No. 17-20545

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.

On Appeal from the United States District Court
for the Southern District of Texas
The Honorable David Hittner
No. 4:10-CV-4969

EN BANC BRIEF OF AMICI CURIAE THE CITY OF HOUSTON, HARRIS COUNTY ATTORNEY, AND AIR ALLIANCE HOUSTON IN SUPPORT OF PLAINTIFFS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

Counsel of record certifies that—in addition to the persons and entities listed in the Appellants' Certificate of Interest Parties, Appellants' En Banc Br. i–vi—the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 also have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

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INTERESTS OF AMICI CURIAE[1]

Amici are local government entities and a nonprofit organization who share an interest in ensuring that the Clean Air Act can fulfil its purpose "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1).

The City of Houston works to promote air quality and protect the health and well-being of its residents, including through its network of air monitors and through investigations and enforcement actions.

Harris County Attorney Christian D. Menefee represents Harris County in all civil matters and is responsible for enforcing the statutes and regulations that protect the health and environment of its residents.

Air Alliance Houston is a nonprofit organization working to reduce air pollution in the Houston region and to protect public health and the environment through research, education, advocacy, and community assistance.

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amici or their counsel, contributed money intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). Amicus Air Alliance Houston's counsel Mary Rock worked as a paralegal for plaintiffs' counsel from August 2011 through April 2014. She joined Earthjustice in June 2020. Counsel for all parties consented to the filing of this brief.

INTRODUCTION

People who live and work near Exxon's Baytown complex, like the plaintiffs, cannot escape the consequences that come with living near one of the largest oil refinery and petrochemical facilities in our country. They stay inside when it hurts to breathe the chemicals in the air. They watch flares fill the sky with smoke and fire. Explosions jolt them awake at night. Some moved away to protect themselves; others stayed. They're not against Exxon, or its work. They just want it "to do the right thing by everybody" and follow the law, putting an end, or at least lessening, these harms.[2]

That's what this suit is about: ordinary people seeking relief from Exxon's extraordinary history of repeatedly violating the Clean Air Act and harming its neighbors. The Act authorizes them to do so. Its citizen-suit provision allows people to sue to abate violations of "an emission standard or limitation" or "an order . . . with respect to such a standard or limitation." 42 U.S.C. § 7604(a)(1). And it authorizes a court to use a civil penalty, instead of, or in addition to, other relief, like an injunction, to craft a remedy that will get a violator to comply with the relevant standard, limitation, or order. *See id.*

[2] Anna Phillips, *Toxic Air, Explosions: Inside The Bitter Battle Between Texas Residents And Exxon*, WASH. POST (Mar. 16, 2023), wapo.st/3ojMNqI.

Because the Baytown complex is large, and because Exxon negotiated for permits that set plant-wide limits, the record shows it violated many standards, limitations, or orders that govern its operations, many times over. It's common sense that a defendant—like Exxon—with a history of repeatedly violating the law may need to be given a strong incentive to comply with the law. But Exxon resists even the $14 million civil penalty (.025% of its 2022 profits) imposed to abate its violations that have been going on for years.

Exxon's primary strategy involves an unprecedented theory of Article III standing. It hinges on the flawed premise that because a district court considers the number of days a defendant was violating the relevant standard, limitation, or order when setting a civil penalty that will deter future violations of that requirement, a plaintiff is "seeking relief" for each of those days. That's wrong. He is seeking relief from further violations of that requirement, and the harm they would cause. So if he seeks a civil penalty under the Act, he just needs to show what any other plaintiff seeking prospective relief—including one seeking an injunction under the Act—needs to show.

The result of twisting Article III as Exxon asks this Court to do would be serious. The City of Houston and Harris County do what they can to get Exxon to comply with the Clean Air Act, and to mitigate the harm the Houston region sees when it does not. But Exxon continues to violate the Act, and the harm

continues. Congress didn't leave people harmed by unlawful air pollution helpless in the face of this reality. It let them sue to stop violations, and, by doing so, stop the harm from those violations. The limits Congress put in place, along with the ordinary limits Article III places on suits for prospective relief, ensure that these suits play a supplemental role under the Act, one that comes into play only when it is most needed.

This Court should reject Exxon's call to craft new constitutional rules so Exxon can avoid the normal consequences of repeated statutory violations.

ARGUMENT

I. The Ordinary Article III Requirements That Govern Suits For Prospective Relief Apply To Citizen Suits Brought Under The Clean Air Act.

