Case No. 15-20030

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ENVIRONMENT TEXAS CITIZEN LOBBY, INCORPORATED; SIERRA CLUB,
Plaintiffs-Appellants,

v.

EXXONMOBIL CORPORATION; EXXONMOBIL CHEMICAL COMPANY; EXXONMOBIL REFINING & SUPPLY COMPANY,
Defendants-Appellees.

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

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

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. Citizen suits have an interstitial role in Clean Air Act enforcement that should not override state and federal regulators' efforts. 5

A. Citizen suits play an interstitial role. 5

B. In deciding whether to assess penalties, courts have discretion to require proof of harm resulting from the alleged violations. 6

C. The district court properly refused to assume the role of a regulator in assessing the seriousness and duration penalty factors. 10

II. Courts retain discretion to examine companies' reporting compliance and cooperation with regulators in determining whether there has been a violation and whether to assess a civil penalty. 11

A. Reports such as STEERS reports and Title V deviation reports do not necessarily constitute sufficient proof that a violation has occurred. 12

B. In determining penalties, a district court may take into account a company's compliance with reporting laws, cooperation with regulators, and the regulators' response. 14

1. Courts routinely consider reporting and cooperation. 14

2. Allowing discretionary consideration of reporting compliance avoids creating perverse incentives. 15

III. District courts should—and certainly may—consider the findings and enforcement decisions of state and federal regulators in determining what relief is appropriate in a citizen suit. 16

IV. Reversal of the judgment below could lead to a cascade of citizen suits and frustrate orderly regulation of the Nation's air quality. 18

CONCLUSION 18

CERTIFICATE OF SERVICE 20

CERTIFICATE OF COMPLIANCE WITH RULE 32(A) 21

TABLE OF AUTHORITIES

Page(s)

CASES

Atl. States Legal Found., Inc. v. Eastman Kodak Co.,
809 F. Supp. 1040 (W.D.N.Y. 1992).....5

Citizens Legal Envtl. Action Network v. Premium Standard Farms,
No. 97-6073-CV-SJ-6, 2000 WL 220464 (W.D. Mo. Feb. 23, 2000) 6

Ellis v. Gallatin Steel Co.,
390 F.3d 461 (6th Cir. 2004) 5

Env't Tex. Citizen Lobby v. ExxonMobil Corp.,
66 F. Supp. 3d 875 (S.D. Tex. 2014).....7, 10, 16

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.,
528 U.S. 167 (2000).....6

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.,
484 U.S. 49 (1987).....5

Luminant Generation Co. v. EPA,
714 F.3d 841 (5th Cir. 2013) 8, 17

Shell Oil Co. v. Writt,
464 S.W.3d 650 (Tex. 2015) 14

United States v. Exxon Mobil Corp.,
No. 1:05-cv-05809, ECF No. 10 (N.D. Ill. Dec. 13, 2005).....17

STATUTES

42 U.S.C. § 7410(c)(1).....8

42 U.S.C. § 7413(e) 16

42 U.S.C. § 7413(e)(1).....7, 10, 15, 16

42 U.S.C. § 7502(c)(1).....8

42 U.S.C. § 7607(b)(1).....9

OTHER AUTHORITIES

75 Fed. Reg. 68,989 17

80 Fed. Reg. 49,187 10

30 Tex. Admin. Code § 101.222 .....8, 17

U.S. Sentencing Guidelines § 8C2.5(g)(1) & n.13, http://www.ussc.gov/guidelines-manual/2014/2014-chapter-8#8c25 14

MISCELLANEOUS

Dep't of Justice, U.S. Announces Clean Air Agreement with ExxonMobil; Nearly 77 Percent of Domestic Refining Capacity Now Under Consent Decrees (Oct. 11, 2005), http://www.justice.gov/archive/opa/pr/2005/October/05_enrd_533.html 17

Memorandum from Joseph T. Haney, Jr. *et al.*, to Ashley Wadick, Regional Director, R12 *et al.*, Subject: Health Effects Review of 2014 Ambient Air Network Monitoring Data in Region 12, Houston (Aug. 18, 2015), http://www.tceq.state.tx.us/assets/public/implementation/tox/monitoring/evaluation/2014/reg_12_houston.pdf. 9

Texas Commission on Environmental Quality, *Houston-Galveston-Brazoria Attainment Demonstration State Implementation Plan Revision for the 1997 Eight-Hour Ozone Standard* (Mar. 10, 2010), http://www.tceq.state.tx.us/airquality/sip/HGB_eight_hour.html 9

INTEREST OF *AMICI*

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

BCCA Appeal Group is a non-profit Texas corporation whose mission includes supporting the goals of environmental protection and a strong economy. BCCA Appeal Group members own and operate industrial facilities in Texas and elsewhere in the Unites States, including refineries, petrochemical plants, and power plants. BCCA Appeal Group has no parent corporation, has no shareholders, and issues no stock.

