No. 17-20545

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ENVIRONMENT TEXAS CITIZEN LOBBY, INC.;
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, HOUSTON DIVISION; NO. 4:10-CV-4969

SUPPLEMENTAL BRIEF FOR THE CITY OF HOUSTON, HARRIS COUNTY ATTORNEY, AND AIR ALLIANCE HOUSTON AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND IN SUPPORT OF AFFIRMANCE

Arturo G. Michel
CITY ATTORNEY

Suzanne R. Chauvin
Chief, General Litigation Section
CITY OF HOUSTON LEGAL DEPARTMENT
900 Bagby Street, 4th Floor
Houston, Texas 77002
Phone: 832.393.6219

Counsel for Amicus Curiae
City of Houston

Christian D. Menefee
HARRIS COUNTY ATTORNEY

Michael Hull
Senior Assistant County Attorney
1019 Congress, 15th Floor
Houston, Texas 77002
Phone: 713.274.5138

Counsel for Amicus Curiae
Harris County Attorney

(List of additional counsel inside cover.)

(Continuation of Counsel)

Kelly Haragan
ENVIRONMENTAL CLINIC
University of Texas School of Law
727 East Dean Keeton
Austin, TX 78705
Phone: 512.232.2654

Emma C. Cheuse
EARTHJUSTICE
1001 G Street, NW Suite 1000
Washington, DC 20001
Phone: 202.667.4500 ext. 5220

Mary Rock (on brief)
EARTHJUSTICE
311 S Wacker, Suite 1400
Chicago, IL 60606
Phone: 312.800.8336

Counsel for Amicus Curiae
Air Alliance Houston

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record hereby certifies that, in addition to the persons and entities previously listed in the Certificate of Interested Parties contained in Plaintiffs-Appellees' Brief, DN0051604698, the following additional listed persons and entities have an interest in the outcome of this case, as described in the fourth sentence of Fifth Circuit Rule 28.2.1. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Additional Persons and Entities Affiliated With Amici Curiae In Support of Plaintiffs-Appellees:

1. Air Alliance Houston, *Amicus Curiae*;
2. Earthjustice, Emma Cheuse and Mary Rock (Counsel for Air Alliance Houston);
3. University of Texas School of Law Environmental Clinic, Kelly Haragan (Counsel for Air Alliance Houston);
4. City of Houston, *Amicus Curiae*, and Counsel: Arturo G. Michel, City Attorney, and attorneys Suzanne Chauvin and Collyn Peddie;
5. Harris County Attorney Christian Menefee, *Amicus Curiae*; and Counsel: Michael Hull, Sarah Utley.

Respectfully submitted,

/s/ Emma C. Cheuse
Emma C. Cheuse

Counsel for Amicus Curiae Air Alliance Houston

TABLE OF CONTENTS

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES...iv

RULE 29 STATEMENTS OF *AMICI CURIAE* 1

INTRODUCTION 3

ARGUMENT...4

I. FAITHFUL IMPLEMENTATION OF CITIZEN ENFORCEMENT IS ESSENTIAL TO THE RULE OF LAW. 4

A. Citizen enforcement has an esteemed history in American law. 5

B. Congress crafted a citizen suit provision in the Clean Air Act that respects executive enforcement authority...........................8

C. Houston and Harris County have a strong need for the relief ordered here to curb Exxon's clean air violations. 11

II. WELL-SETTLED ARTICLE III STANDING JURISPRUDENCE SUPPORTS THE DISTRICT COURT'S TRACEABILITY FINDINGS. 15

A. The District Court applied this Court's 2020 decision and binding precedent to order a new penalty. 15

B. *TransUnion* did not alter the standing test for associational plaintiffs in citizen suits. 18

III. DETERRING VIOLATIONS DEPENDS ON RECOUPING THE ECONOMIC BENEFIT OF NONCOMPLIANCE. 26

CONCLUSION...28

CERTIFICATE OF SERVICE...30

CERTIFICATE OF COMPLIANCE 31

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Adams v. Woods,
2 Cranch 336 (1805) (Marshall, C.J.) 6

Bennett v. Spear,
520 U.S. 154 (1997)....................5, 6

City of Evanston v. Texaco,
19 F. Supp. 3d 817 (N.D. Ill. 2014)....................15

City of Mountain Park v. Lakeside,
No. 1:05-CV-2775-CAP, 2011 WL 13167917 (N.D. Ga. 2011) 15

Contender Farms v. U.S. Dept. of Agriculture,
779 F.3d 258 (5th Cir. 2015) 16

Cranor v. 5 Star Nutrition, LLC,
998 F.3d 686 (5th Cir. 2021) 7

Env't Texas Citizen Lobby v. ExxonMobil,
968 F.3d 357 (5th Cir. 2020) (*ETCL II*) 6, 16-24, 27

Env't Texas Citizen Lobby v. ExxonMobil,
824 F.3d 507 (5th Cir. 2016) (*ETCL I*)....................9, 27, 28

Friends of the Earth v. Carey,
535 F.2d 165 (2d Cir. 1976) 6, 10

Friends of the Earth v. Laidlaw Environmental Services,
528 U.S. 167 (2000)....................14, 19, 20, 22, 24

Garner v. Kennedy,
713 F.3d 237 (5th Cir. 2013) 17

Helena Hunters & Anglers v. Varten,
470 F. Supp. 3d 1151 (D. Mont. 2020)....................15

Hunt v. Washington State Apple Advert. Comm'n,
432 U.S. 333 (1977)....................26

Int'l Union, UAW v. Brock,
477 U.S. 274 (1986)....................26

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992).................... 19-20

Marvin v. Trout,
199 U.S. 212 (1905)....................6

Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms & Explosives,
700 F.3d 185 (5th Cir. 2012) 26

Natural Res. Def. Council v. EPA,
749 F.3d 1055 (D.C. Cir. 2014)....................21

Natural Res. Def. Council v. Train,
510 F.2d 692 (D.C. Cir. 1974)....................8

Sierra Club v. BP Prods.,
2021 WL 1399805 (N.D. Ind. Apr. 14, 2021) 18

Sierra Club v. Cedar Point Oil Co.,
73 F.3d 546 (5th Cir. 1996) 22, 26

Sierra Club v. EPA,
755 F.3d 968 (D.C. Cir. 2014)....................24

Sierra Club v. TVA,
430 F.3d 1337 (11th Cir. 2005) 24

Stringer v. Jonesboro,
986 F.3d 502 (5th Cir. 2021) 15

Texans United v. Crown Cent. Petrol.,
207 F.3d 789 (5th Cir. 2000) 18, 20, 22, 24

