCL I* panel's instruction, the district court rejected testimony that a delay of those larger

recurring costs should be part of a penalty and instead focused the penalty analysis on the most proactive improvements. But under the 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 make 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 not done 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.

Besides 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 in the first place. 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. The en banc Court should reject the *ETCL I* panel's statement that this portion of *Gwaltney* no longer applies to CAA citizen suits. *See ETCL I*, 824 F.3d at 529 n.18. The Supreme Court's statement in *Gwaltney* remains true because 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 the district court's judgment be vacated or reversed.

Respectfully submitted,

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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 27th day of March, 2023, via the Court's CM/ECF system on all counsel of record.

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