The Texas Oil and Gas Association is a non-profit corporation representing the interests of the oil and gas industry in the State of Texas. Founded in 1919, the association is the largest and oldest petroleum organization in Texas, representing more than 5,000 members. The association's membership produces in excess of

[1] *Amici* confirm that all parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a). *Amici* further confirm that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person, other than *amici*, their members or their counsel, contributed money intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(c)(5). *Amici*'s counsel Baker Botts L.L.P. served as counsel for ExxonMobil in the early stages of 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.

90 percent of Texas's crude oil and natural gas, operates nearly 100 percent of the state's refining capacity, and is responsible for the vast majority of the state's pipelines. In fiscal 2014, the oil and gas industry employed 418,000 Texans, providing wages and salaries of over $50 billion in Texas alone. In addition, large associated capital investments by the oil and gas industry generate significant secondary economic benefits for Texas.

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 Chamber of Commerce of the United States of America is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country.

The National Association of Manufacturers is the largest manufacturing association in the United States, representing manufacturers in every industrial sector and in all 50 states. It is the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the nation.

Amici's members are regulated by the 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 proper, limited role in enforcing the Clean Air Act, while district courts are accorded discretion to consider the appropriate penalties—if any—in such suits.

SUMMARY OF ARGUMENT

Courts have recognized that citizen suits serve an important but interstitial role. Expert federal and state regulators take the laboring oar under the statutory scheme. They monitor air quality, consider emissions reports from companies, and assess penalties for violations where appropriate. Congress did not intend for citizen suits to supplant the primary role of regulators. Consistent with this arrangement, district courts have discretion to consider the broader regulatory regime in determining whether alleged violations in fact give rise to liability and whether penalties are justified. The district court reasonably exercised its discretion here.

Appellants seek to expand dramatically the role of a Clean Air Act citizen suit. They argue that the district court was required to automatically impose maximum statutory penalties for alleged violations over numerous years, based exclusively on mandatory reports filed with TCEQ. This approach would require

the district court to turn a blind eye to whether the regulatory reports or other evidence satisfy plaintiffs' burden to establish the elements of the alleged violations. It would improperly overturn the district courts' detailed findings that most of the alleged violations were inconsequential in light of the regulatory context and TCEQ's appropriate enforcement response. And, with regard to penalties, it would override the district court's discretion—indeed, its statutory duty—to carefully consider whether any harm resulted from the alleged violations and whether any economic benefit flowed from them. The district court reasonably exercised its discretion here and found that those factors justified no penalty.

The district court's decision respected the interstitial role of citizen suits. This Court should affirm that district courts have broad discretion to reject penalties where the citizen-plaintiffs cannot demonstrate that they are targeting a specific harm that state and federal regulators have failed to address. And it should affirm that, in determining whether to assess a civil penalty, district courts may consider a company's compliance with reporting and recordkeeping requirements, the company's cooperation with administrative agencies, and most importantly, the response by the expert agencies.

Amici and their members work closely with state and federal regulators to achieve cleaner air. Citizen suits should not be used to second-guess this

regulatory regime. The district court's decision furthers the consistent and effective enforcement of the Clean Air Act. It should be affirmed.

ARGUMENT

I. Citizen suits have an interstitial role in Clean Air Act enforcement that should not override state and federal regulators' efforts.

A. Citizen suits play an interstitial role.

Time and again, the Supreme Court and other courts have characterized the role of citizen suits as "interstitial," while emphasizing that state and federal agencies are to take the lead role in enforcing environmental statutes.[2] That statutory framework imposes key constraints on the role of citizen suits. For example, they cannot be used to address wholly past violations,[3] to stand in the shoes of broad-based government regulation,[4] or to seek a remedy beyond that which regulators have already deemed sufficient.[5]

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[2] *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 61 (1987) (characterizing Clean Water Act citizen suits as "interstitial" rather than "potentially intrusive" on the role of federal, state, and local agencies).