TransUnion LLC v. Ramirez,
141 S. Ct. 2190 (2021).................... 4, 18-26

United States v. Mun. Auth.,
150 F.3d 259 (3d Cir. 1998) 27

Vermont Agency of Nat. Resources v. U.S. ex rel. Stevens,
529 U.S. 765 (2000) 5-7

Yurok Tribe v. U.S. Bureau of Reclamation,
231 F. Supp. 3d 450 (N.D. Cal. 2017) 15

STATUTES

15 U.S.C. § 1681n(a) 23

42 U.S.C. § 7413(e) 23, 28

42 U.S.C. § 7413(e)(1) 27

42 U.S.C. § 7604(a) 8, 15

42 U.S.C. § 7604(b)(1)(A) 9

42 U.S.C. § 7604(b)(1)(B) 9

42 U.S.C. § 7604(c)(2) 10

42 U.S.C. § 7604(c)(3) 10

FEDERAL REGISTER NOTICE

U.S. Environmental Protection Agency, 81 Fed. Reg. 13,638,
(Mar. 2016) 13

LEGISLATIVE HISTORY

S. Rep. No. 101-228 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385 8

LAW JOURNALS

B. Boyer *et al.*, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*,
34 Buff. L. Rev. 833 (1985) 5, 6, 7

S. Burbank *et al.*, *Private Enforcement*, 17 Lewis & Clark L. Rev. 637
(2013) 7

C. Giles, *Next Generation Compliance*, Harv. Law, Envtl. & Energy
Law 3, 28-29 (Apr. 14, 2020) 5

GOVERNMENT DOCUMENTS

EPA Ofc. of Inspector Gen., *Resource Constraints, Leadership Decisions, And Workforce Culture Led to a Decline in Federal Enforcement, No. 21-P-0132* (May 13, 2021), https://www.epa.gov/sites/default/files/2021-05/documents/_epaoig_20210513-21-p-0132_0.pdf 9

EPA, Stationary Source Civil Penalty Policy (1991), https://www.epa.gov/sites/production/files/documents/penpol.pdf 9, 14

EPA, Benefits and Costs of the Clean Air Act 1990-2020, https://www.epa.gov/clean-air-act-overview/benefits-and-costs-clean-air-act-1990-2020-second-prospective-study 11

TCEQ, *Annual Enforcement Report Fiscal Year 2020*, https://www.tceq.texas.gov/assets/public/compliance/enforcement/enf_reports/AER/FY20/enfrptfy20.pdf 9

U.S. Chemical Safety Board, *Storage Tank Fire at Intercontinental Terminals Company, LLC: Factual Update* (Oct. 30, 2019), https://www.csb.gov/assets/1/20/itc_factual_update_2019-10-30.pdf?16522.. 13-14

SCIENTIFIC MATERIALS

M. Petroni et al., *Hazardous air pollutant exposure as a contributing factor to COVID-19 mortality in the United States*, Env't Rsrch. Letters 15 (2020), https://iopscience.iop.org/article/10.1088/1748-9326/abaf86/pdf...........................11

X. Wu et al., *Air pollution and COVID-19 mortality in the United States*, Science Advances 6(45) (2020), https://advances.sciencemag.org/content/6/45/eabd4049 11

Am. Lung Ass'n, *New Report: Texas Air Still Failing* (Apr. 2021), https://www.lung.org/media/press-releases/texas-sota-2021 12-13

RULE 29 STATEMENTS OF *AMICI CURIAE*

Amici Curiae are local governments serving the people of Houston and Harris County, Texas, and a nonprofit organization dedicated to securing clean, healthful air for Houston residents. *Amici* share an interest in ensuring enforcement of the Clean Air Act to protect public health and quality of life.[1] Counsel for all parties have stated they consent to the filing of this amicus brief.[2]

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

Harris County Attorney Christian Menefee is the chief civil lawyer for Harris County, representing Harris County in all civil matters filed in the state and federal courts and is responsible for enforcing the statutes and regulations designed to protect the health and environment of Harris County residents.

---

[1] *Amici* cite and rely on their prior briefs: Houston Br. II, Case No. 17-20545, DN00514438718; Houston Br. I, No. 15-20030, DN00513053135.

[2] No party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than *Amici,* their members, or their counsel contributed money intended to fund the brief's preparation or submission. *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.

Air Alliance Houston is a 501(c)(3) nonprofit organization working to reduce the public health impacts from air pollution and advance environmental justice through applied research, education, and advocacy.

INTRODUCTION

Over a decade ago, Plaintiffs-Appellees brought a citizen enforcement suit to remedy and deter repeated clean air violations at Exxon's petrochemical complex in Baytown, Texas. These violations forced their members to breathe unhealthy air and live under polluted skies. The government allowed this citizen suit to proceed. For years, even after it stopped disputing the violations, Exxon has tried to avoid accountability while receiving economic benefits from noncompliance. Its latest delay tactic is to attack citizen enforcement and settled Article III standing precedent through this supplemental appeal. This Court should affirm the District Court's careful remand ruling and reject Exxon's latest attempt to distort the law and prolong this litigation. Enough is enough; the law is well-settled and relief is overdue. Neither *en banc* review nor additional remand is warranted.

At this stage, Exxon does not dispute its pervasive Clean Air Act violations. Rather, Exxon disputes that organizations whose members neighbor its facility and suffer from its pollution can ask a court to remedy and deter future violations, based on two arguments that should be rejected. First, Exxon mischaracterizes the role of citizen enforcement as problematic. But air pollution is the problem, and Exxon's attack on citizen suits runs counter both to the design and purpose of the Act and the long tradition of supplemental private enforcement as a storied part of American law.

Second, in a misplaced effort to ask this Court to reverse its holding on standing from last year, Exxon mischaracterizes a recent Supreme Court decision. *TransUnion* solely concerns how an individual class-action plaintiff can show standing to win *damages* for past injuries—a form of relief neither sought nor at issue in this enforcement case brought by associational plaintiffs to end and *prevent* clean air violations. More importantly, *TransUnion* reaffirms the standing found by the District Court and did not disturb this Court's precedent.

