Case No. 17-20545

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

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

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

Aaron M. Streett
Matthew Kuryla
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, Texas 77002-4995
(713) 229-1234
(713) 229-1522 (Fax)

Counsel for Amici Curiae

Linda E. Kelly
Leland P. Frost
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th Street, NW, Suite 700
Washington, DC 20001
(202) 637-3000

Of Counsel for Amicus Curiae the National Association of Manufacturers

Steven P. Lehotsky
Michael B. Schon
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062
(202) 463-5948

Of Counsel for Amicus Curiae Chamber of Commerce of the United States of America

Richard S. Moskowitz
Taylor D. Hoverman
AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS
1667 K Street, NW
Washington, DC 20006
(202) 457-0480

Of Counsel for Amicus Curiae American Fuel & Petrochemical Manufacturers

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This brief is filed by American Fuel & Petrochemical Manufacturers, BCCA Appeal Group, Chamber of Commerce of the United States of America, National Association of Manufacturers, Texas Association of Business, 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 virtually all U.S. refining and petrochemical manufacturing capacity. AFPM's members supply consumers with a wide variety of products that are used daily in homes and businesses. AFPM has no parent corporation, and no publicly held company has 10% or greater ownership in AFPM.

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

[1] All parties consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). 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(a)(4)(e). *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.

United States, including refineries and petrochemical plants. BCCA Appeal Group has no parent corporation, has no shareholders, and issues no stock.

The Chamber of Commerce of the United States of America is the world's largest business federation. It directly 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, 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 that raise issues of concern to the nation's business community.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all 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 Texas Association of Business is the leading employer organization in Texas. It is the state's chamber of commerce. Representing companies from large multi-national corporations to small businesses in nearly every community of Texas, Texas Association of Business works to improve the Texas business climate and to help make the state's economy the strongest in the world. For more than 85 years, Texas Association of Business has fought for issues that impact business to ensure that employers' opinions are heard.

The Texas Chemical Council is a statewide trade association of chemical manufacturing facilities in Texas. Currently, 68 member companies produce vital products for our way of life, fulfill educational and quality-of-life needs, and provide employment and career opportunities for more than 74,000 Texans at over 200 separate facilities across the state. Their combined economic activity sustains nearly a half-million jobs for Texans.

The Texas Oil & Gas Association ("TXOGA") has more than 5,000 members and is the largest and oldest petroleum organization in Texas. Members of TXOGA produce in excess of 90 percent of Texas' crude oil and natural gas, operate 100 percent of the state's refining capacity, and are responsible for the vast majority of the state's pipelines. The Texas oil and natural gas industry not only produces products used daily; it anchors the state's economy. In 2016, the industry

paid $9.4 billion in state and local taxes and state royalties that directly funded schools, roads, and emergency services.

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. They could be targeted by Clean Air Act citizen suits like the lawsuit at issue in this appeal. *Amici* are interested in ensuring that citizen suits retain their important but limited role in enforcing the Clean Air Act.

SUMMARY OF ARGUMENT

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

First, Article III of the Constitution constrains the range of claims that a citizen plaintiff may assert, even where the claim is authorized by statute. Article III restricts federal courts to adjudicating cases or controversies between two parties, as opposed to addressing legal compliance in the abstract. To that end, the standing doctrine limits courts to deciding claims for which a plaintiff has suffered a concrete injury that is fairly traceable to the defendant's wrongdoing. Standing, moreover, is not dispensed in gross: a plaintiff who has standing as to one claim—*i.e.*, who has been injured by one of defendant's violations—may not leverage that claim to litigate myriad other claims for legal violations that did *not* injure the plaintiff. These principles apply with full force to CAA citizen suits. A citizen may seek redress under the statute only for a defendant's CAA violations that have concretely and particularly harmed him or her.

Second, the CAA limits the penalties that may be assessed in citizen suits. In determining the proper penalty under the Act, the court "shall take into consideration," among other things, "the economic benefit of noncompliance." 42 U.S.C. § 7413(e)(1). The economic-benefit factor used to calculate penalties ensures that defendants disgorge any economic benefit they gained by delaying repairs or upgrades that were necessary to prevent the violation. Naturally, penalties may only be imposed for the violations that are properly in federal court—those for which the plaintiff has standing. Nor may federal courts 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. A repair or upgrade must relate directly to the violation at issue before a district court may use the cost of such a project as the basis for a CAA penalty. This textual approach is essential to avoid perverse incentives, such as penalizing companies for voluntarily improving their facilities or discouraging companies from entering settlements with regulators that require improvements beyond what the law requires.