A person suing under the Clean Air Act's citizen suit provision seeks to stop ongoing harm from a violation of "an emission standard or limitation" or "an order . . . with respect to such a standard or limitation." 42 U.S.C. § 7604(a)(1). As such, the ordinary rules governing Article III standing to seek prospective relief apply. Congress's decision to include civil penalties as a form of relief a court can grant doesn't change this. A civil penalty under the Act is, just like an injunction, one tool a court can use to secure compliance with the Act and deter future violations. The plaintiffs showed that when they sued and

sought civil penalties, Exxon was violating many permit requirements, repeatedly, in ways that harmed the plaintiffs. That is all Article III requires.

A. The Clean Air Act authorizes citizens to seek prospective relief.

The Clean Air Act's citizen suit provision allows a person being harmed by the violation of "an emission standard or limitation" or "an order issued by the [EPA or relevant state agency] with respect to such a standard or limitation" to sue. *Id.* § 7604(a)(1). In this provision, Congress limited the available relief to prospective relief, that is, relief that ends or lessens a harm by bringing the violator into compliance and by deterring future harm. The text, Supreme Court precedent, common sense, and Exxon's own brief all make this plain.

Section 7604(a)'s language is forward looking. Congress did not authorize suits against just any violator. Instead, a person can sue only if he can plausibly allege the violator has "violated (if . . . the alleged violation has been repeated)" or is "in violation of" an emission requirement or an order. *Id.* That is, he must allege ongoing intermittent violations or ongoing continuous violations. The notice requirement shows the focus on securing compliance. A person cannot sue before giving the EPA, the relevant state agency, and the violator "notice of the violation," allowing the violator time to come into compliance and avoid the need for litigation. *See id.* § 7604(b)(1)(A). The diligent prosecution bar further shows this focus. A person cannot sue if the government is already pursuing "a

civil action . . . to require compliance." *Id.* § 7604(b)(1)(B). And so do the authorized remedies. A court may only "enforce" the "emission standard or limitation" or "order" and "apply any appropriate civil penalties." *Id.* § 7604(a); *see also id.* § 7604(g) (requiring civil penalties to be paid into the U.S. Treasury and authorizing "beneficial mitigation projects").

When addressing the parallel citizen suit provision of the Clean Water Act, the Supreme Court held that its remedies, including civil penalties, are prospective. There, the Court looked to the Clean Water Act's nearly identical limit on the cause of action, notice provision, and diligent-prosecution bar. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56–63 (1987). These textual clues made plain that "the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past." *Id.* at 59.

Focusing on the relief available in a Clean Air Act citizen suit confirms that Congress merely gave people a way to abate harmful pollution. The statute authorizes a court to "enforce" the standard, limitation, or order being violated and "apply any appropriate civil penalties." 42 U.S.C. § 7604(a). There's no disagreement about one way a court can "enforce"—that is, secure compliance with—a requirement: by exercising traditional equitable authority, such as by granting an injunction. Congress identified another in the statute: by issuing a

civil penalty to give the violator an economic incentive to come into compliance (and stay in compliance).

Congress's decision to use an economic stick to achieve compliance makes sense. "[A] defendant once hit in its pocketbook will surely think twice before polluting again." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 186 (2000). Even Exxon agrees. *See* Appellants' En Banc Br. 58 (stating that civil penalties can have the function of "abating ongoing violations or deterring future violations"). And its decision avoided putting courts to an injunction-or-nothing choice, one that could impose real costs because it might "entail continuing superintendence . . . by a federal court—a process burdensome to court and permit holder alike." *Id.* at 193.

Despite its concession, Exxon elsewhere objects that this straightforward understanding of Section 7604(a)'s remedies rests on a "false equivalence between injunctions and civil penalties." Appellants' En Banc Br. 57. This Court already recognized that equivalence when finding standing under the Clean Air Act based on the same kind of evidence and standing principles that plaintiffs rely on here. Citing *Laidlaw*, it agreed that civil penalties can "deter[]" and address the need "to ensure" a defendant "will not violate federal emissions standards in the future." *Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp.*, 207 F.3d 789, 794 (5th Cir. 2000).

In any event, it is the statutory text, not anyone's whim, that makes a civil penalty equivalent to equitable relief for deterrence purposes. Section 7604(a) authorizes courts to issue these forms of relief in the same breath, indicating that both exist to secure compliance. *See* 42 U.S.C. § 7604(a)(1). And the factors that guide a court's assessment of a civil penalty—all focused on the violator—confirm that a penalty is a way to secure compliance. A court considers, among other things, "the violator's full compliance history." *Id.* § 7413(e)(1). Why? Because a repeat violator content to risk enforcement rather than comply with the law may need a bigger financial incentive to comply, just as a party violating an injunction may need sanctions to reckon with the court's order. A court also considers "the seriousness of the violation." *Id.* Why? Because a more serious violation may call for a higher penalty to secure compliance more quickly, just as a court might craft compliance deadlines when granting injunctive relief.