This Court also should reject Exxon's request to split hairs on the penalties available under the Clean Air Act. Parsing the economic benefit Exxon received through delaying substantial pollution control investments is both unnecessary under this statute and impracticable for courts to implement.

Exxon committed, on average, one Clean Air Act violation every day during the time covered by this case—unlawfully releasing pollutants known to cause serious harm to the health of Houston and Harris County residents. These violations require at least the meaningful penalty ordered by the District Court.

ARGUMENT

I. FAITHFUL IMPLEMENTATION OF CITIZEN ENFORCEMENT IS ESSENTIAL TO THE RULE OF LAW.

Exxon attempts to avoid accountability for its illegal actions by questioning the core function of citizen suits and calling this merely a case of "enforcing general compliance with regulatory law." Exxon Supp. Br. 37, 42. But citizen

suits have a deep common-law and historical pedigree. Governmental enforcement can only go so far, leaving significant noncompliance unresolved.[3] Congress addressed this problem in the Clean Air Act when it authorized citizen suits to complement governmental enforcement and improve compliance with federal law, following a hallowed tradition of citizen participation in enforcement. The implementation of that tradition through faithful application of the Act's citizen suit provision here will ensure Exxon cannot escape accountability under federal law due to the identity of its enforcer.

A. Citizen enforcement has an esteemed history in American law.

Environmental citizen suits in U.S. laws developed from the "long tradition" of private enforcement through measures such as *qui tam* suits by individuals acting as private attorneys general, to supplement governmental enforcement. *Vermont Agency of Nat. Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 774 (2000).[4] Private enforcement measures to protect public health and safety have

---

[3] *See, e.g.*, C. Giles, *Next Generation Compliance*, Harv. Law, Envtl. & Energy Law 3, 28-29 (Apr. 14, 2020), http://eelp.law.harvard.edu/wp-content/uploads/Cynthia-Giles-Part-2-FINAL.pdf (environmental law "violations are common"; "Significant violations occur at 25% or more of facilities in nearly all programs for which there is compliance data. For many programs with the biggest impact on health, serious noncompliance is much worse . . . . violation rates of 50% to 70% are not unusual.").

[4] *See, e.g.*, B. Boyer *et al.*, *Privatizing Regulatory Enforcement*, 34 Buff. L. Rev. 833, 835 (1985) (discussing qui tam action as historical antecedent of environmental citizen suits); *see also Bennett v. Spear*, 520 U.S. 154, 164-165

existed "for at least 600 years in Anglo-American law."[5] This Court has recognized that connection, and it warrants emphasis here because of its importance for *Amici* who seek to ensure that this tradition continues effectively in Texas. *Env't Texas Citizen Lobby v. ExxonMobil*, 968 F.3d 357 (5th Cir. 2020) ("*ETCL II*").

Justice Scalia traced the history of citizen suits back to the thirteenth century, "when private individuals who had suffered injury began bringing actions in the royal courts on both their own and the Crown's behalf," up through the pre- and post-Constitutional framing period in the United States. *Vermont*, 529 U.S. at 774-76. For example, an American colonial law "allow[ed] informers to sue for, and receive share of, fine imposed upon officers who neglect their duty to pursue privateers and pirates." *Id.* at 776-77 (citing sources). American citizen enforcement actions "have been in existence . . . ever since the foundation of our government." *Marvin v. Trout*, 199 U.S. 212, 225 (1905).[6] In the nineteenth

(1997) ("the obvious purpose of [citizen suit provision] . . . is to encourage enforcement by so-called 'private attorneys general'"); *Friends of the Earth v. Carey*, 535 F.2d 165, 170, 172-73 (2d Cir. 1976) (same for Clean Air Act).

[5] 34 Buff. L. Rev. at 946-52 (citing early environmental law with dual system of public and private enforcement).

[6] *See, e.g.*, *Adams v. Woods*, 2 Cranch 336, 341 (1805) (Marshall, C.J.) ("Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt [qui tam] as well as [by a public prosecutor]").

century, such tools became used "to increase the costs of [law-breaking] by increasing the penalties and to enlist the citizenry in the enforcement process."[7]

Notably, the Supreme Court held that a plaintiff's basis for standing in *qui tam* suits is not the interest in a financial bounty, but the assignment of the United States' standing and claim to the private attorney general. *Vermont*, 529 U.S. at 773. Although Article III is fully satisfied here, it is illuminating that the tradition from which this claim originates provided an additional ground for standing, as a citizen steps into the government's shoes. *Cf. Cranor v. 5 Star Nutrition, LLC*, 998 F.3d 686, 691 (5th Cir. 2021) (finding sending unsolicited text "akin to someone who illegally emits pollution . . . that damages members of the public" and citing the relevance of English and American legal tradition).

The tradition of private enforcement stems in part from its sizeable benefits, including: increasing resources for enforcement, shifting certain burdens and costs from the public to the private sector, ensuring enforcement occurs where needed, encouraging innovation, increasing deterrence and compliance, reducing government action in the economy, and expanding public participation in governance.[8] Its effectiveness depends on ensuring that private enforcers as well

---

[7] 34 Buff. L. Rev. at 953.

[8] *See, e.g.*, S. Burbank *et al.*, *Private Enforcement*, 17 Lewis & Clark L. Rev. 637, 662-66 (2013).

as the government are able to ensure compliance and win remedies to deter future violations.

B. Congress crafted a citizen suit provision in the Clean Air Act that respects executive enforcement authority.

This Court should reject Exxon's attempt to circumvent the use of the Clean Air Act citizen suit provision here to complement governmental enforcement, and instead should reaffirm its use as part of the longstanding tradition of private attorneys general to deter violations. 42 U.S.C. § 7604(a).[9] Providing a clean air citizen enforcement provision "reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced." *Natural Res. Def. Council v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1974).[10] A core goal of the citizen suit provision is deterrence—assuring citizens can win "civil penalties for violations of the Act" is "necessary for deterrence, restitution and retribution," with penalties won going to the U.S. Treasury rather than individual plaintiffs. S. Rep. No. 101-228, at 373 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3756.

---

[9] *See e.g.*, Houston Br. II at 12-14 (citing legislative history).