[3] *Id.*

[4] *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 809 F. Supp. 1040 (W.D.N.Y. 1992) (dismissing a Clean Water Act citizen suit that targeted discharges that the government had determined not to regulate through a facility's Clean Water Act permit, reasoning that allowing a citizen suit on that basis would functionally put the citizens in the shoes of a Clean Water Act permitting authority).

[5] *Ellis v. Gallatin Steel Co.*, 390 F.3d 461 (6th Cir. 2004) (dismissing Clean Air Act citizen suit claims that effectively challenged the adequacy of a consent decree between the government and the defendant).

"[S]tate agenc[ies]" should "tak[e] the lead" because "the long-term regulation and oversight" of individual industrial plants "cannot well be exercised as a judicial function."[6] The Supreme Court has accordingly cautioned against courts exercising "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). As one district court faced with a Clean Air Act case explained, "courts have little expertise and are thinly staffed with recent law graduates," while agencies possess the skills and resources—not to mention the statutory obligation—to supervise compliance.[7] Thus, "courts should be the last resort, especially in dealing with continuing dangers."[8]

Consistent with these principles, primary responsibility for achieving the Act's objectives and imposing penalties for noncompliance is assigned to state regulators and EPA.

B. In deciding whether to assess penalties, courts have discretion to require proof of harm resulting from the alleged violations.

The district court held that the Appellants' generic evidence that air emissions can cause health effects did not credibly tie the level and duration of emissions at the Baytown Plant to any actual or potential health effects. In

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[6] *Citizens Legal Envtl. Action Network v. Premium Standard Farms*, No. 97-6073-CV-SJ-6, 2000 WL 220464, at *18 n.34 (W.D. Mo. Feb. 23, 2000).

[7] *Id.*

[8] *Id.*

particular, the district court held that air monitoring data and modeling exercises concerning NAAQS and ESL[9] offsite exceedances foreclosed plaintiffs' claim that the alleged violations caused potential adverse health or environmental impacts.[10]

The district court was correct as a matter of law in requiring proof that the alleged violations themselves caused potential harm. This is not only consistent with the Clean Air Act framework in which regulators set targeted goals and have the first responsibility to penalize regulatory violations, while citizen suits address concrete, unresolved harms. It is also compelled by the statute's plain text, which takes into account "the seriousness of *the violation*." 42 U.S.C. § 7413(e)(1) (emphasis added). Proof that air emissions are generally dangerous or that regional exceedances occurred says little about the seriousness of "the violation."

Further, courts should be able to rely on state agency decisions as to whether air emissions caused or could have caused harm. As part of TCEQ's investigation process for emissions events, the agency determines whether or not the emissions caused or contributed to an exceedance of a national ambient air quality standard, a "prevention of significant deterioration" increment, or a condition of air

[9] NAAQS are national ambient air quality standards, and ESLs are effects screening levels. NAAQS and ESLs are conservative air quality-related screening values.

[10] *See Env't Tex. Citizen Lobby v. ExxonMobil Corp.*, 66 F. Supp. 3d 875, 909-10 (S.D. Tex. 2014).

pollution.[11] A citizen suit should not be a means for relitigating a finding that results from this finely calibrated regulatory framework, which has been approved by the EPA and this Court.[12]

Indeed, because air quality is affected by numerous and geographically dispersed sources, the Appellants' approach would effectively place district courts in the role of determining how to regulate individual plants to achieve regional air quality goals. This role is properly reserved for state regulators acting through the Clean Air Act's state implementation plan process, with EPA as the backstop. For example, in areas that do not meet federal air quality standards, the state is assigned primary responsibility for developing a plan to "provide for the implementation of all reasonably available control measures as expeditiously as practicable" and to "provide for attainment of" the federal air quality standards.[13] EPA has the responsibility to evaluate state plans, and if a state submits no plan or an inadequate plan, EPA must then promulgate a federal plan instead.[14] Citizens

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[11] 30 Tex. Admin. Code § 101.222(b)(11), (c)(9), (d)(10), (e)(10) (2006) (TCEQ, General Air Quality Rules) (providing that causing or contributing to such conditions excludes a company from claiming an "affirmative defense" for emissions violations). The state agency evaluates all reportable emissions events to determine whether they qualify for the affirmative defense, and in doing so must determine whether the company meets these criteria.

[12] This Court upheld EPA's approval of this aspect of TCEQ's affirmative defense framework. *Luminant Generation Co. v. EPA*, 714 F.3d 841, 854-55 (5th Cir. 2013).