The proceeding below is a striking example of a citizen suit that transgressed these constitutional and statutory limits. Using reports that ExxonMobil submitted to the state regulatory agency and records that ExxonMobil maintained, plaintiffs sued for thousands of violations across an almost eight-year period. Plaintiffs acknowledged the fundamental Article III requirement to prove they suffered injuries traceable to defendants' actions. But they only presented testimony linking their alleged injuries to five of the alleged emissions events. This empowered the district court to adjudicate those five events, and, if it found liability, to impose an appropriate penalty for violations arising from those events. Instead, the district court asserted authority to adjudicate all 16,386 days of alleged violations, without requiring plaintiffs to establish that they were injured by 99.8% of them. Finding standing-in-gross like this flatly contradicts Supreme Court

precedent. If followed more broadly, it threatens to transform citizen suits from civil actions designed to resolve concrete controversies into regulatory vehicles for dictating environmental policy.

The district court's fundamental error infected the entire case, including the assessment of penalties. In determining the economic benefit that ExxonMobil gained from the violations, the court only inquired as to whether certain improvement projects performed by the company—as part of a negotiated settlement with the state—were related in a general sense to any of the 16,386 days of violations it had found. This novel approach led the court to impose the largest penalty in the history of CAA citizen suits. The court should have limited its penalty analysis to the five events for which plaintiffs established standing. Going further exceeded constitutional boundaries.

The court also misconstrued the statutory direction to consider the "economic benefit *of noncompliance*." 42 U.S.C. § 7413(e)(1) (emphasis added). It awarded penalties based upon the cost of ExxonMobil's projects without inquiring whether those projects corrected the alleged violations. By assigning penalties to plant upgrades that do not relate directly to the alleged violations, the court ignored the plain text of the Act. The district court's approach of assessing penalties based upon any project that is "generally correlated" to pollution control

has no limiting principle; virtually any improvement project or upgrade could be generally correlated to the reduction of pollution.

Amici urge the Court to disapprove the district court's approach to both Article III standing and economic-benefit penalties lest it become a national roadmap for a new quasi-regulatory program through citizen suits. *Amici* and their members work hard to ensure effective compliance with the complex web of regulatory provisions under the Nation's environmental laws. Citizen suits should not be permitted to supplant this ongoing regulatory process. Affirming the district court would require companies to submit to yet another level of regulation—by citizen-suit plaintiffs—beyond the local, state, and federal environmental agencies that legitimately share comprehensive regulatory authority. And it would penalize companies that undertake proactive projects to reduce pollution or otherwise improve their facilities because courts may later use those upgrades as the basis for an economic-benefit penalty. *Amici* respectfully ask the Court to reverse the decision below and restore citizen suits to the important but limited role assigned by the Constitution and the Act.

Finally, *amici* ask this Court to correct the district court's mistaken view of State Implementation Plans ("SIPs") under the CAA. When a state proposes and EPA approves a SIP, that document becomes the law governing the regulated community under the Act. Yet the district court refused to apply the Texas "Act of

God" defense to liability even though EPA had approved that defense as part of Texas's SIP—and never rescinded its approval. The district court erroneously reasoned that the defense was unavailable because it had been recodified in a different part of the state's statutes, and the recodified version had not yet been SIP-approved. But that would just mean that the original iteration of the defense—which the district court acknowledged had been SIP-approved—remained in force. *Amici*'s members rely upon the integrity of SIPs to govern their compliance, and need certainty as to the legal effect of SIPs. *Amici* therefore request that this Court reaffirm the longstanding rule that a SIP-approved provision remains in force unless and until EPA rescinds its approval. Thus, *amici* respectfully ask the Court to reverse the decision below and hold that the "Act of God" provision remains a defense in CAA citizen suits in Texas.

ARGUMENT

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

A. Citizen Suits Are Meant to 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." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987).[2] Citizens may file suit only "when the government cannot or will not command compliance." *Id.* at 62. 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." *Id.* at 61.

Consequently, courts should decline to exercise "continuing superintendence" over a company or industry's regulatory compliance. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 193 (2000). As one district court faced with a Clean Air Act case explained, "state 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." *Citizens Legal Envtl. Action Network v. Premium Standard Farms, Inc.*, No. 97-6073-CV-SJ-6, 2000 WL 220464, at *18 n.34 (W.D. Mo. Feb. 23, 2000).