[10] *Id.* at 12 n.29, 13 n.34 (citing legislative history: "the Government simply is not equipped to take court action against the numerous violations of legislation of this type which are likely to occur"); "[f]acilities subject to the requirements of the Act must know that compliance is the best and least expensive route for them to choose"; "we must also ensure that the resulting legislation is fully enforceable . . . citizen suit provisions are the key to that.").

The need for effective citizen enforcement is stark in Texas, where the state brings enforcement actions for only a small percentage of the documented environmental violations. For example, in 2020, the Texas Commission on Environmental Quality (TCEQ) issued notices of violation for only 5% of the unauthorized air pollution releases industry reported.[11] Federal environmental enforcement has also dramatically declined since 2007 due in part to resource constraints and staffing limitations.[12]

In such instances, nongovernmental parties, like Plaintiffs-Appellees, are authorized to serve "[a]s a supplement to the enforcement authority vested in the EPA and state regulatory agencies like the TCEQ." *Env't Texas Citizen Lobby v. ExxonMobil*, 824 F.3d 507, 513 (5th Cir. 2016) ("*ETCL I*").[13] First, the Act requires plaintiffs give government enforcers pre-suit notice and includes a diligent prosecution bar that the government may use to prevent a citizen suit from proceeding. 42 U.S.C. § 7604(b)(1)(A)-(B). A suit may only be filed if the government allows it to proceed.

---

[11] TCEQ, *Annual Enforcement Report Fiscal Year 2020*, 5-1, 5-6, https://www.tceq.texas.gov/assets/public/compliance/enforcement/enf_reports/AER/FY20/enfrptfy20.pdf; *see also* Houston Br. II at 12-13.

[12] EPA Ofc. of Inspector Gen., *Resource Constraints, Leadership Decisions, and Workforce Culture Led to a Decline in Federal Enforcement, No. 21-P-0132*, 11-19 (May 13, 2021), https://www.epa.gov/sites/default/files/2021-05/documents/_epaoig_20210513-21-p-0132_0.pdf.

[13] *See also* Houston Br. II at 13 (citing EPA, Stationary Source Civil Penalty Policy (1991)). https://www.epa.gov/sites/production/files/documents/penpol.pdf.

Second, the Act allows the government to join and take over a citizen's action through intervention "as a matter of right at any time." *Id.* § 7604(c)(2). Third, a court may only enter a consent decree in a citizen suit after the United States has had a 45-day opportunity to comment and intervene. *Id.* § 7604(c)(3). That the Act preserves the executive branch's role as lead enforcer and authorizes it to prevent or replace any citizen in an enforcement suit debunks Exxon's argument that this type of action somehow threatens separation of powers—along with the fact that Article III is met.

Contrary to Exxon's arguments, Congress determined that citizens should be "welcomed participants in the vindication of environmental interests" when government entities lack the will or resources to enforce permits. *Friends of the Earth v. Carey*, 535 F.2d at 172. Faithfully applying the citizen suit provision, consistent with tradition, requires rejecting Exxon's claim that Plaintiffs-Appellees should obtain a penalty for only 40 days of violations. They have demonstrated standing to warrant the penalty ordered—and, to work, a citizen suit remedy must bear resemblance to what a government enforcer could win. A government enforcer could obtain a penalty award for each violation. Exxon must not be able to escape a meaningful remedy simply because citizen plaintiffs brought this enforcement suit.

C. Houston and Harris County have a strong need for the relief ordered here to curb Exxon's clean air violations.

The benefits of enforcing Clean Air Act regulations and permits are substantial for local governments and localities like ours—and far outweigh the costs of implementation.[14] The annual benefits from cleaner air include about 237,000 avoided premature deaths, 120,000 fewer hospital admissions, 2.4 million fewer cases of severe asthma, 22.4 million school and workdays saved, and net economic benefits of up to $2 trillion for the U.S. economy.[15]

But noncompliance continues to threaten public health. This has become even clearer since early 2020 when a respiratory pandemic hit and people in areas like Houston with unhealthy air quality died more quickly and faced worse COVID-19 outcomes.[16] The Act can only benefit public health if it is enforced.

The need for imposition of a serious penalty is clear. Applying *ETCL II* based on the evidence, the District Court reduced the number of days of violation to be 3,651 (from over 12,000), and decreased the penalty by about $5 million.

---

[14] *See* Houston Br. II at 4-5.

[15] EPA, Benefits and Costs of the Clean Air Act 1990-2020, https://www.epa.gov/clean-air-act-overview/benefits-and-costs-clean-air-act-1990-2020-second-prospective-study.

[16] X. Wu et al., *Air pollution and COVID-19 mortality in the United States*, Science Advances 6(45) (2020), https://advances.sciencemag.org/content/6/45/eabd4049; *see also,* M. Petroni et al., *Hazardous air pollutant exposure as a contributing factor to COVID-19 mortality in the United States*, Env't Rsrch. Letters 15 (2020), https://iopscience.iop.org/article/10.1088/1748-9326/abaf86/pdf.

ROA.75451, ROA.75478. Affirming the penalty ordered by the District Court is critical for Houston and Harris County, an area with over 400 petrochemical manufacturing facilities that emit health-threatening chemicals.

For years Exxon's illegal emissions exposed residents of this region to harmful pollution—well-documented in the record.[17] During the eight-year period this case covers, Exxon committed "more than one violation per day," on average, a devastating noncompliance record for people breathing air nearby. ROA.75464. The violations caused about 10 million pounds of air pollution to be released. ROA.75474.

During the time this case has been pending, this region's residents continue to breathe Exxon's pollution and face serious health consequences from unhealthy air.[18] Exxon's emissions contributed to spikes in ozone and hazardous air that can harm the heart, nervous system, and child development, and can cause cancer, asthma, and early death.[19]

The costs for local government—including to address the negative consequences of Exxon's illegal emissions on the city's health and ability to attract

[17] Houston Br. II at 5-9; *see also id.* at 7 & n.14 (noting Exxon's extreme noncompliance); ROA.75451.
[18] Houston Br. II at 7 & n.14 (citing sources).
[19] *Id.* at 5-9; *see also* Am. Lung Ass'n, *New Report: Texas Air Still Failing* (Apr. 2021), https://www.lung.org/media/press-releases/texas-sota-2021.

investment—are an additional component of the harm Exxon caused.[20] Among other recent initiatives, Harris County has deployed $1.1 million to develop a new air monitoring network and significantly expand its Pollution Control Services Department. The City and County have begun to create an inventory of monitoring equipment, expand monitoring capability, and identify facilities that most threaten public health.[21]

Amici also must expend significant resources to respond to emergency, life-threatening incidents like those that Exxon's fires and other problems can cause. Even seemingly small violations can turn deadly and "potentially lead to a catastrophic release."[22] Affirming the District Court's penalty is crucial to deter such harm and to demonstrate to Exxon and other facilities that, if they violate the Act, there is a reasonably high likelihood of serious enforcement penalties.