In short, Congress made a legislative judgment that a civil penalty, as structured in the Clean Air Act citizen-suit provision, is an effective tool to bring a violator into compliance.[3] Exxon may not respect those policy decisions. But

[3] The Executive Branch has consistently stated that civil penalties have this effect. *See, e.g.*, Memorandum from Jeffrey B. Clark, Assistant Attorney General, Re: Equitable Mitigation in Civil Environmental Enforcement Cases 9 & n.8 (Jan. 12, 2021) (stating civil penalties "should be the first, non-extraordinary form of relief considered," "deter[] future wrongdoing," and "ensure" violators "do not get a competitive advantage"), bit.ly/enrdmem.

this Court should. *See Laidlaw*, 528 U.S. at 186 (recognizing "it is reasonable for Congress to conclude that an actual award of civil penalties does in fact bring with it a significant quantum of deterrence"); *see also Tigner v. Texas*, 310 U.S. 141, 149 (1940) (explaining why "the whole problem of deterrence is related to still wider considerations . . . within legislative competence"); *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1138 (5th Cir. 1995) (noting that Congress is best positioned "to evaluate various policy objectives").

B. The Article III requirements governing prospective relief are clear, and clearly inconsistent with Exxon's theories.

Because a person suing under Section 7604(a) seeks only prospective relief, the ordinary Article III rules governing standing to seek that relief apply. Like all plaintiffs, he must show an "injury in fact," "a traceable connection between" his "injury and the defendant's conduct," and "a likelihood that the requested relief will redress the alleged injury." *Aransas Project v. Shaw*, 775 F.3d 641, 648 (5th Cir. 2014) (quotation omitted). Past "illegal conduct does not in itself show" standing to seek prospective relief, so he must show a "real and immediate threat of future or continuing injury." *Id.* (quotation omitted).

These rules are easy to apply in a Section 7604(a) suit. The defendant's relevant conduct is its violation of "an emission standard or limitation" or "order . . . with respect to such a standard or limitation"; that is what the plaintiff's suit

seeks relief from. 42 U.S.C. § 7604(a)(1). So, the plaintiff must show that the defendant's violation of that standard, limitation, or order harms him, that the violation will likely continue, and that the relief sought will likely lessen or end his harm. *See Aransas Project*, 775 F.3d at 648 (finding standing based on these rules in an Endangered Species Act suit for injunctive relief); *see also* Appellants' En Banc Br. 60 (stating as much).

Here's a simplified (just barely) example. Suppose a refinery's permit "prohibits visible emission from flares"—that is, shooting columns of smoke and fire.[4] Suppose further that the refinery regularly violates that prohibition.[5] And finally suppose that when it does, families who live nearby say they "smell[] a chemical odor outdoors" and that the flares "rattled the windows," woke them up, and could last for hours.[6] As not even Exxon seems to dispute, those families would have standing to seek an *injunction* ordering the refinery to comply with the flaring prohibition. *See* Appellants' En Banc Br. 56.

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[4] *Env't Texas Citizen Lobby, Inc. v. ExxonMobil Corp.*, No. CV H-10-4969, 2017 WL 2331679, at *20 (S.D. Tex. Apr. 26, 2017) (*2017 District Court Opinion*); *see also Env't Texas Citizen Lobby, Inc. v. ExxonMobil Corp.*, 524 F. Supp. 3d 547, 552 n.1, 554 n.10 (S.D. Tex. 2021) (*2021 District Court Opinion*) (reincorporating prior factual findings that were not disturbed on appeal or amended on remand).

[5] *See 2017 District Court Opinion* at *20.

[6] *Id.* at *8.

Exxon argues for a different outcome here, claiming the rules governing prospective relief should apply differently when *civil penalties* are on the table. Its arguments turn on the fact that Congress allowed courts to consider the number of days a violator is in violation of the relevant standard, limitation, or order at issue when setting a penalty that will deter future violations of that requirement. For example, Exxon argues that the plaintiffs had to "prove their standing to sue with respect to each day of violation for which they sought civil penalties." *Id.* at 34. Its wording reveals the error in its reasoning. The plaintiffs do not seek civil penalties "with respect to" any "day of violation." They seek civil penalties "with respect to"—that is, to address—a "violation of . . . an emission standard or limitation" or "an order . . . with respect to such a standard or limitation." 42 U.S.C. § 7604(a)(1). Put differently, they are not trying to stop any given "day of violation" (which would be impossible, as those days will be over when relief is awarded), but to stop *ongoing* or *future* violations of the underlying standard, limitation, or order at issue. Yes, the number of days during which a defendant violated the underlying requirement is relevant to whether a civil penalty is appropriate, and if so, in what amount. But that figure is relevant only because Congress determined the appropriate level of deterrence and the math that is relevant to achieving it. Its judgment doesn't somehow transfigure civil

penalties into damages or justify departing from the rules that govern standing to seek all other forms of prospective relief.