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

[2] While the prior panel held that certain aspects of *Gwaltney* had been overruled by the 1990 amendments that allowed citizen suits for wholly past violations, *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp*, 824 F.3d 507, 529 n.18 (5th Cir. 2016), this Court has reaffirmed the continuing validity of *Gwaltney*'s overarching admonition that citizen suits must "supplement rather than . . . supplant government action." *Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 528 (5th Cir. 2008) (quoting *Gwaltney*, 484 U.S. at 60).

(and, in some cases, local) regulators and EPA—the entities empowered to determine enforcement priorities and balance the costs and benefits that comprise the public interest. This structure affords regulated businesses a consistent approach to the interpretation and enforcement of environmental statutes. This framework is critical to the regulated community, for compliance with the environmental laws often requires years of planning and millions of dollars in capital expenditures.

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

Standing doctrine undergirds the limited, interstitial role of citizen suits. Acting as sovereigns, state and federal agencies may bring enforcement actions to pursue a wide range of CAA violations. In contrast, standing doctrine imposes strict constraints on the scope of citizen suits in federal court.

1. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (internal citations removed). It is this separation-of-powers principle that restrains courts from engaging in policymaking or law enforcement—the functions of the other governmental branches—absent a concrete controversy between two litigants. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

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). Thus, "Article III standing requires a concrete injury even in the context of a statutory violation." *Id*. at 1549. Accordingly, even though the CAA grants citizens the statutory right to sue for certain violations of the Act, Article III principles mean that a plaintiff may litigate only those violations for which the plaintiff has standing. It is no accident that many of the Supreme Court's seminal standing decisions seek to conform the broad language of statutory citizen-suit provisions to the jurisdictional demands of Article III. *See, e.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167 (2000); *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009).

2. To establish standing, a citizen-suit plaintiff must demonstrate the "irreducible constitutional minimum" of (1) a concrete and particularized injury in fact (2) that is fairly traceable to the violation and (3) that will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. Even statutory violations that relate to the plaintiff in some way are not enough, unless the plaintiff also shows that the violation concretely injured him or her. For example, in *Spokeo* the Supreme Court vacated a finding that a plaintiff had standing because the defendant allegedly violated the Fair Credit Reporting Act by distributing

inaccurate data about the plaintiff. The plaintiff was required also to demonstrate that this statutory violation actually harmed him in some concrete way. *Spokeo*, 136 S. Ct. at 1548.

In addition to demonstrating a concrete and particularized injury, citizen-suit plaintiffs must also establish that their injury is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560-61 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). The traceability requirement ensures that the defendant's alleged violations—and not urban air quality in general or the defendant's air emissions in compliance with applicable requirements—injured the plaintiff. An injured plaintiff provides only one side of the case or controversy; the other side is fulfilled by a defendant whose alleged wrong harmed the plaintiff.

3. A citizen-suit plaintiff must make the rigorous injury and traceability showings for *each claim* that he or she wishes to bring. As the Supreme Court has put it, "standing is not dispensed in gross." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008)); *see also Sierra Club v. EPA*, 873 F.3d 946, 951 (D.C. Cir. 2017) ("Standing is not evaluated 'in gross.'"). The Constitution does not permit a "commutative" theory of standing whereby a plaintiff could rely upon standing for

one claim—or several—to establish standing for all other claims that derive from a "common nucleus of operative fact." *DaimlerChrysler*, 547 U.S. at 352. If a plaintiff establishes standing for one claim, but not for others, the court may adjudicate only the claim for which plaintiff has standing. *Id.* at 353.

C. The District Court Failed to Require Plaintiffs to Show Standing for Each Claim.

1. The district court did not require plaintiffs to establish standing for each of the claims they sought to litigate. Plaintiffs implicitly acknowledged their burden to establish injury and traceability through evidence introduced at trial. Indeed, they presented testimony by members who alleged that they suffered injuries and purported to link these injuries to five of ExxonMobil's alleged emissions events. *See* ROA.13221-35. This showing established Article III authority for the district court to adjudicate the five events for which plaintiffs had standing. The plaintiffs, however, did not establish that they suffered a concrete injury traceable to the thousands of other alleged violations.

Without any explanation, the district court leapt from this showing of standing for violations related to five emissions events to a conclusion that it had Article III jurisdiction to adjudicate violations related to thousands of different emissions events alleged by plaintiffs. This approach led the district court to issue what amounted to an advisory opinion regarding more than 16,000 days of

violations and to impose a massive monetary penalty based upon those alleged violations that it lacked authority to adjudicate.