---

[20] Houston Br. II at 9-10.

[21] Env't Def. Fund, *New Multi-Agency Effort Aims to Reduce Air Pollution, Disaster Risk in Houston* (2020), https://www.edf.org/media/new-multi-agency-effort-aims-reduce-air-pollution-disaster-risk-houston; *see also* Houston Br. II at 10-11 (describing enforcement actions, air pollution ordinances, and an action plan).

[22] *See, e.g.*, U.S. Envtl. Prot. Agency, 81 Fed. Reg. 13,638, 13,651 (Mar. 2016); Houston Br. II at 21-23 (citing sources). A 2019 fire at another nearby petrochemical facility is illustrative of how a violation can get out of control, causing a ripple effect of crises—the fire spread, blazed for three days, led to a toxic chemical release, required the community to shelter in place, and forced schools and businesses to close or modify operations. *See* U.S. Chemical Safety Board, *Storage Tank Fire at Intercontinental Terminals Company, LLC: Factual Update* (Oct. 30, 2019), https://www.csb.gov/assets/1/20/itc_factual_update_2019-10-30.pdf?16522.

Air monitoring and local actions alone cannot protect local air quality and public health. Enforcement of bedrock clean air protections, incorporated into permits, is critical to the region's success in protecting public health. To deter future noncompliance, there must be visible and meaningful relief assessed against facilities, like Exxon, with a longstanding pattern of serious violations of the Act's health-based requirements. *See, e.g.*, *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167, 186 (2000) ("an actual award of civil penalties does in fact bring with it a significant quantum of deterrence over and above what is achieved by the mere prospect of such penalties").[23] The penalty issued on remand—$14.2 million—is meaningful and attempts to recoup the ill-gotten gains Exxon received from noncompliance. After the repeated rulings and careful deliberation of this Court and the District Court, Exxon's refusal to accept responsibility and pay a statutory penalty for its violations has become more dangerous to the rule of law. If Exxon were to succeed in avoiding a significant penalty here for undisputed violations, not only will Exxon be encouraged to avoid compliance at other facilities but so could other similarly-situated facilities.

Citizen suits are a vital tool for local governments, including *Amici,* to be able to employ against local facilities like Exxon who flout clean air standards and

[23] *See also* EPA, Stationary Source Civil Penalty Policy (1991), 3-19, https://www.epa.gov/sites/production/files/documents/penpol.pdf (penalties should be calculated to achieve goal of deterrence and remove benefit of noncompliance).

permits.[24] Exxon's attempts to undermine application of the citizen suit provision here thus threaten the ability of local governments, and "any person," 42 U.S.C. § 7604(a), such as hunters, fishers, and landowners, who may wish to seek their day in court to address violations of federal law.[25]

II. WELL-SETTLED ARTICLE III STANDING JURISPRUDENCE SUPPORTS THE DISTRICT COURT'S TRACEABILITY FINDINGS.

In this new appeal, Exxon primarily attacks this Court's prior holding, contending this Court should narrow the standing test to squeeze out nearly all of the thousands of undisputed violations. This Court's prior opinions rely on precedent that remains good law. This Court should affirm the District Court's ruling and, if anything, should expand not further constrict its standing holding.

A. The District Court applied this Court's 2020 decision and binding precedent to order a new penalty.

Air pollution from Exxon diminishes Plaintiffs-Appellees' members' use and enjoyment of areas near the complex, and those injuries readily satisfy the

---

[24] *See, e.g.*, *City of Evanston v. Texaco*, 19 F. Supp. 3d 817 (N.D. Ill. 2014) (city sued regarding petroleum contamination); *City of Mountain Park v. Lakeside*, No. 1:05-CV-2775-CAP, 2011 WL 13167917 (N.D. Ga. 2011) (city sued to stop illegal discharges).

[25] *See*, *e.g.*, *Stringer v. Jonesboro*, 986 F.3d 502 (5th Cir. 2021) (landowner brought environmental citizen suit for spraying sewage onto her property); *Helena Hunters & Anglers v. Varten*, 470 F. Supp. 3d 1151 (D. Mont. 2020) (hunters alliance sued to prevent extensive logging in area used to hunt elk and bear); *Yurok Tribe v. U.S. Bureau of Reclamation*, 231 F. Supp. 3d 450 (N.D. Cal. 2017) (tribe, fishing associations sued to protect their ability to fish).

"fairly traceable" test for standing purposes to bring the Clean Air Act claims at issue here, as the District Court found. ROA.75430-75451.

The "gist of the question of standing is whether the parties invoking standing have such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Contender Farms v. U.S. Dept. of Agriculture*, 779 F.3d 258, 264 (5th Cir. 2015) (internal citations omitted). The constitutional elements of standing are satisfied where, for each claim, plaintiffs present an injury that is "fairly traceable" to the defendant's conduct and redressable. *Id.*

Supreme Court and Fifth Circuit precedent make clear that Article III does not require standing to be analyzed Clean Air Act violation by violation. As this Court recognized, "no court appears to have found standing for some Clean Air Act violations but not others." *ETCL II*, 968 F.3d at 366 (citing precedent). For the particular facts of this highly complex case, involving thousands of violations that "varied greatly" in type and impact, however, this Court articulated two particular showings to satisfy the traceability inquiry: "First, that each violation in support of [Plaintiffs-Appellees'] claims causes or contributes to the kinds of injuries they allege;" and second, that "a specific geographic or other causative

nexus" exists with their members' injuries. *ETCL II*, 968 F.3d at 369-70 (internal quotations omitted).

The District Court carefully followed this Court's instructions. *See, e.g.*, ROA.75430-33; Plaintiffs-Appellees' Supp. Br. at 24-25.[26] That should be the end of the matter here—Exxon has failed to show the District Court did not properly apply this Court's remand test.