[13] 42 U.S.C. § 7502(c)(1).

[14] 42 U.S.C. § 7410(c)(1).

may challenge a state plan if they believe it to be inadequate,[15] but they have not done so here. A citizen suit against an individual plant is no substitute for this framework, nor should it be a vehicle for leveraging generic proof about regional air quality into massive civil penalties against a single company.

Contrary to the assertions of the City and County Attorney *amici*, the region around the Baytown complex has achieved cleaner air,[16] and has done so as the result of a regulatory planning process, not *ad hoc* citizen enforcement. Texas' state implementation plan for achieving federal ozone standards in the Houston area includes a variety of measures that aggressively regulate operating practices at, and air emissions from, virtually all industrial facilities, including cap-and-trade programs for certain emissions, numeric emission limits and work practices for specific industries and equipment types, funding programs for voluntary emission reduction projects, and fuel specifications.[17] EPA has recently proposed to

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[15] 42 U.S.C. § 7607(b)(1).

[16] For example, the TCEQ determined in 2014 that the Houston region met science-based screening levels for air toxics. *See* Memorandum from Joseph T. Haney, Jr. *et al.*, to Ashley Wadick, Regional Director, R12 *et al.*, Subject: Health Effects Review of 2014 Ambient Air Network Monitoring Data in Region 12, Houston (Aug. 18, 2015), http://www.tceq.state.tx.us/assets/public/implementation/tox/monitoring/evaluation/2014/reg_12_houston.pdf

[17] *See, e.g.*, Texas Commission on Environmental Quality, *Houston-Galveston-Brazoria Attainment Demonstration State Implementation Plan Revision for the 1997 Eight-Hour Ozone Standard* (Mar. 10, 2010), at Tbl. 4-1, http://www.tceq.state.tx.us/airquality/sip/HGB_eight_hour.html (follow link to "2010 HGB AD SIP Narrative").

approve Texas' demonstration that the Houston-Galveston-Brazoria area has achieved the 1997 federal standards for ozone.[18] These types of air quality improvements result from area-wide regulatory plans, developed through a public process and implemented by industrial plant operators and other regulated entities, not citizen suits that seek to second-guess the expert agencies in the guise of targeting an individual plant.

C. The district court properly refused to assume the role of a regulator in assessing the seriousness and duration penalty factors.

The district court properly considered the theory of harm as the Appellants presented it and reasonably declined to assume the role of a regulator scrutinizing the myriad alleged violations in the first instance. The district court was well within its discretion to determine that the "seriousness" and "duration"[19] criteria for Clean Air Act civil penalties did not support a penalty.[20]

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[18] 80 Fed. Reg. 49,187 (Aug. 17, 2015) (proposed finding that the area "is currently attaining" the federal ozone standard established in 1997).

[19] *See* 42 U.S.C. § 7413(e)(1) (providing that the court shall consider "the duration of the violation as established by any credible evidence" and "the seriousness of the violation" in determining the amount of any penalty to be assessed).

[20] Because Appellants "ask[ed] the Court to assess the maximum penalty allowed by law for *each* Event and Deviation, regardless of duration," the district court held that the wide variation in event duration "weighs neither towards nor against assessing a penalty." *Env't Tex.*, 66 F. Supp. 3d at 906-07. The district court also rejected similar arguments about the seriousness factor, reasoning that most emissions events involved low emissions, and that Appellants' evidence about the risk of harm was too vague to prove that seriousness should weigh more heavily towards a penalty. *Id.* at 908-11.

Appellants chose to ask the district court to assess a maximum penalty for "thousands" of alleged violations, rather than identifying specific circumstances for which they had concrete evidence of harm or some other reason to believe a remedy was appropriate under the statute. Appellants also failed to present a record on which to distinguish events by seriousness, duration, or other indications of severity. The Appellants should not complain that the district court accepted their view of the scope of the case and then evaluated it on that broad basis.

Under the Appellants' theory, a district court would be required to second-guess the adequacy of the state agency's regulatory enforcement regime as applied to each event listed in the mandatory reports attached to Appellants' complaint. Appellants abused the role of a citizen suit by seeking a judicial redetermination—and maximum civil penalties—on the basis of undifferentiated reports submitted to an agency.

II. Courts retain discretion to examine companies' reporting compliance and cooperation with regulators in determining whether there has been a violation and whether to assess a civil penalty.