2. The district court's approach cannot be squared with the principle that a plaintiff must establish a traceable, concrete injury for each claim on which he or she seeks relief. If a plaintiff seeks to recover a civil penalty for a violation, he or she must establish standing for that violation. A district court may not assume or infer that because the plaintiff has suffered injuries as to some claims, the plaintiff must necessarily have suffered injuries as to other similar claims. As explained by the Supreme Court, "[a] plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982). 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). The district court disregarded these authorities.

The district court could not simply assume that plaintiffs' members must have suffered harm traceable to the 16,000-plus violations simply because plaintiffs' members lived near defendants' facility. *See Spokeo*, 136 S. Ct. at 1548 (vacating standing finding even though plaintiff's personal information was

involved, absent showing of concrete harm). Nor could it 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 ("It is not enough that the conduct of which the plaintiff complains will injure someone."). 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).

In sum, the burden was on the plaintiffs to establish "a factual showing of perceptible harm" as to each claim. *Summers*, 555 U.S. at 499 (quoting *Lujan*, 504 U.S. at 566). The standing requirement is not an invitation for either plaintiffs or district courts to engage in "an ingenious academic exercise in the conceivable," *id.*; standing must be demonstrated by real evidence, just as much as a substantive element of the claim. *Lujan*, 504 U.S. at 561.

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

1. By adjudicating legal violations without evidence that they caused concrete injuries, the district court departed from the role of a judge deciding a case or controversy and assumed the role of regulatory enforcer and policymaker. The district court's approach threatens to convert citizen suits from interstitial to paramount. The plaintiffs' strategy below vividly illustrates this risk.

The plaintiffs based their complaint on information regarding emissions events that ExxonMobil was required to self-report to the TCEQ or record to assist the state in its regulatory responsibilities. *See* 30 Tex. Admin. Code § 101.201. The TCEQ reviewed these voluminous compliance reports and many of the records and decided whether and how to take enforcement action. *See* Appellants' Br. 7. Plaintiffs' citizen suit openly asked the federal court to revisit eight years' worth of enforcement decisions by the assigned regulators. To be sure, the CAA and the Constitution permitted plaintiffs to sue for particular violations resulting from the reported and recorded emissions events that caused them concrete injury. For violations that did not injure plaintiffs, however, their abstract interest in CAA enforcement does not differ from the public at large, and these interests must be vindicated by the government, not private citizens. As the Supreme Court has held time and again, "[i]t would exceed [Article III's] limitations if . . . we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws." *Summers*, 555 U.S. at 497 (quoting *Lujan*, 504 U.S. at 580-81).

The district court's 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. If the decision stands, the district courts will effectively become appellate tribunals

over agency-enforcement processes, grading the adequacy of agency work enforcing the broad suite of environmental laws. Absent this Court's enforcement of constitutional limits, the CAA citizen-suit provision would effectively "turn[] over to private citizens the function of enforcing the law" and allow them to act as "a self-appointed mini-EPA." *Friends of the Earth*, 528 U.S. at 209 (Scalia, J., dissenting). Unfortunately, that is what happened here.

2. Unless reversed, the standing-in-gross strategy pursued by plaintiffs (and blessed by the district court) will serve as a handbook for a new wave of citizen-suit plaintiffs unhappy with regulatory decisions made in their respective states. Plaintiffs will be emboldened to invoke the federal judicial power to superintend the ongoing operations of the regulated community. 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 (quoting *Allen v. Wright*, 468 U.S. 737, 760 (1984)). Under the district court'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 (a task made easy by comprehensive self-reporting and recordkeeping requirements). District courts are ill-equipped to oversee such sprawling law-enforcement enterprises, and the Constitution forbids them to do so.

II. ASCRIBING ECONOMIC BENEFIT TO ACTIONS THAT LACK A DIRECT CONNECTION TO ALLEGED VIOLATIONS PENALIZES CONTINUOUS IMPROVEMENT AND DISRUPTS THE REGULATORY ENFORCEMENT REGIME.

The district court compounded its standing errors when it turned to the calculation of penalties for ExxonMobil's violations. The court appropriately adopted a "bottom up" approach to penalties that uses as its starting point the economic benefit of noncompliance. But rather than assess economic-benefit penalties as to the five events for which plaintiffs had established standing, the district court based its penalty on thousands of emissions events and resulting violations it lacked authority to adjudicate. In doing so, the district court enabled claims to proceed without the constraints of Article III jurisdiction.