Exxon complains that the District Court should have shown more of its work by listing each violation it found traceable individually rather than the careful summary and citation it included for each type of violation. This nit-picking should be rejected as an ungrounded distraction, and wholly inconsistent with Federal Rule 52(a)(1). *Garner v. Kennedy*, 713 F.3d 237, 243 (5th Cir. 2013) (Rule 52(a)(1) "is not overly burdensome—it exacts neither punctilious detail nor . . . tracing of the claims issue by issue and witness by witness.") (internal quotation omitted). The District Court fully satisfied the requirement to find the facts and state its well-founded conclusions of law in a manner that gives this Court "a clear understanding of the factual basis for the decision." *Id.*; ROA.75430-75451. The evidence supports the District Court's opinion that Plaintiffs-Appellees have

[26] There is one exception to the District Court's faithful remand: it undercounted the number of flaring violations, missing approximately 2,000 traceable violations. Plaintiffs-Appellees' Supp. Br. at 10.

demonstrated that their injuries are fairly traceable to Exxon's violations. The Remand Opinion should be affirmed and, if anything, expanded to include additional violations and penalties.[27]

Exxon also regurgitates its claim that its complex is too big to be subject to enforcement and air pollution is too complicated for courts to trace. Exxon Supp. Br. at 29-30. This Court already rejected that argument by recognizing traceability for a variety of pollutants and emissions sources. *ETCL II*, 968 F.3d at 368-71. In applying that opinion, the District Court confirmed the fallacy of Exxon's too-big-to-comply argument, which, if accepted, could immunize the largest industrial facilities from enforcement no matter who the enforcer.

B. *TransUnion* did not alter the standing test for associational plaintiffs in citizen suits.

Instead of demonstrating error by the District Court, Exxon pursues this appeal as a Trojan horse to attempt to relitigate its standing challenge and to try to

[27] By requiring a showing for each violation rather than just each claim and thus ruling out traceable injury from smaller but still harmful violations, *ETCL II* led the District Court to ignore violations that other courts would find actionable—and should not be extended to other cases. *See, e.g.*, *Sierra Club v. BP Prods.*, 2021 WL 1399805 at *8, (N.D. Ind. Apr. 14, 2021) (distinguishing *ETCL II*'s more restrictive test). If this Court were to revisit that issue, it should recognize standing for *more* violations. *See, e.g.*, *Texans United v. Crown Cent. Petrol.*, 207 F.3d 789, 794 (5th Cir. 2000) (no requirement to prove exact time of injuries and violations); *see also* Plaintiffs-Appellees' Supp. Br. at 40-41 (citing cases). Some releases may seem minor when viewed in a vacuum, but repeatedly affect air quality and threaten a "catastrophic release." *See supra* note 22.

move this Court away from binding precedent. Exxon argues that *ETCL II* should be weakened and the precedent upon which it relied be overruled. But *ETCL II* conservatively applied Fifth Circuit precedent concerning traceability analyses in environmental citizen suits. 968 F.3d at 366-69 (citing precedent and noting its narrowing of the standing test "gives us some pause"); *supra note* 27. As this Court found: "Plaintiffs easily demonstrated that their members were injured." *ETCL II*, 968 F.3d at 367. Exxon's arguments to revisit that holding are based on the false idea that the Supreme Court's recent class action decision, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), upended the longstanding test for citizen suit plaintiffs to establish standing. Actually, that case supports, not undermines, standing here.

1. ***TransUnion* underscores that these associational plaintiffs have standing.**

The Supreme Court's *TransUnion* decision does not call into question citizen suit standing precedent. Instead, it relies on the same key citizen suit precedents that this Court has long applied and applied here, including *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and *Laidlaw*, 528 U.S. 167, highlighting that those precedents remain good law. Thus, to the extent that *TransUnion* is considered, it underscores that these associational plaintiffs have standing to supplement governmental enforcement.

TransUnion relied upon and reaffirmed *Lujan* and *Laidlaw*. For example, in noting that Congress cannot authorize suits where a plaintiff would not otherwise have standing, the Supreme Court cited *Lujan*. *TransUnion*, 141 S. Ct. at 2206 (citing 504 U.S. at 576-77). In stating the "preliminaries" about standing, the Court relied on *Lujan* and *Laidlaw*. *Id.* at 2207-08.

This Court relied on the same leading Supreme Court standing decisions in *ETCL II*, which found that Plaintiffs-Appellees have standing for a "substantial number of Exxon's violations," including by satisfying the injury component. *See* 968 F.3d at 362, 371. The District Court also relied on those same precedents in finding that the Plaintiffs-Appellees' injuries here are traceable to Exxon's violations. ROA.75430 & n.12 (incorporating previous opinion on injury-in-fact).

Lujan, *TransUnion*, and *ETCL II* are consistent on the point that Congressional rights to sue do not replace Article III standing. At the same time, the requirement for injury-in-fact as part of that standing analysis has never required—and still does not require—the sort of microscopic dissection that Exxon advocates. *See Laidlaw*, 528 U.S. at 180-88 (not parsing one day of violations from another where a Clean Water Act defendant violated its mercury discharge limits on 489 occasions); *Texans United*, 207 F.3d at 791-92 (same, where a Clean Air Act defendant violated sulfur dioxide and hydrogen sulfide limits for 15,000 hours during a six-year period). Indeed, then-Circuit Judge Kavanaugh found

standing without requiring separate, independent showings based on the type of malfunction that caused the injury:

> The threshold question is whether petitioners have standing to challenge EPA's adoption of the affirmative defense. . . . EPA's affirmative defense would immunize certain emissions that petitioners contend should be penalized. Some of petitioners' members will suffer from those higher emissions . . . A ruling in their favor would prevent those emissions and help alleviate that harm. That's good enough.

Natural Res. Def. Council v. EPA, 749 F.3d 1055, 1062 (D.C. Cir. 2014) (finding standing for environmental associations).

In addition to relying on the same precedents, a hypothetical in *TransUnion* supports this Court's earlier opinion. The Supreme Court offered as dicta two hypothetical scenarios to demonstrate when there is harm in an environmental context: a plaintiff who lived next to a factory in Maine suing that factory for pollution compared to a plaintiff who lived in Hawaii suing that factory for the same pollution. 141 S. Ct. at 2205-06. The members of the plaintiff organizations in this case are similarly situated to the plaintiff living in Maine near the polluting facility whom *TransUnion* stated would have standing.