Indeed, Exxon's theory can't be reconciled with the rule that a plaintiff's standing is determined as of "the time of the action brought." *Feds for Med. Freedom v. Biden*, 63 F.4th 366, 377 (5th Cir. 2023) (quotation omitted). When deciding whether to set a civil penalty, a court must consider, for example, the economic benefit the defendant receives from violating the relevant requirement. 42 U.S.C. § 7413(e)(1). Assume a permit allows a plant to emit a certain amount of mercury, and it violates that limit five times: twice before the complaint is filed, and three times afterwards. On Exxon's theory, a plaintiff's complaint must allege that all five exceedances harmed it, because a civil penalty could take all five exceedances into account. But accepting that theory would require the plaintiff to be clairvoyant when drafting the complaint: to predict when, and how, the three post-complaint violations occur. The better course is to apply the ordinary standing rules for prospective relief.

All of this may explain why Exxon cites no case, beyond the now-vacated panel opinions, that comes close to endorsing its day-of-violation-based standing theory. The Supreme Court did not in *Laidlaw*. There, the plaintiffs sued a wastewater treatment plant under the Clean Water Act, based on repeated and ongoing violations of a limit on how much mercury could be discharged into a

waterway. *See* 528 U.S. at 176. The plant violated the limit "13 times" after the suit was filed, and the district court based the civil penalty in part on the "extended period of noncompliance." *Id.* at 178. When finding standing to seek civil penalties, the Court did *not* require the plaintiffs to show they were injured by each violation that went into calculating the civil penalty. This Court has not applied Exxon's theory, either. *See Texans United for a Safe Econ. Educ. Fund*, 207 F.3d at 792–794 (applying ordinary prospective relief rules to find standing in a suit seeking an injunction and civil penalties).

Finally, Exxon suggests that no civil penalty could redress the plaintiffs' injuries here because it cannot (or, perhaps, will not) comply with its permits. Appellants' En Banc Br. 6, 10. Of course, compliance is possible. *See Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1141–142 (11th Cir. 1990) (noting that a violator is free to "cease[] operations until it [i]s able to discharge pollutants without violating the . . . permit"). Exxon sees some unfairness in expecting it to comply with permits that authorize its operations, but that's what it agreed to do.[7] Even granting the concern, Congress already addressed it when

[7] *See, e.g.*, ROA.57243 (Permit 20211, General Condition 10 (Dec. 21, 2006): Accepting the permit is "an acknowledgment and agreement that" it "will comply with all [state] Rules, Regulations, and orders . . . and the conditions precedent to the granting of the permit"). Exxon chose to seek flexible permits, which limit aggregate emissions, rather than emissions from individual sources

directing courts to consider "the violator's full compliance history and good faith efforts to comply" when deciding whether, and if so how, to issue a civil penalty. 42 U.S.C. § 7413(e)(1). Just as a court applying ordinary equitable principles can consider whether the relevant violations are intermittent and all accidental or unavoidable, a court may do the same when assessing a civil penalty.

But those are not the circumstances here.

C. Exxon twists the trial record to play down the harm its repeated violations are causing, and will keep causing.

One might be forgiven, after reading Exxon's brief, for wondering why the plaintiffs brought this suit, as Exxon works overtime to suggest it did not violate *that many* Clean Air Act requirements, *that many* times, causing *that much* harm. Appellants' En Banc Br. 15. None of this is true. Just as importantly, hardly any of it is relevant to whether the plaintiffs had standing to sue. The extensive record showed that at the time the plaintiffs sued, Exxon was violating multiple permit requirements, repeatedly, in ways that harmed the plaintiffs.

Many of plaintiffs' claims address harms from pollution illegally emitted during refinery "upset events," which occur when, as an example, emission control equipment breaks. The trial established that Exxon violated the upset-

within the complex. ROA.16446-16447; *see also* 42 U.S.C. § 7661b(b) (requiring permittees to submit compliance plans).

pollution limitation on over 10,000 days. *See 2017 District Court Opinion*, 2017 WL 2331679, at *16.[8] Nearly 3,000 of those fell after the plaintiffs sued. ROA.51894-51895.

One Exxon upset-event limit violation involving hydrogen sulfide shows how its habitual violations of these limits harm the plaintiffs. Hydrogen sulfide is a chemical asphyxiant with an irritating odor that can cause coughing, headaches, nausea, and poor memory, even in low concentrations. *See* Appellees' En Banc Br. 29–30, 32; *see also 2021 District Court Opinion*, 524 F.Supp.3d at 562 n.56. Exxon must promptly report emissions of more than 100 pounds of hydrogen sulfide. *See 2021 District Court Opinion*, 524 F.Supp.3d at 556 n.15, 560.