In addition to this constitutional misstep, the district court imposed penalties that violate the Act. The statute provides that, in determining the proper penalty, the court "shall take into consideration," among other things, "the economic benefit *of noncompliance*." 42 U.S.C. § 7413(e)(1) (emphasis added). But here, the district court based its unprecedented $20 million penalty on the cost of the four projects that ExxonMobil implemented as part of a larger negotiated settlement with the State of Texas. It did so without requiring plaintiffs to prove that the projects were necessary to correct or prevent any of the thousands of violations alleged by plaintiffs—*i.e.*, whether they 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 repairs or 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 conduct disconnected from the wrongdoing alleged in a particular case. Once again, the district court crossed the line between a judge deciding a discrete controversy and an enforcement agency empowered to engage in broad-ranging oversight—with disruptive effects on the regulated community.

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 the defendant may have enjoyed as a result of foregoing 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)[3] ("EPA recaptures cost savings . . . to ensure that a noncompliant company, state, local, or Federal agency enjoys no advantage over compliant facilities due to its delay in committing resources to comply with requirements.").

Because Section 113(e) of the CAA mandates disgorgement of the "economic benefit *of noncompliance*," 42 U.S.C. § 7413(e)(1) (emphasis added), this Court has acknowledged the calculation of economic benefit "requires[s] some showing that delayed expenditures would be 'necessary to correct' the violations at issue in the suit." *Env't Tex*., 824 F.3d at 530 (quoting *United States v. CITGO Petrol. Corp*., 723 F.3d 547, 552 (2013)). 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*." *CITGO Petrol. Corp.,* 723 F.3d at 551 (emphasis added).

Because citizen suits are considered a "civil action," 42 U.S.C. § 7604(a), the plaintiffs bear the burden of proving each aspect of their claim, including any asserted economic benefit. *Schaffer v. Weast*, 546 U.S. 49, 57 (2005). Accordingly, a citizen-suit plaintiff must present evidence establishing a direct

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

connection between the delayed project and alleged specific violation for which the plaintiff has standing. Absent such a requirement, citizen-suit plaintiffs would be free to pursue economic-benefit penalties for improvements disconnected from the alleged violations, contravening the Act's requirement that courts consider the economic benefit of *noncompliance*.

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

The district court adopted a "general correlation standard" to determine whether ExxonMobil's four improvement projects undertaken as part of an agreed order with TCEQ were "necessary to correct" the alleged violations. ROA.13288. Considered at this "high level of generality," the district court found that plaintiffs carried their burden of proof. ROA.13288. Specifically, the Court explained that the projects would "provide early identification of potential events and/or instrumentation abnormalities"; "more effectively monitor and troubleshoot the refinery flares"; and "improve operator training and competency." ROA.13288-89. In sum, the district court merely determined that each of the projects in question was designed to generally improve overall operations at ExxonMobil's facility, not to correct the five emissions events and resulting violations for which plaintiffs showed standing, or any of the thousands of other emissions events and resulting violations.

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

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

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

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

correlated" to the following projects, it is unlikely any 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 U.S. Food and Drug Administration certification;
- Investing capital to address a process safety improvement identified through an internal review;
- Switching to lower-emitting raw materials to reduce waste 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 proactively 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. Appellants' Br. 3. The district court rejected testimony that a delay of those larger recurring costs should be part of a penalty, and decided instead to focus the penalty analysis on the most

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

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

Beyond intruding upon the regulator's enforcement discretion, attributing economic-benefit penalties to the cost of such improvements could also discourage businesses from entering into agreed orders with regulators. To avoid being doubly penalized for agreed-order projects, companies would be more likely to risk expensive and time-consuming litigation with the regulatory agency, rather than settling their dispute in exchange for improvements that go beyond what the law

requires. 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) (quoting *Kincade v. Gen. Tire & Rubber Co*., 635 F.2d 501, 507 (5th Cir. 1981)).