As this Court recognized, Plaintiffs-Appellees' members faced difficulty breathing while living in or visiting Baytown. *ETCL II*, 968 F.3d at 367. One member demonstrated concerns for his family's health and safety while living a quarter mile from the Exxon complex, and how he and his family would leave a

nature center next to the Exxon complex that they liked to visit, experiencing recreational harm, whenever he witnessed emissions. *Id*. Similarly, another member was compelled to limit her grandchildren's outdoor activities in Baytown whenever she smelled odors or saw haze. *Id*. As this Court concluded: "Plaintiffs easily demonstrated that their members were injured." *Id.*; *see also id*. at 368 (matching up Plaintiffs-Appellees' members' injuries here with injuries recognized by case law) (citing *Laidlaw*, 528 U.S. at 183-84; *Texans United*, 207 F.3d at 792; *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 557 (5th Cir. 1996); *Sierra Club v. EPA*, 762 F.3d 961, 977 (9th Cir. 2014)). *TransUnion* restated the law that this Court already applies and did not disturb this Court's precedent.[28]

2. *TransUnion* addressed how class action plaintiffs must demonstrate standing to win damages, not how associations may sue to deter ongoing harm.

Exxon relies on *TransUnion* to argue that evidence must prove injury from each pollution episode for a plaintiff to have standing. That's wrong because the parts of *TransUnion* on which Exxon relies cannot be severed from that case's context. *TransUnion* concerned the unique situation of a large group of class

[28] *Compare Laidlaw*, 528 U.S. at 182-83 (finding injury because members refrained from fishing and picnicking along a river due to reasonable concerns about pollution), *with ETCL II*, 968 F.3d at 369 (noting that seeing and smelling the violations made Plaintiffs' members "refrain from outdoor activities or move away from the complex. . . . [a]nd because members' physical symptoms improved when they moved away from the complex, those injuries were traceable to Exxon").

action plaintiffs seeking financial damages for past harms, not citizen enforcers seeking statutory penalties payable to the federal government to deter future harms to their members. Those differences are fatal and show *TransUnion* does not undermine Plaintiffs-Appellees' standing to seek deterrent penalties.

First, unlike this case, the *TransUnion* plaintiffs sought damages for past harms. The statute at issue in *TransUnion*, the Fair Credit Reporting Act (FCRA), provides for individual damages that are recoverable by a consumer who sustained "actual damages." *See* 15 U.S.C. § 1681n(a); *see also TransUnion*, 141 S. Ct. at 2201 ("The Act creates a cause of action for consumers to sue and recover damages."). By contrast, these associational plaintiffs seek deterrent Clean Air Act penalties to remedy and prevent ongoing violations of the law, and "[a]ny recovery goes to the government." *ETCL II*, 968 F.3d at 362. The Act's citizen suit scheme seeks to halt and deter ongoing harms that have occurred and are likely to continue to occur. 42 U.S.C. § 7413(e) (requiring, as part of the penalty assessment, a showing that "the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice" and that the days of violation shall include days after notice until "continuous compliance has been achieved").

The relief authorized by the Clean Air Act redresses plaintiffs' injuries differently from FCRA's damages provision. Those actual damages must be tailored precisely to redress past harms and compensate plaintiffs for injuries.

Clean Air Act penalties, by contrast, remedy ongoing problems and serve as a deterrent to future injury and violations. *Laidlaw*, 528 U.S. at 186; *Texans United*, 207 F.3d at 794; *see also Sierra Club v. TVA*, 430 F.3d 1337, 1345 (11th Cir. 2005) ("[A]s coercive fines aimed at ongoing conduct, civil penalties would redress injuries to [citizens] from violations at the . . . plant 'by abating current violations and preventing future ones.'") (citing *Laidlaw*, 528 U.S. at 187).[29] "A would-be polluter may or may not be dissuaded by the existence of a remedy on the books, but a defendant once hit in its pocketbook will surely think twice before polluting again." *Laidlaw*, 528 U.S. at 186. Exxon's behavior is exemplary of this; only when Plaintiffs-Appellees' enforcement suit was proceeding toward trial with the credible threat of civil penalties did Exxon take actions to correct its Clean Air Act violations. *See ETCL II*, 968 F.3d at 372 (explaining how Exxon reduced its emissions after the filing of this suit).

That the plaintiffs in *TransUnion* sought damages for past harm was crucial to every step of the Supreme Court's analysis. *See, e.g.*, 141 S. Ct. at 2213 (describing the issue presented as "the plaintiffs' standing to recover damages" for

[29] Similarly, the need to prevent future injury from air pollution can alone provide standing, even before any harm has occurred. *See, e.g.*, *Sierra Club v. EPA*, 755 F.3d 968, 973, 976 (D.C. Cir. 2014) ("petitioner need demonstrate only a substantial probability that local conditions will be adversely affected" and "need not wait to bring suit [to prevent pollution] until they can actually detect the toxic contaminants exuding").

certain claims). The Court acknowledged that plaintiffs might demonstrate standing differently depending on the form of relief sought: "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 (for example, injunctive relief and damages)." *Id*. at 2208; *see also id.* at 2210 ("a plaintiff's standing to seek injunctive relief does not necessarily mean that the plaintiff has standing to seek retrospective damages").

Even Exxon could not divorce its arguments about *TransUnion* from the idea that the case concerned standing for damages claims. Exxon set up a strawman, arguing that whether a suit is a class action or a citizen suit "even representative plaintiffs may recover damages only for individual harms." Exxon Supp. Br. at 17. Plaintiffs-Appellees here, however, do not seek to pocket damages for their individual members or themselves. Plaintiffs-Appellees seek to deter future violations by a facility that has repeatedly flouted federal law, and thereby prevent further harm to their members.