On May 1, 2012, after the plaintiffs sued, a compressor trip caused a nine-hour upset event that included flaring and the release of 1,891 pounds of hydrogen sulfide. ROA.52165-52168. During events like this, witnesses see Exxon's flares from their homes and feel and hear loud explosions during some events. *See, e.g.*, ROA.16085-16089 (Cottar); ROA.17270-17275 (Sprayberry). During events like this—involving the emission of hydrogen sulfide more than 18 times over the reporting threshold—witnesses smelled noxious chemical

[8] The number of violations for each pollutant were calculated separately to determine which upset violations were repeated and, therefore, actionable.

odors that gave them headaches and kept them up at night and experienced adverse respiratory symptoms such as having trouble breathing. ROA.16077-16078 (Cottar); ROA.16098-16099 (Cottar). Some suffer from asthma, and their symptoms worsen when they are closer to Exxon's plant. ROA.16115-16120 (Cottar).

This example demonstrates the kinds of harms the plaintiffs experience when Exxon violates upset-event limits. Other pollutants released during upsets cause the same or similar harmful effects that hydrogen sulfide does. *See* Appellees' En Banc Br. 16–17, 27–32. Indeed, the district court examined specific upset-event violations and connected over 1,000 to flaring, 325 to smoke, 359 to pollutants that cause respiratory symptoms when emitted over reporting thresholds, and 320 to pollutants that cause odors when emitted over those thresholds. *See 2021 District Court Opinion*, 524 F.Supp.3d at 558, 560–564.

At trial, the plaintiffs' witnesses discussed their concerns about Exxon's pollution, these adverse impacts, and the changes they made to their lives to try and avoid them. For example, Ms. Aguirre doesn't run outdoors in Baytown, and Ms. Sprayberry avoids visiting friends that live near the plant. ROA.16171-16172; ROA.17292. Given the magnitude and frequency of Exxon's ongoing violations of the upset-emission limits, the plaintiffs' fears and actions were reasonable.

Another set of the plaintiffs' claims address harms from pollution illegally emitted in excess of pollutant-specific, hourly emission limits. *See 2017 District Court Opinion* at *16. Exxon repeatedly violated the hourly emission limits for individual pollutants and was in violation of hourly permit limits on 4,101 days at the Olefins and Chemical Plants. ROA.51897-51901. Over 1,500 of those fell after the plaintiffs sued. ROA.51898-51901.

An example of a violation of these hourly emission limits shows how these violations harm the plaintiffs. Exxon's permit limits carbon monoxide emissions from the Olefins Plant. These emissions cause respiratory impacts and contribute to smog. The permit also limits volatile organic compound emissions, including benzene, which is a carcinogenic hazardous air pollutant and can cause headaches with short term exposure. *See* Appellees' En Banc Brief 29–31; *see also 2021 District Court Opinion*, 524 F.Supp.3d at 562 & n.56. Exxon must promptly report emissions that exceed 5,000 pounds of carbon monoxide or 10 pounds of benzene. *See 2021 District Court Opinion*, 524 F.Supp.3d at 563; 30 Tex. Admin. Code § 101.1(89).

On January 8, 2013, after the plaintiffs sued, a compressor trip caused a ten-hour event, which caused flaring at two separate flares and released almost 23,350 pounds of unpermitted carbon monoxide and over 18,800 pounds of unpermitted volatile organic compounds, including over 1,540 pounds of

benzene. ROA.52436-52438. Violations like this contribute to the flaring-related harms just discussed. Violations like this also contribute to the plaintiff's reasonable health concerns. These carbon monoxide emissions were over four times the reporting threshold and benzene emissions were over 150 times the threshold. The plaintiffs testified to ongoing respiratory harms and concerns about emissions of cancer-causing chemicals. ROA.16116-16117 (Cottar); ROA.16120 (Cottar); ROA.16170 (Aguirre); ROA.17261-17262 (Sprayberry).

The 2013 violation is just one that shows the harm the plaintiffs experienced due to Exxon's repeated and significant violations of its plant-wide, pollutant-specific limits. Here too, the district court examined specific permit limit violations and connected 670 to flaring, 219 to smoke, 365 to pollutants that cause odors emitted in excess of reporting thresholds, and 887 to pollutants that cause respiratory or allergy symptoms emitted in excess of reporting thresholds. *See 2021 District Court Opinion*, 524 F.Supp.3d at 558, 560–564. Given the magnitude and frequency of Exxon's ongoing violations of the pollutant-specific limits, which included violations of each of 24 individual pollutant limits after this suit was filed, the plaintiffs reasonably feared that Exxon's violations would continue to harm them and reasonably modified their behavior to try and avoid that harm. ROA.51897-51901 (tallies by pollutant).