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 forego" in exchange for the violator's commitment to "install particularly effective but expensive machinery, that it otherwise would not be obliged to take." *Gwaltney*, 484 U.S. at 61. By the same token, the approach taken by the district court here, if permitted to stand, will "disincline[] [businesses] to resolve disputes by . . . relatively informal agreements" with regulators "if additional civil penalties may then be imposed in pending citizen suits." *Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 357 (8th Cir. 1998). Only by enforcing the statutory text and requiring plaintiffs to prove that delayed projects were necessary to correct violations can this Court avoid "chang[ing] the nature of the citizens' role from interstitial to potentially intrusive." *Gwaltney*, 484 U.S. at 61.[4]

[4] To be clear, *amici* do not contend that expenditures undertaken pursuant to agreements with state regulators "negate" any economic benefits that a defendant gained from a violation or otherwise legally bar a finding of economic benefits

III. THE DISTRICT COURT ERRED IN FINDING THAT THE TEXAS "ACT OF GOD" DEFENSE WAS INAPPLICABLE.

The district court held that the Texas "Act of God" defense contained in Section 7.251 of the Texas Water Code was inapplicable as a defense to liability "because the SIP incorporates a previous version of the statute, not the current version." ROA.13269-70. Specifically, the district court reasoned that although the original Texas "Act of God" defense had been approved by EPA as part of Texas's SIP, the recodified provision had never been considered or sanctioned by EPA. ROA.13269-70. However, EPA has not rescinded its approval of the original "Act of God" defense since its approval of the 1972 Texas SIP. Because a "state may not unilaterally alter the legal commitments of its SIP once EPA approves the plan," *Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1097 (9th Cir. 2007), the last version approved by EPA governs. *Gen. Motors Corp. v. United States*, 496 U.S. 530, 540 (1990) ("There can be little or no doubt that the existing SIP remains the 'applicable implementation plan' even after the State has submitted a proposed revision."). Indeed, Congress unequivocally mandated that "any provision" of a pre-1990 SIP shall remain in effect until "a revision to such provision is approved" by the EPA. 42 U.S.C. 7410(n)(1); *see Citizens for a Better*

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based on such expenditures. *See Env't Tex.*, 824 F.3d at 529 n.18 (rejecting this proposition). *Amici* argue instead that agreed expenditures may not be considered toward an economic-benefit penalty unless the court finds that these expenditures were necessary to correct a violation; it is not enough to find that agreed measures were taken to generally reduce pollution, as the district court found here.

Env't v. Wilson, 775 F. Supp. 1291, 1296 (N.D. Cal. 1991) (discussing the "crystal clear" intent of Congress in this provision).

Thus, even if the district court were correct that EPA has not approved the Texas Legislature's 1989 codification and 1997 recodification of the "Act of God" defense—a fact *amici* do not admit—the original defense would remain intact and apply here. *See* 40 CFR § 51.105 ("Revisions of a plan, or any portion thereof, will not be considered part of an applicable plan until such revisions have been approved by the Administrator in accordance with this part.").

Amici's members rely upon the integrity of SIPs to govern their compliance. The SIP-approved rules are broadly integrated into the CAA operating permits under which the regulated community conducts its daily business. The district court's erroneous concept that SIP-approval falls away when the state adopts a non-substantive revision would mean that regulated entities' compliance status depends on EPA approvals keeping current with state-level revisions. In fact, that is not the law. *Amici* request that this Court reaffirm the longstanding rule that a SIP-approved provision remains in force unless and until EPA rescinds its approval and hold that the "Act of God" provision remains a defense in CAA citizen suits in Texas.

CONCLUSION

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

Respectfully submitted,

/s/ Aaron M. Streett

Aaron M. Streett
Matthew Kuryla
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, Texas 77002-4995
(713) 229-1234
(713) 229-1522 (Fax)

Counsel for Amici Curiae

Steven P. Lehotsky
Michael B. Schon
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062
(202) 463-5948

Of Counsel for Amicus Curiae Chamber of Commerce of the United States of America

Linda E. Kelly
Leland P. Frost
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th Street, NW, Suite 700
Washington, DC 20001
(202) 637-3000

Of Counsel for Amicus Curiae the National Association of Manufacturers

Richard S. Moskowitz
Taylor D. Hoverman
AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS
1667 K Street, NW
Washington, DC 20006
(202) 457-0480

Of Counsel for Amicus Curiae American Fuel & Petrochemical Manufacturers

CERTIFICATE OF SERVICE

This will certify that a true and correct copy of the above document was served on this the 19th day of January, 2018, via the Court's CM/ECF system on all counsel of record.

/s/ Aaron M. Streett
Aaron M. Streett
Counsel for Amici Curiae

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/s/ Aaron M. Streett
Aaron M. Streett
Counsel for Amici Curiae