Second, unlike class actions, where each class member must have standing and prove past harm to seek relief, the associational standing test for plaintiff organizations just requires an organizational member to have standing, as it does not contemplate member-by-member relief. In *TransUnion*, an individual plaintiff represented a class of 8,185 members, and each had to demonstrate harm to win

relief. 141 S. Ct. at 2200 (determining that a subset of 1,853 class members demonstrated harm and the other 6,332 lacked standing). But where the plaintiffs are organizations, such as in environmental citizen suits as well as challenges to government actions, courts apply a test for associational standing. *See, e.g.*, *Int'l Union, UAW v. Brock*, 477 U.S. 274, 288-90 (1986) (distinguishing associational standing test from class actions).[30] For the association to have standing to bring a claim, this test simply requires showing standing for "any one" of the association's members, not a demonstration that every member was or likely will be harmed unless relief is granted. *See Hunt*, 432 U.S. at 342-43; *see also Cedar Point*, 73 F.3d at 555. Indeed, that is what the District Court found: at least one member suffered traceable injuries throughout the 8-year violations period, and this provides Plaintiffs-Appellees with standing. ROA.75430 (incorporating previous injury-in-fact opinion).

III. DETERRING VIOLATIONS DEPENDS ON RECOUPING THE ECONOMIC BENEFIT OF NONCOMPLIANCE.

Exxon would have the District Court reduce its penalty further by somehow dividing penalty factors between each violation. But the Clean Air Act and its

[30] *See also Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977) (state commission of farm businesses challenging regulation); *Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 191 (5th Cir. 2012) (association advocating for gun ownership challenging statute and regulations prohibiting the sale of handguns to persons under age 21).

penalty scheme are largely concerned with deterring future violations and reducing future pollution and do not require District Court to perform the splitting of hairs Exxon seeks. *See* 42 U.S.C. § 7413(e)(1). Not only did the District Court properly reduce the original penalty on remand based on the traceable violations, but Exxon's argument misses the main point of the penalty provision. *Compare ETCL II*, 968 F.3d at 364 (noting prior $19.95 million penalty), *with* ROA.75475-78 (reducing the multiplier from 50% to 10% and assessing $14.25 million penalty).

The statutory penalty functions to discourage delays in installing antipollution equipment, by including the economic benefit of noncompliance as a mandatory factor. *United States v. Mun. Auth.*, 150 F.3d 259, 267 (3d Cir. 1998) (affirming Clean Water Act penalty applying similar standard as the Clean Air Act, to recoup "any benefits a violator gained by breaking the law and which gave the violator an advantage vis-à-vis its competitors"). As this Court recognized, "delayed expenditures" can demonstrate noncompliance benefit. *ETCL I*, 824 F.3d at 528, 530.

The correlation found between the four projects Exxon delayed and the traceable violations satisfies the Act. ROA.75471. The projects' price tag did not change because some violations dropped out. There is no appropriate way to carve up part of the projects. They happened in full or not at all. And they were wholly

delayed to Exxon's benefit while it committed "more than one violation per day." ROA.75464, ROA.75468-72.

Moreover, the District Court weighed the seriousness and duration of the violations and was not required to parse out a dollar amount somehow apportioned to thousands of violations. ROA.75463-64, ROA.75473-75. It would be an abuse of discretion to weigh these factors against imposing a penalty, particularly when some violations were so long and severe. ROA.75474; *ETCL I*, 824 F.3d at 531-32.

Requiring a district court to jump through additional hoops would only undermine implementation of a straightforward penalty standard intended to deter violations. *See* 42 U.S.C. § 7413(e).[31]

CONCLUSION

The District Court properly found Plaintiffs-Appellees have satisfied Article III requirements to supplement government enforcement and end Exxon's violations of federal law. This Court should affirm the ordered penalty which will deter further violations of federal law and benefit public health.

[31] *See* Houston Br. II at 14 (citing legislative history: "[t]he assessment of civil penalties for violations of the Act is necessary for deterrence, restitution and retribution").

DATED: October 14, 2021

Respectfully submitted,

CHRISTIAN D. MENEFEE
Harris County Attorney

/s/ *Michael Hull (by permission)*
Michael Hull
TBN: 24003733
Senior Assistant County Attorney
1019 Congress, 15th Floor
Houston, Texas 77002
Phone: 713.274.5138
Fax: 713.755.8848

Counsel for Amicus Curiae
Harris County Attorney

Arturo G. Michel
CITY ATTORNEY

/s/ Suzanne R. Chauvin (by permission)
Suzanne R. Chauvin
TBN: 04160600
Chief, General Litigation Section
CITY OF HOUSTON LEGAL DEPARTMENT
900 Bagby Street, 4th Floor
Houston, Texas 77002
Phone: 832.393.6463
Suzanne.Chauvin@houstontx.gov

Counsel for Amicus Curiae
City of Houston

/s/ *Kelly Haragan (by permission)*
Kelly Haragan
TBN: 00793897
ENVIRONMENTAL CLINIC
University of Texas School of Law
727 East Dean Keeton
Austin, TX 78705
Phone: 512.232.2654/ Fax:
512.232.2311
kharagan@law.utexas.edu

/s/ *Emma C. Cheuse*
Emma C. Cheuse
EARTHJUSTICE
1001 G Street, NW, Suite 1000
Washington, DC 20001
Phone: 202.667.4500 ext. 5220
echeuse@earthjustice.org

Mary Rock (on brief)
EARTHJUSTICE
311 S. Wacker, Suite 1400
Chicago, IL 60606
Phone: 312.800.8336
mrock@earthjustice.org

Counsel for Amicus Curiae
Air Alliance Houston

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, 2021, I have served the foregoing Supplemental Brief For The City of Houston, Harris County Attorney, And Air Alliance Houston As *Amici Curiae* In Support of Appellees And In Support Of Affirmance on all registered counsel through the Court's electronic filing system (ECF).

DATED: October 14, 2021

Respectfully submitted,

/s/ Emma C. Cheuse
Emma C. Cheuse

Counsel for Amicus Curiae Air Alliance Houston

CERTIFICATE OF COMPLIANCE

I hereby certify that, on October 14, 2021, this document was transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit via the Court's CM/ECF document filing system.

I hereby certify that (1) required privacy redactions (i.e., *none*) have been made pursuant to 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document pursuant to 5th Cir. R. 25.2.1; and (3) the electronic submission has been scanned with the most recent version of commercial virus-scanning software and was reported free of viruses.

I hereby certify that this brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,468 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), and complies with the typeface and style requirements of Rule 32(a)(5) and (a)(6) because it was prepared in Microsoft Word Using 14-point Times New Roman typeface.

DATED: October 14, 2021

Respectfully submitted,

/s/ Emma C. Cheuse
Emma C. Cheuse

Counsel for Amicus Curiae Air Alliance Houston