As a final example of the plaintiffs' claims, they seek relief from pollution that exceeded plant-wide limits on the emissions of highly reactive volatile organic compounds (HRVOCs). Those include 1,3-butadiene, isomers of butene, ethylene, and propylene. *2021 District Court Opinion*, 524 F. Supp. 3d at 562 n.57. The district court found that Exxon violated the HRVOC rule on 18 days. *See 2017 District Court Opinion*, 2017 WL 2331679, at *20. Eight of those days were after the plaintiffs sued. ROA.51902.

Exxon's permits limit HRVOC emissions like 1,3-butadiene because these compounds can cause respiratory or allergy-like symptoms and contribute to ground-level ozone (smog). *See 2021 District Court Opinion*, 524 F.Supp.3d at 563. In addition, 1,3-butadiene is also a hazardous air pollutant. 42 U.S.C. § 7412(b)(1). Exxon must promptly report 1,3-butadiene releases of more than 10 pounds. *2021 District Court Decision*, 524 F.Supp.3d at 563.

On February 2, 2011, an event at the Olefins Plant lasted over 114 hours, resulted in flaring at three flares, and released pollution exceeding HRVOC limits. ROA.52374-52378. This included 3,813 pounds of 1,3-butadiene. *Id.* This is illustrative of the harm caused by violations of the HRVOC limits, which caused flaring-related harm and contributed to plaintiffs' health concerns about exposure to respiratory pollutants and carcinogens, described above. ROA.17290-17291 (Sprayberry); ROA.17332 (Sprayberry). Here again, the

district court examined specific HRVOC violations and connected 15 to flaring and three to pollutants that contribute to respiratory symptoms. *See 2021 District Court Decision* at 558, 564 n.67. Each of the HRVOC violations are further evidence of the reasonableness of the plaintiffs' concerns regarding the future harm they would suffer from Exxon violations.

II. The Houston Region's Experience Shows The Important Role Citizen Suits Play In Implementing The Clean Air Act.

Citizen suits "supplement," *Stringer v. Town of Jonesboro*, 986 F.3d 502, 506 (5th Cir. 2021), enforcement of the Clean Air Act. Congress recognized the possibility that there might be too many violations and too few government resources to address them. And so, though enforcement is "primarily the work of government regulators," *id.*, Congress let the people harmed by violations sue to abate that harm. The Houston region's experience shows how persistent air pollution violations can outstrip governmental capacity, and the important role citizen suits play in realizing the Act's goals.

A. Persistent Clean Air Act violations in the Houston region harm residents' health and strain local budgets.

The Clean Air Act plays an important role in the Houston region. The City of Houston and Harris County must protect the health and well-being of 4.5 million residents from the harms of air pollution. They must also balance the needs of the energy industry, which generates a significant portion of that

pollution but also makes up a significant portion of the region's economy.[9] The Clean Air Act is essential to that balance: The City and County participate in permitting proceedings under the Act and monitor air quality and compliance with permits.

But in the Houston region's experience, the federal and state government lack resources to enforce the Act. Federal enforcement has declined since 2007, due in part to resource constraints and staffing limitations.[10] The state investigates only a small number of environmental violations. In 2022, the Texas Commission on Environmental Quality investigated 1,928 of 2,603 reported air incidents and issued administrative citations just 4% of the time (less than 0.02% of all air incidents).[11] The TCEQ explained that the decreased number of administrative enforcement orders from past years was "primarily due to significant staff turnover and vacancies and latent impacts of the COVID-19 pandemic."[12] There is no sign the "acute" problem will improve,

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[9] *See* Houston-Galveston Area Council, Harris County Economic Resilience Profile at 2 (2018), bit.ly/3osY08k.

[10] *See* U.S. EPA Office of Inspector General, Resource Constraints, Leadership Decisions, and Workforce Culture Led to a Decline in Federal Enforcement at 11–19 (May 13, 2021), bit.ly/41uPMv2.

[11] TCEQ, Annual Enforcement Report: Fiscal Year 2022 at tbls.7, 12, 13 (Nov. 2022), bit.ly/3H8f6Pq.

[12] *Id.* at 10.

and TCEQ still "lacks the personnel to execute its mission without risking deterioration in . . . services."[13]

Because of this, the Houston region's air quality continually fails to meet the standards needed to protect residents' health. The City of Houston and others have produced studies showing that ozone and particulate matter in the region's air "are almost certainly causing respiratory and cardiopulmonary effects" and "contributing to premature death."[14] In some cities, ozone rises slowly during the day, but the Houston region experiences rapid spikes of ozone due to industrial emission events.[15] And at least nine hazardous air pollutants are present in Houston's air at concentrations for which there is "[c]ompelling and convincing evidence of significant risk to the general or

[13] TCEQ, Overview of the Texas Commission on Environmental Quality, Written Testimony for the March 1, 2023, Public Hearing of the Senate Natural Resources & Economic Development Committee at 3 (2023), bit.ly/3LbaokW.

