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, AMERICAN CHEMISTRY COUNCIL, TEXAS CHEMICAL COUNCIL, AND TEXAS OIL & GAS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR REHEARING EN BANC

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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' Petition for Rehearing En Banc. *Amici* are national and state trade associations whose 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 ("CAA" or "the Act").[2] Such businesses are often targeted by 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 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

[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.

[2] A fuller description of the *amici* is included in the Motion for Leave to File Amicus Brief.

outcomes, inconsistent with the purposes of environmental protection and sound governance.

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. The Constitution places important limits on citizen suits. Unlike a regulator, 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.

This case exemplifies a citizen suit that transgressed these constitutional 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 crafted a standing test that included per se rules that irrebuttably presumed traceable injuries for certain types of violations. Following this test, the majority affirmed the district court's judgment that plaintiffs had standing as to thousands of violations without ever determining whether the plaintiffs had in fact suffered a concrete injury traceable to each violation. The majority's approach contradicts Supreme Court precedent and threatens to transform citizen suits from civil actions designed to resolve concrete controversies into regulatory vehicles for dictating environmental policy.

Amici urge the en banc Court to repudiate the majority's per se standing test 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 grant the Petition for Rehearing En Banc and to restore citizen suits to the important but limited role assigned by the Constitution and the Act.

ARGUMENT

I. Citizen Suits Supplement, Not Supplant, Agency Enforcement of the CAA.

Citizen suits serve an important but limited purpose in enforcing the CAA. 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 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 the invitation of private litigants to exercise "continuing superintendence" over a company or industry's regulatory compliance. *Friends of the Earth, Inc. v. Laidlaw Env't Servs.*, 528 U.S. 167, 193 (2000).

II. CAA Citizen-Suit Plaintiffs Must Demonstrate Article III Standing for Each Claim.

Article III permits a plaintiff to litigate only those CAA violations for which the plaintiff has standing. "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*, 578 U.S. 330, 339 (2016); *see TransUnion*, 141 S. Ct. at 2204-05.

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. *See TransUnion*, 141 S. Ct. at 2205.

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." *Id*. at 2208. The same requirements apply no matter how many violations are alleged. *See id.* (where class of 8,185 individuals sued TransUnion for statutory violations, only 1,853 class members who were concretely injured by

the violations had standing to assert reasonable-procedures claim). Traceability and the bar on standing in gross work together 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. These rules police the line between regulators, who need not prove injury to sue over a violation, and citizen-suit plaintiffs, who must do so.

III. The Majority Improperly Applied *Cedar Point* to Create Per Se Standing Rules for Air Pollution Cases.

Even though the majority paid lip service to the rule that plaintiffs must prove standing for each violation, it created a set of per se rules that nullify Article III's injury and traceability requirements and permit plaintiffs to achieve standing in gross. Applying its interpretation of *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996), the majority reasoned that plaintiffs need make only two showings to demonstrate traceable injuries. Plaintiffs must show that "each violation (1) 'causes or contributes to *the kinds* of injuries' alleged by plaintiffs and (2) has a '"specific geographic or other causative nexus" such that the violation *could have* affected their members.'" *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp. (ETCL III)*, 47 F.4th 408, 414 (5th Cir. 2022) (emphases added).

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." *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.* (*ETCL II*), 968 F.3d 357, 370 (5th Cir. 2020). 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. Rather than requiring that a plaintiff was actually in the vicinity of ExxonMobil's plant and suffered injury at the time of the emissions, the majority irrebuttably presumed that plaintiffs suffered traceable injuries based on the nature of the emissions if the emissions satisfied these per se rules.

This Court had previously limited *Cedar Point* to cases "involving a small body of water, close proximity, well-understood water currents, and persistent discharges," *Ctr. for Biological Diversity v. EPA*, 937 F.3d 533, 545 (5th Cir. 2019), and before this case had "never applied" *Cedar Point*'s traceability rules to air pollution. *ETCL II*, 968 F.3d at 376 (Oldham, J., concurring in part and dissenting in part). In fact, in a previous instance where a panel of this Court applied *Cedar Point*'s traceability rules to greenhouse gas emissions, the en banc Court granted rehearing and vacated the panel's ruling. *Comer v. Murphy Oil USA*, 585 F.3d 855, 866 (5th Cir. 2009) (quoting *Cedar Point*, 73 F.3d at 557); *Comer v. Murphy Oil USA*, 598 F.3d 208, 210 (5th Cir. 2010) (mem. op.) (granting rehearing en banc).

However, the en banc Court subsequently lost its quorum due to the recusal of a judge who had voted in favor of rehearing. *Comer v. Murphy Oil USA*, 607 F.3d 1049, 1054 (5th Cir. 2010). This case presents the en banc Court with a second chance to appropriately cabin *Cedar Point*'s reach.

IV. The Majority's Test is Inconsistent With the Supreme Court's Interpretation of Article III.

The majority's rules assume that because plaintiffs experienced *some* traceable injuries due to violations during the relevant time period, a traceable injury must *also* have arisen whenever other similar violations occurred.

But the Supreme Court has explained that "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 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 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.

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. Courts should not lessen Article III requirements so that plaintiffs can more effectively assume the role of regulators who may vindicate violations without proving traceable injuries.

V. 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 the 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. 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*, 141 S. Ct. at 2206 (internal citations omitted). The panel's ongoing failure to apply this constitutional filter transformed what should have been a relatively narrow case into a wholesale relitigation of regulatory outcomes concerning events that occurred at a large industrial complex over almost eight years.

Unless the en banc Court revisits this case, the standing-in-gross strategy pursued by plaintiffs will serve as a handbook for citizen-suit plaintiffs unhappy with regulatory decisions. Such a result would effectively convert 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. Under the majority'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.

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 other 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 the panel's per se rules, any time a report reveals an emission exceeding a permit limit that falls within the panel's 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 the panel's decision stands, 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.

CONCLUSION

Amici join Appellants in requesting that this Court grant the Petition for Rehearing En Banc.

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 20th day of October, 2022, via the Court's CM/ECF system on all counsel of record.

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation,
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because this brief contains 2,591 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 2010 word processing software in 14-point Times New Roman type style.

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