Appellants sought penalties based solely on mandatory STEERS[21] reports and Title V deviation reports that the defendant made to TCEQ, without demonstrating that those reports establish actionable violations. *Amici*'s members

[21] Reports of emissions events and maintenance, startup, and shutdown activities, many of which are at issue in this case, are commonly described as "STEERS reports." STEERS is the State of Texas Environmental Electronic Reporting System.

are subject to these same reporting requirements (and similar reporting requirements in other states) and do not believe that their compliance with the law should relieve plaintiffs of their proper burden of proof to establish violations as well as their seriousness. Indeed, district courts have discretion to evaluate a company's compliance with reporting requirements, its cooperation with regulators, and the regulators' response to reported incidents, in determining whether a penalty is warranted.

A. Reports such as STEERS reports and Title V deviation reports do not necessarily constitute sufficient proof that a violation has occurred.

TCEQ regulations require broader reporting than the minimum federal standards. They mandate STEERS reporting of a sweeping class of emissions events; maintenance, startup, and shutdown activities; and Title V deviation reporting. They also cover potentially permitted emissions. Consequently, incident reports under TCEQ regulations do not necessarily reflect actionable violations, much less provide sufficient information to indicate that a monetary penalty should be imposed. *Amici* thus strongly agree with Appellees that the district court permissibly exercised its discretion to decline to find violations based solely on STEERS and Title V reporting, when Appellants failed to establish the required elements of each alleged violation. *See* Appellees' Br. 100, 103-04.

STEERS reports and Title V deviation reports often address complex regulatory programs in a highly technical context. Appellants' approach oversimplifies such reports to conclusively presume that a violation has occurred even when the reports do not establish all elements of a violation. TCEQ, with its institutional expertise and personnel dedicated to investigating reports to determine whether violations occurred, is far better positioned to make this call in the first instance. District courts should have broad discretion to assess the legal significance of such reports and regulatory responses in adjudicating citizen suits.

In asking the Court to hold that no further evidence is needed to prove a violation, Appellants misinterpret the Texas rules to call for reporting only where there is a demonstrated violation. Prophylactic reporting requirements benefit the public and facilitate regulatory oversight. They should not be misused to relieve citizen-suit plaintiffs of their burden to establish the elements of actionable violations under the Clean Air Act. Nor should they be misconstrued to elevate citizen suits to a primary enforcement role, superseding that of the regulators who require and review such reports in the first instance.

B. In determining penalties, a district court may take into account a company's compliance with reporting laws, cooperation with regulators, and the regulators' response.

District courts may consider a company's reporting compliance and cooperation with the state administrative agency, as well as the state agency's response, as the district court considers whether to assess a civil penalty.

1. Courts routinely consider reporting and cooperation.

In a variety of different legal contexts, courts, prosecutors, and regulators take into account reporting compliance and cooperation, and the law has long rewarded—not punished—companies for their cooperation. For example, the U.S. Sentencing Guidelines reduce the offense level for companies that report offenses to appropriate governmental authorities.[22] And the Texas Supreme Court recently held that a company enjoys an absolute privilege for reports made to the Department of Justice about internal criminal wrongdoing, shielding it from civil defamation claims brought by the reported employee. *Shell Oil Co. v. Writt*, 464 S.W.3d 650 (Tex. 2015). These two examples from the far more serious *criminal* context illustrate that the law favors those who self-report possible violations. It follows *a fortiori* that courts retain discretion to consider the compliance of companies—such as members of *amici*—who submit regulatory reports covering conduct that may not even establish *civil* violations.

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[22] U.S. Sentencing Guidelines, § 8C2.5(g)(1) & n.13, http://www.ussc.gov/guidelines-manual/2014/2014-chapter-8#8c25.

The Clean Air Act bears out this deeply rooted legal principle. The Act instructs courts to consider a defendant's "full compliance history and good faith efforts to comply" when assessing civil penalties. 42 U.S.C. § 7413(e)(1). District courts may also find support for such consideration in the statute's recognition that the penalty factors are not exhaustive and may be supplemented by consideration of "such other factors as justice may require."[23]

2. Allowing discretionary consideration of reporting compliance avoids creating perverse incentives.

Eliminating judicial discretion to consider regulatory compliance and cooperation could create perverse incentives. If courts could not consider regulatory compliance and cooperation as a factor supporting a lower penalty or no penalty, less scrupulous companies may perceive a relatively greater benefit if they neither fully comply with reporting requirements nor willingly cooperate with regulators investigating them. By contrast, companies that follow the law and cooperate with the government would find themselves disadvantaged for doing so. Appellants' approach—requiring courts to use mandatory reports as automatic evidence of violations—further distorts the incentives in favor of bad actors over good corporate citizens.