[14] Mayor's Task Force on the Health Effects of Air Pollution, *A Closer Look at Air Pollution in Houston: Identifying Priority Health Risks* at 13 (2007), bit.ly/41U9vEu.

[15] *See* David T. Allen, *Combining Innovative Science and Policy To Improve Air Quality in Cities with Refining and Chemicals Manufacturing: The Case Study of Houston, Texas, USA*, 11 FRONTIERS OF CHEMICAL SCIENCE AND ENG'G 293, 297–298 (2017) ("Almost without exception, air parcels with very high ozone concentrations . . . had back trajectories that indicated a substantial contribution of emissions from industrial source regions."); TexAQS II Rapid Science Synthesis Team, *Final Rapid Science Synthesis Report: Findings from the Second Texas Air Quality Study (TexAQS II)* at 6 (2007), bit.ly/3Apxwau.

vulnerable subgroups."[16] Exxon's Baytown complex contributes to all of these harms.[17]

These emissions harm the region's economy. Their health impacts lead to lost school and workdays, which affect household and regional economic welfare.[18] In 2015, particulate matter pollution in Houston contributed to more than 5,000 premature deaths and nearly $50 billion in economic costs.[19] Houston Emergency Medical Services responded to almost 12,000 emergency calls for asthma, between 2004 and 2011, costing almost $17 million.[20]

The City and County have devoted substantial resources to mitigating these and other problems caused by air pollution violations, including Exxon's. Both have spent significant amounts to increase air pollution monitoring and

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[16] *A Closer Look at Air Pollution in Houston*, *supra*, at 13.

[17] *See, e.g.*, ROA.63889-63890 (plaintiffs' expert report); Appellees' En Banc Br. 20 (discussing release of 473 pounds of benzene in a single emission event that occurred during trial).

[18] *See, e.g.*, EPA, The Benefits and Costs of the Clean Air Act from 1990 to 2020 Summary Report at 14 (March 2011), bit.ly/40LETEc (showing health effects of particulate matter and ozone including lost school and workdays).

[19] Letter from Sylvester Turner, Mayor, City of Houston, to Toby Baker, Director, TCEQ (May 14, 2020), bit.ly/3L4m2OA; *see generally* Nikolaos Zirogiannis, et al., *Understanding Excess Emissions from Industrial Facilities: Evidence from Texas*, 52 ENVTL. SCI. TECH. 2482 (2018) (discussing impacts on Texas).

[20] Loren H. Raun, et al., *Using Community Level Strategies to Reduce Asthma Attacks Triggered by Outdoor Air Pollution: A Case Crossover Analysis*, 13 ENVTL. HEALTH 58 at 2 (2014), bit.ly/41AUR56.

enforcement capacity.[21] And the County responds when things go wrong at Exxon. Though Exxon makes light of how often its facilities catch fire, Appellants' En Banc Br. 13, even a small fire at a facility with large quantities of highly combustible chemicals presents a significant risk.[22]

B. The Clean Air Act's citizen suit provision plays a necessary role in addressing these harms.

As all of this shows, air pollution violations impose real costs, and the government cannot stop them all. That's why Congress empowered people to abate air pollution that is harming them. Exxon says in passing that citizen suits may raise separation of powers concerns. Appellants' En Banc Br. 5, 29. Its claim rests on the false premise that the plaintiffs are not harmed by Exxon's violations and lack an interest in ending them. *See supra* p. 14–20. In any event, history and the Clean Air Act's structure shows that there is nothing new, or troubling, about letting a person harmed by pollution sue to stop that harm.

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[21] City of Houston, Resilient Houston at 86, 156 (2020), bit.ly/3AqWdU9; Rachel Estrada, Harris County Monitoring Air Quality, Environment, CW39 HOUSTON (Jan. 29, 2021), bit.ly/3oCQbgw.

[22] Nearby incidents prove this. *See, e.g.*, U.S. Chem. Safety & Hazard Investigation Bd., Explosion and Fire at KMCO Chemical Facility at 5 (2019) (pipe leak caused a vapor cloud that exploded, killing one, seriously burning two, injuring 30, and requiring a shelter-in-place order within a one-mile radius), bit.ly/3LkRRUJ; U.S. Chem. Safety & Hazard Investigation Bd., Storage Tank Fire at Intercontinental Terminals Company, LLC (ITC) Terminal at 5 (2019) (fire near a chemical tank burned for three days, requiring shelter-in-place orders), bit.ly/3L3yX3d.

At common law, a private person could sue to abate a public nuisance, such as polluted air. *See* Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement*, 34 BUFF. L. REV. 833, 948 n.283 (1985). As this Court has recognized, to do so, he just needed to "show that he had suffered damage particular to him and not shared in common"—in modern terms, a particularized injury. *Cranor v. 5 Star Nutrition, L.L.C.*, 998 F.3d 686, 692 (5th Cir. 2021) (quotation omitted). There's no question that pollution was viewed as a public nuisance. *See, e.g.*, *id.* (collecting sources and listing acts that prevent the use of "infrastructure like a road or bridge without confronting a malarial pond, obnoxious noises, or disgusting odors" or "illegally emit[] pollution or disease that damages . . . the public" as examples of public nuisances).

Allowing private suits to complement government enforcement dates back "at least 600 years in Anglo-American law." Boyer & Meidinger at 946–947. In 1388, the English Parliament enacted a water pollution law that paired its prohibitions with an enforcement scheme that will seem familiar. Public officials could enforce the law; so could "others who 'feel themselves grieved' or who 'will complain.' " *Id.* at 947.

This tradition has shown that allowing a person to sue to abate these kinds of harms has real benefits. Even Exxon's amici agree. *See* Industry Amici En Banc Br. 8 (recognizing citizen suits serve an "important" purpose). The

benefits range from the tangible—such as increased compliance with duly enacted laws because of a greater deterrent effect from greater enforcement capacity—to the intangible—such as increased citizen participation in government and strengthened democratic values. *See* Stephen B. Burbank, *et al.*, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 663–666 (2013).

The breadth of plaintiffs who invoke citizen-suit provisions confirms their value. Ranchers whose waters were depleted, homeowners whose land was contaminated, hunters whose hunting grounds were damaged, Tribes and fishing associations whose fishing spots were degraded, and cities whose neighborhoods were polluted use these provisions to abate harm.[23] Companies invoke them too. *See* David E. Adelman & Jori Reilly-Diakun, *Environmental Citizen Suits and the Inequities of Races to the Top*, 92 U. COLO. L. REV. 377, 401, 417 tbl.4 (2021).

Congress structured the citizen-suit provision to achieve these benefits while preserving the federal government's (and state governments') primary role in enforcing federal law.

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[23] *See Bennett v. Spear*, 520 U.S. 154, 281 (1997) (ranchers and irrigation districts); *Stringer v. Jonesboro*, 986 F.3d 502 (5th Cir. 2021) (landowner); *Helena Hunters & Anglers v. Marten*, 470 F. Supp. 3d 1151 (D. Mont. 2020) (hunters); *Yurok Tribe v. U.S. Bureau of Reclamation*, 231 F. Supp. 3d 450 (N.D. Cal. 2017) (Tribe, fishing associations); *City of Mountain Park v. Lakeside at Ansley, LLC*, No. 1:05-CV-2775-CAP, 2011 WL 13167917 (N.D. Ga. July 21, 2011) (city).

The provision ensures that the government can both end a citizen suit before it begins and control the outcome before it ends. If the government "has commenced and is diligently prosecuting a civil action" in court "to require compliance," then a plaintiff cannot sue. 42 U.S.C. § 7604(b)(1)(B). A plaintiff must give the relevant agencies at least 60 days' notice before suing, which allows them to bring an action (if one is not underway) and preclude the suit. *Id.* § 7604(b)(1)(A). Or an agency can sit back and later "intervene as a matter of right at any time." *Id.* § 7604(c)(2); *see also Bennett*, 520 U.S. at 164–165. And a court may enter a consent decree only after the federal government has had at least 45 days to comment and intervene. 42 U.S.C. § 7604(c)(3).

These statutory guardrails serve their purpose. The vast majority of citizen-suits-to-be (about 90%) don't get past the notice letter stage. *See* Adelman & Reilly-Diakun at 401–402. The number of suits filed is low, about 70 per year. *See id.* (studying suits under EPA-administered statutes from 1995 through 2002); *see also id.* at 410–411 (explaining that "[t]he overall trend . . . is relatively flat"). Many suits were against the government, for example, to challenge a regulation, not against a violator. *See id.* at 416. When citizen-suit plaintiffs sued violators, "virtually all" suits "settled under consent decrees," indicating that citizen-suit plaintiffs bring important, meritorious cases. *Id.* at 402–403.

* * *

In sum, those who repeatedly violate the Clean Air Act impose real harm on the people who bear the brunt of that pollution, and the communities they live in. Instead of leaving them powerless to stop that harm, Congress let them sue. That's all the plaintiffs are trying to do here.

CONCLUSION

For these reasons, this Court should affirm the District Court's judgment.

Respectfully submitted,

April 26, 2023

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on April 26, 2023. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,493 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.1.

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