[23] 42 U.S.C. § 7413(e)(1).

III. District courts should—and certainly may—consider the findings and enforcement decisions of state and federal regulators in determining what relief is appropriate in a citizen suit.

Appellants ask the Fifth Circuit to ignore the enforcement decisions of federal and state regulators and elevate citizen suits to a primary role in enforcing the Clean Air Act. This approach would require courts to turn a blind eye to the expert agencies charged with primary enforcement of the statute.

In fact, district courts have broad discretion to consider state and federal agency activities in determining whether to impose Clean Air Act penalties for regulatory violations. The Act repeatedly uses permissive language to describe courts' discretion to impose penalties. It provides factors to consider "in determining the amount of *any* penalty to be assessed" and further states that "a penalty *may* be assessed for each day of violation." 42 U.S.C. § 7413(e) (emphasis added). One factor courts must consider in determining the amount of "any penalty" is "payment by the violator of penalties previously assessed for the same violation." *Id.* § 7413(e)(1).

In carrying out this discretionary function, the district court appropriately considered factors such as past penalties and forward-looking administrative enforcement.[24] Regulators often use such negotiated settlements with companies

[24] *See Env't Tex.*, 66 F. Supp. 3d at 883, 885-86 (discussing the defendant's forward-looking Agreed Order with TCEQ, which required $20 million in emission reduction

to establish substantial new emission controls without consuming judicial resources to adjudicate whether violations have occurred.[25] Allowing citizen suits to relitigate these settlements and impose penalties that do not account for these agency actions would place individual plaintiffs in the role of de facto regulators. It would also reduce the incentives for companies to enter such settlements in the first place.

Moreover, in many cases, a defendant's alleged noncompliance may be subject to the Texas MSS affirmative defense,[26] which was upheld by this Court[27] and confirms that a zero penalty may be appropriate for upsets and MSS activities that satisfy stringent requirements. This sensible, judicially-approved means of implementing the Act should not be superseded by an inflexible approach to citizen-suit penalties. Courts can certainly take into account a state agency's finding that alleged violations warranted no penalty under their federally-approved regime, and decline to impose citizen-suit penalties as well.

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projects and stipulated penalties for future emissions events, and taking into account past penalties imposed by TCEQ and Harris County).

[25] EPA entered such a consent decree with Appellees. *See United States v. Exxon Mobil Corp.*, No. 1:05-cv-05809, ECF No. 10 (N.D. Ill. Dec. 13, 2005); Dep't of Justice, U.S. Announces Clean Air Agreement with ExxonMobil; Nearly 77 Percent of Domestic Refining Capacity Now Under Consent Decrees (Oct. 11, 2005), http://www.justice.gov/archive/opa/pr/2005/October/05_enrd_533.html

[26] *See* 30 Tex. Admin. Code § 101.222(b)-(e) (approved by EPA at 75 Fed. Reg. 68,989 (Nov. 10, 2010)).

[27] *Luminant*, 714 F.3d at 854-55.

IV. Reversal of the judgment below could lead to a cascade of citizen suits and frustrate orderly regulation of the Nation's air quality.

Accepting Appellants' invitation to reverse the decision below would have profoundly negative consequences. Courts would be stripped of their traditional discretion to evaluate violations and set penalties under the Clean Air Act. They would be prohibited from considering the long history of regulation and compliance at a particular plant, and their ability to accord respect to regulators' decisionmaking would be curtailed.

Validating Appellants' tactics could motivate a cascade of citizen suits, seeking to relitigate years of past administrative enforcement. The day-to-day cooperation between industry and regulators would be disrupted and replaced by litigation unconstrained by political accountability and wasteful of judicial resources. The result would be a deleterious patchwork of regulation-by-litigation that would hinder orderly progress toward cleaner air.

This Court should affirm the district court's decision and reinforce that citizen suits play an important, but limited, role in environmental enforcement.

CONCLUSION

Amici join Appellees in requesting that this Court affirm the district court's judgment in all respects.

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 17th day of September, 2015, via the Court's CM/ECF system on all counsel of record.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,148 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using the Microsoft Office Word 2003 word processing software in 14-point Times New Roman type style.

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